Notable Appellate Decisions

by Rob Stefonowicz

Construction Defect: Home-Warranty Notice

Peterson v. Johnson addresses the manner and form of the written notice requirement for home-warranty claims. The Minnesota Court of Appeals ruled that the six-month written notice requirement for home-warranty claims can be satisfied by the homeowner's service of a detailed summons and complaint on the contractor. The appellant argued that the written notice requirement should be treated as a "condition precedent" to commencing a lawsuit, thereby giving the contractor an opportunity to cure any loss or defect. The court disagreed, indicating that the homeowner's service of the summons and complaint satisfied the written notice requirement because the statute does not limit the form of the written notice or require that it be given before commencing a lawsuit.

Zoning and Planning Dispute: Residential Development and Regulatory Takings

In *Wensmann Realty, Inc. v. City of Eagan*, the owner of golf course property, along with a holder of an option to purchase the golf course property, brought suit against the city when the city refused to amend its comprehensive plan to permit residential development of the property. The Minnesota Supreme Court held that the city's denial of an application to amend the comprehensive plan to permit residential development of the golf course property did constitute a regulatory taking under the Minnesota Constitution if the denial of the proposed amendment leaves the property with no reasonable use. The court remanded the matter back to the district court for a determination as to whether there was any reasonable use of the property.

Property Tax Appeals: Burden of Proof

The Minnesota Supreme Court addressed several issues in *Southern Minnesota Beet Sugar Cooperative v. County of Renville*, including the burden of proof imposed on the taxpayer/property owner. The taxpayer, an owner of a beet processing plant, contested the property taxes assessed by the county, arguing that the county's estimated market value of the property was greater than the actual market value and that the property was unequally assessed when compared to other properties. The tax court found that neither the taxpayer nor the county presented sufficient evidence to enable the court to value the property, and therefore, the tax court could not determine the reasonable market value of the property. The tax court did not make a determination as to value, but rather affirmed the county assessor's estimated market value.

The Minnesota Supreme Court sent the matter back to the tax court to make a determination as to whether the property owner had met its burden of overcoming the presumed validity of the county's assessment. The Supreme Court offered that if the taxpayer offers evidence to invalidate the assessment and shows that the assessment does not reflect the true market value of the property, the tax court must determine the market value of the property. If the tax court determines that the taxpayer does not show that the county's assessment did not reflect the true market value, the court's order should explain why and the court should affirm the county's assessment.

If you have questions or concerns regarding the impact of these decisions or would like any additional information, please contact us. ●

Rob Stefonowicz is an associate in the Real Estate Litigation practice group. Rob's practice encompasses all areas of real estate and construction litigation.

Letter From The Department Head

Continued from cover

in the country. The call of the challenges and excitement of private practice proved too strong for Jim, however, and he came back to Larkin Hoffman in July. We think Jim's experience at U.S. Bancorp is to our benefit and we are very happy to welcome Jim back to the group.

Please enjoy this issue of Re:*Litigation* and feel free to call any one of us if we can be of service on any of your real estate or land use problems. ●

Larkin Hoffman ATTORNEYS

Larkin Hoffman Daly & Lindgren Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194

GENERAL: 952-835-3800
EMAIL: info@larkinhoffman.com
WEB: www.larkinhoffman.com

RE: LITIGATION

FALL 2007 ● Published by the Real Estate Litigation Practice Group

Letter From The Department Head

By Gary Van Cleve

Gary Van Cleve has broad experience in all real estate-related litigation areas in state and federal courts at both the trial and appellate levels. He serves as chair of the Real Estate Litigation practice group and on the firm's Board of Directors.

My, how the real estate market has changed since we published our inaugural issue of Re:*Litigation* in Spring 2007.

While we anticipated that home building would be cooling off from its previous red-hot levels, the real excitement occurred when the subprime mortgage market imploded, catapulting virtually all markets into a tailspin that only seemed to abate when the Federal Reserve Bank stepped in and lowered the discount rate in mid-August. We all know that the real estate boom could not last forever, but it always is a rude awakening when any market inevitably turns south. About all I will say that I know for sure is that change is inevitable and yes, the markets will turn up again—just don't ask me when.

Since our last issue, the Real Estate Litigation practice group has been busy with a series of seminars, working hard for our clients and writing for this issue of the newsletter.

Our spring seminar series included breakfast presentations in March, April and May at the Airport Hilton in Bloomington, at which over 50 people attended. In March, we presented topics on valuation litigation, including condemnation and property tax appeals. In April, we discussed construction defect issues, with particular emphasis on mold. In May, we covered development-related litigation issues, including development fee issues. All the seminars included a guest speaker and I think the attendees found the presentations informative and of value.

