

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 502014CP003698XXXXSB

TED BERNSTEIN, as Trustee
of the Shirley Bernstein Trust Agreement
dated May 20, 2008, as amended,
Plaintiff,

-vs-

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN;
MICHAEL BERNSTEIN; MOLLY SIMON;
PAMELA B. SIMON, Individually and as Trustee
f/b/o Molly Simon under the Simon L. Bernstein
Trust Dtd 9/13/12; ELIOT BERNSTEIN, individually,
as Trustee f/b/o D.B., Ja.B. and Jo.B. under the
Simon L. Bernstein Trust Dtd 9/13/12, and on
behalf of his minor children D.B., Ja.B. and Jo.B.;
JILL IANTONI, Individually, as Trustee f/b/o J.I.
under the Simon L. Bernstein Trust Dtd 9/13/12, and
on behalf of her minor child J.I.; MAX FRIEDSTEIN;
LISA FRIEDSTEIN, Individually, as Trustee f/b/o
Max Friedstein and C.F., under the Simon L.
Bernstein Trust Dtd 9/13/12, and on behalf of her
minor child, C.F.,

Defendants.

HEARING BEFORE THE HONORABLE
MARTIN H. COLIN

Thursday, March 26, 2015
South County Courthouse
Courtroom 8
Delray Beach, Florida 33444
1:03 p.m. - 2:10 p.m.

Stenographically Reported By:
April Y. Segui, RPR, FPR
Registered Professional Reporter
Florida Professional Reporter

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1 APPEARANCES:

2 On behalf of the Plaintiff:
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16 BY: JOIELLE A. FOGLIETTA, ESQUIRE

17 On behalf of D.B., Ja.B. and Jo.B., Minors, as
18 Parents and Natural Guardians
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25 BY: ELIOT BERNSTEIN

1 PROCEEDINGS

2 ---
3 THE COURT: All right. We're back on the
4 Bernstein Shirley trust case. Time is of the
5 essence. I carved out a time for you folks, so
6 who are you going to call as your first witness?

7 MR. ROSE: John Poletto, P-O-L-E-T-T-O. He's
8 coming down the hall now.

9 Mr. Poletto, you'll be on the stand.

10 THE COURT: Have a seat, please. Raise your
11 right hand.

12 Thereupon,

13 (JOHN POLETTO)

14 having been first duly sworn or affirmed, was examined
15 and testified as follows:

16 THE WITNESS: I do.

17 THE COURT: Go ahead.

18 MR. ROSE: If I may approach, Your Honor.

19 THE COURT: Yes.

20 DIRECT EXAMINATION

21 BY MR. ROSE:

22 Q. Would you state your name for the record,
23 sir?

24 A. John Poletto.

25 Q. And what's your occupation?

5

1 A. I am the co-owner of Nestler Poletto
 2 Sotheby's International Realty as a real estate broker.
 3 **Q. I have attached -- Exhibit 1 is a page from**
 4 **your Web site that says, "About John Poletto." Is that**
 5 **an accurate page from your Web site that describes some**
 6 **of your professional background?**
 7 A. Yes, it is.
 8 MR. ROSE: I move Exhibit 1 into evidence.
 9 THE COURT: Any objection? It's his CV.
 10 MR. ELIOT BERNSTEIN: No.
 11 THE COURT: Okay. Number 1.
 12 (Exhibit No. 1 was marked for identification
 13 and admitted in evidence.)
 14 BY MR. ROSE:
 15 **Q. Is your firm the listing agent for the house**
 16 **at 7020 Lions Head Lane owned by the Shirley Bernstein**
 17 **Trust?**
 18 A. Yes.
 19 **Q. How long has that house been on the market?**
 20 A. One thousand one hundred fifty days.
 21 **Q. How does that compare to other listings in**
 22 **your firm?**
 23 A. It is one of the longest on record in the
 24 last five years.
 25 **Q. And the house was initially listed by whom?**

6

1 A. Initially listed by our company, myself.
 2 **Q. Who owned the house or who was the --**
 3 A. Si Bernstein.
 4 **Q. Do you recall when that was listed?**
 5 A. Original listing date was January 24, 2012.
 6 MR. ROSE: For the record, Mr. Bernstein died
 7 in September of 2012.
 8 BY MR. ROSE:
 9 **Q. What did you think of the price when it was**
 10 **listed?**
 11 A. It was extremely high.
 12 **Q. Can you tell the Court why it was listed that**
 13 **high?**
 14 A. Mr. Bernstein had another residence on the
 15 ocean, and he was spending time between both residences
 16 and wasn't motivated at that moment to sell.
 17 THE COURT: What was the listing amount?
 18 THE WITNESS: On the other property?
 19 THE COURT: On this property.
 20 THE WITNESS: On this property, three million
 21 four-fifty.
 22 THE COURT: Go ahead.
 23 BY MR. ROSE:
 24 **Q. Did you provide an affidavit at my request?**
 25 A. I did.

7

1 **Q. Before you signed it, did you read it and**
 2 **edit it?**
 3 A. I did.
 4 MR. ROSE: Exhibit 2, Your Honor, is the
 5 Affidavit of John Poletto. I would move that into
 6 evidence.
 7 THE COURT: Any objection to his affidavit?
 8 MR. ELIOT BERNSTEIN: No. Well, I haven't
 9 had any time to review any of this stuff.
 10 THE COURT: We had this hearing on an
 11 expedited basis. That's not a legal basis not to
 12 admit it. Okay. Number 2.
 13 (Exhibit No. 2 was marked for identification
 14 and admitted into evidence.)
 15 BY MR. ROSE:
 16 **Q. Is there a pending contract on the house?**
 17 A. Yes.
 18 **Q. How much is -- what's the price of the**
 19 **pending contract?**
 20 A. 1.1 million.
 21 **Q. Is it your belief that -- a recommendation**
 22 **that that offer should be accepted by the trustee?**
 23 A. Yes.
 24 **Q. Does that offer represent, in your opinion,**
 25 **the current fair market value of the property?**

8

1 A. Yes.
 2 **Q. Can you tell the Court if you have any --**
 3 **well, specific experience in the St. Andrews community**
 4 **where this particular house is located?**
 5 A. I started with the developer in 1983, and --
 6 with new sales in the community. 1989 my partner, Mark
 7 Nestler, and I established our realty company called
 8 Nestler Poletto Realty. We have since 1983, on the new
 9 sales and resale side, sold over 750 new and resale
 10 homes within the community.
 11 **Q. Where do you currently live?**
 12 A. In St. Andrews Country Club for the last 25
 13 years.
 14 **Q. Does your firm have a number of other houses**
 15 **currently listed in the St. Andrews community?**
 16 A. Yes. Currently about 12.
 17 **Q. Okay. Was the asking price lowered at some**
 18 **point from what Simon Bernstein had initially told you**
 19 **to sell the house for?**
 20 A. Yes.
 21 **Q. And can you briefly tell the Court the short**
 22 **history of that?**
 23 A. The short history, started with a number that
 24 Si Bernstein knew, at the outset, was completely a
 25 start number. We went from -- over the course of time

9

1 down into about -- we broke the two million range in
 2 July of 2013. We went to one million nine ninety-five,
 3 taking it down consistently based upon showings. We
 4 had traffic and showings, but were simply not getting
 5 offers.

6 **Q. Did you have the house -- did you suggest**
 7 **that the house be appraised?**

8 A. In all -- same situations, I recommended it
 9 to all clients.

10 **Q. Was the house, in fact, appraised?**

11 A. Yes.

12 MR. ROSE: May I approach, Your Honor?

13 THE COURT: You may.

14 MR. ROSE: I just need to give Mr. Bernstein
 15 his copies.

16 MR. ELIOT BERNSTEIN: Your Honor, we've never
 17 seen this.

18 THE COURT: Well, he's showing it to you.

19 MR. ELIOT BERNSTEIN: It's the first time
 20 we're getting this stuff, okay, just on the
 21 record --

22 MR. ROSE: This is 3 and this is 4.

23 MR. ELIOT BERNSTEIN: -- and we're
 24 beneficiaries.
 25

10

1 (Exhibit No. 3 was marked for
 2 identification.)

3 BY MR. ROSE:

4 **Q. I'm going to hand you what's marked as**
 5 **Exhibit 3. Is this a contract between a buyer, whose**
 6 **name has been redacted, and the Shirley Bernstein**
 7 **Trust?**

8 A. Yes.

9 **Q. For \$1.1 million?**

10 A. That's correct.

11 **Q. Look at -- paragraph 4 on the first page says**
 12 **that the closing was to be on April 20, 2015 --**
 13 **Do you see that?**

14 A. Yes.

15 **Q. -- or before.**

16 **Did circumstances arise after this was signed**
 17 **that necessitated an earlier or more immediate closing?**

18 A. Yes.

19 **Q. Can you just tell the Court briefly?**

20 A. As of April 1st of this year the membership
 21 is going to increase \$30,000. Current membership is
 22 \$95,000. It will be going to \$125,000.

