

Real Estate UPDATE

Message From The Co-Chairs

Winter 2003 – Vol. 3, No. 1

On the Forefront



Benjamin Weinstock



Eric C. Rubenstein

Ruskin Moscou Faltischek's Real Estate Department continues to be in the forefront of some of the most significant transactions on the Island. We are representing the owner in the proposed sale of EAB Plaza, Long Island's most recognizable office complex. We are assisting other clients in obtaining approvals for developing a 700+ bed nursing home and a 150,000+ square foot state-of-the-art office building and parking facility, both in Nassau County.

Whatever projects our clients are involved in – from straightforward acquisitions, sales, leasing and financing to sophisticated sale-leasebacks, 1031 tax-free exchanges and synthetic leasing – we are ready to efficiently handle any transaction and achieve our clients' goals. Contact either one of us if we can be of assistance. ■

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The Rule Against Perpetuities Still Applies Today

Ancient Law Still Affects Real Estate Transactions

by Douglas J. Good and Adam L. Browser

You negotiate an option to buy real estate. You make sure that there is no time limit on when you have to exercise the option, even providing that your heirs will have the right to exercise the option. You and the seller hire lawyers to prepare the option agreement. With counsel's help, the option agreement is prepared and fully signed. You think you have an enforceable option. You are wrong! Your downfall is the Rule Against Perpetuities.

The Rule Against Perpetuities is a legal doctrine law that evolved in the 1600s but continues to affect real estate transactions today. Its purpose is to ensure the productive use and development of real estate by simplifying ownership and facilitating land transfers. Basically, it says that if your interest in real property does not vest within the permissible period, you may be unable to enforce your interest.

Frequently, Rule Against Perpetuities issues show up in option agreements. An option grants to the holder the power to compel the owner of property to transfer real property in the future, whether or not the owner is willing to part with the property.

In a recent case, we used the rule to invalidate an option agreement and saved our client from selling any of her valuable property in Southampton, NY. The plaintiff held a mortgage on unimproved property in Southampton, New York. The mortgage was delinquent and the foreclosure process had begun. The plaintiff agreed to assign the mortgage and the foreclosure action to our client. Under that option agreement, if our client acquired title to



Douglas J. Good



Adam L. Browser

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Contractors Benefit from New State Law

by Eric C. Rubenstein



Eric C. Rubenstein

A recent state law imposes strict new requirements for payments to contractors and prescribes default provisions that directly affect owners, lenders, contractors and subcontractors. These restrictions and penalties may significantly exceed the parties' expectations as to how their arrangement will be governed.

The Construction Contract Act, which became effective on January 14, 2003, generally applies to construction contracts entered into on or after that date where the aggregate cost exceeds \$250,000. The Act does not apply to contracts with a governmental entity, smaller residential developments, or individual one, two or three family homes.

Under the Act, an owner is required to reasonably approve all or a portion of an invoice accompanied by all contractually required documentation within 12 business days of receipt. An owner may decline to approve an invoice for, among other things, unsatisfactory progress, defective construction work or material, failure of contractor to make timely payments for labor or failure to comply with material provisions of the construction contract.

Payment is due no later than 30 days after the invoice is approved. However, if the owner received a construction loan for the project and timely requests a loan disbursement from the lender, and the lender is legally obligated to disburse

funds but has failed to do so, the invoice must be paid by the owner seven days after the owner receives the necessary loan proceeds.

By mutual agreement of the parties, an owner may withhold a reasonable retainage. Retainage must be released to the contractor within 30 days after final approval of the work. Generally, payments by contractors to subcontractors mirror the payment provisions for owners to contractors.

If any payment or a release of retainage to the contractor is delayed beyond the time frames established under the Act, the owner must pay the contractor 1% interest per month on the unpaid balance or unreleased retainage. If an owner fails to approve or disapprove an invoice within the time frames provided for in the Act, or pay a contractor the undisputed invoice amount within the prescribed time frames, the contractor may suspend contractually required performance. Generally, subcontractors have the same remedies as contractors.

It is important to note that the parties to a construction contract are free to negotiate the terms of their agreement, which may vary from the Act. However, if the agreement does not address the provisions covered by the Act, the legislation takes control and the parties will be bound by the Act's penalties and restrictions. Greater scrutiny, therefore, is advised on the key elements of construction contracts. ■

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The Rule Against Perpetuities Still Applies Today

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the property through the foreclosure, and if she subdivided the property, the plaintiff had an option to acquire two of the sublots. Our client eventually bought the property in foreclosure, and years later subdivided the property but did not convey any lots to the plaintiff.

The plaintiff then filed a lawsuit to compel our client to convey two lots to him. We argued that the agreement violated the Rule Against Perpetuities. When the term "successors, heirs or assigns" – commonly used terms in many agreements – was used in the original agreement, the intention at that time was that the option would last indefinitely, which violates the Rule of Perpetuities.

