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MICHAEL CONLEY, JR. and KATIE M.)
MAURER,)
)
Plaintiffs-Petitioners,)
)
v.)
)
)
MONA GUERRERO, BRIAN KRAMINITZ,)
and MICHELE TANZI,)
)
Defendants-Respondents.)
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)
)
)
)

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 076928

APPELLATE DIV.
DOCKET NO.: A-3796-13T2

LAW DIV. DOCKET NO.:
SOM-C-12005-14

BRIEF OF AMICUS CURIAE NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

This case is about bringing the legal practice into the modern age where most people communicate electronically about all facets of their lives from personal to professional. It questions the delivery method required for a notice of termination of a real estate contract by the "attorney review clause," which was established in the settlement of a dispute between the New Jersey State Bar Association (NJSBA) and the New Jersey Association of Realtor Boards in 1983. N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Bds., 93 N.J. 470, mod., 94 N.J. 449 (1983). As a result of that settlement, realtors were permitted to prepare certain residential real estate contracts so long as each contract included language providing the parties with three days to have the contract reviewed by an attorney. The agreed-upon language further permitted disapproval of the contract within those three days by notice sent to the realtors "by certified mail, by telegram or by delivering it personally." Id.

In this matter, 30 plus years after that settlement was reached, notice of disapproval of a residential real estate contract was sent by the seller's attorney to the buyer's attorney by email and fax, and to the realtor by email. The Appellate Division, while not intending to establish a general rule, held that the email delivery under the facts and

circumstances presented in this case provided the actual notice contemplated by the settlement language and was effective to terminate the real estate contract. Conley v. Guerrero, No. A-3796-13T2 (App. Div. Nov. 5, 2015) at Pa16a-17a.

In light of the dramatic advances of technology since the settlement was reached in the N.J. State Bar Ass'n case in 1983, the NJSBA urges the Supreme Court to affirm the Appellate Division's holding, acknowledging that, in this case, an emailed notice received by all parties constitutes substantial compliance with the prescribed delivery methods, and to take steps to reassess the transmission requirements established in the N.J. State Bar Ass'n case over 30 years ago.

LEGAL ARGUMENT

I. The Appellate Division Decision Should be Affirmed

After a thorough examination of the facts of this matter, the relevant case law, and the inferred policy reasons underpinning the case law, the Appellate Division held that termination of the real estate contract in this case by an email from seller's attorney accomplished the actual notice of termination contemplated by the language of the settlement agreement in N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Bds., 93 N.J. 470, mod., 94 N.J. 449 (1983).

Contrary to Petitioner's assertion, the Appellate Division's decision in this matter does not undermine the Supreme Court's constitutional exclusive authority to regulate the practice of law. Neither does it alter the requirements prescribed by the Supreme Court in the N.J. State Bar Ass'n case. Indeed, the Appellate Division opinion states it is not establishing a general rule allowing an alternative delivery method for the notice requirements in real estate contracts, and specifically declines the opportunity to revise the standard language approved in the N.J. State Bar Ass'n matter. Conley v. Guerrero, No. A-3796-13T2 (App. Div. Nov. 5, 2015) at Pa15a-16a, 16a-17a. The Appellate Division applies equitable legal principles to reach a just result that is consistent with the

Supreme Court's purpose and intent of its order in the N.J. State Bar Ass'n case.

That case resulted in the Court's approval of an agreement where realtors are permitted to prepare contracts for the sale of residential real estate, if each contract contains specific Court-approved language making the contract subject to review by an attorney for the buyer or seller within three days ("attorney review"). If neither party exercises that right, the contract becomes legally binding. However, if the attorney for the buyer or seller disapproves of the contract as drafted, the prescribed language requires that attorney to notify the broker and the other party within the three days and requires that the notice to the broker be sent by certified mail, telegram or personal delivery. The parties can extend the prescribed time for attorney review by written agreement, but cannot waive, disclaim, relinquish or abridge the prescribed time for such review. N.J. State Bar Ass'n, supra, 93 N.J. 470, mod., 94 N.J. 449 (1983).

In reviewing the terms of that settlement and reaching its conclusion, the Appellate Division noted strict enforcement of the methods of delivery of a disapproval notice provided under the prescribed settlement language in this matter would result in the forfeiture of the seller's right to disapprove the contract, despite the undisputed fact that the realtor and the

buyer received notice of disapproval within the required timeframe. "Given Guerrero's substantial compliance, the forfeiture should be avoided." Conley v. Guerrero, No. A-3796-13T2 (App. Div. Nov. 5, 2015) at Palla. In balancing the equities, the Appellate Division correctly concluded plaintiff's right to notice was achieved (albeit not in the strict manner dictated by the contract), and defendant's right to disapprove the contract should be enforced.

This finding is consistent with the focus of the Court in approving the prescribed language in the N.J. State Bar Ass'n case where the public interest in allowing for attorney review and disapproval of a realtor-prepared contract was paramount. The options for communicating any disapproval to the broker were not even discussed by either the Chancery Division or the Supreme Court.

