MARCH 2014 ISSUE - **JOSHUA STEIN** IN THE NEWS - Page 50

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Ten Conversations Not To Have By Email

By Joshua Stein, Joshua Stein PLLC

We overuse email. Our over-reliance on email not only creates an unmanageable volume of messages; it also impedes communication and creates risks we might not even realize we're taking. In response, I offer ten suggestions for conversations that should not take place by email.

1. Front Page of the Paper. If whatever you're saying wouldn't look good on the front page of the paper, don't say it by email. You can't control who will see it. Today, someone might forward it. Tomorrow, someone's email archives may come under unexpected scrutiny. If it's embarrassing or you wouldn't anyone but the recipient to know it, don't communicate it by email. I remain astonished by how many otherwise smart and careful people ignore this principle.

2. Complicated Messages. If you start to compose an email message with great care—rolling up your sleeves, closing the door, turning on a special bright light, making an outline—then think twice about whether email is the right medium. Maybe it is. For example, you might want to communicate an entire message all at once with no room for ambiguity. If you were delivering it in person, though, you might adjust your message based on the recipient's reaction. Maybe presentation and body language will matter. In those cases, set your draft email aside and try something more old-fashioned.

3. Series of Dependent Questions. If you want to ask something and the answer will determine what you want to ask next, and then the next answer will determine the next question, and so on, the entire exchange can quickly balloon to 20 emails or more. A rapidly lengthening chain of emails usually signals that a conversation would work better. When you've exchanged four emails on the same topic, think about switching to another communications medium.

4. Criticism. It's really fun to bang out a nasty comment on something and send it with a flourish. Maybe someone really screwed up and you have a great opportunity to be the first one to tell them. Restrain yourself. At least wait a bit. And consider again whether you should deliver the message by telephone or in person. Even if you're just telling Person B bad things about Person A, you have no idea where that message will end up. The mere fact that you're thinking about Person A may lead you to address it to Person A without thinking. It happens! It's another good reason to keep seriously critical comments out of emails.

5. Incomplete Requests. Maybe you know you want someone to do something but you haven't pulled your thoughts together. So you put the monkey on the recipient's back by sending an email and hoping the recipient will deal with it. More likely, though, the monkey will slip off the recipient's back and into the electronic wastebasket. Incomplete or poorly thought through requests sent by email just ask to be ignored. Either figure out what you really want the person to do – and give them what they need to do it – or have a conversation and work together to figure out how to get the project started.

6. No Traction. If you've been trying to get someone to do something via email and it isn't happening, stop using email. It's a lot harder to hide and ignore someone in a real-time, two-way conversation.

7. You Should Know But Don't. When you need to ask a question the answer to which you should know, you may not want a written trail showing that you didn't know or weren't paying attention. Again, get on the phone or have an in-person conversation. It's less incriminating and less obvious.

8. Screw-Ups. If you screwed up in some other way, just remember that emails are forever. You may not want a permanent acknowledgment of your screw-up to live on in someone's email archive.

9. Building a Relationship. If you're communicating with a client or prospective client, or anyone else with whom you are trying to build a relationship that goes beyond just getting the work out the door, see if you can sit down in person, even briefly. It's more effective than exchanging dozens or hundreds of emails. Telephone conversations aren't quite as good as sitting down in person, but they usually work better than email. That's all especially true right at the beginning of a relationship.

10. Risk of Offense. People have thin skins, often particularly so when reading an email. If what you're saying might offend, think twice before saying it by email. You can probably say it more effectively and less offensively in a conversation.

These suggestions offer some great ways to reduce the volume of email, starting with the types of email most likely to cause trouble or not do their job.

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COMMERCIAL OBSERVER

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MARCH 4, 2014 - **JOSHUA STEIN** IN THE NEWS - By Joshua Stein

MORTGAGE OBSERVER

Do We Really Have To Use A Delaware LLC?

Substantial commercial real estate loans, especially those destined for securitization, usually require the borrower to form a single purpose Delaware limited liability company to own the property. The requirement has become so prevalent that it's just part of the territory. But why can't we use a New York LLC? What's so bad about New York?

Joshua Stein

For the most part, that's the wrong question to ask. One should ask instead: What's so good about Delaware? The answer is: plenty. And New York seems to have shown no interest in trying to emulate the Delaware example as a way to attract entity formation to the state and demonstrate New York's new (claimed) friendliness to business. It may be too late anyway.

Delaware starts with a long history of corporate and LLC law. The legislature pays attention to issues that arise in the LLC world, resolving them when necessary. For example, in 2012, the Delaware courts had some trouble with the question of whether a managing member of an LLC owed a "fiduciary duty" to other members if the documents didn't address the question. After a bit of judicial excitement, the legislature resolved the question for the future by saying that managers did owe such a duty but could negate it by including an appropriate waiver in the LLC's governing agreement. New York law may not allow that.

In the course of dealing with that issue, Delaware's highest court reaffirmed the strong principle of Delaware law that, to the maximum extent possible, the Delaware courts like to read any contract and then enforce it as written, without injecting judicial discretion (i.e., uncertainty) into their application of the words of the contract. The market seems to think Delaware courts do a better job of that than do the New York courts. (In this regard, the California and New Jersey courts exist in a whole separate universe of their own.)

Because of Delaware's propensity to enforce the words of a contract as written, the state's law also offers comfort on the one provision of an LLC agreement that some lenders care about above all others—the requirements that the LLC must satisfy before it can file a voluntary bankruptcy petition. If the LLC documents require approval from, e.g., an independent director, the lender will want to know that the courts will enforce that requirement.

As a result, at least for many securitized loans, the rating agencies want to see an opinion of counsel confirming that a court will probably enforce any such requirement in an LLC agreement. Delaware law firms have become very comfortable about issuing those opinions. In New York, they are not part of the territory at all.

Other miscellaneous provisions of Delaware law will often work better than similar provisions in New York. Mergers of LLCs are easier in Delaware. Although both New York and Delaware require the LLC to indemnify its managers for certain liability, Delaware defines the scope of that indemnity more broadly and more consistently with ordinary expectations. Delaware offers some flexibility and certainty in some other areas too technical to mention here. And, of course, New York has an expensive publication requirement, which can be avoided entirely if a Delaware LLC will not own property in New York.

More generally, the Delaware courts are thought to do a better job of interpreting and applying Delaware LLC law, usually in a way that matches industry expectations and the words of the statute.

Should New York consider modifying its LLC law to match Delaware's? The idea has some appeal to it. If Delaware law works better, then perhaps New York could do its business community a favor by importing Delaware law. That idea seems unlikely to ever see the light of day, though, given the overall effectiveness and creativity of our great state's legislative system. And even if New York adopted Delaware law wholesale, New York would still lack a court system that approaches future LLC issues the way Delaware's courts probably will.

As a result, Delaware retains a huge competitive advantage—and marketplace lead—in the business of forming LLCs and then maintaining and updating public records of those LLCs, as well as collecting an annual fee from every LLC formed. If New York decided to capture those revenues, that would hardly move the fiscal needle in Albany, but it might make a good statement about New York's friendliness to business.

Unless and until that happens, we should all expect to keep forming Delaware LLCs for substantial commercial real estate loans. (Thanks go to Tom Kearns of Olshan Frome Wolosky LLP, whose comments at the commercial real estate financing seminar I chaired last week contributed significantly to this month's column.)

Joshua Stein is the sole principal of Joshua Stein PLLC. The views expressed here are his own. He can be reached at joshua@joshuastein.com.

MORTGAGE OBSERVER

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FEBRUARY 2014 Issue - **JOSHUA STEIN** IN THE NEWS - The Sked - Page 34

The Sked: February

2-5

The Mortgage Bankers Association is hosting its CREF/Multifamily Housing Convention & Expo at the Hyatt Regency Orlando early this month. The event is billed as being where market-makers meet. The four-day program includes many opportunities to network with the 2,500 professionals that will be in attendance.

Mortgage Bankers Association: Where Market Makers Meet, Hyatt Regency Orlando, 9801 International Drive, Orlando, Fla., go to events.mortgagebankers.org/CREF2014 for more information

4

The Real Estate Lenders Association's Chicago chapter is hosting its New Year's networking event in Chicago at the American Junkie, a self-described "destination for sports addicts." However, you need not be intimidated. The new American restaurant boasts an impressive cocktail menu and revolutionary spins on hors d'oeuvres. Here's hoping the salmon deviled eggs are served. M.O. columnist Dr. Sam Chandan is the featured speaker.

