

REAL ESTATE NEWS

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Courter, Kobert & Cohen, P.C.

Specific Performance: Alive and Well

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., Howard A. Vex, Esq., James Moscagiuri, 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.

On November 21, 2005, the Appellate Division of the Superior Court of New Jersey confirmed that the equitable remedy of "specific performance" can be ordered even where the party seeking said relief failed to comply with all of the technical requirements of the sales contract. *Albanese v. Grant*, 2005 WL 3092805, (App. Div. Nov. 21, 2005). In *Albanese v. Grant*, Albanese successfully obtained a court order requiring "specific performance" by Grant under their real estate sales contract. Grant was ordered to accept Albanese's exercise of a contract option to purchase a second lot from Grant. Grant vigorously opposed entry of that order and appealed. Grant argued that the contract contained a written notice requirement and specific time limitations for obtaining subdivision approval to create the second lot and to exercise the purchase option, both of which Albanese had clearly failed to meet. Nevertheless, the Superior Court and Appeals Court both concluded that the interest of equity justified the entry of an order requiring specific performance on the sale of the second lot. Grant, they concluded, knowingly and voluntarily waived his right to terminate.

The underlying facts were as follows: On July 10, 2002, Albanese

and Grant entered into a contract for the sale of real estate by Grant to Albanese. Notably, the sales contract included purchase option language giving Albanese the right of first refusal to purchase a second lot which would result upon approval of a proposed subdivision of Grant's property. The purchase option on the second lot was expressly made contingent upon the receipt of subdivision approval within 150 days and written notice from Albanese of his desire to exercise the option. Subdivision approval was not obtained within 150 days, but was delayed because Grant was found to be in significant arrears on his taxes, a fact not previously disclosed to Albanese. Furthermore, long after the expiration of the subdivision approval deadline, Grant continued to engage in conduct which reasonably led Albanese to believe that the subdivision application and sale of the second lot was continuing to move forward. For example, the attorneys for both parties continued to work together to obtain financing for the tax arrearages, with the purpose of obtaining the required subdivision approval.

Despite Grant's overt actions, after the subdivision was ultimately approved, Grant refused to move forward with Albanese's request to exercise the purchase option. Albanese, thereafter, brought suit seeking, among other things, a Court Order requiring specific

performance on the purchase option. The Superior Court granted the requested remedy, concluding that the technical non-compliance with the written notice requirement and time deadline were not conclusive, as “it appeared from the evidence and conduct of the parties that they ... in reality waived by their own conduct that defense which they now urged as a barrier to recovery in the case.”

Clearly, all persons involved in real estate transactions should always conduct themselves with the utmost care and with an eye towards full compliance with the specific requirements in the sales contract. Yet, as witnessed by *Albanese and Grant*, the conduct of the parties and their agents can result in the waiver of express contractual rights. The New Jersey Courts have repeatedly held that a sales contract “must be interpreted considering the surrounding circumstances and relationships of the parties, at the time it was entered into, to understand their intent and to give effect to the nature of the agreement as expressed on the written page. Thus, in the *Albanese v. Grant* case, although Albanese did not meet all the technical prerequisites for exercising the purchase option, because Grant clearly knew Albanese wished to exercise the option and continued to work with Albanese long after the 150 day deadline, the Courts both held that ordering specific performance constituted a fair interpretation of the parties’ intent under the sales contract. The Appeals Court concluded that “common sense shows that the contract provision was intended to insure that Grant had notice that Albanese wished to exercise the option, and the record reflects sufficient, creditable evidence that Grant knew Albanese wished to exercise the option.” Accordingly, the Appellate Division upheld the Superior Court’s grant of specific performance and rejected Grant’s defense, which had been based upon Albanese’s

technical failure to meet some of the prerequisites set forth in the contract. The equitable remedy of specific performance is clearly alive and well.

NEW RESIDENTIAL FIRE EXTINGUISHER REQUIREMENT

Effective November 1, 2005, a residential dwelling, not used for seasonal rental purposes, and not containing more than two households, is required to have at least one portable fire extinguisher. A portable fire extinguisher is defined as “an operable portable device, carried and operated by hand, containing an extinguishing agent that can be expelled under pressure for the purposes of suppressing or extinguishing a fire.” This fire extinguisher must not only be rated for residential usage, but also must be mounted no more than 10 feet from the dwelling’s kitchen.

Like similar provisions requiring the installation of smoke detectors, this requirement shall be enforced upon a change in ownership. A violation of this mandate carries a fine of \$100.

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