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Early Collaboration for Greater Protection: Don't Wait to Assemble Your Team

by Josh C. Grushkin and Javier F. Gutierrez, Partners, Stuart Kane LLP

When kicking off negotiations on a real estate transaction, brokers usually lead the charge for their clients. But some principals wait to call their real estate attorney until the letter of intent is signed, and negotiations are beginning on the definitive lease or purchase and sale agreement. But what if an important deal point is missed in the letter of intent that counsel could have raised? Or worse, what if negotiation of the definitive agreement stalls, and a seemingly non-binding letter of intent is found to be an enforceable contract by a court of law? Involving an attorney early in the deal-making process could help to avoid costly oversights, if not simply streamline the transaction.

In *First National Mortgage v. Federal Realty Investment Trust*, 631 F.3d 1058 (2011), sophisticated real estate parties exchanged several proposals for a ground lease with various put and call options. While each "counter proposal" and "revised proposal" included customary "non-binding" language, the "final proposal" executed by the parties only stated that it was subject to approval of the terms and conditions of a formal agreement. Missing an express statement that it was "non-binding," when the market turned and the parties could not agree on the terms for their formal agreement, the "final proposal" was held by the Ninth Circuit to be a binding contract.

More concerning, recent case law calls into question whether including the words "non-binding" would even solve the potential issue of a letter of intent being held enforceable. The decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.*, 55 Cal. 4th 1169 (2013) overruled 75-year old precedent, with the California Supreme Court holding that a litigant may offer evidence of a prior oral agreement that contradicts a written contract.

Given these types of recent rulings, parties negotiating letters of intent need to consider that documents intended to be non-binding may ultimately be found to be enforceable. And if the party on the other side of the table is litigious, they may be able to win a court battle to invalidate the terms of a written agreement by proving fraud with contradictory prior oral agreements.

Having potential landmines like these in the path of the deal should prompt real estate principals and brokers to involve real estate attorneys early in negotiations. Collaboration on projects helps to quickly address issues, and streamlines the process of negotiating the definitive agreement. Front-loading negotiations with the principal, broker and attorney, yields more efficient use of

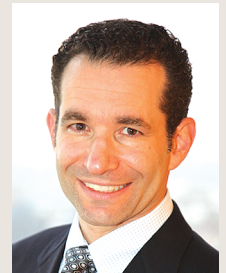
time and resources. For these reasons, assembling your negotiation team and including real estate counsel at the letter of intent stage is encouraged to ensure all the bases are being covered. If the letter of intent is the key opportunity to mutually agree upon crucial deal points, why wait to raise some of those points until after that opportunity has passed?

Whether the goal is to get the deal done quickly, or to just avoid surprises when a non-binding proposal is held to be enforceable, don't wait to call counsel until after the letter of intent is done. Having real estate attorneys on the full negotiation team assembled at the start of the deal is always going to benefit that party in the negotiation, and help efficiently achieve the best results in the transaction.

Josh C. Grushkin

Josh Grushkin is a real estate partner with Stuart Kane LLP. His practice encompasses all aspects of commercial real estate transactions, including land acquisitions and dispositions for commercial and residential developers, homebuilders, investors and corporate users. His expertise also includes lease transactions for office, industrial and retail properties, representing landlords and tenants. Mr. Grushkin also has experience negotiating financing for retail shopping centers, commercial and industrial buildings, as well as for multi-family and residential development.

Mr. Grushkin can be reached at 949.791.5151 or jgrushkin@stuartkane.com.



Javier F. Gutierrez

Javier Gutierrez is a real estate partner with Stuart Kane LLP where he helps clients acquire, finance, construct, lease, and dispose of real estate and other corporate assets. He has considerable experience representing Fortune 500 companies, as well as medium and small sized companies, in a wide range of traditional and non-traditional real estate and corporate transactions.

Mr. Gutierrez can be reached at 949.791.5191 or jgutierrez@stuartkane.com.

