Summer
2016

MONROE MCDONOUGH
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Welcome to the MMB&M Newsletter

While the temperature is burning up outside – things are heating up in the office, too. Take a look at what we do!

- Estate and Trust Planning
- Commercial Leases & Sales
- Employment Contracts
- Probate Proceedings
- LLC and Corporate Formation
- Residential Property Contract Review
- Easements and Property Disputes
- Business Acquisitions & Sales
- And more!

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SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

New Arizona "Safe Harbor" Statute on Independent Contractors

By: Heidi Rib Brent
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On May 12, 2016, our Arizona Governor signed a new law by which employers can create a rebuttable presumption that a worker is an independent contractor rather than an employee. In light of the federal campaign to classify workers as employees for additional tax revenue and mandated employment benefits, this legislation assists employers in defining the working conditions.

New A.R.S. §23-1601 sets forth recommended language for a signed written agreement, entitled a "Declaration of Independent Business Status" ("Declaration"). A Declaration in substantially the language of the statute will create a rebuttable presumption that the worker is an independent contractor rather than an employee. However, failure to execute a Declaration *does not* create a presumption at all and is not admissible in litigation.

The Declaration must provide:

> "1. The contractor acknowledges that the contractor operates the contractor's own independent business and is providing services for or in connection with the contracting party as an independent contractor.
>
> 2. The contractor acknowledges that the contractor is not an employee of the contracting party and the services rendered for or in connection with the contracting party do not establish any right to unemployment benefits or any other right arising from an employment relationship.
>
> 3. The contractor is responsible for all tax liability associated with payments received from or through the contracting party and the contracting party will not withhold any taxes from payments to the contractor.
>
> 4. The contractor is responsible for obtaining and maintaining any required registration, licenses or other authorization necessary for the services rendered by the contractor."

In addition the Declaration must state that the contractor acknowledges *at least six* of the following:

> "(a) that the contractor is not insured under the contracting party's health insurance coverage or workers' compensation insurance coverage.
>
> (b) that the contracting party does not restrict the contractor's ability to perform services for or through other parties and the contractor is authorized to accept work from and perform work for other businesses and individuals besides the contracting party.
>
> (c) that the contractor has the right to accept or decline requests for services by or through the contracting party.
>
> (d) that the contracting party expects that the contractor provides services for other parties.
>
> (e) that the contractor is not economically dependent on the services performed for or in connection with the contracting party.
>
> (f) that the contracting party does not dictate the performance, methods or process the contractor uses to perform services.
>
> (g) that the contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the contractor is authorized to determine the days worked and the time periods of work.

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(h) that the contractor will be paid by or through the contracting party based on the work the contractor is contracted to perform and that the contracting party is not providing the contractor with a regular salary or any minimum, regular payment.

(i) that the contractor is responsible for providing and maintaining all tools and equipment required to perform the services performed.

(j) that the contractor is responsible for all expenses incurred by the contractor in performing the services."

(It certainly doesn't hurt to include all of these provisions, as long as they are true and accurate in describing the working relationship.)

And finally, the Declaration must include that "the contractor acknowledges that the terms set forth in this declaration apply to the contractor, the contractor's employees and the contractor's independent contractors."

What's Happening in Tucson

Astronomy Night - Arizona-Sonora Desert Museum - July 23

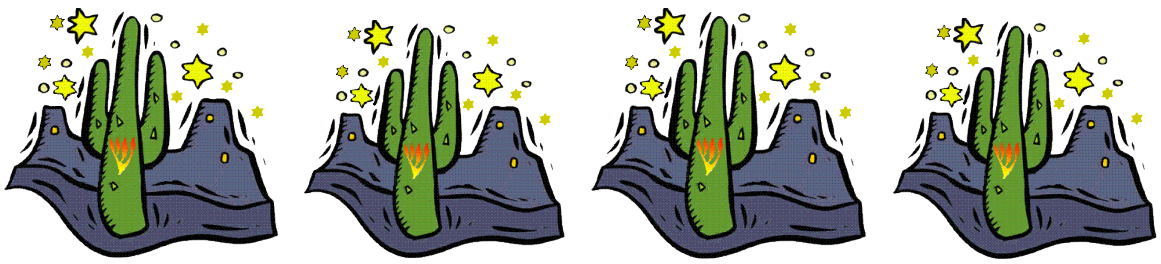
10th Annual Loft Kids Fest - The Loft Cinema - July 23 - 31

6th Annual The Southwest Arizona Birding Festival - Riverpark Inn - August 11 - 14

2nd Saturdays Downtown - Downtown Tucson - August 13

9th Annual Underground Film Festival - The Screening Room - September 16 - 24

40th Annual Tucson Greek Festival - St. Demetrios Orthodox Church - September 22 - 25



