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COURT OF APPEALS

STATE OF NEW YORK

SKANSKA USA BUILDING INC.,

Appellant,

-against-

No. 38

ATLANTIC YARDS B2 OWNER, LLC,

Respondent.

20 Eagle Street
Albany, New York
March 20, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: And we will move to appeal
2 number 38, Skanska v. Atlantic Yards.

3 Counsel.

4 MR. MELLER: Good afternoon. If it would please
5 the court, I'd like to reserve two minutes for reply.

6 CHIEF JUDGE DIFIORE: Of course.

7 MR. MELLER: Your Honors, Skanska had the
8 contractual right to receive and B2 had the contractual
9 obligation to provide Lien Law 5 security as a matter of
10 contract.

11 JUDGE WILSON: Where?

12 CHIEF JUDGE DIFIORE: Where? Yeah.

13 MR. MELLER: In addition - - - in addition to
14 17.3 of the CM agreement which provides that performance is
15 - - - the performance validity and interpretation is in
16 accordance with the law of the State of New York. And
17 according - - - in addition to the general principle of law
18 that the law is written into every contract, we also have
19 general - - -

20 JUDGE STEIN: But does this - - - does that mean
21 that whenever the law of the State of New York has some
22 provision about something - - - and in this case we have
23 Lien Law Section 5, which as I read it obligates the - - -
24 the state, ESD here, to procure that kind of - - - some
25 kind of security, that - - - that we can then read an



1 obligation into a contract that the parties didn't place
2 there?

3 MR. MELLER: You can. You can, and certainly in
4 a construction setting. Construction is one of the most
5 highly legislated industries we have. In addition to the
6 general principle of law, we have General Business Law 757
7 which provides that in a contract if you provide - - - in
8 New York, if you provide that a foreign law governs the
9 parties' rights it's void as a matter of law. Now the
10 argument that is being advanced by B2 is that because it
11 was not specifically mentioned, Lien Law 5 was not
12 specifically mentioned, Skanska has no contractual Lien Law
13 rights. That would be a direct affront to Lien Law 34.

14 JUDGE STEIN: Well, that - - - let's assume that
15 that's not accurate, that Skanska does have some rights
16 under the Lien Law. Aren't those rights as against ESD,
17 Empire State Development, who perhaps, at least in your
18 view, didn't do what it was supposed to do?

19 MR. MELLER: No. First - - - the first - - -
20 first and foremost is if we have - - - if there's a
21 contract right that exists. Okay. It is a cumulative
22 contract right under the court's decisions in - - - bear
23 with me I'm sorry - - - Assured Guaranty v. J.P. Morgan in
24 18 N.Y. 344, ABN AMRO Bank v. MBIA Inc. in 17 N.Y.3d 208.
25 Those are both dealing with the rights against the ESDC if



1 you would. As far as the - - - as far as the tort right
2 against ESDC or - - -

3 JUDGE STEIN: Well, you know, a statutory right
4 or some kind of right, yeah.

5 MR. MELLER: Well, firstly, in this case - - -

6 JUDGE STEIN: We have Article 78s, for example -
7 - -

8 MR. MELLER: Right.

9 JUDGE STEIN: - - - to compel the State to do
10 what it is supposed to do or to get redressed for its
11 failure to do that, right?

12 MR. MELLER: And - - - and again, under the
13 precedent of this court that I just cited, if you also have
14 a contractual right they're cumulative, and you can
15 exercise your contractual right which is - - -

16 JUDGE STEIN: Okay. So that gets us back to
17 whether or not there is a contractual right here.

18 MR. MELLER: Yes. And I was at Article - - -
19 Section 34 of the Lien Law which prohibits in a contract a
20 waiver of a right to lien. Now it is the argument of the
21 respondents that because it - - - it was not specifically
22 placed then Skanska waived its lien rights, and that - - -
23 that's abhorrent to the law. West-Fair v. Aetna Casualty &
24 Surety, again of this court, provided that: "The surrender
25 of protective rights as a prerequisite to obtaining a

