FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Lender's Revocation of Commitment Letter Allows Purchaser to Escape Contract of Sale

In a decision dated June 21, 2011, the Appellate Division, Second Department, held that the lender's revocation of its mortgage commitment letter allowed the purchaser of real property to rescind the contract of sale, even though the revocation occurred well after the mortgage contingency period had run. In the relevant portion the decision reads:

"A mortgage contingency clause is construed to create a condition precedent to the contract of sale. The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period. However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, *and the question becomes whether the lender's revocation was attributable to any bad faith on the part of the purchaser."*

Blair v. O'Donnell, 2011 WL 2478924 (N.Y.A.D. 2nd Dep't., 6/21/2011; internal citation omitted; emphasis added).

In the cited case, the Court found no evidence that the purchaser had conspired to have the commitment revoked and judgment was rendered for the purchaser.

This case should come as a relief to the chilling effect caused by the financial crisis: If the lender issues a commitment letter, but becomes insolvent prior to closing, then the purchaser should get her down payment back because she is not at fault. On the other hand, the holding is a somewhat odd: at the end of the day, the party that loses now is the seller. Unlike the purchaser, the seller had no control over the purchaser's choice of lender, and presumably the seller has no action against the lender for revoking the purchaser's commitment letter.

Title Insurance Does Not Cover Zoning Matters

It is an all too well-known principle, but yet one that merits reiterating whenever the Appellate Division reaffirms it. Title insurance does not provide any protection against zoning matters. In the case in point, the purchasers bought a portion of large tract of land. Although the facts are not clearly recited, it appears that the parcel was being sold for residential purposes and that the seller was the builder. After the closing, the purchaser sued the seller for failure to obtain a certificate of occupancy and subdivision approval prior to the sale. The purchaser also sued its title insurer under the theory that it had "failed to raise an exception in the title report with regard to the lack of proper subdivision of the premises."

The title insurer moved to dismiss the complaint as against it pointing to the policy which specifically excludes losses by reason of "any law, ordinance or governmental regulation ... restricting, regulating, prohibiting or relating to ... the occupancy use, or enjoyment of the land ... [or] a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part."

The Appellate Division, Second Department, agreed with the title insurer and dismissed the complaint. *Nisari v. Ramjohn*, 2011 WL 2496624 (N.Y.A.D. 2nd Dep't, 6/21/2011).

The cited case concerned subdivision approval and the lack of a certificate of occupancy. But the rationale of the decision could just as well apply to the all too common questions regarding building violations. At best, title insurance may protect against the monetary value of the fines imposed by violations, but it will not cover any corrective work mandated by the notice of violation.

Judge Philip S. Straniere

For those who don't know him, Staten Island Civil Court Judge Philip J. Straniere is the author of the most entertaining decisions of our time, many of which concern very recurrent fact patterns in real estate. His extensive and well-reasoned decisions provide important lessons for a real estate practice. For example, in a decision dated June 6, 2011 he shows how a court struggles to interpret unclear documents:

"The court does not know on what date the contract was made because it is undated. Apparently there is a local rule in Richmond County requiring that no real estate contract is to be dated ... Not dating the contract is a particularly dangerous practice, because there are several paragraphs ... where the rights and obligations of the parties are calculated from the date of the agreement. As will be obvious below, it also must be concluded that neither counsel bothered reading this contract."

Aromino v. Van Tassel, 2011 N.Y. Sljp op 51058(U); available at *http://www.courts.state.ny.us/Reporter/3dseries/2011/2011_51058.htm*

The decision concerned a contract rescission, but it is too fact specific to become law applicable to other cases. Nevertheless, the decision is recommended reading because it is interesting (and entertaining) to see how a court finds its way through the contract and the parties' correspondence. The reader gets the impression that better drafting could have turned the decision the other way. For more on Judge Straniere, the following is a link to an article about him published by the New York Times earlier this year: *http://www.nytimes.com/2011/01/25/nyregion/25bard.html*