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REAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

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Editor's Note: Attorneys must carefully consider their deeds

By Adam B. Whiteman, Newsletter Editor

I present to you the following facts which are based on a case out of the Second District. In 1997, Martha and her husband, Stanley, retained an attorney to prepare a deed that would make them co-owners in joint tenancy with rights of survivorship. Attorney thus prepared a quitclaim deed that, by its terms, conveyed title to the premises from Stanley to Stanley and Martha in joint tenancy. In 2007, Stanley died, and Stanley's son, (Martha's stepson), claimed ownership in the property through his beneficial interest under a land trust agreement. The subject land trust agreement pre-dated Stanley's quitclaim deed, and therefore the stepson asserted that he had sole ownership in the property. In a forcible entry and detainer action, the court agreed and allowed the stepson to evict his stepmother from the premises. The evicted widow then sued Attorney for malpractice for the negligent preparation of a quitclaim deed.

In her malpractice case against Attorney, Martha claimed that Attorney negligently failed to recognize that Stanley did not hold title to the premises but merely held the beneficial interest

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The role of the Special Representative in foreclosure following *ABN AMRO*

By Donald P. Shriver

For those whose practice involves mortgage foreclosure you should be aware that the Illinois Supreme Court's opinion in *ABN AMRO,*[1] issued earlier this year, resulted in another procedural requirement if the case involves the estate of a deceased mortgagor. A Special Representative pursuant to 735 ILCS 5/13-209 must be appointed for "purposes of defending the action" where no letters of office have been filed for the deceased's estate. The question remains, however, to what extent the Special Representative's responsibility lies in "defending" the cause of action.

ABN AMRO is not a lengthy decision, and ruled on the issue of "whether a mortgagee must name a personal representative for a deceased mortgagor" in order to acquire subject matter jurisdiction. The decision, in the affirmative, occurred after discussing and resolving the question of whether a foreclosure action is an *in rem* or a *quasi in rem* proceeding. The Court noted that "[p]rior decisions from this court have inconsistently characterized a foreclosure" as both types of actions, tracing cases of *in rem* findings from 1852 to 1992, and *quasi in rem* from 1904 to 1942. Finding a lack of "rationale" for those decisions, the Court held that a foreclosure action is a *quasi in rem* proceeding because: 1) the property itself is not a defendant, but instead the mortgagor who must be personally served; 2) the mortgagor, not the property, is the "instrumentality of the wrong" due to the default on the

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Editor's Note: Attorneys must carefully consider their deeds

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in a land trust that did. An effective conveyance required a trustee's deed, not a quitclaim from Stanley. Attorney sought to avoid liability by claiming that the 6 year statute of repose barred the claim because of the 10 years that had passed since the drafting of the deed. The court disagreed and determined that Martha did not suffer her injury until after Stanley died, and therefore she had two years from the date of death in which to bring her claim pursuant to 735 ILCS 5/13-214.3(d). Since Martha brought suit against Attorney within two years of Stanley's death, her claim would not be barred by the statute of repose.

The case presents a series of unfortunate events. The wishes of the decedent were not fulfilled, a widow was evicted, and an attorney faces an unpleasant claim of malpractice. Presumably, these problems could have been avoided through a simple title search which would have revealed the true legal owner of the property.

As attorneys, we are frequently asked to do a favor for a client, friend or relative. A quitclaim deed is a seemingly innocuous form to the layman, and the attorney may be pressured just to 'throw one together.' Yet, if not drafted correctly, the consequences can be dire. That the document was drafted as a favor will come as little consolation to those affected. The well-meaning attorney then appreciates the age old axiom "no good deed goes unpunished." A fitting legal ancillary might be that a "no-good deed" will be punished. Let's be careful out there. ■

The role of the Special Representative in foreclosure following *ABN AMRO*

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underlying note; and 3) the foreclosure action does not bind the "entire world," but only those interests brought before the court. As a result of the holding that a foreclosure action is *quasi in rem*, a Special Representative pursuant to 13-209 must be appointed.

However, there is no guidance provided by the Court as to the responsibilities of the Special Representative ("SR"), leaving the method of providing a "defense" to intuition and investigation. Upon appointment by the trial court, the SR is named as a defendant in the cause of action in the complaint. Such order should indicate that the SR is not personally liable for any judgment, and that the SR's fees shall be paid by the plaintiff (mortgagee) and considered additional debt under the mortgage instrument, subject to approval by the court. Ultimately, upon the conclusion of the investigation, the SR should provide a written report of findings summarizing the steps taken to review and defend the action.

