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How Tightly Drafted Documents And Effective Use Of E-Discovery Facilitate A Favorable Litigation Outcome

The Editor interviews ***Michael C. Lynch****, Partner, Kelley Drye & Warren LLP.*

Editor: Tell us about your practice.

Lynch: I am a trial attorney with extensive experience in complex, high-stakes litigation including cases involving real estate, securities law, false advertising, antitrust, fraud, white collar criminal defense, internal investigations and other business- and commercial-related claims. I have represented companies in a wide variety of industries including banks, private equity and other funds, broker dealers, real estate investors and companies involved in consumer products, technology, marketing and advertising. Prior to joining Kelley Drye, I served for four years as a prosecutor in the Trial Division of the Manhattan district attorney's office.

Editor: Describe the transaction and parties involved in the Donerail case.

Lynch: Our client Donerail is an investor in U.S. real estate. Since the early 1980s, it has owned a property located at 54th Street and Park Avenue in New York City known as 405 Park Avenue. 405 Park LLC (405 Park) agreed to buy that property for $178.5 million. 405 Park is a joint venture that is 80 percent owned and controlled by Westbrook, a well-known investment firm. The other 20 percent is owned 10 percent each by Laurence Gluck and Steven Witkoff through their business entities. Both Gluck and Witkoff are well-known New York real estate investors.

Michael C. Lynch

Editor: How were the agreements that governed the transaction created? Did your firm play a role in drafting and negotiating those documents?

Lynch: The primary agreement was a purchase and sale agreement, although there were subsequent amendments. Particularly relevant to this case was the second amendment. Kelley Drye, representing Donerail, drafted those documents and negotiated their terms with representatives of 405 Park.

Editor: At the time the documents were drafted the real estate market was booming. A great deal of foresight must have been involved in structuring the transaction in a way that protected your client, Donerail, in the event of changes in property values.

Lynch: I don't think anybody saw the market crash coming as dramatically and suddenly as it did. However, good lawyers build protection for their clients into deal agreements that cover contingencies even though they may seem unlikely at the time. There were mechanisms in the purchase and sale agreements designed to protect our client from a decline in the value of the property. I was not one of the real estate lawyers from our firm who negotiated the deal, so I can't take credit.

There were also mechanisms in the agreements to protect the buyer from a dramatic increase in the value of the property. Had the real estate market rocketed up instead of down, a seller could go out and put a new mortgage on a property and pocket the money. The seller could then tell the buyer it had to take the property subject to the mortgage. Section 2.2 of the purchase and sale agreement was designed to protect 405 Park in that situation by providing that, if the property increased in value, Donerail could not add a mortgage, put the cash in its pocket and force 405 Park to buy the building subject to that new mortgage.

We also protected our client from a decline in property values, which did in fact happen, by negotiating and getting a down payment of approximately $40 million. Indeed, though the court said Donerail was able to keep the building and the down payment, this was not a windfall for Donerail. To the contrary, Donerail had the building off the market during some of the best times in the real estate market – when it could have sold it to somebody else for a lot more.

The $40 million down payment was described in the agreement as earnest money. This is a proper description

Please email the interviewee at mlynch@kelleydrye.com with questions about this interview.

because it was supposed to protect Donerail in the event that 405 Park simply walked away from the deal, which is ultimately what happened.

Editor: Is another example of foresight the time-is-of-the-essence closing?

Lynch: It became crystal clear to us that the buyer was doing whatever it could to avoid closing and to get the $40 million back. It was our impression that it was seeking to find technical defects or to force us into some kind of a mistake that it could capitalize on, and then sue to get its money back. It was unsuccessful in that.

The night before the original closing in May, 405 Park unilaterally adjourned the closing to June 29. We sent it a letter stating that if it is going to do that unilaterally, time is of the essence in the case of the June 29 closing, and it has to be ready to close.

Editor: What motivation did 405 Park have for not wishing to close?

Lynch: For the most part, because it had agreed to pay $178 million. By the fall of 2008 it was acknowledging internally that the building was probably only worth about $80-$90 million because of the declining real estate market. So, its behavior seemed based in large part on the fact that it had overpaid, or could try to force a downward adjustment to the purchase price.

Editor: There was a damaging statement with respect to the intentions of 405 Park in an email between two of its investors. Was a significant amount of e-discovery involved in the case?

Lynch: Yes. E-discovery was a key part of our strategy. We believed that there was significant email traffic that would support our theory. From the very beginning of this case, we were very focused on forcing 405 Park to produce all relevant electronically stored information. We were also very interested in seeing its privilege log to determine whether it listed documents whose privileged status was questionable. As a result of our aggressive e-discovery efforts, we found dozens of emails establishing that 405 Park had no intention to close.

Editor: I found it interesting that in a case this complex, there were no differences with respect to the facts. This set the stage for summary judgment thereby avoiding the uncertainties of a jury trial, which must have been a relief for your client.

Lynch: 405 Park was precluded from challenging our critical facts because of our very aggressive efforts with respect to e-discovery and our emphasis on being sure that their assertions of the privilege were proper. Ultimately, I don't think anyone really disputed the facts. We were prepared for a trial, and we certainly were not afraid of one. However, I believed from the very beginning that this was a summary judgment case.

Editor: Considering the complexity of the case, did the briefs or oral arguments play the primary role in providing the Appellate Division with the clear understanding of the facts reflected in its opinion?

Lynch: When I appeared for oral argument in this case, it was clear to me that the Appellate Division panel fully understood our arguments and questioned defendant's arguments. The briefs clearly were most influential. Nevertheless, the oral argument was certainly helpful because it put the Appellate Division at ease to the extent that it had any concerns.

Editor: A great many complicated transactions are tried in New York courts. What conclusions can be drawn from this case about the quality of the New York judiciary?

Lynch: I have practiced in the Commercial Division, which is at the Supreme Court level, for quite a while now. I have always been extremely pleased and impressed with the quality of the judges there. They are understaffed, underpaid and have a difficult job to do because they have big dockets of complicated cases.

In this particular case we had Judge Kornreich. She was excellent in all respects. She was extremely well prepared. Her clerks worked very hard on the case, and notwithstanding its complexities, were always very responsive. It was a very difficult case for the court to handle because it was so active. Quite a few disputes with the other side arose in the case. We always had great attention from the court.

The Appellate Division was fantastic. The judges were extraordinarily well prepared: they knew the facts, they knew the cases, they knew the law, and they dedicated themselves to understanding everybody's arguments. Their questions at the oral argument showed that.

Editor: As you know, our readership is made up largely of corporate counsel. What lessons does this case teach with regard to real estate transactions and more generally?

Lynch: A real estate deal is frequently a happy event – one party wants to buy, one party wants to sell a property, and everybody is working to the same end. However, what this case teaches is that corporate counsel, like all lawyers, need to keep in the back of their minds when drafting documents that one of the parties may change its mind before closing. This could be because market conditions may change, as in this case, or for a variety of other reasons.

This case demonstrates the need to provide for contingencies that seem unlikely at the time by incorporating provisions, such as the earnest money (and related provisions) in this case, that would deter one of the parties from backing out of a deal. In this case, the purchase and sale agreement and the amendments were both extremely tight and well drafted. It's important that clients be protected when deals go wrong.

It also illustrates the importance of being sure that you have all the facts through the effective use of e-discovery and careful examination of the other side's privilege log. The key lesson is you can't run away from your facts. You have to embrace your facts. You need to deal with them. Any effort to avoid what really happened in the factual record is a very dangerous approach to litigation.