LEGAL FOUNDATIONS

HSLC

NEW ASSUMED BUSINESS NAME LAW HITS THE BOOKS

By: Chad J. Cochran & Nan E. Hannah

"What's in a name? That which we call a rose by any other word would smell as sweet."
Juliet clearly never served in the North Carolina legislature…

Under the current law, North Carolina businesses may always operate under the legal name registered with the North Carolina Secretary of State. However, if a business desires to operate under a separate business name, then an assumed name certificate must be filed in each county where the business operates. For instance, if we registered Acme Plumbing, LLC with the North Carolina Secretary of State but desire to do business in Wake, Mecklenburg, and Buncombe Counties as "Nan and Chad Plumbing", then Acme Plumbing, LLC needs to file an assumed name certificate registering that creative name with the Register of Deeds of those three counties. Business owners risk personal liability for the operations of businesses which fail to operate under registered names.

Effective July 1, 2017, North Carolina Session Law 2016-100 imposes new assumed name requirements upon North Carolina business. The new law requires the Secretary of State to create an online database to store information which will be uploaded by the 100 Register of Deeds' offices. Under the new law, a business only has to register in one county no matter how many counties they intend to offer services in. A new addition will be the necessity of describing the "nature of the business". It will permit amendment of a certificate which does not appear in the existing law. Withdrawal looks the same. The new law contains a provision making it clear that registering an assumed name does not grant exclusive use of the name. There is a provision for liability for executing a false certificate or violating the Article (not apparent in existing law). It will be a Class 1 misdemeanor for false certificate and civil liability for failure to file a certificate – where there is "injury" for that failure. There is not liability for "errors" or "ambiguity" in describing the nature of the business. (This seems a wonderful opportunity for litigation over time).

Existing certificates (those filed under the existing statute) expire on July 1, 2022 (so if you filed next week, then you would need to update the filing in the next five years). Old forms will not be accepted after July 1, 2017 and you cannot use a certificate of amendment for the update. So, given that the filing requires a $26.00 fee – for withdrawal and another $26.00 for the new entity, it would appear that in the next five years, businesses will have to file new forms under the new law. *

The attorneys of Hannah Sheridan Loughridge & Cochran, LLP regularly counsel clients through these issues. If you should have any questions, please call our office.

*A bill pending in the legislature would delay implementation of these changes by one year.

In This Issue

Pitfalls in Contract Administration

By: Cody R. Loughridge

All too often, desires to "get the deal done" or "get it signed" or "get it built" result in poor contractual administration and eventual (often *avoidable*) problems. That is somewhat understandable, given the fact that most contractual arrangements begin with grandiose visions and good feelings, and not with an eye on rifts and litigation. Folks tend to gloss over the "fine print" and "legalese" but failure to adhere to contractual minutiae often leads to otherwise preventable problems. The following are some common provisions parties unintentionally ignore that can sabotage the relationship. Best practice is to follow the four-corners of the contract as it relates to the terms below, rather than relying upon assumptions and past procedures.

Communication

We find ourselves undoubtedly in the technology and information age. As a society, our preferred mode of communication has become a flurry of e-mails and text messages with near instantaneous response. Consequently, we tend to view e-mail and similar communication akin to verbal communication, complete with incomplete thoughts, run-on sentences, and slang. Moreover, we have grown to assume that if an e-mail or text message is sent, it surely was received, processed, and accepted by the intended recipient. However, the complete opposite is often the reality and the ramifications can be detrimental. To address this issue, many contracts clearly and unequivocally state how parties are to communicate with one another. And, often, that does not include the use of e-mail, Snapchat, Facebook Messenger, iPhone Message, or the like. Well-drafted contracts often identify a specifically named person and an address to which certain important communications (like extensions of time, changes in scope, termination, etc.) must be directed. Almost assuredly, the contract will require written, mailed communication. Because those types of contractual terms tend to be material in nature, it is paramount that any related communication be succinctly communicated to the correct person, in a timely manner, and in the proper form. However, all too often once the contract is signed, the parties fall back into bad habits of sloppy communication, opting for a quick text message or e-mail over a proper, contractually mandated written communication. Resist the urge to rely upon the quick and easy text messaging when it comes to conveying information related to material terms.

