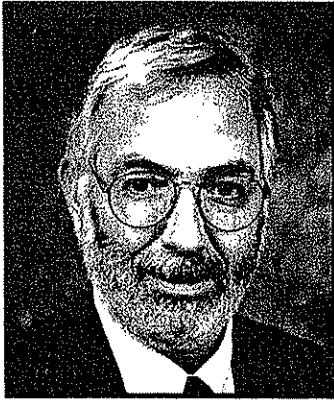


New Jersey Statute Of Frauds Undergoes Major Changes

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On January 5, 1996, Governor Whitman signed legislation amending the New Jersey Statute of Frauds (the "Statute") in a substantive manner which will significantly impact the way in which real estate professionals transact their business.

Since time immemorial, the axiomatic principle of real estate law has been that contracts for the sale of real estate must be in writing in order to be legal, binding, and enforceable. The same principle held true for long term leases, i.e., those having a term in excess of three years. Those basic tenets have now been changed, and are no longer the law.

Further, until the enactment of the new Statute, the only written authorization or agreement required for the collection of a commission by a licensee involved the sale of real estate. Under the new law, a real estate broker's authorization must be in writing for either a sale or lease transaction, whether the broker is acting on behalf of the seller, the buyer, the landlord, or the tenant.

For the first time, written authorization is now required for the sale of a business, without regard to whether the business involves an interest in real estate.

Recommendations for these dramatic changes in the law emanated from a 23 page report prepared by the New Jersey Law Revision Commission entitled "Report and Recommendations Relating to the Statute of Frauds" (the "Commission's Report") which was completed in 1991. A bill was introduced into the Assembly in March, 1994 which was passed at the conclusion of the last legislative session in Trenton, changing many provisions of the Statute which had remained inviolate for centuries.

The Statute of Frauds was first enacted by Parliament in the year 1677 as "An Act for the Prevention of Fraud and Perjuries." The law was passed to prevent fraud and perjury in the enforcement of oral contracts that had never actually been made. Therefore a requirement was legislatively imposed which provided that certain enumerated contracts had to be in writing in order to be enforceable, executed by the person against whom enforcement was sought.

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Included in the group of enumerated contracts covered by the Statute were agreements regarding the sale of land, as well as contracts (a) for an executor or administrator to answer for the debt of his decedent, (b) contracts to answer for the debt of another, such as a guarantor, (c) a contract, the consideration for which was marriage, and (d) a contract that was not to be performed within one year of its execution. All such contracts were said to be "within the Statute," i.e. covered by it.

Since 1677, literally hundreds of cases have been decided in the United States and England interpreting and applying the Statute to different contractual disputes. One of the major themes to evolve was the premise that the Statute of Frauds, which was enacted to prevent frauds, should not be used to perpetrate a fraud. A classic illustration is the situation in which A agrees to sell Blackacre to B for a purchase price of \$1000. In reliance upon the agreement, but prior to the delivery of a deed, B takes possession of Blackacre and builds a house. B then asks A to convey Blackacre to him in return for the agreed upon purchase price payment of \$1000. A denies the agreement, refuses to convey Blackacre, and pleads the Statute as a defense, i.e. the agreement of sale is not enforceable because it was not in writing.

If A were to prevail in his defense, the Statute would serve to perpetrate a fraud rather than prevent one from occurring. Such an untoward result was avoided by the courts through the development of a doctrine known as "part performance" - i.e. where the party seeking performance of the oral contract has relied upon its existence to his detriment by performing his part of the bargain, in whole or in part, the agreement is "taken out" of the Statute, and a court will enforce the oral agreement. The part performance by the party seeking to enforce the agreement was said to be evidentiary of the existence of the contract, and therefore the policy of the Statute of preventing fraudulent verbal agreements was not violated.

The Commission's Report concluded that the judicially created exceptions to the Statute, such as "part performance,"

were too limiting, and that on occasion, justice would not be done due to a court's inability to fit the particular facts of a case into one of the judicially created exceptions. Moreover, the Commission found that the case law was often conflicting. Accordingly, the recommendation of the Commission was to enact a broader standard by which the enforceability of verbal contracts would be measured.

