

HOLIDAY POEM

Dear readers:

I humbly submit this poem in light of the holidays, in hopes of offering a reprieve from the assumed tedium of my normal column. I hope you read it in kindest jest, as it is intended, and that it haunts your holidays, pleasantly.



Vesselin Mitev

Vesselin Mitev, Esq.

Upon a dark night, stormy, dreary,
Perusing net worths, I grew weary,
And pen in hand and Westlaw browsing
I must have dozed off; startled, rousing,
I heard a knock upon my door.
This noise to me it made no sense
Clasping shut Prince, on Evidence,
I shuffled off the slumber cobwebs
And peered into blackness hence.
Outside wind whipped boughs bent and whistled
The night dew shivered 'pon the thistle
But there stood no one at my door
I clasped it shut alone once more.
This fever dream I'm now recounting
Seemed too real:
I stood alone at counsel's table and

Currently I'm ren'd unable to describe to
you dear reader the ghastly apparition
that arose before me then.
It assumed the human condition
but appeared gnarled, feral,
its vestigial position only vaguely
reminiscent of its origin of men.
"Mr. Mitev," the phantom croaked,
from inside its hollow cloak,
"are you ready to proceed?"
"I am, Your Honor, indeed, this matter
is now on for trial"
I heard myself responding as the spectre
guffawed, choked,
And nodding to something vile behind me,
that first snickered then it tittered,
then along the floor it skittered,
Arising 'fore-bench to announce:
"Counsel, but haven't you learned?
Your matter's once more been adjourned!"
Peals of laughter rose and followed
Each more hollow than more hollow and
The courtroom of immense proportion
Melted away; in my trance
I stood again not comprehending
How this nightmare was unending

When something grabbed me by the hand
And shook it hard.
"So good to see you" hissed this
be-spoked spirit
"Sent you an offer; did you see it?
It's good till five pm today.
And if your client should reject it," swayed and
buckled forth the wraith
"We'll see you in Brooklyn for a stay."
Next was something far more sinister
'fore a spectacled magister
I stood.
And while it shuffled papers
made up of nothing more than vapors
it grumbled hoarsely, deathly; then
it spoke, this apparition:
"Pon review of the petition, this Court be
most bound by tradition, and declines its
jurisdiction, so go away, away, away!"
I responded, quite despondent, "Sir! You have
yet to hear my plea!"
"Does not matter," rasped the spectre, "No good
will
come upon this vector, you who represent
Respondent, failed to file his FDA!"
Finally I lay surrounded by nurses,
orderlies, abounded,
concerned looks on all their faces;

"By the graces!" I
shouted: "Somebody tell me my prognosis –
is it deep *id* thrombosis
or of the spirit, a necrosis? Please relieve me,
ill at ease!"
The room parted as the doctor
head bowed, approached.
"Your particular affliction, I'm afraid is
quite contagious."
He paused; I yelped:
"This is outrageous! Why won't anyone inform me
of my malady? In mourning are you all already?
Oh, indeed, woe is me."
The next words the doctor uttered, chilled my bones
and made
me shudder, and had I not been laying prone
I should have dropped upon my knees; he said:
"I regret I must inform you, we indeed have come to
mourn you.
The diagnosis is confirmed. Prognosis: death. The
cause: Black Robe Disease.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

REAL ESTATE

Contracts of Sale: Preserving Rights is Transactional Counsel's Job

By Andrew Lieb

The dichotomy between a litigation and a transactional practice is stark. With differing attendant goals abound, what is good for one often hurts the other. While a deal maker lives by the adage of agreements beget agreements, the litigator is rigidly disagreeable while keenly focusing on exposure. These fields merge in real estate transactions where a litigation mentality must be softened to close deals and a transactional mindset must give way to the duty to preserve rights. Remember, when a deal goes south, unreserved rights are lost. So, transactional counsel must walk the tightrope between maintaining the right energy required to deal while also, cunningly, preserving all rights with a happy face; that is to say, preserving rights can be styled so as not to be disagreeable.

On Oct. 10, 2018, we were reminded about the grave consequences that are often realized by a transacting party when their transactional attorney failed to preserve rights. By failing to preserve rights, a specific performance summary judgment motion was denied, then, the specific performance cause of action was dismissed after a non-jury

trial and, then finally, both decisions were affirmed by the Second Department in *Chany Brisk v. Basya Wolf Bloch*. In terms of real dollars, the action concerned an original purchase price of \$649,990 to which specific performance was sought, and then, a later purchase offer of \$1,335,000, which was made on the same property prior to the commencement of suit. While an ultimate sales price is unknown on the property, it is expected to be higher than the \$685,010 that was lost by counsel's failure to preserve rights.

Simply, transactional counsel needs to adhere to the game of hot potato — don't get stuck as the recipient of a notice when the music stops. Instead, counsel must assert a preservation right whenever counsel receives a notice that asserts contrary rights by the other party. Then, counsel should consult with litigation counsel to collaborate on how to best achieve the client's goal through a hybrid of leveraging litigation and negotiating terms. Remember, the Court of Appeals, in *Princes Point LLC v. Muss Development LLC, et al.*, held



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that the mere commencement of an action seeking rescission and/or reformation of a contract does not constitute an anticipatory breach of such agreement unless there is a "positive and unequivocal" act of an anticipatory breach. Therefore, litigation counsel can support transactional counsel in obtaining denied terms, concessions and the like.

Looping back the Second Department's recent decision in *Chany Brisk v. Basya Wolf Bloch*, the case involved a house swap, under separate contracts, where both contracts were "contingent on the defendant obtaining a mortgage within 60 days of the execution of the contracts." Operatively, defendant "was permitted to cancel the contracts in writing within five business days after the deadline for obtaining a mortgage," and she so cancelled the contracts by letter between counsel. Further, "defendant's attorney sent a letter to plaintiff's attorney with a check for the reimbursement of title search expenses, which was required upon termination of the contracts." As to both letters, plaintiff did not object

or respond. Nonetheless, about six months later, plaintiff asserted, by letter, "that she still had a contract on the defendant's home which was in full force and effect."

The Appellate Division affirmed the nonjury trial finding that "plaintiff's conduct after receiving the defendant's letter of cancellation indicated that she accepted the defendant's termination of the contracts." Further, the Second Department found "plaintiff's conduct evinces an intent to abandon the contracts," such conduct including placing plaintiff's property on the market and making another offer to purchase defendant's property after the letter cancelling the contract and before the institution of this suit. In all, hot potato is lost when you get caught holding the notice of termination after the music stops.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for years.