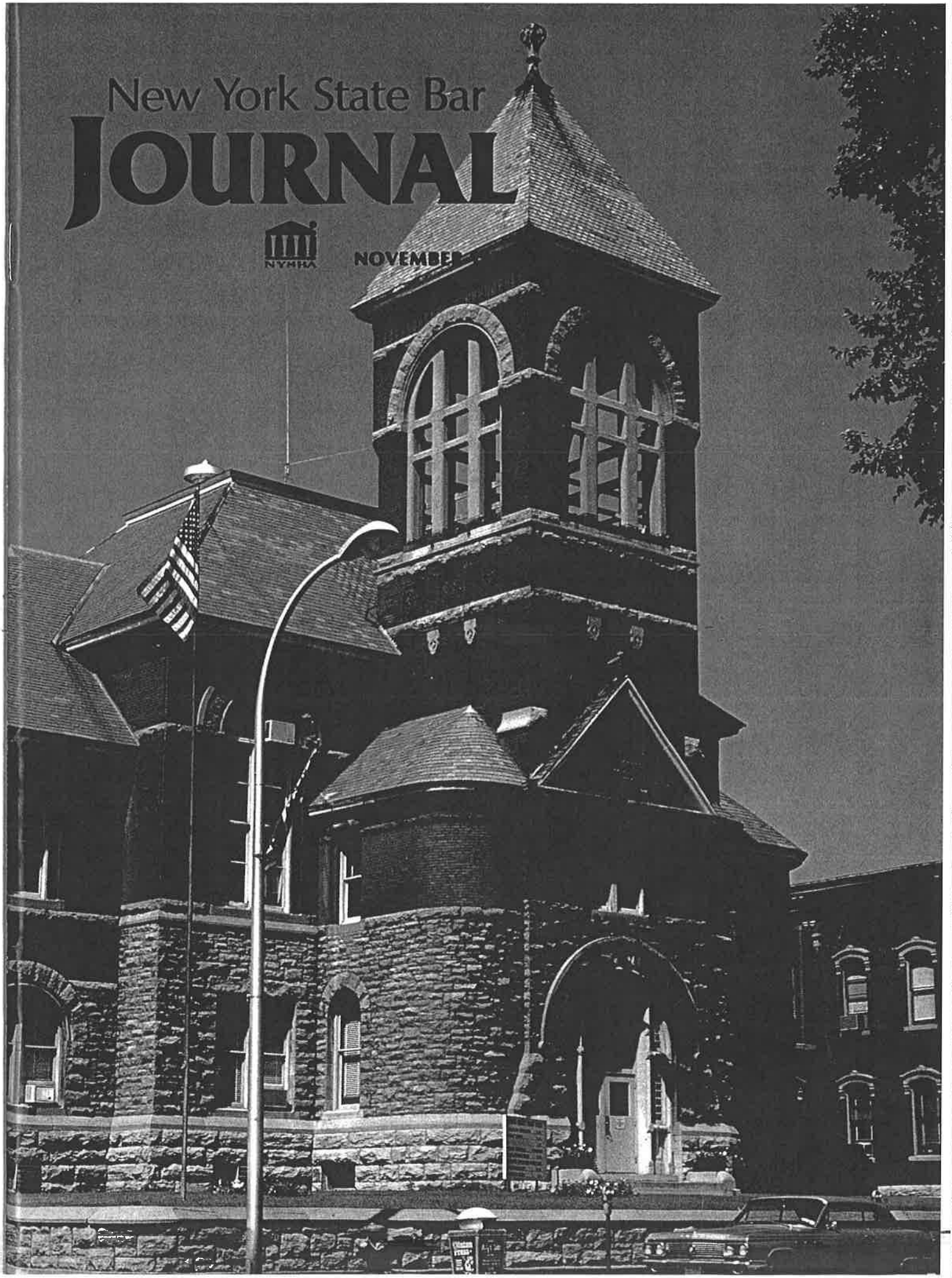
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Real Estate Binders Revisited - Still A Trap for the Unwary

Introduction

It happens every day. A prospective purchaser approaches a broker expressing interest in a certain type of property. The broker shows the prospect a listed parcel. The buyer indicates a desire to purchase, so the broker suggests that a binder be signed, sometimes with the explanation that this is the best way to demonstrate sincere interest and "lock in" buyer's position.[1]

With that signature in hand, the broker duly advises the seller of the interest shown and asks for *his* signature on the binder to "hold" the purchaser. Now the document is mutually signed. For any number of common and obvious reasons, either buyer or owner may decide that the transaction is inappropriate or undesirable.

Given these circumstances, can the parties withdraw from the sale? A second vital query is, has the broker earned a commission as a result of the cited events?

The respective answers are "who knows", but sometimes "no" and "who knows", but sometimes "yes". Such a response appears disconcerting because it suggests that a binder - which most people assume is not really a contract - *is* a contract (or a memorandum of a contract) and may not allow the parties out. It is also upsetting to the person who engaged the broker (usually the seller) because a commission may indeed be due, even absent a written commission agreement or a "formal" contract for sale.[2]

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[1] Binders can, of course, result even when no broker is involved but today are probably most often signed at the behest of a broker or salesperson.

[2] The general rule is that a broker is entitled to a commission when he produces a buyer ready, willing and able to purchase according to seller's terms, unless the parties have made some agreement to the contrary. See *Delgrosso* v. *Soleiman*, 100 A.D. 2d 925, 474 N.Y.S. 2d 810 (2nd Dept. 1984); *Lane-Real Estate Dept. Store v. Lawlet Corp.*, 28 N.Y. 2d 36, 319 N.Y.S. 2d 836 (1971); *Hecht* v. *Meller*, 23 N.Y. 2d 301, 296 N.Y.S. 2d 561 (1968); *Sibbald* v. *Bethlehem Iron Co.*, 83 N.Y. 378 (1881); *Wagner* v. *Derecktor*, 306 N.Y. 386 (1954).

Remember, the foregoing facts assume the usual pattern whereby neither buyer nor owner has had the advice of counsel. So here we have the parties engaged in perceived informalities, without a lawyer, possibly obliging consummation of the largest financial transaction of their lives, with one of them liable for a broker's commission for the privilege! Such are but a few of the problems attendent to those odious documents called binders.

Not surprisingly, the difficulties go further. If the binder is not intended to actually "bind", is not the public being misled in the first instance by the very title of the document? And, if a binder does indeed bind, isn't it in actuality a short form contract? The readily apparent affirmative response to both questions underscores the unfortunate character of these papers.

Still further, assuming the binder is so drawn that it *is* a valid contract, two parties are now bound to an agreement which fails to cover a myriad number of exigent concepts that real estate lawyers would include in the usual more formal contract.

