

The New York Times

Market Indicators: Multiple Bids, Unbound Binders, Frayed Tempers

By **Dennis Hevesi**

Sept. 21, 1997

IF the perils of Carol Joyner's quest through the rugged terrain of the residential real estate market -- pocked as it is by the pitfalls of multiple bidding and unrequited contracts -- were scripted for a silent movie, it would be a cliffhanger.

And the episodes might be titled: "High Hopes," "Naivete," "Avarice," "Betrayal," "Dashed Dreams" and -- not to give away the ending -- "The Denouement."

Ms. Joyner and her husband, Gerald, are among the thousands of would-be buyers who have been frustrated, even infuriated, by a sales market in which the search for the "right one" can last a year, contracts seem less than contractual, bidding wars boost prices beyond what was initially asked and even a winning bid can be cause for dismay.

"I've seen buyer's remorse after fiercely competitive bidding, whether they win or lose," said Barbara Corcoran, chairwoman of the Corcoran Group, a leading Manhattan brokerage.

Before their search ended, the Joyners would see five bids rejected, three contracts left unsigned by a seller, three deposit checks uncashed and one vacation disrupted. "I guess we were a bit naive about all of this," Ms. Joyner said.

Multiple bids, outright bidding wars and sealed-bid auctions have been commonplace in the posher precincts of Manhattan for at least a year. But multiple bidding, that barometer of a pressurized market, has become increasingly evident in the other boroughs of the city and its surrounding suburbs in recent months, real estate brokers, lawyers and customers attest.

"The cursed multiple bidding," said Michael Ford, president of the New Jersey Association of Realtors, tongue only slightly in cheek. "We are seeing it here in Union, Middlesex, and my brokers in Bergen tell me its happening up there."

Ed Gitlin, a broker for Benjamin Realty, which has offices in Forest Hills, Queens, and Syosset, L.I., said, "It's not unusual that one house will have an accepted offer with two or three backup offers.

"I had an instance on a split-level, three-bedroom in North Syosset where an owner accepted an offer and it fell through," Mr. Gitlin said. "Then they accepted another offer as a backup and that fell through, and now they have another offer that they've accepted with two backups."

With the economy humming, conventional mortgage rates hovering in the attractive 7.7 percent range, an abundance of buyers, and computers giving brokers instant access to all the latest listings, multiple bidding is back.

But the phenomenon is more than a measure of demand; like a self-fulfilling prophecy, it is a spur to further demand. And so, with buyers virtually lining up (in one instance on Long Island actually waiting in the next room), sellers are holding off on signing contracts, even after their asking price has been met. Buyers are taking worrisome risks by dropping standard contract clauses -- like those that make the deal contingent on the results of an engineer's inspection, or even on the ability to secure a mortgage -- then feeling betrayed when a deal they thought was done collapses. And all the parties, even the brokers nursing clients through the process only to see commissions slip away, are being discombobulated.

None more so, perhaps, than the Joyners. The couple -- she a child-care agency director, he a union official -- had been subletting a one-bedroom co-op in Park Slope, Brooklyn, and began looking for a two-bedroom in a prewar building a year ago, about the time their 2-year-old daughter, Camara, began scaling the railing of her crib and crawling into her parents' bed most nights.

Hoping to remain near Prospect Park, they offered \$200,000 for a three-bedroom on Plaza Street -- the circle around Grand Army Plaza -- only to be told the price had to be \$250,000. Soon after, however, the seller called, Ms. Joyner said, and proposed that "if we exclude the broker and come up a bit, he'd reconsider."

The Joyners offered \$230,000 -- through their broker. The bid was accepted, a contract was signed, "and then he said he didn't want to sell, they had a higher offer," Ms. Joyner said.

A few weeks later, the same seller called again and said the second bidder had withdrawn, "are we still interested?" Ms. Joyner said. "So we signed the contract again, sent the check again. And then he told us he got a cash offer from somebody else; he'd rather that."

And then the cash deal fell through.

