

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC No. FAR-

APPEALS COURT No. 2018-P-1051

JACK DECICCO, et al.,
PLAINTIFFS-APPELLANTS,

v.

180 GRANT STREET, LLC.,
DEFENDANT-APPELLEE.

APPLICATION FOR REVIEW OF A DECISION OF THE APPEALS COURT

**APPLICATION FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW FOR
THE PLAINTIFFS-APPELLANTS**

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Dated: June 7, 2019

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass.R.App.P. 27.1, the plaintiffs-appellants request that this court grant further appellate review of the appeals court's decision issued on May 17, 2019. As grounds therefore, they state that further appellate review is necessitated by substantial reasons affecting the public interest and the interests of justice.

Introduction

This case addresses the confusion that underlies the *lis pendens* statute which warrants clarification by this court. And, more specifically, whether the plaintiffs' complaint to enforce an offer to purchase real estate (OTP) executed by the seller and plaintiff buyers, relying upon McCarthy v. Tobin, 429 Mass. 84 (2009), was improperly determined as frivolous. "The devil that lurks in offers to purchase real estate and like instruments which contemplate further documentation regarding the same subject matter, once again has triumphed." McCarthy v. Tobin, 44 Mass. App. Ct. 274 (1997), *aff'd*, 429 Mass. 84 (2009).

II. STATEMENT OF PRIOR PROCEEDINGS

On September 22, 2017, the plaintiffs filed their verified complaint seeking specific performance of a contract for the sale of a home in Lexington. Add. 43-49.¹ They sought additional relief as well as damages. Id. As an adjunct to their complaint, they sought endorsement of a memorandum of *lis pendens*, which was granted after hearing. R.A. 59.

On March 12, 2018, the defendant filed a special motion to dismiss pursuant to G.L. c.184, §15(c) (statute). R.A. 86-87. On April 13, 2018, the judge, evaluating and deciding multiple disputed facts, in the light most favorable to the moving party, the seller, relying upon incompetent affidavits and deciding the parties' states of mind, found that the complaint lacked any reasonable factual support, thus "frivolous," and allowed the defendant's special motion to dismiss and awarded attorney's fees and costs. Add. 30-42.

The appeals court, as a three judge panel, affirmed the judgment on May 17, 2019, and published a

¹ Record citations are to the addendum appended to this application by page (Add.____) as well as the appendix by page (R.A. ____) filed by the appellants in the appeals court.

memorandum and order pursuant to its Rule 1:28. Add. 24-29. The appeals court exercised its discretion to deem the plaintiffs' objections to the affidavits waived because, technically, they were located in the "standard of review" rather than in the "argument" section of their brief.² Add. 26 n. 2.

III. STATEMENT OF FACTS

Six days after the defendant-seller accepted the plaintiff buyers' offer to purchase a home in Lexington for \$2,260,000, the seller declared that he "could not make the deal work." Add. 56.

The Offer to Purchase (OTP)

On September 8, 2017, the buyers and seller executed an "Offer to Purchase Real Estate" (OTP) for the home. Add. 50.

The OTP contained the offer, acceptance, full consideration, location and description of the

² Mass.App.R.Civ.P. 1(a) states that the rules of appellate procedure "shall be construed, administered, and employed to secure the just, speedy, and inexpensive determination of appeals." Id.

property, and dates for execution of the purchase and sale agreement (P&S) and the closing.³ Add. 44-45, 50.

Although the home was offered and advertised as a completed home, the seller and buyers clearly understood that it was not complete. Add. 45. Consequently, they executed an addendum to the OTP entitled "180 Grant Street Offer Summary."⁴ Add. 52.

The Defendant's Repudiation of the Contract

In the week between September 8, 2017, and September 14, 2017, no proposed P&S was ever received by the buyers from the seller. Add. 45, 53-60.

On September 14, 2017, the seller emailed the buyers' broker and declared that he "could not make this deal work." Add. 56.

The buyers filed suit and a *lis pendens* request. Add. 43-49; R.A. 24. The seller filed a special motion to dismiss. R.A. 86. The judge heard no evidence and the defendant's special motion to dismiss was decided solely on documentary evidence including

³ The OTP also contained notice that it was a "legal document that creates binding obligations." Add. 50.

⁴ The OTP and addenda with enumeration of the incomplete items were included in the appendix filed by the appellant in the appeals court and is appended to this application. Add. 50-52.

the three contested affidavits. Add. 30-42. The judge explicitly relied upon, as did the appeals court, the three affidavits. Add. 24-42.

The Three Affidavits

1. The First Lyle Affidavit

Affiant Lyle begins by admitting that he has no personal knowledge of the activities of the parties prior to their signing of the OTP and that he was retained only after it was executed. Add. 80. He purports to affirm what the parties were thinking at the time they jointly executed the OTP. Add. 80-83. He states that in his estimation the parties did not intend to be bound by the signing of the offer documents. Id. The affiant also asserts legal and other opinions that the signed offer summary was "vague" and "does not indicate that an agreement was reached." He also offers opinion that "the offer is invalid and unenforceable...." Id. He opines that "in his experience" matters that are left vague are negotiated in a purchase and sale agreement. Id.

