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## Despite delay, insurer may be on the hook

### Judge refuses to dismiss lawsuit over coverage, lost historic tax credits

By KRISTI TOUSIGNANT

A developer's fight over some \$625,000 in lost historic tax credits for an award-winning Mount Vernon redevelopment has survived a challenge in U.S. District Court.

The case involves a dispute over insurance coverage for an omission that caused the McDowell Building, at 339-341 N. Charles St., to miss out on historic tax credits from the state.

Judge Richard D. Bennett denied Zurich American Insurance Co.'s motion to dismiss the case Tuesday, rejecting the argument that its policy-holder had waited too long — several years, in fact — before telling Zurich about the claim.

"I think Judge Bennett got it totally right," said McDowell Building LLC's attorney, Martin H. Schreiber II. "Unless you prove prejudice, you are not allowed to decline coverage here."

DR Brasher Inc., the architecture and design firm that converted the four-story retail building into 12 apartments, failed to file for the state historic tax credits in 2004, the suit alleges.

Brasher was covered by architect and engineers professional liability insurance policies from Zurich. However, when a partner at McDowell sued the architecture firm, Brasher did not notify its insurance company for more than three years, and Zurich denied coverage on that ground.

"When things got a little dodgy, they said 'we are not going to cover you,'" Schreiber said. "The insurance company had a completely free ride in this case."

Zurich's attorney, Kelly M. Lippincott of Carr Maloney PC in Washington, D.C. did not return a call for comment.

As part of a settlement agreement last year between McDowell and Brasher, McDowell took over Brasher's rights against the insurance company.

This week's ruling means the case can proceed.

#### Missing application

Brasher's work on the McDowell Building earned the Adaptive Reuse and Compatible Design Award in 2010 from Baltimore Heritage, which cited the faithful recreation of the building's two entrances and original millwork as well as the preservation of its leaded-glass transoms.

The contract also called for Brasher to apply for federal and state historic tax credits, according to the lawsuit.

"That's the only way these historic renovations are financially feasible," Schreiber said.

Both applications were supposed to be filed with the Maryland Historical Trust, the complaint says.

However, it was discovered in September 2004 that the historical trust had only received an application for federal tax credits. The historical trust told McDowell and Brasher that it was too late to apply for the state tax credit, which McDowell claims is worth \$625,000.

McDowell then launched a series of lawsuits. The developer first sought declaratory judgment to compel the his-

torical trust to accept the state application. One of McDowell's members, Frank Zokaites, also filed a complaint against Brasher in June 2006.

The Baltimore City Circuit Court stayed Zokaites' lawsuit while it decided McDowell's case against the historical trust. In September 2010, it ruled against McDowell in its suit against the trust.

Zokaites' case against Brasher could then proceed. In June 2012, the parties settled for \$625,000; however, the agreement allows Brasher to pay a total of \$250,000 over a 10-year period, and assign McDowell the rights to its claims against Zurich.

McDowell filed a breach of contract lawsuit against Zurich in Baltimore City Circuit Court in August 2012, seeking \$625,000 plus interest and attorney's fees. The lawsuit also alleged that Zurich breached its duty to defend Brasher, with damages in excess of \$25,000. The case was removed to U.S. District Court in Baltimore in September 2012.

Zurich filed its motion to dismiss, saying Brasher had not notified it of Zokaites' complaint until November 2009. It argued that the requirement of proving prejudice from the delay did not apply in this case.

Bennett denied the motion on Tuesday, allowing the case to move forward.

The judge noted that the Maryland Court of Appeals held in 1997 that notice requirements are not conditions precedent (which must be fulfilled before the insurer would have any duty) but a promise or covenant between the two parties. As a result, Zurich can deny coverage based on the lack of notice only if it can show it was prejudiced by the delay, Bennett concluded.