CHIUMENTO MCNALLY, LLC

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THE MINUTES

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INSIDE THIS ISSUE:

SPRING HAS SPRUNG AND SUMMER HAS BEGUN!

What a mild winter the East Coast experienced in 2012 compared to 2011! Instead of snow shovels being sold out of stores every weekend, we experienced record high temperatures and barely used our winter coats. Of course, we are not complaining of all the sunshine. In this Summer Edition of *The Minutes*, we have selected articles which address some recent changes in the law governing the practical practice of design professionals as well as included some "refresher" articles from past CM seminars to which every professional can relate. The purpose of this edition is to provide you some summer reading, whether it is poolside or desk-side, that is informative and useful in your everyday practice.

Enjoy! -Ashley H. Buono, Editor and Senior Associate Attorney

UPCOMING EVENTS:

CM Partner, Stephen McNally, will be a Faculty Speaker at the National Business Institute's New Jersey Foreclosures and Workouts Seminar on July 17, 2012 in Cherry Hill, New Jersey. Mr. McNally will be lecturing on the topic of Title Issues in the Foreclosure Process and Workout Context. For more information and to register contact NBI online: *www.nbi-sems.com*

EQUITABLE SUBROGATION ALIVE AND WELL IN NEW JERSEY.

BY: STEPHEN MCNALLY, ESQUIRE

While other jurisdictions continue to limit the application of the equitable subrogation doctrine, the New Jersey Appellate Division in Investor Savings Bank v. KeyBank National Association, N.J. Super. (App. Div. 2012) reaffirmed its commitment to the doctrine. The Appellate Division in Investor Savings Bank not only confirmed that equitable subrogation is available even in the face of gross negligence claims, but also left open consideration of adopting the Restatement (Third) of Property Mortgages which permits the application of equitable subrogation where the new lender has actual knowledge of the intervening lien.

Investor Savings Bank involved a mortgage given by Dennis Kelliher to Investors Mortgage Company (assignor of Investors Savings Bank) in the amount of $1,330,000.00 (ISB Mortgage). The loan proceeds were used to pay off an existing mortgage given by Kelliher to First Constitution Bank (FCB) with a total payoff of $1,384,107.64. In light of the fact that the FCB payoff exceeded the loan proceeds, Kelliher paid $54,170.64 of his own money to discharge the FCB Mortgage.

The title agent, Quality Title (Quality), undertook a title search on August 1, 2008, but failed to update the search through the October 3, 2008 closing on the ISB Mortgage. The Defendant, KeyBank National Association (KeyBank) docketed a judgment against Kelliher in the amount of $27,457,874.00 (the KeyBank Judgment) on September 30, 3008, three days before the closing on the ISB Mortgage. The ISB Mortgage was not recorded until October 21, 2008 and accordingly KeyBank claimed that its judgment held priority over the ISB Mortgage. ISB filed a Complaint in the Chancery Division, Ocean County for a determination that it held priority based upon the doctrine of equitable subrogation. The trial court granted summary judgment for ISB concluding that giving priority to KeyBank would be an unjust enrichment and that KeyBank would not be prejudiced by the application of equitable subrogation. The Trial Court also rejected KeyBank's claim that gross negligence by the lender or the title agent would preclude equitable subrogation.

KeyBank appealed the trial court's decision and the Appellate Division affirmed. The Appellate Division considered and rejected KeyBank's gross negligence argument. The court acknowledged New Jersey case law which provides that equitable subrogation is available even where a lien is not discovered by reason of negligence. The court also agreed with the 1937 Chancery Division case Cliffside Park Guaranty & Tr. Co. v. Progressive Theaters, Inc., 122 N.J. Eq. 109, 119-120 (Ch. 1937) which concluded that the degree of negligence is not a consideration if the intervening lien holder has not been prejudiced. The Appellate Division stated that they "... agree with [Cliffside's]...observation and conclude that the degree of ISB's negligence in failing to discovery KeyBank's judgment is irrelevant in the absence of a showing that KeyBank was prejudiced by ISB's refinancing of the 1st Constitution Bank mortgage."

Also of particular interest is a footnote in the Investors Savings Bank decision which discusses the Restatement (Third) of Prop. Mortgages, §7.6 comment (e) (1997). The Restatement section allows equitable subrogation even if the new lender knew of the intervening lien. The court in discussing the Restatement section stated:

> [b]ecause there is no evidence from which it could be found that ISB had actual knowledge of Key Bank's judgment when it closed on the loan to Kelliher and the mort gage securing that loan, there is no need to decide whether New Jersey should follow the view of the Third Restatement of Property that even actual knowledge of the interven ing recorded lien should not defeat the right to equitable subrogation in the absence of a showing that the intervening lienor was prejudiced by the refinancing of the original mortgage....

