4 No. 176

James J. Moran and Kathleen D. Moran,

Respondents,

v.

Mehmet Erk and Susan Erk,

Appellants.

John G. Horn, for appellants.
Scott D. Cannon, for respondents.
New York State Association of Realtors, Inc., amicus curiae.

READ, J.:

On December 13, 1995, defendants Mehmet and Susan Erk signed a real estate contract to purchase the home of plaintiffs James J. and Kathleen D. Moran, a 5,000-square-foot ranch-style house located in Clarence, New York. The contract, which was executed by the Morans on December 22, 1995, provided for a

purchase price of $505,000, and contained a rider with an "attorney approval contingency" stating as follows:

> "This Contract is contingent upon approval by attorneys for Seller and Purchaser by the third business day following each party's attorney's receipt of a copy of the fully executed Contract (the "Approval Period"). . . . If either party's attorney disapproves this Contract before the end of the Approval Period, it is void and the entire deposit shall be returned."

Both the contract and the rider were form documents copyrighted and approved by the Greater Buffalo Association of Realtors, Inc. and the Bar Association of Erie County.*

After signing the contract, the Erks developed qualms about purchasing the Morans' house. They discussed their misgivings with each other and with friends and family, and ultimately decided to buy a different residence. As a result, they instructed their attorney to disapprove the contract, and she did so on December 28, 1995, which was within the three-day period for invoking the attorney approval contingency.

The Morans -- who had moved out of their Clarence

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*The form contract, which is available electronically on the Bar Association's website (see http://www.eriebar.org/pdfs/Contract.pdf [last accessed November 17, 2008]), contains the subject attorney approval contingency as paragraph "ATC1" (see id. at 9). A boldface header to paragraph ATC1 provides:

> "**ATTORNEY APPROVAL CONTINGENCY. *CAUTION: The deletion or modification of Paragraph ATC1(A) or Paragraph ATC1(B), unless such modification extends the Attorney Approval Period or Addendum Approval Period, shall result in the automatic withdrawal of any bar association approval of this form***" (id. at 9 [all emphases in original]).

residence in September 1995 -- kept the house on the market until it was eventually sold for $385,000 in late 1998. Shortly thereafter, they sued the Erks in Supreme Court, alleging breach of contract. They sought to recover as damages the difference between the contract price of $505,000 and the eventual sale price of $385,000, as well as "carrying costs" for marketing the Clarence property for almost three years beyond the date of the 1995 contract with the Erks.

After a bench trial, Supreme Court found in the Morans' favor, and entered a judgment against the Erks for $234,065.75, which represented the difference between the contract price and the eventual sale price, plus statutory interest. Citing McKenna v Case (123 AD2d 517 [4th Dept 1986]) and Ulrich v Daly (225 AD2d 229 [3d Dept 1996]), Supreme Court opined that "[i]t is well settled law that where a Buyer acts in bad faith by instructing his attorney to disapprove a real estate contract, the condition that the contract be approved by an attorney is deemed waived and a contract is formed." Likewise relying on McKenna, the Appellate Division affirmed in a short memorandum opinion. We subsequently granted the Erks' motion for leave to appeal, and now reverse.

Attorney approval contingencies are routinely included in real estate contracts in upstate New York (see e.g. Dorothy H. Ferguson, Subject to the Approval of My Attorney Clauses, 35 NY Real Prop LJ 35 [Spr/Sum 2007]; Alice M. Noble-Allgire, Attorney

Approval Clauses in Residential Real Estate Contracts: Is Half a Loaf Better than None? 48 U Kan L Rev 339, 342 [2000]). Requiring a real estate contract to be "subject to" or "contingent upon" the approval of attorneys for both contracting parties ensures that real estate brokers avoid the unauthorized practice of law (see Matter of Duncan & Hill Realty v Department of State of State of N.Y., 62 AD2d 690, 701 [4th Dept 1978], lv denied 45 NY2d 709 and 45 NY2d 821 [1978]; 1996 Ops Atty Gen No. 96-F11), and allows both contracting parties to have agents representing their respective legal interests (see generally Real Property Law § 443 et seq.; Rivkin v Century 21 Teran Realty LLC, 10 NY3d 344, 352-56 [2008] [discussing brokers' agency relationships and duties in real estate transactions, and emphasizing that, absent express disclosure to the contrary, a real estate broker does not represent the interests of both parties to a transaction]). Where a real estate contract states that it is "subject to" or "contingent upon" the approval of each party's attorney, this language means what is says: no vested rights are created by the contract prior to the expiration of the contingency period (see Black's Law Dictionary 828 [8th ed 2004], contingent interest ["An interest that the holder may enjoy only upon the occurrence of a condition precedent"] [emphasis added]).

Here, as previously noted, the contract between the Erks and the Morans explicitly stated that "[t]his Contract is contingent upon approval by attorneys for Seller and Purchaser by

the third business day following each party's attorney's receipt of a copy of the fully executed Contract," and further provided that "[i]f either party's attorney disapproves this contract before the end of the Approval Period, it is void" (emphases added). The Morans argue that the contract nonetheless created an implied limitation upon an attorney's discretion to approve or disapprove the contract. We do not ordinarily read implied limitations into unambiguously worded contractual provisions designed to protect contracting parties. The Morans, however, contend -- and the lower courts apparently agreed -- that the implied covenant of good faith and fair dealing implicitly limits an attorney's ability to approve or disapprove a real estate contract pursuant to an attorney approval contingency. This argument misconstrues the implied covenant of good faith and fair dealing under New York law.