In the November 1979 issue of the *New York State Bar Journal*, this writer published an article entitled "Those Dangerous! Real Estate Binders - Lawyer Beware". While there was no expectation that the piece would change the prevalent custom involving binders, it was hoped that some salutary effect might result. To the extent that attorneys have become more cognizant of the pitfalls of binders, the article served a useful purpose. Since, however, most binders are signed before a party even has the opportunity to consult with counsel, the troubles with binders continue apace. A still more detailed review of cases on the subject should aid attorneys in assessing a client's position once a binder has been signed and presented to counsel as the usual *fait accompli*.

A Boon to Brokers

The problems with binders cannot be emphasized too strongly. If they do not "bind", other than possible moral suasion, they serve no purpose. If they *do* bind, some party is obligated to either buy or sell according to terms which undoubtedly do not provide complete protection for their position.

This presents the threshold issue of the broker's role. Even if the prospective buyer and seller want nothing to do with a signed binder, one party who nevertheless stands to benefit is the *broker*. Recall the general rule that a broker earns a commission when a buyer ready, willing and able is produced.[3]

A signed binder can be persuasive evidence that the broker has discharged his responsibility and earned his commission. Indeed, it has happened just that way. In *M.I. Bernett* v. *Bossert*, 283 App. Div. 952, 130 N.Y.S. 2d 423 (2nd Dept. 1954), a binder was signed with its terms found to be complete and unambiguous. Neither buyer nor seller chose to proceed and no action was started between them. However, the broker sued for the commission and *won*. The Appellate Division found that even though the sale was not consummated, the broker could not be deprived of the commission.[4]

Another court reached the same conclusion where the binder was found to contain all the essential elements of a contract. [*Stavile* v. *Lynch*, 179 (92) NYLJ (5-12-70) 14, Col. 2B, Civil Queens, Posner,J.]. But, in awarding the brokerage commission, the court noted that most sellers do not believe they are entering into a binding and enforceable contract when executing a binder, suggesting that the Secretary of State or the legislature take some corrective action to protect the unwary and avoid unintended results.[5]

The point is well taken. The underlying concept as to when a broker earns a commission has a legitimate basis and there is no urging here that brokers be denied just compensation for their efforts. However, the layman who signs a binder, believing it to be less than a contract, is not in a position to know that he may become a liable for a commission even if no actual transaction results. Clearly, this is a major fault with binders.

The Basic Problem and the Role of the Statute of Frauds

Once a binder is signed, and if one party wishes not to be bound, the respective attorneys on opposite sides will be faced with two questions on the same issue. The party seeking not to proceed will ask whether the document is insufficient to be an enforceable agreement. The person desiring to enforce poses the converse; whether the document is appropriately explicit and complete so as to be enforceable.

Whether the paper is or is not legally sufficient is, perhaps surprisingly, a singularly elusive concept. (Not incidentally, the uncertainty of all this is one of the objections to binders. It is often very hard for counsel to review the paper and readily determine if he is reading a contract as that term is generally understood.)

A basic conundrum is that it doesn't take much to generate a writing that binds. Even if ultimately shown not to bind, vexatious litigation can easily result.

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[3] See cases cited at note 2, *supra*.

[4] Citing: *Colvin* v. *Post Mortgage & Land Co.*, 225 N.Y. 510, 514-516, 122 N.E. 454, 455 (1919); *Tannenbaum* v. *Boehm*, 202 N.Y. 293, 299-300, 95 N.E. 708, 710 (1911); *Mengel* v. *Lawrence*, 276 App. Div. 180, 183, 93 N.Y.S. 2d 443, 446 (1st Dept. 1949); *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 39 N.E. 75, 29 L.R.A. 431 (1984).

[5] There is a saving grace here for the party against whom the commission is sought. Obviously, if the binder itself is incomplete, a commission has not been earned. As stated in *Kaelin* v. *Warner*, 27 N.Y. 2d 352, 355, 318 N.Y.S. 2d 294, 295 (1971), mere agreement as to price on a proposed sale of property does not constitute a meeting of the minds. The parties must have in actuality agreed to all the essential terms.

Moreover, the absence of clarity which many assume would void the binder does *not* have that effect. (To be discussed, *infra.*)

Thus, to the extent parties wish to litigate - and they do often enough - the difficulties with binders are much removed from the niceties of theoretical discussions of contract law.

There is, in any event, a starting point on this issue. That is the Statute of Frauds (General Obligations Law §5-703, subd. 2) which states in relevant part:

> "A contract . . . for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged . . ."

This is certainly straight forward enough, but serves only to beg the question. How the statute is interpreted by case law raises perhaps more questions than it answers.

The General Principles

Stating general principles is not difficult. Applying them to actual fact patterns is a burden. Having noted the Statute of Frauds as a point of beginning, reference to the case law is essential. In turn, an appropriate place for initial inquiry is the view courts have taken of the basics - realizing always that these serve only as a preamble to disposition based upon the specific fact patterns in each case.

A primary concept is this. Where all the essential terms and conditions of the agreement have been set forth in the memorandum and all that remains is their translation into a more formal document, specific performance is mandated. Such is the most basic idea as stated in *Brause* v. *Goldman*, 10 A.D. 2d 328 (1st Dept. 1960).[6]

The reverse idea, cited by the Court of Appeals in *Willmott* v. *Giarraputo*, 5 N.Y. 2d 250 (1959) was that:

> "Few principles are better settled in the law of contract than the proposition that, 'If a material element of a contemplated contract is left for future negotiations, there is no contract enforcible under the Statute of Frauds or otherwise.' "[7]

We know then that a *material* element cannot be left open. What then is defined as a material element becomes critical.

But the point has been expanded somewhat elsewhere. In *Vallone* v. *Regan*, 144 N.Y.S. 2d 324 (1955), it was stated this way:

> "The rule relating to the sale of real property is well established. The contract must be in writing and must contain all of the essential elements to take the contract out of the Statute of Frauds. These essentials must appear from the memorandum itself or from a reference therein without recourse to parole evidence. Ansorge v. Kane, 244 N.Y. 395, 155 N.E. 683. Whenever a material element of a proposed contract is the subject for further negotiations, there is no contract enforceable under the Statute of Frauds. The Courts have consistently held that the memorandum must manifest the intent of the parties in such a manner that it is definite and certain even though the parties themselves may have fully understood all of the terms. This does not relieve one from the responsibility of complying with the Statute which requires contracts for the sale of land to be in writing and in the interests of public policy, to state all of the material terms and thereby eliminate the necessity of proof as to what the parties intended."[8]

Thus, the agreement must manifest the intent of the parties in a definite way. That helps, but is still not dispositive of anything.