1 contract or a subcontract is repugnant as against public
2 policy." So you - - - and there's no question as well that
3 the Lien Law 5 bond is a Lien Law right, and is - - - is a
4 lien for the purposes of the Lien Law. It was placed there
5 by the legislature into the Lien Law. It wasn't placed in
6 the Public Authorities Law. It wasn't placed in the
7 General Business Law. It was placed in the Lien Law
8 because the very purpose - - - the very purpose of the
9 sponsors was to secure the lien rights - - -

10 JUDGE RIVERA: So what - - - what constitutes an
11 undertaking?

12 MR. MELLER: An undertaking - - -

13 JUDGE RIVERA: A bond is separate, right?

14 MR. MELLER: A - - -

15 JUDGE RIVERA: A bond is separately mentioned?

16 MR. MELLER: Right.

17 JUDGE RIVERA: It's not a letter of credit.

18 MR. MELLER: Right.

19 JUDGE RIVERA: Given the legislative history,
20 right?

21 MR. MELLER: Right, if we're - - -

22 JUDGE RIVERA: Or could be?

23 MR. MELLER: Uh-huh. I think if we're talking
24 the form, okay, it could be a pot of gold, all right. I
25 think what is important is the substance. Does - - - is



1 this document or is this guaranteeing to the beneficiaries
2 - - - to the beneficiaries, not to the ESDC, no, no, no,
3 that's the obligee under this - - - under this completion
4 guaranty. But the statute requires to the beneficiaries of
5 the law a direct guaranty. And if there's no direct
6 guaranty that's what controls.

7 JUDGE RIVERA: But what would that be is what I'm
8 saying. I understand your position which is merely
9 promising to pay doesn't satisfy the Lien Law. So other
10 than a bond, a letter of credit, what else could it be?
11 Putting aside the pot of gold, I assume you mean like
12 actual finances of sorts in some account or an escrow or
13 something like that.

14 MR. MELLER: Yes. The legislature wanted to make
15 certain, because you can't file a lien, that the
16 contractors and subcontractors are paid. So when you look
17 at the undertaking - - - and again with a capital U it will
18 be 2501 of the CPLR. With a small u, it still must be a
19 fund, something that is regulated. For example, a bond is
20 regulated by the insurance law. So if someone goes
21 bankrupt, you have the - - - you have the fund, letters of
22 credit, you have banking and banking regulations, some
23 legislative or some statutory - - - some control so that
24 the guarantor simply going bankrupt doesn't leave everyone
25 high and dry. Which - - - and so that is what I would say



1 to Your Honor is the undertaking, something that is - - -
2 goes to the beneficiaries and how far you can go. It's got
3 to be some - - - something subject to the laws. Something
4 subject to certainty that the money's there at the end of
5 the day for the beneficiaries.

6 JUDGE FAHEY: I'm struggling with one - - - one
7 particular part of your argument - - - and you can correct
8 me if you think I'm wrong. Is it correct that the guaranty
9 was by FEC, who's an affiliate of FCRC to - - - Empire
10 State Development Corporation, ECST - - - ECDC - - -

11 MR. MELLER: Yes.

12 JUDGE FAHEY: - - - ESDC; is that correct?

13 MR. MELLER: It was by an affiliate - - -

14 JUDGE FAHEY: That's the question. FCE to FCRC -
15 - - as an affiliate of FCRC and it was to the Empire State
16 Development Corporation.

17 MR. MELLER: It - - - it was by Forest City
18 Enterprises.

19 JUDGE FAHEY: Roughly - - - he's shaking his head
20 yeah, but we - - -

21 MR. MELLER: Which is an affiliate of Forest
22 City.

23 JUDGE FAHEY: Right, Forest City Enterprises
24 which is an affiliate of FCRC, right? And then it was to
25 Empire State Development Corporation. Now these are all



1 non-parties?

2 MR. MELLER: The Enterprises is a non-party.
3 Forest City, we have - - - we did assert that they are a
4 party. We asserted that on piercing, and the Appellate
5 Division did reverse that.