2. Lyle's Second Affidavit

Lyle's second affidavit contains statements describing settlement negotiations, legal conclusions,

and opinions as to how contested material facts are to be resolved by the judge in dispositive summary judgment. Add. 84-86.

3. The Daus-Haberle Affidavit

Peter Daus-Haberle (one of the two members of the defendant, 180 Grant Street, LLC) asserts opinions and conclusions. Add. 61-69. Many, if not most of his facts are disputed by plaintiffs' verified complaint and the documents appended to it.⁵ Add. 43-49, 61-69.

By way of example, Daus-Haberle asserts in his affidavit that the parties did not reach an agreement on the items contained in the offer summary that he himself had signed without condition. Add. 64, 73. This is contradicted by the buyers' verified complaint at paragraph 20 ("the addendum contained features to be completed by defendant/seller prior to closing in order to bring the property to its advertised condition"). Add. 45.

Daus-Haberle states that "no agreement had been reached between the Seller and Buyer as to any of these items...", referring to the items listed in the offer summary. Add. 64. In fact, his statement goes

⁵ The defendant filed no verified pleadings.

beyond personal knowledge to the realm of speculation and conjecture of another party's state of mind.

IV. STATEMENT OF POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether it was error for the appeals court to affirm the judge's decision which essentially processed the matter as an abbreviated jury waived trial, resolving disputed issues of intent and disputed material facts in the light most favorable to the seller moving party.
2. Whether it was plain error for the judge to find, and the appeals court to approve, that the plaintiffs' complaint was frivolous, that is, devoid of any reasonable factual support.
3. Whether the appeals court should have reviewed the evidence in this case de novo, inasmuch as the judge effectively treated the case as one on summary judgment or a motion to dismiss under Mass.R.Civ.P. 12(b)(6).
4. Whether the standard of appellate review of special motions under the statute should be considered and clarified by this court.
5. What does the statute say about the quality of affidavits and do the affidavits in this case meet that standard?
6. Whether it was an abuse of discretion for the appeals court, in a footnote, to rule that the buyer-plaintiffs had waived objection to the affidavits commenting: 1) that the objection was not raised before the judge; and 2) that the objections were not contained in the "argument" section of the brief.
7. Whether the cases relied upon by the appeals court appropriately support the reasoning and decision of that court.

V. REASONS FOR FURTHER APPELLATE REVIEW

1. It Was Error For The Motion Judge To Resolve Disputed Issues Of Intent And Disputed Material Facts, Acting As Fact Finder

This dispute, while it may boil down to McCarthy v. Tobin, 429 Mass. 84 (2009), is replete with disputed facts requiring fair resolution to determine what the parties intended at the time they executed the OTP (with addenda), and what efforts were made, especially by the seller, to make the transaction work.⁶ Levenson v. L.M.I Realty Corp., 31 Mass.App.Ct. 127, 130 (1991) (intention of the parties will present a question of fact).

It is a case which must focus on what they were intending at the time of execution, not later discussions, not repudiation. See Duff v. McKay, 89 Mass.App.Ct. 538, 544 (2016) (an enforceable agreement requires a present intent of the parties *at the time of formation* to be bound by those terms) (emphasis added).

⁶ Whether the seller made a good faith effort to make the contract work was ignored by the motion judge and the appeals court. Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 472 (1991) (every contract implies good faith and fair dealing between the parties to it).

The judge's decision clearly did not depend on a discrete issue of law or interpretation, but rather global consideration of interchange between these parties. It must be reemphasized that the OTP was executed for an incomplete house, and that it obviously required completion of those items in order for the transfer of a completed home. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-716 (judgment is appropriate only where there is no dispute as to the salient facts or if only a question of law is involved). See also David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc., 8 Mass.App.Ct. 237, 239 (1979) (determining existence of contract is only for the judge where the evidence consists only of writing, or is uncontradicted).

2. It Was Plain Error For The Motion Judge To Find, And The Appeals Court To Approve, That The Plaintiffs' Complaint Was Frivolous

Under Mass.R.Civ.P. 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Iannoachino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Under Mass.R.Civ.P.

56, a claim cannot be resolved on a motion for summary judgment where a reasonable jury could return a verdict for the nonmoving party." Dennis v. Kaskel, 79 Mass.App.Ct. 736, 741 (2011).

The applicants in this case argue that the statute's language, "devoid of any reasonable factual support" should be considered in the reflection of rules 12(b)(6) and 56.

The plaintiffs' claims were not "frivolous" under whatever standard or definition. The simple question is, was there any reasonable factual support for the claims. The OTP, the signatures, and the seller's remorse over his level of profit, all undisputed, set forth some reasonable basis for the plaintiffs' claims. Indeed, the motion judge correctly found that the plaintiffs had a "colorable legal argument" and that they "ably identified the avenue that would allow the court to find an enforceable agreement." Add. 37.