"We're gluttons for punishment," Ms. Joyner said. "But the third time we weren't stupid enough to just sign the contract. We had our lawyer call before the contract was sent to confirm that they were serious, and their lawyer said he knew nothing about the deal. So my husband told the seller to go to hell. And that apartment is still vacant, a year later."

A glut of offers can obviously be a hair-puller for potential buyers. As Mr. Gitlin said, "They really are between the earth and the sky, not knowing whether they should go looking at other homes or just wait and see if the other deal falls through."

But it can "drive the sellers crazy, too," Mr. Gitlin said. "It's a nerve-racking experience. You have to baby-sit everybody, nurse them along."

And as Marilyn A. Donahue, president of a brokerage that bears her name and serves brownstone Brooklyn, put it: "We're trained to believe that an O. & A. -- that's offer and acceptance -- means something, but we're discovering that it doesn't always mean very much. Between an O. & A. and the contract, it's like running the gantlet for the last mile."

TAKE the case of Julius Kahn, a teacher, and Sheryl Kamil-Kahn, a cosmetics sales manager, both single parents of a total of five children until their wedding last month. The couple wanted to sell Mr. Kahn's home, a three-bedroom, split-level on Leahy Street in Jericho, L.I., for about \$275,000.

"It became a multiple-bidding scene," Mr. Kahn said. "I had an offer for \$280,000 that I accepted and signed a binder. Two days after that, I was offered \$287,000."

Because he had signed a binder, Mr. Kahn could not accept the second offer. But after all the inspections and engineering reports had been completed, the first buyer began making more demands. "They wanted me to take out asbestos insulation around the pipes in the garage, to repair concrete around the house," Mr. Kahn said. "They wanted a second engineering inspection, but it would be after the terms of the binder expired." During those negotiations, the second buyer found another house.

After the binder expired, Mr. Kahn relisted his house, with a third and then a fourth buyer soon making offers. There came a night in June when Mr. Kahn was negotiating with one prospective purchaser in one room of his house while another waited in an adjoining room, and all the while the original procrastinator was still haggling.

"It was unbelievable," Mr. Kahn said. "It was difficult to sleep. I was very anxious because we had already purchased a home and I needed the sale of my house to consummate the purchase of the new house. It was difficult to tell my mortgage broker how much of a mortgage I required. And, as a result, the people from whom we purchased were getting anxious."

Eventually, the house on Leahy Street went to the third bidder, for \$281,000.

"On top of getting married, packing up two houses and making the Brady Bunch, it's been a little hectic," said Mrs. Kamil-Kahn. At one point, she said, "We thought we would get a trailer and camp out, just drive around."

That sort of furious activity is, of course, a function of a heated market. Until the current quarter, in which preliminary data are indicating a slight leveling off, average sales prices in Manhattan below 96th Street increased five straight quarters, according to one survey, by the Halstead Property Company. "Pretty stunning appreciation, by any standard," said Clark Halstead, the company's founder.

Over the last year, the Halstead report said, prices for all apartments increased 13 percent, with a large two-bedroom jumping 20.1 percent, to \$790,416.

Price increases in the suburbs have been less dramatic, but still substantial. In northern New Jersey, for example, the state's Association of Realtors reported that the median price increased 7.2 percent in the 18 months ended in June, from \$188,100 to \$201,300. And in Westchester, the median price increased 4.8 percent in the last year, from \$292,000 to \$306,000.

To be sure, those numbers point to the possibility of reaping abundant satisfaction from the current market. Witness Ms. Corcoran's tale of a gleeful turnaround for one couple who signed a contract in February to pay \$1.4 million for a two-bedroom condominium on the Upper East Side. "They immediately changed their mind, even considered losing their deposit -- 10 percent," Ms. Corcoran recalled. "But the broker convinced them to make the deal and resell."

The couple closed on the apartment in May and immediately listed it for \$1.5 million. "They had three offers above their asking price within five days," Ms. Corcoran said. The winning bid: \$1.74 million -- \$340,000 more than the couple had paid in May.

