"He Said, She Said"

Law Offices of Burton A. Brown Volume II, Issue 3

Court Reinstates Family's Claim of Religious Discrimination in Condo

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The federal appeals court based in Chicago has allowed a family's claim of religious discrimination by a condo board and its president to move forward.

Reversing its own prior decision, the Seventh Circuit Court of Appeals held that there was enough disputed evidence of intentional discrimination to allow a Jewish family to proceed to trial on their claims against the Shoreline Towers Condominium Association and its president.

The court said that what was likely the strongest evidence of anti-Semitic motives was the removal of the mezuzah from Lynne Bloch's doorpost during her husband's funeral.

The condo association and its president, Dr. Edward Frischolz, contended that they were merely enforcing the condominium rules and regulations (specifically, Hall-

way Rule 1) in an evenhanded fashion. The rule barred residents from placing any objects on outer doors or in common hallways.

In response, the Blochs alleged that a coat rack and card table placed outside their unit were left untouched; thus the Blochs claimed there was evidence of bias rather than a desire to keep the hallway uncluttered.

While not expressing an opinion as to the merit of either party's allegations, the court merely cleared the way for the Blochs to take the case to trial.

The Blochs' claims were made under section 1982 of the Civil Rights Act, and under two sections of the Fair Housing Act.

The court declined to reinstate a fourth claim, also made under the FHA. After their suit was filed, the condo association board adopted an exception to the hallway rule for religious symbols.

Genetic Information Receives Increased Protection

On October 1, 2009, the federal government issued new regulations implementing Title I of the Genetic Information Nondiscrimination Act of 2008 ("GINA").

Under GINA and these final regulations, group health plans cannot (1) increase premiums for the group based on the results of one enrollee's genetic information, (2) deny enrollment, (3) impose pre-existing condition exclusions, or (4) do any other underwriting based on genetic information.

Additionally, group health plans and issuers cannot request, require or buy genetic information for underwriting purposes and are prohibited from asking individuals to undergo any genetic testing.

Besides ensuring that genetic information is not used adversely in determining health care coverage, the protections for genetic information are also designed to encourage individuals to participate in genetic testing to better identify and prevent certain illnesses.

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Subcontractor Was Entitled to Attorneys' Fees on Mechanics Lien

A recent Illinois Appellate Court decision has put new "teeth" into the attorneys' fee award provision of the Mechanics Lien Act.

Under section 17 of the Mechanics Lien Act, a subcontractor is entitled to recover its reasonable attorneys' fees from the owner of the property if the owner refuses to pay the full amount of the contract "without just cause."

In *O'Connor Construction Co. v. Belmont Harbor Home Development*, the Illinois Appellate Court upheld a subcontractor's right to recover on its mechanics lien claim, but reversed the trial judge's refusal to award the subcontractor its reasonable attorneys' fees. The court held that the trial court had incorrectly found the owner had a good-faith basis for denying payment to O'Connor because it frontloaded its draw requests with its profit on the contract.

The Appellate Court did not think this method was inappropriate, but pointed out that at trial, the owner failed to offer a reasonable explanation for withholding payment on an amount that was not in dispute. Further, although the method of frontloading its draw requests with profit was not inappropriate, the subcontractor's method of seeking payment was also appropriate (see article, below), thus triggering a determination of whether the owner's refusal to pay was without "just cause."

The subcontractor's fee award was approximately $41,000.

Court Hands Down New Damages Calculation for Contract

The *O'Connor Construction* case cited above not only enforced an attorneys' fee provision, but is also significant for the way it calculated damages for a breached contract.

In the case, the trial court had correctly held that the subcontractor substantially performed its contract and the owner had breached the contract by failing to provide materials in a timely manner so that the subcontractor could perform its work.

On appeal, however, the Appellate Court found that the trial court erred by employing a "quantum meruit" damages calculation rather than the conventional damages calculation (i.e., amount of contract, including profit, minus cost of completion by another party without profit). This significantly changed the damages award to the subcontractor—instead of the $50,000 cost of completion awarded by the trial court, the Appellate Court found the appropriate measure of damages was $139,000.

As noted above, the Appellate Court also awarded the subcontractor $41,000 for its reasonable attorneys' fees incurred.

Lack of Sworn Statement Defeats Contractor's Lien Claim

Under section 5 of the Mechanics Lien Act, general contractors are required to provide a "Contractor's Sworn Statement" setting forth his or her subcontractors and the amounts owed to each of them. Further, section 5 requires that the sworn statement be "in writing, under oath or verified by affidavit."

In a recent Appellate Court decision, *Weydert Homes, Inc. v. Kammes*, the court considered whether a general contractor's sworn statement—that was signed but not notarized—fulfilled section 5's requirement that the sworn statement be "under oath or verified by affidavit."

