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LEGAL UPDATE
PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SUMMER 2011

What Do You Do When Your Company Receives A Subpoena?

By: Roger L. Stavis, Esq.

In the current prosecutorial and regulatory environment it would not be unusual for your company to receive a subpoena. It is nothing more than a request for information in the form of testimony or records. A subpoena is required to be personally handed to someone at your company's office; it is not valid if received by mail.

It can come from a prosecutor (United States Attorney, District Attorney or State Attorney General), a regulatory agency (Securities and Exchange Commission, Internal Revenue Service), or even a legislative body (Congress, State Legislature). There are two kinds: a subpoena ad testificandum requests testimony; and a subpoena duces tecum requests records. Commonly, the subpoena will be a subpoena duces tecum for records. It will be directed to the company's "custodian of records," and may seek records regarding the company, or records relating to the company's clients, customers, tenants, vendors, etc.

If the subpoena originates with a prosecutor, it will be in the name of the Grand Jury. A Grand Jury is a body consisting of 23 people which meets in secret, reviews evidence, and determines whether criminal charges should be brought. While the records sought by subpoena are supposed to be produced before the Grand Jury itself, they can often be delivered directly to the prosecutor's office. Where the records sought are voluminous, as is often the case,

Continued on page 3

Co-Op's Weapon Against Objectionable Shareholders

By: Beatrice Lesser, Esq.

Many cooperative apartment buildings that are plagued by residents who repeatedly violate the proprietary lease or who create a continuing nuisance now have an easier way to evict the objectionable shareholder.

Courts have upheld a cooperative's right to terminate the lease and evict the offending shareholder, often without the need for a court proceeding to prove the offending conduct, by using the "objectionable conduct" provision of the proprietary lease. Conduct such as repeated instances of excessive noise (from music to barking dogs); offensive odors emanating from an apartment; hoarding or other creation of an unhealthful situation; chronic failure to pay maintenance with no justification; a shareholder's commencement of baseless lawsuits against the cooperative, its board or other residents; use of an apartment as a B&B or other business; and even a sponsor's failure to sell apartments coupled with other harm to the cooperative, are examples of conduct that allows the cooperative to proceed under the "objectionable conduct" clause.

Continued on page 3

In this issue

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ATTORNEYS AT LAW

Wage and Hour Lawsuits Increasing

By David T. Azrin, Esq.

Wage and hour lawsuits increased by 24% last year to an all-time high. Government agencies have stepped up enforcement, and many recent Supreme Court decisions have favored employees. As a result, employers should review their employment practices to ensure they are in full compliance. Three areas to watch closely:

INDEPENDENT CONTRACTOR STATUS

Many employers try to avoid paying their share of payroll taxes by treating employees as independent contractors. The penalties for misclassification can be severe, and it often comes to light when a worker files for unemployment or workers compensation benefits, which then triggers an audit of all workers. Generally speaking, if an employer decides a worker's hours and the manner in which the work is to be done, and provides the worker with the "tools of the trade" (e.g. computer, office, equipment, etc.), then the worker will more likely be considered by the government as an employee.

WAGE ISSUES

Employers must keep accurate time records, collect an I-9 form and written acknowledgement of an employee's pay upon hiring, and pay overtime when owed. If an employee is being treated as exempt from overtime, employers must ensure the employee meets the tests to qualify as exempt. For example, to qualify as an exempt management level employee, an employee generally must be: 1) actually involved in important policy decisions or the hiring/firing of employees; and 2) paid on a true salary basis — which means no deductions for partial days off. New York allows employees to recover six years of back wages for violations, plus attorney's fees, so the cost of wage violations can be very great.

UNPAID INTERNS

As the summer season starts, employers must remember that generally speaking it is illegal to hire a worker for no pay. Calling the worker an "intern" does not solve the problem, unless the intern is actually receiving training similar to what is provided in an educational or vocational program, the intern is not displacing a regular worker, and the employer is not gaining any immediate advantage from the intern's work. This means that observation, shadowing, and make-work by an unpaid intern may be ok, but real work performed by an unpaid intern that immediately benefits the company is probably not.

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Beware Of Counterfeit Check Scams — When Your Bank Lets You Withdraw The Money, It Does Not Mean The Check Is Good

By Jay L. Hack, Esq.

You deposit a cashier's check and when the bank tells you the money is available, you wire it to buy non-refundable first class airline tickets to Cancun. Two days later, your bank tells you that the check was counterfeit and you must repay the money immediately. How can that be? The bank said the money was available.

In New York, and most other states, the bank is right and you must give the money back. Even if a bank makes money available to you when you deposit a check, you are still responsible if the check bounces. It does not matter if the check is counterfeit or just bounces because of insufficient funds. If the money is still in your account when the bank finds out that the check is no good, the bank reverses the deposit. For many years, this was a minor annoyance. However, in recent years, counterfeit check scams have been developed to take advantage of the time lag between when a bank makes funds available to its customer and when the bank finds out that a check that the customer deposited has bounced.

In one case, a lawyer represented a man who was supposedly buying real estate. His client told him that his stock broker would send the attorney a $300,000 cashier's check. The client asked his lawyer to use $200,000 to pay the down payment and wire the rest to the Bank of China branch in Beijing. The lawyer waited to wire the money until his bank told him that the check had cleared, but found out hours later that the check was counterfeit. Because of the time difference between New York and Beijing, we were able to get Bank of China to freeze the money before they opened for business the next morning. The FBI refused to get involved because the amount of the loss was too small, but we eventually convinced the Bank of China to return the money.