Let us then refer to *Read* v. *Henzel*. 67 A.D. 2d 186, 415 N.Y.S. 2d 520 (4th Dept. 1979), which is still more prolix on the point:

> "The applicable rules are quickly stated. Section 5-703(2) of the General Obligations Law requires contracts concerning real property to be in writing but a contract for the sale of property will not be void if evidenced by a sufficient written note or memorandum subscribed by the party to be charged. The purpose, of course, is to remove uncertaintly and prevent imposition through the assertion of unfounded and fraudulent claims. The writing is not itself the agreement, but only evidence of it. If the memorandum is to prove the agreement, it must designate the parties, identify and describe the subject matter and state all the essential and material terms of the agreement (*Villano* v. *G & C Homes*, 46 A.D. 2d 907, 362 N.Y.S. 2d 198; cf. *Birnhak* v. *Vaccaro*, 47 A.D. 2d 915, 916, 367 N.Y.S. 2d 792, 795). If it does so, the fact that it provides for the subsequent execution of a more formal writing which is not done, will not impair its effectiveness. (*Lashway* v. *Sorell*, 51 A.D. 2d 97, 98, 380 N.Y.S. 2d 334, 336). If the memorandum does not indicate an intent to later fix and formalize missing terms, the courts will imply them if they can, or reject incomplete terms as surplusage . . ."

This is helpful in part, providing that the writing may only be *evidence* of the agreement. It also gives us some standards, albeit somewhat obvious, that the document must designate the parties, identify the subject matter and set forth the material terms. Still, definition of material terms remains transient. In addition, we have a new element. Even if a more formal writing is to eventuate, if the memorandum does not suggest existence of missing terms, we may still have something that binds!

So, this progression of oft-cited general principles, while supplying helpful guidelines, merely exposes the topic as fertile ground for confusion. Again, that is the problem.

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[6] See also: *Sanders* v. *Pottlizer Bros. Fruit Co.*, 144 N.Y. 209, 39 N.E. 75 (1894); *No. 2 & 4 Roman Avenue* v. *Goddard*, 220 App. Div. 138, affd 206 N.Y. 726 (2nd Dept., 1927); *Sherry* v. *Proal*, 131 App. Div. 774, App. Div. 928 aff'd 206 N.Y. 726; *People* v. *St. Nicholas Bank*, 3 App. Div. 544, aff'd 151 N.Y. 592 (1st Dept. 1896); aff'd 151 N.Y. 593; *Corn* v. *Bergman*, 138 App. Div. 260 (1st Dept. 1910).

[7] Citing: *Ansorge* v. *Kane*, 244 N.Y. 395 (1927); *Keystone Hardware Corp.* v. *Tague*, 246 N.Y. 79 (1927); *Pollak* v. *Dapper*, 245 N.Y. 628, aff'd 219 App. Div. 455 (1927).

[8] Citing: *Johnson* v. *Edmunds*, 278 App. Div. 470, 106 N.Y.S. 2d 276 (1950); *Cooley* v. *Lobdell*, 153 N.Y. 596, 47 N.E. 783 (4th Dept. 1897); *Coe* v. *Tough*, 116 N.Y. 273, 2 N.E. 550 (1889); *Barber* v. *Stewart*, 275 App. Div. 429, 90 N.Y.S. 2d 607 (3rd Dept. 1949).

How Vexatious It Can Become

If we have the Statute of Frauds, together with judicial pronouncements of applicable general principles, is there really much room for untoward results? The suggested answer is yes, and a few examples will serve to make the point.

In *Bounding Home Corporation* v. *Chapin Home For Aged and Infirm*, 191 N.Y.S. 2d 722 (1959), there was a question of whether the Home's board of trustees authorized a sale. The court believed a trial was necessary on the point. How it even got to that point was more alarming. A Mr. Kemp wrote a letter on December 16. Mr. Wigg replied on December 19. Taken together, these informal letters were found to be a memorandum sufficient under the Statute of Frauds. That the letters provided for execution of a more formal writing did not take it outside the Statute.

It is extremely doubtful that one of the letter writers believed such an informal approach, particularly with the caveat that a more formal writing was to follow, would bind. But the court found enough to schedule a trial on the question!

The facts in *Dickson* v. *Mitchell*, 87 A.D. 2d 697, 448 N.Y.S. 2d 861 (3rd Dept. 1982) are similarly disconcerting. Defendants Mitchell owned property which they listed for sale with a broker. Plaintiffs were shown the property and made a verbal offer through the broker. The broker then sent a binder to the Mitchells purporting to recite the terms of sale according to a phone conversation between broker and the Mitchells of the previous day.

The Mitchells signed and returned a copy of the paper to the broker. There was no place on the binder for signature of the prospective purchasers. Moreover, the binder provided that "contract of sale is to be sent to the prospective purchasers so that it can be given to their attorneys."

Counsel for the Mitchells ultimately prepared a contract and delivered it to the prospective purchasers, at which point the Mitchells declined to proceed. The prospective purchasers sued for specific performance. Although they lost, some of the principles of the case bode ill for those who consider binders to be mere informalities.

The court found that since the binder was not signed by the purchasers, and therefore could not be enforced against them, it was not itself a contract. But, under the Statute of Frauds, it could be a note or memorandum of the agreement sufficient to prove the existence of an agreement. Here, the binder *was* found sufficient as a memorandum since it contained the essential terms.[9] The owners were saved from specific performance only because no underlying oral agreement could be proven.

But the dangerous precedent is there. If there is an oral agreement (even if considered informal) and a binder (even if not signed by the purchaser) and a condition that a contract is later to follow, if the binder contains the "essential" terms, these informal dealings can be enough to underwrite specific performance!

Somewhat similar are the facts in *Latona* v. *Shore*, 144 N.Y.S. 2d 272 (1955). In that case, plaintiff was a purported vendee suing defendent as vendor on a supposed agreement to sell real property. To meet the burden of producing a writing, plaintiff submitted a handwritten letter to him signed by defendant detailing the property offered for sale and, as the court recited it, "what defendant would accept for it."

Even the court concluded from the tenor of the letter that defendant did not envision plaintiff as a purchaser, but as an intermediary for unnamed others. In analyzing the letter the court said it contained language which

> "could be interpreted as an offer to sell the property to anyone for $9,000 'all cash' or for $13,000 or $15,000 under alternative mortgage plans therein specified."

Although in addition to the letter there was an undated receipt for $100 towards the purchase and a cancelled check, a later letter is equivocally interpreted by the court as containing

> ". . . statements which give recognition to the plaintiff as being himself the buyer of the property and it discusses how he might meet the situation of existing leases."

Defendant's motion to dismiss the complaint on the ground that the "agreement" was unenforceable under the Statute of Frauds was *denied*. The Court found these particularly irresolute writings to nevertheless contain the essentials to satisfy the statute, i.e., parties, property and price. It conceded that the note or memorandum may not have been the whole agreement of the parties. Parol evidence would be admissible to demonstrate that the terms were truly incomplete.

Again, it is most doubtful that the vendor ever expected his casual and vague letter writing would bring him as far as a trial before he could even hope to avoid specific performance. But such is what the case suggests. The irksome point is that while the binder (or similar documents) may not actually be the contract supporting a suit, it may be that note or memorandum of the agreement.[10] If enough is found to construe it as such, a trial will usually be necessary for a resolution.

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[9] Also for the proposition that failure of a purchaser to sign a memorandum is not necessarily fatal to its enforcement, see *Epstein* v. *Gluckin*, 233 N.Y. 490, 135 N.E. 861 (1922). Nor will the signature of the agent for an undisclosed purchaser affect the enforceability of a binder. *Saitta* v. *Cooney*, 94 N.Y.S. 2d 289 (1949).