6 JUDGE FAHEY: All right. So FCR - - - FCRC isn't
7 a party but the affiliate is a party; is that correct?

8 MR. MELLER: Forest City is a party. Forest City
9 Enterprises is not a party.

10 CHIEF JUDGE DIFIORE: So Forest City Ratner
11 Enterprises posted a guaranty, correct?

12 MR. MELLER: I think it says Forest City
13 Enterprises, Your Honor.

14 CHIEF JUDGE DIFIORE: Yes.

15 MR. MELLER: They were the ones who - - -

16 CHIEF JUDGE DIFIORE: So how does that fold into
17 our analysis?

18 MR. MELLER: They're a third party, and they - -
19 -

20 CHIEF JUDGE DIFIORE: Right.

21 MR. MELLER: - - - may have a bunch of money with
22 - - - and they've already undergone certain transitions.
23 So - - - again, we make the argument about finding where it
24 - - - and that goes into the dissent, finding where the
25 money is. I mean but they can go bankrupt tomorrow as well



1 as - - - as rich as they - - - they may be today.

2 JUDGE STEIN: Have you alleged any damages? Have
3 you - - - have the contractors suffered any damages as a
4 result of what you say is this breach of contract - - -

5 MR. MELLER: In the - - -

6 JUDGE STEIN: - - - or this inadequacy of - - -
7 of - - -

8 MR. MELLER: Very well could.

9 JUDGE STEIN: Okay. But - - -

10 MR. MELLER: Millions of dollars are owed. The -
11 - - the first thing is those are a contractual promise, and
12 we respectfully remind the court when - - - when we found -
13 - -

14 JUDGE STEIN: But - - - but you don't have to
15 allege that some damages have been incurred on a breach of
16 contract cause of action?

17 MR. MELLER: You have to allege a breach, and - -
18 - and the damages are chasing - - - chasing the money. Or
19 being deprived of your legal right.

20 JUDGE STEIN: But how - - - how do you know that
21 you're going to have to chase the money? I mean maybe - -
22 -

23 MR. MELLER: B2 - - -

24 JUDGE STEIN: - - - FCE's got that pot of gold.

25 MR. MELLER: B2 - - - B2 is a single-asset entity



1 which - - -

2 JUDGE STEIN: No, no, no. But it's - - - but the
3 obligation has been guaranteed by FCE. That's - - -

4 MR. MELLER: The guaranty has not been - - -
5 there's no guaranty to the contractors here, and that is
6 the principle. The obligee is the ESDC, not the
7 contractors. That is the failure. That is the primary
8 failure. It's conditional, it's limited, and it's - - -
9 and it doesn't go to the very beneficiaries that the law
10 says it must go to. And that was - - - and I'll be back in
11 ten.

12 CHIEF JUDGE DIFIORE: Thank you. You will.
13 Thank you, counsel.

14 Counsel.

15 MR. WEINBERGER: Thank you. May it please the
16 court. First, I'd like to address the contract issue, and
17 I think that's really the critical issue here. There is no
18 provision in the contract requiring a bond. The dissent in
19 the Appellate Division said there's a provision saying you
20 have to comply with New York Law, but there isn't. The - -
21 - the provision is simply a choice of law provision. So
22 what they're arguing for here is if you have choice of law
23 provision it turns every statutory obligation into a
24 contractual obligation. That cannot be right. The - - -
25 there is in fact a provision in this contract in which they



1 are entitled to demand financial assurances. That's what
2 they bargained for. There's also a provision in this
3 contract which says that they have to comply with statutory
4 requirements regarding safety and scaffolding law. So they
5 knew how to put statutory obligations and turn them into
6 contractual obligations when they wanted to. The - - - the
7 irony here is that I think the - - -

8 JUDGE RIVERA: So - - - so what - - - what
9 protections do they have?

10 MR. WEINBERGER: Well, they have - - -

11 JUDGE RIVERA: Excuse me.

12 MR. WEINBERGER: I'm sorry, Your Honor.

13 JUDGE RIVERA: If - - - if the company goes belly
14 under or disappears - - -

15 MR. WEINBERGER: They have - - -

16 JUDGE RIVERA: - - - what protections do they
17 have to get paid for the labor?

18 MR. WEINBERGER: They have a guaranty of a
19 company that had ten billion dollars' worth of assets, a
20 public company, and ESD made the determination that that
21 was adequate. And it illustrates the problem here when you
22 try and - - -

23 JUDGE RIVERA: All right. So what recourse, from
24 your side, do they have?

25 MR. WEINBERGER: Well, it's - - - it's possible



1 that they can sue as a third-party beneficiary.

