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DANIEL FITZPATRICK and	:	SUPERIOR COURT OF NEW JERSEY
SARAH FITZPATRICK,	:	APPELLATE DIVISION
	:	
	:	DOCKET NO. A-2812-21
Plaintiffs,	:	
	:	ON APPEAL FROM:
	:	
v.	:	SUPERIOR COURT OF NEW JERSEY
	:	MONMOUTH COUNTY
	:	CHANCERY DIVISION
	:	
YUSUF QASIM and CARLY	:	DOCKET NO. MON-C-0046-22
ANN HORNING,	:	
	:	
	:	SAT BELOW:
Defendants.	:	HON. JOSEPH P. QUINN, P.J.CH.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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Date Submitted: Nov. 30, 2022

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement..... 1

Statement of Facts and Procedural History..... 3

Legal Argument 4

 I. Consistent with the underlying purpose of the Attorney Review Clause, when a practitioner deviates from the prescribed methods of communication of disapproval under the Attorney Review Clause, the disapproval should still be effective if the practitioner can prove that all parties received actual notice 4

 II. Since New Jersey allows the oral formation of contracts with a higher burden of proof, this Court should allow the oral disapproval of a contract when actual notice is established..... 7

 III. The actual notice standard is adaptable to ever changing forms of communication and will provide appropriate guidance to reviewing courts for the future 10

Conclusion 12

TABLE OF AUTHORITIES

Cases

Conley v. Guerrero, 228 N.J. 339 (2017)1,4,6,10,12

Levison v. Weintraub, 215 N.J. Super. 273 (App. Div. 1987), certif. denied, 107 N.J. 650 (1987)6

New Jersey State Bar Ass’n v. New Jersey Ass’n of Realtor Boards, 93 N.J. 470, modified, 94 N.J. 449 (1983)5

Peterson v. Estate of Pursell, 339 N.J. Super. 268 (App. Div. 2001)5

Romano v. Chapman, 358 N.J. Super. 48 (App. Div. 2003), certif. denied, 176 N.J. 431 (2003)6

Statutes

N.J.S.A. 25:1-13.....7

N.J.S.A. 25:1-13(b).....2

Miscellaneous

New Jersey Law Revision Commission, Report and Recommendations Relating to the Statute of Frauds (NJLRC Report), (Final Report 1991).....7,8

PRELIMINARY STATEMENT

Consumer protection is the hallmark of the Attorney Review Clause approved by the New Jersey Supreme Court nearly 40 years ago for use in residential real estate transactions. In every case considering the Attorney Review Clause since, New Jersey courts have been guided by the public interest in allowing for attorney review and disapproval of a realtor-prepared contract as the paramount consideration in deciding disputes involving applicability of the clause. The New Jersey State Bar Association (NJSBA) urges the Court to be guided by that overarching principle in this current case.

The Attorney Review Clause arose out of a settlement agreement between the NJSBA and the New Jersey Association of Realtor Boards. It was approved by the Supreme Court and allows real estate brokers to prepare residential real estate contracts, subject to subsequent review by attorneys for the parties to the transaction. The language of the Attorney Review Clause provides specific means of communicating that a proposed real estate contract is disapproved. The New Jersey Supreme Court has recognized, however, that strict adherence to those methods is not necessary, so long as the interests of the consumer are protected. Conley v. Guerrero, 228 N.J. 339, 352 (2017). While the NJSBA does not advocate for altering the Attorney Review Clause and its prescribed methods of disapproving a residential real estate contract, the NJSBA agrees with existing

precedent that the form of notice should not override the consumer protection purpose of the clause. Accordingly, if notice of disapproval is deemed to have been provided outside of the agreed-upon methods, a reviewing court should retain the ability to validate such disapproval if the attorney deviating from the prescribed methods sufficiently establishes that actual notice was provided to the parties regardless of the method of disapproval, be it by written, electronic, oral or any other form of communication.

