

April 2006 Annual Real Estate Seminar Selected Case Summary

1) Does the exchange of emails between Buyer, Seller and Broker amount to an enforceable contract to purchase?

Lindblad v. Holmes, 2004 WL 315376 (Mass. Super.) (November, 2004)

Not in this case. In this case the exchange of emails did not amount to an enforceable contract to purchase because the parties had not reached an agreement on essential terms. The Court did note that this could have been a contract with the email signature being the signature required.

Lesson: Put the following statement in all email negotiations:

“The purpose of this email is for negotiation only and a written document containing all essential terms with handwritten signatures is required to bind the parties.”

2) Does an offer with a 60 day due diligence period, a series of contingent deposits, and provision for a general optional purchase money mortgage from Seller, amount to an enforceable contract to purchase?

Walsh v. Morrissey, 63 Mass. App.Ct. 916 (2005)

No, the terms were too vague to be enforceable. The terms of the mortgage lacked any specifications regarding interest rates or payment timing. The Court found that the offer represented merely the parties' intent to negotiate further to come up with the terms of a complex real estate transaction. Offer was by itself unenforceable.

Lesson: Put all essential terms into initial offer to purchase if representing Buyer. Have lawyer draft offer to purchase.

3) If there is no signed extension for closing, does Buyer need to show up at the Registry to enforce the contract?

Pierce, et al. v. Clark, et al., 2005 WL 1009533 (Mass. Super.)

Yes, Buyer must appear at closing, bring with him proof of his ability to make full payment, page the Seller at least three times, and then note his appearance in the Registry's default book.

Lesson: If you do not have signed extension, then you must be ready, willing and able to close. The Buyer must have the money available, go to Registry and page the Seller and then sign default book.

4) Is a Seller allowed to retain the Buyer's deposit as liquidated damages after Buyer's default even after the Buyer closes on the property for the price in the Purchase and Sale Agreement?

Perroncello v. Donahue, 64 Mass. App.Ct. 564 (2005)

Yes, the Court said Seller could recover liquidated damages from Buyer after the closing because of the provision in the Purchase and Sale Agreement for liquidated damages in the event of Buyer's breach. The Court rejected the "second look" approach to liquidated damages and was in favor of enforcing the clause where at time of agreement damages were difficult to determine.

Lesson: Make sure all extensions are in writing and signed by both parties or be willing to close on the contracted date.

5) Can a Broker receive a commission under an oral agreement with Seller if another Broker has a written agreement with Seller?

Cusick v. Carver, et al., 2005 WL 873743 (Mass. App. Div.)

Not in this case. An oral agreement was not enough where exclusive right to list, market and sell property vested in another Broker. Even if there was an enforceable oral contract, it was unilateral and revocable and any rights under it were extinguished when the Seller executed contract with another Broker. The exclusive right to list, market and sell were vested the Broker with the written contract.

Lesson: Always have your listing and commission agreements in writing.

6) Can a Broker be sued by a Buyer for fraud regarding an oral representation when the Purchase and Sale Agreement clearly stated that there were no oral representations?

Larson v. Landvest, Inc., et al. v. Scheier 2005 WL 1812471 (Mass. Super.)

Yes, Buyer of real estate could bring claims of fraud and misrepresentation against Seller's Broker despite disclaimer clause in Purchase and Sale Agreement. The judge found that the Broker could not "hide behind" boilerplate language. The Court said the Broker could not use non-negotiated, boilerplate terms as a defense against allegations of fraud.

This case seems inconsistent with existing law and may be appealed further.

Lesson: Make sure to insert addendum to Purchase and Sale Agreement: "The parties have fully negotiated every provision in this Purchase and Sale Agreement including both written and oral representations and warranties and this agreement contains all terms thereof."