The investigation by the SR should include a review the pleadings, analysis of the title work obtained from the mortgagee plaintiff, and review of any search data performed by the plaintiff to locate the heirs. The SR should begin to defend the action from the point of view of a 2-615 "Motion to Strike." Are their flaws in the pleading requirements of 735 ILCS 5/1504? Is the plaintiff in the chain of title? Do the documents support the allegations? The SR should also look at jurisdiction and determine if the known heirs were served, or if publication occurred for unknowns. Following this initial investigation, the SRs should continue their review by attempting to ascertain who are the heirs and then contact the known heirs. Such contact may be established through an introductory letter explaining the SR's role in the process:

> First, I offer my condolences on the loss of {deceased mortgagor}.
>
> Second, I have been appointed the Special Representative for the Estate of {deceased mortgagor} for the purposes of defending the foreclosure action of the property at {address} (copy

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> enclosed). It is possible that: 1) there are defenses available and unknown to me to present to the court; and 2) that there is equity available in the property that could be made available to the Estate for distribution to {decedent's} heirs.
>
> Please contact me at your earliest convenience so that I can speak with you about these issues. You should understand that I do NOT represent the mortgage company, but that I have been appointed by the court to defend the interests of the Estate against the foreclosure action.

A will/estate search should also be done with the Circuit Clerk's office. Status of taxes, payment dates, and the payee information may be obtained from the Treasurer's office. A review of an obituary may provide names of heirs. A copy of a small estate affidavit may provide an additional address to contact potential heirs. Much of this information is available online with little effort and time, and may provide material and relevant information to the investigation.

Once the investigation is completed, the SR will normally be faced with four typical situations that may impact the extent of the SR's role and ability to defend: 1) the property is abandoned with no equity; 2) the property is abandoned with equity; 3) the property is occupied with no equity; and 4) the property is occupied with equity. Determining the amount of equity will normally require expert help through a broker price opinion (BPO) or appraisal. The initial investigation may have disclosed the assessed value, giving a ballpark estimate of equity through comparison with the amount alleged due in the complaint. If warranted, a SR may need to petition the court to hire the expert so that the extent of equity may be determined, using the SR's report and investigation as a basis for granting the relief. Determining abandonment can usually be ascertained from a review of the service returns, but if inconclusive, the SR may need to petition the court to allow the employment of a private investigator or property management agency. While these issues do not necessarily provide a "defense" to the action, they certainly are germane to the SR's duties to defend the action and insure that at the conclusion of the case with the entry of confirmation of sale, nothing "unconscionable" or "unjust"[2] occurred. This is especially true where there exists equity to preserve on behalf of the Estate.

Presentment of the SR's report at or before entry of judgment should thoroughly summarize the investigation process, both to highlight any defenses to the court and to memorialize the attorney's diligence in exploring available defenses. An SR's report can be broken down into categories: 1) pleading review; 2) service review; 3) heir searches and contact; 4) public information (Circuit Clerk, County Clerk, Treasurer, etc) review; 5) expert opinions, if warranted, and 5) SR's conclusions and findings. The findings of the SR must highlight any defenses, and if appropriate, reference a motion filed or to be filed with the court. Further, the report should include the following:

1) The SR's waiver of service of summons (if appropriate) and entry of his/her appearance as the representative of the Estate;
2) A determination that the complaint appears to comply with the dictates enumerated in 735 ILCS 5/1504;
3) That proper service has been had upon the known heirs, that investigation has not revealed any other heirs, and that service was completed upon the unknown owners, non-record claimants, and unknown heirs via publication;
4) Satisfactory evidence in support of the entry of judgment has been submitted pursuant to 735 ILCS 5/15-1506;
5) That there are no other heirs, contacts, or persons of interest known to the SR that would be able to assist in the investigation of any potential defenses or counterclaims in the cause of action, other than those specifically noted in the report;
6) That there are no defenses or counterclaims apparent to the SR after review of the pleadings and information garnered through the investigation (or that there are such defenses and the SR is filing appropriate motions to address same);
7) In the event a sale occurs pursuant to the judgment, any resulting deficiency shall stand *in rem* only, as no personal service has been had upon the mortgagor, as required under 735 ILCS 5/1508(e). Further, in the event of a surplus, the SR reserves the right to contest the order of priority on behalf of the Estate against claims by any party other than Plaintiff and that the SR reserves the right to request from plaintiff evidence (a BPO or appraisal) of the reasonableness of the sale price.