3. De Novo Review

Is the motion judge's decision entitled to de novo review? As will be discussed below, the standard of review in these cases is unsettled and warrants clarification. Examination of the judge's action and

the appeals court decision fairly describes a summary judgment or a decision after incomplete jury waived trial, and prior to routine pretrial discovery. This abbreviated protocol may be fair when the judge considers a *lis pendens* motion if the facts are uncontested and the decision can be made on a discrete question of law. See Faneuil Investors Group, Ltd. P'ship v. Bd. of Selectmen, 458 Mass. 1 (2010); McMann v. McGowan, 71 Mass.App.Ct. 513 (2008).

This court and the appeals court have, by time honored tradition, granted de novo review when a thoughtful and conscientious complaint has been summarily decided by a single judge.⁷

4. Clarification of the Standard of Appellate Review

The standard of review should be clarified by this court. The appeals court relied upon Faneuil Investors Group, Ltd. P'ship v. Bd. of Selectmen, supra; McMann v. McGowan, supra to justify (a) disregarding contested affidavits and (b) defining its standard as review for error of law or abuse of

⁷ The applicant also notes that the appeals court decision, a rule 1:28 case, was decided by a three judge panel, and in the appeals court tradition has been determined to be of low significance not warranting oral argument to a full panel.

discretion in applying the statute. The appeals court rejected the plaintiffs' request for de novo review.

Faneuil Investors Group, Ltd. P'ship v. Bd. of Selectmen, supra, was determined upon a discrete issue of law with no disputed facts requiring resolution. McMann v. McGowan, supra, similarly, was decided upon a discrete question of interpreting the language of "in hand" delivery in a purchase and sale agreement. McMann was essentially and also a case with no disputed facts.

Similarly in Galipault v. Wash Rock Invs., LLC, there were no disputed facts. 65 Mass.App.Ct. 73, 82 (2005). Cf. Germagian v. Berrini, 60 Mass.App.Ct. 456 (2004) (granting summary judgment after completion of discovery and where there was no genuine issue as to any material fact).

Each of these cases was decided upon a discrete issue of law with no factual dispute. These cases present no reasonable standard of review for the case at bar, with substantial facts that need to be evaluated and resolved. McCarthy v. Tobin, supra.

5. The Statute's Specifications For Affidavits

The statute is succinct. The statute instructs the motion judge as to what evidence is to be considered in acting on a motion to dismiss. "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) (emphasis added).

In this application, at pages 8-10, the plaintiffs summarize the assertions in each of the three contested affidavits. In summary, a cursory reading of these highly prejudicial affidavits discloses noncompliance with the rules of evidence and the Massachusetts Rules of Civil Procedure. The applicant requests that this court consider the seven pages of argument contained in their brief to the appeals court at pages 2-8. Add. 110-116.

6. Waiver Of Objections

On the issue of waiver of objection to the affidavits, the appeals court is simply unfair. In view of the succinct instruction in the statute to the motion judge as to the quality of acceptable

affidavits, it is not fair that the appeals court implicitly ruled that some additional red flag needed to be raised by the plaintiffs below.

As for the appeals court's rejection of the appellants' seven pages of arguments addressing the incompetency of the affidavits, the rejection is abusive of discretion. Essential to most competent appellate arguments to this court and to the appeals court is the appellants' statement as to the appropriate standard of review.

The Massachusetts Rules of Appellate Procedure are to be "construed, administered, and employed to secure just, speedy, and inexpensive determination of appeals." Mass.R.App.P. 1(a). For the appeals court in this case to deny consideration of the appellants' objection because those objections were located in the standard of review argument, seems, frankly, inappropriate and constitutes an abuse of discretion.

7. Cases Relied Upon by the Appeals Court

The cases relied upon by the appeals court are inapplicable or, to a great extent, insufficient to support its decision.

The citation to Faneuil Investors Group, Ltd. P'ship v. Bd. of Selectmen, supra, adds nothing. The case simply identifies the fact of a statute, and quotes a brief excerpt from it.

McMann v. McGowan, supra, is cited as establishing the standard as review for error of law or abuse of discretion. However, the entire case turns on a simple and discrete question of the meaning of "in hand" delivery. There are no disputed facts.

Weiler v. Portfolioscope, Inc., 469 Mass. 75, 86 (2014), supports that the appeals court has the discretion to treat as waived, or not, issues neither raised below nor raised in the argument section of the plaintiffs' brief. Please refer to comments in the application above at pages 16-17.

Germagian v. Berrini, supra, is cited by the appeals court to reason that negotiations and behavior subsequent to the execution of the OTP document can be relevant to the ultimate determination of the parties' intention under the McCarthy standard. The case does not say that such evidence can be considered if it is inadmissible because non-compliant with statutory requirements or the rules of evidence. Further, the applicants do not argue that such evidence, if were

properly admitted, could not be considered as factors under McCarthy in evaluation of the entire transaction to determine the intent of the parties. But, it should be noted that Germagian was summary judgment on an undisputed record before the motion judge.

Galipault v. Wash Rock Invs., LLC, supra, is ambiguous in regard to the standard of review. It refers to the ordinary standard in a G.L. c. 231, § 118 case (that involves an "analysis... [and] examination of the same factors properly considered by the judge in the trial court in the first instance".) 65 Mass.App.Ct. at 82 (emphasis added).