Section 4 of the new Statute, like its predecessor, requires an agreement to transfer an interest in real estate to be in writing "signed by or on behalf of the party against whom enforcement is sought." The same written requirement is imposed by Section 3 regarding leases which involve a term for more than three years. An important new concept now appears in that both an oral contract for the sale of real estate and an oral lease agreement for a term of more than three years may also be enforced, provided that the party seeking enforcement is able to prove the contract "by clear and convincing evidence."

"Clear and convincing evidence" is a standard of proof that falls within the bounds between the civil standard of "preponderance of the evidence" and the criminal standard of "proof beyond a reasonable doubt." Thus, the level of proof needed to prove the oral contract is greater than that required to prevail in an ordinary civil matter, but less than that required to convict a defendant in a criminal matter.

The new Statute also provides that in order to enforce an oral agreement regarding the sale of real estate the following elements must be proven by clear and convincing evidence: (a) a description of the real estate sufficient to identify it, (b) the nature of the real estate interest to be transferred (i.e. fee simple, an easement, a lien, an interest in a trust, a share in a cooperative apartment), (c) the existence of the agreement, and (d) the identity of the transferor and transferee. Similar proofs are required for a lease of real estate involving a term of more than three years.

Section 7 of the new Statute is entitled "Commissions of Real Estate Broker and Business Broker, Writing Required." Subsection b. states that:

... a real estate broker who acts as an agent or broker on behalf of a principal for the transfer of an interest in real estate, including lease interests for less than three years, is entitled to a commission only if before or after the transfer the authority of the broker is given or recognized in a writing signed by the principal or the principal's authorized agent, and the writing states either the amount or the rate of commission...

The Law Revision Commission characterized the portion of the Statute dealing with real estate brokers as being a consumer protection law. Its recommendation was to broaden the scope of the Statute so as not only to encompass the sale of real estate, but also to embrace contracts with brokers involv-

ing lease transactions and the sale or purchase of businesses. Mortgage brokers are, however, excluded from the requirements of the Statute.

Subject to subparagraph d. of Section 7, described below, a broker's entitlement to receive a commission in a transaction involving the sale or lease of real estate, or a business, whether acting on behalf of the seller, purchaser, lessor or lessee is predicated upon his or her authority being memorialized in a writing signed by the principal, the principal's authorized agent, the seller, or buyer, as the case may be, which contains the amount or rate of commission.

Subsection d. of Section 7 carves out an exception to the foregoing requirement in the same manner as had the earlier version of the Statute by affording the broker (whether real estate or business broker) an opportunity to satisfy the Statute by fulfilling the following:

d. A broker who acts pursuant to an oral agreement is entitled to a commission only if:

(1) within five days after making the oral agreement and before the transfer or sale, the broker serves the principal with a written notice which states that its terms are those of the prior oral agreement including the rate or amount of commission to be paid; and

(2) before the principal serves the broker with a written rejection of the oral agreement the broker either effects the transfer or sale, or, in good faith, enters negotiations with a prospective party who later effects the transfer or sale.

The notices must be served personally or by registered mail.

Aside from dealing with the sale of a business, Section 7 is essentially the equivalent of the prior Statute, which many real estate brokers know as the "5-Day Rule." Presumably the case law decided under the old Statute will remain as precedent for interpretation of the new Section 7. It must be remembered, however, that confirmations of verbal authorizations deal with all real estate sales and leases (even those involving a term of less than three years), regardless of which party the broker represents. As in the past, the Statute has no impact upon case law which deals with issue of "efficient procuring cause."

The old adage of "Get It in Writing" is still sound advice; however, in order for a real estate contract or long term lease to be binding, it no longer necessarily has to be in writing. Whether the revisions to the Statute will serve the interests of justice as envisioned by the Law Revision Commission or lead to increased non-meritorious litigation on already overcrowded court dockets remains to be seen.

¹ In this Article, the term "Statute" is used in general terms, meaning the Statute of Frauds, N.J.S.A. 25:1-1 et seq. either prior or subsequent to enactment of P.L. 1996, CHAPTER 360 on January 5, 1996. The term "new Statute" refers to the Statute of Frauds after its amendment on January 5, 1996.