While by no means exhaustive, the preceding topics should provide an SR with guidance to begin a defense of the foreclosure action as ordered by the court and mandated by ethics and the code of conduct. Whether the SR's role evolves from more of a detached guardian ad litem to a full blown defense attorney litigator will certainly depend upon the circumstances, especially the heirs' participation in the proceedings. As foreclosure cases continue to be decided by the trial courts, there will certainly be instances of unclaimed equity, title or descent issues, and discovered heirs that may flush out and define further roles of the SR in the process. ■

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1. *ABN AMRO Mortgage Group, Inc. v. McGahan*, docket 107954, 6/4/10
2. 735 ILCS 5/15-1508(b)

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Case law update: Real estate contracts

By Steven B. Bashaw, Steven B. Bashaw, P.C., and Joseph R. Fortunato, Jr., Momkus McCluskey, LLC

1. Real estate contracts; financing, recession and impossibility of performance

YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, (1st Dist., July 19, 2010), 1-09-1797, 2010 Ill.App. LEXIS 720, is a case that will first make you wonder "Why didn't I think of that?," and then realize "Nah, that won't work." At issue was a real estate contract for the purchase of the office building at 180 North LaSalle Street in Chicago, an address familiar to most practicing attorneys. Younan Properties, Inc. entered into a contract to purchase the building from 180 N. LaSalle, II, LLC for $124 million. Younan deposited $2.5 million as earnest money immediately following execution of the contract and increased that fund to $6 million as three amendments to the contract were agreed upon, and then assigned the contract to YPI 180 N. LaSalle Owner, LLC, the Plaintiff in this cause. The contract did not close over the next six months despite the agreement by the parties to three additional amendments to the contract extending the closing date and releasing the earnest money to the seller as "non-refundable," and the seller declared a breach, terminated the contact and retained the earnest money as its damages for the breach under the contract terms. YPI's clever argument was the doctrine of impossibility of performance. Alleging that the closing was rendered impossible when YPI's lender, Allied Irish Bank, declared that it would not finance the purchase due to "economic conditions in Ireland beyond the bank's control or anticipation," the buyer's argument was that the "global credit crisis" prevented it from obtaining the "commercially practical financing contemplated when the contract was originally formed." The trial court granted the seller's Section 2-615 motion to dismiss and struck YPI's complaint, and it appealed.

Affirming the trial court's dismissal, the First District opinion by Judge Hall gives a good overview of the equitable remedy of rescission as one within the sound discretion of the trial court. Noting that while generally "Because of the equitable and personal character of the right to sue for rescission, mere naked claims for rescission are not generally assignable," the right of rescission would transfer from Younan to YPI with the assignment of the contract here based on the fact that the assignment was acknowledged by the parties in the post-contract amendments, and YPI did have standing to bring a suit for rescission. Nonetheless, the theory of impossibility of performance as a ground for rescission was rejected. The theory is a common law doctrine which has risen as an affirmative defense to breach of contract actions, and allows a party to rescind or abandon a contract based on impossibility of performance. It is clear that the doctrine is applicable where the object of the contract is destroyed or rendered impossible by operation of law. The test for impossibility is "objective" rather than "subjective" and is narrowly applied only in extreme circumstances due to "judicial recognition that the purpose of contract law is to allocate risks that might affect performance" in the first place. An essential element of the affirmative defense of impossibility of performance is that the event upon which the claim is based was not reasonable foreseeable at the time of contracting. "The potential inability to obtain commercial financing is generally considered a foreseeable risk that can be readily guarded against by inclusion in the contract of financing contingency provisions." Here, "Even without the global credit crisis of 2008, it was foreseeable that a commercial lender might not provide Younan and YPI with the financing they sought." There was no financing contingency provision in this contract. "Where a contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance…. [and] gives rise to the inference that the risk was assumed." Additionally, impossibility of performance is not a defense where the obstacle to performance is within the control or realm of the party seeking rescission. Here, the obstacle was the availability of financing. The contract, however, was not contingent on financing and the record did not indicate that YPI and/or Younan did not have sufficient assets to purchase without financing. The complaint alleged that Younan's current assets exceeded $1.6 billion, far more than the $124 million purchase price, and there was no indication that the purchase could not have proceeded without financing.

