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Lien Law--Section 39-a--Measure of Damages for Excessive Claim Limited Solely to Amount Willfully Exaggerated (Goodman v. Del-Sa-Co. Foods, Inc., 15 N.Y.2d 191 (1965))

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does not have to bargain on work contracted out which cannot be performed by his employees. Likewise, the employer will not be guilty of a violation of the Act by refusing to bargain if he has formerly contracted out work in the past, or if there is a labor-management contract reserving to him the right to subcontract, even if the work could be performed by his employees.

Although it is apparent that the court does not wish to extinguish management prerogatives, the employer should still place a provision in the labor-management contract expressly reserving such prerogatives.[31] The Board will more readily reserve a subject to management where there is a contract provision relating to it. In doing so, the Board recognizes that the nature of a contract is such that there is bargaining before there is agreement. Without such provision, however, the Board's decisions on the matters subject to mandatory collective bargaining will continue to turn on the particular facts of each case.

LIEN LAW — SECTION 39-a — MEASURE OF DAMAGES FOR EXCESSIVE CLAIM LIMITED SOLELY TO AMOUNT WILLFULLY EXAGGERATED. — In a recent action to foreclose a mechanic's lien, the defendant counterclaimed for a declaration that the lien was void as a result of the lienor's willful exaggeration of the amount due. In addition, the defendant asked for damages, pursuant to Section 39-a of the Lien Law,[1] in an amount equal to the difference between the total amount of the lien filed and the amount found due. The lienor contended that if any damages at all were owing to the defendant, they should include only the willfully overstated amounts and not honest discrepancies. A divided Court of Appeals, although declaring the lien void, nonetheless accepted the lienor's contention as to damages and *held* that section 30-a was designed to permit recovery only in the amount of willful exaggeration. *Goodman v. Del-Sa-Co. Foods, Inc.*, 15 N.Y.2d 191, — N.E.2d —, — N.Y.S.2d — (1965).

Prior to any statutory authority for invalidating liens which were willfully exaggerated, a judicial practice evolved in some courts to declare such liens void on the theory that the exaggeration did not meet the requirements of the statement of value in the

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[31] Although it is advisable to include a management prerogative clause in a contract, it seems to be established that management cannot negotiate on this issue with a "take it or leave it" attitude. See General Elec. Co., 150 N.L.R.B. No. 36 (1964); Shell Oil Co., *supra* note 30.

[1] N.Y. LIEN LAW § 39-a.

notice of lien.[2] Thus, in *Aeschliman v. Presbyterian Hosp.*,[3] a lien willfully exaggerated by over two thousand dollars was held void, since an intentionally false claim was not in accord with the purpose of the notice of lien.[4]

This practice was subsequently codified, in New York, in Section 39 of the Lien Law which voids willfully exaggerated liens.[5] Inbred in this section is the requirement that the element of willfulness be shown in order to establish a defense to the foreclosure.[6] In supplementing this section, the legislature also enacted section 39-a which declares that the person filing such an exaggerated lien shall be liable in damages for "an amount equal to the difference by which the amount claimed to be due or to become due . . . exceeded the amount actually due or to become due thereon." [7] However, the section further provides that such damages can be awarded *only* where the lien has been held void in an action or proceeding to enforce it.

The legislative history of both sections is unclear. The Joint Legislative Committee to Investigate the Lien Law, which recommended the enactment of these sections to the legislature, did not offer specific commentary on them, despite the fact that the explanation of other sections was often elaborate.[8] From this it can be surmised that the Committee considered these sections self-explanatory.

In the case of *Durand Realty Co. v. Stolman,* the appellate division, in construing sections 39 and 39-a, held that the issue of damages *must* be raised by a counterclaim in the foreclosure proceeding, and that the burden is on the claimant to establish the amount of recovery.[9] The court, in noting that section 39-a was

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[2] BLANC, MECHANICS' LIENS § 39b (1949), and cases therein cited.

[3] 165 N.Y. 296, 59 N.E. 148 (1901).

[4] *Id.* at 302, 59 N.E. at 149-50. Indication of the amount due in the notice of lien constitutes the statement of the lienor's claim, omission of which is fatal, since the notice of lien then falls short of performing its function—notice. BLANC, *op. cit. supra* note 2, at § 38e; see N.Y. LIEN LAW § 9(5).

[5] Not only does § 39 of the Lien Law void a willfully exaggerated lien, but it also precludes the filing of a subsequent lien for the same claim. See LIEBERMAN, BUILDING CONSTRUCTION CONTRACTS AND MECHANICS' LIEN LAW 67 (1939).

