

A
Summary
of
HOLDEN ENGINEERING AND SURVEYING, INC.
V.
PEMBROKE ROAD REALTY TRUST
628 A.2d 260 (NH 1993)
by
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Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

A survey practitioner prepared a subdivision plan for a developer. The practitioner sought periodic payment from the developer during the preparation of the plan. When the plan was presented for approval, the municipality determined that an endangered species inhabited part of the area. The municipality sought safeguards from the developer as a condition before approving the development. After submission of the plan for approval (but before approval) the practitioner sought payment of all outstanding amounts due from the developer. The developer refused to pay claiming payment was conditioned on approval and the plan had not been approved. The practitioner sued for payment (breach of contract). At trial it was held that payment was contingent upon approval of the plan. The practitioner was denied payment until the plan was approved. On appeal the appellate court reversed and held that the practitioner was entitled to payment regardless of the plan's disposition.

Several important points were mentioned during the appellate review:

1. The Court found that approval of the subdivision before payment would require there be a condition precedent in the agreement. As a rule, conditions precedent are strictly construed and not favored unless the language in the agreement indicate a condition precedent was intended. Language which generally indicates or signals a condition precedent include words or phrases such as "if," "on condition that," "subject to," and "provided."
2. Generally, where the contract allows: 1) the practitioner to stop services for non-payment, 2) periodic payment is agreed upon and sought, and 3) the condition precedent is not within the control of either party, a condition precedent before payment will not be read into the agreement. (Note: Although favorable municipal approval may not be in the power of either party to guarantee, the practitioner is still required to take all reasonable steps to help attain approval.)

Putting the points into practice will require the practitioner:

1. Avoid words that would suggest an unintended condition precedent before payment.
2. The practitioner should be aware that continuing to provide services where prior fees have not been paid adds to the problem. The failure of the client to pay past due amounts is usually a symptom to a bigger problem. It is better to walk away from a \$500 amount due then to litigate a \$5,000 fee, win, and owe an attorney \$2,500. In the first case the practitioner has lost \$500 to walk away and break even. In the second case the practitioner has lost \$2,500 to walk away and break even (assuming the practitioner is successful in the litigation).
3. If a practitioner feels compelled to continue to provide services when the client has not paid past due accounts 1) obtain a promissory note for the outstanding amounts, 2) take the

proper steps to file a mechanics' lien, 3) don't provide the work product until payment is due. Always keep any amounts due or promissory notes made out for less than the maximum amount set by small claims court. The practitioner should not allow themselves to be put in the situation where they are the client's bank.