2. Real estate contracts; specific performance and earnest money liquidated damages

In *Berggren vs. Hill*, (1st District, May 18, 2010), 401 Ill.App.3d 475, 928 N.E.2d 1225, a Seller brought suit for Specific Performance of a contract for the sale of a condominium unit for $1,650,000. The terms of the form agreement required initial earnest money in the amount of $1,000, to be increased to 10 percent of the sales price within two business days after the expiration of the attorney approval period. The parties amended the form language to require 5 percent rather than 10 percent of the sales price as the earnest money amount. The agreement contained a clause providing that in the event of default by Buyer, the earnest money would be forfeited to Seller. Buyer failed to perform the agreement. Seller filed suit for specific performance and argued that the liquidated damages clause (limiting Seller's damages to forfeiture of the earnest money) did not establish an exclusive remedy and sought actual damages, which greatly exceeded the earnest money amount. Part of the argument relating to the extent of the damages revealed that after the trial court granted Buyer's motion to dismiss, finding the clause regarding disposition of the earnest money to constitute a liquidated damages clause, Seller further prejudiced herself by selling the property to a third party. The Appellate Court reasoned that this rendered the request for Specific Performance of the sale "abandoned" because performance of the contact was no longer an available option. On the issue of liquidated damages Buyer argued that the contract was ambiguous because the parties disagreed as to the interpretation of the clause in question, and therefore the dispute should not have been decided on a motion to dismiss. The reviewing Court began with the general rule that "(i)n absence of an express provision to the contrary, a provision for the forfeiture of earnest money will be construed as a liquidated damages clause… Liquidated damages provisions are enforceable unless they are determined to be a penalty." The factors in determining whether a liquidated damages clause is valid are (1) in-

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tent of parties (2) amount provided as damages was reasonable at time of contracting and bears some relation to actual damages that may be sustained and (3) actual damages would be difficult to prove. The fact that the amount of liquidated damages does not equal a party's subsequent damages is not determinative of validity of the provision. Here, the fact that the parties amended the provision in question and determined an amount that differed from the amount set forth in the form contract evidenced an intention on the part of the parties to establish the amount of 5 percent of the sales price to be liquidated damages, the amount was reasonable at the time it was determined and at the time of contracting the amount of damages was uncertain and could not be determined until the property was sold; therefore the clause was enforceable and the exclusive remedy available to the Seller.

Real estate contracts and options distinguished; Residential Real Property Disclosure Act

In *The Terraces of Sunset Park LLC vs. Chamberlin et al*, (2nd District 2010), No. 2-09-0269, The Terraces entered into an agreement to purchase property from defendants for $1,750,000; the agreement required $50,000 earnest money and a $50,000 down payment on a specific date; if the down payment was not made on the agreed date, the earnest money would be forfeited. Both installments were considered non-refundable and were to be deducted from the price at closing. If the buyer failed to close on the agreed closing date, the down payment would be forfeited and the transaction deemed null and void. The Terraces never signed the contract, but did make the scheduled payments of $100,000. The sale did not close. The Terraces first sought declaratory judgment on the grounds that Sellers failed to provide a Residential Real Property Disclosure Report and, in the alternative, that the agreement was not valid and enforceable. The trial court found that the agreement constituted an option on the part of The Terraces to purchase the property, that the payments were nonrefundable when paid and that because the agreement was an option and not a contract for sale, the Residential Real Property Disclosure Act (the "Act") did not apply. The appellate court agreed that the agreement was not a contract for sale. The Sellers could never have enforced the agreement because The Terraces could have walked away after the payment of the $100,000 and Sellers could not require the Buyer to pay the balance of the price term. All the parties had was an agreement that Sellers would sell only to Buyer until the agreed date for making the down payment. Buyer had the right, but not the obligation, to buy the property, and the fact that the agreement did not contain the word "option" was not determinative. Finally, the Act applied only to "transfers," and none of the nine exceptions to the requirement of disclosure in the Act apply to options. The fact that "options" are not specifically included in the list of exempt transfers is of no consequence because options are not included in the definition of "transfers" and therefore the Act does not apply to this case.

