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Beware Of The Barter: A Cautionary Tale

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A recent ruling by Tennessee's top court sends a strong message: be leery of waiving traditional forms of payment in favor of accepting goods or services. In *TWB Architects, Inc. v. The Braxton, LLC*, et al., an architecture firm and a cash-strapped developer executed an agreement for the architect to receive a penthouse condominium instead of his design fee. When the developer could not deliver a deed for the condominium, the architecture firm sued the developer for its fees.

So far, the ensuing litigation has lasted over 10 years and, most recently, resulted in an opinion by the Supreme Court of Tennessee that reversed summary judgment in favor of the architect and remanded the matter back to the trial court for still more proceedings.

The parties originally entered in a standard Architect Agreement, whereby the plaintiff, TWB Architects, was to be paid for its design services based on two percent of the construction costs for the project. After failing to obtain sufficient financing for the project, the defendant, The Braxton, informed TWB that it could not pay the design fees and suggested TWB accept a condominium in the project as payment instead. TWB agreed, and the parties executed the Condominium Agreement.

Thereafter, TWB's owner acted as though he owned the condominium contemplated in the deal, which just so happened to be a penthouse. He invested nearly $40,000 in upgrades and repeatedly referred to the penthouse as "his penthouse." In December 2008, he moved into the

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penthouse and represented himself as its owner.

However, shortly thereafter, issues arose with Braxton's ability to deed the condominium to TWB's owner. At that point, TWB decided to change course. It claimed that it was still entitled to the original design fee under the Architect Agreement and filed a mechanic's lien for the unpaid fees. Braxton claimed the Condominium Agreement had acted as a novation, nullifying the Architect Agreement and, accordingly, TWB's ability to collect its fee thereunder.

The trial court granted summary judgment in favor of TWB, holding it could still recover its design fees because there was insufficient evidence that the parties intended a novation by substituting the Architect Agreement for the Condominium Agreement. The court of appeals affirmed, but the Tennessee Supreme Court reversed. The Supreme Court found that summary judgment was improperly granted because disputed questions of material fact existed about whether TWB and Braxton intended a novation when they executed the condominium agreement.

Unless the parties can settle the matter, the case will now require a trial to determine whether TWB can recover its fees. It's unknown whether TWB's owner is still living in the penthouse.

This case is a great example of how a tempting barter – like accepting a penthouse from a cash-strapped developer – may sound like a nice solution at the time, but can lead to further headaches and protracted litigation.