Initially, this unique strategy was unsuccessful; the plaintiff obtained an order from the Suffolk County Supreme

Court directing our client to transfer title of two lots to him. But on appeal, the Appellate Division agreed with us, reversed the decision and dismissed the case. The result: our client was not forced to give up two valuable lots, saving her hundreds of thousands of dollars.

Although an ancient doctrine, the Rule Against Perpetuities continues to affect modern real estate transactions. Clients must rely on sophisticated lawyers with sufficient expertise to ensure that real estate transactions will not run afoul of the Rule Against Perpetuities. ■

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Raise The Roof!

Maximize Income from Antennas

by Patricia M. Schaubeck



Patricia M. Schaubeck

Smart building owners have long earned additional revenue by allowing the installation of rooftop antenna systems. This is a win-win-win situation. Telecommunications operators get sites for their transmitting towers, antennas and related equipment; commercial tenants get needing antenna systems to operate their businesses; and, the building owners collect fees for normally unrentable space.

With multiple antenna system agreements, the building owner has as many agreements as it has vendors and tenants using antenna systems in the building. Fixed monthly fees are typically paid to the owner under these arrangements. Alternatively, a building owner may enter into a master antenna system agreement with a "master" telecommunications operator, which sublicenses its rights to install antenna systems at the building to other telecommunications operators. The owner generally shares sublicense agreement revenues.

Either way, maximizing income and assuring the continual flow of revenue is critical. At the same time, owners must retain control over the use of their buildings. Building owners should give special attention in any antenna system agreement:

Non-exclusivity. Any rights granted to the operator or tenant must be non-exclusive. Owners do not want to be precluded from signing up as many telecommunications operators and tenants as the building can handle, thereby increasing the owner's revenue and ensuring maximum service to the building.

Non-interference. An operator's antenna system cannot interfere with any other telecommunications transmissions at the building or the reception of any tenant in the building. Any interference may result in the aggrieved operator withholding license fees.

Relocation. Owners should retain the right to direct the telecommunications operator or tenant to relocate the antenna system to an alternate site designated by the owner. This gives the owner maximum flexibility to accommodate multiple antenna systems.

Representations by Building Owner. In order to avoid license fee disputes, owners should not make any representation or warranty that the antenna system will be able to receive or transmit communication signals without interference or disturbance. The operators, which are more technologically conversant than owners, are in a better position to assure themselves that service will not be impeded.

Assignability. The transfer, assignment, sale or pledge of the agreement by the telecommunications operator or tenant should be prohibited. Without this prohibition, operators could sell their rights for a profit, thereby denying owners maximum revenue for the facilities they provide.

As leading building owners often remark: "A rooftop is a terrible thing to waste." With proper deal structuring and an eye to future utilization of space, antenna licensing can be a substantial boost to the bottom line. ■

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Ruskin Moscou's Real Estate Capabilities

- Acquisitions and Conveyances
- Commercial Leasing
- Mortgage Financing (Conventional and Government Subsidized)
- Secured Lending
- Zoning/Development/Subdivision
- Construction
- Health Care/Senior Citizen Housing
- Co-op/Condominium Conversion
- Ownership Agreements
- Environmental Compliance
- Title Issues
- Real Estate Litigation
- Foreclosures
- Tax Certiorari



Recent Noteworthy Deals

- Ruskin Moscou represented the Win-Holt Equipment Group of companies in a multimillion-dollar financing, including mortgage transactions involving facilities in Texas, California and New York.
- Ruskin Moscou represented a major Long Island developer in contracting to sell a multimillion-dollar parcel of vacant property for development as a hotel in Suffolk County.
- In separate deals, Ruskin Moscou helped clients close on multimillion-dollar acquisitions of a shopping center in Nassau County, and a facility servicing the mentally retarded for a leading not-for-profit agency in New York City.
- Ruskin Moscou resolved intricate rezoning issues to permit construction of a new 350-unit luxury apartment complex on formerly industrial-zoned land in Rockville Centre.

The *Real Estate Update* is published for the purpose of providing clients, colleagues and friends of Ruskin Moscou Faltischek, P.C. with information about developments in real estate matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.



ABOUT THE FIRM

Founded in 1968, Ruskin Moscou Faltischek, P.C. is one of Long Island's largest law firms, with a staff of 120 people — including more than 60 professionals. The firm's legal practice groups have substantial experience in the areas of mergers and acquisitions, securities offerings, technology, Internet, intellectual property, trademarks and copyrights, trial and appellate litigation, health law, seniors' housing, municipal and regulatory affairs, energy matters, commercial lending, real estate, employment, distressed asset management, loan workouts and bankruptcy, banking regulations, construction, environmental matters, Surrogate Court litigation, wills, trusts and estate planning, white collar crime and investigations, business succession planning and international business transactions. Ruskin Moscou maintains offices on Long Island and in New York City.

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