[6] Yonkers Builders Supply Co. v. Petro Luciano & Son, Inc., 269 N.Y. 171, 176, 199 N.E. 45, 47 (1935). The same rule is applied in Minnesota. Delyea v. Turner, 264 Minn. 169, —, 118 N.W.2d 436, 440 (1962).

[7] *Supra* note 1.

[8] *Report of the Joint Legislative Committee to Investigate the Lien Law,* N.Y. LEG. DOC. No. 72 (1930). The purpose of the committee was to "investigate, study and consider the subject of liens . . . for the purpose of establishing *equitable rights and harmonious relations* among the several interests affected by such liens." *Id.* at 3. (Emphasis added.)

[9] 197 Misc. 208, 94 N.Y.S.2d 358 (Sup. Ct. 1949), *aff'd mem.,* 280 App. Div. 758, 113 N.Y.S.2d 644 (1st Dep't 1952); *accord,* Joe Smith, Inc. v. Otis-Charles Corp., 279 App. Div. 1, 107 N.Y.S.2d 233 (4th Dep't 1951), *aff'd mem.,* 304 N.Y. 684, 107 N.E.2d 598 (1952), where it was said that the

penal, concluded that the intention of the legislature was to provide a remedy only for willful exaggeration. Honest differences, therefore, were not within the statute. It is significant to note here that the references to willful exaggeration were mere dicta and that the court was determining only whether the issue of damages could be raised by a separate action begun subsequent to the foreclosure proceeding.

Apparently the only reported case [10] permitting recovery under section 39-a is *Hutchinson Roofing & Sheet Metal Co. v. Gilbert Constr. Corp.*,[11] in which a terse memorandum opinion was written indicating only that "defendant was entitled to recover damages on account of the exaggerated lien." [12] The record on appeal, however, states that judgment was entered for the exact amount of the *willful* exaggeration.[13]

In the instant case, the Court, relying on dicta in the cases previously discussed, stated that the legislature obviously did not envision the present factual situation. It was observed that "the draftsman of the statute was thinking of the simple situation where the entire amount of the exaggeration was willful." [14] The Court also noted the "absurdity" of allowing recovery due to honest mistake.[15]

Since the Court recognized the highly penal character of the statute, it concluded that the clearest language was necessary to make an honest exaggeration unlawful. Furthermore, the majority reasoned that if the statute "were held to impose a penalty measured by a discrepancy due to honest mistake it might well be unconstitutional." [16]

The short, vigorous dissent, written by Chief Judge Desmond, however, insisted that section 39-a was plain and unambiguous, and therefore should have been literally construed. In analyzing the legislative intent, the minority concluded that where there was a willful exaggeration, the legislature, in order to put "sharp teeth" into its enactment, consciously provided a penalty equal to the *total* amount of exaggeration. In concluding, Judge Desmond summarily dismissed the contention of unconstitutionality.[17]

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penalty of section 39-a is drastic and the section is to be strictly construed in favor of the person upon whom the penalty is sought to be imposed.

[10] Goodman v. Del-Sa-Co. Foods, Inc., 15 N.Y.2d 191, 198, — N.E.2d —, —, — N.Y.S.2d —, — (1965).

[11] 275 App. Div. 1048 (2d Dep't 1949).

[12] *Ibid.*

[13] *Supra* note 10, at 198, — N.E.2d at —, — N.Y.S.2d at —. However, the record fails to indicate whether there was an honest discrepancy in issue.

[14] *Id.* at 195, — N.E.2d at —, — N.Y.S.2d at —.

[15] *Id.* at 196, — N.E.2d at —, — N.Y.S.2d at —.

[16] *Id.* at 197, — N.E.2d at —, — N.Y.S.2d at —. This position is predicated on the fact that the legislature cannot arbitrarily provide any penalty and at the same time fulfill the requirements of due process.

[17] *Id.* at 199-200, — N.E.2d at —, — N.Y.S.2d at —.

The general rule of statutory construction and interpretation is that when the language of a statute is plain and unambiguous, there is no need to look elsewhere for its meaning.[18] However, as in the instant case, where there is a lack of clear legislative intent, and where the statute when construed literally produces drastic results,[19] the court can resort to "quick judicial surgery" to avoid serious consequences.[20] Thus, as previously observed, since there was no direct commentary on section 39-a by the legislative committee which recommended it, the Court was justified in performing this operation.

The majority further predicated their decision on the questionable constitutional character of a literal interpretation of the statute. It is a significant rule of constitutional law, however, that a police regulation is not rendered invalid by the fact that it incidentally affects constitutional rights. Any regulation, supported by the indefinable limits of the police power,[21] will necessarily come in conflict with some right.