Our practice group has continued offering fine service and great results for our clients, with several recent successes that bear noting. Mike Mergens helped our client Frontline Investments to a victory, obtaining summary judgment from the court on allegations of breach of the covenant of good faith and fair dealing, unjust enrichment, indemnification/contribution, quiet title and a count for attorneys' fees. Tamara O'Neill Moreland and Scott Johnson scored a significant victory for our client Brookdale Corner, LLC, in recovering over $400,000.00 in rent, liquidated damages and attorneys' fees against a breaching commercial tenant. Rob Stefonowicz won both at trial and on appeal on a claim for our client Giles Properties, seeking to enforce a purchase agreement to acquire a parcel of undeveloped land worth over a million dollars.

In this issue, Tamara O'Neill Moreland provides observations and advice on how a recent Minnesota Court of Appeals decision, *Hoyt Properties v. Production Resource Group*, may force some changes in how attorneys represent clients on settlements. Additionally, Scott Johnson highlights important new changes in the Minnesota Building Code that were adopted by the Legislature this past session and Rob Stefonowicz reviews three notable Appellate decisions.

Finally, I'm very pleased to announce and to welcome back to the firm and our practice group, Jim Susag. Jim left us at the end of 2005 after eight years as both an associate attorney and a shareholder, to become Chief Litigation Counsel for U.S. Bancorp at its corporate headquarters in Minneapolis. For a year and a half, Jim managed significant defensive litigation nationwide for U.S. Bancorp, the sixth-largest financial services corporation

Continued on page 4

IN THIS ISSUE:

Larkin Hoffman ATTORNEYS

1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, MN 55431-1194

GENERAL: 952-835-3800
EMAIL: info@larkinhoffman.com
WEB: www.larkinhoffman.com

The Changing Face of Settlement:
The Effect of *Hoyt Properties v. Production Resource Group*

by Tamara O'Neill Moreland

Negotiation is an essential aspect of the daily business operation of any developer, contractor or subcontractor. This is not only true for the everyday contract or subcontract, but also is true for the resolution of disputes. Litigation is regularly avoided by proactive parties negotiating the resolution of claims before commencing litigation and often prior to engaging legal counsel. The Minnesota Supreme Court's recent decision in *Hoyt Properties, Inc. v. Production Resource Group, L.L.C.*, however, makes the settlement of a dispute or potential dispute a much more risky undertaking.

In *Hoyt Properties*, the plaintiff, an attorney with not only legal experience, but also significant business and real estate experience, brought an action claiming that the defendants' attorney made a misrepresentation in settlement discussions, which resulted in him signing a settlement agreement. These discussions took place at a housing court hearing regarding the plaintiff's eviction action against its tenant. The defendants' attorney requested that the agreement include a release of liability for the tenant's parent company, while the plaintiff would retain a claim for damages against the tenant. The alleged misrepresentation arose when the plaintiff asked the defendants' attorney, "I don't know of any reason how we could pierce the veil, do you?" and the defendants' attorney responded, "There isn't anything. [Parent] and [tenant] are totally separate." The plaintiff then directed his attorney to include the release in the agreement. The plaintiff later discovered that a third party commenced an action against the parent for the liability of the tenant and the plaintiff brought this action to nullify the settlement agreement due to the alleged misrepresentation.

In order to sustain such a claim for intentional misrepresentation, a plaintiff must establish that he or she reasonably relied on a fraudulent representation. The district court granted the defendants' summary judgment, finding that due to the plaintiff's extensive experience, his claimed reliance, was unreasonable as a matter of law. The Supreme Court, however, disagreed. The Court determined that "a party can reasonably rely on a representation unless the falsity of the representation is known or obvious to the listener" and the listener is under no obligation to conduct an investigation of the representation. Even with the limited representation made and the vast experience of the plaintiff, the Court determined that the plaintiff's reliance was not unreasonable as a matter of law.

PROCEED WITH CAUTION

As a result of this decision, parties must be cautious when providing information and opinions in settlement negotiations. Settlement discussions often include each party trying to "sell" their case to the other, bolstering their own position and minimizing the opposition. In this case, the plaintiff was a highly experienced attorney with vast experience in both commercial and real estate transactions who was also represented by counsel. The context of the negotiations was a housing court proceeding, not the most formal of settings, where the court could only determine possession, not damages. The statement itself involved the availability of piercing the corporate veil, which is a claim often attempted but rarely successful. If it is possible that this plaintiff could have been led astray in this situation, then it appears that any person, regardless of their experience and knowledge can claim that he or she was misled during a negotiation. Therefore, you must operate with extreme caution when using persuasive statements or providing opinions in settlement negotiations or be at risk of a claim for fraud.

