

REAL ESTATE NEWS

A Service to Real Estate Professionals



A Note From The Editor:

This bulletin addresses recent developments affecting the real estate community in New Jersey.

The Firm's Real Estate practice, headed by Edward S. Nagorsky, Esq., along with Kevin Hahn, Esq., Michael Selvaggi, Esq., John Abromitis, Esq., James Moscaguri, Esq. And Marysol Rosado Thomas, Esq. is one of the largest in Northwest New Jersey, both in residential and commercial matters. Please feel free to contact our Hackettstown office should you find yourself in need of competent legal assistance.

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When A Commitment Is Not " Firm"

Recently, the New Jersey Appellate Division addressed the right of a prospective Buyer to terminate a Contract based upon a failure of the mortgage contingency clause. In Davis v. Strazza, et. al., the parties entered into a Contract in which the Contract contained the following standard mortgage contingency clause:

[T]his agreement is contingent upon the purchaser obtaining a conventional mortgage at a prevailing rate of interest for 30 years with monthly payments based upon a 30 year payment schedule. If a written mortgage commitment is not received within thirty (30) days, or any agreed upon extensions, either party may cancel this contract.

The Buyers made a deposit of \$25,000.00 to be held in the trust account of the Seller's attorney until closing of title. In addition, the Contract provided that if it were "legally and rightfully" cancelled, the deposit would be returned to the Buyers and there would be no further liability on the part of either party.

The Buyers applied for mortgage financing in the normal course and a written mortgage commitment was

issued by a Lender. The first page of the commitment stated that the loan would be funded if the Buyers met all of the terms and conditions of the commitment and any attached riders. Attached to the commitment was a rider that included a requirement that the Buyers verify the funds available for closing and provide a HUD-1 or an equivalent closing statement respecting the sale of any property that was the source of such funds. The Buyers owned two pieces of property in New Jersey, the sale of which were necessary to provide funds for closing. Within the time period permitted to obtain a mortgage, the Buyers' attorney provided a copy of the first page of the mortgage of commitment to the Sellers' attorney.

Prior to closing, the mortgage company sent a letter canceling the mortgage commitment because the bank account balances could not be verified, the properties required to be sold had not been sold and the Buyers had insufficient assets available for closing. The Buyers then advised the Seller that the mortgage application had been denied and that they wished to terminate the Contract. The Seller refused to consent to the termination and retained the deposit monies. Ultimately, the Buyers filed suit against the Seller for breach of Contract, negligent misrepresentation and fraud.

The Appellate Court, citing two earlier

Court decisions, held that the deposit monies had to be returned. The two cases which the Court relied upon, *Farrell v. Janik* and *McKenna v. Rosen*, contained language that was similar to the *Davis* case, however, those mortgage contingency clauses required the Buyer to obtain a "firm written commitment". The *Davis* contract language did not use the term "firm commitment", rather, it merely required the obtaining of a written mortgage commitment. The Court, however, found that the different language would have no bearing on the intent of the clause or the ability of a Buyer to cancel in the event that a firm mortgage commitment was not obtained. The Court noted that a mortgage contingency clause "informs the sellers in clear and unmistakable language that the buyers do not possess sufficient funds to consummate the purchase without a loan". What the buyers wanted and needed was a loan that was subject to no conditions, or only to conditions that were within their sole control. If a mortgage commitment includes conditions over which the borrowers have no control, the commitment is less than "firm". If the fulfillment of the contingency is not within the sole control of the buyer, the language of the contingent commitment should be interpreted to relieve them of the obligation to close. Even though the *Davis* contract did not require a "firm commitment", the Appellate Division applied the same principals to that transaction. As the earlier cases made clear, because fulfillment of the property sale condition was not within the sole power of the Buyers, the mortgage commitment was not firm and did not satisfy the Contract's mortgage contingency clause. Under those circumstances, the Buyers were not obligated to perform and had the right to cancel the Contract. The only question that the Court needed to address was whether the Buyers made good faith efforts to satisfy the terms of the mortgage commitment. In this case, the

commitment. In this case, the facts clearly demonstrated that the Buyers had done so.

This case is important because of the distinction (or lack thereof) of a "written firm mortgage commitment" as opposed merely to a "written mortgage commitment". The Court ruled that the inclusion of the word "firm" would have no effect on the ability of a purchaser to terminate the Contract, so long as the conditions of the commitment are not within the sole control of the borrower, and the borrower made good faith efforts to satisfy the mortgage conditions. A failure to satisfy the conditions would entitle the Buyers to terminate the Contract and receive a return of any deposit monies.



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