

**CLAIMS FOR DELAY**  
**Tactics for Owner Caused Delay**

**By Henry L. Goldberg, Managing Partner**

Owner-caused delay often disproportionately damages the party actually doing the work, more often than not the subcontractor. To whom, therefore, can a subcontractor turn for compensation for delay... the owner, the general contractor or both? A landmark ruling of New York's highest court that we believe has gotten far too little attention, addressed the respective rights and liabilities of owners, general contractors and subcontractors when confronted with construction delay. The New York Court of Appeals, surprisingly, held in that decision that the prime contractor could not be held liable for the acts or omissions of an owner. However, this reveals an inherent inconsistency, a "Catch 22." A subcontractor is not in privity of contract with an owner and cannot sue it directly. Thus, the court held that in the case of delay exclusively caused by the owner: (1) the sole entity that may be held responsible by a subcontractor is beyond the reach of the subcontractor, and (2) the general contractor, who could be sued by the subcontractor, will ordinarily not be held liable for the acts of the owner.

In this case, a prime contractor in New York City hired a subcontractor to perform a part of its work. Although the prime contract contained the City's standard "no-damage-for-delay" provision which attempted to limit the City's liability for delay, the prime contractor's agreement with its subcontractor contained no similar language. After various delays and interferences on the project, the prime contractor sued the City for damages and, as part of that action, sought to recover damages on behalf of the subcontractor resulting from City-caused interferences to the subcontractor's performance. The prime contractor's suit failed to progress and the subcontractor eventually commenced its own lawsuit against the prime contractor (the only party it could sue directly) to recover its delay damages.

At the trial of the subcontractor's action, the project's delays were shown to have been primarily caused by the acts and omissions of the City, its engineer, other prime contractors, as

well as by extreme weather, but not by the subcontractor's own prime. Based on this evidence, the trial court dismissed the subcontractor's action, finding the prime contractor was not liable for the owner's acts and omissions. This dismissal was eventually appealed to New York's highest court, the Court of Appeals.

The subcontractor argued, consistent with the long-held belief of many in the industry, that in the absence of a clause in the subcontract expressly relieving the prime contractor of responsibility, the prime had implicitly agreed to assume responsibility for all delays that a subcontractor might experience no matter what their cause. The Court of Appeals rejected this theory, ruling that a prime contractor is not responsible for delays that its subcontractor may incur unless those delays are caused by "some agency or circumstances under the prime contractor's direction or control." In other words, prime contractors are only responsible for their own acts or omissions, and, absent an express provision in the contract, do not guarantee to its subcontractors the owner's performance on the project. The court also strongly suggested that "if a subcontractor wants a prime contractor to be a guarantor of job performance, it should bargain for the inclusion in its contract of a provision to that effect."

### **G&C Commentary:**

This case is consistent with the long tradition of the New York Court of Appeals of completely missing the boat in construction related cases by strictly applying contract law more applicable to commercial cases without any consideration of the construction context in which a particular case arose.

Privity of contract in New York is still essential for a breach of contract action. The subcontractor in this case could not sue the owner directly because, as is typically the case with regard to subcontractors and owners, they are not in privity of contract.

### **Increased Importance of Liquidating Agreements**

This decision also clearly elevates the importance of "liquidating agreements" between primes and subcontractors in dealing with the issue of owner-caused delays. A critical element of an enforceable liquidating agreement in New York is an acknowledgment of liability by the general contractor; at least to the extent it collects damages from the owner on behalf of the

subcontractor. Liquidating agreements typically allow subcontractors to bridge the privity “gap” to recover from an owner. This is accomplished by the agreement containing: (1) the critical acknowledgment of liability by the prime contractor discussed above, and (2) a requirement that the prime either pursue the sub’s claims as part of its own claim against the owner or allow the sub to pursue its own claim at its own expense in the name of the prime.

Note also, that in New York, the Wicks Law, at least with regard to electrical, plumbing and HVAC trade contractors on state and municipal projects, mitigates this potential privity problem. On such public projects, these trade contractors are themselves prime contractors with the public owner and are directly in “privity of contract” with the public owner.