The footnote suggests that the Appellate Division would, at least, entertain a discussion as to whether the Restatement view is the more appropriate one. The Investor Savings Bank decision gives comfort that the equitable subrogation doctrine will withstand even claims of gross negligence. The court also reaffirmed that the focus will be on prejudice to the intervening lien holder.

A PAY TO PLAY PRIMER

BY: ASHLEY H. BUONO, ESQUIRE

This article was previously a subject of Chiumento McNally's 2010 "Back-to-School Breakfast Briefing" and due to recent changes in the law and raised interest from our clients, this article is being republished.

The *Pay to Play* law in New Jersey can pose a substantial risk to those who regularly enter governmental contracts and make political contributions. Nowadays to even remotely comply with *Pay to Play* seems akin to ordering a medium drink from a chain coffee shop. And, while it creates a labyrinth of rules to follow, the consequences of a New Jersey Election Law Enforcement Commission ("ELEC") violation could put you and/or your company out of business in these tough economic and competitive times. Therefore, this article focuses on providing you with a working definition of the *Pay to Play* law in New Jersey.

The general purpose of *Pay to Play* is to add a level of transparency to the process of awarding governmental contracts which are not subject to the rigors of the formal, public bidding process. Since its promulgation, *Pay to Play* has been extended to almost all forms of governmental contracts, publically bid or not. Specifically, *Pay to Play* law in New Jersey affects campaign contributions in State, County and Municipal contracts for those "for profit" companies. Its genesis was during the rise of campaign finance reform in 2004, when Public Law 2004 Chapter 19 was signed into law by then-governor James McGreevy. The *Pay to Play* law has since been codified into Statute, Executive Orders, Regulations and is found in each municipality's set of governing Ordinances.

"The general purpose of *Pay to Play* is to add a level of transparency to the process of awarding governmental contracts..."

Violations for *Pay to Play* can be as harsh as substantial monetary penalties (ie, triple the amount of a contract price) as well as criminal prosecution and restraining orders barring future state/governmental contracts. Therefore, it is imperative for those who make political contributions and are awarded governmental contracts to familiarize themselves with not only the exact prohibitions, but also, the required reporting requirements of ELEC. The type of contract (State, County and Municipal) is specific as to the type of prohibited contribution. Here, I will generally address the main requirements of the law.

According to the statutory *Pay to Play* prohibition, a business entity company cannot enter into a contract over $17,500 if certain contributions were made during the term of the contract. Assuming that *Pay to Play* applies to your contract, you must first ask yourself: are you a business entity? Business entity has been defined as any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity organized under the laws of New Jersey or any other state or foreign jurisdiction. Inclusive within the definition of *Pay to Play* are all principals who own or control more than 10 percent of the profits or assets of a business entity. If the business entity is a natural person, then the spouse and children are included within the legal definition of who encompasses the business entity.

The second question is whether your contract is in excess of $17,500. The value of the contract is considered in the aggregate and not what is paid annually. Therefore, if your contract is for a term of two years, but the State paid you in two payments of $10,000 per year, you have met this requirement of *Pay to Play*. Further, included in the *Pay to Play* consideration are purchase orders and other "agreements". [Continued on page 4]

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The most important determination after you have answered the above in the affirmative, is: has your company made a reportable contribution? "Contribution" includes every loan, gift, subscription, advance or transfer of money or other thing of value, including any in-kind contribution, made to or on behalf of any candidate committee, joint candidates committee, political party committee or legislative leadership committee and any pledge or other commitment or assumption of liability to make such transfer. A *reportable* contribution is a contribution made in excess of $300 in the aggregate per election made to, or received by, a candidate committee, joint committee or political committee per calendar year.

If you have not made a prohibited contribution and have been awarded the contract, each Governmental entity has its own reporting requirements. Further, for those business entities with $50,000 or more awarded through State, Municipal and County contracts in a calendar year, a Business Entity Annual Statement must be completed (even if you have not made any "reportable" contributions). A form for filing can be found at: https://wwwnet1.state.nj.us/lpd/elec/ptp/p2p.html.

Finally, all hope is not lost since the New Jersey legislature has recognized that although numerous, the laws and regulations on *Pay to Play* are not as manageable as intended, and therefore has created a "refund" if one accidentally makes a prohibited contribution. Of course, that requires interpretation of another set of legislative mandates and requirements.