23 **Q. When the house was appraised, were you given**
 24 **a copy of the appraisal?**

25 A. I was not.

11

1 MR. ROSE: I would move the appraisal in as
 2 Exhibit 4.

3 THE COURT: Any objection to the appraisal?

4 MR. ELIOT BERNSTEIN: No.

5 THE COURT: Number 4.

6 (Exhibit No. 4 was marked for identification
 7 and admitted into evidence.)

8 BY MR. ROSE:

9 **Q. I'm going to show you an appraisal that was**
 10 **done in July of 2014, and I believe comes out as an**
 11 **indicated value in the range of one million two or one**
 12 **million two fifty?**

13 A. Correct.

14 **Q. Is that consistent with your memory?**

15 A. Yes.

16 **Q. Now, based upon recent comps in the**
 17 **neighborhood, do you have a belief whether \$1.1 million**
 18 **is a reasonable price for this house?**

19 A. I'll give these to you so you can have them
 20 for the record. A property that was originally listed
 21 that we had listed for over \$3 million, and was reduced
 22 over the course of time over the course of one year,
 23 320 days, list price of one million eight ninety-nine
 24 at 7876 square feet of living space, that property sold
 25 for 1.3 million, and just closed as of March 11th and

12

1 is the most recent sale, and that sold for \$165 a
 2 square foot. This home, it was updated and in really
 3 exceptional condition. That is one comparable sale. A
 4 second comparable sale on 7106 Ayrshire Lane, which by
 5 the way, this property also is at 7154 Ayrshire Lane.
 6 The second property at the 7106 Ayrshire Lane was
 7 listed originally at one nine seven five is
 8 7,594 square feet of living space -- both of these
 9 homes are substantially larger than the subject
 10 house -- on the market for a fourth time, but sold for
 11 one million three seventy, and that was almost
 12 7600 square feet. That cost per square foot was \$180 a
 13 square foot. The proposed number we have is \$177 a
 14 square foot. These are the two most recent sales that
 15 are within the last six months.

16 **Q. How many times have you shown this, the**
 17 **Bernstein house?**

18 A. Over 75 times over the time period.

19 **Q. How would you describe the layout? Is it a**
 20 **layout that is attractive to most buyers?**

21 A. Si Bernstein bought this house on a builder
 22 foreclosure, and the reason was this particular builder
 23 had three homes that did not hit the marketplace as to
 24 what properties -- what buyers were buying in
 25 St. Andrews. Mr. Si, actually, and his wife purchased

13

1 the home and customized the homes themselves. It
 2 doesn't have a floor plan that is consistent with the
 3 buyers for St. Andrews.
 4 **Q. And what's the condition of the house**
 5 **currently?**
 6 A. Well, the biggest factor is it's all Spanish;
 7 Spanish driveway tiles, interior Spanish tile floors,
 8 interior -- or exterior patio all terra cotta tile.
 9 Most people would tear all of that out.
 10 **Q. Can you tell the Court how much you would**
 11 **expect the new buyer to spend on the house in**
 12 **renovations?**
 13 A. In excess of 600,000.
 14 **Q. Have there been any prior written offers in**
 15 **excess of \$1,000,000? Written offers.**
 16 A. No.
 17 **Q. Have there been any prior oral offers in**
 18 **excess of \$1,000,000?**
 19 A. Four months ago we received an oral offer of
 20 approximately 1.1 million.
 21 **Q. What happened to that offer?**
 22 A. The buyer was able to get his builder into
 23 the property and determine the home needed too much
 24 work for them to consider it seriously, so it never
 25 went to a written contract offer.

14

1 **Q. Have the dealings with this particular buyer**
 2 **been arm's length and conducted in good faith?**
 3 A. Yes.
 4 **Q. Did they initially have a lower offer and it**
 5 **was negotiated to being higher?**
 6 A. Correct. Well, let me counter that. Their
 7 initial conversation with me was a number in the nine
 8 to nine fifty range, and I simply said that, in my
 9 opinion, that that would not even receive a response.
 10 **Q. And then they made an offer, there was a**
 11 **counteroffer. That's in your Affidavit. The 1.1 was**
 12 **indicated as their best and final offer?**
 13 A. And we -- on behalf of the Bernstein estate,
 14 we countered the \$1.1 million offer unfurnished, as is.
 15 It was countered at one million one fifty. The buyer
 16 rejected that counter.
 17 **Q. Do you agree with the statement that although**
 18 **there's an appraisal, the best evidence of the market**
 19 **value of the property would be putting it on the market**
 20 **for an extended period of time and showing it to a**
 21 **number of buyers?**
 22 A. Yes.
 23 **Q. In your opinion, this offer is --**
 24 **Strike that.**
 25 **Is this a fire sale price?**

15

1 A. By no means.
 2 **Q. And, in your opinion, you would recommend**
 3 **that the Court approve the transaction as structured?**
 4 A. In my opinion.
 5 MR. ROSE: Nothing further. Thank you, sir.
 6 THE COURT: Cross.
 7 MR. ELIOT BERNSTEIN: Your Honor, do I get an
 8 opening statement in this hearing?
 9 THE COURT: No.
 10 MR. ELIOT BERNSTEIN: I don't think I need to
 11 get cross of him if I can get my statement out.
 12 THE COURT: No. Because opening statements
 13 are not evidence, so I'm going to let you testify.
 14 MR. ELIOT BERNSTEIN: Okay. Put in evidence
 15 and stuff?
 16 THE COURT: Yeah. Now is the time for
 17 cross-examination.
 18 MR. ELIOT BERNSTEIN: Can I reserve that?
 19 THE COURT: Reserve what?
 20 MR. ELIOT BERNSTEIN: The time to
 21 cross-examine.
 22 THE COURT: Yeah. Sure, you can. I'll let
 23 you do that.
 24 MR. ELIOT BERNSTEIN: I'm not sure I need
 25 anything from him.

16

1 THE COURT: Okay. He's reserving on cross.
 2 Keep him here just to see if we need him.
 3 Any other witnesses?
 4 MR. ROSE: The only other witness I would
 5 call would be Ted Bernstein.
 6 Just as a proffer, all he would say is that
 7 there's a contract, he signed it, and he wants to
 8 close, and he followed the advice of the
 9 professional realtors he hired.
 10 THE COURT: Well, I'm not accepting a
 11 proffer. Put him on or not.
 12 MR. ROSE: I'll put Ted on the stand.
 13 THE COURT: Stay here.
 14 Thereupon,
 15 (TED BERNSTEIN)
 16 having been first duly sworn or affirmed, was examined
 17 and testified as follows:
 18 THE WITNESS: Yes, I do.
 19 DIRECT EXAMINATION
 20 BY MR. ROSE:
 21 **Q. Did you receive the offer that's embodied in**
 22 **the contract that's marked as Exhibit 3?**
 23 A. Yes, I did.
 24 **Q. And is it your opinion that that is in the**
 25 **best interest of the trust and the beneficiaries of the**

17

1 **trust?**

2 A. Yes, it is.

3 **Q. Have you followed the advice and counsel of**

4 **the professional realtors that you hired and you just**

5 **heard testify?**

6 A. Yes.

7 **Q. And what's the carrying cost of the house if**

8 **it's not sold under this contract, approximately, per**

9 **month?**

10 A. Six, \$7,000 per month.

11 MR. ROSE: Nothing further.

12 THE COURT: Any questions?

13 MR. ELIOT BERNSTEIN: Yeah. Can I examine

14 him?

15 THE COURT: Yeah. That's what

16 cross-examination means.

17 MR. ELIOT BERNSTEIN: Okay. Can I submit

18 some things into evidence?

19 THE COURT: Give them to Marias and he'll --

20 it's not in evidence. You have to show it to him

21 first.

22 MR. ELIOT BERNSTEIN: Who, Ted?

23 THE COURT: Yes, if that's what you want to

24 do with them. Go ahead.

25 MR. ELIOT BERNSTEIN: Do I have to mark it in

18

1 evidence?

2 THE COURT: Let's wait. Give him a document,

3 ask him what you want. If you want to move it in,

4 I'll consider it.

5 CROSS (TED BERNSTEIN)

6 BY MR. ELIOT BERNSTEIN:

7 **Q. Ted, are you familiar with that report that's**

8 **a Palm Beach County sheriff's report?**

9 MR. ROSE: Objection. Relevancy.

10 THE COURT: I don't know what it says. Do

11 you have an extra copy for me?

12 MR. ELIOT BERNSTEIN: I didn't have a lot of

13 time to prepare three copies for today's hearing,

14 but I've got two, one for you. They have 50

15 copies of this. We sent it in 20 pleadings.

16 MR. ROSE: This is dealing with issues

17 about --

18 THE COURT: I want to see it.

19 MR. ELIOT BERNSTEIN: Oh. Show it to you?

20 THE COURT: So the question is: Is he

21 familiar with this document purportedly authored

22 by the sheriff's office? Is that the question?

