

WELCOME

Message to our Readers

Thank you for reading the Summer 2015 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present Legal Alerts written by our team. Greg Spaun, Partner, presents on [Owner/Designer Required to Defend Negligent Misrepresentation Claim on Functional Equivalent of Privity Theory](#); and Geoffrey S. Pope, Of Counsel, discusses [Subcontractor Loses Lien Due to Failure to Identify Public Benefit Corporation as Fee Owner of the Real Property](#).

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Owner/Designer Required To Defend Negligent Misrepresentation Claim On Functional Equivalent Of Privity Theory

By: Greg Spaun, Partner, Welby, Brady & Greenblatt, LLP



Greg Spaun

Contractors who undertake construction projects and follow the plans of the designer may nevertheless find themselves on the defending end of a construction defect lawsuit. In such situations, it is tempting for the contractor to bring the designer into the lawsuit on a theory that the designer negligently represented that the plans were free of defects when, ultimately, they may not have been. After all, if the contractor followed the plans, then where did the defects come from? However, contractors who have attempted to do so over the past 25 years have faced a significant obstacle in the form of the Court of Appeals' holding in *Ossining Union Free School District v Anderson LaRocca Anderson* (73 NY2d 417 [1989]). The holding of *Ossining* is that absent a contract with the designer (which contractors almost never have), a contractor can only assert a negligent misrepresentation claim against the designer where the contractor has a relationship with that designer which is the "functional equivalent of contractual privity". In *Ossining*, the Court of Appeals set forth a three part test for asserting such claims notwithstanding the lack of a contract: (1) an awareness that the plans were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the designer linking it to the party or parties and evincing the designer's understanding of their reliance. It is generally the second and third prongs, reliance by a known party and the conduct by the designer evincing its understanding of the known party's reliance, where

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