

# The Legal Intelligencer

©2007 The Legal Intelligencer Online

Page printed from: <http://www.thelegalintelligencer.com>

## Buyers Not Chopped Down By Inspection Contingency Clause

Alan Nochumson

05-14-2007

In most residential real estate transactions taking place in Pennsylvania, sellers and buyers are generally not represented by legal counsel. Rather, the real estate agents actually assist in the draftsmanship of the agreement of sale. Since real estate agents apparently rule supreme in this arena, the Pennsylvania Association of Realtors has created a form agreement of sale to govern the conduct of parties in real estate transactions across Pennsylvania.

In *Welteroth v. Harvey*, the Superior Court of Pennsylvania recently determined whether buyers to a residential real estate transaction waived their rights under the inspection contingency provision contained within this form agreement of sale.

### **AGREEMENT OF SALE**

In late winter 2005, the parties in *Welteroth* used the form agreement of sale to effectuate the transfer of a residential six-acre parcel of land containing a two-story house. The form agreement contained an inspection contingency provision whereby the buyers were allowed, within 15 days from the date the agreement was executed, to inspect the property and deliver a written report detailing the condition of the property at the time of the inspection. Within the time given for completing the inspection and delivering the inspection report, the buyers were then required to accept the property unless the cost to correct the defective conditions, if any, on the property exceeded \$500.

If this cost exceeded \$500, the sellers, within seven days of receiving the report, had to inform the buyers in writing of their choice to either make repairs before settlement so that the cost to repair the remaining defective conditions on the property was less than or equal to \$500, credit the buyers at settlement for the difference between the estimated cost of repairing the conditions and \$500, or not make repairs and not credit buyers at settlement for any costs associated with repairing the conditions.

If the sellers elected to make repairs or credit the buyers at settlement, the buyers were required to accept the property and consummate the real estate transaction. If, however, the sellers decided not to make repairs and not to credit the buyers at settlement, or if the seller failed to choose any option within the seven-day time frame, the buyers had, within five days, to either accept the property and consummate the real estate transaction or terminate the agreement in writing by notice to the sellers, in which case all deposit monies paid on account of purchase price would be returned promptly to buyers and the agreement would be void.

After the inspections were already completed and the inspection contingency period expired, the sellers in *Welteroth* had "timbered off" roughly 30 full-grown trees, leaving high stumps and damage to the grounds caused by the dragging of logs. Upon discovering the logging operation, the buyers offered to modify the agreement to ensure that closing would go through subsequently, if the sellers would agree to deposit money in escrow to ensure adequate compensation for cleaning up after the logging operation. The sellers flatly rejected that offer.

### **TRIAL COURT ACTION**

The buyers subsequently filed a complaint both for specific performance and damages for breach of the agreement and damages for conversion of the timber.

The sellers then filed preliminary objections in the nature of a demurrer, asserting, among other things, that the buyers failed to exercise their rights under the inspection contingency provision contained within the agreement of sale and thus the buyers had failed to state a cause of action upon which relief could be granted. Moreover, in the preliminary objections, the sellers alleged that at the time of inspection, the property was being logged and that the logging was "open and obvious."

The trial court sustained the preliminary objections with respect to the claim for specific performance while, for whatever reason, declining to address the claims for breach of contract and conversion of timber. In doing so, the trial court relied upon the buyers' alleged failure to exercise their rights under the inspection contingency provision.

After the buyers filed an appeal with the Superior Court, the trial court issued a written memorandum in further support of its ruling. In the memorandum, the trial court did note that it had erred in relying upon the sellers' allegation that, at the time of the property inspection, it was open and obvious that the property was being logged, but nevertheless found that this error was "de minimis."

### **SUPERIOR COURT DECISION**

The Superior Court found that the trial court erred as a matter of law in concluding that the agreement provided for an exclusive remedy and in crediting the sellers' statement that the property was being timbered with the buyers' knowledge during the 15-day inspection window.

The Superior Court first concluded that nothing in the agreement limited the right of the buyers to inspect the property after the 15-day window closed. Rather, the Superior Court pointed out that the intention behind the inspection contingency provision is to create a mechanism for terminating or

modifying an existing agreement within a short period of time after the agreement is consummated, as evidenced by the 15-day default inspection window.

In reaching its conclusion, the Superior Court cited another provision of the agreement that imposed a duty on the sellers to maintain the property "in its present condition, normal wear and tear excepted." According to the Superior Court, "[t]his provision is just as notable for what it does not state as for what it does state," in that the provision does not state that the sellers' duty terminates once the inspection window closes or any other time prior to closing.

Taking the provisions together, the Superior Court refused to imply an artificial limitation on the sellers' duties under the agreement by foreclosing the buyers' remedies for a breach of these duties after the inspection window had closed.

In dicta, the Superior Court explained that if the buyers had learned of the timbering during an inspection conducted during the 15-day window, the curative and remedial provisions contained within the inspection contingency clause would have been triggered and they would have been foreclosed from being afforded a remedy outside the prescribed time frame.

In doing so, the Superior Court clarified that its ruling in *Welteroth* was limited to situations where the condition of the property changes after the inspection period in the agreement of sale already expires. As a result, the Superior Court emphasized that this real estate dispute essentially hinged upon whether the buyers, when they conducted the inspection, knew of the timbering and decided to forego their remedy under the inspection contingency provision.

At this early juncture in the proceedings, however, the Superior Court refused to place any weight on the sellers' allegation that the buyers were aware of the timbering prior to the close of the fifteen-day inspection window simply because the record was unclear as to whether the buyers knew of the logging after a timely inspection of the property. As such, the Superior Court believed that the trial court's reliance on the allegation was not de minimis but rather dispositive "when viewed through the prism of an accurate interpretation of the agreement of sale."

## **LESSONS LEARNED**

The trial court's ruling in *Welteroth* highlights the risks associated with relying upon the form agreements of sale used in most real estate transactions in Pennsylvania. Given the rural nature of the property in *Welteroth*, the agreement of sale should have contained a provision specifically prohibiting the sellers from commencing logging operations through closing. By failing to do so, the sellers are presumably refusing to release the security deposit made by the buyers on account of the real estate transaction, which has forced the buyers to incur the additional cost of litigation.

Like most contracts, terms and conditions must be added and subtracted from the "form" to effectuate the true intent of the contractual parties for that particular transaction. For that reason alone, even in the simplest of real estate transactions, the parties should be represented by legal counsel so as to prevent the parties from attempting to fit a square peg in a round hole.

**ALAN NOCHUMSON** is the sole shareholder of Nochumson P.C., where he specializes in real estate, litigation, employment and labor, and land use and zoning. Nochumson regularly speaks at and writes for trade and professional associations, local universities, and adult education programs on issues commonly confronted by businesses, individuals, and professionals. Nochumson is also president of Bear Abstract Services, where he offers comprehensive title insurance, title examination and closing services for transactions ranging from simple residential agreements of sale to complex commercial projects. He may be reached by telephone at 215-399-1346 or by e-mail at [anochumson@nochumson.com](mailto:anochumson@nochumson.com).