23 MR. ELIOT BERNSTEIN: Correct.

24 THE COURT: You can answer yes or no. Are

25 you familiar with it?

19

1 THE WITNESS: Yes, I am familiar with it.

2 THE COURT: Go ahead. Next question.

3 MR. ELIOT BERNSTEIN: Can I use that?

4 THE COURT: Yeah.

5 BY MR. ELIOT BERNSTEIN:

6 **Q. Okay. Can you turn to page 5, the second**

7 **paragraph? It's highlighted. It says the following,**

8 **correct, "He said" -- that would be you, Ted -- or**

9 **Spallina, your attorney who was --**

10 **Was Robert Spallina, Ted, your attorney as**

11 **trustee and PR of the estate and trust of Shirley?**

12 MR. ROSE: Objection. Relevance. Beyond the

13 scope.

14 THE COURT: Overruled. Overruled.

15 Was he?

16 THE WITNESS: Was he counsel for me for the

17 Shirley Bernstein Trust?

18 BY MR. ELIOT BERNSTEIN:

19 **Q. And Shirley Bernstein when you were PR.**

20 A. I'm not sure about PR. They were counsel for

21 the Shirley Bernstein trust for a period.

22 **Q. So the trust that's central to this piece of**

23 **property; correct?**

24 A. Yes.

25 **Q. Okay. So he, Spallina, said, though, that**

20

1 **"Against" --**

2 THE COURT: Here's the thing. You don't know

3 this, but you're reading from a document not in

4 evidence --

5 MR. ELIOT BERNSTEIN: Can I submit it?

6 THE COURT: -- and the author of it, of the

7 document, is the sheriff's office, I assume is

8 what you're telling me, and they are quoting

9 someone who is not here, Mr. Spallina, so there's

10 multiple evidentiary problems there.

11 MR. ELIOT BERNSTEIN: Can I go to ones when

12 Ted speaks to the sheriff?

13 THE COURT: Well, just ask him the question

14 without referring to the document. Is this true?

15 BY MR. ELIOT BERNSTEIN:

16 **Q. Is it true that against -- that your counsel,**

17 **Spallina, admitted that against his better judgment, he**

18 **altered the first page of the first amendment to the**

19 **Shirley Bernstein Trust Agreement that you're trustee**

20 **for; right?**

21 MR. ROSE: Objection. Relevance.

22 MR. ELIOT BERNSTEIN: All relevant.

23 MR. ROSE: We are only here to decide whether

24 the sale of this particular property makes sense.

25 THE COURT: Slow down.

21

1 So tell me, in a short form, Eliot, what the
2 relevancy of this is.

3 MR. ELIOT BERNSTEIN: What we're going to
4 establish is that Ted has sold the property in the
5 past against the advice of his counsel, then made
6 distributions to improper parties against the
7 advice of his counsel, that he didn't read the
8 trust document he was operating under when he did
9 that, that he signed tax forms that are going to
10 be -- that are under investigation right now where
11 he alleged he was personal representative of the
12 estate. You'll remember the estate at the time he
13 signed that was closed.

14 THE COURT: Remember, I said in short form
15 give me the relevancy.

16 MR. ELIOT BERNSTEIN: The relevance is -- is
17 this sale going to cause a simmer -- similar group
18 of allegations, or fraud; caused the sheriff's
19 department to go investigate all of this;
20 caused --

21 THE COURT: Well, you just told me that the
22 allegations on this other property had to do with
23 improper disbursements.

24 MR. ELIOT BERNSTEIN: Improper sale, improper
25 documents.

22

1 THE COURT: All right.

2 MR. ELIOT BERNSTEIN: And we're going to show
3 that he's making this sale under the same kind of
4 things where no notice was given to beneficiaries,
5 it's not following the statutes. So the question
6 isn't what the property is worth --

7 THE COURT: I'm trying to do this in a
8 separate fashion. I'm not deciding right at this
9 moment whether to let the sale take place for any
10 of the legal issues that you might want to raise.
11 I'll hear about that in a second. What I want to
12 decide now is there's a piece of property, it's
13 owned by the trust. That, you said, was not in
14 dispute. Ted is the trustee.

15 MR. ELIOT BERNSTEIN: Alleged. We've got a
16 hearing coming up on that three days after.

17 THE COURT: He is the trustee for purposes of
18 that transaction, and the issue is whether the
19 trust, regardless of who the trustee is, can sell
20 this piece of property, pursuant to this contract
21 for \$1.1 million, and have the trust proceeds held
22 in a way that I'm going to determine, not the way
23 anyone else wants it to be. So the issue is: Is
24 it appropriate to have the sale take place as
25 opposed to holding onto the piece of real estate

23

1 that the realtors or Ted said cost six or \$7,000 a
2 month to do. Then I'll deal with the legal issues
3 separately. This is a factual issue on whether
4 it's good for the trust, putting everything else
5 aside. I'm not deciding right now any of the
6 other issues.

7 MR. ELIOT BERNSTEIN: Okay. So I'll be
8 able --

9 THE COURT: You can ask him questions about
10 the reasonableness of the sale for the amount in
11 question --

12 MR. ELIOT BERNSTEIN: Okay.

13 BY MR. ELIOT BERNSTEIN:

14 **Q. When you said --**

15 THE COURT: -- which he doesn't, apparently,
16 know anything about. He's listening to
17 Mr. Poletto.

18 MR. ELIOT BERNSTEIN: Okay. And I'm saying,
19 for right now, I don't have a lot of questions as
20 to -- I haven't had any of these documents to look
21 at anything they have said. So the beneficiaries,
22 if we didn't get a Zillow report, we would have
23 never known this sale was happening, okay?

24 THE COURT: Well, we'll deal with that in a
25 second.

24

1 MR. ELIOT BERNSTEIN: Okay.

2 BY MR. ELIOT BERNSTEIN:

3 **Q. Ted, did you notify the beneficiaries of that**
4 **sale? Did you send out the documents when you started**
5 **closing? Did you give any notice to any beneficiaries?**

6 MR. ROSE: Objection.

7 THE COURT: It is definitely relevant so let
8 me ask. You had this property listed; correct?

9 THE WITNESS: Yes.

10 THE COURT: Did the beneficiaries know that
11 the property was on the market?

12 THE WITNESS: Yes.

13 THE COURT: Okay. And at some point you got
14 a contract?

15 THE WITNESS: Yes.

16 THE COURT: Okay. And it looks like the
17 contract was signed.

18 MR. ELIOT BERNSTEIN: See, I didn't even know
19 that.

20 Let the record stand that I just got that.

21 THE COURT: You're interrupting me. Sit down
22 now because you just violated a serious rule. Sit
23 down. Sit down. I'm in the middle of
24 questioning. I'll let you participate, but you're
25 not going to be standing on top of me when you do

25

1 that.

2 Looks like the date of the contract is

3 March 16, 2015. Does that sound right?

4 THE WITNESS: It does, Your Honor.

5 THE COURT: So when this contract was

6 executed, did you provide notice to anyone of the

7 fact that the property that you said you had

8 noticed them was being listed, was now under

9 contract?

10 THE WITNESS: Yes, Your Honor, I did. There

11 are several other beneficiaries, obviously, so

12 yes, I did. I know that Alan Rose has been in

13 communication with Brian O'Connell, so, yes, the

14 beneficiaries, many of the beneficiaries were

15 aware of the sale of the property.

16 THE COURT: Well, did you do -- deal with the

17 disseminate of the information about the contract

18 or did you leave it to someone else to do that?

19 THE WITNESS: I believe it was left to Alan

20 Rose.

21 THE COURT: All right. So do you know

22 whether Eliot Bernstein received notice?

23 THE WITNESS: I believe that he did through

24 Mr. O'Connell. That's my belief.

25 THE COURT: So -- all right.

26

1 Next time -- Eliot Bernstein, the next time

2 you laugh --

3 MR. ELIOT BERNSTEIN: I didn't laugh.

4 THE COURT: I heard you.

5 MR. ELIOT BERNSTEIN: I coughed. I took a

6 sip and coughed.

7 THE COURT: Well, you know what? Go outside

8 and cough.

9 MR. ELIOT BERNSTEIN: I'm sorry. I did not

10 laugh.

11 THE COURT: You know what? There was a while

12 that you were behaving well.

13 MR. ELIOT BERNSTEIN: I am.

14 THE COURT: You're getting worse now, because

15 noise comes from you, gestures come from you,

16 okay? Every time you do that two things happen.

17 It's disruptive, just like it is now, okay, and it

18 makes the presentation of your case worse. So if

19 you have a desire to hurt yourself, continue to do

20 this until eventually I stop you, okay? So I'm

21 warning you, on the record, cut that out. No more

22 disruptions. Speak only when I ask you to speak,

23 and I'll always give you time to do it.

24 MR. ELIOT BERNSTEIN: Okay.

25 THE COURT: No noise, no raising and flailing

27

1 your hands. No one else does that, only you. Cut

2 it out. Understood?

