

Special points of interest:

- The Probate Process in Colorado
- Electronic Records Management
- Statute of Limitation Changes for Certain Discrimination Claims

Spring, 2009

What Does “As Is” Mean?

Paul Chmielewski, Esq., LLM

The housing crisis has resulted in increased residential sales by banks and other lenders. These entities usually insist that their properties be sold “as is.” Commercial real estate sellers have always tried to sell their properties “as is.” Given the growing prevalence of “as is” sales, it is important that buyers and sellers fully understand the implications of the use of this term in their sales contracts and closing documents.

The term “as is,” means that the buyer is purchasing the property in its current condition without any seller warranties or representations regarding the condition of the property, its fixtures or improvements. This means that the buyer is responsible for any defects or issues that are discovered after closing. However, even if a property is sold “as is,” the seller has a duty to inform the buyer of any latent defects of which the seller has knowledge or should have knowledge. A latent defect is an issue affecting the property that cannot be discovered by a reasonably thorough inspection.

Regardless, it should be made clear that the term “as is” does not mean that a buyer cannot perform standard due diligence when purchasing a property. Instead, the term “as is” means the buyer must rely on the results of any inspections and investigations it conducts when purchasing the property. An “as is” buyer does not have any recourse against the seller after closing, except for failure to disclose a latent defect. This means that due diligence inspections are even more important when a buyer is purchasing a property “as is.”

An “as is” buyer should always have a professional inspection of the property conducted. This will highlight any adverse property conditions that may affect the value of the property. Second, the buyer should also always conduct a title and survey review of the property. This will reveal any easements or other encumbrances that may adversely affect title or use of the property. For example, if a property has easements running all over it, development of or expansion on the property will probably not be permitted. An “as is” buyer also needs to confirm that the property complies with local zoning requirements for the use or proposed use of the property. Such zoning requirements might include compliance with building standards, setback lines, sign ordinances, minimum parking spaces and landscaping requirements.

Many commercial lenders require that a buyer conduct an environmental inspection of the property. Even if a lender does not require an environmental inspection, it is wise to have one done if there is any possibility that prior use of the property may have resulted in environmental contamination. Environmental inspections are relatively uncommon in residential property transactions unless there is specific evidence of an environmental risk. For example, illegal residential methamphetamine labs are becoming more common. As a result, if there is any chance that a meth lab may have been operated out of a home, an inspection for that issue should be conducted. The costs of these inspections are outweighed by the risk and high cost associated with environmental contamination and remediation.

(Continued on page 4)

Probate in Colorado

Paul Chmielewski, Esq., LL.M.

“Persons named in the decedent’s Will have priority for appointment as the Personal Representative” (of the Estate).

Probate is the judicial process by which a decedent’s assets are transferred to a decedent’s devisees or heirs. Probate in Colorado is relatively inexpensive and efficient compared with most other states. Although probate is a well-known term, the probate process is a mysterious concept to many people. The purpose of this article is to provide a general outline of several different types of Colorado probate proceedings.

Informal Probate

In Colorado, uncontested probates begin with a petition for an informal opening of probate and the appointment of a Personal Representative. Persons named in the decedent’s Will have priority for appointment as the Personal Representative. In the absence of a Will, Colorado law provides a list of persons who have priority for appointment. Once a Personal Representative is appointed by the Court, the Personal Representative must provide notice of probate to all interested parties. The Personal Representative can also begin transferring assets to the devisees named in the Will or, in the absence of a Will, to statutorily designated heirs. If allowed by the Will, many Personal Representatives sell the decedent’s personal residence before probate has been closed in order to relieve the estate’s cost of maintaining the property. The transfer of real property during the probate process is accomplished by means of a personal representative’s deed rather than a general or special warranty deed.

Notice to creditors is also provided to trigger the deadline for submission of creditor claims against the decedent’s estate. Within a certain amount of time after the creditor claim period has expired and all claims against the estate have been resolved, the Personal Representative can file notice of closing of the estate with the probate court and provide an accounting of income, expenses and distributions of assets to all persons receiving distributions from the estate and all known creditors of the estate.

The informal probate proceeding discussed above is done with minimal court oversight. Informal probate is common in Colorado. A formal probate proceeding will require greater court oversight and, as a result, greater cost.

Simplified Probate In Colorado

Personal Property Affidavit. For probate estates consisting entirely of personal property (e.g., cars, clothes, bank accounts, etc.) worth \$50,000 or less (after deducting liens and encumbrances), Colorado allows a devisee or heir to prepare an Affidavit for Collection of Personal Property (“Affidavit”). The Affidavit entitles the devisee or heir to transfer the personal property into the name of the appropriate persons without the need for opening a probate proceeding with the Probate Court.

