COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FAR No. 26887

Appeals Court No. 2018-P-1051

MIDDLESEX COUNTY

JACK DECICCO AND SANDRA DECICCO
Plaintiffs-Appellants

v.

180 GRANT STREET, LLC
Defendant-Appellee

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

Defendant-Appellee 180 Grant Street, LLC's Application for Further Appellate Review

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I. Request for Further Appellate Review

Pursuant to Mass. R. App. P. 27.1, defendant-appellee 180 Grant Street, LLC ("180 Grant" or "Appellee") hereby applies to the Supreme Judicial Court for further appellate review of this matter which concerns the issuance of an unjustified *lis pendens* premised on a frivolous claim of an interest in real property. On a special motion to dismiss brought pursuant to sub-section (c) of the Lis Pendens statute, G.L. ch. 184, §15, the trial court dismissed the complaint of plaintiff-appellants, Jack and Sandra DeCicco ("DeCicco's" or "Appellants"). As the statute requires, the trial court subsequently awarded attorney's fees to Appellee. The dismissal, and the award, was affirmed by the Appeals Court. Both courts concluded that the claim of title asserted by Appellants was "frivolous" and "devoid of any reasonable factual support." The Appeals Court refused, however, to award *appellate* costs and attorney's fees to 180 Grant. Appellee's request for further appellate review is limited to this discrete issue: whether G.L. ch. 184, §15(c) mandates an award of costs and reasonable attorney's fees to a successful movant who prevails on appeal and who has requested such an award pursuant to the rule of *Yorke Mgt. v. Castro*, 406 Mass. 17, 20 (1989). This question has wide implications that extend well beyond the parties to this lawsuit. It affects all owners of real property who may be doubly burdened by the impact of an unjustified *lis pendens* clouding their title and the need to challenge a claimant's

unfounded allegations in court. Indeed, it is for this reason that, in contravention of the American Rule, the Legislature mandated an award of attorney's fees and costs to the prevailing party on a special motion to dismiss under the Lis Pendens statute. The mandate would "ring hollow" if it did not also apply to the movant's successful defense of the dismissal on appeal. While the Supreme Judicial Court has so held in the context of other statutes that contain identical or similar provisions for the recovery of costs and attorney's fees, a prevailing party's right to recover appellate costs and attorney's fees under the Lis Pendens statute has never been tested or even addressed by this Court or the Appeals Court, resulting in inconsistent and disparate treatment by the courts.

II. Prior Proceedings

The DeCicco's filed a verified complaint on September 22, 2017 in the Middlesex Superior Court, seeking to enforce an offer to purchase a newly constructed private residence in Lexington, Massachusetts, developed and owned by Appellee. At the time they filed suit, the DeCicco's also moved for endorsement of a memorandum of *lis pendens*. A judge of the Superior Court endorsed the memorandum on October 4, 2017, and the DeCicco's recorded the memorandum in the Middlesex County Registry of Deeds. The *lis pendens* continues to cloud Appellee's title pending the disposition of this appeal. *See* G.L. ch. 184, §15(d). On March 12, 2018, Appellee filed a Special Motion to Dismiss

the Complaint and to Dissolve the Lis Pendens pursuant to Section 15(c) of the Lis Pendens statute. On April 13, 2018, after hearing, the Superior Court (Barry-Smith, J.) issued a decision allowing the special motion to dismiss (but denying the motion to dissolve). Pursuant to the Lis Pendens statute, the court directed counsel to submit an itemization of the attorney's fees and costs incurred by Appellee on the Special Motion to Dismiss. On June 13, 2018, the trial court awarded attorney's fees in the amount of $18,000.00. The DeCicco's appealed from the dismissal of their complaint, but not the attorney's fee award. On December 13, 2018, Appellee filed its Appeals brief, in which it requested an award of appellate attorney's fees and costs in accordance with the rule of *Yorke Mgmt v. Castro* and pursuant to the Lis Pendens statute itself. On May 17, 2019, the Appeals Court issued its Rule 1:28 Memorandum decision. In the decision, the Appeals Court affirmed the trial court's special dismissal of the complaint and its award of attorney's fees. However, the Appeals Court "exercise[d] its discretion to deny" Appellee's request for appellate costs and attorney's fees. On May 24, 2019, Appellee filed a Motion for Reconsideration and Modification ("Motion for Reconsideration") in the Appeals Court. In that motion, Appellee requested the Appeals Court to modify its decision and award attorney's fees and costs incurred on the appeal. On June 10, 2019, the Appeals Court denied the Motion for Reconsideration. This case was docketed in the Supreme Judicial Court on June 7,

2019 when Appellee filed a Motion for an extension of time to request further appellate review for a period of fourteen (14) days after the Appeals Court's decision on the Motion for Reconsideration. This Court allowed the Motion for extension on the same day.

III. Statement of Facts

Pursuant to Mass. R. App. P. 27.1(b)(3), Appellee refers this Court to the decision of the Appeals Court which correctly states the facts relevant to this appeal. Also relevant to this appeal is that Appellee sought an award of appellate attorney's fees and costs in its Appeals brief and in its Motion for Reconsideration, both of which are included in the Appendix.

IV. Point of Law on which Further Appellate Review is Sought

Appellee seeks further appellate review on a single point of law, namely, whether sub-section (c) of the Lis Pendens Statute mandates an award of appellate attorney's fees and costs on a successful special motion to dismiss that is affirmed on appeal. The Appeals Court misinterpreted the Lis Pendens statute when it denied Appellee's request for costs and attorney's fees in the "exercise of [its] discretion." Appellee submits that, properly construed, sub-section (c) of the Lis Pendens statute requires that costs and reasonable attorney's fees be awarded: the statute does not permit the exercise of discretion in this regard.

V. Reasons for Further Appellate Review

The relevant portion of G.L. ch. 184, §15(c) provides as follows:

> "If the memorandum is approved ex parte, any party aggrieved thereby may move at any time for dissolution of the memorandum, and the court shall hear the motion forthwith and in any event not later than 3 days after the date on which notice of the motion was given to the claimant. At the hearing the claimant shall have the burden of justifying any finding in the ex parte order that is challenged by the party who is aggrieved thereby. A party may also file a special motion to dismiss the claimant's action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous. The special motion to dismiss, unless heard at the time the claimant first applied for a judicial endorsement under subsection (b), shall be heard at the same time as the hearing on the motion to dissolve the memorandum of lis pendens. If the court determines that the action does not affect the title to the real property or the use and occupation thereof or the buildings thereon, it shall dissolve the memorandum of lis pendens. The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds. In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure. ***If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery***." (emphasis added)

The language of the statute that lays out the special motion to dismiss procedure is virtually identical to that contained in the anti-SLAPP statute:

> "***If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters.***"

G.L. c. 231, § 59H. The purpose of these statutes "is to reimburse persons for costs and attorney's fees if a judge determines that the statute is applicable and allows their [special] motion to dismiss." *McLarnon v. Jokisch*, 431 Mass. 343, 350 (2000).[1]

In *McLarnon*, as here, defendants requested, and the Court allowed, the request for appellate fees and costs in accordance with the procedure of *Yorke Management*. *Id*. The Court reasoned that the statutory mandate requiring that costs and reasonable attorney's fees be awarded on a successful special motion to dismiss "would ring hollow if it did not necessarily include a fee for the appeal." *Id*., quoting *Yorke Management*, *supra*, 406 Mass. at 19. Thus, in *McLarnon*, the S.J.C. interpreted the anti-SLAPP statute – which, as noted, sets out the special motion to dismiss procedure in virtually identical language as the Lis Pendens statute – as mandating an award of appellate attorney's fees and costs to a successful movant who prevails on appeal. *See Fabre v. Walton*, 436 Mass. 517, 525 (2002) (on special motion to dismiss under anti-SLAPP statute attorney's fees and costs incurred in *both* trial and appeals court awarded to defendant). *See also McMann v. McGowan*, 71 Mass. App. Ct. 513, 520 (2008) (affirming award of attorney's fees and costs below, and allowing defendant's request for attorney's

[1] The anti-SLAPP and Lis Pendens statutes have other similarities as well. Both provide for an expedited review of the merits of the claim and both impose a stay of discovery upon the filing of a special motion to dismiss. *Compare* G.L. ch. 184, §15(c) with G.L. c. 231, § 59H, second and third paragraphs.

fees and single costs with respect to the appeal of special dismissal under Lis Pendens statute); *Galipault v. Wash Rock Investments, LLC*, 65 Mass. App. Ct. 73, 87 (2005) (same).

The Supreme Judicial Court reached the same conclusion in *Yorke Management v. Castro*, a case that involved claims for breach of the warranty of habitability and interference with quiet enjoyment under G.L. ch. 186, § 14, retaliatory eviction under G.L. ch. 186, § 18 and unfair and deceptive acts and practices under G.L. ch. 93A, § 2. Like the Lis Pendens statute, each of these statutes provides for an award of attorney's fees and costs to successful litigants. In that case, the S.J.C. noted that neither Chapter 186 nor Chapter 93A explicitly ***limited*** the recovery of attorney's fees and costs to proceedings in the trial court. The Court held that the "right" to recover ***appellate*** attorney's fees was "beyond dispute":

> We have recognized the explicit language of G.L. c. 186, § 14, which provides for payment of attorney's fees, and this language is not limited to attorney's fees for trial proceedings. Similarly, we approved the award of attorney's fees under G.L. c. 186, § 18, where the statutory language is equally clear and not limited to attorney's fees for trial proceedings. The language of G.L. c. 93A, § 9(4), leaves no doubt as to the right to recover attorney's fees without any suggestion that fees for the appeal are excluded. The statutory provisions for a 'reasonable attorney's fee' would ring hollow if it did not necessarily include a fee for the appeal.

406 Mass. at 19 (internal citations omitted).

In a similar fashion, the Lis Pendens statute does not limit the recovery of costs and attorney's fees on a special motion to dismiss to proceedings in the trial court. The Lis Pendens statute also contains no suggestion that fees for the appeal are ***excluded*** from its reach. The dictate of *Yorke Management* that the "statutory provisions for a reasonable attorney's fee would ring hollow if it did not necessarily include a fee for the appeal," 406 Mass. at 19, applies with equal force to the Lis Pendens statute.

As the trial court held, and the Appeals Court confirmed, Appellants' claims are frivolous and devoid of any reasonable factual support. In such circumstances, there is no logical reason – and no statutory basis – to limit the recovery of costs and fees to proceedings in the trial court. The Supreme Judicial Court should take this opportunity to clarify that an award of costs and attorney's fees under the Lis Pendens statute is mandatory in the appellate courts as well. Such an interpretation is necessary to avoid disparate treatment by the courts in this and other cases, and also to harmonize the Court's pronouncements concerning the mandatory award of fees and costs to the prevailing party on appeal in analogous statutes.

VI. Request for Relief

For all of the foregoing reasons, the Court should grant this application for further appellate review.

Respectfully submitted,
Defendant-Appellee
180 GRANT STREET, LLC,
By its attorneys,

/s/ Jon C. Cowen

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Dated: June 24, 2019

CERTIFICATE OF COMPLIANCE

I, Jon C. Cowen, counsel for defendant-appellee 180 Grant Street, LLC, hereby certify that this Application for Further Appellate Review complies with the rules of appellate procedure pertaining the filing of the Application, including Mass. R.A.P. 16(k), 20 and 27.1.

/s/ Jon C. Cowen
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CERTIFICATE OF SERVICE

I, Jon C. Cowen, hereby certify that on this 24th day of June, 2019, I caused a true copy of the foregoing to be served on the following counsel of record, via email and by first-class mail, postage pre-paid.