In reviewing the proposed settlement agreement in the N.J. State Bar Ass'n matter, Chancery Judge Mark A. Sullivan Jr. provided the settlement represented a way to accommodate the competing interests of real estate professionals to use their expertise and draft contracts that begin the real property conveyance process, as well as the interests of New Jersey residents by ensuring that they have an acknowledged right of review by a lawyer, and the right to reject within three days

should that be appropriate and necessary. N.J. State Bar Ass'n, supra, 93 N.J. at 474.

Likewise, the Supreme Court agreed with Judge Sullivan's comments and further noted, ". . . the public's interest is safeguarded through the settlement's attorney review provisions and the Court's continuing supervisory control." Id.

In this case, where both parties were afforded the benefits of the attorney review process, and the only diversion was the method of delivery of a disapproval notice to the realtors, the Appellate Division appropriately concluded that an emailed notice that all parties received is sufficient to terminate the contract in question.

For these reasons, the NJSBA urges the Court to affirm the Appellate Division decision.

II. Consideration Should be Given to Updating the Required Language of the "Attorney Review Clause"

As noted, residential real estate contracts are still required to include the language ordered by the Court in the Bar Association case over 30 years ago. The intent of the language is still relevant today, but the precise requirements mandated by the language are out of date due to technological advances.

Specifically, the language requires notice of disapproval to be sent to a real estate broker by "certified mail, by telegram, or by delivering it personally." N.J. State Bar Ass'n, supra, 93 N.J. at 480. Those were the accepted modes of communicating important legal information in 1983 when the settlement was struck.

In 2016, the accepted modes of finalizing transactions and communicating with one another have changed dramatically. In addition to widespread informal communication through electronic means, such communication is not just relied upon but accepted throughout the legal and other professions. Indeed, it is the NJSBA's belief that realtors, the only individuals to whom the prescribed delivery methods apply, prefer email communications and, based on the proposed *amicus curiae* brief submitted by the New Jersey Realtors, would be in favor of allowing email as an acceptable delivery method. As these transactions are so closely followed by all involved, the increased timeliness of an emailed

notice far outweighs the risk of any potential delivery failure. Furthermore, because of the close monitoring of the transaction during this phase, it is likely that any delivery issue would be quickly caught and ameliorated by either the sender or the intended recipient.

Allowing electronic notice would also be consistent with how other business is conducted. Clients routinely communicate with attorneys through email. Likewise, lawyers regularly communicate with co-counsel, adversaries and others through email. Electronic filing of documents is required in the federal courts, and will soon be required in state courts. Banking, bill-paying and other fiscal transactions are all done electronically. The Court even recognized the changing complexities in the law due to electronic communications in Stengart v. Loving Care, 261 N.J. 100 (2010), where attorney-client privilege issues arose in the context of emailed correspondence. The Court's recent adoption of rules governing metadata in litigation documents provides further acknowledgement by the Court of the pervasive use of electronic methods of communication.

Perhaps of most significance to this case, as of 2013 New Jersey law provides that residential real estate contracts are binding when signed using electronic signatures. N.J.S.A. 12A:12-2.

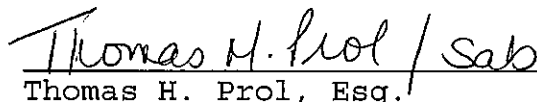
The Appellate Division declined the NJSBA's earlier invitation to endorse a revision of the current standard language required in realtor-prepared contracts to recognize the advent of modern communication methods such as email. Conley v. Guerrero, No. A-3796-13T2 (App. Div. Nov. 5, 2015) at Pa15a-16a. However, the NJSBA submits this case demonstrates the need for a reassessment of the terms of the settlement reached in the N.J. State Bar Ass'n case over 30 years ago. The intent and purpose of the settlement remain the same now as then: to protect the interests of consumers in consummating the purchase of residential real estate by permitting the preparation of real estate contracts by realtors in a timely and efficient manner, while permitting the parties to such contracts to obtain the benefit of legal advice before those contracts become binding. The means to effectuate that intent and purpose, however, are in dire need of updating to account for the significant advances in communication methods that have arisen over the course of the past 30 years.

For these reasons, the NJSBA urges the Court to recognize that the time for change has come and take the steps necessary to amend the transmission requirements found in the prescribed "attorney review" language. The NJSBA stands ready to assist the Court in whatever process is deemed appropriate to accomplish that.

CONCLUSION

For the reasons noted herein, the NJSBA urges the Court to affirm the Appellate Division determination that the notice of disapproval provided by defendant's attorney in this matter effectively terminated the real estate agreement. Further, the NJSBA urges the Court to engage in a reassessment of the transmission requirements for notices of disapproval prescribed in the approved language as a result of the N.J. State Bar Ass'n case.

Respectfully submitted,

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Dated: 6/13/14