What Is the Duty of a Construction Manager in PA and NY? The Answer Is "Well, It Depends"

By Lynne Ingram and Stephen Wolf


If you work in construction or are generally familiar with the industry, you have likely heard the term "construction manager" (CM). Though the term CM is commonly used, the definition varies from project to project. The Construction Management Association of America (CMAA) defines construction management as the "process of professional management applied to a construction program from conception to completion for the purposes of controlling time, costs, and quality." A CM is hired by the owner to provide oversight in either the design and/or construction phases of a project to deliver the project on time, at or under budget, and to the intent of the design plans.

Construction management typically takes two forms, CM-Agency and CM-At-Risk. CM-Agency is where the CM acts as the agent for the owner and helps the owner manage a project and make decisions regarding that project but is not actually committed to delivering the project on-time and/or on-budget and does not directly hire contractors to perform the work. CM-At-Risk is where the CM is legally responsible for delivering the project on-time and on-budget and directly enters into subcontracts with trades to perform the work.

As discussed further, identifying the duty of a CM depends upon the contract, the scope of their performance in the field, and the jurisdiction.

Pennsylvania

In light of the varying definitions of CM and the different forms CM can take from project to project, Pennsylvania courts have resisted attempts to place a static duty onto CMs. In *Farabaugh v. Pa. Tpk. Comm'n*, the plaintiff suffered a fatal accident while operating a dump truck on a construction project on the Pennsylvania Turnpike and brought suit against several parties, including the CM. 911 A.2d 1264, 1266 (Pa. 2006). Under the terms of its agreement, the CM was "to administer, manager, and oversee construction of several sections of the expressway, including reviewing and monitoring the on-site safety procedures and having the authority to stop work if they perceived a dangerous condition. *Id.* at 1268. The Supreme Court of Pennsylvania acknowledged the diversity of contractual responsibilities for construction managers and, therefore, found it could not create a defined duty for all construction managers. *Id.* at 1281–82.

Because of the differences in contractual responsibilities for construction managers from case to case, the *Farabaugh* Court held, "[W]e decline to provide a rigid definition of a construction manager or impose a correspondingly status duty on all construction managers. Instead, we find it preferable to allow owners and construction managers to define their roles and responsibilities in each contract according to the needs of each project and leaving courts to consider on a case by case basis whether such responsibilities trigger a duty to other workers on the jobsite." *Id.* at 1282.

Once it declined to adopt a rigid duty, the Court looked to the CM's contract, which required it to take an active role assuring safety on site. The contractual duties included developing, maintaining and monitoring a comprehensive project safety/insurance program, interviewing applicants to be the contractors' safety representatives and monitor their performance, and monitoring the contractors' compliance with safety regulations frequently and regularly. *Id.* In light of the CM's contractual responsibilities, the Court in *Farabaugh* held that the CM owed a duty to perform its safety obligations under the contract with the owner so as not to injure the plaintiff. *Id.* at 1283-1284.

In *Cottingham v. Tutor Perini Bldg. Corp.*, the U.S. District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, held that the CM did not assume the responsibility to supervise safety at the work site because (1) unlike *Farabaugh*, there was no contract imposing such responsibility; and (2) even if it could be assumed by performance, the plaintiff did not present sufficient evidence that the CM assumed safety oversight. 237 F.Supp.3d 244, 252–53 (E.D. Pa. 2017).

Pennsylvania law makes it clear—the answer as to what duty a CM owes to a worker on a jobsite is "well, it depends" because the courts need to evaluate the contract language to see what safety responsibilities, if any, the CM agreed to perform in its contract. Under this framework, courts give deference to the duties and responsibilities the owner and CM bargain for. However, the downside is that whether or

not the CM assumed such responsibilities is determined on a case-by-case basis, which will typically require discovery and therefore will not lend itself to early dismissals.

New York

In addition to permitting ordinary negligence claims, New York codified the Labor Law to provide additional protections to workers. Section 200 of the Labor Law codifies a common law negligence claim and requires employees on construction site to be provided with "reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequently such places." For a CM to be liable under a section 200 claim, or common law negligence claim, it must be established that the CM "had the opportunity to supervise or control the performance of the work." *Ortega v. Puccia*, 866 N.Y.S.2d 323 (N.Y. App. Div. 2d Dept. 2008); *Narducci v. Manhasset Bay Assocs.*, 727 N.Y.S.2d 37 (N.Y. 2001); *Delahaye v. Saint Anns School,* 836 N.Y.S.2d 233, 236-38 (N.Y. App. Div. 2d Dept. 2007).

In addition to section 200, section 240(1) of the Labor Law, known as the scaffolding law, provides that "[a]ll contractors and owners and their agents… in the erection, demolition, repairing, altering, painting, cleaning or of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices… as to give proper protection" to such workers.

For §240(1) claims, a construction manager is generally not considered a 'contractor' or 'owner' within the meaning of Labor Law §240(1) or §240 and can only be held responsible if it was delegated the authority and duties of either the general contractor or functioned as an agent of the owner, meaning it had the authority to control or supervise the work being performed. *Domino v. Prof'l Consulting, Inc.*, 869 N.Y.S.2d 224, 226 (N.Y. App. Div. 2d Dept. 2008); *Pino v. Irvington Union Free Sch. Dist.*, 843 N.Y.S.2d 133 (N.Y. App. Div. 2d Dept. 2007); *Lodato v. Greyhawk N. Am., LLC*, 834 N.Y.S.2d 242 (N.Y. App. Div. 2d Dept. 2007). Notably, in New York, a construction manager, as a matter of law, is not a statutory agent of the owner to the construction manager and additional facts are required to support the agency argument. *See Phillips v. Wilmorite, Inc.*, 723 N.Y.S.2d 590 (N.Y. App. Div. 4th Dept. 2001).

Section 241(6) provides another cause of action commonly used in New York construction cases, which provides that "All areas in which construction, excavation or demolition work is being performed shall be so constructed… as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." To prevail on a cause of action pursuant to Labor Law §241(6), "a plaintiff must prove a violation of the Industrial Code that sets forth a specific standard." *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 601 N.Y.S.2d 49 (N.Y. 1993). Though absolute liability is imposed upon owners and general contractors where a violation of a sufficiently specific section of the Industrial code is demonstrated, in order for a construction manager to be liable under Labor Law §241(6) as a statutory agent of the owner, the owner must have delegated to the construction manager "the authority to supervise or control the injury producing work." *Bateman v. Walbridge Aldinger Co.*, 750 N.Y.S.2d 402, 403 (N.Y. App. Div. 4th Dept. 2002) (citations omitted); *see also Russin v. Louis N. Picciano & Son*, 445 N.Y.S.2d 127 (N.Y. 1981).

The critical questions when evaluating defending a CM in New York is whether the CM supervised or controlled the injury producing work or had the opportunity to do so and/or whether the CM was the statutory agent of the owner or delegated the duties of a general contractor. These questions are all incredibly fact specific and require an in-depth analysis on a case-by-case basis.

Conclusion

Whether you are litigating in Pennsylvania or New York, the duties and liability of a CM depend upon the CM's contract for that project as well as the CM's performance in the field. When representing a CM, attention to the details of the contract documents for the parties on the jobsite, especially the CM and those entities involved in the injury producing work, is critical. In addition, it is important to evaluate any arguments that the CM assumed additional responsibilities not expressly provided for by contract while on the job. Just like the definition of a CM, a CM's legal duties vary from project to project.

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