The court goes on to say that the judge's "conclusions of law are subject to broad review and will be reversed if not correct [and] [w]hile weight will be accorded to his exercise of discretion, an order predicated solely on documentary evidence permits the appellate court to draw its own conclusions." Id.

This is not clear instruction with respect to appellate review appropriate for this case. Clarity is lacking to permit fair review of the decision for the case at bar.

VI. CONCLUSION

No single discrete question of law appears in this case. The judge sifted through documents which clearly evidenced disputed facts. The list of addenda and later discussion and indeed the seller's abrupt repudiation, among other disputed facts, after routine discovery, may suggest that the seller got a better offer or decided that the market was going up, who knows? A jury or jury waived judge should determine the intent of the parties. In order to prevent a substantial injustice, the plaintiffs urges this court to grant them application for leave to obtain further appellate review of these important issues to the real estate and conveyancing bar.

Respectfully submitted,
Jack and Sandra DeCicco,
By their attorneys,

/s/ John J. Bonistalli

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Dated: June 7, 2019

CERTIFICATE OF COMPLIANCE

I, Jennifer M. Lee, attorney for Jack and Sandra DeCicco, hereby certify that the foregoing application for further appellate review complies with the rules of court that pertain to the filing of the application, including Mass.R.A.P. 16(k), 20, and 27.1.

/s/ Jennifer M. Lee

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I, Jennifer M. Lee, attorney for Jack and Sandra DeCicco, hereby certify, under the penalties of perjury, that on this 7th day of June, 2019, I have made service of two copies of the appellants' application for further appellate review by first class mail, postage prepaid to:

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/s/ Jennifer M. Lee

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1051

JACK DECICCO & another¹

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.

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.

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 17-02777

JACK DECICCO & another¹

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).

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 DeCiccis' 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. Analysis

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 not 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

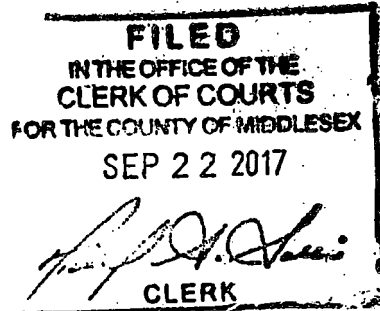
COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT DEPARTMENT

DOCKET NO: 17-2777

JACK DECICCO and SANDRA
DECICCO,
Plaintiffs,
v.
180 GRANT STREET, LLC,
Defendant.



VERIFIED COMPLAINT AND JURY DEMAND

INTRODUCTION

In this action the plaintiffs, Jack DeCicco and Sandra DeCicco seek a memorandum of lis pendens pursuant to M.G.L. c. 184 § 15(b), specific performance, and monetary damages arising out of the defendant's breach of a signed Offer to Purchase Real Estate (attached hereto as "Exhibit 1"). The action involves the right to title to real property or the use and occupation thereof or the buildings thereon.

PARTIES:

1. Plaintiff, Jack DeCicco is an individual residing at 11008 Main Campus Dr., Lexington, MA 02421.
2. Plaintiff, Sandra DeCicco is an individual residing at 11008 Main Campus Dr., Lexington, MA 02421.
3. The defendant 180 Grant Street LLC (180 Grant) is a Massachusetts Limited Liability Company engaged in the purchasing, financing, ownership and sale of real estate in the Commonwealth with its principal address of 10 Hesperus Circle, Gloucester, MA 01930.

FACTS RELEVANT TO ALL COUNTS:

4. Plaintiff repeats, re-avers, and incorporates herein the allegations contained in paragraphs 1-3, above.
5. The defendant/seller 180 Grant is the record owner of real property located at 180 Grant Street, Lexington, Massachusetts (hereinafter the "property") by quitclaim deed, dated October 16, 2016 and recorded in the Middlesex County Registry of Deeds at Book 68268, Pages 303 and 304.
6. On or about September 8, 2017 the plaintiff/buyers agreed to buy, and the defendant/seller agreed to sell the property for the amount of \$2,260,000.
7. On or about September 8, 2017 the plaintiff/buyers executed a binding Offer to Purchase Real Estate (OTP) for the subject property. Ex. 1.
8. On or about September 8, 2017 defendant/seller executed a binding Offer to Purchase Real Estate (OTP) for the subject property. Ex. 1.
9. Under the terms of the OTP, the defendant/seller agreed to convey the property to plaintiff/buyers for consideration of \$2,260,000. Ex. 1, ¶ 1 (e).
10. Under the terms of the OTP the plaintiff/buyers agreed to purchase the subject property from defendant/seller for consideration of \$2,260,000. Ex. 1, ¶ 1 (e).
11. The OTP stated at paragraph 6 that "time is of the essence hereof." Ex. 1, ¶ 6.
12. The OTP contained a notice that read "this is a legal document that creates binding obligations, if not understood, consult an attorney." Ex. 1.
13. The OTP contained all material terms of the agreement to convey the property contemplated by the parties.

