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Episode 9: Expiration of Offer

Call from the Agent: My client's offer was accepted after it expired, but the parties have been performing. Now the seller wants to back out – can anything be done?

The Response: For the benefit of the readers, let me explain para 31 of the contract offer stated it (the offer) would automatically expire at 5:00pm on May 1st (a sample date). The seller accepted the offer by signing it on May 2nd. There is more than one principle at work here – it is worth an explanation.

First, it is definitely true the offer expired at exactly 5:00pm on May 1st. The standard contract contains a provision stating “time is of the essence” with respect to all contract provisions. As everyone knows, “time is of the essence” means each time period is strict -- May 1st means May 1st and 5:00pm means 5:00pm. Therefore, when the seller got around to “accepting the offer” on May 2nd, there actually was no offer to accept. It had vanished at 5:00pm the prior day and the courts hold, in case after case, a tardy acceptance in no way revives an expired offer.

If this question had been presented on May 2nd, the answer would be “no contract” and that would be the end of that. Actually, the question was presented a full month later and, in that space of time, both parties behaved as though a contract existed (it's very possible no one realized the offer had expired prior to its “acceptance”). In any event, the parties were performing – earnest money was paid and accepted and the parties presented the contract to their respective attorneys with instructions to close (my office was not engaged for the transaction at that point). The seller was contractually obligated to have the property surveyed and flagged – he did that and a few other things. The buyer was given the opportunity to perform a perc test and generally make land inspections – he did that and a few other things. The agents communicated the usual transaction essentials back and forth and the parties themselves spoke about the contract a week after it was signed. It was, therefore, a surprise when the seller announced a week before closing that he refused to sell and, as sellers sometimes do, he accompanied his withdrawal with the brave words “sue me.”

At that point, the buyer retained my office seeking contract enforcement against the seller – the contract closing date was a mere week away. The seller had given no reason for his refusal to close, but we had to suppose he knew the offer had expired before he accepted it (in fact, he probably just discovered it and decided to take advantage).

Despite the unmistakable expiration of the offer prior to acceptance, it seems an oral contract had possibly been formed and the terms of the oral contract were peculiarly memorialized in an expired writing. We know, of course, an oral contract concerning real estate is unenforceable in South Carolina (this precept is found in the “statute of frauds” – remember that?). Again, the question might seem to end there, but it does not end because the statute of frauds has some very meaningful exceptions.

One exception is that “partial performance of an oral contract” excludes it from the statute – put another way, an oral contract to buy/sell property is enforceable if it has been partially performed by the parties.

This by no means forms a perfectly straight legal line – an enforcement lawsuit (“specific performance”) would require dealing with a series of contested facts and opposing theories about whether the “partial performance” was sufficient – in sum, the outcome for either party could not be guaranteed. Here, though, we prepared a letter to the seller and his attorney in which the forgoing concepts were fairly discussed and a formal “tender of performance” and “demand to close” were presented. The demand included a description of the mechanics of a specific performance action and included, as well (with believed persuasiveness), a reminder of the court’s power to award attorney’s fees/costs against the seller over and above a court-compelled sale.

Though the ultimate outcome of a lawsuit could not be regarded as certain (it almost never can), the blend of concepts favoring the buyer did seem formidable. Within a couple days, we received word the closing would proceed. It did, in fact, proceed – we closed it on time. Both agents seemed pleased.

As a post script, let me note that, in the event an offer is accepted after its expiration, it would be appropriate to make the date change in the contract itself (have it initialed by both parties) or perhaps deal with it in an addendum.