If you feel that you need assistance or have a question about your governmental contract, please do not hesitate to contact Chiumento McNally, LLC.

WHAT TO DO AFTER THE LAWSUIT IS OVER

BY: ADAM E. LEVY, ESQUIRE

In our last newsletter, we provided you with information on what to do if you are sued. We are hopeful that the practical suggestions contained in that article were helpful in what is otherwise a potentially stressful and confusing time. In this article, we address the other side of the process – what to do *after* the lawsuit.

As suggested in our previous article, the nature of litigation can take a severe toll on your business. This affect is worst felt if, during the litigation, your company becomes overly concerned with the progress of the litigation and its potential outcomes. This pitfall is best counteracted by focusing daily on "job one" – the day to day business. Now that the litigation is over, it is time to do a little litigation file work and truly get back to business.

In assisting counsel during the litigation, you were probably requested to provide project files and other materials that related to the allegations of the law suit. As part of your post-litigation process, you should follow-up with litigation counsel for the return of your original materials. While your first instinct may be to celebrate by throwing all the documents into a shredder, resist this temptation. Theses materials should be retained pursuant to your document retention policy. If you did not have a policy prior to the litigation (providing how long, where, and in what form to keep documents) your litigation counsel should have suggested the implementation of such a policy. If they did not, make one now. Remember that this should include policy on not only paper materials but also policy on electronic media of all forms (CAD's, emails, photos, etc.). Today, the per gigabyte annual online rates for storage are just a couple of dollars. Would you rather keep it in-house than trust it to the "cloud"? Well, hard drive prices continue to get lower, now dropping to approximately $0.07 per gigabyte. That is only $70 for 1 Terrabyte. One Terrabyte of disk space could hold 220 million pages of text!

A good rule of thumb would be to keep the project file for a period of no less than ten years from the date your offices last worked on the project. Note: the post-litigation materials may now contain documents that are not really part of your project file and, for

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legal reasons, should be separated from the file. These documents include the "litigation materials", e.g., letters to and from counsel. Such materials should have been continually segregated during the litigation from the project file. If this wasn't done as a matter of course, a final review of the file to create this separation is advised. Store the litigation materials separately from the project file. This will also assist counsel in the event the "end of the litigation" is not really the end. While not commonplace to every litigation, appeals from final judgments do occur. While your litigation counsel should keep you apprised of such a material event, it is a good idea to follow-up with counsel after a couple of months from the "end" of litigation. Also, within our previous article, we suggested that litigation may serve as a learning tool. If during the litigation you discovered areas of your practice that need improvement, such as document handling and personnel training, now would be the time to review those lessons and implement them. No design professional wants to be in litigation; failing to make retrospective adjustments may only lead to ending up there again.

Following these suggestions, and those detailed in our last article, will hopefully help you create a better practice, and reduce the stress of litigation . ***Chiumento McNally, LLC would be pleased to offer further suggestions to help the specific nature of your practice.***

A RECENT COURT DECISION RECOGNIZES SEVERABILITY OF CONTRACTS AND SUBSTANTIAL COMPLETION DATES.

BY: TERESA M. MUNSON, ESQUIRE

In the recent case of *The State of New Jersey v. Perini Construction,* dated March 30, 2012, the Appellate Division of the Superior Court of New Jersey considered the issue: when would the Statute of Repose begin to run where an alleged construction or design defect concerned a component of an improvement to real estate, and, further, considered the import of that consideration in multi-phase construction projects. The Court reviewed the existing case law and determined that this was a case of "first impression" as there was no published decision in New Jersey where the Court considered the application of the Statute of Repose in multi-phase projects.

Initially, it should be remembered that a *Statute of Repose* refers to the elimination of legal rights after a specific date has been reached. The New Jersey Statute of Repose extinguishes claims ten years after furnishing services relating to the design, planning, surveying, supervision or construction of an improvement to real property, whether the claim sounds in personal injury, property damage or wrongful death. Thus, an injured plaintiff must prosecute any claims against a design professional within ten years from the date that the design professional last worked on the particular project or else, the plaintiff loses his/her right to prosecute the claim (ie., proceed to litigation). The question at the heart of the *Perini* case was how to calculate the starting date of this ten year period in a large, multi-party, multi-layered project, where the various parties completed their designated services at varying times and therefore, portions of the project would be completed and turned over to the owner at different times. [Continued on Page 6]