3 MR. ELIOT BERNSTEIN: I will, yes, sir.

4 THE COURT: Okay. Thanks.

5 So I want to get to the heart of this.

6 Miss Foglietta, you're here for?

7 MS. FOGLIETTA: Mr. O'Connell.

8 THE COURT: Did you have notice of this sale

9 from Ted Bernstein?

10 MS. FOGLIETTA: No. The first notice I

11 received was from Eliot and then I called

12 Mr. Rose, who then told me he was just about to

13 file a motion, and call my office and advise us of

14 it.

15 THE COURT: When was that?

16 MS. FOGLIETTA: Monday afternoon.

17 THE COURT: Today is the 26th, so Monday was

18 the 23rd.

19 Mr. Rose, tell me and show me the notices

20 that you gave of this contract being executed on

21 the 16th by Ted. Tell me and then show me. I

22 mean, put aside tell me. Show me, because Ted

23 says he didn't do it, he allowed you to do it.

24 Show me the notices that you gave. I don't

25 want -- there's no words here. Hand them to me.

28

1 MR. ROSE: It's the motion we filed.

2 THE COURT: Okay. The motion. The first

3 time notice of this contract went to the

4 beneficiaries or the PR was when you filed the

5 motion?

6 MR. ROSE: Correct.

7 THE COURT: When was that?

8 MR. ROSE: To correct Your Honor, though, Ted

9 signed it on the 18th, not the 16th.

10 THE COURT: All right.

11 MR. ROSE: That was a Wednesday. I was out

12 of town. The buyers had seven days to do an

13 inspection and cancel the contract. As soon as I

14 got back to the office Monday, we prepared a

15 motion to approve and we sent it to everybody.

16 THE COURT: Did you send it to the PR's

17 office?

18 MR. ROSE: I did.

19 THE COURT: Well, you just heard that they

20 said they didn't know about it until Eliot told

21 them.

22 MR. ROSE: The sequence of the events is Ted

23 signed the contract, it looks like, on the 18th.

24 The buyers were doing their inspections. The

25 realtors changed the listing from listed to a

1 contingent contract. Eliot found out about it.
 2 He actually e-mailed out a notice of lis pendens
 3 on Saturday morning. So he had learned that. I
 4 returned from my trip on Sunday night. I prepared
 5 a motion for -- to approve it. I needed an
 6 affidavit from Mr. Poletto, which I had sent him
 7 Sunday, to wait for. When I got his affidavit
 8 back, I filed our motion. In the mean time,
 9 Miss Foglietta called me and I confirmed the sale,
 10 made arrangements to get the personal property
 11 inspected and all of that.

12 THE COURT: All right. Have a seat.

13 I got that. Okay. I got it.

14 Because we can't go on too long on this, do
 15 you have any other questions about Ted dealing
 16 with his -- the testimony he's given so far?

17 MR. ELIOT BERNSTEIN: Does that include Alan?

18 THE COURT: No. Answer my questions. You
 19 can't ask Alan anything. Any other
 20 cross-examination of Ted?

21 MR. ELIOT BERNSTEIN: Yeah.

22 BY MR. ELIOT BERNSTEIN:

23 **Q. I need to know what beneficiaries you told**
 24 **that there was this sale.**

25 THE COURT: He just said he left it up to his

1 lawyer. He did say that.

2 Have a seat. He's done for now.

3 MR. ROSE: Nothing further.

4 THE COURT: Miss Foglietta, do you have any
 5 position on the appropriateness or reasonableness
 6 of the sale?

7 MS. FOGLIETTA: No. My only concern is the
 8 personal property, to make sure that's not in the
 9 contract or any fixtures.

10 THE COURT: We'll deal with that if we have
 11 to.

12 So, Eliot, I'm going to let you testify, if
 13 you want. I'm going to break this down.
 14 Initially, it goes just to the issue Mr. Poletto
 15 spoke about, some aspect of whether it's
 16 reasonable to have this sale done at the
 17 1.1 million price and close on the 31st.

18 MR. ELIOT BERNSTEIN: Okay.

19 THE COURT: Go ahead.

20 DIRECT EXAMINATION

21 MR. ELIOT BERNSTEIN: Your Honor, since I
 22 didn't get any of the documents, and can't review
 23 any of this, and see what -- if there was 75
 24 people, how many made offers, even dummy offers,
 25 whatever, low balls, would validate any of this.

1 So this is all being thrown on me. I didn't even
 2 have the contract until today, okay? So I haven't
 3 had any of these documents until today. I had no
 4 chance to cross-examine or get a deposition from
 5 Mr. Poletto. These are issues that would
 6 concern --

7 He had -- when my dad died he had listed
 8 property with Mr. Poletto at \$5.5 million on these
 9 two properties. We're about to sell both of them
 10 for two million, as if the market blew apart, went
 11 screaming down in that time. In fact, it went the
 12 opposite way.

13 So there's Zillow listings, which is just
 14 basic Zillow online, where the property's at two
 15 four with a \$170,000 increase in the last few
 16 days, 90 days or something.

17 THE COURT: Why didn't you show that to
 18 Mr. Poletto when he was on the stand?

19 MR. ELIOT BERNSTEIN: I'm reserving my right
 20 if we have to get there. I want to get to the
 21 legal sufficiency, if this sale is following
 22 proper procedure, because that's what you're
 23 always interested in, statutes and all those codes
 24 and stuff.

25 THE COURT: Go ahead.

1 MR. ELIOT BERNSTEIN: So the question is:
 2 Were beneficiaries given time? Did I get a chance
 3 to throw out that I might want to buy the house
 4 with my father or anything, if I had time to look
 5 at all the documents, get a second opinion? No.
 6 Has there been adequate disclosure of this sale?
 7 And let me tell you. Alan Rose is wrong. We got
 8 alerted by Zillow that the property was being
 9 pending a sale (sic). We called the -- Joi and
 10 spoke with her and said --

11 THE COURT: All right. Stop for a second.

12 I have a question now, looking at this, to
 13 Mr. Poletto. Mr. Poletto, come on up because
 14 there's something I need to ask you on the record.

15 It looks like the contract -- the closing is
 16 to be on April 20th or before; correct?

17 MR. POLETTO: That was the initial contract
 18 offer. The contract that was finally accepted,
 19 the closing date is on or before the 31st of this
 20 month.

21 THE COURT: So this isn't the contract?

22 MR. POLETTO: That's not the final contract.

23 THE COURT: I have two of them. The Exhibit
 24 3 says April 20th.

25 MR. ROSE: There's actually an addendum in

1 there, I believe.
 2 MR. POLETTO: The addendum takes it to the
 3 31st of March. The reason being for that, Judge,
 4 is because St. Andrews Country Club, the issue was
 5 in order to close and take advantage --
 6 THE COURT: I'm looking at the exhibit to see
 7 if I see that in here.
 8 MR. POLETTO: It's in the addendum.
 9 MR. ROSE: May I approach, Your Honor?
 10 THE COURT: I have it here. It's attached.
 11 MR. ROSE: It's on paragraph 20. I can show
 12 it to Your Honor.
 13 THE COURT: Okay. Let me read it.
 14 MR. ROSE: The actual --
 15 THE COURT: I'm reading the Addendum. Okay.
 16 Well, the Addendum that was signed on the 18th
 17 says that the "Buyer agrees to make full and
 18 complete application for golf membership including
 19 payment of \$95,000 for it." And it's contingent
 20 upon -- "The contract is contingent upon buyer
 21 being able to be approved for a golf membership."
 22 So has he made the application?
 23 MR. POLETTO: Yes.
 24 THE COURT: Is he approved?
 25 MR. POLETTO: He is in the process right now

1 of being approved, yes. There's no reason that he
 2 would not be approved.
 3 THE COURT: All right. So in the contract
 4 itself, which date is also the 18th, it says that
 5 "Buyer wants to take advantage of the country club
 6 equity incentive and must close by 3/31/15."
 7 MR. POLETTO: Correct.
 8 THE COURT: So is the price increasing from
 9 95 to 125, or is it 125, but there's an incentive
 10 to have -- if someone closes by the end of March,
 11 they will reduce it to 95?
 12 MR. POLETTO: It's increasing as of April 1st
 13 by \$30,000.
 14 THE COURT: So if I don't let this close on
 15 the 31st because of the objections made to the
 16 rush aspect of this, what happens to this
 17 contract?
 18 MR. POLETTO: It will cost \$30,000 more and
 19 the buyer has the right to cancel.
 20 THE COURT: All right. Too bad. Motion is
 21 denied.
 22 Your notice is vastly inadequate, okay, and
 23 I'm concerned that, for the record, that even the
 24 PR really didn't know, and there's other things
 25 that the PR didn't know that I have to sift out

