



## Prevailed on Behalf of an Owner/ Developer in a Virtual Bench Trial

We successfully obtained a verdict after a virtual bench trial on behalf of an Owner/Developer client against its general contractor for a hotel project in New York City. Zetlin and De Chiara LLP substituted in as counsel for the Owner/Developer in late February 2020, several years after the litigation commenced. The trial was held virtually and included the use of direct testimony affidavits and cross-examination and re-direct examination of witnesses through Microsoft Teams.

Pursuant to their construction contract, the Owner/Developer paid the general contractor the full amount for the project's insurance at the time of the general contractor's first payment application. When the project did not proceed as planned, the parties entered into a voluntary termination agreement. The Owner/Developer then learned that the project's insurance could not be transferred to the replacement contractor. Since the initial contract had been terminated and the voluntary termination agreement did not address the refund or return of any portion of the insurance payment, the Trial Court permitted the Owner/Developer to pursue an unjust enrichment claim against the general contractor.

Discovery in the litigation confirmed that the general contractor had used practice policies to provide the RCNY § 101-08 required levels of insurance for the project. These practice policies also provided insurance coverage for several other unrelated projects.

At trial, Zetlin & De Chiara argued that it was against equity and good conscience to permit the general contractor to keep unused portions of the money the Owner/Developer paid for the project's insurance since the general contractor had only completed 10% of the project when the parties entered into the voluntary termination. We also argued that the general contractor's use of practice policies for multiple projects, which potentially compromised coverage for the Owner/Developer's project given the policies' aggregate limits and for which the general contractor separately billed each project owner, supported a finding that it would be unequitable to allow the general contractor to retain the full amount the Owner/Developer paid for the project's insurance. The general contractor claimed it was entitled to keep the full amount it received from the Owner/Developer for the project's insurance since the contract with the Owner/Developer was a lump sum agreement. The general contractor also argued that the Owner/Developer should be precluded from seeking the return of unused portions of the insurance payment since it did not raise the issue during negotiation of the voluntary termination agreement.

In its decision after trial, the Court awarded the Owner/Developer the majority of the unused portion of the funds it had paid to the general contractor for the project's insurance holding that it was against equity and good conscience to allow the general contractor to retain the awarded funds.

## **PRACTICE AREAS**

Litigation & Alternative Dispute Resolution