REBA news
WWW.REBA.NET
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
JANUARY, 2011
Vol. 8, No. 1
A publication of The Warren Group

Quick draw arbitration: When time is of the essence

BY SANFORD F. REMZ

As lawyers and clients know all too well, real estate litigation is an often arduous process that exhausts both sides financially and otherwise. Often clients and their lawyers see no alternative to slogging it out until one or both parties collapse from exhaustion and financial strain. In the end, many a client who has "won" asks if the win truly was a victory. More important than winning is securing a clear resolution within a timeframe and at a cost consistent with the parties' business objectives. This result is especially vital in real estate disputes, where certainty of ownership of property is critical.


Sanford F. Remz

Let's assume a buyer balks at closing on a purchase of a commercial property, the purchase and sale agreement does not have an arbitration clause and the seller seeks to force the buyer to consummate the transaction. The buyer sues for specific performance in Superior Court, facing years of litigation while the status of the property hangs in the balance. At this point creative lawyers may explore an alternative solution, such as "quick draw' arbitration, to reduce the risk and expense for their clients. With apologies to Coach Lombardi, sometimes winning is not the only thing, even in litigation.

More important than winning is securing a clear resolution within a timeframe and at a cost consistent with the parties' business objectives. This result is especially vital in real estate disputes, where certainty of ownership of property is critical.

A CASE STUDY OF "QUICK DRAW" ARBITRATION

Buyer and seller enter into a P&S agreement for the sale of a commercial building for several million dollars. The agreement includes a closing date and standard time of the essence provision, as well as various closing conditions.

Perhaps out of seller's remorse, the seller asserts that one of the closing conditions had not been met and gives notice that it would not attend the closing. The buyer disagrees and attempts to preserve its rights by proceeding towards closing.

After the seller's non-appearance, the buyer begins an action for specific performance in Superior Court. The buyer also obtains a lis pendens, effectively tying up the property until the conclusion of litigation. A final resolution in Superior Court will likely take two to three years, not including appeals.

Given the lis pendens, the seller cannot sell or refinance the property. The seller faces protracted litigation with an uncertain outcome. An adverse order of specific performance following years of litigation could be costly. Because the property could appreciate during the course of the litigation, the seller could be forced to sell at far below market. However, even a win in litigation, that is, a denial of specific performance, could be costly. The market could suffer a downturn and the seller would then be stuck with a less valuable property, compared to the original sale price.

To avoid these risks, the seller's counsel suggests "quick draw" arbitration. The seller then proposes that litigation be stayed and the parties proceed directly to binding arbitration, despite the lack of an arbitration clause in the P&S agreement. The parties will negotiate a customized arbitration agreement designating a single arbitrator and a one-day hearing to occur within 30 days. Discovery will be limited to an exchange of transaction files. Given its similar interest in certainty

CONTINUED ON PAGE 2

CONTINUED FROM PAGE 1

and a speedy resolution, the buyer agrees. Importantly, the parties readily agree on the arbitrator, an individual both parties trust as fair and experienced.

The arbitration hearing occurs within a month. At the hearing, the parties present their cases within one full day. As the testimony develops, it becomes clear that the seller is unlikely to prevail. At the close of evidence, the arbitrator verbally renders a reasoned award: specific performance for the buyer.

Having perhaps experienced seller's remorse once, will the seller now suffer further remorse over the result of arbitration? While the seller would have far preferred an award in its favor, it ends up in an acceptable position with little remorse about the process. At closing the seller receives the original several million dollar purchase price after a delay of no more than a month and after spending a modest amount in legal fees. It could have been much worse.

Would the seller would have been better off litigating in court with far more time to develop its case through discovery? Rather than spending much time and money in litigation in the hope of obtaining a different result, we believe that seller is much better off learning of the weaknesses in its case sooner.

Of course, quick draw arbitration and other alternative dispute resolution mechanisms may not be appropriate in every situation. Lawyer and client must consider the circumstances of each dispute to determine what path is best. Indeed, before a dispute even arises, lawyers negotiating a P&S agreement should consider including a quick draw arbitration provision designating an organization such as REBA Dispute Resolution, Inc. as the arbitration provider.

Sanford Remz is managing shareholder of the Boston-based business litigation firm of Yurko, Salvesen & Remz, P.C., which has served as long-time counsel to REBA. He concentrates on business litigation matters, including real estate, securities, shareholder and corporate control and partnership disputes. He can be contacted at SRemz@bizlit.com.