The court held that it did not, and therefore concluded the contractor's mechanics lien claim was properly dismissed by the trial court.

The Appellate Court rejected the contractor's argument that there was "substantial" compliance with the statute, noting the long-held rule that there must be strict compliance with the Mechanics Lien Act. The court also observed the contractor could have tendered an affidavit, but did not.

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Suggestions for Getting Customers to Pay Before Suit

In this economy, many businesses are having a tough time collecting bills from customers who are unable or unwilling to pay on time. This makes it difficult to run a business, as well as to estimate cash flow and make budget projections.

While collection agencies and attorneys can pursue and settle claims for you, there are ways to get more control over your situation before resorting to collections or litigation.

First, perform some due diligence in figuring out a customer's pay history. For subcontractors, you might do some research on a credit reporting website before taking on a new general contractor as a client. On Cortera's Credit Exchange Web Site, for $3 per report, you can find out if contractors pay on time or if not, how late their payments are. You can also get detailed information on the owner, the volume of business, and the person in charge of finances.

Other bureaus, like Dun & Bradstreet and PayNet, Inc. offer solvency and delinquency reports to help figure out credit risk that certain customers may pose.

Another suggestion is to offer online payment. There are many online payment options, such as Google Checkout, Bill Me Later and PayPal. Similarly, mobile devices such as cellphones and Bluetooth can allow credit cards to be swiped or punched in at a customer's home or from a job site.

Remember, the work you do does not count if you don't get paid.

"You can find out if contractors pay on time or if not, how late their payments are."

Courts Get Tough on Employers Reading Employees' Email

Most of us are accustomed to the rule that employers can—and do—watch their employees' email and web activity.

But recent cases have shown that employees have more privacy rights than before when it comes to using email stored on the corporate email server.

Last year, for example, the Ninth Circuit court of appeals ruled in favor of a worker whose salacious text messages were viewed by his employer without his consent. The employee had used a company-owned cell phone, but the employer relied on a third party for service.

Similarly, a court in New Jersey held that employees of a home healthcare company had a reasonable expectation of privacy that email on a personal account would not be read.

Courts recognize employers' concerns about viruses and loss of productivity, but some are finding that employers must explicitly tell employees their email is being monitored.

A company that views its employees' email should have a policy in place and clearly communicate that fact to its employees.

News and Updates!

The Law Offices of Burton A. Brown is pleased to welcome new clients **Museum Park Lofts Condominium Association, Fragoso Construction, Inc., Arroyo Plumbing, Inc., Aamir Ashiqali, Mohammad Mahmood, Sharon O'Bryan, Tomboy Construction, Inc., and RDP Development Corp.** Welcome!

On October 29, 2009, The Law Offices of Burton A. Brown conducted a panel discussion at the HACIA Construction Expo. The guest panelists included a labor attorney and a union electric company owner. Burton A. Brown moderated the discussion, which covered responding to union requests for audit, among other topics. Attendees told us they found the discussion informative and helpful!

On December 14, 2009, the Firm offered a pro bono legal clinic for residents of the city's southwest side neighborhood. The clinic covered mortgage foreclosures, family law (divorce, custody issues, etc.), criminal law, and other matters. The clinic was conducted at Uno School on West 47th St. in Chicago.

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Federal Legislation and Regulatory Update

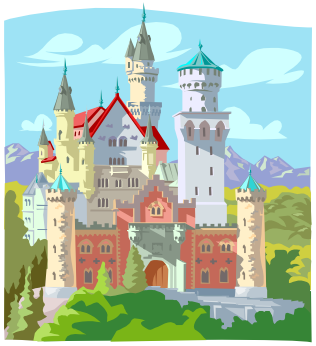
"Under the House bill, estates smaller than $3.5 million would continue to be exempt from the tax. Married couples could potentially exempt up to $7 million, leaving only 1% of all estates subject to the tax."

The House of Representatives has recently voted to extend a 45% inheritance tax on estates larger than $3.5 million, cancelling a one-year repeal of the tax set to begin next year.

A similar effort is pending in the Senate, although the health care delayed any action on the estate tax until after the holidays.

Under the House bill, estates smaller than $3.5 million would continue to be exempt from the tax. Married couples could potentially exempt up to $7 million, leaving only 1% of all estates subject to the tax.

The bill passed by a 225-200 vote, with all Republicans opposed. Democrats argued that a permanent tax rate made estate planning easier, while Republicans argued the estate tax should be permanently repealed.



Nothing, however, will be enacted before the repeal of the estate tax begins on Jan. 1.

In other news, the U.S. Citizenship and Immigration Service announced on Sept. 8, 2009 that its E-Verify Federal Contractor Rule is now in effect.

E-Verify is an Internet-based system that enables employers to verify the employment eligibility of their employees, regardless of citizenship.

Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

All federal contracts after Sept. 8, 2009 will include such terms,