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ADDENDUM

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APPEALS COURT
Full Court Panel Case
Case Docket

JACK DECICCO & another vs. 180 GRANT STREET, LLC
2018-P-1051

CASE HEADER

Case Status	FAR pending	**Status Date**	06/10/2019
Nature	Equity	**Entry Date**	07/20/2018
Sub-Nature	Allowance of special motion to d	**SJ Number**	
Appellant	Plaintiff	**Case Type**	Civil
Brief Status		**Brief Due**	
Panel	Meade, Massing, Lemire, JJ.	**Argued/Submitted**	04/10/2019
Citation	95 Mass. App. Ct. 1113	**Decision Date**	05/17/2019
Lower Court	Middlesex Superior Court	**TC Number**	
Lower Ct Judge	Christopher Barry-Smith, J.	**TC Entry Date**	09/22/2017
FAR Number	FAR-26887B	**SJC Number**	

INVOLVED PARTY	ATTORNEY APPEARANCE
Jack DeCicco Plaintiff/Appellant Blue brief & appendix filed 1 Ext, 47 Days	John J. Bonistalli, Esquire Scott Spencer, Esquire Withdrawn Jennifer Lee Sage, Esquire
Sandra DeCicco Plaintiff/Appellant Blue brief & appendix filed 1 Ext, 47 Days	John J. Bonistalli, Esquire Scott Spencer, Esquire Withdrawn Jennifer Lee Sage, Esquire
180 Grant Street, LLC Defendant/Appellee Red brief filed 1 Ext, 29 Days	Jon C. Cowen, Esquire Patricia B. Gary, Esquire

DOCUMENTS

Appellant DeCicco Brief

Appellee 180 Grant Street LLC Brief

ORAL ARGUMENTS

04/10/2019 Oral Arguments

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/20/2018	#1	Lower Court Assembly of the Record Package
07/20/2018		Notice of entry sent.
07/20/2018	#2	Civil Appeal Entry Form filed for Jack DeCicco by Attorney Scott Spencer.
07/20/2018	#3	Civil Appeal Entry Form filed for Sandra DeCicco by Attorney Scott Spencer.
08/03/2018	#4	Notice of appearance of Patricia B. Gary for 180 Grant Street, LLC.
08/03/2018	#5	Notice of appearance of Jon C. Cowen for 180 Grant Street, LLC.
08/07/2018	#6	Docketing Statement filed for Jack DeCicco and Sandra DeCicco by Attorney Scott Spencer.
08/23/2018	#7	Motion of Appellant to extend date for filing brief and appendix filed for Jack DeCicco and Sandra DeCicco by Attorney Scott Spencer.
08/24/2018		RE#7: Allowed to 10/15/2018. Any future motions to enlarge filed by counsel must include a calendar date certain by when the brief will be filed. *Notice
10/15/2018	#8	Appellant brief filed for Jack DeCicco, Sandra DeCicco by Attorney Scott Spencer.

DOCKET ENTRIES

10/15/2018	#9	Appendix filed for Jack DeCicco, Sandra DeCicco by Attorney Scott Spencer.
10/15/2018		RE#8 & #9 Pursuant to the Appeals Court Standing Order Concerning Electronic Filing, effective September 1, 2018, the within document is required to be e-filed through EFileMA.com. No action will be taken on the within document for failure to comply with the Standing Order. *Notice.
10/15/2018	#10	Appellant brief filed for Jack DeCicco and Sandra DeCicco by Attorney Scott Spencer.
10/15/2018	#11	Appendix filed for Jack DeCicco and Sandra DeCicco by Attorney Scott Spencer.
11/06/2018	#12	MOTION of Appellee to extend brief due date filed for 180 Grant Street, LLC by Attorney Jon Cowen.
11/07/2018		RE#12: Allowed to 12/13/2018. Notice sent.
12/12/2018	#13	Notice of withdrawal as counsel filed for Jack DeCicco and Sandra DeCicco by Attorney Scott Spencer.
12/13/2018	#14	Appellee brief filed for 180 Grant Street, LLC by Attorney Jon Cowen.
02/11/2019		Notice sent seeking information on unavailability for oral argument in April 2019
02/12/2019		Letter of Jennifer Lee Sage, Esquire unavailable for oral argument April 1, 2, 5.
02/19/2019	#15	Letter of Jon C. Cowen, Esquire unavailable for oral argument April 3, 8.
02/28/2019	#16	Notice of 04/02/2019, 9:30 AM argument at John Adams Courthouse, Courtroom 4 (a4) sent.
02/28/2019	#17	REVISED Notice of (date change) 04/10/2019, 9:30 AM argument at John Adams Courthouse, Courtroom 4 (a4) sent.
03/01/2019		Letter from Jon C. Cowen, Esquire re: will appear and argue on 04/10/2019.
03/01/2019		Letter from John J. Bonistalli, Esquire re: will appear and argue on 04/10/2019.
04/10/2019		Oral argument held. (Meade, J., Massing, J., Lemire, J.).
05/17/2019	#18	Decision: Rule 1:28. Judgment affirmed.(Meade, Massing, Lemire, JJ.). *Notice.
05/24/2019	#19	Motion for Reconsideration or modification of decision filed for 180 Grant Street, LLC by Attorney Jon Cowen.
06/07/2019		FAR-26887 opened on MOTION to file FAR application late filed for 180 Grant Street, LLC by Attorney Jon Cowen.
06/07/2019		FAR-26887B opened on FAR APPLICATION filed for Jack DeCicco by Attorney Jennifer Minjung Lee Sage.
06/10/2019		RE#19: After consideration, the motion filed pursuant to Rule 27 is denied. (Meade, Massing, Lemire, JJ.) *Notice

As of 06/10/2019 20:00

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1051

JACK DECICCO & another[1]

vs.

180 GRANT STREET, LLC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On September 22, 2017, Jack and Sandra DeCicco, the plaintiffs, filed suit for breach of contract, breach of the implied covenant of good faith and fair dealing, misrepresentation, and specific performance, against the defendant, 180 Grant Street, LLC. A judge approved the plaintiffs' application for a memorandum of lis pendens on October 4, 2017. On April 17, 2018, a judge allowed the defendant's special motion to dismiss the plaintiffs' complaint pursuant to G. L. c. 184, § 15 (c), of the lis pendens statute. The judge also ordered the plaintiffs to pay the defendant's attorney's fees and costs. The lis pendens on the property subject to this suit remains on record at the Middlesex County registry of deeds pending the disposition of this appeal. On

[1] Sandra DeCicco.

appeal, under G. L. c. 231, § 118, the plaintiffs claim that the judge erred in allowing the defendant's special motion to dismiss because their complaint is not frivolous, as defined in G. L. c. 184, § 15 (c), and that there was ample factual and legal support for their claims. We affirm.

1. Special motion to dismiss. The plaintiffs claim that the judge erred in dismissing their complaint, as the complaint sets out cognizable claims, firmly grounded in facts supported by the verified complaint with its attachments. We disagree.

"Under G. L. c. 184, § 15 (c), a party who believes that a claimant's action or claim supporting a lis pendens is frivolous may file a special motion to dismiss." Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 2 n.2 (2010). The statute provides that a special motion to dismiss "shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." G. L. c. 184, § 15 (c). See McMann v. McGowan, 71 Mass. App. Ct. 513, 519 (2008). Here, the judge allowed the motion under the first provision. We review an order allowing a special motion to dismiss for an error of law or abuse of discretion in applying the standards of G. L. c. 184, § 15 (c). See id.

"In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure." G. L. c. 184, § 15 (c). Here, the materials properly considered by the judge were the plaintiffs' verified complaint and the three affidavits the defendant submitted, along with the attached documents containing communications between the parties.[2] The parties had a signed offer to purchase and an "offer summary" sheet, which stated that the plaintiffs' offer price of $2.26 million for the property was "subject to delivery of home in move-in condition as advertised, subject to Buyer review and approval of the following." The judge highlighted that the list that followed included "phrases such as 'subject to Buyer review and approval'; 'as advertised'; 'as discussed'; and 'location to be determined.'"

There was no support in the record before the judge that the parties had a mutual understanding of the full list of items

[2] The affidavits considered were one by Peter Daus-Haberle, the defendant's general manager, and two by James M. Lyles, the defendant's real estate attorney. The plaintiffs did not submit any affidavits or other evidence; instead they relied on their verified complaint and its attachments. For the first time on appeal, the plaintiffs appear to challenge the adequacy of the affidavits that were considered by the judge. This issue was neither raised below nor raised in the argument section of their brief, and we therefore treat it as waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1630 (2019). See also Weiler v. PortfolioScope, Inc., 469 Mass. 75, 86 (2014).

in the offer summary or the meaning of the equivocal phrases that were attached to many of the items listed. The plaintiffs' verified complaint asserted that the offer summary "contained additional items requested by the plaintiffs/buyers that were not part of the property's advertised condition" (emphasis added). The affidavit of Daus-Haberle also suggests that the defendant did not believe there was an agreement reached on the details of the additional work requested and that there were continued discussions regarding the offer summary, such as what work would be done, who would bear what costs, and even additional work that the plaintiffs requested during the period after the offer summary was originally executed. Even though it is well established that some countersigned offers to purchase real estate can constitute a valid enforceable contract, the intent of the parties to be bound is the controlling fact. See McCarthy v. Tobin, 429 Mass. 84, 87 (1999). Unlike in McCarthy, here the plaintiffs' offer summary, and conduct subsequent to the signing of the offer to purchase, shows there was no intention to be bound.

The plaintiffs appear to claim that the judge erred in considering the parties' postcomplaint communications, which they characterize as inadmissible settlement negotiations. We disagree. The postcomplaint negotiations were conduct subsequent to executing an offer to purchase, and the

negotiations may be relevant in determining whether the party intended to be bound by the offer to purchase. See Germagian v. Berrini, 60 Mass. App. Ct. 456, 460 (2004) (after signing offer to purchase "the plaintiff's conduct demonstrates that he did not intend that the offer be a binding contract -- only the signed purchase and sale agreement would fill that role"). The judge persuasively explained that the continuing discussions between the parties were admissible to "show: i) the breadth of details left open by the cursory listing of items on the Offer Summary; ii) that nearly each item on the list required further detail to establish meaning; and iii) that significant value attached to many of the items listed in the Offer Summary." We should not "substitute our judgment for that of the trial court where the records disclose reasoned support for its action." Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 82 (2005), quoting Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 26 (1981).

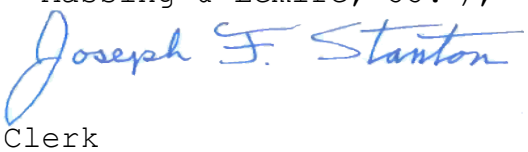
In all, the record before the judge lacked reasonable factual support that the offer to purchase and offer summary reflected the parties' memorialization of a definitive agreement and an intention to be bound. Rather, the record reflected that the offer summary was a list of items and work, which included requests that would require further discussion and agreement in order to create a binding and enforceable contract. The judge

correctly dismissed the plaintiffs' claims.[3] See G. L. c. 184, § 15 (c).

2. Attorney's fees. The defendant requests appellate attorney's fees and costs, pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019). Although we affirm the judgment, "[u]npersuasive arguments do not necessarily render an appeal frivolous." Avery v. Steele, 414 Mass. 450, 455 (1993).[4] The defendant's statutory award of attorney's fees and costs related to the special motion to dismiss below was appropriate. See G. L. c. 184, § 15 (c) ("If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorney fees"). On appeal, however, we exercise our discretion to deny the defendant's request for attorney's fees and costs.

Judgment affirmed.

By the Court (Meade, Massing & Lemire, JJ.[5]),



Clerk

Entered: May 17, 2019.

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[3] We agree with the judge that the plaintiffs' misrepresentation claim is appropriately dismissed because though it sounds in tort it is inextricably linked to the plaintiffs' breach of contract allegation and therefore it is subject to dismissal pursuant to G. L. c. 184, § 15 (c).

[4] "Frivolous" is defined differently in Avery, 414 Mass. at 455, than it is in G. L. c. 184, § 15 (c).

