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Construction Contract's Funding Provision Lets Owner Off Hook for \$13 Million in Contractors' Costs

Announced in July 2004, the luxury 34-floor Granby Tower condominium was to be Norfolk's tallest building and the second-tallest building in the Commonwealth. Now all that remains of the \$180.5 million project is an empty hole at the corner of Granby Street and Brambleton Avenue – and, due to a recent decision from the Norfolk Circuit Court – emptier pockets for some of the project's contractors.

In an August 14, 2009 letter opinion, Judge Everett A. Martin, Jr. ruled that project owner 515 Granby, LLC (the "Owner") does not have to pay for more than \$13 million in project-related work performed by general contractor Turner Construction Company ("Turner") and four subcontractors.

Construction on the project began in July 2007 and ground to a halt only two months later after the Owner failed to obtain financing. Turner and four subcontractors filed complaints and mechanic's lien actions in Norfolk Circuit Court seeking payment for work and materials (these five cases were later consolidated). In response to Turner's suit, the Owner filed a plea in bar in which it alleged that it had no liability to Turner under their contract. Specifically, the Owner cited the provision in the contract that provided that it had "no obligation or liability to [Turner] for any costs for the Construction Phase" in the event that the Owner could not obtain funding for the project. Turner argued that the Owner had waived this defense under the contract or was estopped from relying on it because the Owner had issued a notice to proceed, directed that the work be continued, and approved payment applications.

Nevertheless, Judge Martin sustained the Owner's plea in bar, directed that it be dismissed from all five pending lawsuits, and ordered that the mechanic's liens be released. While he recognized that his decision might "cause serious hardship to some subcontractors and materialmen" on the project, he reasoned that his duty was to "construe the contract as written and not to produce a result some might find fair or just." Notably, Judge Martin determined that the Owner had never represented that its construction loan had been funded

and that Turner knew that the project could not be financed unless the Owner received a loan. He further noted that Turner failed to exercise its right under the contract to demand evidence that financial arrangements had been made to fulfill the Owner's contractual obligations.

The Norfolk Circuit Court cases are *W. O. Grubb Steel Erection, Inc. v. 515 Granby, LLC, et al.* (Case No. CL08-3278); *Atlantic Metrocast, Inc. v. 515 Granby, LLC, et al.* (Case No. CL08-3816); *International Construction Equipment, Inc., et al. v. 515 Granby, LLC, et al.* (Case No. CL08-4280); *Turner Construction Company v. 515 Granby, LLC, et al.* (Case No. CL08-5050); and *Clayton B. Obersheimer, Inc. v. 515 Granby, LLC, et al.* (CL08-7529).



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