But, given its potential for confounding machinations, multiple bidding also carries with it the possibility for difficulty beyond mere aggravation. There is, of course, the possibility of overpaying. And then there is the risk of legal entanglement.

Michael Finder, a real estate lawyer in Manhattan, said he generally advises buyers:

"Don't participate in a bidding war because, once the game starts, you never know where the ceiling is going to be. What are technically not auctions, these days, often evolve into de facto auctions and it's easy to overpay."

For those sellers who court multiple bids, Mr. Finder cautions that they could find themselves liable to claims for commissions from several brokers, each of whom has produced a prospective buyer who was "ready, willing and able" (the legal standard for such a claim) to make the deal.

"Let's say Broker A calls and says, 'John Doe is willing to pay your asking price,' and you say, 'Great,' " Mr. Finder said. "An hour later, Broker B calls and says that Jane Jones would like to buy the house. You respond by saying, 'Somebody's already offered me my asking price.' Broker B says, 'Well, I've been authorized to offer \$10,000 over because she really wants it,' and you say, 'Great.' Then you proceed to sign a contract with Jane Jones.

" 'Great' sounds like assent, doesn't it? It's not like, 'I want to think about it.' There's no reservation expressed there. I have had, fairly commonly, sellers call up and say, 'Gee, do I have a problem here?' where they have five buyers all willing to pay a price above asking, each brought in by a separate broker. And the answer is there is the possibility that four of those brokers will make claims."

Sometimes, said Ms. Donahue, those brokers will hire a lawyer "to recover any money put out for bank application fees or from hiring an engineer for an inspection."

Even more daunting, in New Jersey, where the requirements for what constitutes a real estate sales contract were relaxed by the Legislature last year, a seller might be liable for far more than the commissions of thwarted brokers. Unwittingly, he or she might sell the same property to more than one buyer, said Eric M. Davis, a real estate lawyer who practices in both New Jersey and New York.

"Sellers must be very cautious about competitive bidding in New Jersey because what was considered a safeguard, namely that they needed a written contract, may not be required," Mr. Davis said.

The vice chairman for real estate for the New Jersey Bar Association, Joel M. Rosen, concurs with Mr. Davis's interpretation of the change in the law, but believes the likelihood of legal problems is slim because of other safeguards in the system.

Real estate transactions in New Jersey, New York and Connecticut all fall under what is called the Statute of Frauds, a common-law principle legislatively adopted in all three states, which establishes the standards for a legal writing, or contract. In the interests of consumer protection, the New Jersey Legislature revised the Statute of Frauds so that an exchange of letters could be construed as a contract.

"Let's say you own a house in Bergen County and I offer to buy your house for \$150,000 by sending you a letter," Mr. Davis said. "And you respond to that letter by saying, 'Yes, I'm interested,' and then write back saying that the offer is acceptable with a term for closing in 45 days and describe the property."

Because of the change in law, a purchaser might be able to obtain a legal determination that he or she has, indeed, acquired the property. "This becomes a problem where a seller has sent out letters to several people in an effort to get a higher price," Mr. Davis said.

MR. ROSEN of the bar association said, "That could happen, but my own feeling is that such would be an extraordinarily isolated case." New Jersey (unlike New York or Connecticut) has a statutory three-day "Attorney Review Period," during which either party to a real estate sales contract can back out of the deal for any or no reason without damages.

"Really, what happens," Mr. Rosen said, "is that most transactions for a house are done through a broker, which means, by virtue of the three-day review requirement, that there will be a written contract. So it is extremely unlikely that the parties would

memorialize the transaction through an exchange of letters that could conceivably be recognized as a sufficient writing under the revised Statute of Frauds."

Still, with the parameters of the change in the statute not yet drawn by the courts, Mr. Davis said: "The big warning to sellers who are engaging in multiple bidding in New Jersey is that you may become a test case. Rarely is there glory in being a test case; however, there certainly are legal expenses."