14. The OTP identified the address of the subject property, the terms of payment, the purchase price, the closing date, and the transfer of title.
15. The OTP contemplated that the parties would execute a Purchase and Sale Agreement (hereinafter "P&S") on or before September 15, 2017. Ex. 1, ¶ 3.
16. The OTP contained a closing date of November 13, 2017. Ex. 1, ¶ 4.
17. Construction of the property was not complete at the time the parties executed the OTP on September 8, 2017.
18. The property was advertised as having a number of features that, at the time of the execution of the OTP, were not completed.
19. The OTP contained an addendum, also signed by the parties, titled "180 Grant Street Offer Summary." Ex. 1, p. 3.
20. The addendum contained features to be completed by defendant/seller prior to closing in order to bring the property to its advertised condition.
21. The addendum also contained additional items requested by the plaintiff/buyers that were not part of the property's advertised condition.
22. Between September 8, 2017 and September 14, 2017, inquiries were made to defendant/seller regarding a draft purchase & sale agreement.
23. On or about September 14, 2017, the defendant/seller emailed plaintiff/buyers' broker and indicated that defendant/seller "could not make this deal work." Ex. 2.
24. On September 15, 2017, plaintiff/buyers' conveyancing counsel, David A. Murphy ("Murphy"), emailed a proposed purchase & sale agreement ("P&S") to seller. Ex. 2.
25. Murphy indicated that plaintiffs would consider any changes to the agreement proposed by the seller. Ex. 2.

26. Also on September 15, 2017, plaintiff delivered an executed copy of the P&S and a check in the amount of \$112,000 to the escrow agent, plaintiff/buyers' broker, as agreed to in the OTP. Ex. 2.
27. Also on September 15, 2017, Murphy received a call from seller's attorney, James Lyle, indicating that the sellers would not execute the P&S or convey the property as they agreed to in the binding OTP. Ex. 2.
28. At all times up to and including the present day, the plaintiffs herein have been and are ready, willing and able buyers of the subject property.
29. At all times up to 9 p.m. on September 14, 2017 defendant indicated by their actions that they intended to proceed with execution of the P&S and convey the property and plaintiff relied on that representation.

CAUSES OF ACTION:

COUNT I: BREACH OF CONTRACT

30. Plaintiffs repeats, re-avers, and incorporates herein the allegations contained in paragraphs 1-29, above.
31. The plaintiffs and the defendant entered into a binding and enforceable contract.
32. The defendant has breached that contract.
33. The defendant's breach was material.
34. As a result of the defendant's breach, the plaintiffs have suffered, and will continue to suffer damages.

Wherefore, plaintiffs respectfully requests that this Court enter judgment on all counts of the Complaint, award damages, attorney's fees, costs, treble damages, interest and whatever other relief this Honorable Court deems just and fair.

COUNT II: BREACH OF IMPLIED COVENANT OF GOOD FAITH

- 35. Plaintiffs repeats, re-avers, and incorporates herein the allegations contained in paragraphs 1-29, above.
- 36. The defendant had an obligation to engage in good faith and to deal fairly with the plaintiffs upon the execution of the binding Offer to Purchase.
- 37. By their intentional actions, without any legal justification, the defendants breached that implied covenant.
- 38. As a result of the defendant's breach, the plaintiffs have suffered, and will continue to suffer damages.

Wherefore, plaintiffs respectfully requests that this Court enter judgment on all counts of the Complaint, award damages, attorney's fees, costs, treble damages, interest and whatever other relief this Honorable Court deems just and fair.

COUNT III – Misrepresentation

- 39. Plaintiffs repeats, re-avers, and incorporates herein the allegations contained in paragraphs 1-29, above.
- 40. Defendant stated and represented that they intended to go forward with the execution of the P&S and the selling of the property at all times up to September 14, 2017.
- 41. When defendant made these representations they knew, or should have known that they were false.
- 42. The defendant intended for the plaintiffs to rely on these misrepresentations.
- 43. The plaintiffs did in fact rely upon these representations.
- 44. As a result of defendant's intentional misrepresentations, the plaintiffs have suffered, and continue to suffer, damages.

Wherefore, plaintiffs respectfully requests that this Court enter judgment on all counts of the Complaint, award damages, attorney's fees, costs, treble damages, interest and whatever other relief this Honorable Court deems just and fair.

COUNT IV: SPECIFIC PERFORMANCE

45. Plaintiffs repeats, re-avers, and incorporates herein the allegations contained in paragraphs 1-38, above.
46. This is a count brought in equity.
47. Plaintiffs and defendants entered into a binding contract.
48. The contract required the defendant to sell the subject property to plaintiffs.
49. The defendant refused to do so.
50. The plaintiffs have met all of their obligations under the OTP.
51. The subject property is unique.
52. Due to defendant's failure to convey the subject property to plaintiffs, the plaintiffs will suffer damages and irreparable harm.

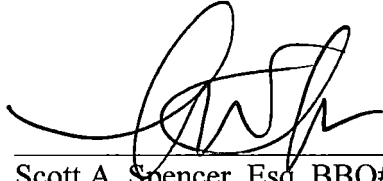
Wherefore, plaintiffs respectfully requests that this Court enter judgment on all counts of the Complaint, award damages, attorney's fees, costs, treble damages, interest and whatever other relief this Honorable Court deems just and fair and further that the Honorable Court issue an Order mandating that the defendant convey the subject property to the plaintiffs.

