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THE COUNSELOR

HOLDING NOTHING BACK ON RETAINAGE

— Bret L. McCabe

Within the context of construction projects, the practice of deliberately withholding a portion of the agreed upon contract price, until the work is substantially completed, is known as Retainage.

As our contractor clients know, this is effectuated to assure that the contractor or subcontractor will satisfy its obligations and complete the construction project pursuant to the Contract Documents and in accordance with the Project's specifications.

Under the provisions of the N.Y. General Business Law, the parties in a private project are free to come to a mutual agreement on the amount of retainage to be withheld, so long as the combined retainage for each contractor or subcontractor, the amount retained does not exceed the overall percentage retained by the Owner of the Project.

In this vein, traditionally, the amount withheld as retainage has been set at 10% for the length of the Project, however, over the last several years, there has been a shift in Construction Management Agreements which has allowed for Retainage to be reduced or even eliminated, once the Contractor's Work has reached 50% completion.

As such, during negotiations, Contractors should seek to reduce the amount of retainage accordingly, and should explore contractual provisions which favor the release of previously withheld retainage amounts at the appropriate stage of Project completion.

Additionally, once Substantial Completion is achieved (typically defined as the stage of the Project where the Owner may begin to occupy the space, in that the Project has been substantially completed for its intended use), with the exception of certain punch-list items remaining, typical Construction Management Agreement language also generally allows for the retention to be modified further to reflect the greater of: (i) Two and a Half Percent (2.5%) of the amount in the schedule of values for the Contractor's work; or (ii) twice the estimated value of the Contractor's Punchlist work to be completed.

Once the Work has been completed in its entirety, and a Certificate of Final Completion is issued, retainage must then be released within thirty (30) days.

As it relates to Public Projects, the law governing retainage is slightly different, as the procurement of a payment and/or performance bond dictates that retainage is capped at five percent (5%).

Our Construction practice group attorneys have extensive experience in negotiating the most favorable terms and conditions in this regard, and are able to guide our clients through the nuances surrounding these issues. ■



Bret L. McCabe, Partner



BANKING & FINANCE

James C. Ricca negotiated and closed a \$23,742,000 building loan mortgage on behalf of an institutional lender for the construction of a 6-story apartment building in Nassau County.

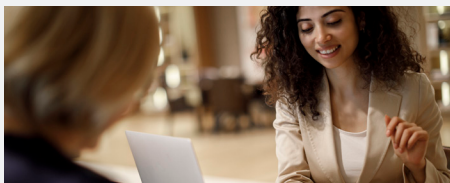
Steve G. Gaebler negotiated and closed a \$5,025,000 consolidated mortgage loan on behalf of an institutional lender secured by a commercial manufacturing building in Queens, New York.

On behalf of an Institutional Lender, **James C. Ricca** and **Lindsay Mesh Lotito** negotiated and closed a package of loans totaling \$8,270,000 for industrial properties in Newark and East Orange, New Jersey.

On behalf of an institutional lender, **Steven G. Gabler** and **Lindsay Mesh Lotito** negotiated and closed and \$11,000,000 acquisition mortgage loan secured by mixed-use buildings in New York, New York.

Lindsay Mesh Lotito negotiated and closed draws under a line of credit secured by industrial properties for: \$4,340,000 in Bay Shore, New York and \$7,085,000 in Chesapeake, Virginia.

James P. Rosenzweig negotiated and closed a \$2.5 million mortgage loan on behalf of firm client, First Development Corp., secured by the client's medical office building located in Smithtown, New York.



TAX CERTIORARI

Douglas W. Atkins, Robert L. Renda and **Julia J. Lee** handled a unique property tax matter, resulting in a firm client receiving a \$300,000 cash

refund for a medical facility in the Town of Smithtown. The case was unusually complicated because, while there was only one parcel of real property, it contained separate medical buildings running unrelated practices. Our attorneys were able to isolate the actual and imputed rental income from each building, and thus demonstrate that the entire parcel was severely overtaxed.

Nicole Forchelli resolved a property tax matter for a national cable television provider related to two properties in Upstate New York. She employed methodologies from both the leased fee and fee simple schools of thought, supported by the actual financial experience of the subject property. After extensive negotiations, Ms. Forchelli obtained a real estate tax benefit of more than \$350,000 for the client.



