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Using Confidentiality Agreements In Real Estate Deals

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Parties negotiating real estate deals often execute confidentiality agreements, usually for the purpose of requiring a prospective buyer to maintain the confidentiality of financial and other information it will inevitably learn during the negotiation process. But sellers should beware – their own failure to maintain the confidentiality of such information will often undercut their ability to continue requiring the buyer to do so.

The First District affirmed the dismissal of a lawsuit filed under just these circumstances in a well-publicized 2017 opinion. *Lakeshore Athletic Club Ill. Ctr., LLC v. Goldman*, 2017 IL App (1st) 161362-U. In May 2010, Peter Goldman expressed interest in purchasing the Lake Shore Athletic Club and a share of the property on which it is located at 211 North Stetson in Chicago. The Club -- a seven level, 120,000 square foot facility just north of Millennium Park -- was operated by Lakeshore Athletic Club Illinois Center, LLC and owned by Two Eleven North Stetson, LLC -- entities both owned by the Kaiser family. The Property was subject to foreclosure proceedings a month before Goldman expressed his interest. To discuss the purchase of the Property, the Kaisers required Goldman to sign a confidentiality agreement which required him to use the information he learned about the Club or the Property solely in connection with the proposed purchase.

After the parties were unable to reach an agreement on price, the note and mortgage on the Property were listed for sale on an internet auction site. An entity called Strategic Hotels & Resorts, Inc. successfully bid on the mortgage for $10.5 million, and then obtained a judgment of foreclosure. Thereafter, Strategic sold the property to Goldman for the same price, refusing to negotiate with the Kaisers.

The Kaisers sued, alleging that Goldman had breached the confidentiality agreement by sharing the Kaisers' financial and other information with Strategic in order to facilitate the auction acquisition. However, the Kaisers also admitted that as a part of the foreclosure, they had been required to share the same "confidential information" with their lenders and loan servicers. The trial court dismissed the suit. The appellate court affirmed, noting that the Kaisers could not maintain an action under the confidentiality agreement because they "could not have had a reasonable expectation that the information they shared with Goldman was, in fact, confidential."

In other words, the mere fact that Goldman had signed an agreement prohibiting *him* from disclosing certain information, the Kaisers could not require him to do more than they, themselves had done to protect the information.

Other courts interpreting Illinois law have similarly limited the reach of such agreements. In one case, the Seventh Circuit noted that "[i]f the party seeking to protect its information did not think enough of it to expend resources on trying to prevent lawful appropriation of it, this is evidence that it is not an especially valuable interest." *Tax Track Sys. Corp. v. New Inv'r World, Inc.*, 478 F.3d 783, 787 (7th Cir. 2007).

Parties can use confidentiality agreements to protect information that may not rise to the level of a trade secret. But parties who intend to hold their counterparts to the terms of such an agreement should treat the supposedly "confidential information" as if it were a trade secret by taking steps to maintain its confidentiality. Such steps include, but are not limited to, requiring those who see it to sign non-disclosure agreements, physical security, entrance and/or exit interviews with employees to stress confidentiality, and simply marking materials as "confidential."

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