

Massachusetts court allows suit to enforce real estate deal even though purchase and sale agreement never executed



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In what has become an increasingly common occurrence, the prospective buyer of commercial real estate, in *Ferguson v. Maxim*, No. 18-P-1098 (Appeals Court, November 6, 2019), sued for specific performance of a real estate deal based on imperfect negotiations which were never memorialized in a purchase and sale agreement, a so-called *McCarthy v. Tobin* claim based on the seminal case of *McCarthy v. Tobin*, 429 Mass. 84 (1999). In *McCarthy*, the Supreme Judicial Court declared that it was the law of the Commonwealth that a buyer may enforce a real estate transaction based on imperfect negotiations even though a contemplated purchase and sale agreement was never executed.

In *Ferguson*, Maxim accepted Ferguson's offer to purchase real estate located in Leominster for the sum of \$245,000.00. The rather standard executed offer agreement contained the basic elements of the transaction – identified the property, stated the purchase price and deposit terms, specified the time and place of closing and set a deadline for executing a purchase and sale

agreement. The parties then began to negotiate the terms of the purchase and sale agreement with counsel for Maxim preparing a first draft. The draft was not circulated until after the purchase and sale deadline had passed and negotiations continued well past the date set forth in the offer for its execution. While the parties discussed an extension of the deadline, no such extension was ever granted or denied. Approximately four weeks after the offer agreement was entered into, Maxim's attorney abruptly notified Ferguson's attorney that all negotiations were terminated.

Ferguson then sued seeking specific performance of the offer and court approval for the recording of a *lis pendens* (Latin for "suit pending") in the registry. The trial court dismissed Ferguson's Complaint and denied the *lis pendens*. On appeal, the Appeals Court allowed Ferguson to pursue his lawsuit but decided to dissolve the *lis pendens*.

The *Ferguson* case is notable for two reasons. First, the Appeals Court allowed Ferguson's case to proceed even though his Complaint omitted information regarding ongoing negotiations toward a purchase and sale and the fact that there were five sellers who needed to be in agreement. The Appeals Court held that all of those facts were irrelevant since the key question in assessing a *McCarthy v.*

Tobin claim is whether the agreement that was entered into was capable of being enforced by the Court notwithstanding the fact that a subsequent purchase and sale agreement was not executed. In the words of the Appeals Court, "[v]iewing the offer as the parties' completed agreement for the sale of the Leominster property, the purchase and sale would have been merely a polished memorandum of an already binding contract."

Second, the Appeals Court did affirm the Trial Court's decision to dissolve the *lis pendens* that was recorded on the subject property, relying on a technicality. The Massachusetts Legislature has implemented a rather complex procedure for dealing with requests for a *lis pendens* which recognizes the powerful effect of recording a *lis pendens* on title to real estate and the need to notify third parties that a parcel of real estate is subject to litigation. Thus, the *lis pendens* statute, G.L. c. 184 § 15, requires a plaintiff seeking a *lis pendens* to certify under the penalties of perjury that the complainant read the complaint, that the facts stated therein are true and that no material facts have been omitted therefrom.

In *Ferguson*, Ferguson failed to make such certification; however, he did file the Complaint as a Verified Complaint which, under the penalties of perjury, swears that he

read the Complaint and the facts are true to the best of his knowledge and belief. The Appeals Court found that the certification requirement of the *lis pendens* statute was "not one of mere form" and affirmed the dissolution of the *lis pendens*. It did so, notwithstanding the fact that the Court concluded that any omitted facts did not foreclose the viability of Ferguson's legal theory, and notwithstanding the liberal pleading rules in Massachusetts which freely allow amending pleadings when there is no showing of harm. Here there was no harm since a) the Court ruled that any "omitted facts" did not eviscerate Ferguson's claim, and b) all of the facts were fully vetted during several court hearings. The Court concluded, however, that it was not an abuse of discretion for the trial court judge to refuse to allow Ferguson to amend his Complaint to cure the technical defect.

What lessons can be drawn from *Ferguson*? Certainly, one must exercise great care in executing an offer to purchase real estate – it can become an enforceable agreement even without a purchase and sale agreement. And when seeking approval of a *lis pendens*, dot your "i"s and cross your "t"s.

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