

Choice of remedies after P&S breached

But buyer can't get counsel fees

By: Eric T. Berkman © June 5, 2014



A buyer in a real estate deal could choose between specific performance and compensatory damages after conduct by the sellers' attorney elevated the anticipatory repudiation of a purchase and sale agreement to an actual breach, the Supreme Judicial Court has ruled.

The buyer planned to turn the sellers' farm into a development of single-family homes. A price dispute arose during the permitting process

after the P&S was signed. Amid the dispute, the sellers anticipatorily repudiated the P&S when their real estate attorney claimed they had a higher offer.

Despite litigation over that breach, the parties held a scheduled closing after the buyer secured its permits. At the closing, the sellers' attorney engaged in behavior — which included bringing along a videographer over the buyer's objections and taunting the buyer's counsel with closing documents that he would not allow the attorney to examine — that, according to the findings of a Superior Court judge, guaranteed that the deal would fall through.

On appeal, the sellers argued that they were responsible only for an anticipatory breach, and, thus, the trial judge erred in awarding monetary damages.

But the SJC disagreed, holding that the initial anticipatory repudiation of the agreement morphed into an actual breach by the sellers when their attorney's actions at closing prevented the sale from going through.

The facts relied on by the judge regarding the actions of the sellers' counsel at the closing indicated that the sellers' counsel — and, therefore, the sellers themselves — had no intention of going forward with the closing, and that he and the sellers instead intended to prevent the buyer from reaping "the fruits of the contract," Justice Robert J. Cordy said, writing on behalf of the court.

The SJC also found that the trial judge properly offered the buyer a choice of remedies, since specific performance of the agreement would have cost the buyer \$300,000 more than anticipated at the start of the suit. The court further determined, however, that the buyer was not entitled to counsel fees incurred as a result of the litigation.

The 18-page decision is *K.G.M. Custom Homes, Inc. v. Prosky, et al.*, Lawyers Weekly No. 10-091-14. The full text of the ruling can be found at masslawyersweekly.com.

Unaddressed issue

Michelle N. O'Brien of Boston, the buyer's litigation counsel, said the decision is interesting not only for what it says, but for what it does not say.

Massachusetts is the only state where the remedy for the anticipatory repudiation of a contract for the sale of land is limited to specific performance, O'Brien noted. In other states, aggrieved parties can seek monetary damages immediately.

But instead of re-examining the commonwealth's approach to anticipatory breaches, the court found that the conduct of the sellers' real estate counsel at closing amounted to an actual breach, she said.

"The practical lesson is that if a case presents these kinds of facts, attorneys should be sure to assert claims for both damages and specific performance in their prayer for relief, leaving the option to elect a remedy at the end of a case," said O'Brien, who practices at Mackey, Shea, O'Brien.

Edmund A. Allcock of Marcus, Errico, Emmer & Brooks in Braintree, the sellers' appellate counsel, disputed the trial judge's finding, affirmed by the SJC, that the behavior of his clients' real estate attorney prevented the sale from going through.

Specifically, Allcock said, litigation between the parties was already pending at the time of closing. He also asserted that the litigation stemmed from the buyer's attempt to manipulate provisions in the P&S to squeeze out a lower purchase price than called for, and that the buyer was never willing to pay the proper purchase price in the first place.

"It is disappointing that the court decided the case based on the boorish conduct of counsel at a closing," Allcock said. "While I understand that professional courtesy is and should be of paramount importance in the practice of law, it should not override substantive real estate law."

Donald R. Pinto, a Boston real estate litigator who was not involved in the case, said the decision is not unexpected.

"Given the circus-like closing... it's no surprise that the SJC gave such short shrift to the sellers' argument that they didn't actually breach the contract," Pinto said. "If the sellers' position had carried the day, that could have encouraged this same sort of gamesmanship by turning anticipatory repudiation into a low-risk tactic to scuttle a deal or force the other side to renegotiate."

Brockton practitioner Kenneth J. Goldberg said the suit highlights the risks of drafting P&S agreements when material terms depend on future events.

The sale price in the case was based on how many buildable house lots were created, with 35 buildable lots triggering a higher sale price. The buyer secured permits for 42 homes, with 10 of them on a single lot with a shared septic system.

"The buyer wanted to go by exactly how many lots were being sold, while the seller wanted to go with how many homes were being sold," Goldberg said.