2 JUDGE FAHEY: But wouldn't - - - wouldn't you
3 still have an obligation under the statute? Let's say
4 you're right. You don't have an obligation under the
5 contract. You still have an obligation under the statute,
6 don't you?

7 MR. WEINBERGER: Yeah, and we believe we've
8 fulfilled that. We - - - we did this project through - - -

9 JUDGE FAHEY: Well, hold on. Was it - - - was it
10 - - - there's a bond in Section 137 bonds, State Finance
11 Law bonds, was that ever posted?

12 MR. WEINBERGER: That's not relevant because
13 that's for - - -

14 JUDGE FAHEY: Well, let me - - - answer my
15 question. What - - -

16 MR. WEINBERGER: The answer is no because this is
17 not a public - - -

18 JUDGE FAHEY: So - - - so it wasn't ever posted?

19 MR. WEINBERGER: No.

20 JUDGE FAHEY: All right.

21 MR. WEINBERGER: That's for a public improvement.
22 That's for if you have a contract with the state or a
23 municipality. This is a hybrid project that's governed by
24 Lien Law Section 5, so Section 137 of State Finance Law - -
25 -



1 JUDGE RIVERA: Well, what's the purpose? What's
2 the purpose of Section 5 with respect to these hybrid
3 projects?

4 MR. WEINBERGER: The purpose was to provide some
5 protection for contractors and subcontractors. That's
6 clear that prior to the enactment of Lien Law Section 5
7 they had no protection at all.

8 JUDGE RIVERA: What's the nature of that
9 protection? Is that protection a mere promise that - - -

10 MR. WEINBERGER: No.

11 JUDGE RIVERA: You don't need the statute for
12 that. What are you getting with the statute?

13 MR. WEINBERGER: Well, you do need the statute
14 for it because without the statute you'd have - - - the
15 only obligation would be on the part of the owner of the
16 property, the B2 owner, which as Mr. Meller pointed out is
17 a single-asset - - -

18 JUDGE RIVERA: But how does - - - why would the
19 legislature go through all that effort to merely say you
20 can just promise you'll pay?

21 MR. WEINBERGER: Well, but it's not just a
22 promise to pay. It's a guaranty which actually this court
23 has defined that undertaking in the Ollendorff case as a
24 guaranty under House (phonetic).

25 JUDGE RIVERA: Okay. So more than a promise,



1 what's the difference? What's the difference?

2 MR. WEINBERGER: Well, because - - -

3 JUDGE RIVERA: What more do you get than a
4 promise?

5 MR. WEINBERGER: You get - - - you get ten
6 billion dollars of assets behind that promise. So if you
7 have - - -

8 JUDGE WILSON: And how - - - how can the unpaid
9 laborers if - - - assuming that there are some, how could
10 they, let's say, levy on the guaranty?

11 MR. WEINBERGER: Well, you can't - - - you don't
12 levy on it.

13 JUDGE WILSON: All right. So how are they going
14 to be able to make good on it? How are they - - - if
15 they're unpaid what good does the guaranty do?

16 MR. WEINBERGER: The guaranty? Well, I - - - I -
17 - - again, this issue has not been reached but it's quite
18 possible that they are a third-party beneficiary of that
19 guaranty.