Plaintiffs demand a jury trial on all issues raised in the Complaint.

Respectfully Submitted,
Plaintiffs Jack DeCicco and Sandra DeCicco,

By their attorney,

Date: 9/21/17

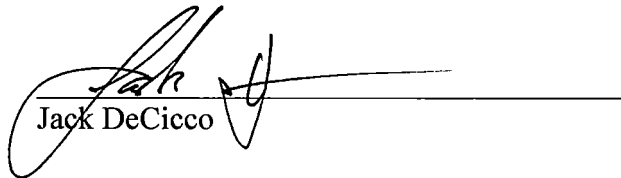


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Scott.Spencer@BonistalliLaw.com

VERIFICATION

I, Jack DeCicco, hereby verify under the pains and penalties of perjury that I have read the contents of the above complaint and know the contents thereof, that the allegations of facts therein set forth are true, and that no material facts have been omitted therein.

Dated: 9/21/2017



Jack DeCicco

I, Sandra DeCicco, hereby verify under the pains and penalties of perjury that I have read the contents of the above complaint and know the contents thereof, that the allegations of facts therein set forth are true, and that no material facts have been omitted therein.

Dated: 9/21/2017



Sandra DeCicco

GREATER BOSTON REAL ESTATE BOARD

OFFER TO PURCHASE REAL ESTATE

TO 180 Grant Street LLC

(Seller and Spouse)

180 Grant St

Lexington, MA 02420

Date: September 8, 2017

Engel & Volkers Concord

19 Main Street

From the Concord, MA 01742

Office of:

The property herein referred to is identified as follows: 180 Grant St, Lexington, MA 02420-2120

Special provisions (if any) re fixtures, appliances, etc. See Attached Addendum B

hereby offer to buy said property, which has been offered to me by Engel & Volkers Concord

(Buyers)

as the Broker(s) under the following terms and conditions:

CHECK ONE:

☒ Check, subject to collection☐ Cash

- I will pay therefore \$2,260,000.00, of which
 - \$1,000.00 is paid herewith as a deposit to bind this Offer
 - \$112,000.00 is to be paid as an additional deposit upon the execution of the Purchase and Sale Agreement provided for below.
 - \$2,147,000.00 is to be paid at the time of delivery of the Deed in cash, or by certified, cashier's, treasurer's or bank check(s).
 - \$
 - \$
 - (e) \$2,260,000.00 Total Purchase Price
- This Offer is good until 9 ☐ A.M. ☒ P.M. on September 8, 2017 at or before which time a copy hereof shall be signed by you, the Seller and your (husband) (wife), signifying acceptance of this Offer, and returned to me forthwith, otherwise this Offer shall be considered as rejected and the money deposited herewith shall be returned to me forthwith.
- The parties hereto shall, on or before 9 ☐ A.M. ☒ P.M. on September 15, 2017 execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board or any form substantially similar thereto, which, when executed, shall be the agreement between the parties hereto.
- A good and sufficient Deed, conveying a good and clear record and marketable title shall be delivered at 12:00 Noon on November 13, 2017 at the appropriate Registry of Deeds, unless some other time and place are mutually agreed upon in writing.
- If I do not fulfill my obligations under this Offer, the above mentioned deposit shall forthwith become your property without recourse to either party. Said deposit shall be held by Engel & Volkers Concord as escrow agent subject to the terms hereof provided however that in the event of any disagreement between the parties, the escrow agent may retain said deposit pending instructions mutually given in writing by the parties. A similar provision shall be included in the Purchase and Sale Agreement with respect to any deposit held under its terms.
- Time is of the essence hereof.
- Disclosures: For one to four family residences, the Buyer hereby acknowledges receipt of the Home Inspectors: Facts for Consumers brochure produced by the Office of Consumer Affairs. For residential property constructed prior to 1978, Buyer must also sign Lead Paint "Property Transfer Notification."
- The initialed riders, if any, attached hereto are incorporated herein by reference. Additional terms and conditions, if any: See Attached Addendums to Offer. A 3% Co-Broke Fee on the purchase price is due to Engel & Volkers at the closing.

NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney. WITNESS MY HAND AND SEAL

Jack DeCicco
 Buyer Jack DeCicco

Sandra DeCicco
 Buyer Sandra DeCicco

Address/City/State/Zip

Phone Numbers (Work & Home)

Receipt of deposit check for transmittal by: (Agent/Facilitator)

Check shall not be deposited unless offer is accepted.

This Offer is hereby accepted upon the foregoing terms and conditions at ☐ A.M. ☐ P.M. on

WITNESS my (our) hand(s) and seal(s)

Seller 180 Grant Street LLC

Seller (or spouse)

Date

RECEIPT FOR DEPOSIT

Received from Jack DeCicco, Sandra DeCicco Buyer the sum of \$ 1,000.00 as deposit under the terms and conditions of above Offer, to be held by Engel & Volkers Concord as escrow agent.

Under regulations adopted pursuant to the Massachusetts license law:
 All offers submitted to brokers or salespeople to purchase real property
 that they have a right to sell shall be conveyed forthwith to the owner
 of such real property.