Real estate contracts; Specific performance of contract for seller to finance with a "standard form mortgage"

In *Schilling v. Stahl*, (2nd Dist., November 5, 2009), 395 Ill.App.3d 882, 918 N.E.2df 1007, 335 Ill.Dec. 264, (Appeal denied, 235 Ill. 2d 605), Jeffrey and Nancy Schilling brought an action for specific performance of a contract to purchase real estate against Patricia Stahl, Matthew Stahl, Gerald Howell and U-Sell We Buy Enterprise, Inc. The property was located on Main Street in Poplar Grove, Illinois, and, at the time of the Schilling contract, was being purchased by Stahl from U-Sell We Buy under articles of agreement for warranty deed dated August 3, 2007 for $313,500. In December of 2007, the Schillings and Stahl met and discussed Schilling purchasing the property, culminating in January with a contract. The purchase price to Schillings was $675,000, including an addendum to the contract reflecting that the Stahls would complete the articles of agreement with U-Sell We Buy on or before January 30, 2007. The Schillings would pay $435,000 of the $675,000 purchase price in cash at the closing, and provide a promissory note and mortgage to Stahl for the balance of $240,000. The note was to provide for 4 percent interest per annum for a period of 5 years, the first interest only payment was due each month beginning one month after closing, and the entire balance being due five years from the closing. The mortgage was to be a "standard form mortgage" and Schilling was granted the right to substitute other property that was equal in value to the balance of the note and had a cash flow equal or greater than the interest only monthly payments. Schilling was also granted a right of first refusal to purchase the note if the Stahls decided to sell it during the term. Two days before closing, on January 28, 2007, Gerald Howell of U-Sell We Buy advised the Schillings that their contract with Stahl was cancelled because Stahl had "decided not to sell." The Schillings nonetheless attended the previously scheduled closing on January 30, 2007. U-Sell We Buy was present, together with the Schillings, but Stahl did not attend the closing.

Schilling filed a complaint against Stahl seeking specific performance, alleging a breach of the contract (as well as a separate count against Gerald Howell and U-Sell We Buy for tortuous interference with contract). Schilling appealed the trial court's grant of summary judgment in favor of the defendants based on its finding that the contract for sale was too indefinite to be enforced because the parties agreed only to execute a "standard form mortgage" and did not come to an agreement on the actual terms of the mortgage, including such things as prepayment privileges or penalties, foreclosure procedures, attorneys fees and costs in the event of foreclosure, or a grace period before default. The Stahls enumerated 12 or 13 "missing terms" of a "standard mortgage" that were not resolved by agreement or included in the addendum, leaving the contract, they argued, unenforceable by specific performance. The trial court noted that the term "standard form mortgage" used in the addendum was "not definitive and contemplates different terms to different persons," that the parties had different understandings of the terms of a "standard mortgage," and that the court felt that it could not supply the missing terms of the mortgage and therefore denied specific performance, citing *Lencioni v. Brill*, 50 Ill.App.3d 802, which also dealt with a "standard form mortgage." The Appellate Court reversed on appeal by the Schillings.

Specific performance requires (1) a valid, binding and enforceable contract (2) compliance with the terms of the agreement by the party seeking specific performance and proof that he is ready, willing and able to perform and (3) the refusal of the other party to perform the contact. Case law requires that the contract be unambiguous and without doubt or uncertainty as to the terms, and the method or manner of payment is an essential part of the agreement to be enforced. Here, however, the Court was not convinced that the "missing terms" of the mortgage created ambiguity, doubt or uncertainty. Noting

that "As the Stahls failed to show up at the closing and present a mortgage, it would be difficult for anyone to dispute the "missing terms" of a document that the Stahls failed to present," the Court distinguished *Lencioni* and cited *J.L. Watts Co. v. Messing*, 111 Ill. App.3d 937 (1982) as "More on point with this case." The opinion by Justice McLaren notes that the contract identified the parties, the property, the price and earnest money, the exact amounts to be paid at closing and to be financed, specifically gave notice to the parties that they were entering into a binding legal agreement which included all agreements and excluded oral representations in bold capital letters, and specified the amount of the note, interest rate, method of calculation, the date from which interest was to accrue, the term of the note, payment schedule and address to which payments were to be sent, with the first right of refuse and option of prepaying principal. "The parties, price, and terms of payment are clear and unambiguous…The "missing" terms listed by the Stahls, like those in *J.L. Watts Co.* are a list of "what ifs" that could arise at some future date, not terms that are essential to the creation of [a mortgage]." While many mortgages provide for payment of taxes and insurance, condemnation, assignment of rents, environmental issues, and lien priorities, "However, it does not follow that the lack of such terms renders the agreement in this case ambiguous and unenforceable. To the extent that any such rights are not included, those rights do not exist; the noninclusion of those rights does not signal a dispute as to what rights exist…We conclude that the contract and addendum were so certain and unambiguous in their terms and in all their parts that the Schillings were entitled to specific performance of the contract."

