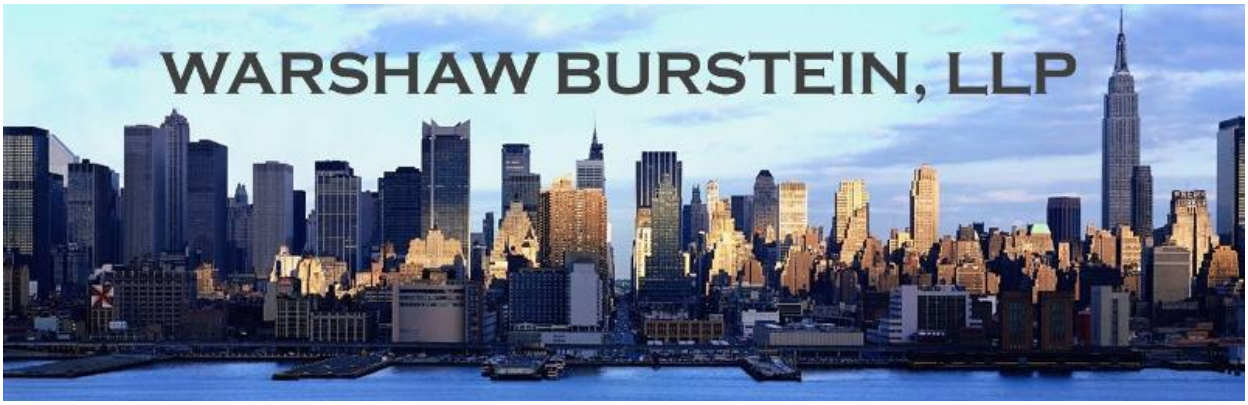

October 2, 2014

CLIENT ALERT

In the Real Estate World, When Is a Deal Actually a Deal?

This question seems simple enough to answer, yet a disagreement about whether one party can enforce an "agreement" against another, unfortunately, and at great expense, sometimes needs to be resolved through litigation. In the past year, the Appellate Division, First Department once again has taken up this issue in two noteworthy real-estate related cases that should serve as fair warning to parties who fail to properly memorialize their "deals."

The first, Gural v. Drasner,[1] decided in December 2013, arose when the owner of a Dutchess County property claimed that his neighbor had breached an "oral agreement" pursuant to which the owner, a horse-breeder, had made substantial and costly improvements to portions of the neighbor's land, without the owner receiving either his end of the bargain (i.e., grazing rights for his horses), or compensation for the improvements that he made. Even though the parties did not dispute the existence of the oral agreement or that the improvements had been made, both the lower court and the First Department ruled in favor of the neighbor and found that the oral agreement was unenforceable. According to the First Department, the oral agreement could not have been performed within one year of its making (a finding by the lower court that the First Department was "constrained" to follow), and therefore was barred by the applicable statute of frauds, which requires that such an agreement be in writing.[2]

In reaching this conclusion, the First Department closed a previously recognized—and judicially created—exception to the governing statute of frauds that could validate an otherwise invalid oral agreement. That exception applied when parties partially performed their obligations under an oral agreement through conduct that was "unequivocally referable" to that agreement. While that exacting "partial performance" exception still may be available with respect to oral agreements that are not subject to the statute of frauds for agreements incapable of being performed within one year, the First Department departed from its own precedent and held that the operative statute of frauds must be strictly enforced according to its terms. Thus, much to the owner's chagrin, the First Department found that what he thought was his "deal" with his

former neighbor was not really a deal after all. He had failed to properly memorialize the terms of the deal necessary to make it enforceable.

In a similar vein, Thor Properties, LLC v. Willspring Holdings LLC,[3] decided in June 2014, took up the issue of whether two parties had reached an enforceable written agreement for the purchase and sale of a mixed-use Manhattan property for a price in excess of $100 million. There, during negotiations that played out over the course of about a week, the parties had exchanged several successive letters of intent, as well as other correspondence, concerning the potential conveyance of the property. When the owner then agreed to sell the property to a third-party, the slighted would-be purchaser commenced an action seeking to compel the conveyance based upon one of the letters of intent, which it claimed was a legally binding and enforceable agreement.

Both the lower court and the First Department disagreed. While the property owner admittedly had revised and countersigned the letter of intent at issue, the parties had continued to negotiate the deal terms after the owner had revised and countersigned the letter of intent, and exchanged both emails and another letter of intent before the would-be purchaser initialed the owner's revisions to the letter of intent at issue. Under those circumstances, the First Department unanimously affirmed the lower court's decision and held that the parties merely had "proposed a series of offers and counteroffers to which they never mutually agreed." In other words, the writing could not be enforced because the parties never had a signed deal in the first place.

The takeaway from these two decisions is both practical and commonsensical: when making a deal, do not rely on a "handshake" or spoken assurance (even from a neighbor), make certain that paperwork is countersigned and do not leave any room for doubt about whether an offer has been accepted or rejected. While it is best to consult with counsel at the planning stage of any proposed transaction, at the very least parties would be taking on significant risks if they fail to confer with counsel as soon as the business terms of a deal have been reached, so that the "agreement" can be memorialized in a signed, enforceable writing. Failing that, parties risk leaving a critical issue to the uncertainties and expense of litigation—a situation that should be, and can be, avoided.

Please contact Maxwell Breed, any of the undersigned, or your regular Warshaw Burstein attorney to review the status of any agreement you may have and to answer any questions concerning the enforceability of agreements.

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[1] Gural v Drasner, 114 A.D.3d 25, 977 N.Y.S.2d 218 (1st Dept. 2013), appeal dismissed, 2014 NY Slip Op 83027 (Sept. 11, 2014).

[2] See N.Y. General Obligations Law § 5-701(a)(1).

[3] Thor Props., LLC v. Willspring Holdings LLC, 118 A.D.3d 505, 988 N.Y.S.2d 47 (1st Dept. 2014).