20 JUDGE WILSON: Well, then - - -

21 MR. WEINBERGER: And then - - -

22 JUDGE WILSON: - - - is it quite possible that
23 they're not?

24 MR. WEINBERGER: Well, again, we haven't briefed
25 or argued that issue, and that's part of the problem here



1 is that this is a determination that was made by ESD. And
2 ESD is not here. They're not a party to this proceeding.
3 If they were going to challenge that they should challenge
4 it in an Article 78 where a record can be developed by ESD
5 as to why they made the determination that they did.
6 Because they did make a determination that this was
7 adequate, and that is within their - - - within their
8 discretion. If they've abused their discretion, then
9 that's something that gets challenged in an Article 78
10 where they can make a record. But not when someone's just
11 trying to terminate a contract which is all that's going on
12 here. They're just trying to walk away from a contract and
13 use this - - -

14 JUDGE RIVERA: So - - - so you read the statute
15 and the legislative intent to - - - to sue - - - to have
16 these suits against the state?

17 MR. WEINBERGER: No. I - - - you know, the
18 statute originally - - - original was drafted to only
19 require a bond as I think Your Honors know.

20 JUDGE RIVERA: Yes. Yes.

21 MR. WEINBERGER: It was changed at the request of
22 the various agencies, including the MTA, to provide them
23 with additional - - - with discretion to evaluate each
24 project on its merits, make a determination - - -

25 JUDGE RIVERA: Provide - - - provide flexibility,



1 but again, isn't whatever they have to agree to have to be
2 in furtherance of the purpose? And if the purpose is to
3 make sure people get paid, how does merely a promise to pay
4 - - -

5 MR. WEINBERGER: Well, again - - -

6 JUDGE RIVERA: - - - ensure that purpose?

7 MR. WEINBERGER: Well, again, Your Honor, if - -
8 - if I lend - - - if I borrow money - - -

9 JUDGE RIVERA: What - - - how is a promise like
10 the bond?

11 MR. WEINBERGER: It's not the same as a bond.

12 JUDGE RIVERA: No, it is not.

13 MR. WEINBERGER: It's not the same. And there's
14 nothing - - -

15 JUDGE RIVERA: It's not meant to be. That's why
16 it says undertaking.

17 MR. WEINBERGER: Right. It's - - - it's not the
18 same as a bond, and if it was to be the equivalent of a
19 bond they would have said so. If a - - - if it had to be -
20 - -

21 JUDGE RIVERA: Well, it could be the - - - the
22 equivalent of what a bond is supposed to serve but just not
23 through a bond which I think is their point.

24 MR. WEINBERGER: Right. But - - - but again,
25 that language was inserted because the agencies wanted to



1 be able to evaluate the needs of each particular project
2 and make a determination.

3 JUDGE RIVERA: But a bond not be appropriate but
4 not to escape the purpose - - -

5 MR. WEINBERGER: But I don't - - - I don't - - -

6 JUDGE RIVERA: - - - of the law, right?

7 MR. WEINBERGER: Yeah. I don't think the purpose
8 is being escaped. When you borrow money from a bank and
9 someone guarantees that it's going to be repaid the bank
10 looks at - - -

11 JUDGE RIVERA: And - - - and then the bank goes
12 under.

13 MR. WEINBERGER: Well, the bank - - - you mean
14 the guarantor goes under?

15 JUDGE RIVERA: No, the guarantor. I'm sorry.
16 Yeah.

17 MR. WEINBERGER: But that's an evaluation.

18 JUDGE RIVERA: It goes under, then what?

19 MR. WEINBERGER: Well, that's an evaluation that
20 ESD made. ESD made the - - - the judgment that a guarantor
21 public company that has ten billion - - -

22 JUDGE RIVERA: So you're saying their recourse is
23 only if they are a third-party beneficiary against the
24 state, and you think that's the intent of the - - - the
25 legislature?



