



MAIELLO BRUNGO & MAIELLO, LLP

A T T O R N E Y S A T L A W

CONSTRUCTION NEWS

mbm-law.net 412-242-4400

mbm-law.net 412-242-4400

“NO DAMAGE FOR DELAY” STILL EXISTS IN PA

This Issue:

Construction News
Spring 2007



mbm-law.net

One Churchhill Park
3301 McCrady Road
Pittsburgh, PA 15235

MAIELLO BRUNGO & MAIELLO, LLP
A T T O R N E Y S A T L A W

We know Construction Law.

Attorneys of the Maiello, Brungo & Maiello Construction Law Team can craft the solutions you need for timely and effective resolution.

- Whether reviewing a contract or the scope of professional service agreements, resolving a labor or bid dispute, dealing with changes and related costs, or addressing sales and use tax, the MB&M Construction Law Team can meet your needs.
- MB&M's Construction Practice has a solid foundation with extensive industry experience and skilled architect/attorneys.
- We have a distinctive advantage in providing legal services because we understand the specifics of our construction clients' business.
- With our knowledge and sophistication on the latest legal decisions and regulations affecting the construction trade, we also provide valuable insight and services to keep our clients informed of current legal trends and topics.

As a full-service law firm, Maiello, Brungo & Maiello can meet all of your construction needs. From developing projects of exceptional quality design and construction to effectively managing and controlling costs and risks, consider us your legal tool. We're only a phone call when your next construction project arises.

“NO DAMAGE FOR DELAY” STILL EXISTS IN PA

Owners, in drafting construction contracts, include “no damage for delay” clauses which preclude a contractor or subcontractor from obtaining a monetary or other damage award for delays during construction and limits the remedy a contractor can recover strictly to additional time to complete the work. While “no damage for delay” clauses are enforceable in Pennsylvania, the Courts have consistently found “exceptions” which have eliminated the effectiveness of these types of clauses. Recently, however, the Commonwealth Court in Guy M. Cooper, Inc. v. East Penn School District, 903 A.2d 608 (Pa. Commw. 2006) has found that such clauses are still effective.

In Cooper, the Project on which the Mechanical Contractor worked was delayed in part due to the Owner’s termination of the General Contractor for a six-week period. The General Contractor eventually returned and the Project was completed 505 days beyond the original completion date. The Mechanical Contractor filed suit against the Owner claiming monetary delay damages and argued that Owner “failed to prevent delays by overseeing and controlling [the] general contractor’s work.” The Owner filed a Motion with the Court seeking to have the suit dismissed. The Owner set forth in its Motion that it was entitled to have the lawsuit dismissed for various reasons including the “no damage for delay” clause contained in the construction contract.

Normally, with respect to construction projects, an owner is not required to guarantee or protect contractors against losses that occur as a result of the delays of independent contractors which may be reasonably anticipated. Owners formalized this theory by placing “no damage for delay” clauses into their construction contracts. Pennsylvania Courts have recognized that there could be occasions and situations where it would be inappropriate to reward an owner and uphold a “no damage for delay” clause. “No damage for delay” clauses cannot be used as a defense by the owner in specific instances. The clause cannot be used when interference by an owner with the contractor’s or subcontractor’s work causes a delay. Examples of this scenario are making the work site available where there are issues known by the owner but not relayed to the contractor. Additionally, the clauses cannot be used when there is a failure on the part of the owner to act on some essential matter necessary to the prosecution of the work. An example in this instance would be when an owner assumes responsibility for a certain aspect of the contract and/or work on the project. Due to numerous decision by the Pennsylvania Courts throughout the years, these exceptions have more or less become the rule and it has become very difficult for owners to be able to rely on the “no damage for delay” clauses that were still being incorporated into construction contracts.

Nevertheless, the Commonwealth Court in the Cooper case, which held that the Mechanical Contractor’s suit should be dismissed, found that the above referenced exceptions to the enforceability of “no damage for delay” clauses did not apply. The Commonwealth Court held the General Contractor to be an independent contractor and held that delays by independent contractors are generally anticipated and are, therefore, covered by the “no damage for delay” clauses found in the Owner’s construction contract. Furthermore, and most importantly, the court closely reviewed the contract language. The court found that the contract language put the burden of construction scheduling and coordination onto the General Contractor, and not the School District. This eliminated the Owner School District’s responsibility with respect to delays. The “no delay for damage” clause was held to be enforceable.

The Cooper decision is important in that it keeps alive the rule of law that was quickly disappearing. The key is to ensure that the construction contract is drafted properly. A court must interpret a contract as written and must review the language of the entire contract to find the intention of the parties to that contract. In light of the exceptions discussed above, a single “no damage for delay” clause is meaningless if the remainder of the contract places the responsibility of preventing delays upon the owner. An owner is still able to limit its liability and should still continue to include “no damage for delay” clauses in its contracts.

The MB&M Construction Law Team includes:

Alfred C. Maiello	acm@mbm-law.net
Lawrence J. Maiello	ljm@mbm-law.net
David Raves	dr@mbm-law.net
Jennifer L. Cerce	jlc@mbm-law.net

To speak with any of our attorneys, call (412) 242-4400. If you prefer not to receive information about Maiello Brungo & Maiello, please call 412-242-4400 or e-mail mp@mbm-law.net.

Maiello Brungo & Maiello provides more legal information for the construction industry at our web site: www.mbm-law.net.