

DIRT Daily Development for Friday, December 21, 2012  
*Bacolitsas v. 86<sup>th</sup> & 3<sup>rd</sup> Owner, LLC*

Guest Editor: Dale Whitman  
James E. Campbell Missouri Endowed Professor Emeritus  
University of Missouri School of Law

*Bacolitsas v. 86<sup>th</sup> & 3<sup>rd</sup> Owner, LLC*, 2012 WL 6602795 (December 19, 2012)

**SUMMARY:** For purposes of compliance with Interstate Land Sales Full Disclosure Act, a description of a condominium in a sales contract is acceptable even though it would not meet the requirements for a description in a deed.

This case involves purchasers who attempted to get out of their contract to buy a \$3.4 million New York City condo unit. In a long-awaited opinion, the Second Circuit reversed the district court and held that a condominium developer had not violated the ILSA in the use of a particular form of legal description in the sales contract. The purchasers had argued (in a classic case of buyer's remorse, after prices dropped in the condominium market) that they were entitled to rescind their purchase. (A two-year right of rescission arises if the contract does not conform to the Act.) The Second Circuit, however, found that they had no right to rescind.

The Act requires that the contract of sale contain "a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located."

The actual description used in the contract was "Unit 20A" on the condominium's floor plans, and the contract contained a specific floor plan of that particular unit. The unit's floor plan indicated the dimensions and locations of the rooms and windows, the location of the unit within the building, and the direction the unit faced.

The developer conceded (and indeed, the developer's disclosure statement prepared for the ILSA stated) that the description was not satisfactory for purposes of a deed of conveyance because it did not include the recording information (book and page number) of the condominium declaration. Since this was a pre-construction sale contract, the declaration had not been, and could not have been recorded, so the recording information could not have been included. As the court says, "a condominium declaration ordinarily cannot be filed until new tax lot numbers are assigned to each unit, which can only occur once construction is complete, see N.Y. Real Prop. L. § 339-p, buyers often will execute purchase agreements before the declaration is recorded, i.e., prior to completion of the development."

The plaintiffs argued that only a description suitable for inclusion in a deed would satisfy the statute. Thus, under the plaintiff purchasers' argument, no pre-construction contract of sale

of a condo unit could possibly comply with ILSA. But the Second Circuit rejected this view. Here's a brief summary of its holding:

1. The plaintiffs argued that the contract of sale itself had to be in recordable form. This contract was not recordable, both because it was not notarized and (arguably) because it contained a provision prohibiting its recording. But the court rejected this view, holding that it is the *description* itself, and not the contract containing it, that must be in a form acceptable for recording.

2. The court held that the description in the contract need not be identical to the description used in the final deed of conveyance of the unit. The court observed that "because a lot may merely be "proposed" and not yet in existence at the time the contract is executed, Congress understood that the description of the lot in the purchase agreement may not be in a form acceptable for recording a deed since, by definition, conveyance of the lot would be impossible under such circumstances."

3. The court's clear objective was to look for anything that made the contract of sale ambiguous or misleading with respect to the unit being sold. It found no such provisions; the description in the contract was complete and unambiguous, and hence in compliance with ILSA.

4. The bottom line was that the description was indeed in recordable form. While the declaration "was not yet recorded at the time the Agreement was executed, because construction of the Brompton was ongoing, the Draft Declaration [attached to the agreement] contained all of the descriptive information required under state law to create the condominium. For this reason, the description provided to Plaintiffs in the Agreement was undoubtedly 'in a form acceptable for recording,' because as the record demonstrates, it was that description that was ultimately recorded."

Of course, this is not quite literally true, since the Agreement did not and could not contain the recorded book and page number of the declaration or the assessor's tax parcel number for the unit. The court obviously believed that these details, while they would be found in the deed of the unit, were not necessary to satisfy ILSA.

**COMMENT:** There are many states in which, for a variety of reasons, a condo declaration cannot be recorded until the completion of construction. For example, the law may require as "as-built" survey or (as in New York) the assignment of assessors' parcel numbers as a precondition to recording of the declaration. If the district court's view of ILSA had prevailed, all pre-construction contracts of sale in those states would have been subject to rescission, since it is universal to require a reference to the declaration in the deed of conveyance.

Condominium developers and their counsel will breathe a great sigh of relief upon reading this opinion.