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## \$3.6 Million in Deposits Must Be Returned for Failure to Render "Marketable Title"

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In a recently decided New York case, 325 Schermerhorn LLC v. Nevins Realty Corp., decided April 27, 2009, Superior Court Kings County, New York, a purchaser under a contract of sale for real property was awarded the return of its \$3.6 million contract deposit after the Kings County Supreme Court held the seller was in default for failing to remove a transit easement encumbering the property. The contract of sale provided that the properties were to be sold “free of all encumbrances” except as otherwise stated in the contract. Attached to one of the contracts at issue was a survey which indicated the footings of the building on the property rested on a subway roof. A subsequent title report identified the transit easement, and the purchaser objected to the easement and demanded it be removed from title. The seller argued that the purchaser was aware of the easement before the contract was signed and that the purchaser agreed under the contract to purchase the properties in their “as-is” condition. The buyer claimed that the seller was in default under the contract since the transit easement was an encumbrance that affected the marketability of title to the property.

The court defined the test of “marketability of title” as: “Whether there is an objection thereto such as would interfere with a sale or with the market value of the property... a purchaser ought not to be compelled to take property, the possession or title of which may be obliged to defend by litigation.” The court explained that “an easement is an encumbrance rendering title unmarketable with the same effect as mortgages, leases and the like” and declared that a purchaser need not accept title subject to an encumbrance if the contract specifies conveyance of title free of all

encumbrances, even if there is no showing that the encumbrance actually diminished market value.

The court further noted that even if the purchaser knew of the easement, such knowledge did not defeat the entitlement to buy the property free and clear of it in accordance with the contract. The “as-is” provision in the contract was held to be a more general provision that conflicted with the specific title clause that required title be conveyed “free of all encumbrances”. The court declined to adopt an interpretation which would leave any provision without force and effect and held that the more specific provision would be controlling.

Courts often make a determination as to which provision will govern when there are conflicting provisions in a contract, often yielding to the more specific provision, as the court did in this case. Therefore, to prevent any ambiguity regarding the intent of the parties, the contract should clearly state which provisions will control in the event of any conflict.

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