1 about this transaction. It may be reasonable,
 2 okay, the price, but because of what goes on in
 3 this case, there needs to be notice.
 4 And Eliot raised a good point. You know, if
 5 he hears that there's a buyer for 1.1 million, he
 6 then, or anyone else, can make an offer to match
 7 that, not that he's going to do that, but they are
 8 entitled to notice. And the problem here,
 9 Mr. Rose, is I don't see how I can eliminate
 10 notice here, and the notice is just inadequate.
 11 It doesn't -- they are getting their copies of the
 12 contracts today. That's when they just said they
 13 got it.
 14 MR. ELIOT BERNSTEIN: We don't have the right
 15 one.
 16 THE COURT: It's, apparently, the right one
 17 because it refers to the -- to that.
 18 MR. ELIOT BERNSTEIN: Okay.
 19 THE COURT: So, you know -- I mean, there's a
 20 due process aspect of getting -- in a contested
 21 case like this, where people want to look and see,
 22 in dealing with the history of not you, but your
 23 predecessors admitted to improper dealings with
 24 things, they want to be able to look in and
 25 they're -- you know, Eliot is going to demand

1 every page be analyzed and every leaf be
 2 overturned because when Spallina and Tescher were
 3 involved with this, a lot of bad things clearly
 4 happened. Now, could that all wind up going
 5 nowhere beyond Spallina and Tescher? The answer
 6 is yes. You know, is there any other wrongdoing?
 7 I haven't found it yet. I keep hearing about it,
 8 but I haven't found it yet.
 9 But this stuff has to be flushed out, and so
 10 these buyers are going to have to -- I mean, I
 11 can't rush this through in this court to try to
 12 save the buyers -- the buyers -- \$30,000. Okay.
 13 If you think that it's going to kill the deal,
 14 kill the deal or, Mr. Poletto, take it out of your
 15 commission, okay, if you want. So if I hear that,
 16 okay, that doesn't even cure it because they want
 17 notice, meaning you can tell them that you will,
 18 not the trust, but you will pay that \$30,000. I'm
 19 not telling you to do this, but I know what
 20 realtors do to make deals go through. If they are
 21 going to back out, and after notice is given, you
 22 know, they are still willing to buy by the 20th,
 23 because April 20th is now the closing date, but
 24 for the rush part of this, so everyone is on
 25 notice that is now the target date of this, okay?

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1 So everyone has to do their due diligence by that
2 date, or then by that date I'll make a decision as
3 to allow this to be sold or not. So far, what I
4 heard, makes the price sound reasonable.
5 Eliot, when you say, but, Judge, why would
6 the value of this home keep on going down when
7 real estate is going up? The answer is, it is
8 what it is, unless you show me otherwise. They
9 have an appraisal that has an appraised value of
10 this close to the amount that they are selling it,
11 and the realtor explained appropriately about the
12 conditions of the home, and it's been on the
13 market for a long time, and so, you know, no one
14 is buying this, and it's not a good idea to let a
15 sale go that may not be able to be retrieved.
16 Because I'm not worried about what happens with
17 the consequences of this sale, in that, clearly,
18 if it takes place, this money goes into escrow,
19 that is the net proceeds to the trust, and cannot
20 be used for any purpose, can't be used for fees,
21 can't be used for costs. I mean --
22 MR. ROSE: I would a hundred percent agree
23 with that, Your Honor.
24 THE COURT: Right. Okay. So -- but, you
25 know, both -- I mean Miss Foglietta even was

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1 concerned about the rush job of this -- did I
2 state that accurate -- being that the personal
3 property --
4 MS. FOGLIETTA: The personal property, we
5 haven't seen it.
6 THE COURT: So this has got to be flushed
7 out, and for \$30,000, you know, we can deal with
8 that and have the closing by April 20th.
9 MR. ROSE: Just for the record, just on the
10 notice issue --
11 THE COURT: Yeah.
12 MR. ROSE: -- I mean the trust document does
13 not require notice. The trustee is empowered to
14 buy and sell real estate without notice to
15 anybody. We fully intended to make disclosure,
16 and we did it. The dates here -- I mean, I
17 realize Your Honor is saying it's a short notice,
18 but the contract was signed. It wasn't even final
19 or binding until they did their inspection, but we
20 did get the notice out on Monday. The Affidavit
21 of Mr. Poletto was attached on Monday.
22 THE COURT: I'm not faulting -- it became a
23 rush because -- this would not be happening,
24 everyone concedes, but for what's going on at the
25 country club in the raise of the \$30,000. You

39

1 say -- your client's agreeing to that.
2 MR. ROSE: I wasn't saying no.
3 THE COURT: Your client is saying yes to
4 that.
5 MR. ROSE: It was also part of the
6 inspection, that the buyers had the right to
7 cancel, so they said we'll take it as is with
8 no -- you don't have to do anything, or give us
9 any money for anything that is broken or needs
10 fixed.
11 THE COURT: Don't change that. But if it's
12 just a question between the April 20th date and
13 March 31st of the 30,000, you folks can think of
14 something creative to keep this deal alive.
15 MR. ROSE: I don't think it would be fair --
16 THE COURT: I'm not making him --
17 MR. ROSE: Al's total commission I think
18 would be \$33,000, and then he's going to pay 30 of
19 it after he's marketed the property for --
20 THE COURT: Well, then, don't do that because
21 that's not reasonable. I'm not suggesting that
22 you do that. I wasn't even having in mind how
23 much your commission was.
24 MR. ROSE: What would you like us to do with
25 the buyers, advise them of what, we're going to

40

1 have another hearing to determine if the price is
2 adequate? I think --
3 THE COURT: I don't have -- I mean -- okay.
4 So I don't have any problem with the price, and
5 I've heard no evidence -- and this was a chance
6 for Eliot to present that, that there's a problem
7 with the price. The problem is is that he's
8 allowed to do other things, like review the
9 contract, and something else that he may want to
10 present, if he can, that makes it inappropriate to
11 have the sale at the 1.1 million, okay? But I'm
12 not -- I mean, there's nothing that I see that
13 suggests it. Eliot may present a witness who says
14 that the fair market value of this house should be
15 much more than 1.1 million, but I would need hard
16 core evidence of that. Not Eliot, he's not
17 qualified to do it; not Zillow, not Houzz. They
18 are not competent evidence to do that. You have
19 to have a hard core person to do that. And I
20 would weigh, then, that opinion, based upon the
21 fact that now there's an actual buyer who is going
22 to do an as-is cash contract. And so that's --
23 you know, cash is king, okay, from my point of
24 view. But I can tell you, if this deal goes down
25 the tubes, it's over your objection, and if you

41

1 wind up at the hearing coming up, having nothing
2 at all, then I'm going to take that into
3 consideration. Nothing substantial. Not things
4 that you say, Eliot, because you're in a zone that
5 you share with, I don't know who, but it's not
6 necessarily where I'm coming from. You know, you
7 see a lot of things that are wrong here that are
8 not necessarily legal wrongs, or wrongs that have
9 been proven, and so I'm stopping this deal because
10 you, Eliot, don't want it to go through, okay? It
11 has all of the remnants of something that could be
12 good for the trust. You don't want it. I'm not
13 going to forget that. So you said: I want a
14 chance to prove it's bad for the trust for various
15 reasons. I'm going to hold you to that proof.
16 True?
17 MR. ELIOT BERNSTEIN: Perfect.
18 Your Honor, can I --
19 THE COURT: I'm in the middle of a trial.
20 What? Go.
21 MR. ELIOT BERNSTEIN: You're talking to me in
22 a trial?
23 THE COURT: No. Another trial. That's what
24 all of these books are for.
25 MR. ELIOT BERNSTEIN: Can I ask him one

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1 question?
2 THE COURT: Go ahead.
3 CROSS (JOHN POLETTO)
4 BY MR. ELIOT BERNSTEIN:
5 **Q. Okay. Mr. Poletto, did you inform the**
6 **potential buyer of potential litigations that could**
7 **be -- that I've discussed with you about the property,**
8 **and that Ted is trying to be removed, and if Ted is**
9 **found to have acted fraudulently, that his removal**
10 **herein, it could cause clawbacks, lawsuits; the cost of**
11 **that could become --**
12 MR. ELIOT BERNSTEIN: I'd like Your Honor to
13 consider bonding for any possible damage because
14 we have this rush and we're -- all of those
15 things.
16 BY MR. ELIOT BERNSTEIN:
17 **Q. But that's my question. You've known about**
18 **litigation on this property for how long, since we**
19 **talked, over a year?**
20 A. (Nods).
21 **Q. You've been given information.**
22 THE COURT: You're talking and he's not even
23 answering.
24 MR. ELIOT BERNSTEIN: He's answering. He's
25 shaking his head.