Timing

Timely notice is often required to preserve contractual rights of the parties. In fact, it is common for contracts to contain provision acknowledging that certain rights are lost unless certain notice, submission, or communication occurs within the prescribed time and in the prescribed manner. For example, many construction contracts require that Contractor A notify Owner B within a certain time frame (say, 3 days) of an event that will require an extension of time and that the failure to do so will result in a waiver of the right to said extension. Unfortunately, these time limits are often overlooked, which creates bad habits that are difficult to break . (Continued on Page 4)

Welcome Chad Dunn

HSLC is pleased to announce the addition of Chad Dunn as Of Counsel to the firm. Chad is a 2014 graduate of Washington & Lee University School of Law and lives in Raleigh with his wife and two daughters. Prior to joining HSLC, Chad practiced primarily insurance defense law. Chad is excited to join HSLC and is looking forward to expanding his practices in landlord tenant (residential and commercial), homeowners association, real estate (with the exception of closings), and personal injury law.

Clients, Friends, & Colleagues of HSLC:

"Save-the-Date"

As many of you know, each spring the attorneys and staff of Hannah Sheridan Loughridge & Cochran, LLP offer a legal seminar known as **Building Legal Foundations**.

This year, we are making some exciting changes to our format and location!

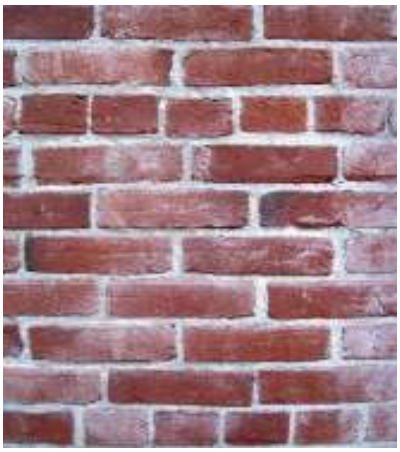
On **May 18, 2017**, Hannah Sheridan Loughridge & Cochran will be hosting our redesigned Building Legal Foundations seminar at **Tobacco Road Sports Café** in Glenwood South (505 W. Jones Street, Raleigh, NC 27603).

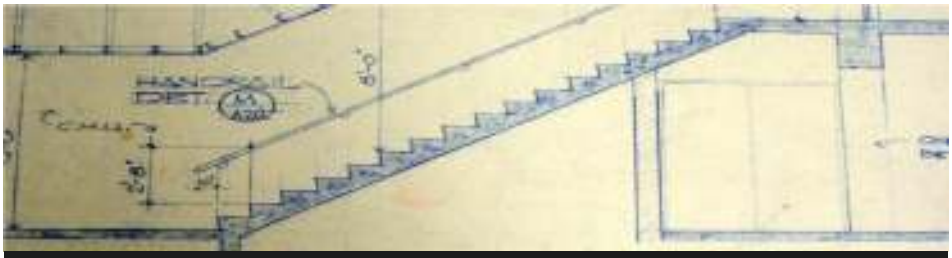
The revamped legal seminar will take place from 3pm to 5pm. HSLC attorneys will be presenting on some exciting new topics in a relaxed environment, and we will be featuring a guest speaker!

Thereafter, we are excited to host all for some appetizers and cold beverages, to show our appreciation of your continued support!

Please join us for the Building Legal Foundations seminar, the Happy Hour, or both!

Please RSVP to RSVP@hslc-law.com





Construction Law

Lien Law Primer

By: Nan E. Hannah

Is the new lien law working or is the economy simply humming along? A good question for all those involved in the construction industry right now. As April arrives, we complete the fourth year under the new age of the Lien Agent. We are unaware of any scientific studies related to the efficacy of the "new" regime. As with almost any change to the law, there are parts of the revised process which all of the parties across the construction landscape would agree need to be changed. However, coordinating efforts to determine what those changes should be and how the statute should be re-worded generally evokes differing opinions, and the North Carolina General Assembly seems to have its focus on less mundane topics at the moment. *

While liens are still being filed, it appears anecdotally that fewer are being filed these days, and no question that fewer are being filed than were filed during the economic downturn of a few years back. With that in mind, it seemed a good time to run back through some lien law fundamentals.