[10] On the point of a binder as note or memorandum, see *Dickson* v. *Michell*, *supra*; *Birnhak* v. *Vaccaro*, 47 A.D. 2d 915, 367 N.Y.S. 2d 792 (2nd Dept. 1975); *N.E.D. Holding Co.* v. *McKinley*, 246 N.Y. 40 (1927).

Items That Do Not Void the Binder

The prior thoughts argue that binders and like informalities tend to be rather insidious because they often have far greater significance than the uninitiated realize. Even for those who may have a sense of a binder's potential gravity, there is perhaps some prevailing wisdom that sundry vagaries in the document will eviscerate its effect. Frequently, though, cases have reached a contrary conclusion. For example:

—More Formal Contract Contemplated

Since a binder is usually recognized as being informal, it often calls for subsequent signing of a more formal contract. But merely that contemplation alone does *not* vitiate a binder otherwise containing the requisite essentials.[11]

Stated another way, a memorandum of sale is no less a contract because the execution of a more formal instrument was expected.[12] That the parties intended to be more formal in the technical sense is thus irrelevant, so long as the essentials were in the binder.[13]

—No Closing Date

Although a closing date is often crucial to a real estate transaction, its absence from the binder will not condemn it as inadequate. The court will imply that closing was intended at a reasonable time. Sometimes the cases use the word customary, or qualify reasonable as dependent upon the circumstances. However it is expressed, leaving out a closing date is not necessarily fatal to a binder.[14]

—No Metes and Bounds Description

In some instances, a binder will contain only a street address, rather than the metes and bounds description found in the typical formal contract. While a street address alone can be a source of difficulty, its use is sanctioned so long as the identity and location of the property is reasonably ascertainable.[15]

On other occasions, the description in the binder may be more detailed than a street address, but less than a full metes and bounds delineation. This too may suffice. In *Boyajian* v. *Casey*, 52 A.D. 2d 104, 383 N.Y.S. 2d 714 (3rd Dept. 1976), the description read as follows:

> "approx 106 Acres Book 488, Page 527 Recorded Saratoga Co. Clerk's Off. House and Barn. Except camp with Approx. 2½ Acres Seller gives right of way in front of camp on river bank."

Inexact and ambiguous though the portion to be excluded was, because a general location of the camp was found elsewhere in the binder, it *was* given effect. The concept is that the property description need not be as exact and detailed as a description in a deed.[16] It need only be described with such definiteness as will permit it to be identifed with reasonable certainty.[17]

Moreover, if this test is met, parol evidence would then be admissible to enable the court to identify precisely the property to which the contract relates.[18]

—No Signature By Party Seeking Enforcement

If one of two parties to an agreement neglects to sign, we would usually conclude that no agreement results. While it is true that a contract enforceable against the party failing to sign does not exist, nevertheless, the writing or binder can be deemed a note or memorandum sufficient to satisfy the statute of frauds.[19]

—No Interest Rate Prescribed in Mortgage

More often than not, agreements to purchase real property contain either or both a mortgage contingency clause and provision for seller to take back a purchase money mortgage. One might assume that failure to recite the interest rate to be yielded by the mortgage or mortgages would render the binder ineffective. It does not. Rather, the court will presume that the legal rate of interest[20] will apply.[21]

—No Duration of Mortgage

Here too, one would assume that a mortgage provision absent recitation of its duration would fall for indefiniteness. Nevertheless, there is case law stating that the mortgage will be deemed due on demand and

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[11] *Dweck* v. *Altman*, 208 N.Y.S. 2d 294 (1960); *Sanders* v. *Pottlitzer Bros. Fruit Co.*, *supra* at note 6; *Pelletreau* v. *Brennan*, 113 App. Div. 806, 99 N.Y. Supp. 955 (2nd Dept. 1906); *Zlobinsky* v. *Broadlane Realty Corp.*, 129 N.Y.S. 2d 818 (1954).

[12] *McTague* v. *Conroy*, 133 Misc. 312, 232 N.Y. Supp. 171, aff'd 227 App. Div. 745, 236 N.Y. Supp 844 (2nd Dept. 1928); *McLean* v. *Kessler*, 103 Misc. 2d 553, 426 N.Y.S. 2d 704 (1980).

[13] *Karson* v. *Arnow*, 32 Misc. 2d 499, 224 N.Y.S. 2d 891 (1962); *Zirman* v. *Beck*, 225 N.Y.S. 2d 330 (1962); See also *Bounding Home Corporation* v. *Chapin Home For Aged and Infirm*, *supra*; *Pollak* v. *Dapper*, *supra*, at note 7.

[14] *Rohrwasser* v. *Al & Lou Construction Co., Inc.*, 82 A.D. 2d 1008; 442 N.Y.S. 2d 171 (3rd Dept. 1981); *Kursch* v. *Verderame*, 87 A.D. 2d 803, 449 N.Y.S. 2d 500 (1st Dept. 1982); *Birnhak v. Vaccaro*, *supra* at note 10; *N.E.D. Holding Co.* v. *McKinley*, *supra* at note 10; *Schnitzer* v. *Lang*, 239 N.Y. 1 (1924); *Door Knob Realty, Inc.* v. *Northrop*, 86 Misc. 2d 675, 383 N.Y.S. 2d 484 (1976).

[15] *Morrison* v. *Brenmohl*, 137 App. Div. 4, 122 N.Y. Supp. 81 (2nd Dept. 1940); *Lukawski* v. *Devlin*, 214 App. Div. 734, 210 N.Y. Supp. 880 (2nd Dept. 1925); aff'd 243 N.Y. 583, 154 N.E. 614; *MacLaeon* v. *Lipchitz*, 56 N.Y.S. 2d 609 (1945); aff'd 269 App. Div. 953, 58 N.Y.S. 2d 337; *Dweck* v. *Altman*, *supra*, at note 10; *Birnhak* v. *Vaccaro*, *supra* at note 10.

[16] *Vandenburgh* v. *Madarash*, 283 App. Div. 537, 128 N.Y.S. 2d 895 (3rd Dept. 1954).

[17] *Barber* v. *Stewart*, 275 App. Div. *429, 90 N.Y.S. 2d 607 (3rd Dept. 1949)*; *Piazzo* v. *Sutherland*, 53 Misc. 2d 726, 279 N.Y.S. 2d 640 (1967); *Crandall* v. *Smith*, 172 Misc. 92, 15 N.Y.S. 2d 488 (1939).

[18] *Balkum* v. *Marino*, 299 N.Y. 590, 86 N.E. 2d 109 (2nd Dept. 1949); *Malin* v. *Ward*, 21 A.D. 2d 926, 250 N.Y.S. 2d 10009 (3rd Dept. 1964); *Miller* v. *Tuck*, 95 App. Div. 134, 88 N.Y. Supp 495 (2nd Dept. 1904).