RELA: Chicago New Year's Networking Event, American Junkie, 15 West Illinois Street, Chicago, 5:30-7:30 p.m., go to rela.org for more information

11

Hailing from one of New York's prominent real estate family dynasties, Will Zeckendorf will speak at a meeting with the Real Estate Lenders Association. Please note that the event is limited to lenders and equity investors only.

RELA: New York City Meeting with Will Zeckendorf, Yale Club, Grand Ballroom, 50 Vanderbilt Avenue, New York City,. 5- 8 p.m., go to rela.org for more information

13-14

Catch our other M.O. columnist, Joshua Stein of Joshua Stein PLLC, as he chairs this two-day Practicing Law Institute program for his 18th consecutive year. Attorneys, accountants and commercial real estate managers are encouraged to attend.

Commercial Real Estate Financing 2014, Practicing Law Institute, 1177 Avenue of the Americas, New York City, 9 a.m.-5 p.m. both days, go to pli.edu or call 800-260-4PLI for more information

Information Management Network nails it again with a perfectly located executive conference on the coast of Fort Lauderdale at the Ritz-Carlton. The program focuses on special assets and real estate workouts, but the real workout is a walk—or run,

for the physically fit finance set—along the white sand beaches.

IMN: The Fourth Annual Bank & Financial Institutions Special Asset Executive Conference on Real Estate Workouts, Ritz Carlton, 1 N. Fort Lauderdale Beach Blvd, Fort Lauderdale, Fla., contact Andy Melvin at 212-901-0542 or amelvin@imn.org for more information

18-21

Apparently, mortgage bankers are taking over the Hyatt Regency Orlando hotel in Florida. The Mortgage Bankers Association returns to host its national mortgage servicing conference and expo. The opening general session will feature a speech from Captain Mark Kelly, the commander of space shuttle Endeavour's final mission.

Mortgage Bankers Association: Emerge, Evolve, Excel, Hyatt Regency Orlando, 9801 International Drive, Orlando, Fla., go to events.mortgagebankers.org/servicing2014 for more information

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MORTGAGE OBSERVER

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FEBRUARY 2014 Issue - **JOSHUA STEIN** IN THE NEWS - M.O. Columnists - Page 12

Stein's Law

Leasehold Financing and the Mortgage Priority Conundrum

When you structure a ground lease, the tenant's mortgage needs to be ahead of the landlord's mortgage, doesn't it? Otherwise, maybe it's not a first mortgage—or something like that. But what about the landlord's mortgage? Isn't that supposed to be ahead of everyone else? Otherwise, maybe it's not a first mortgage. Who comes first?

Joshua Stein

These questions arise again and again in ground leases and leasehold loans. Usually, they start when someone announces the tenant's mortgage must be prior to the landlord's mortgage or the landlord's mortgage must be ahead of everyone, though the lender will graciously give the tenant nondisturbance protection. Often, these discussions lead to tail-chasing driven by nonnegotiable edicts, coupled with a misunderstanding of the logic of ground leases.

These issues matter. If the parties get them wrong, then the landlord or the tenant—in the worst case, maybe even both—may find themselves seriously constrained in their ability to obtain mortgage financing or a favorable exit. And these issues arise again and again, because leasehold financing plays a huge role in major development and investment transactions in New York City and, to a lesser degree, elsewhere in the United States.

There is a right way to resolve these issues.

It starts by recognizing that, when the parties create a ground lease, they fundamentally convert a single piece of real property into two pieces of real property. First, there is the tenant's long-term right of possession on hopefully attractive terms—a "leasehold." Second, there is the property owner's right to receive a hopefully attractive long-term stream of rental income, followed eventually by full possession of everything, including the tenant's building, when the ground lease ends. That's a "leased fee." Each of those positions should have its own value and constitute a reasonable investment asset and reasonable collateral for a loan.

When a mortgage lender finances either the leasehold or the leased fee, the lender's collateral consists of only the leasehold or the leased fee—nothing more. If the landlord defaults on its loan, the landlord's lender or a foreclosure purchaser should end up acquiring the leased fee without in any way affecting the leasehold. After the foreclosure against the landlord, the tenant will just keep paying rent to a different landlord. Conversely, if the tenant defaults, the lender or purchaser should get just the leasehold without affecting the leased fee. A different tenant will just keep paying rent to the same landlord. Each lender must be comfortable with that result—i.e., comfortable with its collateral—or else not make its loan.

That means the tenant's lender should receive a mortgage that attaches only to the leasehold. And the landlord's mortgage should attach only to the leased fee, in a way that cannot possibly hurt the leasehold. That means the landlord's mortgage needs to be "subordinate" to the ground lease, which in turn means that a foreclosure under the landlord's mortgage will not affect the ground lease in any way. This is exactly the desired result. If such a foreclosure occurs, it should have no impact on the ground lease at all, because the ground lease should be "prior" to the landlord's mortgage.

But when the landlord's lender accepts the landlord's leased fee as collateral, doesn't that lender need to have a first priority mortgage, ahead of everyone else, including the ground lease?

No. When a mortgage lender finances a leased fee, the mortgage lender needs to understand and accept that its collateral consists of only the leased fee—the incoming rent stream and the possible windfall at the end of the lease—but not the entire interest in the property, i.e., both the landlord's and the tenant's positions. So when a lender accepts a mortgage on the leased fee, the lender needs to accept that, when it forecloses, it will acquire only the leased fee, subject to the lease. Thus, the lender's mortgage needs to be subordinate to the leasehold. If the lender can't live with that, it should not finance a leased fee.

What if the landlord's lender gets a first priority mortgage but gives the tenant nondisturbance protection, i.e., an agreement not to terminate the lease if the lender ever forecloses? Yes, major national retailers do accept that arrangement, but careful tenants under ground leases, and their lenders, do not like it at all. Too much can go wrong. Why should they have to worry about it?

As the last piece of the puzzle, should a mortgage on a leased fee be prior to a mortgage on the leasehold? Or the reverse? Answer: neither. Each mortgage has different collateral, and never the twain shall meet. As long as the leasehold stays prior to the landlord's mortgages, it all works. But what about condemnation clauses? That will have to wait for a future issue. MO

Joshua Stein is the sole principal of Joshua Stein PLLC. The views expressed here are his own. He can be reached at joshua@joshuastein.com.

THE COMMERCIAL OBSERVER

Time Hotel Set for Foreclosure Auction—Again

Perhaps the third time's the charm for Midtown's **Time Hotel.**

The Times Square-area hotel is set for a mortgage foreclosure auction—twice postponed—on Feb. 19, PropertyShark records show.

The auction, for the ground lease of the 192-room boutique hotel, at **224 West 49th Street**, was previously set for Jan. 15, 2014, and, before that, Oct. 23, 2013.

As *The Real Deal* reported, the London-based hospitality company began battling a foreclosure suit from special servicer **LNR Partners** after an affiliate of **Hampshire Hotels** failed to make any interest payments on roughly $55 million in loans from January 2012 onward.

Foreclosure proceedings commenced in July 2012. Hampshire Hotels, founded by **Vikram Chatwal**, agreed to settle in May 2013.

"It looks to me like this dispute got resolved in the second quarter of last year," said real estate attorney **Joshua Stein**. "Now, almost a year later, they still haven't held the sale. Foreclosures just take a long time for no good reason in New York, although for all I know, it was the lender that decided it wasn't ready to proceed with the auction." Mr. Stein is a columnist for *Commercial Observer*'s sister publication, *Mortgage Observer*, and is not involved in the case.

Calls to attorneys on both sides weren't immediately returned, and

Continued on Page 7

Jay Stein, the chief executive officer of Hampshire Hotels, declined to comment. —*L.E.S.*

REAL ESTATE WEEKLY

FEBRUARY 5, 2014 - **JOSHUA STEIN** IN THE NEWS - Around Town Section - Page B6

Financing Symposium

Feb. 13-14: Commercial real estate attorney **Joshua Stein** will chair Practicising Law Institute's "Commercial Real Estate Financing 2014" symposium, its annual two-day financing symposium, at PLI New York headquarters, 1177 Avenue of the Americas. For more information call (800) 260-4PLI or visit www.pli.edu.

citybizlist NEW YORK

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JANUARY 14, 2014 - **JOSHUA STEIN** IN THE NEWS

Attorney Joshua Stein to Chair Annual NYC Commercial Real Estate Law Program for Practising[1] Law Institute, February 13-14

Joshua Stein

Two Days of Cutting-Edge Seminars for Attorneys, Accountants and CRE Managers at PLI Center, 1177 Avenue of the Americas

For the 18th consecutive year, leading commercial real estate attorney **Joshua Stein**, of **Joshua Stein PLLC**, will chair a two-day program on the law and deal structure of commercial real estate financing on **Thursday, February 13** and **Friday, February 14, 2014.**

The program, "Commercial Real Estate Financing 2014," will take place at PLI's recently relocated New York conference center, now at 1177 Avenue of the Americas, on both days from 9 a.m. to 5 p.m. PLI will simultaneously broadcast the conference to two other locations via live webcast. Full attendance at the two-day program provides CLE, CPE and CPD credits.

