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An Important Lesson for Condominium Developers

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On December 15, 2016, the Michigan Court of Appeals issued an unpublished opinion in the matter of *Woodland Estates, LLC v. City of Sterling Heights and County of Macomb*. The Woodland Estates case should be taken as a warning to developers. This case illustrates the importance of obtaining legal advice from an attorney throughout all stages of the development process. The Developer in this case may have been able to recoup a substantial sum of money from the Government if it had asserted its rights in a timely fashion.

Background

Woodland Estates, LLC (the "Developer") filed a lawsuit against the City of Sterling Heights and the County of Macomb (the "Government") regarding a Condominium Project located in Sterling Heights, MI. The case centered on the Developer's allegation that it was entitled to monetary compensation from the Government based on an inverse condemnation theory. Inverse condemnation is a term used to describe a situation in which the government takes private property but fails to pay the compensation required by the Fifth Amendment of the Constitution.

In 2003 the Developer purchased a five-acre parcel of property in Sterling Heights upon which the Condominium Project was to be developed. When the Developer attempted to obtain permission from the Government to develop the property, the Government informed the Developer that a portion of the property (a 92-foot wide tract of land across the property) could not be developed because the Government anticipated that land would be used in a future expansion of 18 mile road. This left the Developer with a five-acre parcel of property upon which only 3.88 acres could be developed for the Condominium Project (the remaining 1.12 acres was left undeveloped and reserved for the Government's eventual expansion of the road).

The Master Deed of the Condominium Project was recorded on February 6, 2006. One month later, the Developer recorded a Consent to Submission of Real Property to Condominium Project which essentially stated that the Developer was giving consent for the entire property to be governed by the Master Deed. The Developer filed the lawsuit against the Government on December 30, 2014 claiming that the Government was required to compensate the Developer under an inverse condemnation theory.

The Court's Decision

The Appellate Court ruled on the following arguments brought forth by the Developer: (1) Whether the application of a statute of limitations defense to an inverse condemnation claim is constitutional; and (2) If a statute of limitations defense is constitutional, as applied to an inverse condemnation claim, whether the appropriate limitations period should be six years or fifteen years.

The Court first ruled on the constitutional issue and stated that the Michigan Supreme Court as well as the United States Supreme Court have both held it constitutionally permissible to apply a statute of limitations to a constitutional claim (internal citations omitted). Moving next to the question of whether the appropriate limitations period was six years or fifteen years, the Court held the proper statute of limitations for an inverse condemnation claim is six years pursuant to MCL 600.5813 and *Hart*, 416 Mich at 503, where the plaintiff does not maintain an interest in the property, and 15 years pursuant to MCL 600.5801(4) and *Difronzo*, 166 Mich App at 153-154, where the plaintiff does maintain an ownership interest. Based on the language contained in the Master Deed and the Michigan Condominium Act, the Court held that the 1.12 acres of land reserved for the Government was classified as "general common element" land in the Condominium Project. Accordingly, that land is owned equally among the co-owners of the Condominium Project pursuant to the Master Deed.

The Court further stated that since the Developer was not a co-

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owner (since it did not own any units in the Condominium Project) it did not have any ownership interest in the property at issue. Therefore, the Court held that the appropriate statute of limitations period was six years. Because the Developer filed the Consent to Submission in March of 2006, the statute of limitations ran in March of 2012 and the Trial Court correctly dismissed the Developer's lawsuit against the Government.

Conclusion

Because the Developer did not obtain adequate and timely legal advice at the time it acquired the property, the Developer lost a significant amount of money. In fact, the amount of compensation owed by the Government to the Developer would be easy to calculate since the Condominium Project was initially intended to contain 17 or 18 units as opposed to the 11 that were developed and sold as a result of the inability to build on the 1.12 acres reserved for the Government. Accordingly, experienced real estate attorneys should be consulted from the beginning of the process through the end.

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New Tools for Asset Protection and Estate Planning

Gerald C. Davis

Individuals in Michigan seeking to protect assets from creditors no longer have to transfer their assets to Delaware, Nevada or Alaska. Effective February 5, 2017, the Qualified Dispositions in Trust Act, Domestic Asset Protection Trusts, Public Act 330 of 2016, will allow the owner of trust assets to retain and protect his or her assets from creditors, while still retaining the power to direct investment decisions, the power to veto distribution from the trust (including to himself), the power to receive income, and the right to remove and replace a trustee. The owner may also retain a special Power of Appointment to direct how the assets will be distributed upon the owner's death.

While the owner retains some powers and interest, this is still a discretionary trust, so the owner must give up control over his assets to an independent trustee whom the owner does not control.

This is especially useful for people with large estates that can be targets of lawsuits such as doctors, business owners, those with a high public profiles, entertainers, developers and business investors.

