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Business Law Newsletter

Condo Purchasers Sue to Rescind Purchase Agreements

By: Arianna Gleckel

Have you ever had buyer's remorse? Eight condominium buyers in Falls Church did. They brought suit against the developer in an attempt to rescind their purchase agreements for residential condominium units in a new development in Falls Church, Virginia.

In Bartley v. Merrifield Town Center Limited Partnership, the condominium buyers brought suit under the Interstate Land Sales Full Disclosure Act ("ILSFDA" or "the Act"), claiming Defendant Merrifield Town Center Limited Partnership ("Merrifield") violated the Act by failing to file registration and disclosure statements with the Department of Housing and Urban Development, as required by ILSFDA.

The eight plaintiffs signed purchase agreements in June and July of 2005 when new condo projects sold out quickly. This development contained 97 units, which were still under construction when the purchase agreements were signed. Delivery was expected to occur within 36 months of the ratification date of the purchase agreements.

ILSFDA was enacted in 1968 as part of a consumer protection statute designed to prohibit and punish fraud in land development projects. The Act requires developers to inform buyers of the necessary facts that would allow a reasonably prudent individual to make an informed decision about purchasing the property.

The Act also requires developers to register subdivisions with the Department of Housing and Urban Development by filing a statement of record. The statement of record must include the names of interested people in the transaction, a legal description of the entire property, the price of the lots being sold, the condition of title, and a description of any nuisances, utilities, encumbrances, and liens.

A buyer may revoke a purchase agreement within two years of the agreement's execution if the developer fails to provide the buyer with these specific disclosures in advance of execution. The Act allows courts to revoke the purchase agreement if a developer is found to be in default of its responsibilities under ILSFDA.

However there are several exemptions to ILSFDA, which if applicable, do not require a developer to comply with the Act. For example, the Act does not apply to the sale of lots in a subdivision containing fewer than 100 lots/units or if the subdivision is completed within two years of the sales contract.

Inside This Issue:

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Continued from Page 1

With the recent changes in the economy and housing market, the plaintiffs asserted that the value of their condos has decreased by at least twenty percent since July 2005, which may have played a role in the Plaintiffs' decision to bring this lawsuit.

In Bartley, Judge Gerald Bruce Lee of the United States District Court for the Eastern District of Virginia, Alexandria Division, granted Merrifield's Motion to Dismiss the condo buyer's claim, finding that Merrifield was exempt from the ILSFDA's general disclosure requirements because the project had less than 100 units. However the case remains important because it identifies a major risk for developers and a potential recourse for dissatisfied condo purchasers.

If You Want Your Contract Enforced, Put it in Writing - ALL OF IT

By: Alan Bowden

On September 12, 2008, the Supreme Court of Virginia, in Delta Star, Inc. v. Michael's Carpet World, reminded all businesses that in order for a contract for the sale of goods of $500 or more to be enforceable, the contract must be in writing and signed by the party to be bound.

Michael's sued Delta Star for the enforcement of an alleged contract for the purchase and installation of flooring for Delta Star's business offices. While Delta Star admitted that it had contracted with Michael's to install flooring in its entryway, it denied it ever formally contracting with Michael's to complete the flooring in other areas of its office space and argued that because the alleged contract for the installation of additional flooring exceeded $500 and was not in writing, it was unenforceable under the Statute of Frauds provision of the Uniform Commercial Code.

In April of 2006, the Parties exchanged written proposals for the installation of flooring in Delta Star's entryway and two offices. Ultimately, Delta Star faxed Michael's a purchase order which contained a reference to "carpet for entrance to lobby" with a price of $832.22 for the materials and installation.

Michael's installed the flooring and billed Delta Star $832.22. Delta Star paid the invoice and instructed Michael's to order the tile for the additional two office spaces. Thereafter, Delta Star told Michael's to limit the additional installation to one of the two offices. Michael's asserted that all of the tile had already been ordered and, consequently, that Delta Star was responsible for all materials and installation. Michael's denied that there was a contract for the installation of flooring in the additional two offices and Delta Star filed suit to recover the alleged breach of contract damages.

The trial court overruled Delta Star's Statute of Frauds defense, ruled that it had breached its contract with Michael's, and entered judgment against Delta Star in the amount of $2,565.58. The court determined that the alleged contract "satisfied several of the exceptions to the Statute of Frauds set forth in Code Section 8.2-201" of the UCC.