43

1 THE COURT: No. I'm not hearing anything.
2 BY MR. ELIOT BERNSTEIN:
3 **Q. Can you answer?**
4 A. Ask me the question.
5 **Q. Okay. Did you inform the potential buyers of**
6 **potential litigation you were knowledgeable about?**
7 A. No.
8 **Q. Was there a reason you didn't?**
9 A. My job is to get the contract -- the property
10 in contract. I'm not in a position to try to scare
11 people away from buying a house we've been trying to
12 sell for almost three years. The objective here is to
13 sell the asset, not scare buyers away. So the answer
14 is absolutely no. My job is to get it in contract and
15 then you guys close it.
16 **Q. So your profession doesn't require you to**
17 **fully disclose potential litigation?**
18 A. Let me ask a question. Is there litigation
19 filed right now?
20 **Q. Yes.**
21 A. Was it prior to being filed?
22 **Q. Yeah.**
23 A. Okay. I haven't received a copy.
24 **Q. I've given you information, we've had**
25 **conversations about the litigation that's pending;**

44

1 **correct?**
2 MR. ROSE: I'd object.
3 MR. ELIOT BERNSTEIN: Alan Rose --
4 MR. ROSE: I'd object.
5 THE COURT: Stop.
6 MR. ROSE: We're here to get you to order the
7 sale approved. If you don't order the sale
8 approved, it doesn't go forward.
9 THE COURT: The contract is still pending.
10 I'm not negating the contract. You want -- what
11 you wanted was a court order to allow the closing
12 to take place by the 31st.
13 MR. ROSE: And to prohibit him from
14 interfering.
15 THE COURT: I'm going to deal with that --
16 I'm going to deal with that second.
17 MR. ROSE: Because he --
18 THE COURT: You don't have to argue that, him
19 interfering. I'm going to enter an order right
20 now dealing with that subject.
21 MR. ROSE: As soon as you tell the buyers
22 that there's going to be litigation to claw back
23 the property, these are very wealthy people. They
24 don't need the aggravation.
25 THE COURT: I don't need your help on this

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1 issue.

2 MR. ROSE: I apologize.

3 THE COURT: So one part of my ruling is that

4 because Eliot is objecting and says there's a good

5 faith basis for this sale not to go through

6 whereby the -- what's going to happen is there's

7 going to be a change in the asset structure of the

8 trust from property to cash. Eliot is objecting

9 to that.

10 All right. So, Eliot, I'm going to make this

11 clear, I'm going to right it. If the buyers here,

12 by telling me that the Pony Express told them that

13 there was litigation about this, I know it's

14 coming from you, okay? I am ordering you not to

15 discuss, not to disseminate, or not to give any

16 notice that you think needs to go to the buyers,

17 okay? And if I find out that the buyers find out

18 about the stuff that you just asked Mr. Poletto

19 about, I'm only going to look to you, and then you

20 and I are going to have issues, okay?

21 MR. ELIOT BERNSTEIN: I hear it.

22 THE COURT: Because you may think it's good

23 to do that huffing that you do to Mr. Poletto by

24 telling him all of that stuff that you think has

25 some merit, that I have never found to have any

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1 merit yet, okay, so I haven't found the

2 conspiracy, I haven't removed Ted, I haven't found

3 that it matters who's trustee in order to go ahead

4 and sell this for the benefit of the trust. I

5 might wind up finding that all of the things

6 you're doing is harmful to the trust and the trust

7 beneficiaries, okay. I haven't gotten there yet

8 because that's why I'm trying to push this matter

9 through.

10 So we're going to take this one small step at

11 a time, but I'm ordering an injunction against you

12 not to contact the buyers directly or indirectly

13 with respect to any information concerning this

14 transaction. Understood?

15 MR. ELIOT BERNSTEIN: Yes. I've never

16 contacted any buyers.

17 THE COURT: But you're suggesting that they

18 need to know that.

19 MR. ELIOT BERNSTEIN: I'm suggesting if he

20 knew it.

21 THE COURT: But that's not the point.

22 MR. ELIOT BERNSTEIN: Okay. That's fine. I

23 understood what you said.

24 THE COURT: That's not your job.

25 MR. ELIOT BERNSTEIN: My next question was:

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1 Did you get a lis pendens I filed in this matter?

2 THE COURT: Doesn't matter. I got it. They

3 are told that it's filed.

4 MR. ELIOT BERNSTEIN: So are the buyers aware

5 there's a lis pendens? I'm not allowed to ask

6 that?

7 THE COURT: No, you're not allowed to ask

8 that. I don't know who you gave notice to. If

9 you sent notice to the contract -- if you sent

10 notice of this lis pendens to a contract buyer,

11 you're going to be right back in court here so

12 quickly your head is going to ring.

13 MR. ELIOT BERNSTEIN: I'm not going to talk

14 to the contract buyer.

15 THE COURT: No, but I don't want you to send

16 something to them.

17 MR. ELIOT BERNSTEIN: I'm not going to send

18 anything to the buyer. I would never do that.

19 I'm not doing that.

20 THE COURT: Because, obviously, if there's a

21 sale --

22 MR. ELIOT BERNSTEIN: I'm assuring you, I am

23 assuring you on that.

24 THE COURT: -- because if we have a sale, the

25 lis pendens is going to go away. They can't clear

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1 title. It can't be sold over that.

2 MR. ELIOT BERNSTEIN: Correct. Now, I don't

3 think I filed it properly in the county and

4 recorded it with the thing.

5 THE COURT: If you improperly file a lis

6 pendens, you're at risk for whatever it is you

7 did, so withdraw your lis pendens then, if that's

8 the case.

9 MR. ELIOT BERNSTEIN: I'm not quite sure I

10 filed it wrong. I'm pro se. We will have to get

11 to that. But the point was, you asked that

12 everything come to you in this case.

13 THE COURT: But you didn't do it with the lis

14 pendens.

15 MR. ELIOT BERNSTEIN: I did. I gave it to

16 you in October.

17 THE COURT: Well, yeah, but I didn't approve

18 it. I held it because I didn't order it being

19 filed. You did send it.

20 MR. ELIOT BERNSTEIN: In the meantime, all of

21 a sudden, we get alerted there's a pending sale.

22 That would have denied me the due process to file

23 a lis pendens properly.

24 THE COURT: No, no. All you had to do was --

25 he went ahead and gave notice because you can't

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1 sell it without getting court approval, okay, and
2 so once he filed to get court approval, you had
3 notice, he gave you notice of the hearing.
4 MR. ELIOT BERNSTEIN: That's just the other
5 day.
6 THE COURT: That's when this all started.
7 MR. ELIOT BERNSTEIN: Well, I filed the lis
8 pendens first --
9 THE COURT: All right.
10 MR. ELIOT BERNSTEIN: -- prior to his --
11 THE COURT: So what do you want, Ted?
12 MR. TED BERNSTEIN: I know you have something
13 else pressing, but I'm concerned I don't
14 understand something Mr. Poletto said and I want
15 to make sure in court I'm clear.
16 THE COURT: Go ahead.
17 MR. TED BERNSTEIN: Did you say that there's
18 a chance the buyer backs out of this contract if
19 it's not done by March 31st, just walks away from
20 the deal?
21 MR. POLETTO: That's correct.
22 THE COURT: I didn't see that as a
23 contingency.
24 MR. POLETTO: I actually have another
25 document.

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1 MR. ROSE: I haven't allowed my client to
2 sign the addendum because the addendum is -- they
3 had a chance to inspect or cancel. They exercised
4 their right, and said we will accept it as is if
5 it closes by March 31st. I have not let him sign
6 that because we -- I mean, I don't know that we
7 technically need court approval to sell property
8 in trust, but in this case, we wanted your
9 approval.
10 THE COURT: Right.
11 MR. ROSE: We were not going to do it
12 otherwise, sir.
13 THE COURT: It's one and the same.
14 MR. ROSE: If we don't sign that, then
15 there's no contract at all and the buyers are not
16 bound by anything, and ultimately what's going to
17 have to happen is we're going to have to lower the
18 asking price by \$30,000 to get these guys to go
19 forward.
20 THE COURT: For right now, subject to me
21 assessing the financial consequence of that to the
22 person who caused that sale not to go through, I
23 mean, that's what I reserve. But, Mr. Rose, part
24 of the problem is, it's like when I tell people
25 when they file emergency hearings, not everything

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1 that seems to be important is an emergency. You
2 may have an important reason, and I think you do,
3 to try to sell this by the 31st. It may keep this
4 deal alive, and it may save someone \$30,000, but I
5 can't use that as a basis to deny the
6 beneficiaries the chance, now that we kind of
7 agree that they have a right to be involved in
8 this, to some degree, not contacting the buyers,
9 so there's a trade-off here in that. And so, you
10 know, if this was life or death, I would go for
11 life, but it's not life or death. This is a piece
12 of property. The property will just stay, if this
13 buyer backs out. If the buyer backs out, I'll
14 deal with that.
15 Ted, what else?
16 MR. TED BERNSTEIN: Your Honor, just to
17 clarify for me, what things can the beneficiaries
18 do to help bring whatever they want to bring to
19 bear to make this happen faster so that we, at
20 least, know what the expectations are?
21 THE COURT: That's a good question. The
22 answer is, now that the beneficiaries have notice,
23 okay, if they have an objection that's bona fide,
24 that's based upon a -- for example, here's a
25 potential bona fide basis. No matter what

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1 testimony I've heard about the reasonableness of
2 this, the property is really worth more, and if it
3 was, that's something that you, Ted, would want to
4 know, and so let's say --
5 MR. TED BERNSTEIN: Yes.
6 THE COURT: -- I don't know who did that
7 appraisal, but a bona fide appraiser said, for
8 some reason -- this is James Hackett, okay -- and
9 some other MAI appraiser said, no way, you know,
10 Ted, this is a 1.4 or \$1.5 million deal, you may
11 want to know that.
12 MR. TED BERNSTEIN: Definitely.
13 THE COURT: So that's one thing, because I'm
14 told that it's not like the history of the
15 listings, as they have decreased and the appraisal
16 has been shared -- this appraisal was done as July
17 of 2014, so did anyone -- did the beneficiaries
18 get this appraisal?
19 MR. ROSE: No, Your Honor. In fact, I would
20 not -- I would like you, if you would, ore tenus,
21 to expand your injunction to prohibit the filing
22 in the public records of any of these exhibits,
23 including the appraisal and --
24 THE COURT: I'm holding on to the exhibits.
25 I'm not filing them.

