

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

Drafting a FSBO residential real estate contract: Questionnaire for your clients

BY COLLEEN L. SAHLAS

No broker? No problem. Now you as the attorney can properly draft the residential real estate sales contract from the get-go, rather than “fixing” it during the attorney approval period (after the real estate agent has completed it or more likely left it incomplete). Avoid multiple phone calls, emails and piecemeal information

with your client. Get all the information in one form. Instruct your client to fill out this questionnaire and you'll have all the pertinent information you need to draft the contract and get the deal efficiently underway.

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Mortgage foreclosure defense: Mortgagors beware

BY MICHAEL J. MASLANKA

The case of *Bank of New York Mellon v. Wojcik, et al.*, decided on February 15, 2019 by the fifth division of the first district of the Illinois appellate court, offers some points of guidance to mortgage foreclosure defense attorneys. The cite is 2019 IL App (1st) 180845. In this case there were cross motions for summary judgment. The bank filed an amended complaint for foreclosure, basically following the statutory form prescribed by the Illinois mortgage foreclosure law. It was considered

as though the amended complaint included the allegations that “any and all notices of default or election to declare the indebtedness due and payable or other notices required to be given have been duly and properly given.” The defendants generically denied that allegation.

The bank had given the mortgagors a notice of acceleration, which differed slightly from the language called for in the mortgage instrument itself. The defendants alleged that the plaintiff's failure to strictly

comply with the condition precedent called for in the mortgage, merited summary judgment in the defendants' favor.

The matter went on appeal because of Rule 304(a) language in the summary judgment. In this case, the defendants' answer to the amended complaint for foreclosure did not comply with Illinois Supreme Court Rule 133(c). That rule required the defendants to state specific facts in connection with their denial that

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Drafting a FSBO residential real estate contract

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FSBO Residential Real Estate Contract

Drafting Questionnaire for the Attorney to Draft the Contract

Dear Client, please complete the questions for us to draft your contract:

- I. Seller's Name(s): _____
Current Address: _____
Marital Status: _____
- II. Buyer's Name(s): _____
Current Address: _____
Marital Status: _____
- III. Subject Property:
A. Common address of property being sold: _____
B. P.I.N. of property being sold: _____
C. What is the approximate lot size or square footage of the property? _____
D. Type of property: (e.g. condominium, town home, single family home, multi-unit building, or co-op, etc.) _____
- IV. Purchase Price: \$ _____
- V. Earnest Money (typically 1% of the purchase price): \$ _____
- VI. What personal property (including fixtures) will be included in the sale?

What personal property will be EXCLUDED from the sale?

- VII. Will the Buyer take property in its "as is" condition? YES / NO (Circle one)
- VIII. How much will Buyer's loan be? _____
- IX. What type of loan? (i.e. Conventional, FHA, or VA) _____
- X. What is the highest interest rate for a loan that the Buyer will accept?

- XI. Number of years of loan (e.g. 30 years, 15 years, etc.) _____
- XII. Whose name(s) will appear on the Buyer's mortgage? _____
- XIII. Provide Buyer's Lender name, the contact person, a phone # and an email address:

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

- XIV. Can Buyer obtain a pre-approval/pre-qualification letter? **YES / NO (Circle one)**
If yes, then Buyer should obtain from their lender ASAP and provide it to the parties.
- XV. Choose a closing date, considering the below factors:
 A. Lenders typically require 30-45 days to process a loan, and longer for FHA/VA loans.
 B. **Closings are only on business days during business hours** (no holidays).
 C. If Seller(s) requires money from this sale to purchase a new property, the sale closing should precede the purchase closing (can be the same day).
 D. The Seller should be fully moved out at the time of closing.
- Proposed Closing Date: _____
- XVI. Can Sellers move out and give keys to Buyer on the closing date? **YES / NO (Circle one)**
If not, then what date will Sellers be able to move out? _____
- XVII. Does Buyer need money from their own home sale to purchase this home?
YES / NO (Circle one)
- XVIII. Are there any existing contracts for the sale of this property which have not been cancelled or which are in dispute? **YES / NO (Circle one)**
- XIX. Is this property in foreclosure proceedings or in danger of default on the mortgage(s)?
YES / NO (Circle one)
- XX. Does this property have a mortgage balance which is greater than the home value?
YES / NO (Circle one) Approximate balance of the mortgage(s): \$_____
- XXI. Has Seller obtained a certified appraisal or a market analysis from a real estate agent?
YES / NO (Circle one) Appraised value: \$_____
- XII. If this property has a homeowner's association, then:
 A. Provide the association name, contact person, phone number and email address: _____

