HOW NOT TO SELL A HAUNTED HOUSE

In keeping with the ghostly time of year, I submit the following legal advice for home sellers. The old rule of “buyer beware” has been eroded over the years by court cases involving less than candid sellers and disappointed buyers. These days, the basic rule in home sales is disclosure. A seller is expected and, in some instances, required to disclose to a potential buyer defects in the home, such as physical problems, environmental contamination and the like.

The duty of disclosure was elevated in a 1991 appellate case in New York State in which a buyer rescinded the purchase contract and sued the seller for a return of his earnest money deposit on the basis that the seller had not disclosed the fact that the home was haunted. The buyer contended that the seller should have disclosed the ghosts, and the seller defended under the legal doctrine of “buyer beware” and the theory that no duty of disclosure existed.

The Judge in the case summarized the tension between the two legal theories as follows:

From the perspective of a person in the position of plaintiff herein (the buyer), a very practical problem arises with respect to the discovery of a paranormal phenomenon: “Who you gonna’ call?” as the title song to the movie “Ghostbusters” asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.

Ultimately, the Judge reversed the ruling of the lower court and ruled that rescission was available to the buyer and that the money should be returned.

So, if you lie in bed and hear things going “bump” in the night or you have a “face to face” relationship with ghostly house guests, you should not remain silent as a tomb when you are trying to sell your house. Rather, you should consider making a disclosure to the buyer. You should let them decide for themselves if they want to share the home with the spirits; hopefully all of whom are like Casper, the friendly ghost.
HAPPY HALLOWEEN!!

WILL CONTESTS

In Wisconsin, any person of sound mind who is at least eighteen years old is presumed capable of making a will. A will should be created voluntarily and express how the testator desires his or her property to be distributed upon death. However, when another person's influence over the testator becomes so strong it overpowers the testator's free will, such influence is "undue," and the resulting will may be invalid.

As the baby boomer generation ages, many people forecast an increase in challenges to wills or trusts based on undue influence. Generally, these legal challenges are brought when elderly or ill people make or change wills or trusts which are inconsistent with that person's character, and often involve generous bequests to non-family members. The unnatural beneficiary is often someone who holds a position of power and influence over the testator.

Under Wisconsin law, undue influence can be shown in two ways. The first way to show undue influence is by proving four things. First, it must be proved that the testator is susceptible to undue influence. Factors include the testator's age, personality, physical and mental health, and his or her ability to handle business affairs. Second, it must be proved that the other person had the opportunity to exercise such influence and effect the wrongful purpose. Third, it must be proved that the other person had a disposition to influence unduly in order to gain an improper favor. This implies willingness to do something wrong or unfair, such as overreaching or taking advantage of the testator, not just a desire to benefit from the estate. Finally, it must be proved that a result occurred that was clearly the effect of the supposed influence. The fact that the other person benefits from a will does not prove undue influence. Instead, this requirement is met when a person benefits from a will against natural expectations under the circumstances.

The second test for proving undue influence has two requirements: (1) a confidential or fiduciary relationship between the testator and the favored beneficiary; and (2) suspicious circumstances surrounding the making of the will. However, a will is not set aside based on someone's suspicion alone.

Other states have established similar elements to prove a claim of undue influence. Undue influence challenges to wills or trusts can be difficult to prove because they depend almost entirely on the particular facts and circumstances in an individual case. These facts often must be proved by indirect evidence because often one who is attempting to unduly influence a testator acts subtly and in secret.

A MOMENTARY SIGH OF RELIEF FOR LAND CONTRACT VENDORS IN WISCONSIN

The Wisconsin Court of Appeals, in *Jakubow v. Lichosyt*, 2007 WI App 150, recently addressed the interplay of competing interests to real property where a land contract is involved: Namely, that of a third-party attempting to execute on a judgment lien against a land contract vendee's equitable interest in real property and that of a land contract vendor who has brought an action for strict foreclosure on the same real property. The Court of Appeals' analysis and determination of the parties' respective rights should be comforting to land contract vendors in Wisconsin … at least for the time being.

The facts in Jakubow are relatively straightforward:

- In 2002, Lichosyt entered into a land contract with Jakubow to purchase real property in Sauk County, Wisconsin (the "Property"). The purchase price was $4,350,000, with $350,000 to be paid upon execution of the land contract. At the time of the Court of Appeals' decision, the value of the Property was $6,668,000.
- In 2004, Republic Bank of Chicago (the "Bank") filed and docketed with the Sauk County Circuit Court a money judgment taken against Lichosyt in an Illinois court proceeding. The Bank then attempted to execute on the Property, requesting a judgment of foreclosure and sheriff's sale of the Property and distribution of proceeds to creditors.
- Asserting that its land contract vendor's lien was superior to the Bank's judgment lien, Jakubow filed a complaint for strict foreclosure naming both Lichosyt and the Bank as defendants.
- Subsequent to the filing of the strict foreclosure action, Lichosyt and Jakubow stipulated that Jakubow was entitled to strict foreclosure and, at the same time, Lichosyt executed a quitclaim deed of the Property to Jakubow releasing his right, title, and interest in and to the Property arising from the land contract. Lichosyt also waived any redemption period during which he would have had the opportunity to pay Jakubow what was owed in full or lose his interest in the Property.
- Following execution of the stipulation and quitclaim deed, Jakubow moved for summary judgment in her strict foreclosure action. The Bank opposed the motion, arguing that the Bank itself had a right to redeem the Property since substantial equity existed in the land above that which was owed to Jakubow. The Bank also argued that Jakubow's acceptance of a quitclaim deed from Lichosyt required dismissal of her strict foreclosure action.
- The trial court disagreed with the Bank and granted Jakubow's motion for summary judgment, ordering that all interests of the Bank in the Property be foreclosed with title vesting in the name of Jakubow. The Bank appealed the trial court's order, asserting, in part, that Jakubow's acceptance of the quitclaim deed from Lichosyt should have effectively terminated the strict foreclosure action, thereby preserving the judgment lien recorded against the Property.

