Barley Snyder

Real Estate Law Update July 2012

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Get it in Writing or Lose Your Commission

By: Sarah Yocum Rider

Real estate brokers who rely upon oral agreements or oral modifications or extensions to written brokerage agreements run the risk of losing valuable commissions.

In a 2011 Pennsylvania Superior Court case, the Court addressed the enforceability of an oral extension to a written listing agreement. The Court ultimately refused to allow a real estate broker to recover a commission from a landlord based on an oral extension to a brokerage agreement. The broker failed to comply with the Pennsylvania Real Estate Licensing and Registration Act ("RELRA") (*see* 63 P.S. 455.101 - 455.902) by failing to put the extension of the term of the agreement in writing.

In order for brokerage agreements to be enforceable, it is important to be aware of the RELRA requirements. The RELRA provides that brokerage agreements must be in writing and signed by all parties. The Pennsylvania Superior Court held that this requirement must be applied to extensions of original brokerage agreements as well.

In addition, a written brokerage agreement must contain the following:

1. Notice that a Real Estate Recovery Fund exists to reimburse a person who has obtained a final civil judgment against a Pennsylvania real estate licensee owing to fraud, misrepresentation or deceit in a real estate transaction and who has been unable to collect the judgment after exhausting legal and equitable remedies;

2. Notice that payments of money received by the broker on account of a sale shall be held by the broker in an escrow account pending consummation of the sale or a prior termination thereof;

3. Notice that the broker's commission and the duration of the agreement have been determined as a result of negotiations between the broker, or a licensee employed by the broker, and the seller/landlord or buyer/tenant;

4. A description of the services to be provided and the fees to be charged;

5. Notice about the possibility that the broker or any licensee employed by the broker may provide services to

more than one party in a single transaction, and an explanation of the duties owed to the other party and the fees which the broker may receive for those services;

6. Notice of the licensee's continuing duty to disclose in a reasonably practicable period of time any conflict of interest;

7. In an agreement between a broker and a seller/landlord, a statement regarding cooperation with subagents and buyer agents, a disclosure that a buyer agent, even if compensated by the listing broker or seller/landlord, will represent the interests of the buyer/tenant and a disclosure of any potential for the broker to act as a dual agent; and

8. In an agreement between a broker and a buyer/tenant, an explanation that the broker may be compensated based upon a percentage of the purchase price, the broker's policies regarding cooperation with listing brokers willing to pay buyer's brokers, a disclosure that the broker, even if compensated by the listing broker or seller/landlord will represent the interests of the buyer/tenant and a disclosure of any potential for the broker to act as a dual agent.

Typically, all of the requirements above are included in standard written brokerage agreements. However, it is equally important to be aware that any extensions (or other modifications) to those agreements must be in writing signed by the parties in order for such agreements (and thus rights to commissions) to be enforceable.

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Confession of Judgment Clauses in Commercial Leases

By: Troy B. Rider

One of the most negotiated provisions in a commercial lease agreement is a confession of judgment clause. Two types of confessions of judgment exist in Pennsylvania: one for money damages and one for possession of the leased premises. A confession of judgment clause allows a landlord to file specific paperwork with the court to enter judgment against its tenant without the opportunity for a hearing or response from the tenant. The landlord is not required to notify the tenant, and the tenant does not have a right to dispute the entry of the judgment, except in limited circumstances. Usually, the landlord is permitted to confess judgment against the tenant only after the occurrence of a defined event, like failure to pay rent. As you can imagine, with such a powerful remedy at the fingertips of a landlord, Pennsylvania courts have limited its application, particularly with respect to lease amendments and assignments.

Generally, under Pennsylvania law, a confession of judgment clause contained in a commercial lease agreement will only be enforceable if it is restated in its entirety in a lease amendment or assignment. A confession of judgment clause that is not restated in a lease amendment or assignment may not be enforceable.