[5] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Appeals Court No. 2018-P-1051

JACK DECICCO and SANDRA DECICCO, Plaintiffs-Appellants.	)
v.	)
180 GRANT STREET, LLC, Defendant-Appellee.	)

DEFENDANT-APPELLEE 180 GRANT STREET, LLC'S MOTION FOR RECONSIDERATION AND MODIFICATION OF RULE 1:28 MEMORANDUM AND ORDER

Pursuant to Mass. R. App. P. 27, defendant-appellee 180 Grant Street, LLC ("180 Grant") moves for reconsideration and modification, in part, of the Court's Memorandum and Order pursuant to Rule 1:28, entered on May 17, 2019 (the "Order"). In the Order, this Court held that the trial court did not commit an error of law or an abuse of discretion when it concluded that plaintiffs' claims are frivolous because they are "devoid of any reasonable factual support" and it affirmed the lower court's dismissal of the complaint pursuant to the special motion to dismiss procedure of the Lis Pendens statute, G.L. ch. 184, §15(c). The Court also characterized the lower court's statutory award of attorney's fees and costs as "appropriate." Order, p. 6. But the Court declined to award *appellate*

attorney's fees and costs to 180 Grant: "***On appeal, however, we exercise our discretion to deny the defendant's request for attorney's fees and costs.***" *Id.* (emphasis added). 180 Grant seeks reconsideration of this aspect of the Order only; and it respectfully requests that the Order be modified by allowing 180 Grant's request for an award of attorney's fees and costs incurred on this appeal.

ARGUMENT

I. 180 GRANT REQUESTED AN AWARD OF APPELLATE ATTORNEY'S FEES AND COSTS IN ITS BRIEF

In its appellate brief, and in accordance with the rule set forth in *Yorke Management v. Castro*, 406 Mass. 17, 20 (1989), 180 Grant requested an award of attorney's fees and costs incurred on appeal.[1] *See* Brief for the Defendant–Appellee ("Appellee's Brief") at pp. 44 – 45. 180 Grant also cited two cases in which this Court interpreted the Lis Pendens statute itself as an independent basis for awarding appellate attorney's fees and costs. *See id*. In *McMann v. McGowan*, 71 Mass. App. Ct. 513, 520 (2008), the Appeals Court affirmed the trial court's order dissolving the memorandum of lis pendens, dismissing the plaintiff's action,

[1] In *Yorke Management*, the Supreme Judicial Court clarified the procedure for seeking an award of legal fees for appellate work: "A party who seeks an award of appellate attorney's fees should request them in his brief. If such party does not prevail, he is not entitled to fees, though no harm accrues from the request. If such party prevails, he may then submit his petition for fees together with the necessary back-up material and details as to hours spent, precise nature of the work, and fees requested. The other party should be given a reasonable time to respond. The appellate Justice who considers the petition may request more data and may set down the matter for hearing with notice to the other party." 406 Mass. at 20.

and awarding attorney's fees and costs to the defendant. The Court also "allow[ed] the defendant's requests for attorney's fees and single costs with respect to [the] appeal." *Id.* Similarly, in *Galipault v. Wash Rock Investments, LLC*, 65 Mass. App. Ct. 73, 87 (2005), the Appeals Court affirmed the trial court's orders dissolving the lis pendens, dismissing the plaintiffs' action and issuing an award of attorney's fees and costs; in addition, the Court "allow[ed] the defendants' requests for attorney's fees and costs with respect to [the] appeal." This Court should reconsider 180 Grant's properly presented request for attorney's fees and costs on appeal.

II. THE LIS PENDENS STATUTE MANDATES THAT ATTORNEY'S FEES AND COSTS BE AWARDED UPON ALLOWANCE OF A SPECIAL MOTION TO DISMISS

In this case, the trial court awarded legal fees and costs to 180 Grant in accordance with the statutory mandate of the Lis Pendens statute which provides:

> "If the court allows the special motion to dismiss, it ***shall award*** the moving party costs and reasonable attorney's fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery."

G.L. ch. 184, §15(c) (emphasis added). The trial court has no discretion and must award attorneys' fees and costs if the moving party prevails on the special motion. In this regard, the Lis Pendens statute closely mirrors the special motion to dismiss procedure of the anti-SLAPP statute, which provides:

> "If the court grants such special motion to dismiss, the court ***shall award*** the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters." (emphasis added).

G.L. c. 231, § 59H.

The purpose of both statutes "is to reimburse persons for costs and attorney's fees if a judge determines that the statute is applicable and allows their [special] motion to dismiss." *McLarnon v. Jokisch*, 431 Mass. 343, 350 (2000).[2]

III. THE STATUTORY MANDATE FOR ATTORNEY'S FEES AND COSTS IN THE TRIAL COURT WOULD "RING HOLLOW" IF IT DID NOT ALSO INCLUDE AN AWARD OF COSTS AND FEES ON APPEAL

In *McLarnon*, the Supreme Judicial Court was asked to consider a successful movant's request for attorney's fees, both in the trial court and on appeal, on a special motion to dismiss under the anti-SLAPP statute. The trial court had erroneously denied defendants' request but the S.J.C. did not reverse this order because defendants did not appeal from it. However, defendants also requested appellate costs and attorney's fees pursuant to the procedure of *Yorke Management*. The Court allowed this request and directed defendants to apply for an award of fees and costs incurred on the appeal. *McLarnon*, *supra*, 431 Mass. at 350. The Court reasoned that the statutory provision for an award of reasonable

[2] The anti-SLAPP and Lis Pendens statutes have other similarities as well. Both provide for an expedited review of the merits of the claim and both impose a stay of discovery upon the filing of a special motion to dismiss. *Compare* G.L. ch. 184, §15(c) with G.L. c. 231, § 59H, second and third paragraphs.

attorney's fees under the anti-SLAPP statute "would ring hollow if it did not necessarily include a fee for the appeal." *Id*., quoting *Yorke Management*, *supra*, 406 Mass. at 19. Thus, in *McLarnon*, the S.J.C. interpreted the anti-SLAPP statute – which contains virtually identical statutory language as the Lis Pendens statute – as mandating an award of appellate attorney's fees and costs to a successful movant who prevails on appeal and who requests such an award in its appeals brief. 180 Grant is in precisely the same position.

In *Yorke Management v. Castro*, the Supreme Judicial Court reached the same conclusion. That case involved claims for breach of the warranty of habitability and interference with quiet enjoyment under G.L. ch. 186, § 14, retaliatory eviction under G.L. ch. 186, § 18 and unfair and deceptive practices under G.L. ch. 93A, § 2. Each of these statutes contains provisions for awarding attorney's fees and costs to successful litigants. The S.J.C. noted that neither Chapter 186 nor Chapter 93A explicitly ***limited*** recovery of attorney's fees and costs to trial court proceedings. The Court held, therefore, that the "right" to recovery of appellate attorney's fees was "beyond dispute":

> We have recognized the explicit language of G.L. c. 186, § 14, which provides for payment of attorney's fees, and this language is not limited to attorney's fees for trial proceedings. Similarly, we approved the award of attorney's fees under G.L. c. 186, § 18, where the statutory language is equally clear and not limited to attorney's fees for trial proceedings. The language of G.L. c. 93A, § 9(4), leaves no doubt as to the right to recover attorney's fees without any suggestion that fees for the appeal are excluded. The statutory provisions for a

> ‘reasonable attorney’s fee’ would ring hollow if it did not necessarily include a fee for the appeal. The right to appellate attorney's fees under these statutes is beyond dispute.

406 Mass. at 19 (internal citations omitted).

Like G.L. ch. 186, §§14 and 18 and ch. 93A, § 9(4), the Lis Pendens statute does not limit the recovery of costs and attorney’s fees on a special motion to dismiss to proceedings in the trial court. Additionally, like these statutes, the Lis Pendens statute contains no suggestion that fees for the appeal are excluded. The dictate of *Yorke Management* that the “statutory provisions for a reasonable attorney’s fee would ring hollow if it did not necessarily include a fee for the appeal,” 406 Mass. at 19, applies with equal force to the Lis Pendens statute. Indeed, the S.J.C. has so held in the context of the anti-SLAPP statute which provides for a mandatory award of attorney’s fees and costs in nearly identical terms as the Lis Pendens statute. *See McLarnon*, *supra*, 431 Mass. at 350. *See also Fabre v. Walton*, 436 Mass. 517, 525 (2002) (on special motion to dismiss under anti-SLAPP statute attorney’s fees and costs incurred in both trial and appeals court awarded to defendant).

As the trial court held, and this Court confirmed, plaintiffs’ claims are indisputably devoid of any reasonable factual support. As a result, the trial court allowed defendant’s special motion to dismiss and, by statute, awarded attorney’s fees and costs to the defendant. This mandate is not limited to proceedings in the

trial court. Rather, it should extend to the proceedings in this Court. This interpretation is consistent with the plain language of the Lis Pendens statute and with case law interpreting analogous statutes that provide for a mandatory award of attorney's fees and costs to the prevailing party. Any other result would make the statutory mandate of the Lis Pendens statute "ring hollow."

WHEREFORE, for each of the above reasons, 180 Grant Street, LLC respectfully requests that this Court reconsider and modify its May 17, 2019 Memorandum and Order by:

(1) Removing the last sentence of the Order which states: "On appeal, however, we exercise our discretion to deny the defendant's request for attorney's fees and costs."

and

(2) Inserting the following text in its place:

"The defendant's request for an award of attorney's fees and single costs incurred in connection with this appeal is allowed. The defendant may file a petition within fourteen (14) days of the date of this opinion together with supporting materials and the plaintiff shall have fourteen (14) days thereafter to respond. The case is remanded to the Superior Court for further proceedings with respect to the defendant's counterclaims."

Respectfully submitted,
Defendant-Appellee
180 GRANT STREET, LLC,
By its attorneys,

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Dated: May 24, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 27

I, Jon C. Cowen, counsel for the Defendant-Appellee 180 Grant Street, LLC, hereby certify pursuant to Mass. R. A. P. 27(b) that this Motion complies with the requirements of the Massachusetts Rules of Appellate Procedure including Mass. R. A. P. 20(a)(4)(B) and that compliance with the length limit of Rule 27(b) was ascertained by using the proportionally spaced font, Times New Roman, size 14, with 1,772 words, using Microsoft Word 2010.

/s/ Jon C. Cowen
Jon C. Cowen, Esq.

CERTIFICATE OF SERVICE

I, Jon C. Cowen, hereby certify that on this 24th day of May, 2019, I caused a true copy of the foregoing to be served on the following counsel of record, via email and by first-class mail, postage pre-paid.

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2018-P-1051

MIDDLESEX, ss.

JACK DECICCO AND SANDRA DECICCO,
APPELLANTS

v.

180 GRANT STREET, LLC,
APPELLEE

ON APPEAL FROM THE SPECIAL DISMISSAL OF THE PLAINTIFFS' COMPLAINT BY THE SUPERIOR COURT, MIDDLESEX COUNTY

BRIEF FOR THE DEFENDANT-APPELLEE
180 GRANT STREET, LLC

Submitted by,

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STATEMENT OF THE ISSUE

Whether the trial court abused its discretion or committed an error of law when it specially dismissed the complaint pursuant to the expedited procedure set forth in G.L. c. 184, § 15(c) where Plaintiff-Appellants' claims lack any reasonable factual support and are devoid of any arguable basis in law.

STATEMENT OF THE CASE

This is an appeal under G.L. c. 231, § 118 from an interlocutory order of the Superior Court (Barry-Smith, J.) (April 17, 2018) (the "Order"), by which the trial court specially dismissed the Verified Complaint ("Complaint") of Plaintiff-Appellants Jack and Sandra DeCicco ("the DeCiccos" or "the Buyers") pursuant to G.L. c. 184, § 15 (the "Lis Pendens statute").[1] While the trial court allowed the Defendant-Appellee 180 Grant Street, LLC's ("180 Grant" or "the Seller") Special Motion to Dismiss, it denied the Seller's contemporaneous Motion to Dissolve

[1] By a subsequent order dated June 13, 2018, the trial court awarded attorneys' fees to the Defendant-Appellee in the amount of $18,000. (App. 198) The Buyers have not appealed from, or otherwise challenged this award.

the Lis Pendens which had been issued by a different judge of the Superior Court (Inge, J.) shortly after this suit was filed. (App. 3, 26) The reviewing judge mistakenly adopted the standard applied by the issuing judge that the Buyers' claims implicated a "right or interest" in real property.[2] (App. 171) However, as Judge Barry-Smith correctly noted, once filed at the Registry of Deeds, the Order would constitute "conclusive evidence" that the Buyers' action does not affect title to the subject real property, resulting in dissolution of the lis pendens after expiration of the 30-day appeal period. (App. 181-182) *See* G.L. c. 184, § 15(d). The DeCiccos filed a Notice of Appeal on May 7, 2018, within 30 days of the Order. Therefore, by operation of G.L. c. 184, § 15(d), the lis pendens remains on record at the Middlesex Registry of Deeds, continuing to cloud 180 Grant's title, pending the disposition of this appeal.