It has been said that "the police power extends to all the great public needs." [22] Thus, if the legislature intended to provide a penalty for the full amount of exaggeration in order to underscore its condemnation of willfully overstated liens, then the statute would have a legitimate public purpose and hence be constitutional. This, seemingly, is the rationale underlying the dissent's view

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[18] See SUTHERLAND, STATUTORY CONSTRUCTION §§ 234-36 (1891); Note, *Intrinsic and Extrinsic Aids to Statutory Construction: Ohio State Bar Association Committee Reports*, 26 U. CINC. L. REV. 299, 300 (1957).

[19] *Supra* note 10, at 196, — N.E.2d at —, — N.Y.S.2d at —. The Court was here taking the first important step in a construction process adequately described in the following passage: "The cases demonstrate that where literal construction of a statute will produce an unjust result the dictates of propriety and justice will be used as guides to the true legislative intent. 'In statutory construction the courts endeavor to give effect to the legislative intent. In the absence of language so clear that it allows no room for construction, the courts will not ascribe to the Legislature an intention which is contrary to general and well-established rules of justice and fairness.'" United Parcel Serv., Inc. v. Joseph, 272 App. Div. 194, 201, 70 N.Y.S.2d 22, 28 (1st Dep't 1947), *aff'd mem.*, 297 N.Y. 1004, 80 N.E.2d 533 (1948), quoting Sharkey v. Thurston, 268 N.Y. 123, 127, 196 N.E. 766, 768 (1935); see generally Dickerson, *Symposium on Judicial Law Making in Relation to Statutes: Introduction*, 36 IND. L.J. 411, 413 (1961); Merrill, *Judicial Interpretation of Legislation*, 32 OKLA. B.J. 1347, 1350 (1961).

[20] Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 416-17 (1961); see Comment, 8 STAN. L. REV. 293, 295-96, quoting CARDOZO, PARADOXES OF THE LEGAL SCIENCE 10 (1928), where it was said: "A legislature can not anticipate every possible legal problem. Neither can it do justice in novel cases after they have arisen. This inherent limitation in the legislative process makes it essential that there be some elasticity in the judicial process."

[21] Health Dep't v. Rector, 145 N.Y. 32, 39, 39 N.E. 833, 835 (1895); People v. Budd, 117 N.Y. 1, 14-15, 22 N.E. 670, 672 (1889), *aff'd*, 143 U.S. 517 (1892).

[22] Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

that the statute as literally read is constitutional. However, even if this position is correct, it would not adversely affect the majority's holding, since they were justified in performing "judicial surgery" based on the "drastic result" concept.

Even though damages are limited to the portion of exaggeration attributable to willfulness, the effectiveness of section 39-a is still guaranteed. For example, if a lienor has a valid claim for $10,000, but files a lien for $20,000—including in this $10,000 exaggeration, $2,000 due to honest, though mistaken belief, and $8,000 due to willfulness—he will forfeit the lien and, in addition, pay a penalty of $8,000. Under these circumstances a lienor would be foolish to attempt to enforce the lien. If the lienor does attempt to enforce an exaggerated lien, as a matter of legal strategy, he might well be advised to discontinue his action if the defendant-owner threatens to institute a counterclaim pursuant to section 39-a, since a foreclosure proceeding is in fact a condition precedent to the enforcement of the statute.

It is submitted that the majority's construction of section 39-a still affords adequate protection to owners and contractors against whom exaggerated liens have been filed. It also insulates lienors from the sting of unnecessary penalties, which the legislature probably did not intend. Thus, since there does not appear to be *direct* comment or legislative history on the statute, the majority was warranted in utilizing a construction process designed to ascribe the most reasonable legislative intention.[23]

TAXATION — SECTION 7605(b) — INTERNAL REVENUE SERVICE NOT REQUIRED TO SHOW PROBABLE CAUSE IN OBTAINING SUBPOENA OF TAX RECORDS. — The Internal Revenue Service summoned one Powell to produce records concerning prior tax returns made by a corporation of which Powell was president. Powell refused to comply, claiming that since the three-year statute of limitation had expired, the assessment must be predicated on fraud,[1] and in order to examine the records for fraud there must be a showing of "probable cause." The Supreme Court, in reversing

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[23] Chief Judge Cardozo wrote that "the legislator has only a fragmentary consciousness of the law" and when the question is one of fixing meaning to the rules which he prescribes, one should search at their source, that is, social utility. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 122 (1932). See generally Note, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 970-74 (1940).

[1] INT. REV. CODE OF 1954, §§ 6501(a), (c). See generally 5 RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION §§ 76.01(1), (2) (1964).