Spring 2009

"He Said, She Said"

Law Offices of Burton A. Brown Volume II, Issue I

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Form a business succession plan before it is too late

For most small business owners, it is hard enough to maintain a positive cash flow and a stable balance sheet. Planning for retirement—much less planning to hand over the business—seem like far off goals.

However, forming a business succession plan is a good idea for most business owners and may be critical for some.

The first step is to pick a successor. Although some owners prefer to simply sell the business to a third party, many prefer the thought of their businesses continuing on even after they are gone.

Picking a successor must be done carefully. If you are choosing a family member, is that person qualified to run the business, or does he or she even want to? If not, can his or her interests be represented by granting them a share, and appointing someone else to take management responsibility?

Another key step is to obtain an independent valuation of the business. The sooner this is known, the sooner the key financial documents can be structured.

One such document is an appropriate buy-sell agreement. Whether the succession is to family members, key employees, or to a third party, the buy-sell agreement will establish what happens to an owner's interest in the event of death or disability.

If your succession plan contemplates a transfer to a family member, then the plan should be integrated into your estate plan as appropriate. This involves consulting with a qualified estate advisor.

By crafting a succession plan, business owners can establish a smooth and equitable transition of their interests. Experienced advisors should always be consulted in this process.

Tips for contractors in today's economy

The challenging economy makes it more important than ever that contractors and subcontractors minimize their risks and maximize their recoveries. Here are some basics that should be part of every contractor's plan and office procedures.

First, **carefully review the contract**. Make sure your price realistically reflects the scope of work. Make sure you are familiar with the payout clause that recites the procedure to use when tendering a payout request. Review the dispute resolution clause for any adverse content. Have counsel review every contract before signing, not just when a problem arises.

Know the parties. As a preventative measure you should be aware of the reputation and litigation records of the General, project manager, or owner so you can weigh whether to work for them. See "Tips" from our last issue for more on that topic.

Safeguard the lien. Illinois has strict requirements (See Tips, p.4)

"He Said, She Said"

CEO of LLC denied reimbursement for attorneys' fees

Typically, a business person serving as an officer or director is interested in being indemnified by his or her corporate entity if that person is sued in their capacity as officer or director. This means that the person is reimbursed his or her costs for defending the suit, including attorneys' fees. In Illinois, as in many states, the law allows a business corporation to indemnify officers and members, and many corporations do so.

But a recent Appellate Court ruling held that the same indemnification did not apply for the CEO of a limited liability company. Unlike the statute regarding business corporations, the Illinois LLC law is less specific and is designed to be more flexible. Therefore, it leaves administration and operation of an LLC to the LLC's Operating Agreement.

In its decision, the court looked to the LLC's operating agreement, which stated that the LLC would indemnify each Member for "any act performed" pertaining to the agreement. Despite this, the court held that the Agreement did not cover attorneys' fees for the CEO who had been sued (and successfully defended the case) because the agreement did not specifically mention attorneys' fees.

This is surprising because the agreement's drafters likely intended it to cover attorneys' fees. Corporate officers and members of LLCs should thus make sure that the Operating Agreement fills in the gaps provided by the flexible LLC law.

Condo association had duty before election of board

A new condominium building may operate for months or even years before its first board of directors is duly elected. In the meantime, the developer acts as the director of the board—after all, someone has to maintain the property, pay bills, and collect assessments.

But if someone is injured on the premises before the board is elected and sues, who owes her the duty—the association or the developer?

This was the question before the Illinois Appellate Court in a recent case. The answer: the association.

In the case, a unit owner of the 4600 S. Indiana condominiums slipped on ice and fractured her ankle in the building's common areas. She sued the developer and the association, contending they owed her a duty to prevent an unnatural ice build-up. Two months later, the association elected its first board of directors.

The court held that, even though the board had not yet been elected, it was the association's duty to safely maintain the premises under the Illinois Condominium Act. The developer, it held, simply performs those duties on the association's behalf during the transition period.

Subcontractor denied lien for failing to deliver copy to PBC

A recent Illinois Appellate Court case illustrates the importance of strictly complying with the rules governing mechanics liens.

In the case, the Public Building Commission contracted with a general contractor to perform work on a high school. A subcontractor was then hired to provide removal of rock and gravel at the job site.

The subcontractor finished its work and timely filed its notice of mechanics lien, claiming an unpaid amount of $1.38 million, later reduced to $700,000. The complaint was timely filed as well, within 90 days of the lien's filing date.

However, the subcontractor failed to deliver a copy of the complaint to the PBC within 90 days of serving notice of the lien as required by the version of the Mechanics Lien Act then in effect. (The current version allows the claimant 10 days after filing the complaint to deliver the complaint.)

The court held that failure to timely deliver the complaint was a fatal error that terminated the lien, rejecting the argument that it was a "minor deficiency."

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Supreme Court rules in favor of employee on retaliation

The U.S. Supreme Court recently ruled in favor of an employee in a retaliation case, coming on the heels of decisions by the President and Congress that have expanded employee rights as well.