LAND USE & ZONING

Andrea Tsoukalas Curto obtained a conditional use permit and parking variance from the Town of North Hempstead Board of Zoning and Appeals for a new upscale restaurant on Mineola Avenue in Roslyn Heights. Ms. Curto established through expert testimony that the proposed valet parking and licenses secured for parking lots within the vicinity satisfied the parking demand for the restaurant and would create less congestion on residential streets in the area.

William F. Bonesso was successful in securing variance and special exception relief from the Town of Hempstead Board of Appeals for a new Pollo Campero restaurant on Sunrise Highway in Merrick. Mr. Bonesso worked with neighboring

property owners to address community concerns about the restaurant while providing the popular restaurant chain with its first drive-through operation on Long Island.



Kathleen Deegan Dickson obtained multi-jurisdictional approvals for a major hospital system to locate a new outpatient surgical center in Manhasset. She obtained variances from the Town of North Hempstead and site plan approval from the Village of North Hills.

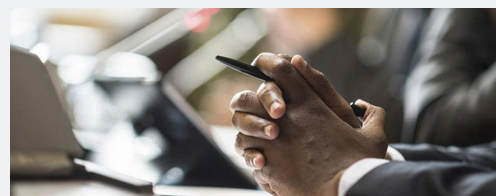
Andrea Tsoukalas Curto obtained approvals from the Town of North Hempstead Board of Zoning and Appeals for a cycling studio at a shopping center on Northern Blvd. in Manhasset. Ms. Curto established that the relief should be granted because the proposed studio's peak hours are in the morning when other uses at the center are closed.

Judy L. Simoncic and **Erik W. Snipas** recently represented Brookfield Properties in connection with its applications to the Town of Oyster Bay for the redevelopment of the 15.1-acre former Hooker Chemical/RUCO Polymers Superfund Site in Hicksville. The 207,237 square foot spec-warehouse required Site Plan Approval from the Planning Advisory Board and a variance to allow the future tenant to operate 24-hours a day, 7 days a week. Ms. Simoncic and Mr. Snipas worked closely with the client and its consultants to overcome the numerous environmental and zoning challenges on the site. As a result, the Planning Advisory Board adopted a Negative Declaration (no environmental significance) pursuant to the State Environmental Quality Review Act and granted Site Plan Approval. Additionally, they utilized acoustical studies to secure the variance by

proving that the 24/7 use of the facility would have no impact on the nearby residential properties.

William F. Bonesso has secured zoning approval for a new Wells Fargo bank branch in Huntington Station. The approvals obtained from the Huntington Zoning Board of Appeals will permit the complete redevelopment of a former diner site situated at the convergence of Walt Whitman Road and Old Walt Whitman Road. What was an eyesore and underutilized property will now be replaced with an in-demand use and a far more attractive piece of property on the Route 110 corridor.

Working closely with the Town of Babylon Planning Department and Boards, **Kathleen Deegan Dickson** received approvals to permit The Academy Charter School to establish a permanent elementary school in the Wyandanch Rising redevelopment zone, and also obtained a change of zone and site plan approval for the Alzheimer's Foundation of America to establish their Long Island headquarters in North Amityville. **Daniel P. Deegan, John P. Gordon** and **Louis H. Fiore** assisted The Academy Charter School with obtaining bond financing through the Town of Babylon's local development corporation to finance the construction of the school.

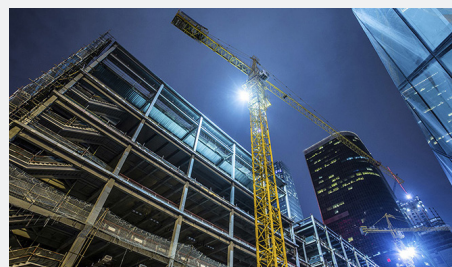


LITIGATION

In a successful appeal handled by **Richard A. Blumberg** and **Nathan R. Jones**, the Appellate Division, First Department reversed a Bronx County Supreme Court ruling that our client, Cablevision, failed to properly exercise its right to terminate a lease early, which could have resulted in a potential judgment against our client for more than \$2.5 million. On appeal, the Appellate Division disagreed, holding

that the Supreme Court's rationale and the landlord's arguments for why Cablevision failed to properly terminate the lease early were improper and contradicted by the terms of the lease.

Jacqueline A. Rappel and **Danielle E. Tricolla** were successful before Judge Schechter in the Commercial Division of New York County Supreme Court after a hearing on the fair value of our client's 50% interest in a boutique optical store in Manhattan. Our adversary and its expert took the position that the company was worthless because of its claimed "massive debt". Ms. Rappel was able to impeach the adversary's witnesses on cross-examination at the hearing, and was able to discredit their evidence to prove that the company's claimed "debt" was a sham. The judge – in a very detailed decision – adopted many of the arguments from Tricolla and Rappel's post-hearing brief, fully rejecting the argument that the company was valueless, and instead holding that the company is worth nearly \$300,000 and awarded our client judgment plus interest at 9% from the date the petition was filed.