The Buyers' claim that they hold an enforceable right to purchase the subject property is based on an

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[2] A different legal standard applies to a Motion to Dissolve than to a Motion for Endorsement of a lis pendens. *See* Argument, *infra* at pp. 40 - 41.

inchoate agreement that left open numerous material terms (including monetary terms) of the sale for later discussion and agreement. The claim is plainly "frivolous" within the meaning of the Lis Pendens statute and, as the trial correctly determined, devoid of any reasonable factual support. (The Buyers' claims also lack any arguable basis in law.) By filing this lawsuit, and by pressing their groundless claims on appeal, the DeCiccos are employing legal process illegitimately to interfere in the Seller's rights of ownership and to frustrate the sale of the property to another buyer.[3]

STATEMENT OF THE FACTS[4]

The Property

In October 2016, 180 Grant purchased the real property located at 180 Grant Street, Lexington,

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[3] 180 Grant has asserted Counterclaims for *inter alia*, Abuse of Process and Interference with Prospective Contractual Relations. (App. 68 - 77) The counterclaims are not at issue in this appeal.

[4] The factual record presented to the trial court consists of the Verified Complaint (App. 6) and three (3) affidavits submitted by the Seller: (1) the Affidavit of Peter Daus-Haberle, dated October 3, 2017 (App. 36); (2) the Affidavit of James M. Lyle, Esq., dated October 3, 2017 (App. 55); and (3) the Supplemental Affidavit of Mr. Lyle, dated February 14, 2018 (App. 106)

Massachusetts (the "Property"), the subject of this dispute and of the lis pendens. It then tore down the existing structure and built a new residence on the 17,290 square foot parcel, consisting of a 7-bedroom, 6.5-bathroom home with an attached 3-car garage (and living space above), totaling over 6,250 square feet on three levels, including the basement. (App. 36) In April 2017, the Seller listed the Property for sale on the Massachusetts Multiple Listing Service at an initial asking price of $2.4 million. (App. 36 - 37)

Events leading up to the Buyers' Offer to Purchase

On September 7, 2017, Peter Daus-Haberle, who had designed the newly constructed residence and acted as the primary point of contact for prospective buyers, met with the DeCiccos and their broker at the premises. (App. 37) Construction of the main house was 95% complete at the time, although the living space above the garage was only 60% complete. (*Id.*) The Buyers made a written offer to purchase the Property in the amount of $2,125,000 later that day. (App. 38) Their offer was set forth on a standard Greater Boston Real Estate Board (GBREB) form. (App.

46) It provided that the parties would execute a purchase and sale agreement by September 15, 2017 "which, when executed, will be the agreement between the parties." (*Id.*) Attached to the standard form Offer to Purchase was a Contingency Addendum (also a standard GBREB form), with boxes checked indicating that the offer was subject to mortgage, inspection, radon and pest inspection contingencies. (App. 38, 47) The Buyers created a second addendum which they attached to the offer entitled, "180 Grant Street Offer Summary" (hereinafter, "Buyers Addendum"). (App. 38, 48)

On the next day, the parties discussed by telephone two of the items contained in the Buyers Addendum. (App. 38, 39) Specifically, they discussed the Buyers' request to remove and replace the existing refrigerator and to replace it with a Sub Zero brand. (App. 39) This would entail removal and replacement of the cabinets above the refrigerator which had already been installed. (*Id.*) The parties also discussed the Buyers' request to replace kitchen and dining room lighting fixtures. (*Id.*) None of the other items referenced in the Buyers Addendum were

discussed. (App. 38 - 39) On September 8, 2017, the Buyers agreed verbally to increase their offer to $2,260,000 but requested an opportunity to visit the premises again. (App. 40)

On September 9, 2017, Mr. Daus-Haberle met with Jack DeCicco at the Property. (App. 40) At that time, Mr. Daus-Haberle agreed that the Seller would bear the cost of removing and replacing the existing refrigerator and cabinetry (although the parties never agreed on the model of the replacement refrigerator). (App. 39) The Seller also agreed to increase the lighting allowance from $1,000 to $1,200. (App. 40) The parties deferred further discussions of other changes to the lighting and lighting fixtures. (*Id.*) On the Buyers Addendum, the parties penned in the increase in the offer price, from $2,125,000 to $2,260,000, and the $1,200 lighting allowance. (App. 40 - 41, 48) The Offer, the Addendum and the Buyers Addendum (collectively, the "OTP"), was then signed by both parties. (App. 41, 46 - 48)

At the time the OTP was signed, construction of the newly built residence was still on-going. (App. 37) As alleged in the Complaint, the Property was

advertised as “having a number of features that, at the time of the execution of the OTP, were not completed.” (App. 8) The Buyers also admit that the Buyers Addendum set forth features that were "to be completed by [the Seller] prior to closing in order to bring the property to its advertised condition.” (App. 8) In addition, Buyers admit that the Buyers Addendum “contained additional items requested by [the Buyers] that were not part of the property’s advertised condition.” (*Id.*) (Emphasis added)

Mr. Daus-Haberle has testified that it was his belief, understanding and expectation “that all of these items would be the subject of further discussion (and negotiations) with the Buyers, and that the items referenced in the [Buyers Addendum] - which were substantial - would be detailed and agreed upon in the purchase and sale agreement." (App. 39)

The Buyers’ Addendum; the parties’ continuing discussions and negotiations

The Buyers Addendum is a one-page document, prepared by the Buyers, that lists, in bullet point fashion, thirty-one (31) changes, upgrades and build-out items that were outstanding at the time the OTP

was signed. (App. 8, 23, 41) Each of the items is written in truncated text (e.g., “Updated hardware throughout”); none are complete sentences. (App. 23) Additionally, at the top of the page is the conditional language: "Offer price subject to delivery of home in move-in condition as advertised, subject to Buyer review and approval.” (*Id.*)

The Buyers Addendum describes several areas of construction that were unfinished at the time the OTP was signed. These include the Basement (as to which the Buyers Addendum states only, "Complete work as described”); the Room over garage ("Complete construction of space as advertised of matching quality and workmanship"); and Fencing ("Complete as advertised and discussed"). (*Id.*) At the time of signing, the parties had neither discussed nor agreed to the specifications for completing these unfinished items. (App. 42) The items that were not yet completed in the space above the garage included plumbing, HVAC, interior framing, plastering, finish tiling, finish flooring, finish trim and finish painting. (*Id.*) As to these components, the Buyers Addendum states only: "Complete construction of space

as advertised of matching quality and workmanship" within 45 days of closing. (App. 48) The parties did not reach agreement, or even discuss these unfinished items of construction. (App. 41) For example, the parties did not discuss or reach agreement on changes to be made in the first floor bath (the Buyers Addendum states that the Buyer will "select different sink of matching quality"). (App. 39, 48) Nor did they discuss or reach agreement on changes in the basement (as to which the Buyers Addendum states that the Buyers will "select flooring materials of comparable matching quality" but does not specify the cost, who will pay or the amount of the allowance). (*Id.*)[5]

Mr. Daus-Haberle estimated that it would cost tens of thousands of dollars or more to complete these outstanding items. (App. 42) The Buyers estimated a significantly higher sum would be required: $114,815. (App. 124) None of these open items were discussed -

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[5] The lack of discussion and agreement on these items contrasts starkly with the parties' agreement on the two terms in the Buyers Addendum that were negotiated and concluded at the time the OTP was signed: the removal and placement of the refrigerator and the kitchen and dining room lighting allowance.

let alone an agreement reached regarding them - when the parties signed the OTP. (App. 39, 42) Counsel for the Seller, James M. Lyle, has testified that absent further discussion and negotiation, it would have been impossible to draft a purchase and sale agreement to memorialize how these many outstanding items were to be addressed. (App. 56-57)

The Buyers imposed additional conditions after signing the OTP

Two days after signing the OTP, on September 11, 2017, the Buyers requested that additional changes be made to the residence. (App. 42) The requests included: removing and replacing the vanity in the master bathroom (and receiving a commensurate allowance from the Seller); removing the double sink and faucet in the kitchen and replacing it with a single bowl (and receiving a Seller allowance); and installing exterior shutters on the front and side of the house. (App. 42, 50)

At that point, the Seller concluded that it would not be able to reach agreement with the Buyers on the various changes and upgrades they were requesting and Mr. Daus-Haberle so informed their broker. (App. 43,

52, 54) In an apparent attempt to re-start negotiations, the Buyers' broker requested that the Seller "make a counter offer," but the Seller refused. (App. 43).

Commencement of suit; issuance of lis pendens

When the Buyers commenced this lawsuit on September 22, 2017, they moved *ex parte* for endorsement of a Memorandum of Lis Pendens. (App. 3) The Court (Talit, J.) denied the motion without prejudice, but ordered that the Property not be conveyed until all parties could be heard. (*Id.*) A hearing was held on October 4, 2017, after which a different judge (Inge, J.) approved the endorsement of a Memorandum of Lis Pendens. (App. 3, 26)

After issuance of the lis pendens, the parties continued their discussions concerning terms for the sale but did not reach agreement

For a period of eight (8) weeks after the lis pendens was issued, from early October through early December 2017, the parties and their counsel continued discussions in an attempt, ultimately unsuccessful, to reach mutually agreeable terms for the conveyance. (App. 106) Most of these discussions revolved around the parties' efforts to interpret, define and allocate

the cost of the numerous changes, upgrades and construction build-out items requested by the Buyers. (App. 107) While some progress was made in sorting out some of these items, the large majority remained unresolved. (App. 107-108) The continuing discussions and negotiations are further evidence that no definitive agreement had been reached at the time the OTP was signed. (App. 180)

On October 27, 2017, the Buyers' attorney wrote to the Seller's attorney and requested a credit of $114,815 against the purchase price, purportedly to complete the changes and upgrades referenced in the Buyers Addendum. (App. 107, 111-112) That same day, the Buyers' attorney forwarded a list of specifications for various door levers, cabinet knobs and pulls and basement flooring, presumably to be paid by the Seller, but the Seller never agreed to pay for them. (App. 107-108, 114-116) Through November 2017, the parties and their counsel continued to speak by telephone, correspond via e-mail and to meet in person. (App. 108, 118-125) By early December 2017, it became clear that a definite agreement could not be

reached, and further discussions were suspended. (App. 108)

Tellingly, at no point during the negotiations did the parties' counsel exchange drafts of a Purchase and Sale agreement. This would have been standard practice for a transaction like this one, which was characterized by a large number of outstanding construction details that needed to be resolved and memorialized. (*Id.*) The reason is simple: "the parties remained too far apart to make the exercise of drafting appropriate language for a purchase and sale agreement worthwhile." (Id.)