 B. What is the unit's monthly assessment amount? \$_____
- C. Are there any special assessments? **YES / NO (Circle one)**
 If yes, provide the amount(s) owed and the particular project it is for.
 Amount: \$_____
 What is the assessment for? _____
 Amount: \$_____
 What is the assessment for? _____
- XXIII. Are there any existing leases or tenancies for the property? **YES / NO (Circle one)**
 Tenant(s) Name(s) & address(es): _____
 Security deposit: \$_____ Monthly Rent: \$_____
 Is rent current or past due? _____ Past Due Amount Owed: \$_____
 Is there a written lease or is it a month to month? _____

Please note that any verbal agreements or written agreements which are not part of the contract are unenforceable in court; it is as if they do not exist. Accordingly, please inform us now if there are any other terms to which the parties verbally agreed that should be included in the contract. You may write them on the back side of this document or attach a separate document to this form. ■

Mortgage foreclosure defense: Mortgagors beware

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there was no failure on the plaintiff's part to perform a condition precedent in the contract. The defendants' mere general denial in this situation, without their allegations of specific facts, resulted in the forfeiture of the issue. Therefore, the general denial as to the allegation of the performance of the condition precede resulted in an

admission of that performance.

The court went on to mention, from another case, that "an admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission."

The court here acknowledged that its result might be viewed as unduly **harsh**, but it affirmed that the Illinois Supreme Court

expects its rules to be followed, as they have the force of law.

The summary judgment for the mortgagee/plaintiff/appellee was affirmed. ■

Cook County Recorder of Deeds fee schedule changing

The "New Predictable Recording Fee Schedule" takes effect on May 20, 2019 in Cook County. You will see some huge increases. For details, visit: <https://cookrecorder.com/wp-content/uploads/2013/01/Fee-Schedule-5-20-19.pdf> ■

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Illinois Supreme Court decision in *Teamsters Local Union No. 700* has ramifications for condominium associations, municipalities, and other areas of law

BY ELLIS LEVIN

The Illinois Supreme Court decision in *1550 MP LLC v. Teamsters Local Union No. 700*, 2019 IL 123046 (“*Teamsters Local Union No. 700*”), not only has ramifications for union law, but for a wide variety of other areas of law. That decision involved the validity of a lease agreement where the union officers signed the lease, but failed to comply with the statutory requirement of the Property of Unincorporated Associations Act (Act) to give notice to the union membership and for the membership to vote to approve the lease.

On three occasions in its opinion, the supreme court cited *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass’n*, 2015 IL App (1st) 150169 (“*Alliance Property Management Ltd.*”), which was a decision involving a condominium board’s failure to comply with the condominium bylaws requirement that the board cannot enter into a contract for more than two years. Condominium law is one of those areas that will be affected by the *Teamsters Local Union No. 700* decision.

Within the area of condominium law, one of the major questions this decision clearly resolves is that the statutory requirement set forth in Section 18(a)(9) of the Condominium Property Act (the “Condo Act”), that all major decisions, including whether to authorize the filing of a forcible action against a unit owner, must be followed for the condominium board of managers to authorize that litigation. When the first district in *Palm v. 2800 Lake Shore Drive*,

2014 IL App (1st) 111290 (“*Palm II*”) first interpreted that section of the Condo Act to be mandatory, many condominium boards strongly opposed the decision, ultimately leading to several appellate court decisions that sought to limit the effect of that decision.

The initial decisions followed *Palm II*. The first district panel in the above- referenced *Alliance Property Management, Ltd.* relied upon *Palm II* in finding a condominium board had no authority to enter into a management contract for more than two years in violation of the Association bylaws and, therefore, the management company could not sue the condominium board to enforce the contract. That decision also rejected the argument that the parties could correct the breach by a subsequent ratification, holding the failure to comply with the statutory requirements rendered the lease void *ab initio* and required it to be treated as if had never existed, meaning it could not be subsequently ratified. Another decision that followed *Palm II* was *Jayne v. Courtyard of Harwood Heights Condominium Association*, 2016 IL App (1st) 141004-U, which involved an alleged parking rules violation, which was never noted upon at an open meeting of the condominium board.

However, the next three decisions of first district appellate court’s panels sought to limit or expressed hostility to the mandatory application of Section 18(a)(9). The first such decision was *North Spaulding Condominium Association v. Cavanaugh*, 2017 IL App (1st) 160870, wherein a First District panel held that the statutory requirement did not

invalidate forcible entry and detainer actions filed by condominium boards against unit owners, noting that the *Palm II* decision did not expressly state that it applied to forcible entry and detainer actions. That decision was thereafter followed by a second decision by another first district panel, *Lake Point Condominium Ass’n v. Diane Waller*, 2017 IL App (1st) 162072. That decision relied upon the *North Spaulding* decision, upholding the validity of a condominium association’s attempt, after the lawsuit had already been filed, to ratify the initial filing of the forcible action. A third decision was *749 West Cornelia Condominium Association v. Hurlburt*, 2016 IL App (1st) 160356-U, wherein another first district panel stated it was gravely troubled by the trial court’s decision to have applied *Palm II* retroactively.