"The commercial real estate financing market continues to improve," says Stein, whose firm is listed in the latest edition of the Best Lawyers in America. "We're going to look at how deals are getting done today. That means looking at, among other things, the current state of securitization, what the rating agencies are looking for, issues surrounding loan enforcement, and how some smart borrowers are using joint ventures as a financing vehicle."

Other seminar topics will include capital stacks and intercreditor issues; the developing law of limited liability companies, including securities law; interest rate protection in commercial real estate loans; enforcement vs. negotiation; malpractice prevention techniques; and the role of bankruptcy.

Speakers include Kevin C. Blauch, Sidley Austin LLP; Richard S. Fries, Bingham McCutchen LLP; Robert Bergson, Abrams Garfinkel Margolis Bergson, LLP; Ellen M. Goodwin, Alston & Bird LLP; and Daniel B. Rubock, Moody's Investors Service, Inc.

The full two-day program costs $1,695. For more information or to register, visit www.pli.edu, or call 800-260-4PLI.

About Joshua Stein

Joshua Stein is a leading commercial real estate attorney and the sole principal of Joshua Stein PLLC, www.joshuastein.com, a law practice established in 2010 with an international client base. Mr. Stein works on commercial real estate financing, development, acquisition, hotel-related and leasing transactions and disputes. He also acts regularly as an expert witness and arbitrator in these areas.

A member of the American College of Real Estate Lawyers, Mr. Stein has, since 1997, chaired the Practising[2] Law Institute's annual two-day seminar on commercial real estate financing. Mr. Stein was recently named one of the "Top Ten Most Highly Regarded" real estate lawyers in the world by the International Who's Who of Real Estate Lawyers. Mr. Stein earned his undergraduate degree from University of California, Berkeley, and his law degree from Columbia Law School, where he served as a managing editor of Columbia Law Review and was a Harlan Fiske Stone Scholar.

About Practising Law Institute (PLI)

Practising Law Institute is a non-profit continuing legal education organization chartered by the Regents of the University of the State of New York, founded in 1933. PLI is dedicated to providing the legal community and allied professionals with the most up-to-date, relevant information and techniques which are critical to the development of a professional, competitive edge. The group produces seminars annually in locations across the United States, as well as annually supplemented treatises, audio CDs and DVDs, MP3s, live webcasts, course handbooks, CLE and CPE Now web programs and private label solutions.

THE REAL DEAL
NEW YORK REAL ESTATE NEWS

MARCH 4, 2013 - **JOSHUA STEIN** IN THE NEWS - By Adam Pincus

Court backs Extell in forced sale of Ring building

From left: Gary Barnett of Extell Development, Frank Ring of F.M. Ring Associates and 251 Park Avenue South

A state court judge signed an order on Thursday requiring the auction of a 16-story office building co-owned by Extell Development and brothers Frank and Michael Ring, located in the core of the strong Midtown South office market, court records show.

Neither a price nor a date for the sale of the mostly-vacant building, located at 251 Park Avenue South on the corner of 20th Street, was provided in the decision filed on Friday. Insiders said a simple auction could take place as early as 45 days, or if a more-sophisticated broker-led process is undertaken, it may not occur until the summer.

Extell, headed by Gary Barnett, bought a 50 percent interest in the 120,000-square-foot building in December 2011 for $19 million. Four months later he sued the Ring brothers, in New York State Supreme Court seeking the sale of the building, owned 25 percent by Frank, president of F.M. Ring, and 25 percent by his brother Michael. The two are known in the industry as being reluctant to conclude real estate deals.

Frank, through his attorney Charles Salfeld, a partner at the law firm Morrison Cohen, said he was reviewing the decision. At the same time, Frank was, "Looking to work with Extell as to whether they can resolve the outstanding issues between them in a spirit of cooperation," Salfeld said.

The Ring brothers own a portfolio of 14 mostly-vacant commercial buildings that landlords have sought to lease or buy for years. Currently, brothers Eli and Joseph Tabak are mired in state litigation after Michael balked at the Tabaks' effort to buy a controlling interest in Michael's 50 percent ownership of that portfolio for $112.5 million.

The property in the Extell litigation is the only one of those 14 buildings that Frank and Michael do not own alone.

The building is about 25 percent occupied, with Sovereign Bank occupying the ground floor retail on a lease extending to 2024 and fabric company Maharam Fabric on floors 14 through 16 through 2020, court records and a visit to the property reveal.

This was Barnett's second court victory over the Ring brothers in this type of litigation, seeking a judicial sale. In 2008 he sued them to force a public sale of 20 West 47th Street, a Diamond District building that he acquired an interest in and later sold.

Barnett, Michael Ring and Eli Tabak declined to comment, as did Joshua Stein, an attorney appointed by the court to act as a referee to analyze the property and manage the sale.

In court papers, the Ring brothers suggested instead of a judge ordering a sale of the property, the building should be split into two separate condominiums, with Extell owning one and the Ring brothers the other. Stein, in a court filing, rejected such a plan, saying that dividing the property into condo units would reduce the value of the building.

Under New York law, a court can order a sale of a property if the owners lack an ownership agreement and cannot decide how to proceed, after one has sued to partition the property or force a sale. In the event of a sale, one of the owners can purchase the property using its own stake (plus any additional money, if needed), or an outsider can. Following a sale, the money is distributed among the owners based on their stake.

COMMERCIAL OBSERVER

JUNE 26, 2013 - **JOSHUA STEIN** IN THE NEWS

Mortgage Observer

Breaking Up is Hard To Do: Inside the Fate of 251 Park Ave. South

Earlier this year, a court ordered me to hold a public auction of **251 Park Avenue South**, a 16-story office building that is almost 70 percent vacant—an incredible opportunity for someone to create a new landmark in one of the hottest neighborhoods in New York City.

Joshua Stein.

The court decided the property had to be sold because the co-owners weren't getting along. When that happens, New York law says a court can order the sale of the property. The proceeds of the sale are then divided among the fighting co-owners. It is a remarkable process—a "partition sale"—but it's a traditional element of American real estate law and one of the things that can happen when multiple parties have ownership interests in the same real estate.

Partition sales usually happen when two siblings fight over a house they inherited, or when a family has some other form of falling out. These sales are rare for commercial real property, because when multiple parties own commercial real property, they usually own it in a limited liability company. In the occasional case when they own it as tenants in common, they typically have a tenancy-in-common agreement that defines their relationship. In that agreement, everyone typically waives any right to force a partition sale.

In the case of 251 Park Avenue South, however, **the Ring family** had owned a 50 percent interest in the property for decades, and the other 50 percent found its way into the hands of an investor, reportedly an entity owned by **Extell Development**. The co-owners had no tenancy-in-common agreement or any other agreement regarding the property. The different parties just owned different percentage interests in the property. The investor said it wasn't happy with how the property had been managed and exercised its right to force a sale. And there we are.

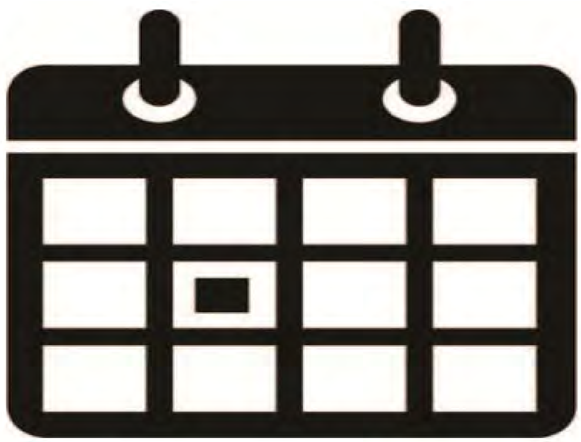
The sale will take place on August 28, 2013 at the New York State Supreme Court on Centre Street. I will be the auctioneer.

Conceivably, the co-owners could stop the process by settling their differences. Maybe one will buy out the other(s). But if they haven't yet figured out how to do that, they seem unlikely to change their minds now. So my challenge is to achieve the highest price for the property.