1 MR. ROSE: He has a copy of them, though. He
2 now has the appraisal. I would not have advised
3 he be given a copy --

4 THE COURT: He can't -- Eliot can't file
5 anything without sending it to me first.

6 MR. ROSE: But he puts it on the Internet,
7 and we don't want the appraisal to be on the
8 Internet.

9 THE COURT: I've already ordered him not to
10 do anything directly or indirectly -- contact any
11 aspect of this transaction -- with the buyer.
12 That's direct or indirect.

13 MR. ROSE: We didn't share the appraisal
14 because, frankly, we were concerned it would be
15 public and that would defeat their chance of
16 selling it.

17 THE COURT: I'm not -- look, nothing is easy
18 here. It's not going to get easier until we can
19 get hearings where I can start to knock off some
20 of the issues, which is what I have been saying
21 now like a broken record.

22 At some point, either Eliot is going to be
23 sustained on his positions or he's going to be
24 overruled, but one way or the other, we can put
25 some of this stuff to rest. The problem is we're

1 MR. ELIOT BERNSTEIN: No. Your Honor, you
2 just said in the last hearing --

3 MS. FOGLIETTA: Your Honor, if I could --

4 THE COURT: Hold on. It's her motion.

5 MS. FOGLIETTA: If I could, I want to clarify
6 a few things because we went so quickly through
7 it, and I just want to bring to Your Honor's
8 attention, if I may approach, an order that you
9 prior entered on this, on Mr. Brown as curator,
10 his motion, where you capped the price of the
11 inspection at \$500 for Mr. Hittel to do it and
12 then you included language that Ted and Eliot
13 could be there, but only could be outside.

14 So what my petition has, which is directly
15 under that order I've just handed you, Judge, is
16 we're actually asking for a few things, and I want
17 to address something Mr. Rose brought up outside
18 to me, too, that I just confirmed with
19 Mr. O'Connell. We're asking for an appraisal, an
20 inspection, and to take possession and move the
21 property in the house. Now, when Mr. Hittel
22 originally agreed to that \$500, that was if things
23 were not boxed in boxes in the house. We have
24 since found out that there are. He had said
25 previously, if things are boxed, now I need an

1 doing all of this business with some of the metes
2 of the case still up in the air where I haven't
3 been able to adjudicate; the claims that Ted
4 should be removed; the claims that there's
5 wrongdoing beyond Spallina and Tescher, the trust
6 is not valid. I mean, give me a chance to rule on
7 that, because once I rule on that, then the matter
8 is over with on those and you'll know one way or
9 the other what to do.

10 Do you understand what I'm saying? I think
11 we have hearing time coming up. Let's use that,
12 you know, prioritize hearings on this case. So as
13 soon as we can, I'll give it to you.

14 MR. ROSE: I appreciate that.

15 We have one other thing, three seconds.

16 Miss Foglietta would like to go forward with
17 the inspection on Friday and I have no objection
18 to it. It had to be done at any point and she
19 already had it scheduled.

20 THE COURT: That's fine.

21 MR. ROSE: The only issue is, your prior
22 order was that Eliot could be present outside of
23 the house but not go physically into the house
24 during the inspection. We'd just like to maintain
25 that same ruling.

1 assistant and it's not going to cost \$500.

2 So what I am seeking is to have Hall and
3 Hall, a different appraiser, actually do this, not
4 Mr. Hittel, at a rate of \$125 an hour, and also to
5 get him an assistant at a rate of \$100 an hour.
6 So that's the first thing.

7 THE COURT: And the tasks these people will
8 undertake is what?

9 MS. FOGLIETTA: To inspect the property
10 that's currently there because there's been
11 allegations some of the property is missing; to do
12 another appraisal because there's been allegations
13 that the first appraisal was done incorrectly.

14 THE COURT: Appraisal of the personality?

15 MS. FOGLIETTA: Yes, Judge.

16 THE COURT: Let me ask you something. This
17 is being done this way in connection with the sale
18 of the property?

19 MS. FOGLIETTA: Well, we had always planned
20 on filing another motion because we found out
21 Mr. Hittel couldn't do the appraisal -- or the
22 inspection -- excuse me -- that you ordered for
23 \$500 and now we've just, you know, kind of brought
24 it to the forefront here because of the sale of
25 the property. But, either way, it needs to get

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1 done. It's always been something that's on our
2 plate.
3 THE COURT: So inside this house is what that
4 belongs to the estate?
5 MS. FOGLIETTA: Personal property of the
6 decedents. Furniture -- I haven't seen it myself,
7 but I believe it's furniture, things that are
8 boxed, all sorts of trinkets and things, but the
9 way that I understand it, it's boxed, tangible
10 personal property, and also personal property
11 that's just outside.
12 THE COURT: And none of that is being sold
13 with the unit; is that true?
14 MR. POLETTO: Correct.
15 MS. FOGLIETTA: That's what I have been told.
16 I haven't seen the contract.
17 THE COURT: So everything, then, other than
18 things that are not to be detached, is going to
19 leave there and go to the estate, is that the
20 idea?
21 MS. FOGLIETTA: Yes.
22 MR. ROSE: It is. I would suggest, if
23 there's not a closing, you don't empty the house.
24 THE COURT: Okay. I understand that.
25 MR. ROSE: There's two different issues.

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1 They can do their inspection. I have no problem
2 with that.
3 THE COURT: Okay.
4 MR. ROSE: And we understand there's an
5 increased cost. I don't believe they should do
6 another reappraisal.
7 THE COURT: Well, I don't know that I need an
8 appraisal now. If you want to, in anticipation
9 that there's going to be a closing and that the
10 items of personalty are going to leave there and
11 go somewhere else, and where will be at the
12 direction of the PR; you'll say where you want
13 it -- you know, the idea of having an appraisal is
14 something we can wait on because -- I mean, the
15 items are in the house now and ultimately they
16 will be taken out of the house.
17 MS. FOGLIETTA: The only reason we were
18 asking that is because we have to have Hall and
19 Hall already go to the house to do the inspection,
20 and since he will already be there charging the
21 same rate, we figured we might as well just have
22 the appraisal all done at the same time rather
23 than having him have to go back and us come back
24 on another motion, you know, and go through that
25 whole thing, so if we could just do it all at the

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1 same time --
2 THE COURT: How much is this going to cost,
3 though?
4 MS. FOGLIETTA: It depends how much is in the
5 house. I don't know. It could take one day, it
6 could, at the most, take two days. From what I've
7 been told from Mr. Rose, there's not all that much
8 there. I'm hoping it will be one day, but it's
9 hard for me to say without actually having --
10 THE COURT: Well, one day and between the two
11 people, that's \$250 an hour, so eight hours, that
12 now could be, you know --
13 MS. FOGLIETTA: And if he's got to go there,
14 anyway, to do the inspection, he might as well do
15 the appraisal.
16 THE COURT: The appraisal is included in that
17 time frame.
18 MS. FOGLIETTA: That's right, Judge, yes,
19 it's for both. That's the rate we were quoted for
20 both. So I would ask that, you know, so that he
21 doesn't have to go back and incur additional fees,
22 so we don't have to file another motion, incur
23 additional fees, that we could do the inspection,
24 the appraisal, and then take possession and
25 store --

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1 THE COURT: Well, not possession, because it
2 needs to sell with furniture in it. That makes it
3 more --
4 MS. FOGLIETTA: We could hold off on that.
5 That was only in anticipation of the sale, Judge,
6 that portion of the motion.
7 THE COURT: Okay. So inspect and appraise.
8 Approved to inspect, appraise, but not remove.
9 MS. FOGLIETTA: And then the next thing,
10 Judge, part of this motion was inspection of some
11 office property, which we briefly spoke about
12 yesterday. Mr. Rose said there's nothing there,
13 but I just wanted to be clear that Your Honor
14 still, you know, allows us to go ahead and inspect
15 it and appraise that.
16 THE COURT: You're allowed to inspect the
17 property under the rules, true? Yes.
18 MS. FOGLIETTA: And then Mr. Rose agreed
19 yesterday that the trust would pay for, and Eliot
20 had no objection, the inspection and appraisal of
21 the home -- of the property in the St. Andrews
22 home and we would ask for the same thing for the
23 office stuff, although it seems like there might
24 be nothing there. There may be no cost associated
25 with it.

