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"ALWAYS READ THE FINE PRINT"

BEWARE THE RIGHT OF FIRST REFUSAL

By R. STEPHEN GOLDSTEIN

If you own or if you lease property as either a landlord or tenant, beware the right of refusal! It can be a good or a bad thing, depending on your relationship to the affected real property, and how well the right of first refusal is drafted. Rights of first refusal can be, and often are, the source of expensive litigation.

What is a right of first refusal? It is the right to buy property on the same terms as the seller has offered to another party. Let's say a building owner ("Seller") wants to sell his or her building. Once the Seller has a bona fide Buyer, i.e., someone has committed to purchase the building at a price acceptable to the Seller, the Seller must first tender the offer to anyone holding a right of first refusal, typically a tenant of the building. Perhaps the Buyer approaches the Seller and offers to buy Seller's building for $1,000,000. The Seller thinks this a good price and wants to sell. But the Seller must first go to the tenant holding a right of first refusal and offer the building to the tenant on the same terms, in this case $1,000,000. If the tenant accepts, the tenant can acquire the property for the offer price. Only if the tenant doesn't accept can the Seller go ahead and sell to the third-party Buyer.

You can see that the right of first refusal puts a heavy burden on the property owner who has granted the right to a tenant or other non-owner. The owner may be hampered in selling because he or she will have to tell any third-party buyer that even if a deal is struck it could go up in smoke because someone else – in the example above, the tenant – may step in and take the property. Buyers who fear their only function is to fix the price for someone else may feel that they are "just spinning their wheels" by submitting an offer, making it difficult for a property owner to attract multiple offers, thus lowering the overall selling price. If the right of first refusal is not expressly limited, then it may be continuing – meaning that if the tenant doesn't exercise the right the first time the property is sold, the tenant will retain the right during subsequent sales of the property, for the entire lease term.

Even worse, suppose the tenant equivocates about exercising the right of first refusal and complains that the third party buyer is not bona fide, or that the landlord didn't give the tenant enough time to exercise the right before conveying the property to the third party buyer, or issues an estoppel certificate which says the landlord has ignored the tenant's rights? What if the tenant doesn't have the money to buy the property at market value, but wants to meddle with the sale of the property, perhaps forcing a lower price from the landlord? All of these things happened in a case g3mh handled recently, which went all the way to the California Supreme Court. Our client won, but it was time-consuming and expensive.

The lesson to be learned: If you are a property owner or landlord, consider carefully before giving a tenant or any other party a right of first refusal to buy your property. If you decide that you must, be sure you're amply compensated for the trouble and risks involved, and make sure that the language of the contract governing the right of first refusal is written by a knowledgeable attorney and sufficiently detailed to set limits on when and how the right must be exercised.

About the Author

R. Stephen Goldstein is a transactional and litigation attorney, with particular expertise in settlement negotiations, arbitration and mediation techniques, tort, contract real property and business law, and sexual harassment. A native of San Francisco, Steve is a graduate of the University of California, Riverside, earning his law degree from Hastings College of Law, San Francisco, in 1978, where he wrote for the Constitutional Law Quarterly. In 1993, Steve completed mediation training at Program for Instruction of Lawyers at Harvard Law School. He has served as lead counsel in all manner of business trials, and was a co-founder, first President and is a member of the Board of The Mediation Society. Steve is available at (415) 673-5600 ext. 231, or via email at SGoldstein@g3mh.com.

UNINSURED MOTORIST PROTECTION AGAINST THE WORST DRIVERS

The legislature forgot to extend the time limit for filing lawsuits (statute of limitations) in uninsured motorist claims when it extended the time limit for filing personal injury cases from 1 year to 2 years effective January 1 of 2003. Partner Lee Harris was in Sacramento recently as part of a consumer attorney's team talking to legislative leaders to bring the uninsured motorist law up to the new 2-year personal injury statute of limitations. Until that legislation is passed, it is important to make sure that any claim involving a possible uninsured motorist is investigated quickly so that a decision can be made on whether to file suit before 1 year expires. It is also important to check your uninsured motorist limits. The standard policy is only for $15,000, which barely covers a day in the hospital. Increased policy limits of $100,000, $300,000 or $1,000,000 for accidents caused by the worst drivers, the uninsured ones, can be purchased for relatively small additional premiums. Agents typically do not bring up the subject, so do not forget to ask.

Lee Harris is available at (415) 673-5600 ext. 231, or via email at LHarris@g3mh.com.

NEW RULES FOR OMI EVICTIONS

On April 30th, the Honorable David A. Garcia, judge of the San Francisco Superior Court, granted summary judgment to plaintiffs seeking to abolish portions of the 1989 Proposition G, which changed San Francisco's Rent Ordinance by limiting owner move-in (OMI) evictions to one per building, and prohibiting OMI evictions of certain elderly and disabled tenants. Judge Garcia ruled that Proposition G was unconstitutional as applied to the case before him, and therefore unenforceable by the City against the parties who brought the case.

At this early date it is not yet known whether other trial courts will follow this decision, or what the rules will be after all appeals have been heard. It is premature to be making plans based upon this ruling, but if it is upheld, it may once again be possible for small groups of individuals to purchase multi-unit buildings in San Francisco as tenants-in-common and to remove rent-controlled tenants, allowing the new owners to occupy their units as their principal residences, without invoking the Ellis Act.

A separate decision from the First District Court of Appeal appears to have struck down a San Francisco Rent Control rule which required owners pursuing an OMI eviction to allow tenants to move into any vacant, noncomparable, units at their old rent. The Court ruled that state law preempts San Francisco's local ordinance, and therefore while owners pursuing an OMI eviction must offer the tenants a noncomparable unit which is vacant and available, the owners may establish the initial rent for the unit. This decision does not affect the rule that owners may not pursue an OMI eviction if a *comparable* is vacant and available. Owners must still reside in their units for three years after the OMI eviction; suspicious timing of the eviction notice will be considered as bad faith and may defeat the eviction.

CONDO CONVERSION UPDATE

January 10, 2003, the San Francisco Superior Court struck down the "McGoldrick Ordinance," and the City ceased accepting applications for 2-unit buildings with only one owner-occupier, although it will continue to process all "McGoldrick" condo conversion applications filed on or before January 21, 2003.

Since its passage in August of 2001, the "McGoldrick Ordinance" had expanded eligibility requirements for condominium conversion of 2-unit buildings to allow properties with only one owner-occupier to condo convert without participation in the annual City condo lottery. Unless the Court's decision is reversed on appeal, we now return to the pre-McGoldrick rules, which allow 2-unit buildings to bypass the City's condo lottery only if *both* units have been owner-occupied *by separate owners* for the 12 months preceding the conversion application.

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