

# CONSTRUCTION LAWYERS SOCIETY OF AMERICA

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## **CONSTRUCTION LITIGATION ALTERNATIVES & SURPRISES**

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# CONSTRUCTION LITIGATION

## -A STARTING POINT-

### The Contract

## I. THE SETTING

"Except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield. Further, it is a difficult task for a court to be able to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on a jobsite, become so extreme, so debilitating and so unreasonable as to constitute a breach of contract between a contractor and subcontractor."

Blake Const. Co. v. CJ Coakley Co., Inc. 431A.2d 569, District of Columbia Court of Appeals (1981)

## II. THE DILEMMA

"I was never ruined but twice: once when I  
lost a lawsuit,  
And once when I won one."

--Voltaire

## III. THE CONTRACT

- **COURTS READ CONTRACTS, PLANS & SPECIFICATIONS**
  - NOT MINDS
- **PARTIES GET WHAT THEY BARGAIN FOR**
  - BUT NOT ALWAYS WHAT THEY DESERVE.
- **STARTING POINT FOR COURT DECISION**
  - THE CONTRACT

# PRELIMINARY QUESTIONS:

- **1) IS THERE A CONTRACT?**

- Question of law for the Court
- Open to Summary Judgment

- A. FULLY EXECUTED CONTRACTS**

- B. INCOMPLETE CONTRACT WRITINGS**

- C. GENERAL PRINCIPLES-**

- See e.g. Four-fold test adopted by the Second Circuit (*See Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 2d Cir. 1985)
- Parties can seek to show that they intend to be bound through their words or through their actions (See e.g. Restatement (Second) of Contracts §1981)

- D. PRELIMINARY AGREEMENTS**

- Type 1 & Type 2**

# PRELIMINARY QUESTIONS:

## • 2) WHAT IS THE CONTRACT

**A) WRITTEN DOCUMENT; WORKS, CONDUCT, PAROL EVIDENCE**

**B) INCOPORATION BY REFERENCE-Caveat**

- See *S. Leo Harmonay v. Binks Mfg. Co.* 597 F. Supp 1014, 1015 (SDNY 1994)
- See also *U.S. Steel Corp. v. Turner Const. Co* 560 F. Supp. 871, 872 (SDNY 1983)

**C) COURT IMPLIED DUTIES AND WARRANTIES**

EXAMPLES:

- 1) GOOD FAITH & FAIR DEALING
- 2) US V. SPEARIN JUDICIAL NUANCES;  
APPLICABILITY AND EXCEPTIONS
- 3) HELENE CURTIS V. U.S.

# PRELIMINARY QUESTIONS:

## • 2) WHAT IS THE CONTRACT (cont'd)

### D) EXAMPLES OF GOOD FAITH & FAIR DEALING

- “[a] complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.”

—RESTATEMENT (SECOND) OF CONTRACTS §205 comment d (1981)

### E) STATUTORY RULES INCORPORATED INTO CONTRACT

### F) MISSING TERMS

- UCC 2-305 (OPEN PRICE),
- 2-306 (DELIVERY TERMS);
- 2-308 (OUTPUT TERMS)

### G) RULES OF INTERPRETATION

- Contra Proferentum
- Preference Clause

# PRELIMINARY QUESTIONS:

- **3) INTERPRETATION OF THE CONTRACT- QUESTION OF FACT FOR THE JURY, ISSUE OF PAROL EVIDENCE**
  - An important issue is the role of extrinsic evidence in determining whether or not a contract is ambiguous. This in turn controls issues such as suitability for summary judgment and whether or not this presents a question of law for the Court or a question of fact for the jury.
  - See e.g. *Isbrandtsen v. North Branch Corp.* 556 AD2d 81 Supreme Court of Vermont (1988) **regarding “admission of evidence as to the circumstances surrounding the making of the agreement as well as the object, nature, and subject matter of the writing”**, citing Restatement (Second) of Contract §212 comment b (1981) and 3 A. Corbin, Corbin on Contracts §542, at 100-02 (1960).

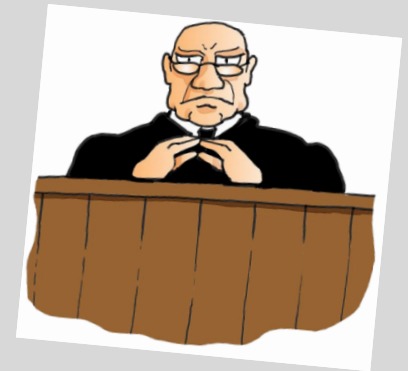
# DISPUTE RESOLUTION

- **ARBITRATION**

- A. MANDATORY (COURT RULE/CONTRACT REQUIREMENT) vs. VOLUNTARY**
- B. FEDERAL COURT SUCCESS RATES-NDNY, WDNY**
- C. CRITICAL ISSUE-TIMING; EXTENT OF DISCOVERY**
- D. CORPORATE POLICY**

- **WHY AM I IN COURT??**

- A. PRE-ARBITRATION COURT LITIGATION**
- B. CHALLENGES TO ARBITRATION AWARDS**





# DISPUTE RESOLUTION

## C. EXAMPLES OF ARBITRATION BASED LITIGATION

### 1) PRE-ARBITRATION

- a) Application to Compel (CPLR §7503) Arbitration (3 issues); 9 USC §4
- b) Application to Stay Arbitration (CPLR §7503); *Am. Broad Cos v. AM Fed'n of Television & Radio Artists*, 412 F. Supp. 1077, 1082 (SDNY 1976)
- c) Court Appointment of Arbitrator (CPLR §7504); 9 USC §5
- d) Statute of Limitations (CPLR §7502(b)); 9, 12

### 2) POST-AWARD

- a) Confirmation of Award (CPLR § 7510) 9 USC § 9
- b) Vacating or Modifying Award (CPLR § 7511) 9 USC § 10-12

## SURPRISE: A GAME CHANGER

1. **U.S. v. SPEARIN-Does it apply in my jurisdiction; Does it apply to private contracts?**
  - i. 248 US 132 (1918)
2. **HELENE CURTIS v. U.S.**
  - i. 312 F. 2d 774 (Ct. Cl. 1963)
3. **CARDINAL CHANGES-See e.g.:**
  - i. *Westcott v. State* 264 App. Div. 463 (1942)
  - ii. *Allied Materials & Equip. Co. v. U.S.* 569 F.2d 562 (1978)
  - iii. *Albert Elia Bldg. Co. v. New York State Urban Dev. Corp.* 54 AD2d 337(1976)
  - iv. *Bell/Heery v. U.S.* 739 F. 3d 1324 (Fed. Cir. 2014)
4. **ECONOMIC WASTE DOCTRINE**
  - i. *Jacobs & Young v. Kent* 230 N.Y. 239 (1921) (Justice Cardozo) and its progeny see e.g. *Edgewater Construction Co. Inc. v. 81 & 3 Watertown, Inc. et. al.* 252 AD2d 951 4<sup>th</sup> Dept. (1998); 1 AD3d 1054 4<sup>th</sup> Dept. (2003)
5. **TERMINATION FOR CAUSE, Am I liable if I do it wrong; termination at will-Am I safe?**
  - i. Example *Patrick v. Whelan and Curry Const. Services, Inc.* 303 AD2d 974 (4<sup>th</sup> Dept. 2003)