[19] *Saitta* v. *Cooney*, *supra* at note 9; *Epstein* v. *Gluckin*, *supra* at note 9.

[20] Currently in New York, 16%, pursuant to Banking Law, § 14a(1).

[21] *Spielvogel* v. *Veit*, 197 App. Div. 804 (2nd Dept. 1921); *Door Knob Realty, Inc.* v. *Northrop*, *supra* at note 14; *Keystone Hardware Corp.* v. *Tague*, 246 N.Y. 79, 158 N.E. 27 (1st Dept. 1927).

therefore not violative of the Statute of Frauds.[22]

Along the same lines, a party resisting enforcement of a binder argued indefiniteness because there was no amortization schedule for the purchase money mortgage. The argument was dismissed by the court. Since the term and interest rate of the mortgage was set forth, the payments were ascertainable simply by consulting a standard table. They can, therefore, be implied so the binder was sufficiently definite.[23]

—Silence on Date Purchase Price to be Paid

Still again, logic dictates that this is an essential point. But the presumption is that final payment will be made upon delivery of the deed.[24] Hence, a binder successfully resists attack on this subject.

When the Binder Fails

In emphasizing the multitude of dangers attendent to binders, to a certain extent, we have erected a straw man. To be sure, documents considered to be informal may indeed become binding. Expensive and disconcerting litigation does result. Brokers may earn commissions when parties never expected to be so responsible.

But in reading the cases, we find that binders are most often held to be ineffectual. That is not to say, therefore, that objections to them are any less persuasive; only that statistics will be on the side of those who prefer the binder to be ineffective.

Ultimately, this should not be especially surprising, for a number of reasons. After all, the binders are almost always prepared by non-lawyers - brokers or the parties themselves - usually without any forethought about compliance with the Statute of Frauds. Indeed, some "binders" are nothing more than an exchange of correspondence.

Perhaps most intriguing, though, is an analysis of how the courts view binders. While the cases don't explicitly say so, one gets the impression that judges are somewhat uncomfortable with these documents. Thus, when parties to informal papers, prepared without the aid of counsel, come to court protesting that they never intended to actually be bound, they are most likely to find the judge a sympathetic arbiter. Again, that does not mean binders cannot be enforced. They can be and are, creating apparently distasteful results. But the numbers are in favor of those who wish not to be bound.

To set guidelines for advocates who must then litigate the binders, which come before the courts with considerable frequency, becomes an exercise in esoterica. The precedents set appear for the most part to be ephemeral and unpredictable. When the courts reject binders, the reasons given demonstrate that virtually every case must stand on the particular facts encountered. Aphorisms are difficult to establish.

Of course, some reasons presented to void the binder are apparently more obvious than others, such as, incomplete payment terms,[25] price indefinite,[26] lack of mortgage release provisions, [27] descripton inadequate,[28] subject to an engineer's report,[29] or party not clearly identified.[30] The basis for other rulings may be more obscure, such as subject to obtaining an unclear mortgage,[31] no closing date,[32] further negotiations contemplated,[33] no agreement on all essential terms,[34] down payment not specified,[35] more formal contract intended,[36] binder not the whole agreement,[37] future negotiations ex-

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[22] *Spielvogel* v. *Veit, supra* at note 21

[23] *Dickson* v. *Mitchell, supra; Wertheimer* v. *Boehm*, 241 N.Y. 575, 150 N.E. 561 (1925); *Weintraub* v. *Kruse*, 234 N.Y. 575, 138 N.E. 452 (2nd Dept. 1922).

[24] *Birnhak* v. *Vaccaro, supra* at note 10; *N.E.D. Holding Co.* v. *McKinley, supra* at note 10.

[25] *Galletta* v. *Zuckerman* 122 N.Y.S. 2d 10 (1953); *Miller* v. *Kall Associates, Inc.* 228 N.Y.S. 2d 529, aff'd 239 N.Y.S. 2d 950 (1963).

[26] *Sheehan* v. *Culotta*, 99 A.D. 2d 544, 471 N.Y.S. 2d 626 (2nd Dept. 1984); *Trade Winds Realty Corp.* v. *Cortes*, 188 (90) NYLJ (11-9-82) 23, Col. 18; *Aceste* v. *Wiebush*, 72 A.D. 2d 810, 425 N.Y.S. 2d 369 (2nd Dept. 1980); *In re McVoy's Estate*, 94 N.Y.S. 2d 396 (1950); *Hallmark Construction Corporation* v. *Kemmerer*, 55 A.D. 2d 637, 390 N.Y.S. 2d 171 (2nd Dept. 1976).

[27] *Israelson* v. *Bradley*, 139 N.Y.S. 2d 107 (1954); *Guadagno* v. *Greenfield*, NYLJ 5-19-85, p. 15, Kuffner, J.

[28] *Snay* v. *Wood*, 50 A.D. 2d 651, 374 N.Y.S. 2d 809 (3rd Dept. 1975); *Von Bargen* v. *Ginsberg*, 245 N.Y. 647 (1927); *Hummell* v. *Cruikshank*, 280 App. Div. 47 (3rd Dept. 1952); *Israelson* v. *Bradley, supra* at note 27; *Hallmark Construction Corporation* v. Kemmerer, supra at note 26.

[29] *Paduano* v. *Salli*, unreported decision of Justice Morton, Kings County, December 19, 1980, index no. 76948/1980.

[30] *Villano* v. *G&C Homes, Inc.*, 46 A.D. 2d 907, 362 N.Y.S. 2d 198 (2nd Dept. 1974); *Big City Realty Co.* v. *896 Realty, Inc.*, 9 A.D. 2d 660, 191 N.Y.S. 2d 705 (1st Dept. 1959),

[31] *Pollak* v. *Dapper, supra* at note 7; *Hallmark Construction Corporation* v. *Kemmerer, supra* at note 26; *Willmott* v. *Giarraputo, supra; Wilson* v. *State*, 101 Misc. 2d 924, 422 N.Y.S. 2d 347 (1979); *Osta* v. *Jarrett*, 27 A.D. 2d 882, 278 N.Y.S. 2d 8 (3rd Dept. 1967); *Vallone* v. *Regan*, 144 N.Y.S. 2d 324 (1955); *Israelson* v. *Bradley, supra* at note 27; *Miller* v. *Kall Associates, Inc., supra* at note 25; *Spielvogel* v. *Veit, supra* at note 21; *Kusky* v. *Berger*. 33 Misc. 2d 564 (1962).

[32] *Concordant Associates, Inc.* v. *Slutsky*, 104 A.D. 2d 920, 480 N.Y.S. 2d 540 (2nd Dept. 1984); *Vallone* v. *Regan, supra* at note 31.

[33] *Ansorge* v. *Kane, supra* at note 7; *Brause* v. *Goldman, supra; Spielvogel* v. *Veit, supra* at note 7; *Read* v. *Henzel, supra; Hallmark Construction Corporation* v. *Kemmerer, supra* at note 26.