SUMMARY OF ARGUMENT

This court need not review the trial court's dismissal of the Complaint because the court below correctly applied applicable legal standards and its factual findings were fully supported by the evidence. (pp. 20 – 22) The Buyers' evidentiary challenges are barred and additionally, are without substantive merit. (pp. 22 – 26) The trial court's expedited review of the Seller's Motion to Dismiss was clearly warranted by the special procedure of the Lis Pendens statute. (pp. 26 – 28) The trial court correctly

held that the Buyers' claims were frivolous under the first prong of Section 15(c) of the Lis Pendens statute because the parties never reached agreement on the material terms for the sale and did not intend to be bound by the offer to purchase, and also because the offer was revoked. (pp. 28 – 38) The complaint was also subject to dismissal under the second prong of Section 15(c) of the Lis Pendens statute because the Buyers' claims are devoid of any arguable basis in law. (pp. 38 – 39) The memorandum of lis pendens should have been dissolved for these same reasons, i.e., because the Buyers' claims lack any reasonable factual support or legal merit. (pp. 39– 41) The Buyers' claims are all based on the existence of a contract that was never formed, and therefore, all counts of the complaint were properly dismissed. (pp. 41 – 43) Because this appeal is frivolous, the Seller is entitled to an award of attorney's fees on appeal plus double costs. (pp. 44 – 47)

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Review pursuant to G.L. c. 231, §118 is an "extraordinary review" that should be exercised only

in the most exceptional circumstances. *Royal Dynasty, Inc. v. Chin*, 37 Mass. App. Ct. 171, 173 (1994). The focus for review of an interlocutory matter is "whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions." *Caffyn v. Caffyn*, 441 Mass. 487 (2004) (quoting *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20 (1981)); *McMann v. McGowan*, 71 Mass. App. Ct. 513, 519 (2008) (applicable standard of review for dismissal of plaintiff's action under Lis Pendens statute is whether the trial court "committed an error of law or abused his discretion in applying the standards of G.L. c. 184, § 15(c)"); *Galipault v. Wash Rock Investments, LLC*, 65 Mass. App. Ct. 73, 82 (2005)(on appeal of order dissolving lis pendens and dismissing complaint, court "must exercise special care not to substitute [its] judgment for that of the trial court where the records disclose reasoned support for its action").

There was ample support for the trial court's evaluation of the factual questions presented. The trial court also applied the correct legal standard in specially dismissing the complaint under the first

prong of Section 15(c) of the Lis Pendens statute. There was no abuse of discretion.

II. THE TRIAL COURT ACTED PROPERLY IN CONSIDERING THE EVIDENCE OF RECORD AND ALLOWING THE SPECIAL MOTION TO DISMISS UNDER THE EXPEDITED PROCEDURE OF THE LIS PENDENS STATUTE

A. The Buyers' Evidentiary Challenges Are Without Merit and Have Been Waived

On appeal, Buyers assert various evidentiary objections that were neither properly raised below nor preserved for appeal. First, Buyers contend that the trial court committed an error by overlooking disputed issues of fact concerning the parties' intentions. *See* Brief for the Plaintiff-Appellants ("Appellants' Brief") at p. 2, fn. 1. Buyers misconstrue the trial court proceedings. In fact, the trial judge did consider the entirety of the evidentiary record, including the Verified Complaint, the three (3) Affidavits presented by the Sellers and, most importantly, the Buyers Addendum. The trial court concluded that the Buyers' evidence and the Seller's evidence were consistent in establishing that the parties did not intend to be bound by the offer and had not reached a definitive agreement at the time they signed the OTP. (App. 179)

In their Opposition to the Motion to Dismiss, the Buyers vaguely asserted below that they “dispute many, if not most of the facts alleged in the [Seller’s] affidavits.” App. 126 - 127. But assertions in a legal brief are not evidence and they do not create a dispute of fact. *See Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991) (once moving party has demonstrated the absence of a genuine issue of material fact, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial"); *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989) (although court views evidence on summary judgment motion in favor of nonmoving party “opposing party cannot rest on ... mere assertions of disputed facts”). The Buyers’ failure to submit admissible evidence to contest the facts contained in the Seller’s affidavits cannot be remedied on this appeal. The Buyers’ second evidentiary challenge, mounted for the first time on appeal, is that the Seller’s affidavits do not comply with the requirements of Mass. R. Civ. P. 4.1(h) and 56(e). On this ground, Buyers assert that the trial court should have disregarded them. But the Buyers never moved to

strike the affidavits and they never challenged their admissibility before now. Accordingly, this argument has been waived. *See Fidelity Management & Research Co. v. Ostrander*, 40 Mass. App. Ct. 195, 200 (1996) (court will not consider theories or issues raised for the first time on appeal). In any event, the Seller's affidavits unquestionably comply with the Massachusetts rules of civil procedure: each affidavit is a sworn statement submitted under oath, based on the affiant's knowledge, information or belief that establishes the affiant's competency to testify on the facts contained in them. *See* Mass. R. Civ. P. 56(e). Accordingly, this evidentiary challenge is without merit.

The Buyers' third evidentiary challenge – again raised for the first time on appeal – is that the trial court erred in considering evidence of post-filing negotiations. Specifically, Buyers argue that evidence of the communications that occurred after suit was filed (and after the lis pendens issued), in which the parties continued to discuss mutually acceptable terms for the purchase and sale, constitute inadmissible settlement negotiations under Section 408

of the Massachusetts Guide to Evidence. *See* Appellants' Brief at p. 6. While Section 408 provides that evidence of compromises, or attempts to compromise are inadmissible to prove or disprove "the validity or amount of a disputed claim," the rule does not apply here. The mere fact that the parties continued to negotiate the terms of sale after signing the OTP - as opposed to the substance of the negotiations - is relevant and admissible evidence on the central question of whether or not the parties intended to be bound when they signed the OTP. As the trial court correctly found, the continuing discussions were admissible to show:

> "i) the breadth of details left open by the cursory listing of items on the Offer Summary; ii) that nearly each item on the list required further detail to establish meaning; and iii) that significant value attached to many of the items listed in the Offer Summary."

(App. 180) These communications fall within the exception to prohibited uses under Section 408, i.e., "evidence [offered] for another purpose, such as proving a witness's bias or prejudice or other state of mind..." Massachusetts Guide to Evidence, Section 408(b).

As the court also correctly found, "the parties' continued negotiations after signing the offer further supports [Seller's] position that the offer was not sufficiently definite and that the parties did not intend to be finally bound by the offer." (App. 180) This conclusion is in accord with applicable case law. *See Germagian v. Berrini*, 60 Mass. App. Ct. 456, 460 (2004) (buyer's attempt to add new terms after signing the offer demonstrated that buyer did not intend the offer to be a binding contract); *Blomendale v. Imbrescia*, 25 Mass. App. Ct. 144, 147 (1987) (buyer's introduction of new elements to the transaction which had not been discussed, let alone agreed upon, demonstrated that the parties did not intend to be bound by the preliminary document).

B. The Lis Pendens Statute Contemplates an Early Adjudication of the Factual and Legal Sufficiency of the Claimants' Purported Interest in the Defendant's Real Property

In 2002, the Lis Pendens statute was amended to create "a mechanism for expedited removal of an unjustified lis pendens, including dismissal of frivolous claims supporting an approved lis pendens." *Galipault*, *supra*, 65 Mass. App. Ct. at 81, quoting

Wolfe v. Gormally, 440 Mass. 699, 705 (2004). Thus, the statute creates an alternative mechanism for property owners to challenge claims with no legal merit expeditiously, at the inception of the case, without the burden of time-consuming discovery and a summary judgment filing. The statute now provides, in relevant part, as follows:

> "The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds. In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure. If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery."

G.L. c. 184, § 15(c).

The Buyers' contention that the trial court should have deferred consideration of the Motion to dismiss pending the development of a fuller evidentiary record is without merit and contrary to the explicit language of the statute. Indeed,

Massachusetts courts have regularly granted special motions to dismiss on the basis of verified pleadings and affidavits alone. *See McMann*, *supra*, 71 Mass. App. Ct. at 515; *Galipault*, *supra*, 65 Mass. App. Ct. at 73. *See also Donius v. Milligan*, No. 16 MISC 000277 HPS, 2016 WL 3926577 at *6 (Land Ct. July 25, 2016); *Trolio v. Friedman*, No. 051170, 2005 WL 1683601 (Mass. Super. Ct. May 3, 2005); *Waters v. Cook*, No. 312953, 2005 WL 2864806 (Mass. Land Ct. Nov. 2, 2005).

III. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT BECAUSE THE BUYERS HAVE NO LEGALLY ENFORCEABLE RIGHT TO TITLE

A. The Trial Court Found Correctly that Buyers' Claims Are Devoid of Any Reasonable Factual Support And Are "Frivolous" under the First Prong of G.L. c. 184, § 15(c)

Under G.L. c. 184, § 15(c), a court must dissolve the lis pendens and dismiss the lawsuit if, as here, the action supporting the memorandum of lis pendens "does not affect the title to real property or the use and occupation thereof." A claim that affects title has been defined as a claim brought on a plaintiff's own behalf to enforce "some interest in the real estate or some right to use and occupy it." *McCarthy v. Hurley*, 24 Mass. App. Ct. 533, 536 (1987).

Here, the trial court concluded correctly that the Buyers had no rights in or to the Property "because the parties' negotiations regarding the items listed in the Offer Summary were never finalized and no binding and enforceable agreement was reached." (App. 177) Thus, the trial court dismissed the Complaint under the first prong of G.L. c. 184, § 15(c) on the grounds that Buyers' claims are "devoid of any reasonable factual support." (*Id.*)[6]

1. The Offer to Purchase Is Not a Legally Binding Contract

It is black-letter law that "[a] written memorandum must set forth all the material rights and obligations of both parties in order to constitute a binding contract when accepted" by the offeree. *Kaufman v. Lennox,* 265 Mass. 487, 488 (1929). If the offer and acceptance memorializes merely "an agreement to reach an agreement," it imposes no obligations on

[6] The court also concluded that the third prong of Section 15(c) - that "the action or claim is subject to dismissal based on a valid legal defense" - was also potentially applicable but noted that its analysis under this prong (based on the legal defense that no binding contract was formed) "would be identical to its analysis under the first prong." (App. 177 at fn. 5)

the parties. *Lafayette Place Assoc. v. Boston Redevelopment Authority,* 427 Mass. 509, 517 (1998). To be enforceable, a contract must contain two indispensable elements: First, “there must be agreement between the parties on the material terms" and second, “the parties must have a present intention to be bound by that agreement.” *Situation Mgmt. Systems, Inc. v. Malouf, Inc.,* 430 Mass. 875, 878 (2000) citing *McCarthy v. Tobin,* 429 Mass. 84, 87 (1999).

Buyers argue that the OTP constitutes a legally binding contract under the holding of *McCarthy v. Tobin*. Appellants’ Brief at pp. 15 – 16. This argument hinges on whether the Buyer and the Seller intended to be bound and reached agreement on all of the essential and material terms for the purchase and sale of the Property. Because the parties did not intend to be bound and because no agreement was reached, the trial court’s dismissal of the Buyers’ complaint is on all fours with *McCarthy* and its progeny.

In *McCarthy*, the buyer and seller signed a standard form offer to purchase. The offer contained

the terms and conditions for the conveyance, including the purchase price, a description of the premises, the amount of the deposit, limited title requirements, and the time and place for closing. 429 Mass. at 85. Unlike the present matter, after the offer was signed, counsel exchanged several drafts of a purchase and sale agreement. The last draft was prepared by the seller's counsel, who confirmed to the buyer's counsel that the draft was acceptable and that his clients would sign. But before the buyer could deliver a signed agreement, the seller accepted a competing, higher offer. *Id.* at 86. The issue presented was whether, in the absence of a signed purchase and sale agreement, the offer was binding.

Applying basic contract law, the *McCarthy* court held that the offer was binding for two essential reasons: First, the offer to purchase ***adequately described all of the essential terms of the sale,*** leaving only "subsidiary matters" which the court characterized as "ministerial and nonessential" and that "norms" existed for the "customary resolution" of these subsidiary matters. *Id.* Second, the buyer and the seller ***demonstrated an intent to be bound by the***

offer and therefore, the purchase and sale agreement, while anticipated, was superfluous. *Id.* at 87 (intention of the parties is the "controlling fact"). In those circumstances, which are easily distinguishable from the present case, "it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *Id.* at 87, quoting *Goren v. Royal Investments, Inc.,* 25 Mass. App. Ct. 137, 140 (1987). Buyers here simply cannot satisfy their burden to establish these essential elements for enforcement of the OTP.[7]

First, there was no agreement on all of the material terms for the purchase and sale at the time the document was signed. "The requisite intent is the 'present intent' at the moment of the formation of a contested agreement." *Targus Grp. Int'l, Inc. v. Sherman*, 76 Mass. App. Ct. 421, 432 (2010). On its face, the Buyers Addendum enumerates several outstanding items that were subject to further

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[7] On a motion to dissolve, the claimant has the burden "of justifying any finding... that is challenged by the party who is aggrieved thereby." G.L. c. 184, § 15(c).

discussion and negotiation. These included upgrades, changes and miscellaneous construction components, most of which were described in only vague and ambiguous terms. On its face, the Buyers Addendum does not set forth sufficiently complete and definite terms to establish that there was a meeting of the minds. *See Air Tech. Corp. v. General Elec. Co.*, 347 Mass. 613, 626 (1964) (uncertain essential terms render agreement unenforceable).

