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BOILERPLATE CONTRACT LANGUAGE MAY GET YOU IN HOT WATER

PREPRINTED FORMS DO NOT ALWAYS REFLECT CLIENTS' INTENTIONS OR CLARIFY PARTIES' RIGHTS

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"THE DEVIL is in the details" is both an apt description and a warning for busy practitioners. In today's world of preprinted forms and word processor documents it is easy to gloss over the details of the transaction and rely upon a preprinted form. However, by relying upon the preprinted language of form contracts, escrow agreements and other "boilerplate" documents or by not clearly reflecting your client's intentions in the document itself, a client may not be afforded the best legal position.

Sometimes a standard legal document does not contemplate all aspects of a client's transaction, or more often, does not sufficiently clarify each party's rights and positions relative to the transaction. Equally important is the ever present need for clear drafting which will avoid future questions concerning the intentions of the parties to the instrument. Although all parties may walk away from a conversation feeling as though they are in agreement, it is the written document evidencing these agreements that will control when a dispute arises requiring a court to determine the meaning and intention of the parties.

Plain Meaning

One glaring example of where standard language in a contract could cause major problems for a client is contained in Stathakis v. Poon, 2002 N.Y. Slip Op. 05220 (2d Dept., June 17, 2002). The facts are as follows: Poon, as the seller of a five-lot piece of property, of which one lot was improved by a one-family dwelling, entered into a contract to sell the property to Stathakis, the buyer, for a price of $470,000. The buyer deposited into escrow $47,000, which was held by Poon's attorney.

The preprinted portion of the standard sale contract provided that the property was being conveyed subject to, among other things, "[u]tilities agreement, easements, covenants, reverters, restriction and consents if any, of record, insofar as the same may now be in force and/or effect provided the same [i]s not violated by existing structures, or present use." The contract also contained the standard language that the buyer would accept "such title as a reputable New York State Title Company was willing to approve and insure with a standard form of title policy ...."

Upon receiving the title report for the subject property the buyer learned that part of the unimproved land lay in the bed of a mapped, but unopened street. Accordingly, since the title company was unwilling to insure the portion of the property, which was subject to an unopened street, the purchaser asked for a return of the escrow deposit contending that title was unmarketable.

The seller refused to return the deposit contending that the terms of the contract provided that the unopened street did not violate the current use of the property, as specified in the contract. Purchaser commenced an action to recover the deposit

from Seller and was unsuccessful in the lower court and appealed to the Appellate Division.

The appellate court confirmed the lower court's decision citing Slamow v. Del Col, 174 A.D.2d 725 (2d Dept. 1991) aff'd 79 NY2d 1016 (1992). In Slamow the standard real estate sale contract provided that the purchasers would seek a written commitment from an institutional lender "of not less than $201,375". When the purchaser applied for a mortgage loan in the amount of $241,650, and was subsequently rejected, the seller claimed that the buyer had breached the contract by applying for a mortgage loan that was "$40,000 more than was required under the contingency clause." Although the lower Supreme Court agreed with the seller, both the Appellate Division and the Court of Appeals disagreed and found for the purchaser.

The Court of Appeals in its ruling in Slamow stated that the seller's contention that the buyer was really meant to apply for a mortgage loan "not to exceed $201,375" was "contrary to the plain words of the contract ... that there could be no doubt that if defendant had intended a more specific meaning for the terms used, then the burden was upon [the seller] ...." Perhaps the most strenuous reasons for the Court's decision came in the dicta wherein the Court stated "[that this may be a standard clause in a form for the sale of real property suggests even more strongly that the clause should be rewritten if it is indeed inaccurate, rather than for this Court to speculate as to what the parties to a particular transaction could have believed it meant." The Court in Slamow was unwilling to rewrite the contract to what was more likely both parties' intention: a mortgage contingency for an amount not to exceed $201,375.