For instance, assume a landlord and tenant enter into a commercial lease agreement containing a confession of judgment clause. Two years later, the landlord and the tenant amend the lease to extend the term but fail to restate the confession of judgment clause in the amendment. Under Pennsylvania law, the tenant now has an argument that the confession of judgment clause in the original lease is ineffective against the tenant. Consequently, the landlord may be forced to pursue other remedies in the event of a default by the tenant, which other remedies often require additional time and expense.

The same principle applies in an assignment of a commercial lease agreement. In fact, Pennsylvania courts have

expressly held that a confession of judgment clause is not binding on the assignee of a commercial lease without the assignee's express written acknowledgement of the confession of judgment clause.

Accordingly, to retain the right to confess judgment against a tenant or a proposed assignee, a landlord should always ensure that the confession of judgment clause is restated, in its entirety, in any lease amendment or assignment.

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Property Tax Assessments: Should you appeal?

By: Daniel M. Frey

Do you want to lower your property taxes? Would it surprise you to learn that you could do so at little to no net cost? There may be an opportunity to do exactly this if your property is currently assessed too high. Your property's tax assessment forms the basis for all of your real estate taxes. The assessment, which is different than the appraised value of your property and in most cases does not equal 100 percent of the fair market value of your property, is established by the County once every few years and remains fixed as property values move up and down. So if your assessment is too high (either because it was originally assessed too high or because of a decrease in your property's value), you are paying too much in taxes each year that the assessment remains the same. The assessment will remain the same until the property is changed (improvements are added or removed), the County undergoes a county wide reassessment, or your file an appeal of your assessment. County wide reassessments usually occur only once or twice a decade although in some counties, a county wide reassessment has not occurred in nearly 20 years. If you lower your assessment, you will lower your real estate taxes until the next County wide reassessment occurs which could be several years. You are entitled to challenge the assessment every year if you believe the assessment is too high. The amount of costs involved in the appeal are often far less than the total savings you will receive if the appeal is successful. In most cases, the only costs are an appraisal of the property and legal fees.

To determine whether an appeal is appropriate, you must first estimate what your property is worth. Then, find the common level ratio[1] for your county below:

- Adams - 100%
- Berks - 73.2%
- Lancaster - 76.5%
- York - 83.7%

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[1] The common level ratio is used to determine assessments in the years following a county wide reassessment. In the first two years following the county wide reassessment, your assessment should equal 100 percent of the fair market value of the property. In all subsequent years, the assessment should equal the common level ratio then in effect multiplied by the fair market value. The common level ratio, which is determined by the state, varies by county and changes in July every year.

Now multiply your estimated fair market value by the common level ratio. For example, if your property is located in

York County and is worth $500,000, multiply $500,000 by .837 and your assessed value should be $418,500. This figure should be close to your assessed value. If it is significantly lower than your assessed value, you may want to consider challenging your assessment. If you are unsure what your assessed value is, check your most recent property tax bill or call your County's assessment office and ask.

Another way to determine if your assessment is too high is to take the assessment and multiply it by the number listed below for the County in which the property is located:

- Adams - 1
- Berks - 1.37
- Lancaster - 1.31
- York - 1.19

Again, if your property is located in York County and is assessed at $500,000, you multiply $500,000 by 1.19 and your property is being taxed as though it is worth $595,000. If the figure is higher than what you believe the property is currently worth, it might make sense to appeal your assessment.

So how do you challenge your tax assessment? The process is started by filing an appeal to the County's Board of Assessment Appeals. The Board will review your assessment and determine if it is too high. For a successful appeal, you will most likely need a recent appraisal of the property. If the Board's decision is not satisfactory, you can appeal this decision to the Court of Common Pleas which then determines the fair market value and applies the common level ratio to establish your new assessment.

Keep in mind that any reduction in your assessment will most likely result in tax savings not just in the year in question but in future years as well. While in general you can not receive a refund for past taxes paid if your assessment is too high, your assessment will be reduced for future years which will save you money. To determine how much savings you could receive, determine your local milage rates and multiply these by the difference between the current assessment and what you believe the assessment should be and you can determine the savings for one year. For example, if the combined millage rates in your municipality (School, County and Municipal millage rates) are 25 mills (or 2.5%), you would save $250 for every $10,000 that you reduce your assessment.