CONSTRUCTION

After winning two, multi-day bench trials in Supreme Court, Suffolk County, for a contractor client, including obtaining several hundred thousand dollars in fees and other damages, and defending against claims totaling approximately \$1.5 million, **Joseph P. Asselta** and **David A. Loglisci** recently defeated a motion to dismiss a new lawsuit filed on behalf of the same client seeking to recover in excess of \$3 million in additional fees from the same defendant and a related

company. By arguing that New York's fraudulent conveyance statutes allows the recovery of fees under contracts that were diverted to the related company, the firm was able to persuade the court to deny the motion to dismiss.



Stephanie M. Alberts successfully represented a client in an application to establish a court-ordered supplemental needs trust for the benefit of the client's disabled child. This trust will permit the disabled child to continue to receive government benefits and the trust assets, which will consist of the disabled child's share of an estate, will be held and administered by the Trustee for the benefit of the disabled child.

Cheryl L. Katz and **Jacqueline A. Rappel** successfully represented an Executor of an Estate in defending against a proceeding commenced by an unsuccessful probate Objectant in the Appellate Division, Second Department, which sought a stay of the Executor's authority while the probate Decree's appeal is pending. The Appellate Division not only denied the Appellant's request for an immediate stay, but also denied her request for any stay whatsoever, enabling the Executor to proceed with the prudent administration of his father's estate without any delay. ■

FIRM MENTIONS

EVENTS & SPEAKING ENGAGEMENTS

LONG ISLAND BUSINESS NEWS FEATURED:

- **Cheryl L. Katz** in WHO's WHO in Women in Professional Services.

NEW YORK REAL ESTATE JOURNAL PUBLISHED:

- **Donald F. Leistman's** article, "Property tax turmoil - The coming of office building valuation apocalypse."
- **Bret L. McCabe's** byline, "Intended vs. Incidental Third-Party Beneficiary Status," in the Long Island Section.
- **Julia J. Lee's** article, "Understanding the 485-b Tax Exemption When Planning Commercial Construction or Improvements," in the Page 4 Column.
- **Bret L. McCabe's** featured spotlight "Ones to Watch Industry Leaders".
- **Lindsay Mesh Lotito's** article, "Cannabis and Lending" in the Long Island section.

NASSAU LAWYER PUBLISHED:

- In Brief p. 22:
 - Forchelli Deegan Terrana LLP Congratulates **Judy L. Simoncic**, one of the Most Dynamic Women Leaders on Long Island.
 - **Stephanie M. Alberts** election to the NCBA's Board of Directors.
 - LIBN's Real Estate, Architecture & Engineering Awards – Top Property Tax Assessment Firm, **Daniel P. Deegan** & **William F. Bonesso**.
 - Welcome, **Julia J. Lee**.

CANNABIS LAW JOURNAL PUBLISHED:

- **Lisa M. Casa's** article, "Cannabis in the Work Place"

LAW.COM PUBLISHED:

- **Peter B. Skelos** co-authored article, "The Benefits of Early Mediation, The Path Least Taken Requires Commitment". ■

FDT's Long Island General Counsel Network hosted a 90's-themed networking event at AriZona Beverages in Woodbury. The event was a huge client relations/ business development success! We had close to 50 General Counsel/ in-house attendees, including Zoom, Deloitte, CardWorks, Canon, Steve Madden, Nestle, Colgate-Palmolive and Hofstra University, just to name a few. Special guests included the cast of FRIENDS, The Dream Team, Spice Girls, Men in Black and Clueless.



Cheryl L. Katz was interviewed by Neil Himmelstein, President of the Main Street Planning Group, Inc. on 103.9 LI News Radio, where she discussed common estate planning and litigation issues, including fiduciary appointments, life insurance and Trusts.

John V. Terrana, Judy L. Simoncic, Donald F. Leistman, William F. Bonesso, Daniel S. Dornfeld and **Daniel P. Deegan** attended the International Council of Shopping Centers' (ICSC) Conference in Las Vegas. ICSC LAS VEGAS is a three-day gathering of dealmakers and industry experts, who are driving innovation and evolution in the Marketplaces Industry.