THE COMMERCIAL OBSERVER NOW

APRIL 18, 2013 - **JOSHUA STEIN** IN THE NEWS - By Michael Ewing

Thursday's Must-Attend Real Estate Events



Joshua Stein of **Joshua Stein PLLC** will be hosting **The Mortgage Bankers Association of New York's** luncheon on how borrowers and senior mortgage originators can use mezzanine lending to put together a debt stack that works for all parties. **Bruce Batkin** of **Terra Capital Partners** will be featured as a guest speaker at the event.

Bridging the Gap: Mezzanine Financing, Club 101, 101 Park Avenue; 11:45am-2pm, visit www.mbany.org or call (516) 997-3707 for more information.

citybizlist NEW YORK

JULY 3, 2013 - **JOSHUA STEIN** IN THE NEWS

Chambers USA Raises Ranking for Joshua Stein in 2013 Guide

Joshua Stein has received a **"band two"** designation in the 2013 Chambers USA Guide. It is one of the publication's highest rankings, based upon a six-band ranking system, with "band one" signifying the most highly regarded commercial real estate lawyers in the New York market. Of all the commercial real estate lawyers listed in any of the six bands within the Chambers rankings, **Joshua Stein** is the only one at a boutique firm or his own practice.

"It has been an honor to appear in the Chambers USA Guide for the past few years," said Stein. "To have achieved this status is especially gratifying, and I appreciate the decision of Chambers to upgrade my ranking."

Rankings for the Chambers USA Guide reflect information collected each year from thousands of lawyers and clients. Chambers's 130 full-time researchers conduct the interviews and focus on such criteria as technical ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities clients appreciate. The final results appear annually in the various Chambers guides, considered to be among the most trusted resources in the industry.

In addition to this recognition in Chambers USA Guide, Stein was recently listed as one of the top commercial real estate lawyers in the United States in the 17th edition of "Best Lawyers in America." He was also recognized as one of the ten "most highly regarded" commercial real estate attorneys in the world by Who's Who Legal; and Super Lawyers cited him as one of the top ten leading lawyers in the New York Metropolitan region across all practice areas.

About Joshua Stein

A member of the American College of Real Estate Lawyers, Joshua Stein chairs the educational programming for the Mortgage Bankers Association of New York, Inc., and has presided over the Practising[1] Law Institute's annual two-day seminar on commercial real estate financing since 1997. He chaired the New York State Bar Association Real Property Law Section for the year ending in mid-2006. Annually for the last few years, Mr. Stein has been named one of the "Top Ten Most Highly Regarded individual real estate lawyers in the world" by the International Who's Who of Real Estate Lawyers.

The author of five books on commercial real estate law, his latest is "A Guide to Troubled Commercial Real Estate Loans for Lenders and Borrowers," published by LexisNexis. Stein earned his undergraduate degree from University of California, Berkeley, and his law degree from Columbia Law School, where he served as a managing editor of Columbia Law Review.

COMMERCIAL OBSERVER

October 16, 2012 - BATTLE OF THE SYKSCRAPERS - By Carl Gaines

MBANY Event: It's Good to Be Tall, New York!

New York City's tallest buildings took center stage Monday night at a **Mortgage Bankers Association of New York** event, moderated by **Joshua Stein**, a *Mortgage Observer* columnist and principal of **Joshua Stein PLLC**.

Mr. Stein introduced guest speaker **Stacy Wallach**, who took attendees through a fascinating look at New York City skyscrapers, "An Evening with the Tallest of the Tall."

Stacy Wallach, left and Joshua Stein.

So it might seem difficult to bring anything new to a discussion of the city's skyscrapers, but Mr. Wallach—an adjunct professor at **Pace Law School**, who also teaches American history at **Berkshire Community College**—did just that.

Interspersed with the buildings, which as any jaded New Yorker can admit are full of drama themselves, were tidbits about some of the characters that made them all possible. And some of the news wasn't actually good for the forbearers of those mortgage brokers assembled.

"Time to weep in your beers," Mr. Wallach told them when detailing the history of the "Cathedral to Commerce" at **233 Broadway**—constructed by **F.W. Woolworth** for $13.5 million in cash. That particular building held the title of New York City's tallest from 1913 to 1930 when mortgage brokerage was still in its infancy. Some lucky New Yorkers or foreign investors will call the upper floors home, **when they're developed into condos** by 2015.

Equally depressing for commercial mortgage brokers was, well, the Great Depression. When it hit in the 1930s, **J.D. Rockefeller** funded the bulk of Rockefeller Center's $125 million construction costs with his own cash. The rich are different!

Mr. Wallach's talk was great fun, and also educational, hitting on the "game changers" that made New York City skyscrapers possible in the first place. Among them the Bauhaus group's international style, CAD and Green Building—for which Mr. Wallach tipped his hat to **William Rudin**, an early proponent.

Though we were partial to rebar.

REAL ESTATE WEEKLY

Wednesday, October 10, 2012 - AROUND TOWN Section - Page B6

MBA Panel

Oct.15: MBANY Hosts "An Evening with the Tallest of the Tall: NYC's Skyscrapers" dinner presentation featuring moderator **Joshua Stein**, principal of Joshua Stein, PLLC and guest speaker **Stacy L. Wallach**. An informative dinner presentation on the history of many of Manhattan's most prominent office buildings, at Club 101, 101 Park Avenue at 41st Street. Drinks & hors d'oeuvres at 6 p.m., dinner from 6:30 p.m. - 8:30 p.m. Fee: Members $95, Non-members $115. Register online at www.mbany.org or call (516) 997-3707.

JOSHUA STEIN

THE MORTGAGE OBSERVER

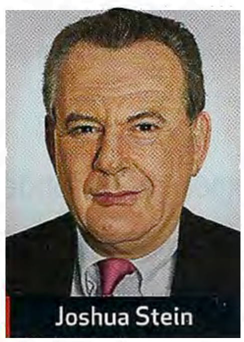
The M.O. Columnists / October 2012 Issue - Page 16

Stein's Law

Quicker And Cheaper Loan Closings?

Why does it cost so much in legal fees to close a commercial real estate loan? How can a borrower control legal fees for one of these transactions? What's the magic answer?

Any set of loan documents typically goes into tremendous detail on a tremendous range of issues. A complete and perfect negotiation of the documents may require full exploration of all those issues, which can take a lot of time and cost a lot of money. But every one of those issues could, in some circumstance, make a difference. As the starting point for discussion, then, borrowers and their counsel should at least consider working their way through and negotiating everything.


Joshua Stein

A borrower may want to direct counsel to take a different approach, by telling them to focus on only three things in reviewing and negotiating the documents.

First, make sure the loan documents get the deal right—the dumb stuff staring everyone in the face—such as the maturity date, the interest rate, who will sign which guaranties and anything that relates directly to how much the borrower will pay for the lender's money. Given the complexity of modern legal documents, the fundamentals of a deal often can become overwhelmed by details, alternatives, hypotheticals and side issues.

For example, have you ever tried to figure out the loan amount, interest rate and maturity date just by reading a syndicated loan agreement? You can do it, of course, but it's typically an ordeal that can involve dozens of interacting defined terms. Important points can slip between the cracks in all that complexity. Borrower's counsel must make sure that doesn't happen.

Second, try to trim back the verbiage of the loan documents at least enough so the borrower isn't automatically in default at the moment of closing or when proceeding with his or her basic business plan for the property. Don't worry so much about hypothetical eventualities, provisions unlikely to become relevant in the ordinary course of events. Focus on the parts of the documents that relate to the borrower's real daily life in operating (and, where relevant, developing or improving) the property. And make sure the financial reporting and insurance requirements match what the borrower really expects to do.

Third, and most important, focus on the

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THE MORTGAGE OBSERVER

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Stein's Law

Quicker And Cheaper Loan Closings?

guaranties. If someone agreed to guaranty something in connection with the loan, confirm that the guaranties cover only what they should cover and nothing more. No one should face personal liability as a guarantor for anything more than the business deal contemplated. Understand all possible circumstances that could trigger the guaranty. Recent litigation has shown that surprises lurk in "standard" carveout guaranties, including in the "boilerplate." Counsel should identify and prevent those surprises.

If a borrower tells counsel to focus on the three areas just described—and it is the borrower's decision, not the lawyer's—this means some verbiage in the loan documents will escape close legal attention. Arcane requirements for lender approval to various unlikely matters may just survive, and the lender won't have to be "reasonable." Ordinary obligations to preserve the property may not have the benefit of complicated exceptions and limitations that lawyers could have created. If the borrower goes into default, the documents will give the lender the ability to take various unpleasant actions, which would have, for the most part, also been true even if the borrower had tried to negotiate those unpleasant actions.

In short, the loan documents won't be as "good" as they could have been if the lawyers had worked harder. But, for three reasons, the borrower might conclude they will be "good" enough.