HOW TO LOSE YOUR ASSETS –

A CASE STUDY IN WHAT NOT TO DO AS A COMMERCIAL TENANT

By Anne Terry Morales
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The recent decision in Pima County Superior Court case, *LCL Heritage LLC v. Brass Maze Pizza #794 LLC, et al.* dramatically exemplifies what commercial tenants should not do if they want to protect their business and personal assets. Prior to entering into its lease, Brass Maze Pizza, LLC ("Tenant") spent approximately $30,000 to acquire equipment and trade fixtures to use in its pizza business. The Commercial Lease Agreement granted LCL Heritage, LLC ("Landlord") a security interest and an express contractual lien on any personal property belonging to the Tenant and used at, in or upon the leased property (the "Assets"). The Lease also provided that, after notice of default, the lien was enforceable without further notice or demand. This contractual lien was in addition to the lien under A.R.S. Section 33-362, which provides a landlord a lien on all "property of his tenant" located or used on the premises. Both liens expressly granted the Landlord the right to take possession of and sell the Assets in the event the Tenant failed to pay rent.

A few years into the Lease, the Tenant began to miss payments. The Landlord sent the required written default notices, of which the Tenant acknowledged receipt. In an effort to assist the Tenant, the Landlord made rent concessions. Unfortunately, even with the concessions, the Tenant continued to miss payments. In response, the Landlord gave notice of the additional defaults, reminded the Tenant of the Landlord's rights to the Assets under the liens, and offered to make further rent reductions.

Thereafter, using a cover story that the business was closing for one day to repair a broken cooler, the members/managers of the Tenant instructed its employees to remove the Assets from the premises. The Landlord's property manager happened by and was told by one of the managers/members of the Tenant and by the employees that the business was closing only for a day. The employees further stated to the property manager that the Assets were "being cleaned" not removed. The property manager didn't buy the story and immediately contacted the Tenant to assert the liens; instructed the employees not to remove any of the Assets; and posted notice of the liens on the premises. Later that day, with full knowledge of the liens, the Tenant removed all of the Assets and closed the business. The Tenant then transferred the Assets to various third parties (entities in which, coincidentally, one or both of the Tenant's managers/members had financial and/or ownership interests in) or placed them in storage. The Court took particular notice of the fact that the truck used to remove the Assets was rented by one manager/member of the Tenant, driven to the premises by his wife, and then driven away by the other manager/member.

The Landlord filed suit against the Tenant and each manager/member individually alleging Breach of Contract, Conversion (the act of wrongfully taking control over the Assets inconsistent with the rights of the Landlord) and Breach of Fiduciary Duty. Since the Tenant no longer had any assets, the Landlord specifically sought an award of damages against the individual managers and members of the Tenant.

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The managers/members of the Tenant argued that under Arizona's Limited Liability Company Act, Brass Maze Pizza, LLC's "corporate veil" protected them personally from liability for the tort of conversion. Notwithstanding the Act, the Court determined to "pierce the corporate veil" since each manager/member of the Tenant directly participated in the conversion. Consequently, they were each held personally liable for the conversion.

The Court went on to find that, at the time of the conversion, the business was obviously in the "zone of insolvency," therefore each manager/member owed a fiduciary duty to the Landlord. That duty included the duty to protect the rights of the Landlord in the Assets. Again, each manager/member was held personally liable since the facts showed that they purposefully put their own interests before the rights of the Landlord.

The Court also ruled that the Tenant breached the Lease and was responsible for the full amount of rent due for the entire term of the Lease (over $400,000.) In addition, the Court ruled that Landlord's liens on the Assets (which the Court valued at over $57,000) could be enforced up to the amount of the rent due. In setting the value of the liens the Court pointedly noted the lack of credibility and convoluted reasoning of the manager/member who attempted to argue that the Assets were only worth $5,000.00.

Finally, since the action arose out of contract, the Court awarded the Landlord its attorney's fees. The Tenant and its managers/members lost on every count.

If you are a commercial tenant and want to avoid losing assets, do the opposite of what was done in this case. In short:

1. Know and follow the terms of your Lease;
2. Pay your rent;
3. Work with your Landlord (especially when they offer to reduce your rent);
4. Tell the truth;
5. Do not instruct your employees to lie;
6. Do not remove liened property from the premises;
7. Do not devise schemes to try to get around the law;
8. Maintain your integrity and credibility;
9. Do not go to Court when the facts and law are against you; and
10. Do not tick off the Judge!

Assisting Seniors in Real Estate Transactions

BY: HEIDI RIB BRENT
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When assisting senior citizens in real estate transactions, the most important thing to keep in mind is that we each age individually. There are plenty of octogenarians or even nonagenrians (people in their nineties) who are fully capable of handling such transactions without assistance. However, chances are that we will need more assistance as we age.