Each of the three first district decisions which were adverse to the full application of the 18(a)(9) was effectively overruled *sub silentio* by the *Teamsters Local Union No. 700* decision. That decision clearly and unambiguously held that the failure to comply with a statutory or other applicable requirement, rendered the lease, contract, lawsuit or other board action void *ab initio*. In the *Teamsters Local Union No. 700* case that meant notifying the membership and the membership voting to approve the lease before it could be entered into as required. The underlying facts of the *Teamsters Local Union No. 700* case clearly parallel those of *Palm II*, in which Section 18(a)(9) of the Condominium Property Act required all decisions, including the decision to authorize

the filing of litigation, to be made by the condominium board of managers at a meeting open to unit owners.

For condominium associations going forward, this means that, for example, if a condominium board files a Forcible Entry and Detainer action against a unit owner or other type of lawsuit, without first having voted to authorize the lawsuit at an open meeting, as required by Section 18(a)(9) of the Condo Act, the lawsuit is subject to being challenged under section 2-619(a)(2) of the Code of Civil Procedure for not having the legal capacity to have filed the lawsuit. Under *Palm II*, the board members may also be personally liable for having violated that clear requirement.

Note that Illinois courts have held that there is a difference between capacity to sue and be sued under section 2-619(a)(2) and standing. Thus, while they are frequently erroneously deemed synonymous, standing is not the same as legal capacity to sue or be sued. In addition, that appellate court held that while standing, which is an affirmative defense, can be waived, legal capacity to sue

or be sued can be raised at any time.

It is also clear that the *Teamsters Local Union No. 700* decision validates prior appellate court decisions holding that the failure of a local governmental board or city council, to comply with statutory requirements means the board or city council lacked “capacity” under section 2-619(a)(2) of the Code of Civil Procedure to file a lawsuit or enter into a contract.

Finally, it is clear that the fields of condominium and municipal law are only two in which the *Teamsters Local Union No. 700* decision will have major ramifications.■

Ellis Levin's primary area of practice is condominium, community association, and cooperative law. He was an Illinois state representative for 16 years and authored the Smith-Hurd Historical and Practice Notes on the Condominium Property Act.

1. 765 ILCS 115/2 (West 2010).

2. See also *Illinois State Bar Ass'n Mutual Insurance Company v. Coregis Insurance Company*, 355 Ill. App. 3d 156 (1st Dist. 2004).

3. See the concurring opinion of Justice Gordon in *Palm v. 2800 Lake Shore Drive*, 2014 IL App (1st)

111290 at ¶138, “defendants’ conduct was grossly negligent in that they intentionally failed to act in the face of a known duty, demonstrating a conscious disregard for their duties,” citing *Sherman v. Ryan*, 392 Ill. App. 3d 712, 730, 911 N.E. 2d 378 (1st Dist. 2009).

4. See *Board of Managers of the 1120 Club Condominium Ass’n v. 1120 Club*, 2016 IL App (1st) 143849, 66 N.E. 3d 863, quoting *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673 which held that the doctrine of standing requires that a party have a real interest in the action brought and in its outcome, while “legal capacity to sue or be sued” under section 2-619(a)(2) generally refers to the status of the party.

5. See *Lake County Forest Preserve District v. Northern Trust Bank/Lake Forest N.A.*, 207 Ill. App. 3d 291, 565 N.E. 2d 715 (2d Dist. 1990), where the question was whether the forest preserve district board’s decision to file condemnation proceedings complied with the section of the Municipal Code which required a majority vote of the members of the municipal board to approve the filing of litigation where defendant property owners in condemnation cases filed Section 2-619(a)(2) motions. See also *Meade v. City of Rockford*, 2015 IL App (2d) 140645, 40 N.E. 3d 141 (2d Dist. 2015), where the appellate court held that where a party to a settlement agreement with a city council attempted to enforce the agreement where the city council, after the settlement was entered into in open court, refused to approve it by a vote of the majority of the members of the city council, the settlement agreement was held to be unenforceable; *Grassini v. Du Page Township*, 279 Ill. App. 3d 614, 665 NE. 2d 860 (3d Dist. 1996)(where a township exceeds its statutory authority in entering into a contract, the township’s act is *ultra vires* and the resulting contract is void *ab initio*).

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