



Best efforts in contracts - Does it mean something more or different than reasonable efforts?

August 10, 2015 - Long Island

Lawyers drafting real estate contracts and brokers preparing letters of intent that are preliminary outlines of the terms of such contracts frequently use the term "best efforts" to describe a standard that, on its face, seems intended to impose greater than usual obligations with respect to such parties' contractual obligations. But is that the case? Does the term "best efforts" mean something more or different than "reasonable efforts?" And what is the best way for deal makers and practitioners to utilize these terms in their efforts to express the actual intention of the parties?

Review of a few notable cases decided by in New York courts would be instructive in answering these questions.

One case decided in New York County in 2012 concerned the acquisition of air rights by one adjoining landowner from another in aid of the development of a mixed-use residential and retail complex. The contract provided that the defendant seller of air rights had to obtain a "waiver and subordination" from its mortgagee prior to closing and was obligated to use its "best efforts" to do so.

The defendant in the case argued that the contract was rendered unenforceable on the grounds of uncertainty because the "best efforts" clause contained no objective criteria against which its conduct could be measured. But the court rejected that argument and, while discussing appellate cases supporting the objective criteria standard, ruled that the law does not require that "best efforts" criteria be defined by the contract and that "best efforts" clauses are enforceable as long as the circumstances impart a reasonable degree of certainty as the intention of the parties.

But what does "best efforts" mean under the law?

For one thing, the court in the air rights case stated that a "best efforts" clause imposes an obligation to act "with good faith in light of one's own capabilities" and requires that the party obligated by the standard "pursue all reasonable methods" to fulfill the obligation.

So is "best efforts" expressed by itself something more than "reasonable efforts?"

It would appear not, at least based upon the cases in New York that discuss the subject, whether in the context of real property actions or otherwise.

In a case decided in Nassau County involving a claim by a commercial subtenant that its landlord, the ground lessee of a shopping center, was required to extend the term of its ground lease so that sublessee could, in turn, extend the term of its sublease, the court, in refusing to compel such a duty, used the terms "reasonable efforts" and "best efforts" interchangeably.

In another case involving real property in Columbia County, two parties agreed upon the sale and purchase, respectively, of 216 acres of land, with seller to retain eight acres of the tract, and with the deal contingent upon purchasers' ability to get approval of a subdivision which it agreed to use "best efforts" to obtain. When the planning board refused to grant approval and the purchasers took no

further steps to obtain the subdivision, the purchasers sued for the return of their down payment, but sellers refused, claiming that purchasers failed to use "best efforts" to gain approval for the subdivision. Again, as in the air rights case, the court stated that "best efforts" required that plaintiff to use no more than "all reasonable methods" to obtain subdivision approval and that the determination of whether that had been done was a question of fact.

Numerous other contract cases outside of the real property context demonstrate that the courts in New York routinely use the term "best efforts" interchangeably with the term "reasonable efforts."

So what are we to conclude about the use of the term "best efforts" in real estate contracts?

For one, "best efforts" clauses will generally be enforced in New York as long as the circumstances, if not the actual language of the contract itself, make it reasonably clear what the parties intended by the use of the term.

Secondly, "best efforts" clauses, without more in the contract, will probably be interpreted as requiring no more than "reasonable efforts" under the circumstances.

And finally, if it is the intention of the drafter that something more than "reasonable efforts" be intended by use of the term "best efforts," it would probably be wise to include specific language to that effect in the contract, including objective criteria to be employed in determining the meaning of the term so that the clear intention of the parties can be enforced.

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