

## LEGAL PIPELINE

# Contract Claims and COVID-19

Contractors seeking to collect on construction claims will do well to use an experienced construction attorney to navigate through the process.



BY STEVEN NUDELMAN

As the country continues to grapple with the effects of the novel coronavirus, the legal industry has not been immune. Real estate transactional work has diminished, while bankruptcy and restructuring work has increased. Similarly, commercial litigation has been on the rise as business disputes still require resolution — even if much of it takes place via Zoom or Microsoft Teams.

Construction claims fall into this last category since the projects that are now the subject of commercial litigation were commenced well before COVID-19 became a part of our everyday vernacular. This month, we take a close-up look at one particular construction dispute affected by the COVID-19 pandemic.

In June 2019, Level 10 Construction entered into a general contract with Sea World San Diego to construct the park's "2020 Attraction," which is now known as the Emperor Dive Coaster (named for the Emperor penguin). It was going to be California's tallest, longest and fastest dive coaster — and the only floorless dive coaster in the state. The whole ride would last for two minutes. Riders would get suspended at a 45-degree angle before making a 143-foot, facedown plunge at speeds faster than 60 miles per hour.

Level 10's work included labor and materials necessary for the erection of the Bolliger & Mabillard roller coaster, including site demolition, grading, utilities, foundations, the ride station, electrical, plumbing, landscaping, hardscaping and general contractor services. The roller coaster itself was going to be installed by Bolliger & Mabillard Consulting Engineers Inc., the manufacturer.

The project was completed in May 2020 and was scheduled to open in the summer. Level 10 claims it is owed money by Sea World. In a response typical of the COVID-19 era, Sea World said it would not pay until its park reopened. (The park remains closed as of August 2020.) Level 10 sued Sea World in California federal court, seeking payments of nearly \$3.3 million. The lawsuit was filed after work on the roller coaster was stopped following the amusement park's closure under California's shelter-in-place orders.

Level 10's original contract was for just over \$11 million. During the course of the project, the scope of work increased by way of change orders. According to the federal court complaint, when the contractor demanded payment from Sea World, the park responded it "would not process any outstanding payments until the parks open" and it

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"understand[s] they are in breach of contract."

Level 10 asserted five causes of action in its complaint against Sea World: breach of contract, monies due, quantum meruit (or the reasonable value of work), account stated, and foreclosure of mechanic's lien. Notably, the contractor indicated that, under the parties' contract, payment for work was not conditioned upon Sea World San Diego's theme park being open for business to the public.

From all outward appearances, Level 10 had no choice but to file suit to enforce its claims (including the one predicated on its mechanic's lien). Indeed, published reports indicate that more than two dozen contractors filed mechanic's liens against the project (including a number of subcontractors who worked for Level 10).

### Takeaways

While Level 10's construction dispute appears to be a garden variety claim facing a general contractor, it provides a good entrée into the concept of claim preparation. What should a contractor that finds itself in Level 10's position do? First, prepare. Second, contact a construction lawyer. By following this simple recipe, a contractor will make its claims process go much smoother — whether it be via litigation, arbitration or some other form of dispute resolution.

To prepare, the contractor needs to assemble all the project records: contract documents, plans, specifications, meeting minutes, transmittals, RFIs, correspondence, emails, payment records, applications, etc. Having these materials assembled (usually in chronological order) will help a construction attorney prepare the necessary claim(s) and, if appropriate, file a mechanic's lien against the project.

Once the documents are assembled, speak with a construction attorney to evaluate the claim(s) and the best path forward. Oftentimes this process is guided by the express language in a written contract. For example, some agreements call for mediation and/or arbitration or litigation.

As for mechanic's lien claims, they are guided by state law (and they vary from state to state). A seasoned construction attorney in the contractor's jurisdiction should be familiar with the filing requirements and necessary deadlines, which are often strictly construed.

In short, there is a lot to keep track of in the claims process. This column touches only the tip of the iceberg. The guidance of an experienced construction attorney will prove most helpful to the contractor seeking to collect on construction claims while dealing with the added adversity of the COVID-19 pandemic. ●

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