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CONSTRUCTION LAW

Conditions Precedent In Construction Contracts



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Given the fast-paced nature of most construction projects in New York City, strict compliance with the minute details of each contract clause often falls low on the list of the parties' priorities. Although the parties can often fulfill their obligations through substantial compliance with an agreement's terms, under certain circumstances, even a minor deviation from the contract's requirements can forfeit a party's rights or benefits.

In a prior article, we discussed conditions precedent in the context of notice provisions, but conditions precedent can operate in any form. (See, Kenneth M. Block, *Enforcement of Notice Provisions* NYLJ, Sept. 11, 2013, p. 5, col. 2). In the context of construction, provisions related to defective work, change orders, dispute resolution and delay claims are often drafted as conditions precedent. This article will explore the differenc-

es between typical contract terms and those that rise to the level of conditions precedent, the latter requiring strict compliance to avoid forfeiture.

Conditions Precedent

A condition precedent is "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Merritt Hill Vineyards v. Windy Heights Vineyard*, 460 N.E.2d 1077 (1984). Conditions precedent are distinguishable from promises as conditions precedent contain language that mandates strict performance and sets forth clear consequences for noncompliance. *Barsotti's, Inc. v. Consol. Edison Co. of New York*, 680 N.Y.S.2d 88, 89 (1st Dep't 1998). While New York contract law requires the breach of a promise to be material or prejudicial to release a non-breaching party from its duties under the agreement or forfeit the breaching party's rights, conditions precedent "must be literally performed; substantial performance will not suffice." *MHR Capital Partners v. Presstek*, 912 N.E.2d 43, 47 (2009).

Failure to comply strictly with the requirements of a condition precedent functions as a waiver of the right or obligation the condition preceded. *Kingsley Arms v. Sano Rubin Const. Co.*, 791 N.Y.S.2d 196 (3d Dept. 2005). (It should be noted that, pursuant to CPLR 3015(a), when a defense to an action is based on the failure to comply with a condition precedent, the denial of performance "shall be made specifically and with particularity.")

Applications of New York Law

In *Archstone v. Renval*, a developer sued its contractor over a deposit demanded by the contractor and which the developer claimed was paid under duress. *Archstone Dev. v. Renval Constr.*, 156 A.D.3d 432 (1st Dept. 2017). The governing contract was AIA Document A201-2007 that required mediation "as a condition precedent to binding dispute resolution." The First Department upheld the lower court's dismissal of the action without addressing the merits of the case simply because the developer failed to seek mediation. Despite the developer's substantial

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compliance with all the other conditions precedent to the claim, its failure to seek mediation did not meet the requirement of strict performance and the clear consequence set forth in the contract was the developer's inability to maintain the court action.

Likewise, in *Schindler Elevator v. Tully Construction*, a subcontractor brought suit against a contractor for delay damages it incurred in performance of its work. *Schindler Elevator Corp. v. Tully Const. Co.*, 30 N.Y.S.3d 707, 709 (2d Dept. 2016). The relevant subcontract required the subcontractor to submit "within forty-five (45) days...and every thirty (30) days thereafter...verified statements of the details and amounts of such damages, together with documentary evidence of such damages" further stating that failure "to strictly comply with the requirements...shall be deemed a conclusive waiver...of any and all claims for damages for delay..." Although the subcontractor produced letters and e-mails it had sent the contractor making the contractor aware of the delay claims, the communications did not contain verified statements nor were they supported by documentary evidence of the damages. Accordingly, the Second Department overturned the lower court's dismissal of the contractor's motion for summary judgment and dismissed the subcontractor's claim. Having failed to comply strictly with the condition precedent, the subcontractor effectively waived its right to claim damages for the delays.

By contrast, in *Facilities Development v. Nautilus Construction*, a surety

appealed the dismissal of its motion for summary judgment to dismiss an action by an owner on the grounds that the owner's failure to require its contractor to obtain fire insurance prior to the start of work was a condition precedent to the performance bond's payment. *Facilities Dev. Corp. v. Nautilus Const. Corp.*, 550 N.Y.S.2d 127 (3d Dept. 1989). While the contract did require the contractor to obtain fire insurance, no conditional language was used nor any consequence for failure provided. The court held that the fire insurance requirement could not be construed as a condition

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precedent as it was just "one provision among several that the parties intended to be performed." Without the necessary conditional language or explicit consequence for failure to perform, the fire insurance requirement was only a promise and did not require the literal performance demanded from an express condition precedent.

Conclusion

Those entering into agreements for construction should be vigilant about conditional contractual language—especially if the conditions state a consequence for failure. Words such as 'until,' 'if,' 'provided'

and (most obviously) 'as a condition precedent' are indicators of a condition precedent and will require the strict performance discussed in this article. Developers, owners, contractors and subcontractors performing work under agreements with such terms should be certain that their performance literally complies with the condition precedent to avoid the forfeiture of any rights or benefits under the agreement. Even substantial performance, as demonstrated by the subcontractor in *Schindler*, will be insufficient to prevail on a contract claim. In certain instances, such as *Archstone*, a court may not even consider evidence as to the merits of the claim if the condition precedent has not been strictly satisfied.

However, conditions precedent can be advantageous for both owners and contractors if used properly. They are ideal for situations where precise performance is critical to the success of a project, allowing the parties to delineate clearly the performance required, such as the timely and detailed submitting of change orders or the prompt notice of a potential delay. Nevertheless, if used incorrectly or—worse yet—inadvertently, the unintended consequences could be disastrous and often irreversible.