On Appeal, the Virginia Supreme Court reviewed, among other things, a) whether the flooring goods were specially manufactured for Delta Star, b) whether there was a writing confirming the existence of a contract between the parties and, c) whether the customary dealings between the parties established an enforceable contract.

The Supreme Court held that the flooring tiles were merely samples displayed in Michael's showroom and available to all of Michael's customers. The mere fact that Michael's kept no inventory of the specific tiles chosen by Delta Star did not preclude Michael's from selling them to other customers. Furthermore, the court found that the tiles were not altered in any way to suit Delta Star's business.

The Court also disagreed with Michael's assertion that its written proposals along with the invoice for the installation of the flooring for Delta Star's entryway constituted confirmation of a contract for the installation of flooring for the additional two offices. The Court reasoned that proposals are merely offers presented for acceptance or rejection and cannot constitute confirmatory writings. Additionally, the Court stated that the invoice for the entryway could only confirm the existence of a contract with regard to the services provided in the entryway. Consequently, the Supreme Court concluded that the trial court erred in finding that the parties' course of conduct established an enforceable contract.

If You Want Your Contract Enforced, Put it in Writing - ALL OF IT

Continued from Page 2

For these reasons, the Supreme Court reversed the trial court's ruling and entered final judgment in favor of Delta Star.

Delta Star, Inc. v. Michael's Carpet World stands as a stern reminder that unless there is an established exception to the Statute of Frauds, a contract for the sale of goods of $500 or more is not enforceable unless there is a writing sufficient to demonstrated the material terms of the contract and signed by the party against whom enforcement is sought.

NON-COMPETITION AGREEMENTS - DON'T ASK FOR TO MUCH

By: James V. Irving

On October 7, 2008, Fairfax Circuit Court Judge Jonathan C. Thatcher handed down his ruling in the case of Strategic Enterprise Solutions, Inc ("SES") v. Akira Ikuma.

Ikuma was employed as a Homeland Security Consultant by SES between August 28, 2006 and January 2, 2008, when he resigned to take a similar position with Booz Allen Hamilton ("BAH"). Not long thereafter, SES filed a four count Complaint seeking enforcement of a contractual non-competition provision; restricting Ikuma's solicitation of SES's clients; prohibiting Ikuma's solicitation of SES's employees; and enforcing protection of SES's trade secrets. Ikuma demurred to all counts, arguing that the claims were unenforceable as a matter of law.

After noting parenthetically noting that enforcement within a "100 square mile radius" is a geometric impossibility, Judge Thatcher relied a more traditional rational for finding the non-compete overbroad and unenforceable. SES's wide-ranging non-competition provision fell afoul of the elemental prohibition against restricting the employee from any form of employment with a competitor. As Judge Thatcher noted, it would have prohibited Ikuma from working as BAH's janitor, and since so broad a restriction is clearly unnecessary to preserving SES's business, the provision was deemed unenforceable.

Next, Judge Thatcher disposed of SES's contractual restriction again soliciting SES's customers. As written, Ikuma would have been prohibited from any conversation with an SES customer, including a casual conversation at a grocery store. Clearly, no Virginia court will enforce such a prohibition.

Similarly, the provision prohibiting Ikuma from soliciting SES's employees to leave their employment suffered from fatal over-reaching. Virginia courts always construe employment limitations broadly in favor of the employee and Judge Thatcher constructed an example illustrating the unreasonableness of this prohibition: if Ikuma had left to open a pizza parlor, he could be sanctioned for asking an SES employee whom he'd never met to work there.

These findings left SES arguing the last recourse of all sloppy draftsmen: the blue pencil rule. Blue penciling refers to the practice, current in a number of jurisdictions, including Maryland, whereby the parties agree in advance to allow the Court to re-write an offending clause. As Judge Thatcher noted, although the Virginia Supreme Court has never expressly ruled on blue-penciling non-competes, the concept is repugnant to the over-riding anti-employer construction.

The Court did allow SES remaining claim to proceed to trial. In order to establish a claim for violation of the Trade Secrets Act, the proponent must show that the alleged trade secret derives independent economic value from not being generally known and that the holder of the secret took reasonable steps to preserve its secrecy. The Court found that the cause of action was sufficiently alleged although whether SES can prove the claim is a question for another day.

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