Small Estate Administration. If the value of a decedent’s probate estate (less liens, encumbrances and certain administrative expenses) does not exceed the value of the personal property held by the decedent at the time of his or her death, the estate is entitled to utilize a small estate administration in Colorado. A small estate administration is opened in the same manner as the informal probate proceeding discussed above; however, the Personal Representative is not required to publish any notice to creditors. In addition, as soon as all assets are transferred to the proper devisees or heirs, the Personal Representative can file a statement with the probate court that the estate is being closed as a small estate. The Personal Representative is also required to provide an accounting of the estate to all persons receiving distributions from the estate and all known creditors of the estate.

(Continued on page 4)

Statute of Limitations Changes for Certain Discrimination Claims

R. Garth Ferrell, Esq.

The Lilly Ledbetter Fair Pay Act of 2009 (the "Ledbetter Act"), signed in January, 2009 by President Obama, modifies the application of the statute of limitations to Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination and Employment Act ("ADEA"), the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans With Disabilities Act of 1990 ("ADA"). The Ledbetter Act overturned the United State's Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S.618 (2007), and was a direct response to perceived unfairness in the application of the 180-day statute of limitations by the Supreme Court in the Lilly Ledbetter case.

Under Title VII, discrimination claims must be made within 180 days of the date when the discriminatory act occurs. In Ms. Ledbetter's case, she claimed that from 1979 to 1998, she was discriminatorily given poor reviews and, therefore, lower pay. After her retirement from the company, Ms. Ledbetter initiated a discrimination claim under Title VII. The Supreme Court applied the 180-day filing deadline and declined to apply a new statute of limitations each time a new paycheck was issued to Ms. Ledbetter. The Supreme Court found that Ms. Ledbetter's Title VII claims were barred by the statute of limitations because they were not filed within 180 days of the date the claims first arose.

The Ledbetter Act, however, expands the application of statutes of limitation for claims under Title VII, the ADEA, the Rehabilitation Act and the ADA so that a discriminatory act occurs and the cause of action arises each time "an individual is effected by application of a discriminatory compensation decision or other practice." Therefore, each time the employee receives a paycheck that is tainted by a discriminatory practice, a new claim arises.

Employers should examine their pay practices to insure that employees are being paid in a nondiscriminatory manner. Employers can avoid discrimination claims by setting clear procedures and practices for pay raises and promotions, and for treating employees consistent with those practices and procedures.

Electronic Records Management

R. Garth Ferrell, Esq.

Appropriate electronic records management is increasingly critical to effective defensive litigation strategy. Increasingly, cases both large and small involve discovery of electronic records. Discovery is the process whereby these records are gathered and produced to the opposing party. Electronic records subject to discovery include emails, transaction items, telephone logs and instant messages and any other electronically-stored information that could be relevant to the resolution of the dispute. Companies cannot afford a casual attitude with respect to the maintenance and preservation of such records.

First, companies need to develop and follow a document retention policy. The appropriate requirements for such a policy will vary from company to company, but the goals should be to preserve documents that may be required for regulatory purposes and for prosecution and defense of litigation. The inadvertent or intentional destruction of relevant documents could lead to negative presumptions in a lawsuit regarding the content of such documents. For example, the destroyed documents may be presumed by a court to have contained information that is negative or damning to the case of the party destroying the documents. Routine processes should be in place to save electronic information so it can be retrieved if needed in litigation.

"Companies cannot afford a casual attitude with respect to the maintenance and preservation of (electronic) records."

Mallgren & Ferrell, P.C.

Lowry Office:
200 Spruce Street, Suite 201
Denver, Colorado 80230

Tech Center Office:
8480 E. Orchard Road, Suite 6500
Greenwood Village, Colorado 80111

Phone: 303-341-0700
Fax: 303-341-0701
Email: office@mallgrenferrell.com
Website: www.mallgrenferrell.com

**WE ARE CLOSING
OUR LOWRY OFFICE
IN MAY. WE WILL
LET YOU KNOW
WHAT OUR NEW
PHONE NUMBERS
ARE SOON!**

*Our goal is to provide cost-effective legal
assistance to help our clients achieve
their personal and financial goals.*

What Does “As Is” Mean?, Cont.

(Continued from page 1)

The due diligence inspections listed here are in addition to, not in lieu of, other due diligence items, including but not limited to, review of any existing leases for the property, financial statements and market demographics. Furthermore, the inspections discussed above are not meant to be exhaustive or applicable in every transaction. Although inspection results do not provide a means of recourse against the seller after closing in an “as is” transaction, they will allow a buyer to terminate the contract or possibly obtain more favorable terms before closing provided a properly drafted contract is used.

Probate in Colorado, Cont.

(Continued from page 2)

Conclusion

The procedures discussed in this newsletter are intended to provide a brief and general description of certain probate proceedings. This discussion should not be viewed as a detailed guide for administering any type of estate. If you have any questions about a specific estate, please contact our office.

Electronic Records Management, Cont.

(Continued from page 3)

Second, when faced with electronic discovery requests in litigation, companies must have a careful plan to identify, locate and retrieve documents that may have relevance to the dispute. This is certainly true with respect to large cases, but small cases also routinely involve emails and other documents that were initially preserved electronically.