[34] *Blakey* v. *McMurray*, 488 N.Y.S. 2d 286 (3rd Dept. 1985); *Wagner* v. *Zonghetti Const. Corp.*, 115 N.Y.S. 2d 410 (1952); *Read* v. *Henzel, supra; Ansorge* v. *Kane, supra* at note 7.

[35] *Nathan* v. *Spector*, 281 App. Div. 451, 120 N.Y.S. 2d 358 (3rd Dept. 1953); Sheehan v. *Culotta, supra* at note 26; *Wagner* v. *Zonghetti Const. Corp., supra* at note 34; *Villano* v. *G&C Homes, supra* at note 30.

[36] Pomponio v. *Petrillo*, 59 N.Y.S. 2d 65 (1945); *Brause* v. *Goldman, supra; Sheehan* v. *Culotta, supra* at note 26; *Read* v. *Henzel, supra.*

[37] *N.E.D. Holding Co.* v. *McKinley, supra* at note 10; *Latona* v. *Shore, supra; Rohrwasser* v. *Al & Lou Consturction Co., supra* at note 14.

pected,[38] multiple essential terms missing,[39] binder intended only as a receipt,[40] mutual mistake,[41] or subject to attorney's approval.[42]

When the reasons not to honor the binder are manifest, they are not especially enlightening, unless counsel meets such an obvious situation. Nevertheless, they are worthy of brief review.

Some Specifics

—Incomplete Payment Terms

In one binder, the down payment and the purchase price were not settled, evidenced by a discrepancy between the amount of the deposit and the total price recited in the memorandum. An essential term was thus found to be missing.[43]

Where a binder recited the purchase price as "$89,000 net" it was held not sufficiently clear or certain to satisfy the Statute of Frauds.[44] Language setting the price as a consideration satisfactory to the seller was found likewise to be insufficient.[45]

In another case, the binder noted the price as $16,000 which would normally meet the test of clarity. However, upon the motion for summary judgment, evidence was adduced which raised the question as to whether the price was all cash or only cash above a mortgage. Price then became an issue and ran afoul of the Statute of Frauds.[46]

Another memorandum recited the price as $16,000, payable $500 on account, $1,000 on the signing of a formal lease, $10,000 upon possession or title with one final line reciting "mortgages" with no amount states. The Court found the price too indefinite since it could not be determined whether this meant one mortgage or more than one, or an existing mortgage, or one to be executed, or what is terms were to be.[47]

—Description Inadequate

Where a seller owned two farms, but the memorandum referring to seller's farm did not supply enough information to differentiate it from the other farm, the binder was held unenforceable.[48]

In an earlier case the document described the property as follows:

> "Property known as and by the street number 1441 Bedford Avenue, being an eight-family brick and stone apartment building on a lot about 33 by 95, irregular."

But proof at the trial for specific performance showed the dimensions of the plot to be thirty-three feet one and one-quarter inches fronting on Bedford Avenue, ninety-three feet ten inches in depth on the northerly side, ninety-eight feet five and three quarters inches in depth on the southerly side, both north and south dimensions tapering to the rear where the width was only fourteen feet, one and one-half inches. The variance between the quantity purportedly to be granted and the actual was such as to cause the court to deny specific performance.[49]

In other cases on this point we find descriptions which were patently inadequate[50] or where the word "approximately" was found under certain circumstances to be excessively vague.[51] How this can be resolved with the line of cases previously cited whereby a description is adequate so long as location is reasonably ascertainable and that parole evidence is admissible to enable precise identification by the court[52] is problematic. It leads to the suggested conclusion that if courts are uncomfortable with a binder, they will find a way to bring about the result believed to be just.

—Party Not Clearly Identified

Mindful that the basis for a binder are price, parties and property, insufficient identification of buyer or seller will void the binder. Although not often encountered, it has occurred. In an action for specific performance by a vendee, he was described only as "Villano". The deposit check was signed by Alphonse Villano but it was Anthony Villano who brought the action. Although other factors entered into the decision, the binder failed.[53]

Clouding the Principals

If the payment terms are incomplete, or the description inadequate, or a party not clearly identified, we know that the three requisites for the binder are immediately in jeopardy, as well they should be. But if those *are* met, or appear to be, a binder on the underlying transaction may still be successfully attacked. That is where the law in this area begins to defy categorization, harkening back to the suggestion that the courts view binders somewhat warily.

As the concepts lean towards the arcane, guidance for counsel becomes more difficult. Analysis of the specific facts of each case

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[38] *Tymon* v. *Linoki*, 16 N.Y. 2d 293, 266 N.Y.S. 2d 357 (1965); *Willmott* v. *Giarraputo*, *supra*; *Read* v. *Henzel*, *supra*, *Door Knob Reality, Inc.* v. *Northrop*, *supra* at note 14.39

[39] *Concordant Associates, Inc.* v. *Slutsky*, *supra* at note 32; *Hallmark Construction Corporation* v. *Kemmerer*, *supra* at note 26; *Vallone* v. *Regan*, *supra* at note 31.

[40] *Belbird Realty Corporation* v. *Wolfson*, 221 App. Div. 67 (1st Dept. 1927); *Wagner* v. *Zonghetti Const. Corp.*, *supra* at note 31.

[41] *DaSilva* v. *Musso*, 53 N.Y. 2d 543 (1981).

[42] *Trade Properties, Inc.* v. *Ziminski*, 75 Misc. 2d 606, 348 N.Y.S. 2d 476 (1973); *Wagner* v. *Zonghetti Const. Corp.*, *supra* at note 34; *Sheehan* v. *Culotta*, *supra* at note 26; *Atkins* v. *Trowbridge*, 162 App. Div. 629 (1st Dept. 1914); *Guadguano* v. *Greenfield*, *supra* at note 27.

[43] *Sheehan* v. *Culotta*, *supra* at note 26.

[44] *Aceste* v. *Wiebush*, *supra* at note 26.

[45] *In re McVoy's Estate*, *supra* at note 26.

[46] *Galletta* v. *Zuckerman*, *supra* at note 25.

[47] *Miller* v. *Kall Associates, Inc.*, *supra* at note 25; See also other cases cited at note 26, *supra*.

[48] *Hummell* v. *Cruikshank*, *supra* at note 28.

[49] *Von Bargen* v. *Ginsberg*, supra at note 28.

[50] *Hallmark Construction Corporation* v. *Kemmerer*, *supra* at note 26; *Snay* v. *Wood*, *supra* at note 28.

[51] *Israelson* v. *Bradley*, *supra* at note 27.

[52] See cases cited at notes 15 through 18, inclusive, *supra*.

[53] *Villano* v. *G&C Homes, Inc.*, *supra* at note 30; See also, *Big City Realty Co.* v. *896 Realty, Inc.*, *supra* at note 30.

almost, but not quite, becomes a prerequisite. However, a sense of how the courts think can emerge from a review of the cases which have rejected binders for the less obvious reasons.