The Court of Appeals began its review of the trial court's decision by identifying the respective rights that each party held. Lichosyt, as a land contract vendee, acquired equitable title to the Property while Jakubow, a land contract vendor, retained legal title as security for the unpaid balance of the land contract. Unless the land contract would have stated otherwise, equitable title effectively gave Lichosyt full rights of ownership, including the ability to sell, lease or encumber the real estate subject to the rights of the legal titleholder, Jakubow.

The Court noted that, following Lichosyt's default under the terms of a land contract, Jakubow could have sued for the unpaid purchase price of the land contract, for specific performance, or asserted the most common vendor remedy – an action for strict foreclosure. In a strict foreclosure action, a land contract vendor foregoes its right to collect the amount remaining on the debt and instead recovers the real property. Typically, the court sets a redemption period in which the vendee must pay up or lose its interest in the land.

The Bank, with a properly docketed judgment against Lichosyt, held a judgment lien on all real property of Lichosyt. As a judgment lienholder, the Bank was entitled to collect by executing on real property of Lichosyt, a process which includes a sheriff's sale upon notice with a right of redemption thereafter for Lichosyt and other prescribed persons. A judgment lien, however, creates no estate, interest or right of property in the land which may be bound for its satisfaction.

The Bank correctly stated that its judgment lien attached to the real property in which Lichosyt, through his land contract, had equitable title. The Bank, however, attempted to further contend that, by accepting a quitclaim deed of Lichosyt's equitable interest, Jakubow's strict foreclosure action immediately terminated and, thus, the Bank's judgment lien could not have been foreclosed. Moreover, the Bank argued that Jakubow's legal title merged with Lichosyt's equitable title upon execution of the quitclaim deed.

According to the Wisconsin precedent, if the equitable title of a vendee and the legal title of a vendor merge into one interest of the vendor, then lienholders may reach all of a vendor's interest in real property. The Court of Appeals recognized such precedent but also made clear that a claim to such equity is cut off by a judgment for strict foreclosure. The Court of Appeals rejected the Bank's argument that Jakubow forfeited her right to obtain a strict foreclosure judgment by accepting Lichosyt's quitclaim deed.

As noteworthy as the majority opinion in Jakubow was a dissent that, more or less, informally certified a much broader issue for consideration should this case proceed to the Supreme Court of Wisconsin. Particularly, the dissent identifies widespread inequity in the longstanding traditions of Wisconsin and other states in the way that land contract foreclosures are distinguished from traditional mortgage foreclosures (where, unlike strict foreclosure actions, junior lienholders and mortgagees routinely share in proceeds from foreclosure sales.)

The dissent views Jakubow's sole, unencumbered entitlement to the Property valued at $6,668,000 as evidence of the inequitable nature of strict foreclosures in Wisconsin. The Property was sold to Lichosyt in 2002 for $4,350,000 with a down payment of $350,000, leaving $4,000,000 to be paid pursuant to the land contract over the course of seven years. The Bank's judgment lien totaled about $2,000,000. According to the dissent, there should have been more than enough equity in the Property to satisfy the interests of both Jakubow and the Bank.

The dissent provides ample authority from which the Supreme Court of Wisconsin could be swayed to change the way Wisconsin views rights of various parties relative to strict foreclosure actions, including citation to a United States Bankrutpcy Court opinion from the Western District of Wisconsin that is squarely at odds with the Court of Appeals' opinion in Jakubow. See *Berge v. Sweet*, 33 B.R. 642 (Bankr. W.D. Wis. 1983) (addressing a factual situation identical to the one in Jakubow but concluding that a land contract vendee's substantial equity in a farm could not be cut off from the grasp of creditors by a judgment of strict foreclosure.)

While, for the time being, Jakubow safeguards a land contract vendor's right to receive property following a strict foreclosure unencumbered by liens against the former vendee, as the title of this article warns, Jakubow may be a momentary victory for land contract vendors. The rationale of the dissent and its potential effect on the way Wisconsin courts handle strict foreclosure actions warrants further monitoring.

For further information on Jakubow and other cases or issues relating to land contracts or foreclosure actions, contact John R. Schreiber of O'Neil, Cannon, Hollman, DeJong, S.C.'s Real Estate and Construction Practice Group.