

Bank Alert

Welcome to autumn. The kids are back at school and the race to December 31st is on. We are all trying to close deals that have percolated through the remarkable economy over the past few months. With this in mind, we wanted to take a moment to highlight a recent case that was decided by the Supreme Judicial Court. Not because it is a ground breaking decision; but rather, because it is a good reminder of what can happen if we are not careful.

Lambert v. Fleet National Bank, is relatively straightforward case where a borrower sued the bank claiming that the bank had breached an oral contract to renew its loan, notwithstanding minor defaults for a late payment history. The borrower had obtained a \$500,000 commercial mortgage loan in 1985 secured by a rental housing unit complex. There was a loan-to-value ratio of 50%. During the initial five year term, the bank had made some additional small advances. In 1990, the bank "rolled over" the loan into a new five year note. Between 1991 and 1995, the borrower fell behind in taxes and municipal charges.

In 1995, the bank officer met with the borrower and expressed "with optimism" that that bank would "renew" the loan and asked the borrower to stop contacting rival lenders to do a refinance. While the borrower was waiting for a commitment letter, it was subsequently advised that the bank decided not to renew the loan and that the bank was going to commence foreclosure proceedings if it could not be paid. The borrower brought suit; its theory was that the bank officer made an oral agreement which was an independent binding obligation on the bank to renew the loan. The borrower attempted to rely on the fact that when the initial loan was taken out, the bank officer signed a letter agreeing to "renegotiate the mortgage in five years and in five year increments thereafter, provided that the loan was not in default and there was no history of delinquent payments and the mortgaged property continued to be acceptable collateral." The court placed heavy reliance on this letter agreement which the borrower tried to argue had been changed by the subsequent verbal negotiations. The court held that the verbal negotiations in 1991 were overly vague to find a binding obligation as the bank officer did not say that it was committed to make the loan. Furthermore, it looked back to the original letter agreement, which simply said that the bank would "renegotiate" its terms. While the court ultimately went on to conclude that no binding agreement on the part of the bank took place, you must remember that the lawsuit started in the Superior Court in 2000, followed by an appeal in 2006, and a subsequent appeal to the Supreme Judicial Court in 2007. The attorneys' fees for both parties were enormous, leaving aside the amount of employee hours which are devoted to such claims. The lost opportunity cost is staggering.

While you walk the fine line of marketing and protecting the bank's assets, we strongly recommend that you use confirmatory letters and reservations of rights in such circumstances as you may be able to avoid such suits. Even if you prevail, a "he said-she said" is costly battle.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Shrair', with a long horizontal stroke extending to the right.

Peter Shrair
Cooley, Shrair P.C.

email: pshrair@cooleyshrair.com

phone: 413-735-8013

web: <http://cooleyshrair.com>