1 MR. WEINBERGER: Well, the other - - - the other
2 thing I would say is if they felt that that was inadequate
3 there is a remedy for them. The remedy is not to sit two
4 years and do the work and then walk off the job and use
5 this as an excuse because there is no contractual - - -
6 there is no contractual - - -

7 JUDGE RIVERA: The remedy in your opinion is?

8 MR. WEINBERGER: They - - - they could have
9 brought an Article 78 proceeding.

10 JUDGE RIVERA: So again, it's back to the state?

11 MR. WEINBERGER: Yeah. But if they feel that the
12 - - - that the security was inadequate they had a remedy.
13 They also could have bargained to put a - - - any
14 requirement they wanted into the contract, and if they
15 weren't satisfied with that they didn't have to do the job.
16 That was a decision - - -

17 JUDGE FAHEY: I guess one of the - - - does your
18 - - - does your rights under the Lien Law - - - by you I
19 mean a party who - - - who's got a claim under the Lien Law
20 - - - exist outside of the contract? What would you - - -
21 what would you say to that question?

22 MR. WEINBERGER: There - - - right - - - well,
23 again this is - - - this is a - - -

24 JUDGE FAHEY: Well, kind of straighter forward,
25 does the Lien Law remedy it? You're a contractor. You



1 claim - - - you claim somebody owes you money, they haven't
2 paid you. In this hybrid situation do you have a right
3 under the Lien Law to bring an action?

4 MR. WEINBERGER: You do not have the right to
5 file a lien for this kind of a project, so you don't have
6 the right to foreclose any lien - - -

7 JUDGE FAHEY: And there's nothing to foreclose
8 on, right?

9 MR. WEINBERGER: There's nothing to foreclose on.
10 That's correct. You cannot. Just as in a public - - -

11 JUDGE FAHEY: So unless there is a bond or other
12 undertaking that has been provided per Section 5 of the
13 Lien Law, right? And it wasn't provided here.

14 MR. WEINBERGER: Well, I - - - I beg to disagree
15 with that.

16 JUDGE FAHEY: Okay.

17 MR. WEINBERGER: It was provided. I mean the
18 question of - - - of whether it met - - - I mean these
19 requirements that Mr. Meller is referring to are not in the
20 statute that it has to be with Assurity or it has to have a
21 specific fund. The - - - it's not in the statute. Those
22 may be the requirements for an undertaking under the CPLR,
23 but they're not the requirements that are in the statute.

24 JUDGE STEIN: So are you saying that - - -

25 JUDGE FAHEY: One other - - - one other question.



1 I'm sorry, Judge, just this last thing. So let's assume -
2 - - leave the - - - your argument, though, is that it's not
3 - - - it's not provided for in the contract. If you're
4 going to do something you can't do it under a breach of
5 this contract?

6 MR. WEINBERGER: Correct.

7 JUDGE FAHEY: That's the core of your argument?

8 MR. WEINBERGER: Correct.

9 JUDGE FAHEY: The core of your argument is not
10 that the Lien Law would never apply or Lien Law is - - -
11 you don't care.

12 MR. WEINBERGER: That - - - I - - - I'm simply
13 saying - - -

14 JUDGE FAHEY: Your argument is that - - - yeah.

15 MR. WEINBERGER: - - - you cannot terminate this
16 contract for failure to fulfill - - -

17 JUDGE FAHEY: I see.

18 MR. WEINBERGER: - - - that statutory obligation.
19 That's what the motion court decided. I think the
20 Appellate Division got sidetracked. If you look at the
21 majority opinion, even though we're asking for affirmance,
22 you'll see that what they say in the - in the end of this
23 discussion was that they say something like because Skanska
24 is only asking to require the posting of a bond, we're not
25 going to decide. But that's not what Skanska's asking for.



1 JUDGE FAHEY: I see.

2 MR. WEINBERGER: They're - - - they're trying to
3 terminate this contract on the ground that the Lien Law
4 wasn't complied with. And I'm simply saying you cannot
5 terminate a contract - - -

6 JUDGE FAHEY: You're saying you can't terminate a
7 contract in the context of a breach of - - - you can't
8 enforce a lien in a breach of contract action unless it's
9 expressly laid out.

