

## The Path to Recovery of Damages for Delay Narrows

By the Appellate Division, Second Department in its decision in *Schindler v. Tully Construction Co.*, 139 A.D.3d 930 (May 18, 2016), reversing the trial court's (non-jury) decision in Queens County which awarded the plaintiff-subcontractor \$209,235.36, the path to recovery for delay damage was significantly narrowed.

The case derives from Tully Construction Co.'s ("Tully's") 2000 contract with the City of New York Department of Sanitation ("DOS") to construct a garage. In August 2003, Tully entered into a subcontract with Schindler Elevator ("Schindler"), under which Schindler was to furnish and install five elevators for the project. In 2010, Schindler commenced the litigation against Tully to recover damages allegedly incurred as a result of delays in the performance of the work.

The Supreme Court, Queens County, found that Schindler was entitled to delay damages in the principal sum of \$209,235.36, and the Trial court rejected Tully's argument that Schindler waived its claim to delay damages by failing to comply with a contractual notice requirement.

The notice provisions cited were contained in the prime contract between Tully and the DOS, which is incorporated into the Tully-Schindler subcontract. The prime contract contains a condition precedent notice provision.

Article 11.1.2 requires a contractor claiming to be sustaining delay damages to submit, "within forty-five (45) days from the time such damages are first incurred, verified statements of the details and amounts of such damages, together with documentary evidence of such damages." Moreover, as the contract goes on to state, a failure "to strictly comply with the requirements of Article ...11.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition."

The Appellate Division proceeded to address Schindler's other arguments as well. The appellate court stated "The letters and email relied upon by the Supreme Court and the plaintiff [Schindler] did not strictly comply with the contractual notice requirement, since they did not contain verified statements of the amount of delay damages allegedly sustained by the plaintiff [Schindler] and were unsupported by documentary evidence."

The appellate court continued as follows, "Contrary to the plaintiff's [Schindler's] actual knowledge of the delay and claims did not relieve the plaintiff [Schindler] of its obligations to serve a proper

notice of claim, and Defendant's [Tully's] alleged breach of the subcontract did not excuse the plaintiff [Schindler] from complying with the notice requirements under the circumstances of this case."

### Osborn Law Notes

The Schindler decision, in essence, eviscerates delay damage claims. In our representation of large property owners on construction contracts, we find that incorporating provisions in the contracts calling for strict and prompt compliance supported by detailed documentation with verified statements of the amounts allegedly due for delay is virtually tantamount to full exculpation from all delay claims. This is because contractors do not do a good job at preserving and backing up their claims. The positive "flip side" of this virtual exculpation is that contractors experiencing *real* and *compelling* claims during a project will be more likely to lay all of their delay claim cards on the table and resolve or abandon them in "real time", rather than trying to save up a "murky" delay claim for leverage at project close out. Under these conditions, resolution of delay claims may cease to be an impediment to project close out. This case law will force owners and contractors, alike, to reckon with and resolve delay costs during the project. And that is a good thing.

### About the Author

John E. ("Jack") Osborn is the Managing Partner of John E. Osborn P.C., a 10-lawyer firm concentrating in complex construction, environmental, real estate law and litigation, which he founded in 1992. The firm's clients include hotels, college and universities, school districts, charter schools, healthcare and not-for-profit institutions, commercial and residential developers, construction managers, architects and specialty contractors. He has over 30 years of experience litigating complex commercial disputes relating to construction, real estate, corporate and environmental issues. Mr. Osborn has tried multi-million dollar construction cases and has represented owners on multi-hundred million dollar projects, which are among the largest and "highest profile" in the metropolitan area. He has developed a reputation as one of New York State's premiere strategists and problem solvers in negotiating contracts and advising companies on business, government relations and commercial matters.