Additionally, the vast majority of the open items in the Buyers Addendum were never discussed, let alone an agreement reached regarding them. Importantly, the parties had widely different conceptions of the cost to complete them, ranging from the Seller's estimate of "tens of thousands" of dollars to the Buyers' estimate of $114,815.[8] For this reason alone, the OTP did not bind the Sellers. *See Goren, supra,* 25 Mass. App. Ct. at 141 (to be binding real estate agreement

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[8] The Buyers' handwritten mark-up to the Buyers Addendum reflects that the Buyers estimated it would cost $52,130 to refinish the hardwood floors alone and they sought a credit against the purchase price for this work. App. 111 - 112. The Seller never agreed to this credit.

must resolve at least “all significant economic issues”).

After the OTP was signed, the Buyers requested additional changes and upgrades to the Property. Once again, no agreement was reached on the cost, or financial responsibility for completing these additional items. After the Buyers filed suit (and secured a lis pendens), the parties continued their negotiations but were unable to come to terms. *See* App. 106 – 108. They remained so far apart that – unlike in *McCarthy* – no draft purchase and sale agreement reflecting the numerous construction details was prepared. Far from being “a polished memorandum of an already binding contract,” *McCarthy*, *supra*, 429 Mass. at 87, a purchase and sale agreement was necessary here in order to confirm all of the outstanding construction finishes and details.

Second, it is abundantly clear that neither party intended to be bound by the preliminary document. Mr. Daus-Haberle has plainly expressed the Seller’s understanding that the numerous items in the Buyers Addendum "would be the subject of further discussion

(and negotiations)... [and would be] detailed and agreed upon in the purchase and sale agreement." App. 39. By their conduct, the Buyers demonstrated that they too expected further discussion and negotiations before agreeing to final terms. The conduct of the parties is an important factor in ascertaining whether or not they intended to be bound. *See, e.g., Germagian*, *supra*, 60 Mass. App. Ct. at 460 (buyer's conduct showed that buyer did not intend the offer to be binding); *Coldwell Banker/ Hunneman v. Shostack*, 62 Mass. App. Ct. 635, 639 (2004) (same; no agreement reached on material terms where buyer insisted on negotiating additional conditions).

Here the OTP did not adequately describe all of the material terms of the transaction. The numerous outstanding changes and upgrades reflected in the Buyers Addendum, as well as the additional changes requested by the Buyers subsequently, confirm that the parties had, at best, reached only "imperfect negotiations at the time of the original agreement." *Blomendale v. Imbrescia*, 25 Mass. App. Ct. 144, 147 (1987).

The court below correctly concluded that the OTP is not binding or enforceable. Like the offer at issue in *Walsh v. Morrissey*, it "represented merely the parties' intent to negotiate further in the hope of coming to terms in a formal purchase and sale agreement on the specifics of a complex real estate transaction. By itself, the offer was an unenforceable 'agreement to reach an agreement' at some later time." 63 Mass. App. Ct. 916 (2005) (rescript), citing *Rosenfield v. United States Trust Co.*, 290 Mass. 210, 217 (1935).

2. The Buyers Revoked the Offer to Purchase

The OTP cannot be enforced for an additional reason: as discussed above, after signing it, the Buyers imposed additional requirements and conditions, effectively rejecting the OTP and proposing new terms for the sale. The Buyers first revised the terms of the offer just two (2) days after signing it, and before this suit was filed. At that time, the Buyers imposed additional conditions, requesting the Seller to install a new vanity in the master bathroom; a new kitchen sink (and provide a corresponding allowance for both); and exterior shutters. (App. 42) The

Buyers continued to make demands for changes, upgrades and build-out items through November 2017. (App. 108) Eventually, the Buyers requested a total credit of $114,815 to be applied against the purchase price for the various changes, upgrades and additions they desired. (App. 111) By their conduct, the Buyers revoked the terms of the original offer, and they cannot enforce it by turning back the clock. *See Donius*, *supra*, 2016 WL 3926577 at *6 (where buyer introduced new terms to a later writing that were not mentioned or contemplated in the earlier writing, the earlier writing was rendered unenforceable). *See also Com. v. Johnson*, 447 Mass. 1018 (2006) (offeror may revoke his offer at any time before it is accepted); *Ismert and Associates, Inc. v. New England Mut. Life Ins. Co.*, 801 F.2d 536, 541 (1st Cir. 1986) (counter-offer made upon receipt of an offer generally terminates the party's power to accept original offer); *Peretz v. Watson*, 3 Mass. App. Ct. 727, 728 (1975) (an offer once rejected cannot thereafter be revived by an attempted acceptance thereof).

For all of these reasons, the trial court correctly concluded that Buyers' claims were devoid of

any reasonable factual support under the first prong of G.L. c. 184, § 15(c).

B. Alternatively, Plaintiffs' Claims Should Have Been Dismissed under the Second Prong of G.L. c. 184, § 15(c) Because They Are Devoid of Any Arguable Basis in Law

Although the trial court did not so find, Buyers' complaint was also subject to dismissal under the second prong of Section 15(c) because the claims are devoid of any arguable basis in law. This court can and should affirm the dismissal on grounds that are different (in part) than those reached below. *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991) ("We may consider any ground supporting the judgment"). *See Weidman v. Weidman*, 274 Mass. 118, 125 (1931) ("A correct decision will be sustained even though the ground stated for it may be unsound").

The trial court confused the standard for issuing a memorandum of lis pendens initially with the standard that is to be applied when the plaintiff's claims are challenged on a special motion to dismiss. At the time of the initial motion, the court may consider only whether "the ***subject matter*** of the action constitutes a claim of a right to title" to

real property, but not the merits of the claim. G.L. c. 184, § 15(b) (emphasis added). *See Sutherland v. Aolean Dev. Corp.*, 399 Mass. 36, 40-41 (1987) (rejecting argument that, in deciding whether to endorse a memorandum of lis pendens, a judge must determine that the complaint would survive a motion to dismiss; the statute "gives little discretion to the judge once the judge determines that the subject matter of the action concerns an interest in real estate"). However, on a special motion to dissolve and to dismiss, the reviewing judge must examine the legal sufficiency of the plaintiff's alleged right or interest in the subject property under Section 15(c). *Id.* In this case, because the Buyers had no legally enforceable right to acquire title, their complaint is devoid of any arguable basis in law. Pursuant to the second prong of G.L. c. 184, § 15(c), the trial judge should have dismissed the complaint for this additional reason.

C. The Memorandum of Lis Pendens Should Have Been Dissolved Because Plaintiffs' Action Does Not Affect Title to the Property or the Use and Occupation Thereof

When the Seller specially moved to dismiss the complaint, it moved simultaneously to dissolve the lis pendens. The trial court denied the motion to dissolve on the grounds that "there is no real dispute that plaintiffs' claims implicate a right or interest" in the Property. (App. 171, fn. 2) As discussed immediately above, the trial court applied the wrong standard when it denied the motion to dissolve.

Specifically, the trial court applied the standard for issuance of a lis pendens under ***Section 15(b)***, namely, that "the subject matter of the action constitutes a claim of a right to title" to real property, rather than the standard applicable on a motion to dissolve under ***Section 15(c)***: "If the court determines that the action does not affect the title to the real property or the use and occupation thereof or the buildings thereon, it shall dissolve the memorandum of lis pendens." G.L. c. 184, § 15(c). Because the Buyers had no legal right to acquire the Property, their claim "does not affect the title" and therefore, the lis pendens should have been dissolved. The trial court's denial of the Motion to dissolve was erroneous but it was also harmless in that the Buyers

appealed the Order within thirty (30) days of its entry, preventing the lis pendens from being dissolved at the Registry of Deeds. G.L. 184, § 15(d).

IV. THE TRIAL COURT PROPERLY DISMISSED ALL FOUR COUNTS OF BUYERS' COMPLAINT

The trial court found that each count of the DeCiccos' complaint is "grounded in [Buyers'] contention that the offer executed by the parties... was a binding and enforceable agreement." App. 176 – 177. Because the court also concluded that Buyers had no enforceable right to purchase the Property, it dismissed all counts of the complaint on the Seller's special motion to dismiss. There was no error.

In Count I of the complaint, Buyers assert a claim for breach of contract. As the court below correctly found, there are no set of facts by which Buyers could prove that the Seller breached a contractual obligation to sell the Property to them. To the contrary, for all of the reasons discussed above, no valid and enforceable agreement was created.

Similarly, Buyers cannot make out a prima facie case for breach of the implied covenant of good faith and fair dealing (Count II). It is black-letter law

that every contract implies an obligation of good faith and fair dealing between the parties. *Anthony's Pier Four, Inc. v. HBC Associates,* 411 Mass. 451,471-472 (1991). However, these obligations do not exist in the absence of a valid and enforceable agreement. *Levenson v. LMI Realty Corp.*, 31 Mass. App. Ct. 127, 131 (1991) (where parties had not reached a binding contract the implied covenant of good faith and fair dealing did not apply). To support a claim for breach of the implied covenant of good faith and fair dealing, the Buyers must demonstrate the existence of a contract, which they cannot do.

In Count III of the Complaint, Buyers purport to assert a claim for Misrepresentation. They allege that the Seller represented "that they intended to go forward with the execution of the P & S and the selling of the property" and that the Seller "knew, or should have known" that these representations were false. App. 10. In their Brief, Buyers acknowledge that this claim sounds in tort "because it is, in fact, a tort." Appellants' Brief at p. 18. But in their complaint, App. 10, Buyers do not allege the requisite elements of a tort claim, namely, the

existence of a duty of care and its breach. *See Richmond v. Warren Institution for Savings*, 307 Mass. 483 (1940). On this ground alone, the misrepresentation claim must fail. Additionally, the Seller owed no general duty of care to the Buyers in the absence of a contract: "[F]ailure to perform a contractual obligation is not a tort in the absence of a duty to act apart from the promise made." *Anderson v. Fox Hill Village Homeowners Corp.*, 424 Mass. 365, 368 (1997).

Finally, Buyers cannot avail themselves of the equitable remedy of specific performance, asserted in Count IV of their complaint, because the parties never arrived at mutually agreeable terms for the purchase and sale of the Property. *See Lima v. Lima*, 30 Mass. App. Ct. 479 (1991). Stated differently, Count IV fails to state a claim upon which relief can be granted because the parties never "progressed beyond the stage of imperfect negotiation." *Situation Mgmt. Systems, Inc., supra,* 430 Mass. at 878.

In sum, the trial court properly dismissed all four counts of the Complaint.

V. 180 GRANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES INCURRED IN CONNECTION WITH THIS APPEAL

A. The Seller Is Entitled to Appellate Fees and Costs under the Lis Pendens Statute

A serious deficiency in the pre-2002 Lis Pendens statute was its failure to adequately protect owners of real property who became embroiled in litigation that was without arguable merit. The 2002 amendments provide not only a mechanism to dispose of such claims (i.e., the Special Motion to Dismiss), but they also provide for an award of costs and attorneys' fees in the event that the claims upon which the lis pendens was issued are determined to be frivolous. This statutory provision would "ring hollow if it did not necessarily include a fee for the appeal." *See Yorke Mgt. v. Castro*, 406 Mass. 17, 19 (1989) (awarding appellate attorney's fees and costs in claim under G.L. ch. 93A). *See also Fabre v. Walton*, 441 Mass. 9 (2004) (award of appellate attorney's fees and costs under anti-SLAPP statute, G.L. c. 231, § 59H). 180 Grant is entitled to an award of its attorney's fees and costs incurred in this appeal under the rule articulated in *Yorke Mgt. v. Castro* and *Fabre v. Walton*. Additionally, 180 Grant is entitled to

appellate attorneys' fees and costs under the Lis Pendens statute itself. *See McMann, supra*, 71 Mass. App. Ct. at 520 (affirming award of attorney's fees and costs below, and allowing defendant's request for attorney's fees and single costs with respect to the appeal); *Galipault*, *supra*, 65 Mass. App. Ct. at 87 (same).