In *Crawford v. Metropolitan Government of Nashville*, an employer conducted employee interviews as part of an investigation into whether its H.R. director was sexually harassing other employees. During one of the interviews, an employee, Vicky Crawford, described several instances of the H.R. director's sexually harassing behavior. Subsequently, Ms. Crawford—a 30-year employee—was terminated on the stated basis of "embezzlement."

Ms. Crawford then filed a suit for retaliation under federal law, claiming that she was fired due to the answers she gave during the investigation interview about the H.R. director's conduct. The trial court found in favor of the employer, as did the federal appeals court in Cincinnati, holding that she did not overtly "oppose" the discriminatory behavior as required by federal law, but rather merely participated in an investigation.

The Supreme Court disagreed, however. The Court specifically held that Ms. Crawford's description of the H.R. director's behavior during her interview met the required "opposition" needed to assert a retaliation claim. In doing so, the Court criticized the lower courts' strict view of the necessary level of "opposition."

The decision was unanimous.

Contractor not entitled to mechanics lien for removing waste

The Illinois Appellate Court recently announced limitations to the Mechanics Lien Act.

In a recent case, a contractor was hired to remove several drums containing hazardous waste from the owner's parking lot and warehouse. The contractor completed its portion of the clean-up and filed a mechanics lien when the owner failed to pay.

The trial court agreed with the contractor's argument that he had "improved" the property under the Mechanics Lien Act. The Appellate Court disagreed, however. The court ruled that removing and disposing of drums containing waste—in and of itself—does not constitute an "improvement" of property as required by the Act.

The court noted that the contractor did fill the drums; rather, it simply removed and disposed of drums that had already been filled with the waste by someone else. The contractor had also performed only "incidental" cleaning activities.

The court concluded that none of these activities were shown to be part of a plan to "improve" the property, rather than merely maintain it. Thus, the court declined to enforce the lien.

"The plaintiff simply removed and disposed of drums that had already been filled with waste by someone else."

News, Client Updates and PeopleYou Should Know!

The Law Offices of Burton A. Brown would like to welcome new clients **G Construction Co.**, specializing in concrete masonry, excavation, and related work, and **1119 W. Belden Condominium Association**, located on the city's North side.

The firm is also pleased to announce an association with Chicago attorneys who practice in the area of **property tax reductions**. At a time when expenses are rising and money is tight, a reduction in property taxes would be a welcome thing. Contact us for more information.

Finally, we would like to begin a feature called **"People You Should Know."** A friend of the firm, **Al Mendoza**, is one of those people. Al works in business development for **Steve's Equipment Service, Inc.**, which leases and sells heavy earthmoving equipment and is MBE certified. Al has worked for IDOT as a minority contractor liaison and has been a HACIA member for 20 years. Al can be reached at (630) 231-4840.

You should also know **Paul N. Buckingham**. Paul is a senior vice president in brokerage and tenant advisory services with **CB Richard Ellis**. He is an industry veteran with over 16 years' experience acquiring/disposing office space and negotiating favorable business terms for lessees and buyers of office space.

To contact Paul, e-mail him at paul.buckingham@cbre.com.

The Law Offices of Burton A. Brown

Law Offices of Burton A. Brown

205 West Wacker Drive
Suite 922
Chicago, Illinois 60606

Phone: 312.236.5582
Fax: 312.236.3503
E-mail: info@babrownlaw.com
Newsletter Editors: Babak Bakhtiari, Maria Hernandez

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www.babrownlaw.com

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- **Business and Real Estate Transactions;**
- **Litigation and Dispute Resolution;**
- **Condominium Law;**
- **Construction Law;**
- **Estate Planning and Wealth Management;**
- **Guardianships and Probate;**
- **Tax Deed Litigation; and**
- **Elder Law**

To contact us, please call (312) 236-5582, or e-mail info@babrownlaw.com.

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Tips, cont'd from Page 1

"Having consistent, accurate documentation can not only help you in a dispute, but also make it easier to negotiate payment before a lawsuit becomes unavoidable."

for establishing a mechanics lien. You must file a notice of lien within 90 days after the last date of work, which means contract work, not punch list work or repairs. On public jobs, you must file suit to enforce the lien within 90 days after filing the lien.

Safeguard the bond claim. Get the bonding company information if it is a bonded project. Remember there are strict time limits for the bond claim, just as with a mechanics lien—check the bond as it may shorten the statutory periods, and review the time periods with your legal counsel as well.

Document your claim. When a lawsuit arises, the party

with the most thorough documentation has an edge. Develop an office procedure to monitor the time frame and deadlines for mechanics liens and bond claims so that you are not time barred—no attorney can help you collect your contract price if you are time barred from your most valuable leverage, a mechanics lien.

Your documentation should be in the form of both letters to the other side, internal memos and job diary entries. Having consistent, accurate documentation can not only help you in a dispute, but also make it easier to negotiate payment before a lawsuit becomes unavoidable.

Of course, there are no guarantees for a problem-free contract. Following deadlines for liens and protecting the paper trail, however, are good policies for any economic climate, especially now.