Barley Snyder has attorneys with experience handling tax assessment appeals throughout central Pennsylvania. If you believe your assessment is too high, give us a call to see if we can help lower your assessment and lower your taxes.

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Pennsylvania's New Oil And Gas Law

By: Keith Mooney

On February 14, 2012, Governor Corbett signed Act 13 into law. Act 13 was the product of the legislature's, as well as many special interest groups', desire to regulate and produce revenues for the state government from various drilling activities being conducted by oil and gas companies drilling in the Marcellus Shale Geological Formation. Act 13

provides for the following: new fees to be assessed and collected on unconventional wells; a formula for distribution of these fees; revisions to environmental protections for both surface and subsurface activities; and restrictions on the authority of local governments to impose burdens on oil and gas activities beyond those required by the state or those imposed upon other commercial industrial activities within the local municipality.

The new well fees, enacted pursuant to Act 13, will be applied to unconventional wells based upon the average annual price per million British thermal units ("BTU's") in the previous calendar year. An unconventional well is defined as a well drilled to produce natural gas from shale existing below the base of the elk sandstone or its geological equivalent where natural gas generally cannot be produced at economic flow rates or in economic volumes except by hydraulic fracturing or by the use of multi-lateral well bores. For all unconventional wells the Commonwealth has developed a fee schedule to be implemented for the next 15 years depending on the annual price per million BTU's in the previous calendar year. In the event that an unconventional well produces less than 90,000 cubic feet of gas per day, it is not subject to the well fee assessment.

Act 13 provides a formula for the distribution of unconventional well fees collected by the Pennsylvania Public Utility Commission ("PUC") in a calendar year. The first year's allocations from the well fee assessment is estimated to be $22.25 million for calendar year 2012. The formula for distribution of the well fee assessment provides that 60% of the funds collected shall be distributed among the counties and municipalities in which the unconventional wells are located and 40% of the monies collected shall be deposited in the Commonwealth Marcellus Legacy Fund and be utilized for statewide initiatives.

There are several new environmental restrictions contained in Act 13 which are primarily directed at operators of unconventional wells. Act 13 requires operators of unconventional wells to disclose the composition of hydraulic fracture fluids to the chemical disclosure registry, which will make the information about chemicals and additives utilized in hydraulic fracturing available to the public. Act 13 also requires unconventional well operators to improve record keeping regarding the transportation of waste water fluids, begin source reporting for air contaminate emissions, and develop well sites designed to prevent spills to the ground surface during drilling and hydraulic fracturing, through the use of impervious surfaces and additional practices to be determined by the Pennsylvania Environmental Quality Board.

All local ordinances regulating oil and gas operations regulated by Act 13 are preempted, except those adopted pursuant to the Pennsylvania Municipalities Planning Code ("MPC") and the Floodplain Management Act. Ordinances adopted pursuant to either the MPC or the Floodplain Management Act are preempted to the extent that they impose conditions, requirements or limitations on the same features of oil and gas operations regulated by Act 13 or that accomplish the same purposes as set forth in Act 13. Also, local ordinances must provide for the reasonable development of oil and gas. In order to permit the reasonable development of oil and gas, Act 13 limits local regulation of oil and gas activities as follows: conditions on permanent oil and gas operations may not be more stringent than those imposed on industrial uses or other land development in the district in which the use is sought; oil and gas operations must be a permitted use in all districts, except that a municipality can prohibit or require them as a conditional use in residential districts; no limits or conditions may be imposed on subterranean operations or hours of operations for compressor stations, processing plants, drilling of wells and construction or disassembly of drilling rigs; and no setbacks for oil and gas wells may be more stringent than those imposed upon other industrial uses.

The information provided above is a brief overview of Act 13's impact upon oil and gas drilling activities in the

Commonwealth of Pennsylvania. In the event that you have further questions regarding the effect of Act 13 on your operations for your municipality, do not hesitate to contact Barley Snyder's Environmental Law Group or Municipal Law Group.

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