

When Is A Contract Not A Contract

By Bradley S. Dornish, Esq.

Sometimes, the cases I find myself going to court on deal with issues which would be of great interest to real estate investors. That is the situation with a case I argued before the Pennsylvania Superior Court on March 19, 2008. In my case, a bank was the seller of property, and my client, a real estate investor, made an offer on the property. The offer was fully executed, and was sent to the bank through the bank's listing broker. The selling agent for the investor received a phone call back from the listing agent advising that the bank had signed the Agreement of Sale, and on that basis, the hand money was deposited and the parties moved forward. The listing agent subsequently advised that the bank was the agent for an incapacitated seller and as a guardian, had to have the final Agreement approved by the Court. However, they considered Court approval to be a mere formality, since the offering price on the two parcels involved was way above the assessed market values of the properties, and virtually the price at which the properties were listed by the listing agent.

The offer was made in March and closing was to occur after court approval in May. The court approval in May was postponed, when some third party represented that there would be another offer coming in for more money than the original agreement. At the time the contract was scheduled to be approved by the court again in June, the bank had sent a Release of Agreement of Sale to my client buyer, which was already signed by a Vice President of the bank and which indicated that they were releasing an Agreement of Sale dated May 8.

While the date on the release indicated a contract date almost two months after the date of the offer, that didn't appear to be too unusual to those who are familiar with bank transactions. My client refused to sign the release, but the court approved a higher offer which came in June and the property was thereafter sold to the person who made the higher offer. In the meantime, my client had a loss since the opportunity to make a profit on the property was taken away after we were at least led to believe there was a fully executed Agreement of Sale. We filed suit, attached a copy of the offer to the Complaint to prove the terms of the Agreement of Sale, and attached a copy of the Release of Agreement of Sale including the May 8 contract date, to show the court that we had lots of evidence of the existence of a

signed written contract. Unfortunately, the Judge of the Court of Common Pleas ruled that since we did not have a fully signed contract with the signature of bank Vice President on the contract, we had no enforceable Agreement of Sale, and therefore no basis upon which to sue anyone. The Judge's position was based upon the Pennsylvania Statute of Frauds which provides that all contracts for the sale of real property in Pennsylvania must be in writing. The trial court's position also reflected that the contract could not have been final without the approval of the Orphan's Court on behalf of the incompetent party.

Although the guardianship was a small factor in this decision, it is the other rationale in the trial court's opinion which I find so disconcerting. The trial court granted Preliminary Objections after the Complaint was filed, and did not even require the bank to file an Answer. That meant that my client had no opportunity to develop through discovery, (things like interrogatories, depositions and requests for production of documents), information which would have supported the existence of a contract. Based on the Judge's rationale, since we didn't have a fully executed written agreement in the beginning, we could not use the procedures available in court to show whether that contract really existed.

When the Judge threw us out on Preliminary Objections, we appealed to the Superior Court, and I made my argument to three Appellate Judges. However, I think there is more than a fifty percent chance that I will lose the case in front of the three judges. They were simply concerned that without a fully executed agreement I couldn't even draft a Complaint that would allow me to engage in discovery. That would mean that my client would be completely out of luck, and we would never know if the bank had the fully executed Agreement of Sale or not.

I see the decision by the Common Pleas Judge and a possible decision by the Superior Court against me as being red flags for all real estate investors dealing with REO Companies. For too long, investors, real estate agents and brokers have tolerated the practice of the REO Companies and banks where they simply tell us they have executed an Agreement of Sale and do not send a fully executed copy of the agreement back. We as investors should insist that no hand money be deposited until we see a signed copy of the Agreement of Sale. Real estate brokers and agents should insist upon the same thing. There is no reason that everyone should not be held to the same standards when dealing with Agreements of Sale in Pennsylvania. The fact that REO Companies and banks in general have been able to avoid

producing fully executed Agreements of Sale and are still able to enforce the transactions against the buyers of real estate creates a tremendous injustice, as illustrated by the case which I just argued.

If we had a fully executed Agreement of Sale and my client and his agent had been given a copy of that agreement at the time the agreement was entered, we would not have spent all of this time in court, and we would have been able to focus on issues as to who should be responsible to my client under that agreement, and for what sum of money, instead of whether my client even had any opportunity whatsoever to get into court. Whether we ultimately win or lose this case, it is a warning to everyone who purchases real estate in Pennsylvania to make sure that you do not act upon a contract or move forward upon an oral representation that a contract has been signed. Instead, all buyers should insist upon a copy of a fully executed agreement by the seller at the commencement of the contract, and none of us should wait until the day of closing to find out if we have a contract.

(Created March 2008)