When engaging with older clients, whether it involves a listing, house-hunting or otherwise, you may want to inquire if there is someone else you can contact if you cannot reach them. Is there a local relative who does – or does not – have their authorization to receive the information regarding the transaction? Inquire if the property is or will be in the name of a trust and, if so, request contact information for the successor trustee just in case. If they do not have a trust, do they have a financial power of attorney ("POA")? Since many financial institutions will not honor a POA that is more than 5 years old, you may suggest that they update or renew their POA. The POA should specifically mention that the agents have the power to sign to buy or sell real property for a title company to accept it.

If you have particular concern that your clients do not fully understand the transaction and question if they have the competence to sign the contracts, you should contact their successor trustees or agents under the POA, or you can decline to work with the clients without medical confirmation of their competence.

To determine whether a successor trustee or agent under a POA can take over the real estate transaction, you need an interpretation of the trust or the POA. Absent a written resignation of the original trustee, some trusts have an automatic transition to the successor trustee, while others require medical confirmation of the clients' incompetence for activation. Some POAs are effective upon execution and others are not effective until medical confirmation of incompetence as well. Therefore, a child cannot simply advise you that they are taking over and completing the transaction. You should ask an attorney or the title company to determine what is necessary to accept the successor trustee or agent under the POA.

So, if there is no trust nor POA and you are concerned that the clients are not competent, can you just let them sign anyway? We do not recommend it. The transaction is voidable on behalf of the clients. A person with priority under the statute, A.R.S. Section 14-5410, could seek appointment as a conservator to overturn the transaction. It's better for the person to seek appointment in advance and then to act in the clients' place to complete the transaction. The appointment as a conservator can be limited to just the real estate transaction or apply in general for all the clients' financial needs. It requires notice to other persons of priority, including spouses, children, parents and siblings, education to learn the responsibilities of a conservator, a hearing and court-approval of the real estate sale or a bond for the value of the clients' property. The process generally can be completed in four to six weeks, absent objection by the clients or other interested parties. If any objection is entered, the process may take months of litigation.

In circumstances where you are concerned as to your clients' safety, well-being or whether your clients are being financially exploited, it's best to pause the transaction and contact Adult Protective Services ("APS") toll free at 877-767-2385 or in Tucson 520-872-9005. APS will investigate and advise if you can continue the transaction.

A Checklist for Nonprofits – How to Maintain Tax-Exempt Status

By: Anne Terry Morales
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Receipt of a Determination of Tax-Exempt Status from the Internal Revenue Service ("IRS") is definitely a significant accomplishment for any charitable organization. After what can be a long, arduous application process, once an organization receives tax-exempt status the last thing they want to do is lose it. The following is a checklist for nonprofits to use to help maintain their hard-fought tax-exempt status:

✓ Follow All Governing Documents

The Articles and Bylaws of the organization typically set forth specific requirements regarding the day to day operations of the organization. These requirements were reviewed by the IRS and need to be followed. The Board of Directors needs to meet when it is supposed to. In addition, the meetings need to be properly noticed and conducted in accordance with the Bylaws. The prohibitions against private inurement must be strictly adhered to. All policies adopted regarding conflicts of interest, records retention, acceptance of gifts, whistleblowers, dealings with Designated Nationals and Blocked Persons and Entities also must be followed. (If the organization does not have any such policies, they should adopt and then follow them.) Checklists, procedures and training sessions should be established so that all of the Directors, staff and volunteers know the requirements of the governing documents.

✓ Timely File All Required Annual Filings

Each tax-exempt organization must file some version of IRS Form 990 annually. Failure to file Form 990 can lead to revocation of the organization's tax-exempt status. In addition, Arizona corporations, including nonprofits, must file an Annual Report. Failure to file the Annual Report can lead to involuntary dissolution of the corporation. Procedures should be adopted to ensure timely filing of these documents.

✓ Monitor Activities and Practices of Directors, Staff and Volunteers

Whether the activity is a Director acting without the direct authority of the Board of Directors, a volunteer illegally using copyrighted material in a presentation, a staff member campaigning for a candidate in the name of the organization, confidential or private information obtained by the organization being disclosed over social media, or the organization failing to properly categorize an employee or volunteer, various activities may cause an organization to run afoul of IRS requirements. The organization must educate itself regarding those requirements and establish measures to ensure that activities done in its name, whether by Directors, staff or volunteers, are authorized and meet the applicable IRS requirements.

✓ Stay Current Regarding IRS Requirements

In addition to becoming familiar with IRS Publication 557 – Tax-Exempt Status for Your Organization (available on-line at www.irs.gov/pub/irs-pdf/p557.pdf), each tax-exempt organization should subscribe to Exempt Organizations Update at www.irs.gov/charities-non-profits/subscribe-to-exempt-organization-update. The Exempt Organizations Update provides free e-mail updates from the IRS regarding policies, services and other information that impact tax-exempt organizations.

This checklist is a general overview. While it is a good start, it may not cover all situations. Every tax-exempt organization needs to work with its own Board, staff, volunteers and outside professionals to create a framework that will enable the organization to preserve its status as a tax-exempt organization.