Danielle E. Tricolla was a panelist on HIA-LI's program "Emerging Industries Pt 1: Cannabis." FDT was a sponsor and **Brian W. Kennedy** attended.

FDT sponsored the Veterinary Medical Association on New York City's (VMA NYC) Big Apple Veterinary Mixer. **Mary E. Mongioi** and **David J. Borkon** attended the Mixer.



Andrea Tsoukalas Curto presented, "The Importance of Early-Stage Zoning Due Diligence When Purchasing or Leasing Commercial Property," at CIBS' Real Estate Roundtable. **Daniel S. Dornfeld** and **Julie Allegretti** also attended.

Mary E. Mongioi attended VetPartners's Mid-Year Meeting in Denver, CO. FDT was a Break Sponsor of the Meeting and provided co-branded water bottles to all attendees.

CONGRATULATORY HIGHLIGHTS

FDT was a major sponsor of *Long Island Business News'* Real Estate Architecture & Engineering Awards. **FDT** was honored in the following categories:

TOP PROPERTY TAX ASSESSMENT FIRM



TOP INDUSTRIAL PROJECT:

*Nassau, Meadowbrook Logistics Center,
Garden City*

Daniel P. Deegan & William F. Bonesso



Judy L. Simoncic was selected by *Long Island Business News* to be featured in the 2023 Long Island Business Influencers: Most Dynamic Women Leaders on Long Island issue. This elite group of women leaders was chosen exclusively by the Editor and Associate Publisher, and the editorial team, based on their achievements and standing in the business community.

On June 23, 2023, Wagner College dedicated the terrace at the Student Union as the “Forchelli Terrace” in honor of Paul B. ('69), Don Jr. and Jeffrey D. ('66) Forchelli.

Jeffrey D. Forchelli, Chairman and Co-Managing Partner was elected Chair of Wagner College's Board of Trustees in 2022.

He has also held the following positions:

- Trustee, 2006-15, 2020-present
- At-Large Member, Board Executive Committee, 2007-09
- Treasurer, Board of Trustees, 2009-13
- Vice Chair, Board of Trustees, 2014-15



Sadie and Jeff Forchelli



Paul B. Forchelli's Family



Jeffrey Forchelli and Don Forchelli Jr.

NOTABLE APPOINTMENTS

FDT CONGRATULATES EIGHT ATTORNEYS ON THEIR NASSAU COUNTY BAR ASSOCIATION COMMITTEE APPOINTMENTS



Gerard R. Luckman
Partner
Chair of the Bankruptcy Committee



Danielle B. Gatto
Partner
Co-Chair of the Commercial Litigation Committee



Robert L. Renda
Partner
Vice Chair of the Condemnation Law and Tax Certiorari Committee



Lisa M. Casa
Partner
Vice Chair of the Labor and Employment Law Committee



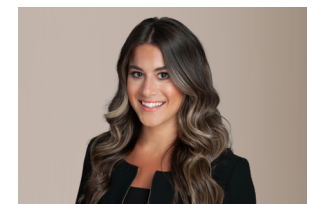
Gregory S. Lisi
Partner
Chair of the Lawyer Referral and the Nominating Committees



Erik W. Snipas
Partner
Vice Chair of the Municipal Law and Land Use Committee



Michael A. Berger
Associate
Co-Chair of the New Lawyers Committee



Cheryl L. Katz
Partner
Vice Chair of the Surrogate's Court Estates and Trusts Committee

FDT DIVERSITY FELLOWSHIP PROGRAM

Throughout the years, the Firm has actively recruited qualified candidates with diverse backgrounds and perspectives to foster an inclusive workplace and better serve our clients. Each Fellowship recipient served as a paid legal clerk at the firm, and received an academic scholarship to be applied toward their law school tuition for the academic year. This summer we had the pleasure of selecting two recipients, Camila Morcos and Josephine Pinnock. They were excited to share their experience at the firm.

"In this dynamic setting, I was able to gain hands-on experience in various legal facets such as attending depositions, creating a secured line of credit promissory note, and researching the impact of a recent Supreme Court decision on current New York statutes, to name a few."

- **Camila Morcos**



"Every attorney's door is always open, and they welcomed interns to discuss assignments, but also to discuss general professional development in the field. It is clear they are invested in my growth as a law student and future attorney. Forchelli Deegan Terrana is truly exceptional place to work, learn, and grow."

- **Josephine Pinnock**

If you know someone who would be fit for our program, please click [here](#) to visit our wesbsite. Information on summer 2024 internships will be posted in November.