

REAL ESTATE LAW ALERT

November 2010

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For information on this or any real-estate related topic, contact Real Estate Department Co-chairs Eric Rubenstein, Esq., at 516-663-6513 or erubenstein@rmfpc.com or Ben Weinstock, Esq. at 516-663-6555 or bweinstock@rmfpc.com

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Recent Rulings Shake Condominium Market

By Matthew Zangwill, Esq.



Matthew Zangwill

It is no surprise that many purchasers of condominium units in the New York metropolitan area want out of their contracts due to the precipitous decline in real estate values, particularly in the new construction arena. Several recent court rulings have afforded purchasers valuable weapons while confounding developers already suffering severe economic pain in this market.

By now, most real estate practitioners have at least heard of the Interstate Land Sales Full Disclosure Act (ILSA) and the surge in contract rescission claims made by purchasers of newly constructed condominiums. ILSA is a federal law that requires developers to register non-exempt projects with the United States Department of Housing and Urban Development (HUD) and to comply with extensive disclosure procedures, some of which are duplicative of the stringent disclosure requirements of the Office of the New York State Attorney General and under the Martin Act. We have helped clients take advantage of statutory exemptions to ILSA, but sometimes the exemptions do not apply.

Notwithstanding what can now be viewed as a common misconception, registering a project that is subject to ILSA with HUD will not solve all of a developer's potential problems. A recent opinion by a U.S. Southern District Judge (*Bacolitsas et al v. 86th & 3rd Owner, LLC et al*) has made headlines by directing the developer of a luxury condominium project on Manhattan's Upper East Side to return the purchasers' down payments even though the developer complied with the registration and disclosure requirements of ILSA and despite the lack of any allegations of breach of contract, claims of fraud or misrepresentation or other commonly raised grounds for rescission. The Court ruled that because the developer simply failed to attach a legal description of the unit to the contract of sale in a form capable for recording, the purchasers were entitled to a return of their down payments.

Particularly alarming was the Court's application of an ILSA requirement that is contrary to common real estate practices in the New York metropolitan area. Generally, metes and bounds legal descriptions are not included in condominium contracts found in most offering plans. Also, most contracts have provisions specifically prohibiting the recording of the contract. Without requiring a showing of harm to a purchaser, it appears as though a purchaser may, even after closing, win a return of their down payment and presumably, unwind the sale. Under ILSA, purchasers have up to two years after closing to make a claim for rescission and return of the down payment. What would happen if the original purchaser re-sold a unit to a bona fide party during that two-year period is a question yet to be resolved.

Another recent decision by a Judge of the U.S Court of Appeals for the Second Circuit (*CRP/Extell I, L.P. v. Cuomo*) ordered the return of several purchasers' down payments due to a typographical, and arguably harmless, error in a condominium offering plan. The error was a reference to "September, 2008" rather than "September, 2009" as the date on which purchasers could demand their deposits back if the first unit closing did not occur. Given the dates of the purchase agreements and other relevant time periods in the offering plan, it was an obvious typo. Nonetheless, the Court's application of a hyper-literal interpretation of the offering plan has ominous implications for the developer (the decision is on appeal).

Notwithstanding that ILSA has been coined legislation aimed to "protect purchasers from unscrupulous sales of undeveloped home sites, frequently involving out-of-state sales of land purportedly suitable for development, but actually under water or useful only for grazing" another U.S. Southern District Judge recently ruled that although a purchaser's claim for rescission was time barred, they were entitled to seek damages due to the developer's ILSA violations (*Nu-Chan, LLC v. 20 Pine Street LLC*).

Among the real estate community, these decisions have lawyers, developers, brokers and purchasers alike buzzing. It seems the time has come to take an accounting of the applicability of ILSA to New York condominium development whether through legislative means or otherwise. Moreover, the attention to drafting offering plans in this environment where purchasers are seizing any opportunity to rescind has never been more critical. These issues will not be easily resolved, and just add to the existing uncertainty in the real estate market.

YOU'RE INVITED TO A FREE SEMINAR

Legal Strategies You Must Employ When The Threat of Condemnation Looms

Thursday, November 18, 2010

8:30 - 10:30 a.m.

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Robert G. Litt, Esq.

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Understanding the Condemnation Process From the Government's Perspective

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