A "ROADMAP" FOR SETTLEMENT REMORSE

If a party claims that it entered into a settlement agreement as a result of fraud, the relief sought will be the elimination of the settlement agreement itself. One of the primary attractions of settlement is finality. We often accept less than we legally deserve to avoid lengthy and costly litigation. Now, however, a persuasive statement or opinion expressed in settlement negotiations can be grounds for a party experiencing settlement remorse to walk away from a settlement agreement entirely and revive their original claim. The dissent in this case recognized that the decision would create a "lack of confidence in the enforceability of settlement agreements" and aptly noted that the decision created "a roadmap with a well-defined exit route for parties who experience remorse after entering into a settlement agreement." This decision creates yet another avenue for a party to avoid a negotiated deal. ●

Tamara O'Neill Moreland is a shareholder in the Real Estate Litigation practice group who focuses on litigation involving both commercial and residential construction matters as well as fraudulent real estate transactions. She has experience with environmental and mold issues and extensive experience in telecommunications law.

New Changes in Effect for the Minnesota Building Code

by Scott Johnson

The Minnesota Department of Labor and Industry (DOLI) recently enacted significant changes to the Minnesota State Building Code, as it pertains to residential building. An understanding of these code changes is of vital importance to all general contractors and subcontractors who perform work on residential buildings. Likewise, developers and others with close ties to the building industry should have at least a basic knowledge of some of the more important changes.

SIGNIFICANT CHANGES

The Minnesota Amendments to the 2006 International Residential Code (IRC) contain changes that are too numerous to describe here. A few of the changes, however, are particularly significant in that they address long-standing issues related to water intrusion and corresponding water intrusion litigation.

One of these issues is the type and number of layers of building paper required behind stucco exterior finishes. For the last several years, the building code has required two layers of "Grade D" building paper under stucco. Despite this code requirement, many stucco installers used #15 roofing felt between the exterior sheathing and the stucco, rather than Grade D paper. Often times, the stucco installers would install only one layer of #15 felt, but sometimes they installed two layers. Despite the fact that experts disagreed on whether or not the use of #15 felt was as effective as the use of Grade D paper in resisting water, its use was still technically a code violation.

During the process of developing the most recent code amendments, the Minnesota Lath and Plaster Bureau provided extensive research showing that #15 felt was an effective weather-resistive barrier. Accordingly, the Minnesota amendment to IRC Section R703.6.3 allows for #15 roofing felt as an acceptable substitute for Grade D building paper behind stucco finishes. It does, however, still require two layers of paper unless the installation includes a drainage space that allows bulk water to flow freely behind the stucco.

Water intrusion problems gave rise to another significant code change as well. The Minnesota Amendments to the 2006 IRC now require "pan flashing" of windows and doors in all new construction. Pan flashing involves the installation of a metal "pan" below the windowsill. The pan is sloped to the exterior and allows any incidental water that may enter through the window assembly to drain back out to the exterior of the home, preventing damage to the wall structure itself. This requirement allows limited exceptions, including instances where the window manufacturer specifies a different method of installation.

The Minnesota Amendments make one other window-related change that is unrelated to water intrusion, but is a significant benefit to homeowners. The existing code required all windows installed in bedrooms to meet current egress requirements, even if the window was merely replacing an existing window. The new amendment exempts replacement windows from this requirement, as long as the replacement window is the manufacturer's largest standard size window that will fit in the existing frame or rough opening. This amendment will allow homeowners to replace old windows with new, more energy-efficient windows without having to make expensive structural modifications.

IMPLEMENTATION

Knowing when the changes take effect is as important as knowing what the changes are. As previously stated the effective date of the new code is July 10, 2007. That date, however, means different things depending on the status of a project.

DOLI issued the following guidance to code officials for applying the new code. Projects for which permits have been issued prior to July 10, 2007 should be required to comply with the 2003 Minnesota State Building Code. When these buildings are completed the Certificate of Occupancy should certify to the 2003 Minnesota Building Code. The 2003 Minnesota Building Code also governs projects for which permits were applied, but not issued prior to July 10, 2007. Projects for which the permit application is not received until after July 10, 2007 are governed by the 2007 Minnesota Building Code, unless the jurisdiction had already been involved in preliminary plan reviews based on the 2003 Code.

The new Minnesota State Building Code is here to stay. The changes to the code should have benefits for builders and homeowners alike. As stated above, these are just a few of the myriad changes contained in the new Minnesota Amendments to the 2006 IRC. For a complete summary of all changes, Builders Association of Minnesota members can go to www.bamn.org. Additionally, DOLI has made its summary of the changes available at www.doli.state.mn.us/pdf/2006_irc_summary.pdf. ●

Scott Johnson is an associate in the Real Estate Litigation practice group. He handles all types of real estate litigation, with a focus on construction defects and contract disputes.