First, if the borrower makes the required loan payments when due, the lender probably will give the borrower a wide berth and mostly leave him or her alone. And if the borrower doesn't pay the loan, everything will change.

Second, if the borrower takes care to build and maintain a good relationship with the lender, the lender will probably work cooperatively with the borrower as possible issues arise.

Third, lenders usually don't want to have a loan in default, and they don't want the collateral. Once the borrower has the lender's money and the lender just has the loan documents, much of the practical leverage switches to the borrower.

Of course, much will depend on the type of lender involved. Today's "nice" lender may sell the loan to tomorrow's "mean" lender.

It ultimately amounts to a business decision and a judgment call. A borrower may decide it makes sense to save money and time today in exchange for the possible risk of less-favorable loan documents later, particularly if the borrower has some comfort that any problems will probably arise only in secondary or tertiary areas of the loan documents.

Joshua Stein is the sole principal of Joshua Stein PLLC. The views expressed here are his own. He can be reached at joshua@joshuastein.com.

From the Career Files: A Dozen Suggestions for New Lawyers

Ed. note: This is the fourth installment in a new series of posts from the ATL Career Center's team of expert contributors. Today, we have some great advice for newly minted attorneys from Joshua Stein, the principal of Joshua Stein PLLC, a prominent commercial real estate law practice in Manhattan.

It's your first year as a new lawyer. What do you need to know? How can you not screw it up? Here are some suggestions, based on more than 30 years of experience — as an associate at two firms, then a brief time as an associate at a third firm, followed by 20+ years as a partner at that third firm. These suggestions reflect my own experiences, lessons learned along the way, and what I've seen and heard from others. Nothing here applies specifically or uniquely to any firm where I worked.

It's a Business. As much as we might all want law firms to be kind and gentle, remember that client demands are not kind and gentle. Also remember that a firm's profitability — the ultimate main event — depends on buying a lot of legal expertise wholesale, converting it into as many hours of billable legal work as possible, then selling those hours at retail. That isn't going to go away. Get used to it. That's the business you're in. If you don't want to be in it, go find some other business to be in.

Work Hard. Yes, of course you expect to be told to work hard. But you should work hard strategically. Be available for that horrible assignment from the assigning partner on a Friday night. It's not great for your family life, but you won't have to do it every Friday night, and it comes with the territory. Make sure people know you "stepped up" and know, subtly, how hard you are working. People notice. People remember. It doesn't hurt to send emails in the middle of the night.

But Don't Work Too Hard. On the other hand, there is always more work you can do. You can always have more assignments piled on your plate. If you let yourself get truly overworked, you invite mistakes, missed deadlines, dropped balls, and other problems. People will remember those screw-ups much more than all the hours you worked. So once you have bitten off a good amount of work, try not to bite off more — even though it's always available, absent a financial crisis. Then focus on doing a really great job, on time, on the assignments you've undertaken.

Understand What They Want. When you get an assignment, pay attention from the very beginning. Bring a notepad and take notes. Understand what your supervisor wants you to do, and how your supervisor wants you to present that work product. You don't want to find that you've wasted a lot of time producing something that's not what they want. You look bad that way, and you cause time crunches, emergencies, and billing write-offs. If you aren't sure what your supervisor wants, ask them. But try to collect all your questions at once rather than bombard your supervisor with a series of emails.

MBA of NY to Host Dinner Presentation on NYC Skyscrapers

September 27, 2012


Joshua Stein

The **Mortgage Bankers Association of New York** (MBANY) will host "**An Evening with the Tallest of the Tall: NYC's Skyscrapers**," a dinner presentation on the history of many of Manhattan's most prominent office buildings.

The event at Club 101 (101 Park Avenue at 41st Street) is set for Monday, October 15. It will start with registration at 5:45 p.m., followed by a networking session with drinks and hors d'oeuvres at 6 p.m. The dinner presentation begins at 6:30 p.m. through 8:30 p.m., with a dessert break from 7:30 p.m. to 7:45 p.m.

The evening's moderator will be commercial real estate attorney **Joshua Stein**, principal of **Joshua Stein PLLC** and Chair of MBANY's Education Committee.

MBANY's special guest speaker is **Stacy L. Wallach**, who will present the story of Manhattan's skyscrapers, sharing his collection of hundreds of images and many little-known back stories about the people, individual buildings, and engineering accomplishments of the skyscrapers that form the Manhattan skyline.

A well-regarded New York historical authority, Mr. Wallach has held senior positions with Edward S. Gordon Company, Insignia/ESG, Cushman & Wakefield and CBRE. His presentation will focus on the development of tall buildings in Manhattan from 1846 to the present.

An adjunct professor at Pace University Law School and lecturer in American history at Berkshire Community College, Wallach was a business trial lawyer with Tenzer, Greenblatt, Fallon & Kaplan for 20 years before he became a senior real estate executive for an additional 20 years.

The registration fee for this special event will be $95 for MBA/NY members and $115 for non-members. Early registration is recommended online at www.mbany.org or by calling 516-997-3707.

From the Career Files: A Dozen Suggestions for New Lawyers

Your Own Clients. Ultimately, with only the most occasional exceptions, your only security as you advance in your career will consist of having your own clients. When you start out, you don't face that pressure. You won't generate your own clients anyway. But you can start to build the foundations and sow the seeds so that you will later develop clients when you need to do that. Get to know and get friendly with the people you work with on your client's team. Build relationships with your own legal colleagues, many of whom will go off to become clients before long. Attend industry events and meet people. Develop your network before you need your network. Stay in touch with the people you meet. Treat your contacts as gold and never lose control of your contacts list. And maintain those relationships, both the close ones and the ones that aren't so close. It's often the latter relationships that lead to introductions, opportunities, and new clients.

Escape from Email. You're in an office. You can still walk down the hall and talk to someone. Do it. This will enhance the quality of your interactions, help you learn more, and build relationships that will ultimately help you. You might even have a conversation with someone and learn something that wasn't exactly what you expected.

Legal Research. Lawyers are supposed to know law and know how to find answers to legal questions. Those skills atrophy in legal practice, replaced by a general tendency to use online searches to answer every question. Don't let that happen. When legal questions arise, approach them as a lawyer. Get legal answers through legal research. You will learn far more than those answers. It's one of the best ways to develop your knowledge and legal skills.

Evaluation. You are always being evaluated. Behave accordingly. Dress the part. If you are at a firm event, don't drink too much. Don't do silly things generally. Although large classes of junior associates sometimes feel like everyone's in a fraternity, remember you're not. Everything you do or say can and will be used against you.

Headhunters. You will probably hang up on headhunters because you don't want to make a move any time soon, or you feel loyalty to the firm. Instead, try to identify two or three headhunters who you think are professional and knowledgeable about the marketplace. Get to know them, even if you tell them (as you should) that you don't plan to move any time soon. Like any other great networkers, headhunters have a long time horizon. They're happy to be a sounding board, and give you market insights and other advice, often from a very knowledgeable and seasoned perspective. They do all this in the hope that if you ever decide to move you will call them first. If and when that happens, you will have the great benefit of working with someone who already knows you, which will make the process much easier. In the meantime, you'll benefit from the relationship.

Email. Assume that your managing partner will read everything you say in any email message. Maintain a personal email account and use it for any personal email. Recognize that email isn't always the best medium for every conversation, especially one that's complicated or sensitive. Before you press "send" for any email, recheck the list of recipients. If you send someone a "blind" copy, there's a reasonable chance they

From the Career Files: A Dozen Suggestions for New Lawyers

will “reply all” and blow their cover (in Microsoft Outlook and similar email applications). You can easily prevent that. Instead of sending “blind” copies, forward a copy of the email at issue after you send it. That will also make it easier for you to track who got sent what. These comments only scratch the surface of how to mitigate the risks and problems of email.

Something Else. Legal practice, especially as a junior associate, can consume your entire life. But, beyond your practice and your family and friends, try to have one other significant thing going on in your life — involvement in a museum, a hiking group, a nonprofit, a sporting team — something where you will meet other people, develop connections to the larger world, and take a break.

Be Nice. Interact with everyone in a way that builds your personal brand. For that purpose, “everyone” starts with your secretary and the bicycle messenger delivering your dinner. It also includes your colleagues, paralegals and junior associates who might report to you, the partners who assign you work, and opposing counsel. Don’t complain. Don’t have fits. Don’t whine. Eventually, you develop a persona — an image and a perception of who you are — within the firm and even within the larger practice and business world. Your persona consists of the accumulated effect of all the interactions with everyone you’ve ever interacted with. And once you establish your persona, it travels through walls and doesn’t go away. Once the world perceives you as negative or a whiner or “difficult,” it’s very hard to change that. Don’t let it happen in the first place.

crain's new york business.com

September 24, 2012 - EVENTS CALENDAR

"An Evening with the Tallest of the Tall: NYC's Skyscrapers" Dinner moderated by Joshua Stein, principal of Joshua Stein

Monday, Oct 15, 2012
6:00 p.m. - 8:30 p.m.

