

## **By Matt Pawa and Wesley Kelman - Buyers and sellers beware: Offer to purchase and even oral agreements can be enforceable in Mass.**

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When is a deal a deal? Many real estate professionals assume that an agreement to purchase land cannot be enforced until a formal purchase and sale agreement has been signed. The reality is messier. Preliminary written agreements and even wholly oral agreements can be enforced by Massachusetts courts - and not just against sellers, but sometimes even against downstream buyers.

One common way this comes up in commercial real estate transactions is where a buyer and seller sign an "offer to purchase." The OTP will expressly refer to a formal purchase and sale agreement that is to be concluded later. In these situations, one of the parties may believe itself free to back out, as long as the P&S has not been consummated. But in Massachusetts, an OTP can itself become a binding contract to convey the property. The key issue in such cases is whether the parties agreed upon all material terms and demonstrated by their actions and words that they intended to be bound by the OTP. Even where there are missing terms in an OTP, the courts will infer those terms from the circumstances as long as the agreement is not so indefinite as to be incurable. This was the result in a case in Massachusetts dealing with the sale of a multi-million dollar commercial building in Framingham in which the seller tried to back out; the court ruled he was contractually bound by an OTP even though it contemplated a subsequent, formal P&S.

In fact, even oral agreements to convey real property can be enforceable. Under the doctrine of "promissory estoppel," an oral promise to convey real property can be enforceable under Massachusetts law if the recipient of the promise has taken action in reliance on the promise and injustice can be avoided only by enforcement of the promise. For example, in a decision this year, the Massachusetts Court of Appeals held that an oral agreement for the transfer of land was enforceable where the seller tried to renege after the buyer, in reliance on the agreement, erected a commercial structure on a portion of the seller's property.

But what if the property already has been sold? Can the recipient of the promise claim the land out from under the buyer?

The answer may be "yes." The general rule is that buyers are protected if they are "bona fide purchasers" - i.e., someone who in good faith buys property for value without notice of any defects in or claims against the seller's title. Yet a third party can be charged with "constructive" or "inquiry" notice of an oral promise, such as where the buyer knew or had reason to know about a defect in title, but failed to make an inquiry that would have revealed a prior oral agreement to convey the property.

There are some important lessons here for parties to real estate transactions. First, OTPs and other preliminary agreements, and even oral agreements, cannot simply be assumed to be unenforceable.

Second, sellers should clearly disclose to prospective buyers all agreements regarding the subject property, including oral ones. Third, a prospective buyer of property who has any notice of a defect in title or other reason to believe that someone else has any kind of claim to the property would be well advised to contact that someone to find out exactly what those claims are and to proceed cautiously and with advice of counsel in making sure that a valid sale can be consummated. If you do not do these things, then you might just find that you have bought a lawsuit along with - or even instead of - the land in question.

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