

Liquidated damages not available for P&S agreement breach

Seller got specific performance; not entitled to 'windfall'

By Eric T. Berkman

A seller of real estate who obtained a specific-performance order after the buyer breached the parties' purchase-and-sales agreement could not collect liquidated damages, the Supreme Judicial Court has ruled in a case of first impression.

The Appeals Court had previously decided that the liquidated-damages clause in the contract had been triggered by the buyer's breach despite the fact that the seller had ultimately received what he was entitled to under the contract.

But the SJC reversed.

"The law of contracts is intended to give to an injured party the benefit of the bargain, not the benefit of the bargain and a windfall," wrote Justice Robert J. Cordy for the court. "To award liquidated damages against the buyer for his failure to close and also specific performance to the seller requiring the buyer to acquire the property by a date certain at the contracted price, would violate the fundamental principles of contract law."

The 12-page decision is *Perroncello v. Donahue*, Lawyers Weekly No. 10-007-07.

'Reaffirmation' of law

Mitchel S. Ross of Boston, who represented the plaintiff buyer, said both he and his client were



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pleased with the SJC's "clear analysis and reaffirmation of basic contract principles."

The Appeals Court's prior decision, he explained, "had created a fairly wide impact in that knowledgeable conveyancers had begun to amend the form language of purchase-and-sale agreements to protect buyers from being caught" the way his client had been.

"Now the SJC has made it clear that the understanding the conveyancing bar had [before the Appeals Court's decision in this case] — that one could obtain specific performance or liquidated damages, but not both — remains the law," Ross continued.

Boston attorney Albert L. Farrah Jr., who represented the defendant seller, could not be reached for comment prior to deadline.

Delayed closing

In April 1998, plaintiff Joseph F. Perroncello signed a purchase-and-sale agreement to buy property at 198 Beacon St. in Boston for \$2.25 million from defendant Paul J. Donahue Sr.

The contract required the plaintiff to pay a nonrefundable \$150,000 deposit. The defendant would retain the deposit as liquidated damages if the plaintiff breached the agreement.

The P&S also contained a "time is of the essence" clause and called for a May 6 closing. But it also allowed for a 30-day extension, which the plaintiff exercised.

By June 4, the plaintiff still had not finalized the mortgage financing he needed to purchase the property, so his lawyer sent a request to the defendant's lawyer seeking to extend the closing to June 16. The defendant's attorney responded the next day with a letter saying the defendant was ready to deliver the deed immediately.

The plaintiff claims the defendant told him to continue working with his bank to secure financing and that the letter from his lawyer should be disregarded.

But on June 12, the defendant's attorney informed the plaintiff's lawyer that since the closing had not taken place, the contract had been breached and the deposit was forfeited. Nonetheless, the plaintiff and defendant allegedly had further discussions over the ensuing weeks.

The plaintiff obtained a mortgage on June 23, but the defendant apparently disregarded the plaintiff's calls and re-listed the property.

A Superior Court judge subsequently ordered conveyance of the property to the plaintiff. The plaintiff's motion for summary judgment on the seller's liquidated-damages counterclaim claim was allowed and the defendant appealed.

The Appeals Court overturned the ruling and awarded the defendant the liquidated damages, rejecting a "second-look" approach where the claim for damages should be re-evaluated in light of the specific performance.

No double dipping

The SJC disagreed with the approach taken by the Appeals Court.

"While [the remedies of specific performance and liquidated damages] may not be inconsistent in the sense that they are both premised on the validity of the contract, ordinarily a seller is not entitled to seek both remedies," said Cordy. "[T]he retention of a deposit as liquidated damages is an alternative to specific performance, not an additional remedy."

The SJC also found that the defendant had incorrectly relied on the court's 1999 *Kelly v. Marx*

decision in arguing that he was entitled to both forms of relief.

In *Kelly*, Cordy pointed out, neither party sought specific performance. Instead, the seller simply found another party who purchased the property for \$5,000 more than the original contract price. The court held that the liquidated damages clause was enforceable in that case "because potential damages were difficult to determine at the time of the contract formation, and the amount agreed to was a reasonable forecast of damages in the event of a future breach," Cordy continued. "We did not imply that liquidated damages could be obtained, in addition to specific performance from the buyer."

Because basic contract law demands that an injured party receive the benefit of the bargain but not a windfall, the SJC concluded, the defendant should not have been awarded liquidated damages.

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