Date Posted: September 24, 2012
Months Active: 1
Expires: October 17, 2012

Club 101
101 Park Avenue
at 41st Street
New York, NY 10178

Description
Mortgage Banker's Association of New York (MBANY) will host an informative and entertaining dinner presentation on the history of many of Manhattan's most prominent office buildings. The guest speaker will be New York historical authority Stacy L. Wallach, who has held senior positions with Edward S. Gordon Company, Insignia/ESG, Cushman & Wakefield and CBRE. The evening's moderator will be commercial real estate attorney Joshua Stein, principal of Joshua Stein PLLC.

THE REAL DEAL
NEW YORK REAL ESTATE NEWS
September 20, 2012

"An Eve with the Tallest of the Tall: NYC's Skyscrapers" Dinner Presentation

Mortgage Bankers Association of New York (MBANY) will host "An Evening with the Tallest of the Tall: NYC's Skyscrapers" Dinner Presentation featuring moderator Joshua Stein, principal of Joshua Stein PLLC and guest speaker Stacy L. Wallach. Members – $95. Non-members – $115. Club 101, 101 Park Avenue at 41st Street. Monday, October 15, 2012. Drinks & Hors D'oeuvres at 6 p.m. Dinner at 6:30 p.m. – 8:30 p.m.

Contact: Register online at www.mbany.org or call (516) 997-3707.

THE MORTGAGE OBSERVER

The M.O. Columnists / September 2012 Issue - Page 16

Stein's Law

How New York State Shoots Itself in the Foot on Revolving Mortgage Loans

A multistate developer wanted to set up a credit line secured by mortgages on a few available properties, one in New York City. Knowing from experience that New York State had a mortgage recording tax, the developer resigned itself to paying that tax as the price of using New York property as collateral. The developer reluctantly prepared to write a five-digit check to support New York's various governments.


Joshua Stein

Then the developer started to move toward a closing. Someone saw the word "revolving" in the developer's credit line agreement. The loan documents allowed the developer to borrow on the credit line, repay and then borrow again to meet the developer's cash needs. The developer soon learned that this meant it would, in theory, owe a mortgage recording tax both for the initial closing and borrowing of the loan, and then again every time it repaid and borrowed. The state tax officials take the position that once any mortgage loan has been repaid, even temporarily, any additional borrowing of that loan incurs another tax.

Unfortunately, the developer contemplated using its secured credit line just like any other revolving credit line. The developer would borrow and repay multiple times over the course of a year. If this required the developer to pay a tax every time, then payment of the tax would dwarf all other borrowing costs. The tax amounts to 2.8 percent of each borrowing. The tax would simply make it impossible for the developer to use the credit line.

Given the business deal with the developer's lender, someone suggested that the developer could limit the New York piece of the revolving loan so it falls within a $3 million "safe harbor" in the New York tax law. That's a special provision that says revolving loans below $3 million don't incur multiple taxes with each repayment followed by another borrowing.

If a revolving loan as a whole amounts to $3 million or more, though, then the safe harbor won't apply even if the New York mortgage secures only some smaller piece of the loan. The New York collateral needs to secure the entire loan, which

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THE MORTGAGE OBSERVER

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Stein's Law

How New York State Shoots Itself in the Foot on Revolving Mortgage Loans

must be less than $3 million. Moreover, as a price of qualifying for the safe harbor, the borrower must, in practice, pay off and release the mortgage when the borrower sells the property, losing the opportunity to deliver to the buyer a tax-paid mortgage, for which the buyer may pay a little extra at closing. Other technical restrictions on availability of the safe harbor also made it difficult for the developer to use.

Before long, the developer threw up its hands, and decided not to record a New York mortgage at all. It just cost too much and created too many problems to have New York real property secure a revolving loan. So, instead of writing a five-digit check to pay mortgage recording tax, the developer saved some money. And the New York taxing authorities received zero instead of the check for mortgage recording tax the developer would have reluctantly paid if New York accommodated revolving mortgage loans.

This all happened because New York law and tax officials cling to a hyper-technical interpretation of the mortgage recording tax. They insist that any repayment and additional borrowing of a mortgage loan incurs a new tax. In practice, that means New York real property can't secure revolving loans, because no sane borrower will pay another 2.8 percent tax every time it borrows again. And, as a result, New York effectively turns down whatever mortgage recording tax payments the state could collect if the mortgage recording tax accommodated revolving loans.

As the easiest way to accommodate revolving loans—i.e., to make it practical to use New York real estate to secure them—the state could expand the safe harbor so it applies to all revolving loans. Ideally the state could also cut away some of the technical issues that limit the practical usefulness of the safe harbor. The state could, in effect, say that if a loan is in fact a revolving loan, then it only incurs mortgage recording tax once, not multiple times.

New York State must think that today's interpretations of the mortgage recording tax will somehow allow the state to collect multiple iterations of mortgage recording tax on any revolving loan. In practice, what really happens is New York real property doesn't secure revolving loans, so no one pays any mortgage recording tax at all on them.

If the state fixed its treatment of revolving loans, this would not only raise a bit of money, it would also encourage at least one type of commercial real estate financing that is commonplace outside New York.

What does New York have against revolving mortgage loans?

Joshua Stein is the sole principal of Joshua Stein PLLC. The views expressed here are his own. He can be reached at joshua@joshuastein.com.

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THE LARGEST COMMERCIAL/INVESTMENT NEWSPAPER COVERING THE STATE

August 14-27, 2012 - IN THE NEWS

Names, Faces, People and Places

Joshua Stein PLLC celebrates second year

NEW YORK, NY Joshua Stein PLLC celebrated its second anniversary on August 1st. Since opening about 24 months ago, Joshua Stein PLLC has handled a range of legal matters covering major financing, ground lease, space lease and development work, both in New York and elsewhere.

Joshua Stein

"When I first set up shop as Joshua Stein PLLC, I didn't know what to expect," said Joshua Stein, the sole principal of the firm. "Two years later, I remain pleasantly surprised–actually quite blown away–by the response I've received. The work has been terrific, and I've really appreciated all the support from clients and other attorneys. I love the independence of running my own shop and look forward to more of the same for many years to come."

Already, Stein and his colleagues have overseen the refinancing of an iconic five-star hotel in Manhattan, a lease/sublease development transaction for a FedEx distribution center in an outer borough; multiple office leases; a pioneering development transaction in Brooklyn; closing and administering a multi-property redevelopment loan in Miami; and advising long-term property owners on asset management strategies, including ground leases and other possible dispositions.

REAL ESTATE BISNOW NEW YORK
July 23, 2012

CELEBRATION

Next week, Wednesday in fact, man-about-town **Joshua Stein** celebrates the **second anniversary** of his law firm, which he started after leaving Latham & Watkins in July 2010. Joshua's decorating scheme is **courtesy of his dad**, who paints a picture every three or four months. Since he has two sisters, Josh gets one a year from Dad, a retired University of California Davis math prof. To celebrate two years, he's working on financing a **multi-property redevelopment** in Miami, updating a national REIT's ground-lease criteria, helping a private equity fund with leasing, refinancing some apartment buildings, and negotiating a **publishing agreement**. Joshua tells us he's also got half a dozen pending **expert witness** projects.

THE MORTGAGE OBSERVER

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Stein's Law

Better Luck Next Time

When the refinancing closed, the real estate investor—the principal of the borrower—leaned over to his counsel and asked just two questions. The first related to the interest rate on the loan. The second question, the only other thing the investor really cared about was, "Show me the personal guaranty. And can you promise me I'm not signing on for anything I didn't agree to guarantee?"

It was a bedrock proposition that guaranties wouldn't cover the entire loan, just particular deal-specific risks and a typical list of "standard nonrecourse carveouts."

Recent cases have, however, thrown curve balls to guarantors of "standard nonrecourse carveouts." Courts have found them liable for the entire loan under circumstances that never should have triggered such liability.

First off, start with the principles that drive nonrecourse guaranties. They are supposed to discourage borrowers from doing bad things. But then ask what might happen if a property starts to get into trouble. What are the ordinary consequences of financial distress for commercial real estate? Those aren't "bad

Continued...

THE MORTGAGE OBSERVER

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things" a borrower might do—they are just the consequences of financial distress. They shouldn't trigger liability for the guarantor.