10 MR. WEINBERGER: Yeah, I'm saying - - -

11 JUDGE FAHEY: In the contract.

12 MR. WEINBERGER: Yeah, I'm staying statutory
13 obligations do not become contractual obligations merely
14 because you have a choice of law provision in the
15 agreement. The consequences of that are if you just think
16 it through, if you violate discrimination laws or you don't
17 pay your taxes can someone breach a - - - terminate a
18 contract with you? It - - - it has to be in - - - that's
19 what this case is about. It's a contract case. It's not
20 an attempt to enforce a lien. It's not an attempt to
21 require a bond. It's not an attempt to have a third-party
22 beneficiary claim.

23 JUDGE RIVERA: I - - - I know you're calling it a
24 choice of law provision. Okay. So let's say we disagreed
25 with you. Or - - - or let me put it another way. What



1 language, other than saying we're subject to Lien Law
2 Section 5 - - - other than that, short of that, what else
3 would - - - could they have negotiated in this contract?

4 MR. WEINBERGER: Look at Section 3.5 of the
5 agreement.

6 JUDGE RIVERA: Okay.

7 MR. WEINBERGER: And you'll see in Section 3.5
8 that they negotiated an entire provision that we had to
9 comply with safety rules, with the scaffolding law, with
10 the statutory requirements, and if we had not that would be
11 a breach of contract.

12 JUDGE RIVERA: So if it had said and otherwise
13 all laws of New York State apply to this contract - - -

14 MR. WEINBERGER: I - - -

15 JUDGE RIVERA: - - - would that have worked?

16 MR. WEINBERGER: It'd be closer. Be closer. I
17 mean we haven't - - -

18 JUDGE RIVERA: So if we disagreed with you that
19 this was a choice of conflicts provision - - -

20 MR. WEINBERGER: I - - -

21 JUDGE RIVERA: - - - and we read it to be an
22 agreement of these parties that you would be subject to all
23 the laws of New York State, would that include the Lien Law
24 Section 5?

25 MR. WEINBERGER: It would, but I don't think you



1 can read it that way. I think it's very, very clear. It's
2 a - - - it's a standard choice of law provision that's in
3 every contract, and I - - - I think you'd be hard-pressed
4 to read it as a - - - as a - - - as a contractual
5 obligation to comply. And again, they - - - they knew how
6 to bargain for a provision like this when they wanted it.
7 They put it in Section 3.5. And the fact that they - - -
8 that it's not there is an indication that it just wasn't
9 part of the deal. And - - - and I think it's 4.3 is the -
10 - - is the provision that says what they can do if they
11 have qualms about payment which was to demand financial
12 assurances, and frankly, that was another of the grounds
13 that they used for termination - - - to justify termination
14 of the agreement.

15 So they negotiated for what they wanted and - - -
16 and if they - - - if they didn't - - - if they didn't want
17 to proceed in the absence of that provision no one put a
18 gun to their head and forced them to go ahead and do this
19 job. And it's not like they didn't know that there was no
20 provision in there. So I think, you know, going down the
21 road of saying every statutory obligation is a - - - is a
22 contractual obligation is a pretty - - - pretty strong,
23 pretty dangerous thing to do. And again, I would - - - I
24 think that - - - and I - - - so I think the - - - the
25 dissent I was going to say also got mis - - - misdirected



1 because the dissent said - - - because Skanska said in
2 their brief that the - - - that the contract contained a
3 provision requiring compliance with New York Law, and then
4 they cited Section 17.3. And my time is up, but I think
5 when you look at 17.3 you'll say it doesn't - - - you'll
6 see it does not say that.

7 CHIEF JUDGE DIFIORE: Thank you. Thank you, sir.

8 Mr. Meller, your colleague makes the argument
9 that had you been concerned about the adequacy of the
10 security you would have brought an Article 78 against ESDC,
11 so how do you respond to that?