In another case, a man was selling his recreational vehicle on eBay for $25,000. A supposed buyer sent the seller a cashier's check for $32,000. The buyer asked the seller to wire the excess to someone who was supposedly arranging to ship the RV to the buyer. The seller's credit union had a policy of allowing good customers to withdraw money one day after a check was deposited, so the seller wired the funds right away. Two days later, the counterfeit check bounced. Both the buyer and the shipping company disappeared.

These problems arise because banks must make money available for withdrawal by depositors based upon a schedule established by the Federal Reserve. The schedule is derived from estimates of how long it takes checks to clear, but sometimes the estimates are wrong. In addition, some banks allow good customers to withdraw money faster than the Federal Reserve requires. However, the deposited check still has to go through the check clearing process, make its way from your bank to the bank on which it was written, and then if it bounces, notice must get back to the bank where it was deposited. This may not happen until a few days after your bank lets you withdraw the money.

How do you protect yourself? Do not be in such a hurry to act as a conduit for funds, rushing them out the front door as soon as they come in the back door, especially when you are sending money to someone you do not know or do not owe any money. Very rarely is it a life and death matter that cannot wait two extra days. Always be suspicious when you get more money than you are supposed to get and you are asked to send the extra money to a third party. Because many of these scams target elderly people, you may want to warn any elderly friends or relatives.

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Subpoena (continued from page 1)

It is important for any business that is served with a subpoena to seek immediate legal advice to make the appropriate objections to the subpoena, preserve the applicable privileges, and to deal with the prosecutor or government agency seeking the records or testimony.

they can be delivered on a rolling basis, that is, in stages as the records are located and copied. If testimony is requested by subpoena, it must take place before the Grand Jury.

There may be legal reasons for your company to refuse to comply with a subpoena. With regard to testimony, the Fifth Amendment right against self incrimination may come into play. This may also protect against the production of records under certain limited circumstances. There may also be certain privileges against production of records, such as the physician/patient or attorney/client privilege. It is important for any business that is served with a subpoena to seek immediate legal advice to make the appropriate objections to the subpoena, preserve the applicable privileges, and to deal with the prosecutor or government agency seeking the records or testimony.

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Co-Op's Weapon

(continued from page 1)

In order to proceed, the proprietary lease must have a provision allowing the cooperative to terminate the lease for "objectionable conduct." That provision usually requires a supermajority vote by the board and/or the shareholders at a special meeting. The cooperative must strictly follow the technical requirements, such as the sending of notices. We also recommend sending a notice to the offending shareholder stating the date of the special meeting at which the shareholders and/or the board will vote on a resolution to terminate the shareholder's proprietary lease, giving the shareholder a listing of the objectionable conduct which is the basis for the vote and providing the shareholder an opportunity to be present, with or without counsel, and to be heard. We recommend that a professional stenographer record the proceedings.

Provided that the cooperative is acting in the best interests of the shareholders for a proper business purpose, and has documented its case properly and followed all procedural requirements of the lease and court precedents, the courts will likely uphold the termination of the lease without requiring a trial to determine whether the offending conduct did occur or was serious enough to warrant an eviction. This removes the need for neighbors and building employees to testify in a court proceeding against the offending shareholder, making the process faster and less costly.

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Homeowners Given Powerful New Weapon For Use Against Home Improvement Contractors

By Randy J. Heller, Esq.

Homeowners in New York City who believe they have been ripped off by an unlicensed home improvement contractor have long had a very useful tool available to them — the Home Improvement Business provisions of the Administrative Code of the City of New York.

Those provisions (versions of which have been enacted in many neighboring counties) require that a home improvement contractor must be licensed. If it is not, the contractor may not file a mechanic's lien and may not sue the homeowner for failing to pay for the work — even if the work has been done and money would otherwise have been due.

But where the contractor is licensed, or there is no further money due to the contractor, that remedy is of little help to a damaged homeowner. The Appellate Division, Second Department recently handed down a case which may provide a potent weapon for these homeowners.

The case involved a home improvement on Long Island where the contractor had breached the contract and abandoned the project. At the time of the abandonment, the contractor had been overpaid. In addition to seeking the added cost to complete the work, the homeowner argued that the contractor failed to hold and apply the money it received for the benefit of the project, but rather misappropriated the funds. This was an argument based on Article 3A of the Lien Law — the trust fund provisions of that law.

Article 3A is rather arcane, dealing with an esoteric subset of the Lien Law. In simple terms, it provides that contractors who receive payment for construction work are required to hold the money as a trust fund for the benefit of all of its subcontractors and suppliers who provide improvements to the project. The contractor may not even keep any of those funds for its own profit until all trust fund beneficiaries (the subcontractors and suppliers) have been paid in full. If the contractor fails to use the trust funds for a valid trust purpose, the contractor can be said to have committed a trust fund "diversion" which can subject not only the contractor, but its officers or agents, individually, to both civil and criminal penalties.

What was unusual about this case, however, was that Article 3A was applied not for the benefit of an unpaid subcontractor or supplier, but for the benefit of the homeowner. Relying on a little-used provision in Article 3A, the court held that a home improvement contractor must deposit into a bank account all moneys received from a homeowner, which deposits remain the property of the homeowner until they are spent on the costs of improving the premises or until the project is completed. In essence, they remain trust funds for the benefit of the homeowner. Use of these trust assets for any purpose other than an expenditure permitted by the Lien Law constitutes an improper diversion, regardless of the contractor's intentions.

The Lien Law provides that contractors who receive payment for construction work are required to hold the money as a trust fund for the benefit of all of its subcontractors and suppliers who provide improvements to the project

And to the extent that the corporate officers of the contractor were responsible for the diversion of these trust funds, the court held that they could be personally liable for the missing money.

Not a bad weapon to have in your arsenal. And a warning to home improvement contractors everywhere.

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