Therefore, parse through events that might trigger personal liability for the entire loan.

If any language in a carveout guaranty could be construed to trigger personal liability under such circumstances, the guarantor and their counsel need to get rid of it. Otherwise, the "carveout guaranty" amounts to an unintended full guaranty of the loan, because that's what it will become at the only time that matters, i.e. when the property gets into trouble and the loan heads toward default.

Guarantors and their counsel also need to focus on two areas that don't always tie to the property's financial performance: intertwined defined terms and obligations that prohibit transfers and require the borrower to remain "separate" or a "single-purpose entity." These concepts have accreted over time, with the result that they now impose on a borrower a list of obligations both great and small. Some trivial violation of one of those obligations shouldn't make a guarantor liable for the entire loan.

For example, the loan documents might require the borrower to remain a "single-purpose entity." The loan documents might also say that a "single-purpose entity" must have a separate telephone number. If the borrower shares a telephone number with a related company, then this might trigger a claim that it's not a "single-purpose entity," thus making the guarantor liable for the entire loan.

A guarantor and their counsel might respond by saying that the guarantor shouldn't face liability because of such

Continued...

issues unless those issues actually result in the problem that they were designed to prevent. Specifically, the guarantor would become liable for the loan only if these issues caused the borrower to become "substantively consolidated" with another entity in a bankruptcy proceeding. Unless that happens, the lender doesn't really suffer any loss. Some sloppiness in this area might marginally increase the lender's risks in a possible future bankruptcy—but that by itself shouldn't trigger personal liability for the entire loan.

A guarantor also should insist on having a chance to repair any problem that might otherwise trigger personal liability. For example, if the lender were concerned about the borrower's shared telephone number, the lender should first give the guarantor a chance to solve the lender's concern.

Guarantors and their counsel might also note that the whole theory of a nonrecourse loan contemplates that a borrower can "walk away" from the collateral and let the lender keep it. But the law generally does not allow a borrower to give the lender the keys unless the lender agrees to accept them. So even if a borrower wants to roll over and let the lender have the collateral and cut off any further potential exposure and issues for the guarantor, they can't.

Tomorrow's guarantors may say that, no matter what, their liability should stop accruing if the borrower offers the lender a deed to the collateral or functionally equivalent control of the collateral. This wouldn't necessarily terminate any guarantor liability that already existed, but it would give borrower and guarantor an easy exit, consistent with the underlying theory of nonrecourse loans. Without it borrowers don't have a right to walk away, which was the whole point.

Joshua Stein is the sole principal of Joshua Stein PLLC. The views expressed here are his own. He can be reached at joshua@joshuastein.com.

THE MORTGAGE OBSERVER
April 2012 - Page 28

STEIN'S LAW

Guaranties Bite

BY JOSHUA STEIN

It's only a nonrecourse carveout guaranty—nothing to worry about, right? Well just don't file bankruptcy, mess around with the collateral or get up to other mischief. It's still a nonrecourse loan.

That was the mantra for thousands of commercial real estate loans that closed in the boom years. And everyone believed it—until recently, when some nonrecourse carveout guaranties started blowing up in the faces of guarantors, in ways that no one ever envisioned.

Opportunitistic loan purchasers have scrutinized the fine print of the nonrecourse carveouts. Using that fine print and interpretations that were never anticipated, the loan purchasers are demanding that "carveout guarantors" pay the entire loan under circumstances that no one ever thought would trigger such liability.

In one Michigan case, *Cherryland Mall*, the loan documents required the guarantor to pay the entire loan out of its personal assets if the borrower didn't remain a "single purpose entity." One of the single purpose entity covenants (covering ground that would typically fall under a different provision of the loan documents) required the borrower to stay "solvent." The collateral value dropped below the loan balance, the loan went into default, and—*bingo!*—the loan holder successfully claimed that the borrower was insolvent, so the guarantor faced liability for the entire loan.

Regardless of how today's litigations turn out, tomorrow's loan negotiators now know about one more problem area on which to focus. And deal sponsors may "just say no" when asked to sign nonrecourse carveout guaranties. The risk of surprises is just too great.

The documents in another Michigan case, *Chesterfield*, produced a similar surprise. Here, the guarantor had to pay the loan if the borrower didn't comply with "separateness covenants." One required the borrower to pay its debts from its own assets. When the borrower stopped paying the loan, the lender claimed the guarantor became personally liable for the entire loan. The court agreed.

These two cases have shocked the commercial real estate lending community, by making a guarantor liable for the whole loan at exactly the point—loan default—where nonrecourse treatment matters most. Any nonrecourse loan fundamentally contemplates that if a property gets into trouble, the borrower can walk away without liability. The borrower and its principals are not supposed to place their "other assets" at risk if the collateral can't support the loan. The borrower has choices very much like dealing with a pawn shop, at a different stratum of the credit market.

The two Michigan cases may represent the beginning of a trend, though, where opportunistic loan purchasers scrutinize a nonrecourse carveout guaranty, and assert claims against guarantors in ways that no one ever expected.

In other cases, innocent or trivial actions by borrowers have been asserted as the basis for triggering claims under nonrecourse carveout guaranties. We can expect to see more of this.

In one case, a limited liability company borrower wasn't supposed to change its business purpose—but someone foolishly and probably innocently amended the organizational papers to broaden the company's permitted activities. This, again, violated the single-purpose entity covenants and—again, *bingo!*—the lender claimed the guarantor had to pay the entire loan.

Mortgage/mezzanine financing structures offer fertile ground for these claims. In one case, the mortgage lender foreclosed. The mezzanine lender said this was a prohibited transfer, triggering the nonrecourse carveout guaranty for the mezzanine loan. The court ultimately didn't buy it, but the guarantor spent many months in litigation to get there.

The converse situation could also produce surprises: a mezzanine lender forecloses, takes control of the mortgage borrower, and throws it into bankruptcy. Next thing you know the mortgage lender can sue the carveout guarantor for the entire loan, because the mortgage borrower filed bankruptcy.

In a pending case, the lender is claiming the guarantor must repay the entire loan because the borrower incurred levels of indebtedness—in this case, ordinary unpaid trade payables—that violated the loan documents, and didn't remove some mechanics' liens.

In all these cases, everyone expected that the ordinary vicissitudes of commercial real estate were part of the lender's risk—not the guarantor's risk—when the parties negotiated their loans. But aggressive loan purchasers have sometimes been able to interpret loan documents in a way that no one would have anticipated, and in fact in a way entirely inconsistent with the underlying theory and deal structure of nonrecourse financing. We are probably not done with surprises in this area.

Regardless of how today's litigations turn out, tomorrow's loan negotiators now know about one more problem area on which to focus. And deal sponsors may "just say no" when asked to sign nonrecourse carveout guaranties. The risk of surprises is just too great.

Joshua Stein is the sole principal of Joshua Stein PLLC. He acted as an expert witness on industry standards and expectations in two of the litigations discussed in this column. The views expressed here are his own. Mr. Stein can be reached at Joshua@joshuastein.com.

Recaps Abound Througho

NEW YORK CITY—If 2011 serves as any indication, much of the equity generated in the industry this year may well come through recapitalizations. Last year saw a blizzard of recaps—from the SL Green Realty Corp.'s $425.7-million recap of 180 Maiden Ln. with developer the Moinan Group, to Keystone Property Group's $23.8 million recap of Sentry Park West in Blue Bell, PA.

CBRE's Darcy Stacom says that "last year more than 50% of the volume was recaps." She adds that she anticipates that 2012 could bring much of the same. "Before when we brought out a couple of the recapitalizations in a brokered format, people were pretty surprised," she says. "Up and until then, recapitalizations had occurred when a partner would say to an operator, 'I want to be bought out'. The operator would then go run the auction to

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Restructure Ownership Without a Foreclosure

You have a great development, a great developer, but too much debt—a relic of boom times—with no hope of finishing the job and having it make economic sense.

Not long ago, this combination would have pointed straight toward foreclosure, litigation and a multi-year disaster. More recently, struggling developers, cash-rich investors and realistic lenders have worked out a better solution.

By Joshua Stein

The investor, perhaps with a new lender, buys into the deal at a price that makes sense today. Most of that new money goes to pay off the undersecured original lender at a discount. The rest goes to critical vendors and restarting the project. The developer stays in, with a monthly development fee for their expertise, attention and name recognition value.

If the project succeeds, the new investor gets their money back with a return. Once the return exceeds a certain level, the original developer starts to see some upside. And if the project becomes a huge success, the original developer could see a substantial upside.

