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May 2014

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A MODERN TWIST ON THE THREE DAY ATTORNEY REVIEW NOTICE PROVISION

By C. John DeSimone, III

Ever since *New Jersey State Bar Association v. New Jersey Association of Realtor Boards*, 93 N.J. 470 (1983), residential real estate contracts prepared by realtors have been required to have language permitting a party to rescind the contract during the three day attorney review period if notice is given by certified mail, telegram, or personal service. See also *N.J.A.C.* 11:5-6.2(g)(2). Recently, the Chancery Division in a case captioned *Conley et al. v. Guerrero et al.*, SOM-C-12005-14 (Ch. Div. March 14, 2014), had reason to look again at the above notice requirement, but with a modern twist.

In *Conley*, it was undisputed that a written letter rescinding the contract was sent, received, and was timely. The problem was, the notice was sent by e-mail rather than certified mail, telegram, or personal service. An aggrieved party sued claiming that as the notice provision was not strictly complied with, the purported termination was invalid. Relying on equitable principles, and in particular a truism of equity that equity looks to substance rather than form, the court approached the matter analogizing it to the doctrine of substantial compliance.

The Chancery Division found that although there had been a breach, such breach was minor. The court further found that the letter provided did satisfy the purpose of the attorney review provision, and that it was undisputed because the letter was sent and received, all were on actual notice of the termination. The parties were further represented by counsel and counsel were actually consulted. The essential

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purpose of the notice requirement was therefore satisfied. As a result, the court ruled that the contract was property terminated.

The court went on to observe that the methods for conveying notice established in the early 1980s have been "significantly transformed" since. The court questioned whether telegraphs are used anymore, noting the prevalence in modern communication of e-mail, facsimile, and text messaging. The court concluded by suggesting it may be time to amend the "dated notice provisions contained as boilerplate within nearly ever residential real estate contract" in the State.

NJ APPELLATE COURT RESTRICTS LIABILITY FOR DIRECTORS UNDER N.J.S.A. 14A:6-12

By Charles J. Stoia

The New Jersey Appellate Court recently ruled that directors of a corporation were not personally responsible for the corporation's debts based upon an estimated $25 million cash distribution to the shareholders/directors approximately 14 months before the corporation became insolvent. *G.S. Partners, L.L.C. v. Venuto, et al.*, A-4176-12T4 (App. Div. April 28, 2014).

G.S. Partners L.L.C. ("G.S. Partners") acquired a franchise from Hollywood Tanning Systems, Inc. ("Hollywood Tanning") in December 2006. In April 2007, Hollywood Tanning sold most of its assets to another company, Tan Holdings L.L.C. ("Tan Holdings") for $40 million in cash, 25% of the outstanding preferred units of Tan Holdings, and certain earned payouts over time.

Nearly two months after the asset sale, Hollywood Tanning distributed roughly $25 million to the Hollywood Tanning shareholders who were also the defendant/directors of the corporation. Hollywood Tanning became insolvent and stopped transacting business in the summer of 2007.

G.S. Partners subsequently obtained a default judgment against Hollywood Tanning for almost $1 million. After learning about the large cash distribution to the shareholders/directors, G.S. Partners filed a new action alleging personal liability of the directors for the default judgment against Hollywood Tanning.

N.J.S.A. 14A-6-12 provides for personal liability of directors

who "vote for" or "concur in" certain corporate activities. Under this statute, a director can be liable for "distribution of assets to stockholders during or after dissolution of the corporation" if the corporation has not adequately provided for its known debts and liabilities.

Applying a strict interpretation of the statute, the Appellate Court ruled that N.J.S.A. 14A:6-12(1)(c) was not applicable because the distribution to shareholders did not "occur during or after dissolution." The Court noted that Hollywood Tanning officially never dissolved and that the corporation technically continued to exist. Based on the facts as presented, the Court rejected G.S. Partners' argument that the cash distribution was a "constructive" dissolution. The Appellate Court noted that Hollywood Tanning continued to transact some aspects of its business for more than a year after the cash distribution.