Much has been made of the lack of reliability of oral communication, which is the issue in this case. Oral communication is generally not preferred. However, since 1996 when New Jersey amended the Statute of Frauds, New Jersey has upheld oral formation of real estate contracts provided that such formation can be proven by clear and convincing evidence. N.J.S.A. 25:1-13(b). If a real estate contract can be formed using oral communication, then oral notice of the disapproval of a real estate contract should also be effective when actual notice occurs.

As forms of communication are constantly changing due to evolving technology, the lines between oral and written are being blurred. For example, voice messages are now generally transcribed, most phone calls using VOIP systems are recorded and preserved. Business communications can be conducted using voice and written texts, as well as through social media. The actual notice

standard provides the flexibility needed to ensure that, regardless of the form of communication, consumer protection will remain the paramount consideration in the residential real estate attorney review process and courts will be free to make appropriate decisions based on the facts presented rather than how they are delivered.

Statement of Facts and Procedural History

The NJSBA relies on the statement of facts and procedural history provided by the parties in interest.

LEGAL ARGUMENT

- I. Consistent with the underlying purpose of the Attorney Review Clause, when a practitioner deviates from the prescribed methods of communication of disapproval under the Attorney Review Clause, the disapproval should still be effective if the practitioner can prove that all parties received actual notice.

In Conley v. Guerrero, 228 N.J. 339 (2017), the Court noted strict enforcement of the methods of delivery of a disapproval notice provided under the prescribed contractual settlement language would result in the forfeiture of the seller's right to disapprove the contract, despite the undisputed fact that the realtor and the buyer received notice of disapproval within the required timeframe. Because such a result would contravene the purposes underlying the Attorney Review Clause and would elevate form over substance, the Court concluded that strict enforcement of the contractual requirements was not necessary in order to disapprove a residential real estate contract pursuant to its Attorney Review Clause. The Court affirmed that cancellation of the contract via email (a method not expressly delineated in the Attorney Review Clause) constituted legally adequate notice of the disapproval of the contract as there was sufficient proof that all parties received the notice of cancellation (by way of e-mail). Id. at 342.

The Conley decision reflects the Court's sentiment in approving the Attorney Review Clause that courts retain the power to address, "questions of the interpretation, application, and general adherence to or enforcement of the

settlement [] that may arise and affect the public interest [] in the most appropriate manner under the given circumstances.” New Jersey State Bar Ass’n v. New Jersey Ass’n of Realtor Boards, 93 N.J. 470, 474, modified, 94 N.J. 449 (1983).

In reviewing the proposed settlement agreement in the N.J. State Bar Ass’n matter, State Superior Court Judge Mark A. Sullivan Jr., sitting in the Chancery Division, provided that the settlement represented a way to accommodate the competing interests of real estate professionals to use their expertise and draft contracts that begin the real property conveyance process, as well as the interests of New Jersey residents by ensuring that they have an acknowledged right of review by a lawyer, and the right to reject within three days should that be appropriate and necessary. Id.

The Supreme Court agreed with Judge Sullivan’s comments and further noted, “. . . the public's interest is safeguarded through the settlement's attorney review provisions and the Court's continuing supervisory control.” Id.

The Court has since used its supervisory control to resolve cases and provide clarifications in a manner that advances the purpose of the Attorney Review Clause to allow the parties to a residential real estate transaction adequate opportunity to engage an attorney to review the form agreement. Peterson v. Estate of Pursell, 339 N.J. Super. 268, 275 (App. Div. 2001) (three-day attorney review begins to run

when contract is delivered to parties, not their real estate agents); Levison v. Weintraub, 215 N.J. Super. 273 (App. Div.), certif. denied, 107 N.J. 650 (1987) (timely disapproval of a contract by an attorney upheld despite prior approval of an agent for the party, who happened to be an attorney); Romano v. Chapman, 358 N.J. Super. 48 (App. Div.), certif. denied, 176 N.J. 431 (2003) (once attorney approves an agreement on behalf of a party to a residential real estate transaction, that attorney cannot subsequently disapprove the contract, even if within the 3-day attorney review period.)