The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002], quoting Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995] [additional citation omitted]). Yet the plain language of the contract in this case makes clear that any "fruits" of the contract were contingent on attorney approval, as any reasonable person in the Morans' position should

have understood (see 511 W. 232nd Owners Corp., 98 NY2d at 153 [implied covenant of good faith and fair dealing encompasses "promises which a reasonable person in the position of the promisee would be justified in understanding were included"] [citations omitted]).

Further, considerations of clarity, predictability, and professional responsibility weigh against reading an implied limitation into the attorney approval contingency. Clarity and predictability are particularly important in the interpretation of contracts (see Maxton Bldrs. v Lo Galbo, 68 NY2d 373, 381 [1986] ["when contractual rights are at issue, where it can be reasonably be assumed that settled rules are necessary and necessarily relied upon, stability and adherence to precedent are generally more important than a better or even a 'correct' rule of law"] [quotation marks and citation omitted]), and "[t]his is perhaps true in real property more than any other area of the law" (Holy Props. v Cole Prods., 87 NY2d 130, 134 [1995] [citation omitted]). But the bad faith rule advocated by the Morans, which derives from the McKenna decision, advances none of those objectives.

In McKenna, a short memorandum opinion, the Appellate Division held that an attorney's disapproval pursuant to an attorney approval contingency "would terminate plaintiff's rights under the contract, unless said disapproval is occasioned by bad faith" (123 AD2d 517, 517 [internal citations omitted; emphasis

added]). The court further stated,

> "[w]hile the issue of 'bad faith' usually raises a question of fact precluding summary judgment, the uncontradicted proof demonstrates conclusively that defendant acted in bad faith by instructing his attorney to disapprove the contract. Defendant, by interfering and preventing his attorney from considering the contract, acted in bad faith and, therefore, the condition that the contract be approved by seller's attorney must be deemed waived and the contract formed" (id. [citations omitted]).

Reading a bad faith exception into an attorney approval contingency would create -- as the McKenna court itself recognized -- a regime where "question[s] of fact precluding summary judgment" would "usually [be] raise[d]" by a disappointed would-be seller or buyer any time an attorney disapproved a real estate contract pursuant to an attorney approval contingency. In an area of law where clarity and predictability are particularly important, "this novel notion would be entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules" of plain-text contractual language (Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 403 [1993]).

The circumstances of this case illustrate the chanciness inherent in a bad faith rule. The Erks' attorney disapproved the contract for the sale of the Morans' Clarence house in late 1995. The Erks soon bought a house in a different community, and continued on with their lives, relying on their attorney's disapproval of a contract that declared that such disapproval rendered it "void." Some three years after their

last contact with the Morans, the Erks were served with the complaint in this breach-of-contract lawsuit. Now -- 10 years after their attorney disapproved the contract within a three-day disapproval period -- the Erks are fighting a six-figure judgment for putatively breaching an unwritten covenant because of something Mrs. Erk may have said or neglected to say in a single conversation with her attorney.

Indeed, any inquiry into whether a particular attorney disapproval was motivated by bad faith will likely require factual examination of communications between the disapproving attorney and that attorney's client (see e.g. McKenna, 123 AD2d at 517 ["defendant acted in bad faith by instructing his attorney to disapprove the contract"] [emphasis added]; Moran v Erk, 45 AD3d 1329, 1329 [2007] ["the evidence supports the court's determination that defendants acted in bad faith by instructing their attorney to disapprove the contract"] [emphasis added]). That is, the disapproving attorney will be subpoenaed to testify about communications the disclosure of which might be detrimental to that attorney's client -- a direct conflict with an attorney's duty to preserve a client's confidences and secrets (see 22 NYCRR 1200.19[a] [defining "secret" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"]). This is precisely what occurred here, where the lower courts' findings of

bad faith were expressly grounded in the deposition testimony of the Erks' attorney. Moreover, the threat to attorney-client confidentiality under a bad faith regime could harm the attorney-client relationship itself in the context of real estate transactions. A diligent attorney, cognizant of the risk of being subpoenaed to testify as to the basis for a disapproval, would face a perverse incentive to avoid candid communications with his or her client regarding a transaction in which the attorney is supposed to represent the client's legal interest.

All these potential problems vanish when an attorney approval contingency is interpreted according to its plain meaning, as our sister state of New Jersey has long done (see New Jersey State Bar Assoc. v New Jersey Association of Realtor Bds., 452 A2d 1323 [Superior Ct 1982] [approving "broad construction" of attorney approval clause "enabling an attorney to disapprove a contract or lease for any reason or reasons which would not be subject to review"], modified on other grounds and affd 461 A2d 1112 [NJ 1983]). We therefore hold that where a real estate contract contains an attorney approval contingency providing that the contract is "subject to" or "contingent upon" attorney approval within a specified time period and no further limitations on approval appear in the contract's language, an attorney for either party may timely disapprove the contract for any reason or for no stated reason. Since no explicit limitations were placed on the attorney approval contingency in

the contract in this case, the Erks' attorney's timely disapproval was valid, and the contract is void by its express terms.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the complaint dismissed.

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Order reversed, with costs, and complaint dismissed. Opinion by Judge Read. Chief Judge Kaye and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Decided November 25, 2008