FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Damages Suits for Failure to Close

Does a buyer of real estate suing the seller for damages for failure to close need to show that the buyer was ready, willing and able to close? The Court of Appeals recently considered the question of whether an "anticipatory breach" was enough to give the purchaser standing to sue for damages, or whether the buyer must, nonetheless, schedule a closing day (by "time is of the essence", if need be) and make a showing, on the appointed day, that he or she was ready, willing an able to close. In the case considered by Court, the seller had transferred title to another entity. The purchaser argued that such an act was inconsistent with seller's obligations under the contract and rendered seller unable to perform, thus causing and "anticipatory breach." The Court of Appeals noted that case law conflicted in the decisions of the departments of the Appellate Division. According to the Second Department, the theory of anticipatory breach was applicable to real estate sales contracts. According to the Third and Fourth Departments, the purchaser must go through the ritual of scheduling a closing day and appearing on the appointed day, time and place ready, willing and able to close. The Court of Appeals held that the rule of the Third and Fourth Departments is the correct one. Prospective litigants must make a showing that they were willing, ready and able to close. *Pesa v. Yoma Develop't Group, Inc.*, 2012 NY Slip Op 856 (2/09/12); available here: http://www.nycourts.gov/ctapps/Decisions/2012/Feb12/3opn12.pdf

Termination of Contract and Damages

Buyer and seller entered into a real estate sales contract for $200,000. The buyer advanced $2,000 upon the contract signing, but eventually failed to close. The seller eventually sold the property to another purchaser for $180,000, and sued the first buyer for the difference of $20,000. The supreme court granted summary judgment to the seller, and the buyer appealed. The Appellate Division, Fourth Department, found that the parties disagreed as to whether they had voluntarily terminated the contract. The purchaser alleged that they had verbally terminated the contract and agreed that the seller was entitled to keep the $2,000 deposit. The purchaser noted that the $2,000 had not been refunded. The seller disputed that fact, but, more importantly, argued that the contract specifically prohibited oral changes. The Court reviewed the contract and agreed that it mandated all *changes* to be in writing, but not all *terminations*. The Court further reviewed the law concerning the statute of frauds and partial performance and ultimately decided that the contract could be terminated orally. As the parties disagreed as to whether they had intended to terminate the contract, the Court returned the case to the supreme court to make a finding on the facts. *Dolansky v. Frisillo,* 2012 NY Slip Op 01305 (2/17/12); available here: http://law.justia.com/cases/new-york/appellate-division-fourth-department/2012/114-ca-11-01790.html

Notably, it appears that the Court may have overlooked the law regarding escrow deposits. Typically, a down payment is deemed to be the seller's agreed liquidated damages in the event the purchaser fails to close. Usually, by accepting a certain down payment

amount, the seller is deemed to have agreed on what will be his or her damages for in the event the purchaser fails to close on title. This point of law is not mentioned in the decision. It may be that it was not applicable under the facts, and therefore neither argued by the purchaser nor considered by the court. For example, the contract might have had a provision declaring that the seller's acceptance of 1% as down payment was not to be deemed to be the agreed seller's liquidated damages in the event of breach by the purchaser.

DEP Leak Notification Program

The NYC Department of Environmental Protection, which administers water supply, announced a program by which property owners may receive notification in the event of sudden increase in daily water consumption. The point is to make owners aware of potential undiscovered leaks, which create a wide range problems, such as increased water and sewer charges, issuance of violations, mold, deterioration of the building elements, and damages to personal property. Participants of the leak notification program would receive notice by e-mail or, in the near future, by text message. Only properties with wireless meters are entitled to enroll in the program. The press release with the enrollment information is available here: http://www.nyc.gov/html/dep/html/press_releases/12-14pr.shtml

New ADA Requirements

The NYC Department of Buildings announced that new requirements pursuant to the Americans with Disabilities Act will become effective on March 15, 2012. Significantly, DOB has announced that the new requirements will expand ADA requirements in two areas: First, more properties will now fall within the scope of ADA; second, the new requirements will not only apply to new work permits, but also to any extensions or amendments of previously-issued permits. The press release is available here: http://www.nyc.gov/html/dob/downloads/pdf/ada_2010.pdf