12 MR. MELLER: Well, Skanska did not even know that
13 this was the quote, unquote "substitute" for the bond until
14 we were in the Appellate Division. That was when it was
15 first argued. Skanska was searching - - - was asking for
16 the - - - as soon as Skanska learned that they had lost
17 their financing. Skanska said give me a copy of the bond,
18 and for two months they - - - they were put off. And then
19 they found out that there was no bond that - - - at the
20 same time there was a FOIL request being filed by our
21 office trying to hunt that down as well. So to address it,
22 we didn't even know about it, number one. Number two, as
23 far as what's required, we respectfully bring the court's
24 attention to Legnetto, which we cite, as well as
25 Chittenden. Legnetto - - - and this court said under 137



1 the contractor's required to post the bond. Even though
2 it's the same language, it placed the requirement on the
3 contractor because that's consistent with the sponsoring
4 statements. The sponsoring statements is to require the
5 owner to post the bond. The - - - in Chittenden - - -

6 JUDGE RIVERA: Just to clarify, is he correct?
7 Do you agree with him that what you're seeking to do is
8 terminate the contract?

9 MR. MELLER: This is not a - - - this is a
10 breach. We noticed - - - under the contract we gave them
11 notice of a breach. They had forty-five days to cure,
12 forty-five days to cure, and they thumbed their nose at
13 Skanska. Okay. They could have gotten that bond and
14 addressed their contractual obligations. They didn't say
15 boo. They just - - -

16 JUDGE STEIN: Well, but this - - - this arose
17 because they - - - they imposed a deadline for completion
18 of the work and at that point, you said you were
19 terminating the contract. Do I have that wrong?

20 MR. MELLER: We - - - there was a - - - yeah, I -
21 - - I believe it's not precise. There's a 146-page letter
22 sent of all the miscellaneous breaches. That's - - -
23 that's in the record. And we were - - - the performance
24 was continuing for forty-five days thereafter because
25 that's what the contract provides, right? And then at the



1 end of forty-five when they cured none of it there was a
2 termination.

3 I would also like to jump, if I can, 17.3 is not
4 a choice of law. It's a governing law provision. 14 - - -
5 the scaffold, he referenced the safety. It just said - - -
6 in 4 - - - 4.5 that simply says a safety plan will be
7 established in Exhibit L, and there was nothing in Exhibit
8 L. So that's - - - that wasn't a bargain for law. That was
9 just there will be a safety plan. There was nothing about
10 the scaffolding law. I mean could we have bargained to
11 say, ah, you know something - - -

12 JUDGE FAHEY: Well, if you could bargain away
13 provisions of law I don't think the scaffolding law would
14 survive any contractual relationship between any businesses
15 in New York state.

16 MR. MELLER: Right.

17 JUDGE FAHEY: We - - - we all know that.

18 MR. MELLER: Yes.

19 JUDGE FAHEY: That you'd be bargaining it away.
20 That - - - that's pretty straightforward. Listen, if the
21 Lien Law - - - I guess the question in my mind, does the
22 Lien Law have to be expressly included in a contract to
23 apply in - - - in other situations? And the answer to that
24 is no, it doesn't.

25 MR. MELLER: No.



1 JUDGE FAHEY: Of course it doesn't. So why would
2 it have to be included here? Well, let's assume that it
3 doesn't, but that doesn't mean that you would have been
4 able to file a lien under Section 5.

5 MR. MELLER: Right.

6 JUDGE FAHEY: Right.

7 MR. MELLER: Because there's no fund.

8 JUDGE FAHEY: So - - - so the argument that
9 you're - - - that the Lien Law applies to you would be
10 incorrect by the Appellate Division, wouldn't it, because
11 you wouldn't be able - - - you wouldn't be able to use it.

12 MR. MELLER: Well, no, the Lien Law - - - the
13 Lien Law is - - - also includes in Section 5 the bond. And
14 the - - - and that the legislature equated to a lien
15 because they placed it in 5 as compared - - - and I'm
16 repeating myself, as compared with the Public Authorities
17 Law and the General - - -

18 JUDGE FAHEY: Right.

19 MR. MELLER: All the different laws that have
20 regulations on the construction industry. Okay. But they
21 placed it in the Lien Law because the very purpose of 5 was
22 to give the contractors lien security to the extent that
23 would be possible. Okay.

24 JUDGE FAHEY: Uh-huh. I see.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. MELLER: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Skanska USA Building Inc. v. Atlantic Yards B2 Owner, LLC, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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