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The *Perini* Court first noted that according to prior case law, the trigger date for substantial compliance is the date of substantial completion, and not the completion of every final task of the contractor. Secondly, the Court found that separate trigger dates apply to subcontractors who have substantially completed their work, even if the improvement as a whole is not completed and ready for use and a certificate of occupancy has not issued. Third, the Court recognized that the trigger date for any individual contractor runs from completion of that contractor's entire work on the *improvement,* not from discrete tasks, unless evidence exists which establishes a different intended result. For instance, in multi-phased projects, documentary evidence may be reviewed to determine the parties' intent and understanding whether specific phases were to be treated as separate improvements, each triggering its own period of repose. The Court specifically wrote, "[W]e have no difficulty accepting the premise that multiple phases of a construction project that are clearly identified and documented can trigger separate periods of repose, even for the general contractor and other contractors that continue to work on the entire project." The Court cited as examples, a multi-phase condominium development or large commercial project – in those situations, if the parties have contractually set forth distinct dates of substantial completion, (use vs. occupancy) then separate period of repose would apply.

Therefore, the *Perini* decision offers cautious optimism for the design professional community. Notably, where the documentary evidence supports the professional's claim that the work was sequenced in such a manner requiring the turnover of completed portions to the project owner as soon as practicable, as evidenced by separate certificates of substantial completion, each completed phase of the project could have a separate repose date.

DESIGN PROFESSIONALS AND ADDITIONAL INSUREDS: A POTENTIAL TRAP FOR THE UNWARY.

BY: DESMOND H. O'NEILL, ESQUIRE

In a construction project, it is quite common for one of the involved parties to require that they be named as an "Additional Insured" under another party's insurance policy. A prudent design professional should be aware of potentially significant issues that may arise from providing or receiving Additional Insured status.

There may be occasions when the Owner requests that the design professional name the Owner as an Additional Insured under its insurance policy. While most design professionals will immediately recognize that a non-licensed Owner cannot be named as an Additional Insured under a professional liability policy, similarly, a design professional should insure that the applicable contract documents for the project do not contain language requiring the design professional to name the Owner as an Additional Insured under its professional liability policy. In other words, if the design professional agrees to name the Owner as an Additional Insured per the contract documents, then the design professional is likely "on the hook" to provide coverage out of its own pocket in the event that the professional liability insurer denies coverage. The same is true with respect to any other insurance policies, such as automobile, worker's compensation or other type of "additional" insurance that the design professional agrees to provide in its contract. Thus, it is recommended that a design professional think twice before agreeing to name the Owner or any other party as Additional Insureds in any construction contracts.

"if the design professional agrees to name the Owner as an Additional Insured per the contract documents, then the design professional is likely "on the hook" to provide coverage out of its

Another issue to be aware of occurs when the design professionals are named as an Additional Insured under an insurance policy. It has become common industry practice in construction to require that a contractor name the Owner, Architect, Project Engineer

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and/or the professional's consultants as Additional Insureds under the contractor's commercial liability insurance policy ("CGL insurance"). Many design professionals will be surprised to learn that the purported benefit of being named an Additional Insured is largely illusory in nature. Specifically, one of the most common exemptions to claims made under a CGL policy are those for damages arising from the "provision of professional services." Thus, if the asserted claim relates in any way to the provision of the design professional's services (such as errors in the design documents) insurance coverage would likely be denied under the Contractor's CGL policy. The same outcome of declination of coverage is likely to occur to the extent that the claim relates to professional services provided by a subconsultant.

In conclusion, the practical design professional should exercise caution when agreeing to provide Additional Insured status to another party in its contract documents. Furthermore, professionals should be aware that the naming of the professional or its subconsultants as Additional Insureds n connection with a construction project may be effectively meaningless if the claim at issue relates to the provision of professional services.

ATTORNEY SPOTLIGHT OF THE QUARTER: DESMOND H. O'NEILL, ESQUIRE

The attorney spotlight of this issue is CM Associate Attorney, Desmond H. O'Neill. Desmond, originally from Rochester, New Hampshire, holds dual citizenship from the United States and Ireland. Desmond is a graduate of the University of New Hampshire where he also was an active member of the Air Force Reserve Officer's Training Corps and the Student Senate. Desmond graduated from Seton Hall University School of Law and was given the distinction of Faculty and Centennial Scholar. During law school, he was also the research assistant for Professor Catherine McCauliff, one of the revision authors of Corbin on Contracts. Desmond authored several published articles on the history of human spaceflight. For casual reading, he recommends the Horatio Hornblower series, by C.S. Forester. Desmond practices in the areas of construction, environmental and landlord tenant litigation.

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