—Lack of Multiple Essential Terms

Aggrieved by a binder before it, courts sometimes find fault with any number of the elements. Combining the numerous apparent deficiencies, they find the binder wanting for a number of reasons which, when taken together, lead to the ultimate conclusion to reject.[54] While certainly open to question, the inference is that if only one offending aspect were found, perhaps the binder could be saved. Hence, attorneys opposing a binder should consider a broad attack to bolster their position.

—Information on Mortgage Too Vague

A particularly fecund area to void binders centers around delineating mortgage obligations. Where, for example, the space after the word "mortgages" on a binder is left blank, even if the amount which might have been inserted can be inferred from other sums in the document, it has been held fatally defective.[55] Similarly, just neglecting the amount or terms of a purchase money mortgage renders the binder unenforceable.[56] Also unavailing is the language "Subject to purchaser obtaining mortgage."[57]

Even where the amount of the mortgage *is* recited, the binder is ineffectual when the payment of interest and amortization were to be mutually agreed upon.[58]

A like principle is explained in an earlier case. If a memorandum is silent as to the terms of a mortgage, the law will imply a mortgage due on demand and bearing interest at the legal rate.[59] But the court cannot even reach the point of implication if a binder says "terms to arrange (sic) upon the signing of the contract."[60]

Where a binder was completely silent on the subject of a mortgage, it was only upon purchaser's summary judgment motion that the issue of a contemplated mortgage was raised. Since the binder contained no terms for a purchase money mortgage, the court deemed a material element to be missing.[61] This is an anomalous result, because a binder otherwise meeting the standards was rejected based upon parol. While comforting for anyone opposing a binder, it lends uncertainty to the subject.

—Binder Only Intended As Receipt

Although it will always be a matter of parties' intentions, one could surmise that most laymen probably intend a binder to be a receipt for a good faith deposit. It might be expected that courts would see it that way with some regularity, but they have not. It does appear though to be a logical argument and was found convincing in a First Department case where the binder looked rather complete on its face. The court held that the writing could not be considered more than its form indicated and that was as a receipt.[62]

—Further Negotiations Contemplated

This idea is one of a number of concepts a court cites when it believes the binder to be flawed. A leading example was a binder which read:

> "The price is $32,625; payable $12,625 cash; balance of $20,000 to remain on 1st mortgage for five years. The sum to be paid on signing of contract on March 26 . . . to be agreed on. The balance of cash payment on passing of title on May 26th . . ."

The Court ruled the binder ineffective stating:

> "If a material element of a contemplated contract is left for future negotiations, there is no contract enforcible under the Statute of Frauds or otherwise. The price is a material element of any contract of sale and an agreement to agree thereon in the future is too indefinite to be enforceable"
>
> (Citing *St. Regis Paper Co.* v. *Hubbs & Hastings Paper Co.*, 235 N.Y. 30)[63]

Where it was the terms of the mortgage for which further negotiations were expected, the ruling was the same.[64] Stated another way, the necessary finality of assent is lacking.[65]

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[54] *Concordant Associates, Inc.* v. *Slutsky, supra* at note 32; Hallmark Construction Corporation v. *Kemmerer, supra* at note 26; *Vallone* v. *Regan, supra* at note 31.

[55] *Miller* v. *Kall Associates, Inc., supra* at note 25.
However, this must be compared to *Rohrwasser* v. *Al & Lou Construction Co., Inc., supra* at note 14, holding a binder sufficient even though there was a failure to provide a closing date and to fill in the blanks in the mortgage contingency clause. The writing was held to be valid on its face with a trial to determine if it represented the whole agreement of the parties.

[56] *Vallone* v. *Regan, supra* at note 31; *Hallmark Construction Corporation* v. *Kemmerer, supra* at note 26; *Trade Winds Realty Corp.* v. *Cortes, supra* at note 26.

[57] *Harbor Cove Realty, Inc.* v. *Maffai*, unreported decision of Justice Doyle, Suffolk County, September 16, 1983, Index No. 82-27189. Also insufficient is subjecting the binder to "approval of $43,000 mortgage". In *Padvano* v. *Salli, supra* at note 29, that was found too imprecise, lacking interest rate, maturity or whether it was to be of the conventional or FHA variety. But reciting "conventional" would not have saved it either according to *Neiss* v. *Franze*, 101 Misc. 2d 871, 22 N.Y.S. 2d 345 (1979).

[58] *Willmott* v. *Giarraputo, supra.*

[59] That certainly appears to be the prevailing wisdom, but should be compared to the decision in *Israelson* v. *Bradley, supra* at note 27 providing that the law could *not*, under the circumstances of that case (which are unclear in the text of the decision), imply a mortgage on demand.
Neiss v. *Franze, supra* at note 57, seems in accord. There "subject to a conventional mortgage of $29,000" was not enough and the court was apparently unwilling to apply either the legal rate of interest or an interpretation that it was due on demand.

[60] *Pollak* v. *Dapper, supra* at note 7.

[61] *Osta* v. *Jarrett, supra* at note 31.

[62] *Belbird Realty Corporation* v. *Wolfson, supra* at note 40; See also: *Wagner* v. *Zonghetti Const. Corp., supra* at note 34.

[63] *Ansorge* v. *Kane, supra* at note 7.

[64] *Read* v. *Henzel, supra.*

[65] *Brause* v. *Goldman, supra;* see also: *Speilvogel* v. *Veit, supra* at note 21; *Pollak* v. *Dapper, supra* at note 7; *Hallmark Construction Corporation* v. *Kemmerer, supra* at note 26 and cases cited at note 38, *supra*

—Necessity for More Formal Contract

This is much the same concept as the contemplation of further negotiations, couched in somewhat different semantics.

Where the parties have clearly expressed an intention not to be bound until their preliminary negotiations have culminated in the execution of a formal contract, nothing is binding until the latter event occurs.[66] And this would certainly be found where the writing states that it "is subject to the making and delivery of a contract agreeable to purchaser and seller.[67]

So too was a formal contract found to be necessary where even a plaintiff admitted that parties had an understanding at the time the memorandum was signed that a formal contract would be prepared and that plaintiff would not have purchased the property without a formal contract.[68]

—Not the Whole Agreement

Still another permutation of the prior concept is the view that a binder otherwise valid on its face may nevertheless not be the entire agreement of the parties - in which event it may be shown not to be binding.

Justice Cardozo's recitation of the applicable law is at once enlightening and alarming. In analyzing a binder, he ruled for the Court of Appeals:

> "We do not say as a matter of law that the note or memorandum states the whole agreement of the parties. We do not say that it does not. Since the writing is not the contract, but only a note or memorandum of a contract, parol evidence will be admissible in support of the . . . claim that its terms are incomplete."[69]

—Lacking Essential Tasks

From another vantage point, some courts have condemned binders for lacking essential terms or lacking agreement on all the essential terms.

