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Construction Manager Liability Still Awaits an Answer From Our Courts

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The question of liability between general contractors and construction managers has existed ever since construction managers were introduced into project delivery systems. Each participant in a construction project has one or more contractual relationships, each of which identifies its contractual rights and duties. Typically, the construction manager and general contractor have no contractual relationship and therein lies the legal problem. While construction managers certainly play a role in each participant's work, the recurring issue is whether a construction manager has a common-law duty to the various participants in the construction process. Although the question is common, the issue has not been definitively ruled on by the New Jersey courts.

When a construction manager is hired by a project owner to act as its agent or advisor, he typically does not enter into contracts with the general contractor, prime contractors or design consultants. Rather, he might be hired by an owner to assist in scheduling, cost control, construction and preconstruction project management, the bidding process and coordination. See *Construction Law Handbook*, Cushman & Myers at p. 348. Construction projects are known for their contractual pyramids. In claims for unjust enrichment on a construction project, the prevailing law in the state of New Jersey is that one cannot look beyond the party with whom it has privity for liability because the courts have held that such a process would wreak havoc on the construction industry. Similarly, in recognition of the interplay among the many participants of each project delivery system, most construction contracts specifically preclude the possibility of the creation of any third-party beneficiary rights. The same theories concerning the interplay among participants on a construction project apply between prime contractors and a construction manager on a multiprime project. Under ideal conditions on a construction project, even though the general contractor and construction manager do not have a contract, they will attempt to properly coordinate with each other to complete the project in a timely manner. However, where the construction process fails, a general contractor may believe that the construction manager, which it relied on for coordination or scheduling, and with whom it had daily interaction, is more to blame that the owner with whom it has contractual privity.

The use of construction managers is becoming more commonplace. Where the duties of the parties are contractually created and no third-party beneficiary rights exist, the question that is resonating throughout the industry is whether a construction manager can be held liable to a general contractor when there is no contractual privity for failing to perform its obligations.

Elements of Negligence

Absent contractual privity, a general contractor that desires to assert a cause of action against a construction manager must rely on principles of negligence. The three elements of a cause of action in negligence are (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach. Under New Jersey law, a tort remedy cannot arise from a contractual relationship

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unless the breaching party owes an independent duty imposed by law. *Saltiel v. GSI Consultants, Inc.,* 170 N.J. 297 (2002).

Economic Loss Doctrine

The New Jersey Supreme Court endorses what is commonly referred to as the "economic loss doctrine." *Alloway v. General Marine Indus.*, 149 N.J. 620 (1997). The economic loss doctrine stands for the proposition that "an independent tort action is not cognizable where there is no duty owed to Plaintiff other than the duty arising out of the contract itself." *Sylvan Learning Systems v. Gordan*, 135 F. Supp. 2d 529, 547 (D.N.J 2000). This doctrine is supported by the belief that tort principals are better suited to resolve claims for personal injuries and damages to property, while contract principles are more appropriate for claims of economic damages resulting from the use of the product itself. Simply put, the Economic Loss Doctrine is used to argue that someone not in privity with the person being sued can sue for negligence when there is a personal injury or property damage but not for monetary damages for which there is contractual redress.

While this doctrine arose in the field of products liability, its application has been significantly expanded. In *Sylvan Learning Systems,* an insurance agent fraudulently overcharged the insured. Sylvan, the insured, wanted to pursue a claim against Chubb, the insurance company, for its negligence in failing to supervise the insurance agent. The District Court refused to ignore the contractual chain, finding that a negligence claim would require an independent claim that does not arise from the contract at issue.

Construction managers are sure to argue that a general contractor's claim against a construction manager must fail under the tenets of the Economic Loss Doctrine, due to the lack of privity between them and the availability of contractual recourse for its purely economic loss.

Does a Construction Manager Have an Independent Duty to a General Contractor?

By definition, construction management involves a large amount of oversight and coordination of the many participants in complex construction projects. While the construction manager will rely on the economic law doctrine to exonerate itself from liability for negligence, a general contractor will argue that the construction manager has an independent duty to it to perform its work properly. There are currently no reported cases in New Jersey to support such a duty.

In the seminal case of *Conforti & Eisele, Inc. v. John C. Morris Associates*, 175 N.J. Super. 341, (Law Div. 1980), aff'd, 199 N.J. Super. 498, (App. Div. 1985), the Appellate Division examined the issue of whether a licensed design professional is answerable in tort to a contractor who has been suffered economic damage as a result of the design professional's negligence in the absence of contractual privity. Although *Conforti* is widely recognized as having held that there is an independent duty for design professionals, the fact is that the duty of the licensed design professional, as well as all other elements of negligence, were stipulated by the parties and no judicial determination was needed on the issue of whether a duty exists.

Nonetheless, the *Conforti* decision is illustrative of the argument that can be made for an independent duty of a construction manager. In reaching its decision, the *Conforti* court cited the factors relied upon by the federal district court in the case of *U.S. v. Rogers & Rogers,* 161 F.Supp. 132 (S.D. Cal., 1958) to support its determination that an architect had liability for negligence. The six *Rogers* factors are: (1) The extent to which the transaction was intended to affect the plaintiff; (2) The foreseeability of harm to him; (3) The degree of certainty that the plaintiff suffered injury; (4) The closeness of the connection between defendant's conduct and the injury suffered; (5) The moral blame attached to defendant's conduct; and (6) The policy of preventing future harm.

General contractors may ask for an application of these six factors to reach a determination that a construction manager has a duty to a general contractor based on its duties (i.e., to coordinate the work of the participants of the project). Construction managers will certainly argue that design professional are distinguishable by the fact that they, as licensed professionals, are held to a higher standard.

Factors similar to those relied upon by the *Rogers* Court have been the basis for multiple cases in other jurisdictions finding that construction managers and architects have a duty to the contractors on a construction project. New York courts have explicitly found that a construction manager required by contract with the owner to "manage, supervise, and inspect the construction" owes a duty of care which inures to the benefit of the contractors on a project because "they are members of a limited class whose reliance upon the project manager's ability is clearly foreseeable." *James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc.,* 92 A.D.2d 991, 993 (3rd Dep't, 1983).

Relying upon the concept of foreseeability, courts in Connecticut have found also that a construction manager owes a duty to contractors and can be liable for the reasonably foreseeable consequences of its failure to exercise care, skill and diligence. *Insurance Co. of North America v. Town of Manchester*, 17 F.Supp.2d 81 (D.C.Conn.). "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised….The test is, would the ordinary man in the defendant's position, knowing what he knows or should have known, anticipate that harm of the general nature of that suffered was likely to result?" The Connecticut court noted that "the majority of jurisdictions that have addressed the issue have concluded that the absence of privity will not bar a negligence action by one construction professional against another for economic losses, where reliance by the plaintiff was reasonably foreseeable."

There is no precedential case law in New Jersey allowing a general contractor to sue a construction manager under the theory of negligence in the absence of contractual privity. Established arguments can be offered in support of each side. Given the frequency of this factual scenario and the impact of an adjudication of this issue, the construction industry eagerly awaits guidance from the courts. Until then, construction managers will continue to attempt to protect themselves contractually while general contractors will continue to make the strategic decision of whether or not it will join the construction manager as a direct defendant in its lawsuit. ■