FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

Stop Work Order Penalties Increased

As of December 1, 2008, the penalty for violating a stop work order in New York City is $5,000 for the first violation and $10,000 for any subsequent violations. This is naturally in addition to the violation that caused the stop work order to be filed in the first place.

Retaining Wall Maintenance Requirements

The City Council has enacted §28-305.4 of the NYC Administrative Code which imposes maintenance requirements on retaining walls fronting on a street and being at least ten foot tall. Owners of these walls have a duty to have the walls inspected at least once every five years by "a registered design professional with appropriate qualifications as prescribed by the department." The registered professional shall inspect the wall for structural-worthiness and file a report with the Department of Buildings. Filing fees will be charged. If the wall is found to be unsafe, the registered agent also has the duty to call 311 to report the public safety concern. The owner shall then have the duty to take immediate appropriate measures to secure public safety and apply for a permit to correct the unsafe condition. Walls requiring only minor repairs will be monitored until the repair is completed. The Commissioner of Buildings shall issue rules governing the due dates of the reports, the qualifications for the inspecting professionals, the safety criteria, the time frame allowed to correct unsafe conditions, the amount of the filing fee for the reports, and shall have discretion to grant extensions of time to comply.

The Rule Against Perpetuities and the Contract of Sale

In an action to enforce a contract of sale the defendant-seller argued that the contract was void because it violated the rule against perpetuities. The contract set the closing "on or about 30 days after the Village's adoption of a revised Master Zoning Plan." The rule states that every interest in real property must vest or fail within the natural term of a life-in-being plus twenty-one years. The rule applies to contracts of sale because they are considered interests in real estate, like mortgages and fee simple. The seller's argument was that the contract violated the rule because it could not be established at the time of contract whether the "on or about date" would be "within the natural term of a life-in-being plus twenty-one years." There was no telling when the village would adopt the revised zoning plan. Surely, the parties estimated that it would happen in the near future, but the rule calls for certainty, not probability. Therefore, since it could not be established with certainty whether the buyer's interest under the contract would mature within the term of a life-in-being plus twenty-one years, the buyer's interest, arguably, violated the rule against perpetuities.

Unfortunately, the defendant-seller only raised this argument on appeal, hence the Appellate Division did not address it. But the defense certainly seems meritorious under current law, so the prudent practitioner should take notice of it. The

lesson learned is this: If the "on or about" date is to be determined by a future, contingent event, it would be wise to include a perpetuities saving clause in the contract of sale. This clause need only read "notwithstanding [insert the section addressing the 'on or about' date], the 'on or about date' shall in no event be later than twenty-one years from the date this contract of sale." References to "lives in being" are better avoided because they could jeopardize the validity of the contract if the purchaser is not a natural person. The case discussed above is *KPSD Mineola, Inc. v. Myra Jahn*, 2008 WL 53765583 (N.Y.A.D. 2nd Dep't, Dec. 23, 2008).

Mechanics Liens and Subrogation by the Owner

Developer hired Contractor. Contractor in turn hired Subcontractors for the project. Developer paid Contractor in full, but Contractor did not pay Subcontractors. Contractor distributed monies due to Subcontractors to the principals of Contractor, which was a crime because the monies were a "trust fund" under the Lien Law. Contractor filed for bankruptcy, so the Subcontractors could not act against it. Instead, they threatened Developer with stopping the project and filing mechanics liens if they were not paid. Developer, noting that its ground lease and loan covenants required it to discharge or bond all mechanics liens, paid Subcontractors (incurring a double payment, since their services and materials had been accounted for in the contract price with Contractor) and finished the project. Developer subsequently sued the principals of Contractor to recover the double payment, claiming that the monies they received were trust funds and that Developer had the equitable right to subrogate into the rights of Subcontractors.

The court agreed that the monies were trust funds, but did not agree that Developer had the right of subrogation. The right of subrogation applies when a party pays the debt of another under compulsion or for the protection of some interest, but not when the payments are made voluntarily. Here, the court found that the Subcontractors did not have a right to file mechanics liens or take any action against Developer because Developer had paid in full under its contract with Contractor. Any mechanics liens filed by Subcontractors would have been easily discharged, or at the very least bonded for only 1.5% of their face value. Therefore, Developer had no legal obligation to pay Subcontractors, therefore its payments were deemed merely voluntary and did not entitle it to subrogation. The court stated that Developer's only remedy to the double payment is to seek relief against Contractor in Bankruptcy Court. *Broadway Houston Mack Dev't LLC v. Kohl*, 2008 WL 5339448 (Suffolk County, Dec. 22, 2008).

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