However, pursuant to the Uniform Fraudulent Transfer Act, if a transfer is deemed fraudulent it can be set aside, including transfers to a Domestic Asset Protection Trust. In law, if the disposition was made with actual intent to hinder, delay, or defraud any creditor of the debtor, that transfer can be set aside and the assets therefore reached by creditors. In addition, the assets in the trust are not protected in a divorce action, if the assets were transferred to the trust 30 or fewer days before the marriage.

There are certain requirements that must be satisfied for the protections to be enforceable, including a two-year waiting period from the date the assets are transferred to the trust, and as stated, the trustee must be an independent third party who has total control over the distributions, such as a bank with trust powers or a trust company.

Therefore, it is important that the trust be set up early before liability attaches. For example, once a tenant defaults on a lease and a claim of personal liability attaches as guarantor, the trust would already have to be in place, or it will likely be deemed a fraudulent transfer. Thus, the trust must be created prior to any creditor claims being filed against the assets or the creator of the trust, particularly in view of the minimum two-year waiting period required between the time the trust is created and the protections under the trust are asserted, as from a judgment, court order or even a claim of a creditor capable of being reduced to a judgment against the creator of the trust.

With this valuable new tool, debtors and potential debtors, such as tenants under leases, or purchasers of major equipment or real estate, risk having their entire estate wiped out from circumstances they cannot control and are now afforded protection at least to the extent that the assets are subject to a validly created Domestic Asset Protection Trust.

As two-thirds of the states do not offer this type of protection, Michigan will likely be a haven to protect assets from creditors' seizure.

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Gerald C. Davis is a partner in our Livonia office where he concentrates his practice on corporate and business law, leveraged buy-outs, company reorganization and refinancing, analyzing investments for joint ventures, intellectual property, and drafting loan agreements. He may be reached at (734) 261-2400 or gdavis@cmda-law.com.

Court of Appeals Reaffirms Public Bodies are Under No Obligation to Monitor FOIA Requests Once Denied

In *Whittaker v Oakland County Sherriff*, unpublished decision of the Court of Appeals dated Nov. 22, 2016 (Docket No. 329545), plaintiff filed suit alleging violation of the Freedom of Information Act (FOIA). On July 27, 2014, officers suspected plaintiff was driving under the influence and pulled him over. On August 20, 2014, prior to charges being filed, plaintiff submitted a FOIA request to defendant seeking all reports, audiotapes, videotapes, laboratory information and other information relating to the incident. On the same day, the District Court issued a warrant and complaint against plaintiff. On August 22, 2014, defendant denied the request because the information sought was part of a pending investigation or court action, citing MCL 15.243(1)(b)(i).

In February 2015, plaintiff filed suit arguing that defendant violated FOIA when it denied his initial request. While the suit was pending, defendant informed plaintiff that the exemption cited in the initial denial had expired and defendant would comply with a resubmitted request.

By July 2015, defendant had provided all of the documentation sought and moved for summary disposition. Plaintiff insisted he was still entitled to attorney fees, costs and punitive damages because defendant wrongfully denied his initial request, making it necessary for him to file suit. Defendant responded that because it would have complied with a resubmitted request after the expiration of the exemption cited, the suit was not necessary to gain disclosure of the documents. The trial court granted summary disposition and the Michigan Court of Appeals affirmed.

In affirming the trial court's grant of summary disposition, the Court of Appeals noted that plaintiff had reason to know the circumstances surrounding the initial denial had changed and the exemption initially cited no longer applied. As the Michigan Supreme Court has held, "FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure." *State News v Mich State Univ*, 481 Mich 692, 704-705; 753 NW2d 20 (2008). The Supreme Court has also held that "[t]here is no language in…FOIA that requires a public body to continue to monitor FOIA requests once they have been denied." Id. at 704.

The Court of Appeals concluded that defendant was under no duty to continue monitoring plaintiff's request and the onus was on plaintiff to resubmit his FOIA request once the circumstances had changed rendering the previously cited exemption inapplicable. Because plaintiff had another option to obtain disclosure, filing suit was not necessary to obtain the documents and thus plaintiff was not entitled to attorney fees, costs and punitive damages.

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Experienced Attorney Joins Firm's Grand Rapids Office

We are pleased to announce an experienced attorney has recently joined our Firm.

Josh Fahlsing is an attorney in our Grand Rapids office where he focuses his practice in the areas of municipal law, insurance defense, law enforcement defense and litigation, and Veterans' legal issues. He has experience with the Michigan Open Meetings Act and Freedom of Information Act and represents municipalities and government agencies throughout Michigan in civil rights cases including claims brought under the 1st, 4th, 8th, and 14th Amendments to the US Constitution.

Prior to joining CMDA, Mr. Fahlsing spent seven years running a general practice solo firm in downtown Grand Rapids, and five years as a journalist, covering education, state and local government.

He received a Juris Doctor degree, *cum laude*, from Thomas M. Cooley Law School and a Bachelor of Arts degree from Saginaw Valley State University.

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To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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