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Deal or No Deal: Proving Oral Real Estate Contracts

The meaning of clear and convincing evidence discussed

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In this current real estate market of anxious sellers and change-of-heart buyers, attorneys need to be particularly conscious of New Jersey's 1996 Statute of Frauds amendment validating oral land contracts. Now, "for the first time in modern history," an oral contract for the sale of land can be established if there is "clear and convincing proof" of its existence, a sufficient description of the realty, nature of interest to be conveyed and identification of the parties. *Prant v. Sterling*, 332 N.J. Super. 369 (Ch. Div.), *affirmed d.o.b.*, 332 N.J. Super. 292 (App. Div.), *certif. denied*, 166 N.J. 606 (2000); *N.J.S.A. 25:1-13b*. It is especially difficult to understand the reason for the revision given New

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Jersey's continued insistence that a valid contract for the sale of personal property for \$500 or more must take the form of a signed writing. *N.J.S.A. 12A:2-201(1)*. Nonetheless, the amendment is something with which practitioners must cautiously learn to deal.

This article first focuses upon the decisions construing claims based upon the amendment. With that as a backdrop, we next pinpoint the criterion which must be considered to prove (or to disprove) a binding oral agreement, provide a few cautionary practice tips and then suggest a further legislative revision.

Prant is the first of only three reported decisions construing the amendment. There, a summary judgment dismissal of a buyer's claim was affirmed mainly because negotiations on items other than price continued following the date of the alleged oral agreement and the draft contract was accompanied by a letter stating it had yet to be reviewed by the seller.

However, there was a memoran-

dum of agreement providing "This is to confirm our understanding and document our agreement," the diary of a trustee of the seller reflected the deal was definite and that another trustee had told the buyer the seller's entire family had agreed, checks were actually tendered by the buyer and placed into an escrow account, the buyer retained an environmental testing firm and executed a draft contract and the parties' attorneys did not immediately become involved after the initiation of the negotiations.

Prant signaled New Jersey's intention to place a strong emphasis upon the amendment's "clear and convincing" standard and bore out the statement in *Brill v. Guardian Life Insurance Company*, 142 N.J. 520 (1995), that "our judges are made of sterner stuff" than to deny summary judgment for fear of reversal.

Four years later in *McBarron v. Kipling Woods, LLC*, 365 N.J. Super. 114 (App. Div. 2004), the denial of a seller's motion for summary judgment was understandably upheld because in addition to a tape recording which disclosed the seller repeatedly admitting a binding verbal agreement had been reached, there was a long course of oral dealings between the parties, the seller allegedly told the buyer's builder there was a binding deal, no attorneys had been enlisted and thus draft contracts were not in the process of being

exchanged, in reliance on the seller's assurances the buyer had secured two mortgage commitments and the seller allegedly reneged when he "received a significantly higher offer" from another buyer.

It was only in the context of these strong, substantiated proofs -- rather than in dilution of *Prant* that the court held whether a binding oral agreement exists is "solely a matter of intent determined in large part by a credibility evaluation of witnesses."

The same year in *Morton v. 4 Orchard Land Trust*, 180 N.J. 118 (2004) the Supreme Court affirmed the summary judgment dismissal of a buyer's suit for specific performance. Drawing upon the New Jersey Law Commission's 1991 Report and Recommendations Relating to Writing Requirements for Real Estate Transactions, Broker's Agreements and Suretyship Agreement, Morton cited examples of conduct both indicative and not indicative of an intent to be bound,

More specifically, if the parties engaged in lengthy negotiations for the sale of a costly office building by the exchange of draft contracts, or, conversely, if the parties had prior "hand shake" deals which they have honored. In refusing to find the existence of a binding oral contract, *Morton* found significant the provision in the broker prepared contract, signed only by the buyer, that it was binding only upon "parties who sign it" and that "the signed contract" had to be delivered to the parties. 180 N.J. at 128-129.

A lengthy string of unpublished opinions following *Morton* are instructive in establishing relevant criterion to ascertain an intent to be bound and underscore that the required analysis involves a weighing of the need to avoid "trapping parties in contractual obligations they never intended" against the desire "to enforce and preserve agreements that were intended [to be] binding..." *Teachers Insurance & Annuity Association v. Tribune, Co.*, 670 F. Supp. 491, 497-8 (S.D. N.Y. 1987)

In addition to substantive case law, the amendment's imposition of a clear

and convincing standard deserves brief but special discussion because under summary judgment motion practice "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact." R.4:46-2(c). [Emphasis added.] This enhanced standard also embraces proof of the existence or scope of an agent's actual, implied or apparent authority to bind either the seller or the buyer in oral negotiations. *Lobiondo v. O'Callaghan*, 357 N.J. Super. 488 (App. Div.), *certif. denied*, 177 N.J. 224 (2003).

Clear and convincing evidence must establish in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Matter of Purrazzella*, 134 N.J. 228, 240 (1993). The belief must be "so clear, direct and weighty and convincing as to enable [a judge or jury] to come to a clear conviction, without hesitancy, of the precise facts in issue." *Matter of Seaman*, 133 N.J. 67, 74 (1993). "Clear and unequivocal" is synonymous with "clear and convincing." *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 161 (App. Div. 1960).

Fairly synthesized, all of the decisions construing the 1996 amendment adopt a common-sense, objective rather than subjective, approach in determining whether a seller or buyer intends to be bound without a signed contract.

With all of this in mind, because it is both prudent (and required for a new client) and maybe discoverable, the scope of professional duties in the fee agreement should encompass the conduct of negotiations in order to conclude a binding contract. Since the mere anticipation of a signed agreement does not preclude a valid oral agreement where all of the essential terms have been agreed upon, and because an attorney can unwittingly bind his client, at the outset of representation counsel should inform the other party's attorney in writing that his client does not intend to be

bound absent a mutually executed agreement and that he has no binding authority otherwise.

Every draft should also contain a heading reflecting this. When a party is not represented by counsel and the transaction is being negotiated by the parties themselves, counsel should similarly advise the client in writing of the pitfalls of private oral negotiations and at the very least direct or have the client direct a letter to the buyer or seller stating his intent not to be bound without a signed contract prepared by counsel.

Lastly, during negotiations counsel should make contemporaneous notes of every conversation with the other party's attorney and, where possible, by letter or e-mail memorialize every conversation with the suggested caveats. This is an amendment which dictates the defensive practice of law.

If no objective criterion exists to satisfy the clear and convincing standard, a buyer's or seller's unsupported assertion that the other orally agreed to a deal and shook hands on it should not be sufficient to survive summary judgment. *Collins Realty Co. v. Sale*, 104 N.J. Eq. 138 (E. & A. 1929) (pointing out the insignificance of competing testimony in satisfying a high burden of proof).

Under these circumstances, a credibility determination is simply not warranted. Hopefully, trial judges will be cognizant of the very narrow circumstances in which *McBarron* calls for a trial on the issue of intent not only because of the unrecoupable costs of litigation but also because of the seller's burden resulting from a *lis pendens*.

Given those burdens, the ability of a buyer or seller to claim the other agreed to a deal and to feign reliance, the immunity afforded to those who file a baseless *lis pendens* and the judicial reluctance to award sanctions under R.1:4-8, our Legislature would be well advised to revise the Statute of Frauds further to require an award of fees and costs to the prevailing party for a claim seeking to enforce a wholly oral agreement for the sale of land. ■