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1 THE COURT: Well, if you have an assistant,
2 if there's nothing in there, that cost could be
3 minimized by someone verifying there's nothing in
4 there.
5 MS. FOGLIETTA: That's correct, Judge.
6 THE COURT: That sounds like it's a quick
7 thing.
8 MS. FOGLIETTA: And then two other things.
9 The prior order that you have in front of you did
10 limit Ted and Eliot from going in, and then Your
11 Honor made -- whether it was a ruling or not, I
12 don't know -- but you made a statement at
13 yesterday's hearing that Eliot was allowed in and
14 was allowed to video it, so I just wanted Your
15 Honor to know there was a prior order that you
16 entered and I wanted to make sure that the estate
17 wasn't doing anything contrary to either your oral
18 statement yesterday or written ruling prior.
19 THE COURT: Let me look and think about this.
20 Okay. I'm going to reverse myself.
21 Eliot, you're not going in.
22 MR. ELIOT BERNSTEIN: Your Honor, can I
23 explain why you made that decision?
24 THE COURT: I'm leaving everything in there.
25 MR. ELIOT BERNSTEIN: This is very important.

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1 THE COURT: What? Go ahead.
2 MR. ELIOT BERNSTEIN: The reason you made
3 that decision yesterday is because Joi found out
4 yesterday that -- not the only thing in the house
5 is supposed to be my dad's house stuff, 4,000
6 square feet of furniture and possessions of my
7 mother's condominium are also supposed to be in
8 that house. You made a court order to inspect
9 those items at that property. We just found out
10 yesterday from Joi that there are claims that
11 Mr. Rose has, or Ted, somebody has sold, or
12 otherwise moved properties.
13 THE COURT: So what's there to inspect?
14 MR. ELIOT BERNSTEIN: Well, to find out
15 what's missing from --
16 THE COURT: Here's the thing: The appraiser
17 that goes in is going to not look at title, but
18 look at items in the house. They will photograph
19 and prepare a report of what's in there. They are
20 not going to remove it. It is staying in there,
21 so I'm not sure what you're getting at.
22 MR. ELIOT BERNSTEIN: They are saying nothing
23 is left.
24 THE COURT: Nothing left of what?
25 MR. ELIOT BERNSTEIN: Of the personal

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1 property.
2 THE COURT: Well, no, there is personal
3 property.
4 MR. ELIOT BERNSTEIN: Of Si, not of Shirley.
5 THE COURT: But, see, the appraiser is not
6 determining title. He's going to determine what's
7 in there and what it's worth.
8 MR. ELIOT BERNSTEIN: Well, the Court was
9 told one thing. He had no right to sell personal
10 property, meaning that was in their custody.
11 THE COURT: Okay. I'm not dealing with -- if
12 something is sold, I'll deal with that.
13 MR. ELIOT BERNSTEIN: I'm a beneficiary. Why
14 would you preclude me from the inspection?
15 THE COURT: Because I want to. I think
16 you'll be disruptive.
17 MR. ELIOT BERNSTEIN: I won't.
18 THE COURT: I'm ruling on that.
19 MR. ELIOT BERNSTEIN: I promise you not to be
20 disruptive in any way.
21 THE COURT: The answer is no. You can be
22 present, you can stay outside, you can watch the
23 appraiser go in. If he wants to speak to you, he
24 can, but you can't make him. He's going to look
25 at whatever is in there, he inventories, he

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1 photos, he does all of that, and then it's
2 available to be looked at at some point later on.
3 And I don't want this being a show, and that's why
4 I'm changing my mind.
5 MR. ELIOT BERNSTEIN: Here is the other part.
6 If we're going to do this evaluation of the house,
7 Mr. Poletto, in his statement says that -- in his
8 affidavit or something says there's \$300,000 of
9 damages and remodeling costs and it's in -- well,
10 I was with my dad a lot at his house before he
11 died. The thing was immaculate, perfect, just had
12 an elevator put in. I don't know the cost.
13 THE COURT: What's your point?
14 MR. ELIOT BERNSTEIN: The house wasn't
15 crumbling apart like it's being portrayed. I want
16 to know: Did they rip out the copper? Is the
17 wall missing?
18 THE COURT: You have an inspector who did an
19 appraisal and went in.
20 MR. ELIOT BERNSTEIN: I haven't looked at
21 that yet.
22 THE COURT: He describes the condition and
23 there's --
24 MR. ELIOT BERNSTEIN: If I'm going to get
25 another inspector, or possibly a second opinion,

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1 I'd sure like to go in.

2 THE COURT: Well, if -- not you. If you make

3 a bona fide motion to have it inspected by a bona

4 fide appraiser, I might let that person in. Maybe

5 there won't even be an objection on their side.

6 Because no one -- an appraiser is not going to

7 move stuff around. They are going to look, take

8 pictures. You know, that's the problem. They

9 don't want you in there.

10 MR. ELIOT BERNSTEIN: So they are going to --

11 they are going to take pictures. Can Joi take

12 video, possibly?

13 THE COURT: Well, I'm not telling them how to

14 do their job.

15 MR. ELIOT BERNSTEIN: So there will be photo

16 evidence.

17 THE COURT: We'll see where it goes, but for

18 what you want to accomplish, you need to do it

19 through separate motions, if you think there is

20 something in there, but why don't you wait and see

21 what, at least, is reported about being in the

22 house and make up your mind what you want to do.

23 MS. FOGLIETTA: Judge, I'll use the same

24 language from previous order.

25 THE COURT: Yes.

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1 MS. FOGLIETTA: And the very last thing,

2 which shouldn't take long, is we need \$500 from

3 the trust to put up front as an initial deposit to

4 get this thing rolling tomorrow so I would ask

5 that as part --

6 THE COURT: Any objection?

7 MR. ROSE: There's no objection. One

8 clarification. I personally am not paying any of

9 this. Under the statute that allows the personal

10 representative to request money from a revocable

11 trust, we've agreed, for this purpose only, we'll

12 advance the costs. I'll give her a check for \$500

13 today from our trust account.

14 THE COURT: Thanks. Bye.

15 MR. ROSE: Thank you for your time.

16 THE COURT: No problem. I need to get to my

17 trial. Take this stuff back, please. I'm giving

18 you the exhibits back, I'm not taking them.

19 MR. ROSE: I'll hold them.

20 THE COURT: Get me that order, make sure

21 Eliot doesn't contact this buyer directly or

22 indirectly.

23 MR. ROSE: When should we set another

24 hearing?

25 THE COURT: We have a closing now set for

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1 April 20th so, Eliot, you need to do your due

2 diligence. If you're going to want something to

3 be done, set it so I can hear it before the 20th.

4 So if you want to file something, get me what you

5 want to file, don't file it, I'll look at it, I'll

6 give you a hearing date before the 20th, if it's

7 bona fide. Otherwise, they are going to look

8 forward to selling this on the 20th.

9 MR. ELIOT BERNSTEIN: Can I, right now,

10 schedule this hearing to continue so I can deal

11 with the legality of if this is a legal sale? I

12 mean, we're going to have to deal -- I don't care.

13 If the price is right -- look, Your Honor, if the

14 price is right, I'm all for it, but if the deal is

15 going to put it into a legal quagmire of fraud,

16 possibly, and make decisions that lead us down

17 that path, I think I have to have a hearing that

18 continues this hearing to determine if the trustee

19 is acting within the statutes. It's real simple.

20 If he's not, then whether the price is good or not

21 isn't the key, the key is the statutes aren't

22 being followed. I don't want to have to bond

23 people, but, you know, obviously if we're going to

24 take a risk of violating statutes to get a sale

25 done because there's a buyer who just popped out

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1 of the woodwork today --

2 THE COURT: Okay. But I can't give you a

3 hearing right now. I've got to start my trial.

4 If you file something, I'll get you a hearing.

5 MR. ELIOT BERNSTEIN: So a continuation of

6 this hearing?

7 THE COURT: Or something new. They are

8 still -- right now I know the sale is for

9 April 20th. They are going to come in before then

10 to get an order that actually allows them to close

11 on that date.

12 MR. ROSE: Or I will advise you that they

13 canceled. We'll keep you posted.

14 THE COURT: Or they have canceled. One of

15 the two. Okay. Bye.

16 MR. ELIOT BERNSTEIN: Thank you.

17 MS. FOGLIETTA: Judge, would you like me to

18 write this up and send it to you?

19 THE COURT: Yeah. I don't have time to do

20 that now. Thanks.

21 (The hearing was concluded at 2:10 p.m.)

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CERTIFICATE OF REPORTER

THE STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, APRIL Y. SEGUI, Registered Professional Reporter, Florida Professional Reporter, State of Florida at large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 16th day of April, 2015.

April Y. Segui



APRIL Y. SEGUI, RPR, FPR

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