B. The Seller Is Entitled to Double Costs Because Buyers' Appeal Is Frivolous

Rule 25 of the Massachusetts Rules of Civil Procedure provides that '[i]f the Appellate Court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Mass. R. A. P. 25. An appeal is frivolous when "there can be no reasonable expectation of a reversal." *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458 (1984).

Buyers filed this interlocutory appeal with full knowledge of the fact that, while the appeal proceeds, the Property is impaired by a lis pendens to the same extent as if there were a valid attachment. *See Debral Realty, Inc. v. DiChiara*, 383 Mass. 559 (1981) (memorandum of lis pendens temporarily restricts power

of landowner to sell property by depriving it of the ability to clear title while litigation is pending). The clear - and intended - consequence of the DeCiccos' appeal is to prolong the substantial economic burden imposed on 180 Grant by preventing it from selling the Property to another buyer and forcing it to incur additional costs and expenses associated with its ownership of the Property pending the conclusion of the appeal (in addition to the attorney's fees and costs incurred on appeal).

The record currently before this Court, and the Superior Court before it, clearly demonstrates that the DeCiccos have no legally viable claim to the real estate on which their claims are based. The lower court found their claims are devoid of any reasonable factual support and therefore "frivolous." On this appeal, Buyers have not shown that the trial court applied an incorrect legal standard or abused its discretion. The Buyers have no reasonable expectation of reversal. Their appeal is therefore frivolous under Mass. R. A. P. 25 and double costs should be awarded. *See O'Flynn v. Powers*, 38 Mass. App. Ct. 936 (1995) (appellee entitled to double costs for

frivolous appeal involving issues clearly precluded under established case law); *Beaton v. Land Court*, 367 Mass. 385, 394 (1975) (where appeal was without merit and accomplished no purpose other than delay, prevailing party awarded double costs of appeal).

CONCLUSION

For the reasons set forth above, Defendant-Appellee, 180 Grant Street, LLC requests that this Court: (1) affirm the Superior Court's dismissal of the Complaint; (2) issue an order dissolving the memorandum of lis pendens; and (3) issue an award of reasonable attorneys' fees related to this appeal together with double costs.

Respectfully submitted,
180 Grant Street, LLC
By its attorneys,

/s/ Jon C. Cowen_____

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CERTIFICATE OF COMPLIANCE

Undersigned counsel for the Defendant-Appellee, 180 Grant Street, LLC, hereby certifies, pursuant to Mass. R. App. P. 16(k), that this Brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to the rules referenced in Mass. R. App. P. 16(k).

/s/ Jon C. Cowen_____
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CERTIFICATE OF SERVICE

I, Jon C. Cowen, counsel for the Defendant-Appellee, 180 Grant Street, LLC, hereby certify under penalties of perjury that on December 13, 2018, the within Brief of the Defendant-Appellee were served via the Appeals Court electronic filing system on the following counsel of record:

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 17-02777

JACK DECICCO & another[1]

vs.

180 GRANT STREET, LLC

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISSOLVE LIS PENDENS AND SPECIAL MOTION TO DISMISS

This lawsuit stems from an offer to purchase property located at 180 Grant Street, in Lexington, Massachusetts ("property"). The plaintiffs Jack and Sandra DeCicco ("plaintiffs"), who offered to purchase the property, brought several claims against the defendant 180 Grant Street, LLC ("defendant") for breach of contract, breach of the implied covenant of good faith, misrepresentation, and specific performance. On October 4, 2017, after a hearing, the court (Inge, J.) approved the plaintiffs' application for a memorandum of lis pendens. This matter is before the court on the defendant's motion to (1) dissolve the memorandum of lis pendens and (2) dismiss the plaintiffs' complaint pursuant to G. L. c. 184, § 15(c). Because the court's prior determination that plaintiff's claims involved a right or interest in land was correct, the motion to dissolve the memorandum of lis pendens is **denied**.[2] For the reasons set forth below, the defendant's special motion to dismiss is **allowed**. Upon filing at the Registry of Deeds this decision and order allowing the special motion to dismiss, and expiration of the thirty day appeal period, the memorandum of lis pendens will be dissolved pursuant to G. L. c. 184, § 15(d).

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[1] Sandra DeCicco

[2] For the reasons set forth on the record at hearing, there is no real dispute that plaintiffs' claims implicate a right or interest in the property at 180 Grant Street in Lexington. The defendant's real challenge to the memorandum of lis pendens is grounded in the factual and legal infirmities in plaintiffs' underlying claims, and therefore is addressed by defendant's special motion to dismiss. For those reasons, the motion to dissolve is not discussed further.

BACKGROUND

The defendant purchased the property in October 2016 and is the property's present owner. After purchasing the property, the defendant tore down the existing residence and began constructing a new seven bedroom, six-and-half bathroom home. Peter Daus-Haberle ("Daus-Haberle") is the defendant's general manager. Daus-Haberle designed the new home, oversaw the permitting process, and acted as the general contractor during the home's construction.

The defendant listed the property for sale on the Massachusetts Multiple Listing Service in April 2017. The plaintiffs became interested, and on September 7, 2017, Daus-Haberle showed the property to the plaintiffs and their real estate broker. The following day, the plaintiffs offered to purchase the property for $2,260,000. The offer comprised three one-page documents (collectively referred to as the "offer"):

- First, a Greater Boston Real Estate Board ("GBREB") standard "Offer to Purchase Real Estate" form, which was signed by both plaintiffs and Daus-Haberle on behalf of the defendant, on September 8, 2017. This form identified the property, the seller and purchaser, and the purchase price; provided that the parties would execute a purchase and sale agreement by September 15, 2017, "which, when executed, shall be the agreement between the parties hereto"; and provided for a closing date of November 13, 2017.

- Second, an "Offer to Purchase Contingency Addendum," also a GBREB form, signed by the parties, which provided the buyer about a month to address certain contingencies, namely, obtaining a mortgage loan to finance the purchase, conducting a home inspection, and inspecting for radon and pests. None of these standard contingencies are at issue in this litigation.

- Third, the offer included a page captioned "180 Grant Street Offer Summary," prepared by plaintiffs and signed by the parties. The Offer Summary restates the offer price of $2,260,000 and contained a list of items.

The parties characterize this list of items differently: (i) Daus-Haberle says the Offer Summary is a list of the DeCiccos' requests for work to be done on the house, as a condition of their offer, and that the parties never reached an agreement with respect to the proposed work; and (ii)

counsel for the plaintiffs characterizes the Offer Summary as a list *memorializing* the parties' agreement with respect to work to be done on the house as part of the plaintiff's offer.

Because the Offer Summary is central to the plaintiffs' claims and the defendant's special motion to dismiss, its text is set forth here:

> Offer price subject to delivery of home in move-in condition as advertised, subject to Buyer review and approval of the following:

- Seller obtaining Certificate of Occupancy within 20 days of signing contract
- Entire Home
  - Hardwood flooring
    - Darker Stain – Buyer to select color
    - Gloss finish
  - Updated hardware throughout
  - Alarm system wiring
  - Install lighting fixtures throughout the house, subject to buyer review and approval of hardware
  - Shelving for all closets
- Appliances:
  - Fridge – Replace with comparable Sub Zero
  - Range and oven: Replace with Wolf brand
- Showers: Install frameless glass with stainless steel hardware
- Electrical
  - Install speakers on first floor and basement
    - Location: to be determined
    - Buyers to purchase hardware
- ½ Bath on First Floor (nearest kitchen)
  - Buyer to select different sink of matching quality
  - Replace flooring with tile
    - Buyer to purchase material
- Basement
  - Complete work as described
  - Buyer to select flooring materials of comparable matching quality
- Room over garage
  - Complete construction of space as advertised of matching quality and workmanship
  - Construction complete no later than 45 days after closing
- Fencing: Complete as advertised and discussed
  - Along driveway
  - Fenced in back yard
- Offer Valid Through: September 8, 2017

Exh. 1 to Verified Complaint, at third page.

In addition to this bulleted list, the Offer Summary contained two handwritten annotations initialed by Daus-Haberle and Jack DeCicco. The first was a mark that crossed out a $2,125,000 offer price and replaced it with a $2,260,000 offer price (which is consistent with the first page of the offer). The second was a "$1,200 allowance" handwritten next to the "install lighting fixtures" bullet point.

After the parties executed the offer on September 8, 2017, they continued to discuss a purchase and sale agreement, which the offer stated would be executed by September 15th. Those discussions were unsuccessful, and on September 14, 2017, the defendant emailed the plaintiffs' broker, stating that it "could not make this deal work." The next day, September 15, 2017, the plaintiffs' real estate attorney emailed the defendant a proposed purchase and sale agreement. The email stated that the plaintiffs were willing to consider any changes to the purchase and sale agreement that the defendant proposed. Later that day, the plaintiffs delivered an executed copy of the purchase and sale agreement and a $112,000 check to their broker, who was supposed to be the escrow agent for the transaction. The defendant then informed the plaintiffs that it would not execute the purchase and sale agreement and was not going forward with the parties' transaction.

In his affidavit, Daus-Haberle explains that the parties never reached a final agreement. He avers that the parties had not agreed on many of the "big ticket" items identified in the Offer Summary as the cost required to complete them would be significant. Daus-Haberle states that the plaintiffs continued to ask for additional changes to the property in the days following the parties' execution of the offer. Daus-Haberle further avers that the parties made the annotations to the Offer Summary on September 9, 2017, after Jack DeCicco visited the property to discuss lighting and hardware. Lastly, Daus-Haberle avers that "given the scope of the items left open in

the Offer Summary, and the additional changes requested by the [plaintiffs] after the offer was signed, the [defendant] was not able to proceed with the sale."

Believing that they had entered into an enforceable agreement with the defendant, the plaintiffs filed this lawsuit on September 22, 2017, bringing claims for breach of contract (Count I); breach of the implied covenant of good faith (Count II); misrepresentation (Count III); and specific performance (Count IV). On October 4, 2017, the court (Inge, J.) approved the plaintiffs' application for a memorandum of lis pendens. The defendant in turn brought counterclaims for dissolution of the memorandum of lis pendens, abuse of process, interference with prospective contractual relations, and declaratory judgment.

Between October 2017 and November 2017, after the plaintiffs commenced this action, the parties engaged in additional discussions regarding the property, the items listed in the Offer Summary, and some newly requested items. The defendant submitted a supplemental affidavit from their real estate attorney, James M. Lyles ("Lyles"), cataloging these discussions. Attached to Lyles's affidavit are several emails the parties exchanged in which the parties' real estate attorneys discussed executing a purchase and sale agreement. Also attached to Lyles's affidavit is a "redline" version of the Offer Summary with various notes and dollar figures that the plaintiffs added next to the items listed in the Offer Summary.

The defendant now moves to dissolve the memorandum of lis pendens and dismiss the plaintiffs' complaint pursuant to G. L. c. 184, § 15(c).