A lucid review by the Third Department said it this way:

> "The fact that the memorandum contains all the essential terms of *a* contract of sale is beside the point. The questions is whether the memorandum was a sufficient memorandum of *the* contract, if any, which was made by the parties.
>
> * * *
>
> . . . The parties had not reached a complete agreement at the time of the execution of the memorandum. The amount to be paid on the signing of the contract was an important element of the complete contract. It was left open . . . The transaction was destitute of legal effect." (emphasis is court's)[70]

—Subject to Attorney's Approval

On those all too infrequent occasions when an attorney does hear about a binder *before* it is signed, this is the safeguard counsel will rely upon to vitiate the binder. Even if not consulted, the efficacy of a binder is sometimes conditioned upon counsel's approval. How viable this condition will be may be open to question.

To be sure, there are a number of cases which recite the failure of the attorney to sanction the transaction as a basis to deny enforcement. In one of these, the court stated that:

> "The receipt herein states on its face 'contract to be subject to approval of purchaser's attorney otherwise deposit will be refunded.' It would follow that the purchaser's attorney would have the right to reject the contract for any reason whatever and the $500 would then have to be refunded. Until he approved same there would be no binding agreement between the parties."[71]

That statement appears to be affirmative enough, but it should be noted that the binder in that case was also deficient because of missing payment terms. Attorney's approval was not the sole or main issue in the decision. Other rulings are in accord, albeit somewhat less explicitly, but they too found other defects in the underlying agreements.[72]

The need to possibly equivocate here arises from a more recent decision where attorney's approval was a condition. With emphasis supplied, the troublesome language reads:

> "The evidence in this case is uncontrovertible that the seller made acceptance of the binder conditional upon the approval of his attorney, Fred Edel. Plaintiff acceded to this condition and *no evidence was introduced to show that Mr. Edel's disapproval was occasioned by bad faith to escape payment of the commission.*"[73]

Although apparently at variance with the prior cited decisions, it introduces a new element, implying that if counsel's reason for declining to approve was ill-motivated, it might be unavailing.

But this is the only case injecting this additional factor. Combining this minority view with a still more recent holding seems to dispose of the issue. In the newer matter,[74] a binder was once again "subject to formal contract and attorney approval." The court examined this point in depth, stating:

> "In the instant case, the arbitrator designated was the defendant's attorney. It may reasonably be inferred that such approval was not forthcoming . . . While 'attorney approval' clauses have, apparently, not been the subject of extensive litigation in the state, they have received attention in neighboring jurisdictions.[75]

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[66] *Brause* v. *Goldman, supra*

[67] *Pomponio* v. *Petrillo, supra* at note 36

[68] *Sheehan* v. *Culotta, supra* at note 26; see also: *Read* v. *Henzel, supra*

[69] *N.E.D. Holding Co.* v. *McKinley, supra* at note 10; See also: *Latona* v. *Shore, supra; Rohrwasser* v. *Al & Lou Construction Co., Inc., supra* at note 14

[70] *Nathan* v. *Spector, supra* at note 35; See also: *Blakey v. McMurray, supra* at note 34; *Wagner* v. *Zonghetti Const. Corp., supra* at note 34; *Read* v. *Henzel, supra; Ansorge* v. *Kane, supra; Sheehan* v. *Culotta, supra* at note 26

[71] *Wagner* v. *Zonghetti Const. Corp., supra* at note 34

[72] *Sheehan* v. *Culotta, supra* at note 26; *Atkins* v. *Trowbridge, supra* at note 42

[73] *Trade Properties, Inc.* v. *Ziminiski, supra* at note 42

[74] *Guadagno* v. *Greenfield, supra* at note 27

[75] Citing: *Trenta* v. *Gay*, 468 A2d 737, N.J. Super. Ch. 1983; *Indoe* v. *Dwyer*, 424 A2d 456, N.J. Super. Ch. 1980; *Smith* v. *Allmon*, 461 N.E. 2d 1237, Mass. App. 1984

The court went on to observe that in other jurisdictions, two views of attorney approval clauses emerge. One subjects the attorney's decision to a test of reasonableness. The other declares the attorney's decision non-reviewable. In evaluating this divergence of authority, the court opined that the latter view more nearly reflected the status in New York.[76] It concluded, therefore, that even if the binder was a valid contract or memorandum, the action for specific performance would be dismissed where it was evident that the discretion vested in seller's attorney was exercised against completion of the sale.[77]

In so doing, its penultimate pronouncement serves nicely as a coda to the subject of binders.

> "This view is buttressed, in the court's opinion, by the very nature of the negotiations which take place among the prospective purchaser, seller and real estate broker. In such cases the parties act without the advice of counsel in a matter of no little significance, monetary or otherwise, to them. As the court in Indoe v. Dwyer (supra), pointed out: "the complexity of the law of contracts and of real property demand that one qualified by education and experience determine the legal sufficiency of a real estate sale agreement and advise the prospective seller or purchaser as to the rights and obligations arising thereunder. Objective counseling by one's own attorney as to the practicability or desirability of undertaking the sale or purchase is often necessary to avoid precipitous actions which may prove to be legally, financially or socially disadvantageous".
>
> Specific performance, like other forms of equitable relief, is available only at the discretion of the court (see, Burke v. Bowen, 40 NY2d 264, 1976). Where, as here, the granting of such relief involves the enforceability of agreements negotiated in the absence of counsel and drawn by real estate brokers involved in the de facto practice of law, such discretion should be carefully and sparingly exercised. The court should view such agreements with special scrutiny and construe the same, where at all ambiguous, against the party seeking enforcement."

Conclusion

Having reviewed the law at some length, the suggested conclusion is that binders are still unsettling and confusing documents. It remains quite difficult to predict just how a particular binder may be adjudicated.

Statistically, most binders will not be upheld. But that is just a numbers game. Attorneys demand at least a modicum of stare decisis as a basis to advise clients and gauge the results of litigation. It's hard to tell if we really have that with any assurance in the realm of binders.

If the document contains parties, price and property, it is a memorandum of an agreement sufficient on its face to satisfy the statute of frauds. It won't take much to reach that point, but still there is room for dispute. Even if that hurdle is overcome, there may yet be room for parol evidence to induce a court to conclude that the paper is not the whole agreement because it is missing essential terms and contemplated further negotiations. Afterall, sometimes leaving blank a line for mortgages is irrelevent; sometimes it vanquishes the binder to a netherworld, and so on, back and forth.

If it will so often be a major challenge for a skilled attorney to glean just what the effect of a binder is, what are all the buyers and sellers of real property out there to think? The answer, in the form some law school professors employ to tweak the neophytes, is: who knows? But if such a vagary is applicable much of the time, then surely the public is ill served by these curious binders.

Those people wishing to buy, sell or lease real property derive maximum benefit not by signing documents purporting to be memoranda or short form contracts, but full length agreements, carefully crafted and intended at the outset to encompass precisely what the parties intended. While even that is neither foolproof nor immune to attack, it represents the most rational approach to achieving the desired end.

[76] Citing *Atkins* v. *Trowbridge*, *supra* at note 42; *Youla* v. *Rappaport*, 115 N.Y.S. 2d 408 (1949)

[77] *Guadano* v. *Greenfield*, *supra* at note 27