



Online real estate auctions - by Thomas Kearns

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Thomas Kearns

After years of reading about online auctions I finally had a client win one last week. The experience was a bit unnerving as, by design, the bidder and the bidder's counsel have very limited insight or input into the auction process. A non-negotiable purchase and sale agreement was posted on the auction site along with some diligence materials, which contained several errors.

The process was simple – the bidders and their attorneys could register on the site and follow the auction for the property involved. The registration process was marred by typical password and other glitches but no more so than we are accustomed to dealing with on a day to day basis.

Somehow I received an email with a confidentiality agreement – it was unclear whether the site was claiming I agreed to it as part of the registration process. I certainly did not do so intentionally but since I was not going to discuss any specifics about the property with anyone other than my client and colleagues, I wasn't too worried.

Downloading the diligence materials again involved the typical tech difficulties but fortunately a younger colleague was able to navigate successfully without too much trouble. A look at the title report provided by the site (the bidder is required to use the designated title company) revealed a significant issue – it disclosed a 99-year ground lease to a third party. No such ground lease was mentioned in the sales brochure nor in the proposed purchase agreement. Something was wrong. An email to the lead broker, the seller's asset manager and title company followed – yes, email addresses were provided but there was minimal responsiveness leaving us with a feeling that the diligence efforts were a waste of time.

It took multiple days to receive the answer – the ground lease was terminated some time ago! But the incident led to some concern – who was paying attention if something so basic was not cleaned up prior to the auction? Was the auction merely a way for the seller to save legal fees?

The purchase contract itself was a reasonably fair form – it included a requirement for a warranty deed and basic seller representations. A number of the contract clauses were unclear and, of course, several additional items that a good buyer's lawyer would ask for were missing but if the bidder was getting a fair price, those niceties were not deal breakers.

The bidding process itself was mysterious since the reserve price was not disclosed. The fear that all of the bidder's diligence work and legal fees would be wasted was real. Toward the end of the bidding process, the online bids came quickly and the deadline was extended several times. The seller accepted the high bid and my client secured a contract which had several minor errors. There was no way to correct the errors so the judgment was made to sign and wire.

The process was certainly efficient and a contract was signed within five (5) days of the start of the process, two (2) of which were weekend days but did the seller achieve top value? As refinements come to the online bidding process, I can see it becoming a valuable tool particularly for smaller and middle market transactions. Brokers need not worry – the seller had a broker coordinating the sale

and the buyer had their own broker.

Thomas Kearns is a partner in the real estate department with Olshan Frome Wolosky LLP, Manhattan, N.Y.

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