When these transactions work, everyone wins, at least as against the alternative. Many moving parts must come together, though. And it won't necessarily happen with the perfection and certainty that major commercial real estate transactions often require.

The developer must negotiate with the new investor and the lender at once, showing enough cards but not too many. If the developer controls some unencumbered piece of the project—e.g., the parking garage in a mixed-use development—it can make a huge difference.

These transactions often involve time constraints, because other solutions have failed and the lender has announced an ultimatum. The investor may need to reach an agreement with the lender before the developer, or vice versa. Even with all the time in the world, the investor probably couldn't fully understand all the mysteries of the project, given its state of suspended animation, perhaps even chaos.

The investor must ask about the developer's "old investors," if any, in the original deal. Do they get a piece of the "new deal"? If they don't—but should have—this could become the "new" investor's problem. The investor can't leave it to the developer.

The developer will need to accept a "back seat" in the restructured project, but will want to know it still plays some type of role and that if the project succeeds, the developer will in fact see some upside.

The developer shouldn't have tax problems, either, but the resolution of the developer's loan can produce income, which must match up with the developer's loss. The tax details can become both crucial and tricky.

In contrast to the developer, if the lender takes a loss, the lender might not want the developer to have any future upside, unless the lender gets some too. The developer might intuitively try to solve that problem by hiding the ball, but that usually turns out badly.

If all parties approach the situation realistically and practically—without too much emotion—and work together, they might solve the puzzle and put together a restructuring that works for everyone.

Joshua Stein is sole principal of Joshua Stein PLLC, a New York City-based law practice. He may be contacted at joshua@joshuastein.com. The views expressed here are the author's own.

Vital Signs. . .New York City's 2012 job growth could be 43% smaller than projected just three months earlier.—*Independent Budget Office*

Financial Digest

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THE LARGEST COMMERCIAL/INVESTMENT NEWSPAPER COVERING THE STATE

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Stein of Joshua Stein PLLC moderates MBA luncheon

Shown (from left) are: Kramer, Tahl, Stein, Justin and Franco.

NEW YORK, NY "The ball is in your court," was the prevailing message from four of New York's most active developers to a roomful of lenders and brokers at the Mortgage Bankers Association of New York's "Meet the Developers" luncheon. Moderated by attorney Joshua Stein of Joshua Stein PLLC, the panel included: David Kramer of the Hudson Companies. Inc; Joseph Tahl of Tahl Propp Equities; Henry Justin of HJ Development; and Robert Franco of the Albanese Organization.

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STEIN'S LAW

Guaranties Bite

BY JOSHUA STEIN

It's only a nonrecourse carveout guaranty—nothing to worry about, right? Well just don't file bankruptcy, mess around with the collateral or get up to other mischief. It's still a nonrecourse loan.

That was the mantra for thousands of commercial real estate loans that closed in the boom years. And everyone believed it—until recently, when some nonrecourse carveout guaranties started blowing up in the faces of guarantors, in ways that no one ever envisioned.

Opportunitistic loan purchasers have scrutinized the fine print of the nonrecourse carveouts. Using that fine print and interpretations that were never anticipated, the loan purchasers are demanding that "carveout guarantors" pay the entire loan under circumstances that no one ever thought would trigger such liability.

In one Michigan case, *Cherryland Mall*, the loan documents required the guarantor to pay the entire loan out of its personal assets if the borrower didn't remain a "single purpose entity." One of the single purpose entity covenants (covering ground that would typically fall under a different provision of the loan documents) required the borrower to stay "solvent." The collateral value dropped below the loan balance, the loan went into default, and—*bingo!*—the loan holder successfully claimed that the borrower was insolvent, so the guarantor faced liability for the entire loan.

The documents in another Michigan case, *Chesterfield*, produced a similar surprise. Here, the guarantor had to pay the loan if the borrower didn't comply with "separateness covenants." One required the borrower to pay its debts from its own assets. When the borrower stopped paying the loan, the lender claimed the guarantor became personally liable for the entire loan. The court agreed.

These two cases have shocked the commercial real estate lending community, by making a guarantor liable for the whole loan at exactly the point—loan default—where nonrecourse treatment matters most. Any nonrecourse loan fundamentally contemplates that if a property gets into trouble, the borrower can walk away without liability. The borrower and its principals are not supposed to place their "other assets" at risk if the collateral can't support the loan. The borrower has choices very much like dealing with a pawn shop, at a different stratum of the credit market.

The two Michigan cases may represent the beginning of a trend, though, where opportunistic loan purchasers scrutinize a nonrecourse carveout guaranty, and assert claims against guarantors in ways that no one ever expected.

Regardless of how today's litigations turn out, tomorrow's loan negotiators now know about one more problem area on which to focus. And deal sponsors may "just say no" when asked to sign nonrecourse carveout guaranties. The risk of surprises is just too great.

In other cases, innocent or trivial actions by borrowers have been asserted as the basis for triggering claims under nonrecourse carveout guaranties. We can expect to see more of this.

In one case, a limited liability company borrower wasn't supposed to change its business purpose—but someone foolishly and probably innocently amended the organizational papers to broaden the company's permitted activities. This, again, violated the single-purpose entity covenants and—again, *bingo!*—the lender claimed the guarantor had to pay the entire loan.

Mortgage/mezzanine financing structures offer fertile ground for these claims. In one case, the mortgage lender foreclosed. The mezzanine lender said this was a prohibited transfer, triggering the nonrecourse carveout guaranty for the mezzanine loan. The court ultimately didn't buy it, but the guarantor spent many months in litigation to get there.

The converse situation could also produce surprises: a mezzanine lender forecloses, takes control of the mortgage borrower, and throws it into bankruptcy. Next thing you know the mortgage lender can sue the carveout guarantor for the entire loan, because the mortgage borrower filed bankruptcy.

In a pending case, the lender is claiming the guarantor must repay the entire loan because the borrower incurred levels of indebtedness—in this case, ordinary unpaid trade payables—that violated the loan documents, and didn't remove some mechanics' liens.

In all these cases, everyone expected that the ordinary vicissitudes of commercial real estate were part of the lender's risk—not the guarantor's risk—when the parties negotiated their loans. But aggressive loan purchasers have sometimes been able to interpret loan documents in a way that no one would have anticipated, and in fact in a way entirely inconsistent with the underlying theory and deal structure of nonrecourse financing. We are probably not done with surprises in this area.

Regardless of how today's litigations turn out, tomorrow's loan negotiators now know about one more problem area on which to focus. And deal sponsors may "just say no" when asked to sign nonrecourse carveout guaranties. The risk of surprises is just too great.

Joshua Stein is the sole principal of Joshua Stein PLLC. He acted as an expert witness on industry standards and expectations in two of the litigations discussed in this column. The views expressed here are his own. Mr. Stein can be reached at Joshua@joshuastein.com.

REAL ESTATE WEEKLY

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Industry experts: It wasn't supposed to be this way

Two leading commercial real estate attorneys will offer suggestions on dealing with troubled loans during a webinar sponsored by the American College of Real Estate Lawyers and the national Mortgage Bankers Association.

The webinar, entitled "It Wasn't Supposed to Turn Out This Way," will feature Joshua Stein and Richard Fries. Stein is the sole principal of Joshua Stein PLLC. Fries co-chairs the real estate group at Bingham McCutchen LLP.

JOSHUA STEIN

The two speakers will discuss deal structures they see in the marketplace, lender and borrower concerns, as well as pre-workout agreements, lender liability, receiverships, loan enforcement, and restructuring models.

The webinar will air on www.mbaa.org, on Thursday, May 17, 2012 from 2:00 to 3:30 p.m., New York time.

"Dealing with loan workouts is more interesting than originating the loan," said Stein. "The origination process is relatively straightforward. You get information, understand the asset, prepare or review documents, negotiate, and sign. Everyone's happy.

"When the loan gets into trouble, it's a whole different mindset, with a much more complicated situation because of the history of the loan."

Added Fries, "To restructure a loan, you have to understand what happens if you don't restructure it, and you also have to understand the dynamics, the people, and the leverage involved.

"It's a fascinating area, and we have excellent strategies and techniques that help the parties implement a successful and lasting workout."

Stein is a leading speaker and writer on commercial real estate law, including commercial real estate financing. He represents both borrowers and lenders. In his fifth book "A Guide to Troubled Commercial Real Estate Loans for Lenders and Borrowers," he offers a summary of how to deal with troubled commercial real estate loans.

Fries handles origination, litigation, and restructuring of loans, primarily for lenders, for properties located throughout the country. He was the primary author of New York's non-judicial foreclosure law.

For more information on the webinar, visit www.mbaa.org.