- Remember to look for the Designation of Lien Agent. Whether or not you are giving Notice to the Lien Agent (and you should be), there is a wealth of information to be obtained through the act of locating and downloading the Designation of Lien Agent form. If you need to file a lien, most of the information you need for the lien will be right at your fingertips (and you can always hope it is accurate, but do not count on that being the case.
- Know where you are in the chain. Before starting work on a construction project, make certain you have a good idea of who is above you in the lien chain. There is a world of difference in risk between being a third tier and being fourth tier. On federal projects, being a second tier or third tier is the difference between being protected by a Miller Act payment bond and not being protected.
- Remember that your first and last date can be <u>your</u> first and last date or you may rely upon the contractor's first and last date. But, if you decide to rely upon the contractor's dates, remember that at a trial, you will have to prove those dates.
- The last date is the most critical piece of information you will have to prove because it determines deadlines for filing the lien and filing the Complaint. And, if you mess up the date, the error is generally fatal.
- Review each lien issued in your name as soon as you get it. We, as lawyers, strive for perfection, but as much as we might dislike admitting it, we can make mistakes. Sometimes the error is on our end and sometimes it arises from the underlying information, but the key to remember with liens is they cannot be amended so catching an error early allows it to be corrected with reduced risk of harm. The more eyes the better.

Liens are a wonderful collection tool provided by the North Carolina Constitution to protect those in the construction industry from non-payment. But, because they are something of an extraordinary remedy, accuracy and attention to detail are demanded by the courts. Keep in mind that if a lien case gets to trial, someone will need to be able to testify under oath regarding each element of the lien. If you have questions or thoughts arising from this article, please contact our office.

*Though legislation has been introduced in both chambers to add a permissive cancellation of Notice to Lien Agent provision, so standby.

Pitfalls

(continued from page 2)

As applied to the above example: Rather than abide by the mandated 3-day written deadline, Contractor A might just tender a change order to Owner B at the end of the project, for purpose of recouping his costs related to the weather delay. Although Contractor A did not intend to waive its ability to receive an extension of time for bad weather, Contractor A's failure to properly abide by the prescribed 3-day period in the contract likely results in an unintended waiver of contractual rights. That can have disastrous effect on the project, and the parties. You must pay close attention to the stipulated deadlines and timing triggers in contracts, following them with the precision they call for. Otherwise, you risk waiving contractual rights.

Contract Documents

Perhaps the most common pit-fall encountered when dealing with contracts and contract administration is for the parties not to have the *entire* contract. Although a contract on its face can seem convoluted, onerous, and unnecessarily complex, quite often that contract does not even represent the entire agreement between the parties because it actually incorporates other terms, conditions, provisions of other contracts, or even entire additional documents. Items like schedules, bids, specifications, insurance policy requirements, or the prime contract are just a few examples of extraneous papers that may be incorporated into a single contract. By way of example: it is common for a subcontract between a general contractor and a subcontractor to incorporate the prime contract between the owner and general contractor. Said differently, the subcontractor may very well be held to standards that are not explicitly stated in the subcontract that he is executing, because additional\higher standards are called for in the incorporated prime contract. As such, when reviewing a contract, be sure that the "contract documents" are clearly defined and itemized, and that you have each and every document which is incorporated into your contract. Only then can you review all applicable provisions to which you may be contractually liable. Consult your contract.

Just because a contract is signed does not mean it should not be revisited or reread. During the course of a contractual relationship, the contract must be constantly consulted, reviewed, and utilized as a source of information and guidance. A contract between consenting parties is ultimately the ruling document, governing the relationship of the parties. As such, the goal should be to not only understand what your contract says, but abide by it. Unfortunately, that is often easier said than done.

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