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Seller Not Required To Sign Title Affidavit

Document Was Only For Buyer's Benefit

BY JOHN O. CUNNINGHAM

A seller of residential property could not be forced to execute a title affidavit at a real-estate closing that would have indemnified the buyers against title defects, a Superior Court judge has ruled.

The buyers argued that the seller's failure to execute the affidavit of title was contrary to common practice and a breach of implied contract, entitling them to a judgment for specific performance and damages under Chapter 93A.

But in a jury-waived trial, Judge Charles M. Grabau disagreed and ordered a judgment for the defendant seller.

"There is nothing implicit in the purchase and sale agreement at issue ... that required the seller to execute any loan documents as a condition for the buyers to obtain financing," wrote the judge.

Grabau added that since the seller had not breached any legal obligation, he was entitled to keep the buyer's security deposit.

The nine-page decision is *Teague, et al. v. Bisceglia*, Lawyers Weekly No. 12-023-05.

No Implied Obligation

Robert R. Berluti of Boston, coun-

Boston attorney Robert R. Berluti, who represented the seller, suggested that in light of this decision, buyers' lawyers may want to insure that purchase agreements have some provision for specific documents the seller needs to execute at closing, such as title insurance affidavits.



sel for the defendant seller, said the decision made it clear that any duty to execute a title affidavit for a buyer's lender is not an "implied obligation" but rather "a matter of contractual interpretation."

He noted that both sides presented experts on the question of customary practices, but that the judge relied solely on the agreement, done on a standard Greater Boston Real Estate Board form, along with other documents executed by the parties.

"The buyers were entitled to purchase an owner's policy with standard exceptions as a condition to clos-

ing, but they elected not to get that coverage and their lender demanded a seller's affidavit of title insurance," Berluti said.

He suggested that in light of this decision, buyers' lawyers may want to insure that purchase agreements have some provision for specific documents the seller needs to execute at closing, such as title insurance affidavits.

"You have to know what the lenders will require at closing and get both sides to agree on how to fulfill those obligations ahead of time," he contended.

John J. Russell of Boston, counsel for the plaintiff buyers, asserted that "this was an experienced seller who knew or should have known he would be required to execute a title insurance affidavit at closing."

He noted that "relations between the parties had deteriorated by the time of closing," suggesting that the seller refused to execute the document because he could benefit from reselling the property and keeping the sizeable deposit.

Russell said the seller had "an obligation to deliver marketable title," asserting that his failure to execute a title affidavit violated that obligation.

"It used to be that it was a matter of course to execute a title insurance affidavit, but this decision would require lawyers to address every little contingency in writing, regardless of whether it is a part of standard practices," he claimed.

The decision is likely to be appealed, Russell said.

Failure To Communicate

On April 25, 2000, the plaintiffs, Justin and Jean Teague, submitted an offer to purchase residential property in Marshfield.

Within a month, the plaintiffs came to an agreement that was executed by the defendant seller, Paul Bisceglia. Both parties were represented by counsel.

They agreed to a mortgage financing contingency and to the plaintiffs' right to obtain an owner's title insurance policy.

A closing was scheduled for Aug. 11, 2000, and on the appointed date both parties appeared.

At that time, the plaintiffs presented the defendant with a title insurance affidavit certifying under oath that there was no basis for a lien on the property, there were no parties in possession there, the property did not violate any restrictive covenants and no security interest had been given by the seller to another party.

Neither the title company nor the lender offered any consideration for an indemnification provision contained in the affidavit.

Later in August, the plaintiffs sent to the defendant a demand letter regarding his alleged unfair and deceptive practices.

In September, the defendant sent the plaintiffs a letter detailing the purchase agreement provision for liquidated damages in the amount of the security deposit.

The deposit of \$15,275 was not returned and a lawsuit followed.

No Implied Rights

Grabau determined that the seller was entitled to keep the security deposit because there was no obligation on the part of the seller to provide a title document at closing.

He pointed out that there was no consideration running from the buyers, the lender, or the title company in exchange for the indemnification sought in the closing affidavit.

"The mortgage contingency contained in the purchase and sale agreement is for the benefit of the [buyers] and does not require them to obtain any particular type of mortgage nor does it require [the seller] to satisfy any requirements that a buyer's lender may have which a seller is not otherwise required to perform," the judge added.

Grabau also rejected the notion that the obligation to deliver marketable title was relevant.

"The term 'marketable title' has little or no meaning under the circumstances of this case," he said, explaining that a marketable title must simply be free of obvious defects and substantial doubts.

"There was no evidence presented at the trial to show that [the seller] was not able to convey an 'indefensible unencumbered estate,'" said the judge.

Grabau concluded that the seller "did not breach the purchase and sale agreement or the implied covenant of good faith and fair dealing." MLW

Questions or comments may be directed to the writer at jcunningham@lawyersweekly.com.