Agent for Seller

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 Form ID: RA101



GREATER BOSTON REAL ESTATE BOARD

OFFER TO PURCHASE CONTINGENCY ADDENDUM

The BUYER, if checked, hereby incorporates the following contingencies into this Offer to Purchase Real Estate:-

☒ **MORTGAGE CONTINGENCY**

In order to help finance the acquisition of the property, the BUYER shall apply for a conventional bank or other institutional mortgage loan of \$1,695,000.00 at prevailing rates, terms and conditions. If despite the BUYER's diligent efforts a commitment for such loan cannot be obtained on or before October 13, 2017, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER prior to the expiration of such time, whereupon all deposits made by the BUYER shall be forthwith refunded, and this agreement shall become null and void and without further recourse to either party. In no event will the BUYER be deemed to have used diligent efforts to obtain such commitment unless the BUYER submits a complete mortgage loan application conforming to the foregoing provisions on or before September 19, 2017.

☒ **INSPECTION CONTINGENCY**

The BUYER may, at the BUYER's own expense and on or before October 9, 2017, have the property inspected by a duly-licensed person engaged in the business of conducting home inspections. If it is the opinion of such inspector that the property contains serious structural, mechanical or other defects and if the repair of such defects would cost the BUYER in the aggregate more than \$, then the BUYER shall have the option of revoking the agreement by written notice to the SELLER and/or Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the inspector's opinion and cost estimates.

☒ **RADON CONTINGENCY**

The BUYER may, at the BUYER's own expense and on or before October 9, 2017, have the property inspected for the presence of radon gas. In the event a customary test for the presence of radon gas indicates the presence of radon gas in excess of levels deemed acceptable by the federal Environmental Protection Agency, then the BUYER shall have the option of revoking the agreement by written notice to the SELLER and/or Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the test results.

☒ **PEST INSPECTION CONTINGENCY**

The BUYER may, at the BUYER's own expense on or before October 9, 2017, have the property inspected by a person engaged in the business of pest inspection and control. If it is the opinion of such inspector that the property is infested by termites or other wood boring pests, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the inspector's opinion and any related inspection report.

☐ **LEAD PAINT CONTINGENCY ADDENDUM**

~~The BUYER may, at the BUYER's own expense and within ten (10) days after the acceptance of this agreement, have the property professionally inspected for the presence of paint, plaster or other accessible materials containing dangerous levels of lead (as such terms are defined by applicable Massachusetts laws and regulations). A copy of the inspector's report shall be furnished to the SELLER upon receipt by the BUYER. If it is the opinion of such inspector that any such materials are present on the property, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER prior to the expiration of such time.~~

~~In the event the BUYER revokes the agreement consistent with the terms of the above selected Contingencies, then any deposits made by the BUYER shall be forthwith refunded, and this agreement shall be null and void and without further recourse to either party.~~

Initials:

SELLER

180 Grant Street LLC

SELLER (or Spouse)

BUYER

Jack DeCicco
Jack DeCicco, Inc.

BUYER

DocuSigned by:
Sandra DeCicco
Sandra DeCicco, Inc.

Broker(s)

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This form may not be copied or reproduced in whole or in part in any manner whatsoever without the prior express written consent of the Greater Boston Real Estate Board.

Form ID: RA102 PD: 03/10

Engel & Volkers Concord, 199 Sudbury Rd. Concord, MA 01742
Sharon Mendosa

Phone: (978)580-6386

Fax:

Produced with zipForm® by zipLogix 18070 Fifteen Mile Road, Fraser, Michigan 48026 www.zipLogix.com

180 Grant Street

180 Grant Street
Offer Summary

Offer Price: \$2,125,000

~~\$2,260,000~~ J.D. PDH

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 \$1,200 ALLOWANCE PDH
 - 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

DocuSigned by:

Jack Delicco

9BFDDCA419945C...

DocuSigned by:

Sandra Delicco

BDC484FE9FD8423...

THANK U
FOR 180 GRANT ST
LLC

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT DEPARTMENT
DOCKET NO:

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

AFFIDAVIT OF DAVID J. MURPHY ESQ.

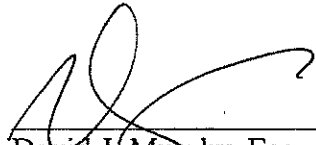
I, David J. Murphy, being of legal age, do hereby depose and state under oath as follows:

1. I am an attorney admitted in the Commonwealth of Massachusetts and I represented Jack DeCicco and Sandra DeCicco in the attempted purchase of a property located at 180 Grant Street, Lexington, MA.
2. On or about September 14, 2017, I received a forwarded email from my clients' broker that indicated sellers were not willing to convey the property to my clients.
3. A copy of the email referenced in the previous paragraph is attached hereto.
4. On September 15, 2017 at 8:48 am, I emailed a proposed purchase & sale agreement ("P&S") to seller.
5. I indicated in that email that the buyers would consider any changes to the agreement proposed by the seller.
6. A copy of the email reference in the preceding paragraph is attached hereto.
7. Also on September 15, 2017, having received no response from the seller to my earlier email, my client delivered an executed copy of the P&S and a check in the

amount of \$112,000 to the escrow agent, plaintiff/buyers' broker, as agreed to in the OTP.