Consistent with the jurisprudence involving the Attorney Review Clause and the recent Conley decision, the Appellate Division should hold that if the disapproving party can demonstrate actual notice of disapproval was given to the parties involved, even if the method used to provide such notice was not expressly prescribed by the terms of the Attorney Review Clause, the interests of the consumer dictate that the disapproval should be deemed valid.

- II. Since New Jersey allows the oral formation of contracts with a higher burden of proof, this Court should allow the oral disapproval of a contract when actual notice is established.

In 1996 the New Jersey Legislature amended the Statute of Frauds to allow for the oral formation of a real estate contract when it could be proved by clear and convincing evidence. N.J.S.A. § 25:1-13 provides:

An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless:

- a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or

- b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

This change in the law was based on a report by the New Jersey Law Revision Commission (NJLRC) relating to writing requirements in real estate transactions. The commission advocated for the statutory change because it recognized that in some circumstances parties enter into a binding agreement without reducing it to a formal writing. The NJLRC argued that refusing to enforce a contract because of the lack of writing resulted in an unjust repudiation of what otherwise would be a valid agreement. See NJLRC, Report and Recommendations

Relating to the Statute of Frauds (NJLRC Report), 10 (Final Report 1991). The NJLRC noted the policy goal of consumer protection would be better served by imposing a higher standard of proof on transactions not reduced to writing rather than imposing a preclusive writing requirement. NJLRC Report at 2-3.

It is important to note that the Legislature's adoption of the proposed change did not result in a wave of oral contracts being formed. In fact, it is fair to say that there has not been a measurable increase in oral real estate contracts since 1996. In adopting the new language, the Legislature attempted to address a very small percentage of situations where there was no debate about the formation of an actual contract and found that to automatically disqualify such oral contracts in those circumstances would be unfair and inequitable.

Similarly, it would be inequitable to disqualify the disapproval of a contract simply because notice was provided orally and not in writing if actual notice of such disapproval can be established by the disapproving party. Just as there has been no material increase in the number of contracts formed orally since 1996, the NJSBA anticipates there will not be an increase in verbal disapproval of residential real estate contracts if the court finds that verbal disapproval of a residential real estate contract may be valid under certain circumstances. Certainly, the best practice to form or disapprove any contract is through a writing that can be easily produced to dispel any questions or disputes. However, an attorney's mere failure

to utilize best practices should not be dispositive on its face based upon the existing New Jersey statutory and caselaw.

- III. The actual notice standard is adaptable to ever changing forms of communication and will provide appropriate guidance to reviewing courts for the future.

In 1982 when the original parties developed the Attorney Review Clause, they agreed that the most effective methods of communication were certified mail, personal delivery or telegram. During the 1980s the facsimile machine became the standard for business communications and overnight delivery services became more prevalent. By the turn of the century, email became the primary method of communication. However, it was not until the decision in Conley that fax, email or overnight delivery communications were approved as a valid method of communication for the disapproval under the attorney review clause.

By focusing on the question of whether actual notice of disapproval was provided to all parties instead of the method used to provide such notice, the Court's holding in Conley is adaptable to future means of communication. Conley, 228 N.J. at 355-57. Practitioners will take heed that if they deviate from the prescribed methods of overnight delivery, email, fax, or certified mail, they bear the burden of proving actual delivery. Alternatively, if they adhere to the prescribed methods, no proof of actual notice is required, simply sending the notice would make disapproval effective. Reviewing courts will be confident they have the authority to appropriately determine whether disapproval occurred based on the facts presented and not solely on the method of delivery. Most importantly,

consumers will be protected under any scenario, as the intent of the Attorney Review Clause will be effectuated regardless of the delivery method.

CONCLUSION

To effectuate the underlying purposes of the Attorney Review Clause, the NJSBA urges the Appellate Division to confirm that the Supreme Court's decision in Conley v. Guerrero dictates that notice of disapproval of a residential real estate contract is valid if the disapproving party can show actual notice was provided to all parties, regardless of whether the notice was provided in writing, electronically, orally, or through some other means as yet undetermined.

Respectfully submitted,

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Dated: Nov. 30, 2022