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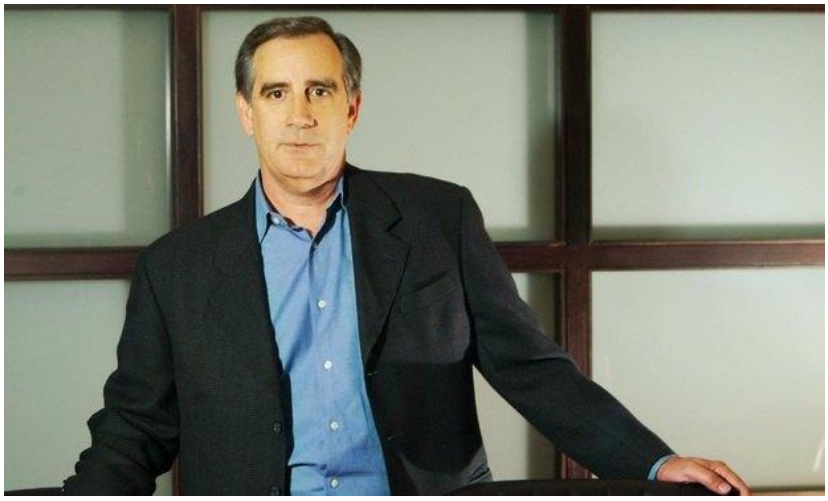
Appellate Court Strictly Construes FAR-BAR 'As Is' Residential Sales Contract

By **Oscar R. Rivera** | September 7, 2018



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When real estate transactions are not consummated, disputes over alleged violations of the terms of the sales contract are par for the course. However, when a Florida appellate court recently affirmed an $850,000 award for legal fees and costs in a dispute over a $2.85 million residential sale gone awry, the real estate industry takes notice.

The ruling by the Third District Court of Appeal in *Diaz v. Kosch,* is certainly drawing quite a bit of industry attention, and there are a number of important takeaways from it for buyers, sellers and the professionals who work on their behalf.

The case stems from the sale of a Coral Gables home in 2012 for $2.85 million. After the sales contract was executed and the initial $50,000 deposit had been made, the buyers, who are identified in the ruling as both being "attorneys with substantial experience with real estate transactions and title matters," notified their broker on the penultimate day of the 10-day inspection period about potential permitting issues with the property. On the following day, the buyers sent an email to the sellers accusing them of "active misrepresentations" and threatening "legal fees and litigation."

Nonetheless, on the same date, the buyers made the second deposit of $235,000, stating it was "with full rights reserved." A week and a half later, they emailed a notice of termination to the sellers, who were amendable to it and responded by imposing no conditions on the return of the buyers' full deposit. However, apparently due to demands for a release from legal liability by the buyers' own broker (who also served as the escrow agent), the deposit was not returned by the escrow agent.

Soon thereafter the buyers filed suit and began a trial that would eventually move forward with their fourth amended complaint after a great deal of discovery and depositions that generated more than 6,000 pages of documents. The trial court granted summary judgment in favor of the sellers and brokers, and it awarded them $850,000 in attorney fees and costs.

In the buyer's subsequent appeal, the Third DCA panel focused on the plain and unambiguous terms of the inspection provisions in the parties' FAR-BAR form contract, which it described in complimentary terms as the "as is" residential real estate contract form that reflects "a wealth of experience with both successful and failed transactions among professional realtors and real estate attorneys" from the Florida Realtors and The Florida Bar. It strictly construed the language in the contract and concluded that the terms provide the buyer with two choices at the end of the 10-day inspection period: either a cancellation via written notice to trigger the immediate return of their deposit or the issuance of a second deposit, which cannot be subject to a "conditional tender."

The appellate court found that the buyer's right to cancel does not provide them an open-ended extension during which they could investigate records or documents, as the contract includes a "time is of the essence" provision. The opinion notes that the sellers paid more than $32,000 to permitting consultants and met with the buyers to assist with the resolution of their claims. It also states that the inspection/cancellation period could have been extended via a simple written agreement by the parties, but neither party had chosen to do so.

The appellate panel concluded that the buyers' maneuvers were aimed at enabling them "to avoid losing the property to a backup buyer, while simultaneously attempting to preserve a claim to reduction in the purchase price." It found that the buyers "sought to transform an 'as is' form of contract into a continuously negotiable-price transaction by attempting their 'conditional tender' of the second deposit payment and allowing the due diligence/cancellation period to expire without issuing a termination notice."

As to the $850,000 in attorney fees, the opinion notes that while the amount may seem shocking for a failed residential transaction, "a review of the 6,000-page record is sufficient to persuade the patient reader that this was no ordinary lawsuit relating to a buyer-seller dispute. Early in the litigation—and this relates to mitigation of damages and fees—the sellers offered to exchange releases, allow the buyers to receive the $285,000 deposit, and pay the buyers a further $40,000 simply to end the matter. The offer was not accepted. The trial court conducted an evidentiary hearing, considered expert testimony, reviewed the hours and hourly rates claimed, and reduced the fees by over $90,000.

"… In light of the number of depositions taken by the buyers; the number of nonparty witnesses subpoenaed for testimony and records; the 11 sets of interrogatories and nine requests for production of records served on the sellers; the dead-end allegations pertaining to improper record destruction and computer forensics; and hearings on a wide array of motions, including unsuccessful claims by the buyers for punitive damages; we cannot and do not conclude that the trial court abused its discretion in awarding the attorney fees to the sellers or in determining the amount of that award."

In affirming the trial court"s summary judgment in favor of the sellers and brokers, as well as its award for legal fees and costs, the Third DCA has offered a cautionary warning to real estate buyers and the professionals who represent them. As this ruling demonstrates, the Third DCA will turn to the plain and unambiguous terms of the FAR-BAR sales contract, and the court is unlikely to be swayed by unilaterally established conditions that are not upheld by its plain and clear provisions.

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