Real estate contracts: Specific performance and monetary damages

In *Mandel v. Hernandez*, (1st Dist., Sept. 23, 2010), 2010 Ill.App. LEXIS 1015, Hernandez was 80 years old at the time of the contract he entered into with Mandel to sell his property 731 West 61st Place, Summit, Illinois. The property had been vacant for some time, and Hernandez stated he had "hoped to get rid of it" when Mandel asked him what he would sell the property for. Hernandez stated he would sell it to the first person who offered him $50,000, and Mr. Mandel responded "sold." The Mandels were in the business of buying, renovating and selling property and expected to complete the rehab projection on this property and sell it for a range of $210,000 to $240,000 within 90 days. The parties signed a "standard form real estate contract" at Hernandez' home. Hernandez later stated he did not recall seeing the contract and did not remember signing it. The earnest money presented a problem. Mandel testified she sent the earnest money check to Hernandez by U.S. Mail. When Hernandez said he hadn't received the check in response to Mandel's follow-up inquiry, she sent him a second check, which was returned to her by Hernandez. Hernandez' daughter testified that Hernandez did receive the second check, but that it was received late and he returned it based on his decision not to sell. When Mandel contacted Hernandez, he advised her that he was not willing to complete the transaction. Mandel testified she was ready, willing and able to close and had deposited the cash and closing documents into escrow. At trial each party presented testimony relating to the property's value; Hernandez offering Michael Kaput who valued the property between $139,000 and $149,000 based on comparables, and Mandel offering a real estate broker and certified appraiser who placed an $80,000 value on the premises. Mandel also presented expert testimony that the renovation costs for the property would have totaled $50,000. Hernandez offered affirmative defenses that (1) he was elderly and ill at the time of the contract and did not understand the meaning of the contract, (2) Mandel failed to disclose that she was a licensed Real Estate Broker as required by the License Act, and took advantage of her superior knowledge of real estate, (3) the terms of the contract were unconscionable, and (4) Mandel failed to deliver the earnest money. The trial court found that the contract was valid and enforceable, that Mandel was ready willing and able to close, and that Hernandez breached by not closing. Mandel was awarded a judgment of specific performance against Hernandez but the court refused to award money damages for the delay in performance and lost profits. Holding that "an award of money damages is inconsistent with the award of specific performance," the trial court ruled that Mandel could not recover those money damages and obtain specific performance. Mandel appealed. The First District affirmed, noting that "The decision to award or deny monetary damages in addition to specific performance rests within the sound discretion of the trial court…Although we agree with Mandel that monetary damages incidental to a delay in performance may be awarded in addition to specific performance, we conclude that the trial court did not abuse its discretion in finding that the lost resale profits that Mandel seeks here are not recoverable… As established in *Rostogravure* and *Talerico*, when a decree of specific performance does not provide complete relief, the injured party is entitled to those damages that will make him whole, including monetary damages incidental to and caused by a delay in performance (citations). The injured part is entitled to damages incurred between the time of the breach and the time of performance if those damages arose naturally from the breach or were reasonably foreseeable at the time the contract was executed (citations). Lost profits may be recovered as damages resulting from a breach of contract if both parties at the time of entering into the contract contemplated that such profits would be lost if the contract was breached." Here, the Court reasoned, Mandel's profits were speculative and "contingent upon a string of uncertain collateral transactions, such as the renovation of the property within budget, the placement of the property on the market within 90 days of purchase, the fortuitous appearance of a prospective buyer, an agreement to pay the projected resale price and the completion of the resale transaction." The trial court was correct in not holding Hernandez responsible for lost profits which were dependent upon collateral transaction which he did not know of at the time of the contract and could not have anticipated. ■

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