Additionally the appellate court in Stathakis relied on Laba v. Carey, 29 NY2d 302 (1971) for many of the same reasons cited in the Slamow ruling. The court reasoned in deciding against the respondents that they must give words and phrases their plain meaning and not divine the parties' intent, nor construct new contracts. To hold that a title is unmarketable because a title company is excepting from coverage a matter that was agreed to be taken subject to by the purchaser would "give every purchaser dissatisfied with his bargain a way of avoiding his contractual responsibilities."

The fact that the seller in Stathakis was required to provide property that a reputable title company would insure was modified by the statement that such title was subject to certain items of record, of which the unopened street was one. The court upheld the literal terms of the contract and refused the buyer's request to have the deposit returned.

Another recent case illustrating the careful use of wording in contracts and escrow agreements is Lee v. Manson, June, 12, 2002, N.Y.L.J. 24, (col. 5). In Lee the defendant/sellers Worobow entered into an "as is" contract for the sale of defendants/sellers' real property located in Manhassett, N.Y., to plaintiff Lee. The contract provided for a closing date of Sept. 28, 2001. A "use and occupancy" agreement permitted the seller to remain in possession until Oct. 2, 2001. For each day thereafter, the agreement provided that a $500 daily rental was to be paid from a $5,000 escrow deposited by Worobow and held by defendant Manson for the sole purpose of paying the daily rental. The seller also agreed to make all necessary repairs and maintain the premises in good working order. After the sellers vacated the premises, defendant Manson released the $5,000 escrow to Worobow, despite the plaintiff's claim to the escrow due to the discovery of what appeared to be an inoperable heating system.

In cross motions, the court ruled that there was an issue of fact whether the heating system was operable at the time title was transferred to the buyer, and whether the possession agreement extended the time until the buyers took possession, and thus denied seller's motion for summary judgment on these issues. The court, in granting defendant Manson's motion to dismiss the case against him, relying upon National Union Fire Ins. Co. of Pittsburgh, Pa. v. Proskauer, Rose, Goetz & Mendelsohn, 165 Misc.2d 539 (Sup. Ct. N.Y. County 1994) held that an escrow agent must strictly follow the requirements of the escrow agreement.

In the instant matter, it was clear to the court that the $5,000 escrow was strictly for security in the event that Worobow maintained possession of the property beyond the stated day of Oct. 2. Since there was no question of fact that Worobow vacated the premises in a timely fashion and the escrow was strictly to cover the cost of the Worobows' continued possession of the premises, the court granted Manson's motion.

Granting Language

Another case evidencing a problem in the careful draftsmanship of documents is Steven A. Stasack et al. v. Lisa Dooley, 739 NYS2d 478 (3d Dept. 2002). In Stasack, the court was forced to interpret the following grant of an easement contained in adjoining owners' deeds, as well as the validity of the description contained in the instrument. Concerning the first issue, the following language was contained in both deed chains from a common grantor:

together with the right to use the private beach located on said Long Pond and owned by the parties of the first part for swimming and bathing privileges in common with other owners of beach privileges.

Plaintiff claims that the defendants did not have the benefit of an easement for beach access and use granted in their deed. The plaintiffs contend in their pleadings that the easement grant did not contain granting words such as: "grant and release" or "successors and assigns," thus limiting the easement grant to that of a license, which is alienable to successor interests.

Since the easement did not contain successor language the easement became a license subject to termination by plaintiff. The court in reviewing the easement language disagreed with plaintiff, indicating that the presence of the subject language or language of a similar nature is not dispositive of whether or not the beach rights were transferred in successor deeds. The court went on further to say that in the absence of any qualifying language limiting the alienability of the beach rights, it was clear that the grantor's intention was in fact to create an easement to run with the land.

Concerning the second issue regarding the description of the easement area, the court in Stasack, further held that the lack of a description of the location of the easement was also not dispositive as to whether or not an easement existed. In Stasack the easement area was described as "Private beach rights located on said Long Pond." The Stasack court opined that only a reasonable description of the property encumbered by the easement is necessary in the instrument. The court, relying upon Clements v. Schultz, 200 AD2d 11, 14, 612 NYS2d 726 (4th Dept. 1994) stated that the instrument only "reasonably describe the property where the easement exists ... the fact that it fails to give the precise location does not preclude a finding that an easement was intended." Thus, the mere mention of Long Pond satisfied these requirements.