"There were about a dozen more homes being sold than actual lots," Goldberg added, noting that the dueling interpretations resulted in a \$300,000 gap between the parties. "Lawyers need to be as precise as possible when material terms are left for future contingencies."

Meanwhile, Michael C. Fee of Boston said he was somewhat surprised by the SJC's reversal of the trial court's award of attorneys' fees.

The liquidated damages provision in the P&S contained language allowing the buyer to recover fees paid "in connection with this transaction," Fee said. The SJC interpreted that to not include fees related to litigation stemming from the transaction.

"The SJC found the phrase ambiguous," Fee said. "Given the context, however, I think the court took the narrowest possible view and could have just as easily concluded that the phrase 'in this transaction' includes post-breach litigation fees to enforce rights granted by the agreement."

Going forward, attorneys need to be aware of the clear line drawn between transactional and post-breach fees when drafting liquidated damages provisions, Fee advised.

Circus closing

On Oct. 12, 1999, defendant Stephen J. Prosky and two siblings signed a P&S agreeing to sell a 45-acre tract in Norton to plaintiff K.G.M. Custom Homes for development of residential homes.

The price was to be determined by the number of "approved and permitted buildable house lot[s]." According to the P&S, the sale price would be \$25,000 per lot if at least 35 lots were approved. If between 25 and 34 lots were approved, the price would be \$22,500 per lot.

The plaintiff spent the next several years acquiring the necessary permits.

In 2004, Mansfield attorney Peter T. Clark took over as the sellers' transactional counsel and apparently attempted to renegotiate a higher price. He also told the buyer's transactional counsel, Henry Sousa, to calculate its damages pursuant to the liquidated damages clause because the sellers had another offer.

The sellers did not, in fact, have another formal offer and later testified that they did not intend to back out of the deal.

In December 2004, the buyer sued the sellers alleging violation of the implied covenant of good faith and fair dealing and seeking specific performance of the sale for \$720,000 based on their interpretation of the "buildable house lot" provision.

While the suit was pending, the buyer received final approval of its plan, informing the sellers that it was ready to close and that it would appear for the closing on May 30, 2005, at Sousa's office.

On the closing date, Clark, apparently acting on his own, brought a videographer to record the proceedings as a "defense strategy." Sousa objected, triggering a heated argument, and at one point shut off the electricity to the building to prevent the videotaping.

When the parties finally attempted to complete the closing, Clark refused to let Sousa inspect the note and mortgage, instead holding them up at a distance, asking Sousa if he could read them from two feet away. Sousa told Clark the documents were unacceptable and the sale never closed.

Superior Court Judge Thomas F. McGuire Jr. held a bench trial on K.G.M.'s complaint in November 2009.

McGuire found that the sellers indeed breached the implied covenant of good faith and fair dealing via the anticipatory repudiation, which turned into an actual breach as a result of Clark's actions at the closing.

The judge also found that the amount owed for the property under the P&S was \$1.05 million as the sellers claimed, and not \$720,000 as the buyer contended. Because that would raise the price required to secure specific performance, the judge gave K.G.M. the choice of specific performance or liquidated damages. The buyer chose the latter.

In an unpublished decision, the Appeals Court affirmed McGuire's award of specific performance but reversed the option of monetary damages and his award of counsel fees.

K.G.M. appealed.

Proper choice

The SJC affirmed that the sellers committed an actual breach of the P&S.

"While parties may have disagreed over the cost, the issue could have been negotiated had Clark's actions not ensured that the matter would not be resolved," Cordy said. "Simply put, K.G.M. could not possibly be expected to close a deal for the purchase of land without an opportunity to review the note and mortgage prepared by the Proskys."

The court also found that McGuire correctly offered the buyer a choice of remedy.

"K.G.M. [initially] sought specific performance under the belief that the purchase price was far less than the price eventually determined by the judge," Cordy said. "Given that specific performance of the agreement would have cost K.G.M. almost \$300,000 more than it anticipated at the start of the suit, the judge did not err in allowing K.G.M. to elect to receive liquidated damages."

CASE: *K.G.M. Custom Homes, Inc. v. Prosky, et al.*, Lawyers Weekly No. 10-091-14

COURT: Supreme Judicial Court

ISSUE: Was a buyer of real estate entitled to choose between specific performance and compensatory damages after the sellers' attorney engaged in behavior that elevated an anticipatory repudiation of a P&S agreement to an actual breach?

DECISION: Yes

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