



Top 2014 court decisions and statutes affecting the real estate industry

January 26, 2015 - Front Section

Release of Claims "Known or Unknown" Bars Unknown Fraud Claims

The First Department, New York's intermediate appeals court, unanimously affirmed a lower court order in *Kafa Investments, LLC v. 2170-2178 Broadway, LLC* holding that plaintiffs' general release of defendants from "any and all claims" "known and unknown" barred fraud claims resulting from the buy-out of their partnership interest. The plaintiffs alleged that defendants intentionally misrepresented the value of the limited liability company owning a hotel and the plaintiffs' interest in the entity. Furthermore, the First Department held that the arguable fiduciary duties owed by defendants to plaintiffs did not invalidate the release since plaintiffs were "sophisticated parties represented by counsel."

The *Kafa* opinion marked another shift away from the much-cited *Blue Chip* decision, where the First Department in 2002 held that controlling owners owe to non-controlling owners a non-releasable fiduciary duty to disclose material information bearing on a transaction involving the buy-out of a partner. However, in its two decisions in *Centro* (2011) and *Pappas* (2012), New York's highest court, the Court of Appeals, confirmed the enforceability of contractual releases of fiduciary duties and thereby either overturned or at least significantly limited the breadth of *Blue Chip*'s holding. The First Department in *Kafa* relied on *Centro* in enforcing the release and rejecting the plaintiffs' fraud claims. By refusing to follow its own precedent in *Blue Chip* (despite not explicitly overruling it), the First Department confirmed that *Blue Chip* should now be ignored.

Interstate Land Sales Act

Exempts Condos from

Registration Requirements

In a big win for sponsors, the Interstate Land Sales Disclosure Act (ILSA) was amended to exempt condominium developments from the registration requirements under ILSA. However, the amendment did not immunize sponsors from liability under ILSA's anti-fraud provisions. Because of the potential advantages ILSA offers to plaintiffs over New York law, sponsors should anticipate claims brought under ILSA's anti-fraud provisions, which may be brought by individual purchasers.

Sponsors Intentionally Delaying Condo Unit Closings May Be Liable for Damages

A New York court held that a sponsor may be liable for limited damages for a breach of contract by failing to diligently pursue completion and closing of a unit. The plaintiff-purchaser signed a purchase agreement for a condominium unit in December 2012 when the unit was virtually complete. However, the sponsor did not close the sale until October 2013. The purchaser sued for damages including those incurred due to an interest rate increase and for interim living costs. The court dismissed the interest rate increase claims due to various offering plan disclaimers, but let survive the claims for additional living costs, assuming that the plaintiff could prove intentional delay

(Hurley v. Watanabe).

Terrorism Risk Insurance

Reauthorization Act Sunset

After much political maneuvering, Congress finally renewed the Terrorism Risk Insurance Reauthorization Act (TRIA) with modest modifications, thereby preserving the program from the risk of expiration. TRIA and its subsequent reauthorizations were passed in the wake of the 9/11 terrorist attacks to ensure the availability of terrorism risk insurance. TRIA provides government reinsurance backstops in case of large-scale terrorist attacks and requires that business insurers offer terrorism coverage. As of the writing of his column, the bill was waiting for the President's signature.

Tom Kearns is a partner at Olshan Frome Wolosky, New York, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540