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Contractor's Failure to "Strictly Comply" With Notice Provision Precludes Contract Damages Award

BY:

In the New York case of *Schindler Elevator Corporation v. Tully Construction Co., Inc.*, 139 A.D.3d 930 (2d Dep't 2016), the plaintiff sought recovery of additional expenses and costs it allegedly incurred as a result of delays in construction attributable to other entities at the site. Defendant Tully Construction Co., Inc.'s ("Tully") was the general contractor for the construction of a multi-story garage for the City of New York Department of Sanitation. After contracting with the City in 2000, Tully subcontracted with certain entities to complete portions of the project. Plaintiff Schindler Elevator Corporation ("Schindler") contracted with Tully in 2003 to install five (5) elevators in the new garage.

Construction of the garage progressed over the next several years, until Schindler brought a breach of contract suit against Tully in 2010. Schindler alleged that project delays had prevented its completion of elevator work in a timely fashion, and caused it to incur various costs and expenses. At the subsequent bench trial of the action, plaintiff submitted a series of emails and letters it had forwarded to Tully, advising of delays and timetable issues during the period in question. Schindler asserted that these communications were sufficient to comply with the subcontract's notice of damages provision. Moreover, Schindler argued that Tully had actual notice of project delays from other contractors and due to its continuous presence at the site. The trial judge found in plaintiff's favor and awarded Schindler \$209,235 plus interest.

On appeal to the Second Department, the trial court's decision and award were reversed, and the action was dismissed. The appellate court examined the controlling subcontract language regarding the elements of notice required to be given to Tully. Article 11.1.2 of the contract required that notice of any delay damages claimed was to be served on Tully within forty-five (45) days of the onset of such damages, and updates of the damages generated every thirty (30) days. In addition, a "verified statement" detailing the damages, and documentary evidence to support same was required to support a valid claim under the contract. The court held that "where a construction contract contains a condition precedent-type provision setting forth the consequences of a failure to strictly comply, strict compliance will be required." *Id.* at 931. According to the court, Schindler's communications clearly did not "strictly comply" with the contract's condition precedent for a delay damages claim. Sealing plaintiff's fate, and the dismissal of the action, was the contract wording stating that a "failure to strictly comply with [notice requirements] shall be deemed a conclusive waiver of any and all claims for damages due for delay arising from such condition." *Id.* at 931. The court likewise brushed aside plaintiff's argument that actual notice of the delay(s) and resulting damages obviated the contract-based notice obligation. The court found no contract language to support such a waiver of the contractor's obligation to "strictly comply" with the notice requirement. *Id.* at 932.