Effect of Binder

It is also advisable to avoid "boiler-plate" language even when the parties have not fully agreed to the terms of a transaction. Parties who have seemingly negotiated the terms of a transaction will often utilize a Binder to memorialize the understanding. Whether or not this Binder rises to the level of a contract or is merely an "agreement to agree" is dependent upon its contents.

In Terrusa v. Bonomo & Sons Construction Corp., July 24, 2002, N.Y.L.J. 22, (col. 1), the parties entered into a Binder that identified, among other things, the parties, property, purchase price and the terms of payment. The Binder further provided that the agreement was "subject to attorneys review" and "approval on

easement by-laws." Although the Binder provided for a date upon which a contract was to be signed, it further provided the following language:

It is further understood that these terms and conditions will be incorporated into a contract of sale to be prepared by attorneys for seller and purchaser. Parties agree this is not a contract or memorandum thereof.

For reasons that are immaterial to the discussion, the Plaintiff/Buyers refused to sign the contract offered to them by the Defendant/Seller even though it substantially reflected the intentions of the parties as evidenced by the Binder. Thereafter the defendant advised the plaintiff that its offer to purchase was rejected. Plaintiff commenced the instant action seeking to compel the defendant to convey the subject property to them. Additionally, the plaintiff filed a Notice of Pendency to protect its interest in the subject property.

The defendant, in its summary judgment motion, argued that the Binder was merely an "agreement to agree" and therefore unenforceable under the Statute of Frauds, General Obligations Law 5-703[2]; and that the Binder failed to contain all the "material terms and conditions of sale." The court ruled that in addition to stating the parties and essential terms, a valid contract is only formed where there is a meeting of the minds. Additionally, it must be unconditional and unqualified in order to rise to the level of an enforceable contract. While the court does not opine as to whether the Binder contained all the valid terms of an enforceable contract, which at first blush it appears it does, it made its rulings on whether there was a clear meeting of the minds.

Significant to the court in reaching its ruling was that the parties had specifically agreed that the Binder was "not a contract or memorandum thereof" and was subject to several conditions, including attorney review and acceptance of certain by-laws. Additionally, and perhaps equally as fatal to the plaintiff's cause of action was that the Binder provided that a more formal contract was to be prepared and accepted by a certain date, which condition was also unfulfilled.

Accordingly, although the Binder appears to contain all the terms necessary to form a contract under the Statute of Frauds, it is the modifying language that controlled the document. Where parties specifically agree that their intention is other than the formation of a binding contract it appears that courts are unwilling to find otherwise. While the parties to Terrusa may have used a boilerplate Binder agreement containing all the terms necessary to form a valid contract, it was their lack of mutual agreement that was the potential contract's undoing.

In conclusion, the first two cases are examples of errors that could have been avoided with proper attention to the clients' intentions and less reliance on preprinted forms or instruments. The court was fortunate in those matters to be able to use the parties to determine the intent of the documents. In the third example, many years had passed allowing the court only the instrument itself to determine its intent. Finally, the last example is evidence of how careful drafting enabled the court to interpret the clear intentions of the parties. These cases, and cases like them, are examples of why care must be taken when drafting and reviewing a document. In each case, the party's agreements were questioned, resulting in a determination by the court of the parties intentions. These cases are perfect examples of how parties can seemingly do and say all the right things, yet not have a meeting of the minds.

As an aside, the Residential Binder Agreement is a document that clients should be wary to sign without first consulting an attorney. Too often, though, the binder is a device used to forestall the intervention of competent counsel, leaving the client with terms he or she may later be unhappy with.

Lastly, Black's Law Dictionary (7th ed. 199) defines "boilerplate" as "Ready-made or all purpose language that will fit in a variety of documents." In many cases this familiar language provides an almost hypnotic calm to permeate the review of a document. Asking if the boilerplate language clearly represents a client's intentions is the key to deciding when its use is justified.

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