DISCUSSION

I. Legal Standard

"Under G. L. c. 184, § 15(c), a party who believes that a claimant's action or claim supporting a lis pendens is frivolous may file a special motion to dismiss." *Faneuil Investors*

Group, Ltd. P'ship v. *Board of Selectmen*, 458 Mass. 1, 2 (2010). "The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds." G. L. c. 184, § 15(c). "In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure." *Id.*

Courts have analogized a special motion to dismiss under this statute to a motion for summary judgment. See *Gould* v. *Lancaster Tech. Park L.P.*, 2006 Mass. Super. LEXIS 96, at *1-2 (Mass. Super. 2006); *Trolio* v. *Friedman*, 2005 Mass. Super. LEXIS 263, at *4-5 (Mass. Super. 2005) *Waters* v. *Cook*, 2005 Mass. LCR LEXIS 116, at *13-15 (Mass. Land Ct. 2005). On the other hand, the Appeals Court has equated this type of special motion to a special motion to dismiss under the Anti-SLAPP statute. See *Galipault* v. *Wash Rock Invs., LLC*, 65 Mass. App. Ct. 73, 81-82 (2005). Regardless of the precise label attached to the standard of review under G. L. c. 184, § 15(c), the statute and case law make clear that this court must determine whether the plaintiffs' claims are "frivolous," as that term is defined in Section 15(c), based on the verified pleadings and the affidavits the parties submitted. Accordingly, this court considers the plaintiffs' verified complaint and three affidavits the defendant submitted, together with the attached documents containing communications between the parties.[3]

II. <u>Analysis</u>

Each of the plaintiffs' four claims, which support the lis pendens, are grounded in plaintiffs' contention that the offer executed by the parties on September 8th was a binding and

[3] The defendant submitted Daus-Haberle's affidavit and two affidavits from Lyles.

enforceable agreement. The parties agree that the signed offer comprises three pages, including the Offer Summary described above. The defendant argues that plaintiffs' claims must be dismissed as frivolous under G.L. c. 184, § 15(c), because the parties' negotiations regarding the items listed in the Offer Summary were never finalized and no binding and enforceable agreement was reached. This court agrees, and concludes that the plaintiffs' verified complaint must be dismissed.[4]

"An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms." *Targus Grp. Int'l, Inc.* v. *Sherman*, 76 Mass. App. Ct. 421, 428 (2010). "It is not required that all terms of the agreement be precisely specified, and the presence of undefined or unspecified terms will not necessarily preclude the formation of a binding contract." *Situation Mgmt. Sys., Inc.* v. *Malouf, Inc.*, 430 Mass. 875, 878 (2000). But the parties must "have progressed beyond the stage of imperfect negotiation." *Id.* (internal quotations and citations omitted).

As a threshold matter, this decision on defendant's special motion to dismiss turns on whether the plaintiffs' claims have reasonable factual support, under the first prong of Section 15(c).[5] It cannot be said that plaintiff's claim for specific enforcement is "devoid of any arguable basis in law" under the second prong; it is well established that a countersigned offer to purchase real estate, even when the parties contemplate that a more formal P&S agreement will

[4] Although the plaintiffs' misrepresentation claim sounds in tort, it is inextricably linked to the plaintiffs' breach of contract allegations and therefore subject to dismissal pursuant to G. L. c. 184, § 15(c).

[5] Arguably the third prong of Section 15(c) also is relevant—whether the plaintiff's claim is "subject to dismissal based on a valid legal defense such as the statute of frauds." The absence of a binding agreement may be viewed as a "defense" to the plaintiff's breach of contract/specific performance claims. But application of that defense here turns on the facts in the affidavits submitted upon the special motion to dismiss, as distinct from a defense, like statute of frauds, more typically raised in a Rule 12(b)(6) motion to dismiss. The first prong of Section 15(c) applies most directly to this special motion. In any event, if the third prong of Section 15(c) properly applies, the court's analysis to the defense that there was no binding contract formed would be identical to its analysis under the first prong of Section 15(c).

follow, can be a binding agreement. See, e.g., *McCarthy v. Tobin*, 429 Mass. 84, 87 (1999) (offer to purchase reflected the parties' intention to be bound and contained all material terms). The question in this case is not whether an offer can be *legally* binding—it indisputably can. The question is whether the offer in this case—which included a list of fourteen items of work to be completed on the still-under-construction home—is binding as a factual matter.

At hearing, counsel for the plaintiffs ably identified the avenue that would allow the court to find an enforceable agreement even though the Offer Summary on its face contains a list of further work to be done on the home, many of which appear to require further discussion of details: Counsel argued that the Offer Summary is a *memorialization* of the further required work on the house, as agreed to by the parties. It is accurate that this offer *could be* legally binding if the Offer Summary indeed was a memorialization of the parties' agreement. But here, the plaintiffs lack "reasonable factual support" for their (colorable) legal argument.

First, many of the terms in the Offer Summary are neither sufficiently complete nor definite. Throughout the list of items in the Offer Summary are phrases such as "subject to Buyer review and approval"; "as advertised"; "as discussed"; and "location to be determined." Given these equivocal phrases attached to many of the items—especially without evidence that both sides had a mutual understanding of the terms' meaning, the Offer Summary on its face does not contain sufficiently complete and definite terms. See *Air Tech. Corp.* v. *General Elec. Co.*, 347 Mass. 613, 626 (1964) (stating that uncertain essential terms render agreement unenforceable). The use of such terms likewise does not reflect a present intention to be bound at the time of the offer, but instead reflects identification of several issues that required further discussion, presumably to be addressed further in a P&S agreement.

Second, and most important, the materials before the court show that the parties did not intend to be bound by the offer, and that the terms were not sufficiently definite. Plaintiff's *argument* is that the Offer Summary memorializes the parties' explicit agreement, but their evidence is contrary. In paragraphs twenty and twenty-one of their Verified Complaint, the plaintiffs allege that "[t]he addendum [Offer Summary] contained features to be completed by the defendant/seller prior to closing in order to bring the property to its advertised condition" and "contained additional items *requested* by the plaintiffs/buyers that were not part of the property's advertised condition." Verified Complaint, ¶¶ 20-21 (emphasis added). Thus, even plaintiffs' evidence suggests that the Offer Summary requested additional work; the verified complaint does not support plaintiffs' contention that the Offer Summary memorialized an agreement on the details of that work, and neither does the document itself.

On the other side of the transaction, Daus-Haberle, in his affidavit, testified that the work reflected in the Offer Summary was significant and that no agreement was reached on the details when he signed the offer. Daus-Haberle Affid., ¶¶ 15-20. Daus-Haberle explained that, on September 8th and 9th and continuing thereafter, discussion continued about the requested work, whether it would be done, and whether seller would grant "allowances" for certain work, some of which involved tens of thousands of dollars. *Id.* Then, on September 11th, plaintiffs added a request that is not referenced on the Offer Summary, namely, to remove and replace kitchen and master bath fixtures and to install exterior shutters. Id. ¶¶ 21-23. In light of these new requests, the failure to agree on the details of the work outlined on the Offer Summary, and the absence of agreement on who would bear the costs of the additional work requested, Daus-Haberle informed plaintiffs he would not be able to reach a "definitive agreement" with plaintiffs. *Id.* ¶¶ 23-24. In sum, Daus-Haberle provided evidence that the Offer Summary is not a memorialization of the

parties' agreement, but a list of work or requests that needed further discussion, which the parties in fact discussed further after signing the offer. In response to defendant's special motion to dismiss and affidavits, the plaintiffs did not submit affidavits or other evidence but instead relied on the Verified Complaint. Therefore, the record upon the special motion to dismiss lacks any reasonable factual support for plaintiff's linchpin argument that the Offer Sheet reflected the parties' memorialization of their definitive agreement.

In addition, the fact that the parties continued to negotiate after they executed the offer further suggests that they did not intend to be finally bound by the offer. See *Germagian* v. *Berrini*, 60 Mass. App. Ct. 456, 460 (2004) (a party's conduct subsequent to executing an offer to purchase may be relevant in determining whether he or she intended to be bound). In the days immediately following the signed offer, the parties negotiated the details of the Offer Summary and, importantly, who was financially responsible for replacements or improvements. Daus-Haberle Affid., *supra*. Then, after this lawsuit commenced, the parties continued to negotiate, as reflected by (1) the redline copy of the Offer Summary attached to Lyles' affidavit and (2) emails the plaintiffs' real estate attorney sent to the defendant that discuss various items listed in the Offer Summary and some newly requested items. Although these post-lawsuit negotiations are different because they reflect reasonable settlement discussions of this action, the communications do show: i) the breadth of details left open by the cursory listing of items on the Offer Summary; ii) that nearly each item on the list required further detail to establish meaning; and iii) that significant value attached to many of the items listed in the Offer Summary. That the parties continued negotiations after signing the offer further supports defendant's position that the offer was not sufficiently definite and that the parties did not intend to be finally bound by the offer. See, e.g., *Coldwell Banker/Hunneman* v. *Shostack*, 62 Mass. App. Ct. 635, 639

(2004) (parties' ongoing negotiation of material term indicated that they did not intend to be bound by the offer to purchase real estate they previously executed); *Blomendale* v. *Imbrescia*, 25 Mass. App. Ct. 144, 147 (1987) (parties executed preliminary document that identified transaction's basic terms, but "[t]he buyer introduced new elements which had not been discussed, let alone agreed upon . . . [thereby demonstrating] that the parties did not intend to be bound by the preliminary document").

Accordingly, although some signed offers to purchase can be binding, the factual record here shows that this one was not. The Offer Summary memorialized not the parties' definitive agreement, but their imperfect negotiations to that point. See *Situation Mgmt. Sys., Inc.*, 430 Mass. at 878. When the factual record upon a special motion to dismiss does not support the plaintiff's asserted claim to property, the special motion to dismiss is to be allowed under G.L. c. 184, § 15(c). See, e.g., *Gould* v. *Lancaster Tech. Park L.P.*, 2006 Mass. Super. LEXIS 96, at *14 (Mass. Super. 2006) (allowing special motion to dismiss where "[t]he evidence set forth in the affidavits d[id] not support the plaintiff's claims, and d[id] not establish that there [was] even a colorable claim of a right to any of the real property owned by the defendant."); *Lindblad* v. *Holmes*, 2004 Mass. Super. LEXIS 631, at *12-13 (Mass. Super. 2004) (allowing special motion to dismiss where, among other reasons, email communications that were the purported agreement "d[id] not establish on their face that the parties had agreed upon all the essential terms of the transaction or an intention to be bound by such documents").

Pursuant to G. L. c. 184, § 15(d), this decision and order granting defendants' special motion to dismiss may be filed at the Registry of Deeds. Once filed at the Registry, this decision and order is conclusive evidence that plaintiffs' action that was the subject of the memorandum of lis pendens, does <u>not</u> affect the title to the real property at 180 Grant Street, Lexington, but

only after expiration of the thirty day appeal period set forth in Section 15(d). See G. L. c. 184, § 15(d).

Lastly, G. L. c. 184, § 15(c) provides that "[i]f the court allows the special motion to dismiss, it *shall* award the moving party costs and reasonable attorneys [*sic*] fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery" (emphasis added). The defendant, therefore, is entitled to costs and reasonable attorneys' fees that it incurred in bringing this motion.[6]

ORDER

For the foregoing reasons, it is hereby **ordered** that the defendant 180 Grant Street, LLC's motion to dissolve lis pendens is **denied**. Defendant's special motion to dismiss is **allowed**. Counts One through Four of plaintiffs' complaint shall be dismissed and judgment shall enter for the defendants. By operation of G. L. c. 184, § 15(d), this decision and order may be filed at the Registry of Deeds and, following the expiration of the thirty day appeals period, is conclusive evidence that the plaintiffs' claims do not affect right, title or interest in the property at 180 Grant Street in Lexington, Massachusetts. Further, within twenty days of this order, unless the parties extend that date by agreement, counsel for defendant shall submit an affidavit under Superior Court Rule 9A, itemizing the attorneys' fees and costs incurred in bringing the

[6] In light of the statutory award of fees upon allowing the special motion to dismiss, the court notes that the defendant could have the memorandum of lis pendens dissolved most promptly, prior to even the expiration of the thirty day appeal period, by a voluntary dismissal of the memorandum of lis pendens by plaintiff consistent with Section 15(a) & (d). The parties should consider whether a more prompt dismissal of the lis pendens, together with the fee award, might be an appropriate topic for negotiation.

defendant's special motion to dismiss. Upon review of the affidavit, and any opposition thereto, the court will determine the reasonable amount of attorneys' fees and costs to be awarded pursuant to G. L. c. 184, § 15(c).

SO ORDERED.

Christopher K. Barry-Smith
Justice of the Superior Court

DATED: April 13, 2018