With all the psychological and legal complications, Randi Hutton's advice to all parties is to avoid combat. Ms. Hutton, a broker at Weichert Realtors in Westport, Conn., said that if an agent thinks there are going to be multiple offers on a property, "which you do know when you have contact with other agents, then I suggest the agent go to the seller and advise them not to accept the first offer, but rather go to a closed bidding situation.

"You want everybody to have a chance to go to their highest, best offer," she said. "That's what you as a professional have to be able to do, present it in a way that you're doing this for fairness. The worst way for everybody is to create a bidding frenzy, because when you do that trust gets lost."

For the Joyners, the Brooklyn couple whose ability to trust had already been pummeled, there would be further blows during their ongoing search for an apartment with a bedroom for Camara, their night-wandering toddler.

After finally telling that one shifty seller where to go, the Joyners set their sights on a prewar building on Eastern Parkway. But, one after another, their offers for five apartments there were rejected.

Then, seemingly, hopefully, at last, their bid on a three-bedroom in that same building was accepted; the contract signed, the check sent. "So, we went on vacation to celebrate," Ms. Joyner said, "and the whole time we were checking our bank account to see if the check was cashed, calling our lawyer to see if they had signed the contract. And their lawyer kept saying, 'Any day now.'"

"We get back home from vacation only to discover from our realtor that they had signed a contract with another party and they were holding onto our check and contract as a backup."

To avoid just those sort of setbacks, some buyers have resorted to sometimes simple, sometimes incautious, tactics.

In a sealed-bid auction, one buyer, his sights set on a two-bedroom co-op on the Upper East Side, bid just above what he figured the apartment would go for and won by a margin of \$132 -- his \$360,132 offer edging out the next highest bid of \$360,000.

Other buyers take the risk, sometimes successfully, of forgoing standard contingency clauses in the contract to rivet the interest of the seller.

"You can get caught up in the frenzy," said Mr. Rosen of the New Jersey bar association. "I've seen buyers in a bidding war, for example, agree to do away with the ordinary request for a home-inspection contingency, or a mortgage contingency. What makes it reckless is the fact that they may be bound to the contract and then be unable to actually obtain financing."

Steven and Terry Lewis took that chance and, fortunately, won.

THE Lewises paid \$649,000 for a house they actually don't want -- a "small ranch on an acre" down the road from their home in Westport, Conn. "The new house, actually, I purchased to tear it down and build a new one," said Mr. Lewis, a stockbroker.

The Lewises, who have an 8-year-old daughter, Madison, hope to sell their current home for at least \$1.3 million and use the difference to build a bigger house on the new property.

"Six hundred and forty-nine thousand for a small ranch," Mr. Lewis said. "When I was a kid I figured I'd be living in a mansion for \$649,000."

And, yet, on the day he found out that the house was on the market, Mr. Lewis "ran over there, gave them my check." The next day, he found out that there were six backup bids and numerous other inquiries. "I went full price and I waived all my contingencies, mortgage and inspection," Mr. Lewis said. "I figured I wouldn't even give them time to think."

The reason he acted so quickly, Mr. Lewis said, was frustration. Several weeks earlier, he had tried to buy vacant property by the beach in Westport and lost out to a builder. "We both bid full price, \$545,000, for a piece of empty land." The sellers went to sealed bids. The builder won, at \$577,500, Mr. Lewis said. "So I knew I didn't want to get into another bidding war."

As for Carol and Gerald Joyner, they, too, were -- finally -- rewarded for their frustrations.

A few weeks after returning from that frenetic vacation, only to find that once again they had been strung along by a bet-hedging seller, another apartment in the same building on Eastern Parkway became available.

"Within a couple of months we had a contract, closed and moved," Ms. Joyner said. "It's a beautiful three-bedroom with views of Manhattan and lovely space, wonderful light."

The price (perhaps some hint of cosmic justice): \$180,000, "much less than any of those other apartments," Ms. Joyner said.

"And Camara loves it. She likes her own bed, and when people come to the house she takes them by the hand and says, 'Come, let's play in my room.' "