



Examining real estate online auction dispute - by Thomas Kearns

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Transactional lawyers are aflutter over the recent New York Court of Appeals opinion in *Stonehill Capital v. Bank of the West* which unanimously held that the bank was contractually required to sell a mortgage to Stonehill despite never signing a definitive contract. The court relied both on the bank's actions following the conclusion of the auction and an email from the bank to Stonehill that stated, "Subject to mutual execution of an acceptable [contract], [Bank] has agreed to the Stonehill...bid..." In reliance on the emails and the bank's conduct, Stonehill had refinanced the mortgage in question, thereby showing reliance and resulting in a \$1.8 million windfall to the seller if the bank did not close on the Stonehill bid.

The auction terms contained a disclaimer that nothing would be binding on the seller until the definitive contract was signed. The bank was confused about which form contract to use and the back and forth around the issue created delays. In addition to the email excerpted above, the bank's internal memo stated the bank had "verbally committed" to the sale to Stonehill. The legal rationale used by the court in *Stonehill* was that the formal contract was not a condition to the formation of a binding agreement – the online auction process and the follow up emails created the binding agreement.

The typical advice given by transactional lawyers in these circumstances has been that the protective language regarding the final contract would let the bank out of the deal until the formal contract was signed—but in this case, the court held that it did not. Many lawyers will no doubt focus on the email traffic between the parties but the context of the *Stonehill* decision is also key—the sale involved an online auction. New York case law over auctions is surprisingly sparse but the few reported decisions hold the seller to a high standard of fairness. For example, in *Solow v. Consec* the court permitted the plaintiff's claim that his bid was rejected, even though it was the highest bid at the time the auction was closed under the terms of the auction's rules. The 1997 Appellate Department's decision in *Valeo v. Atkinson* upheld a bidder's claim that the auction was a sham to get a higher bid from another party.

Stonehill is another court decision in recent New York law where courts have overridden written provisions where a seller's or a landlord's actions were deemed inequitable. My favorite is the 2007 *Bank of America v. Solow* where the Appellate Division held that a landlord just can't say no to every single alteration request made by a tenant despite lease language that gave the landlord an unfettered consent right.

A seller using an auction to sell real estate assets is forewarned: The case law of inequitable conduct may restrict the seller's actions particularly in the context of auctions.

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