8. Also on September 15, 2017, I received a call from seller's attorney, James Lyle, indicating that the sellers would not execute the P&S or convey the property as they agreed to in the binding OTP and are refusing to convey the property to buyers.

Signed under the pains and penalties of perjury this 21st day of September, 2017.



David J. Murphy, Esq.



Scott Spencer <scott.spencer@bonistallilaw.com>

FW: 180 grant st

1 message

David J. Murphy <dmurphy@murphypc.com>

Thu, Sep 21, 2017 at 10:01 AM

To: "scott.spencer@bonistallilaw.com" <scott.spencer@bonistallilaw.com>

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

www.murphypc.com

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From: David J. Murphy

Sent: Friday, September 15, 2017 5:35 PM

To: 'Abair, Jesse W.' <jabair@rackemann.com>

Subject: FW: 180 grant st

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

www.murphypc.com

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From: Sharon Mendosa [mailto:sharon.mendosa@engelvoelkers.com]

Sent: Thursday, September 14, 2017 12:06 PM

To: David J. Murphy <dmurphy@murphypc.com>; Jack DeCicco <jack.decicco7@gmail.com>

Subject: Fwd: 180 grant st

This is what I received from Peter this morning

|

----- Forwarded message -----

From: <dhomedesign@aol.com>

Date: Thu, Sep 14, 2017 at 10:40 AM

Subject: 180 grant st

To: <sharon.mendosa@engelvoelkers.com>

Hi Sharon,

My business partner and I have closely examined the original requests and the requests made after the offer was executed and I am sorry but we cannot make this deal work.

Good luck to Jack and Sandra.

Thanks again for all your time.

Peter

—

Sharon Mendosa
License Partner / Principal

ENGEL & VÖLKERS Concord
Engel & Völkers U.S. Holdings, Inc.
19 Main Street
Concord, Ma 01742
USA

Office 978 341-5400
Mobile 978 580-0386
Website: MendozaBalboni.com
Email: sharon.mendoza@evusa.com

This e-mail and any attachments are confidential. If you are not the intended recipient of this e-mail, please immediately delete its contents and notify us. This e-mail was checked for virus contamination before being sent - nevertheless, it is advisable to check for any contamination occurring during transmission. We cannot accept any liability for

virus contamination.



Scott Spencer <scott.spencer@bonistallilaw.com>

FW: 180 Grant Street, Lexington, MA

1 message

David J. Murphy <dmurphy@murphypc.com>

Thu, Sep 21, 2017 at 10:01 AM

To: "scott.spencer@bonistallilaw.com" <scott.spencer@bonistallilaw.com>

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

www.murphypc.com

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From: David J. Murphy

Sent: Friday, September 15, 2017 5:36 PM

To: 'Abair, Jesse W.' <jabair@rackemann.com>

Subject: FW: 180 Grant Street, Lexington, MA

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

www.murphypc.com

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From: David J. Murphy

Sent: Friday, September 15, 2017 8:48 AM

To: Peter Daus-Haberle (dhomedesign@aol.com) <dhomedesign@aol.com>

Cc: Sharon Mendosa <sharon.mendosa@engelvoelkers.com>; 'Brian T. Cronin' <bcronin@murphypc.com>

Subject: 180 Grant Street, Lexington, MA

Mr. Daus-Haberle,

My office represents the Buyers in connection with the purchase of the above-referenced property. Although it is customary for the Seller to prepare the draft Purchase and Sale Agreement, I have been advised that you do not intend to do so. In addition, I have been advised that you do not intend to proceed with this transaction.

Please note that the fully executed Offer to Purchase Real Estate contract that you signed "is a legal document that creates binding obligations" as stated on the first page above the signature lines. Accordingly, if you fail to perform under the Offer contract then we will pursue all available rights and remedies against you under Massachusetts law.

Please find attached Purchase and Sale Agreement and Exhibits for your review pursuant to Paragraph 3 of the Offer contract, which requires a Purchase and Sale Agreement to be signed by the parties by 9:00PM on September 15, 2017. My client will consider any proposed changes to the attached Agreement, but please note that this Agreement must be signed by 9PM tomorrow per the Offer contract. My clients intend to perform their obligations under the Offer contract.

Sincerely,

David

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

www.murphypc.com

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3 attachments



EXHIBIT A - Offer Summary.pdf
318K



EXHIBIT B - Contingency Addendum.pdf
805K



P&S 180 Grant Street, Lexington.docx
39K

6

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 1781-CV-02777

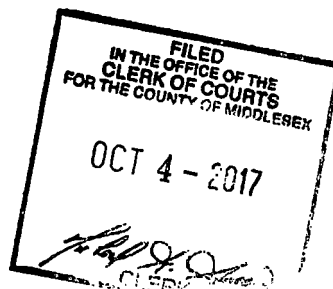
JACK DECICCO and SANDRA DECICCO,

Plaintiffs,

v.

180 GRANT STREET, LLC

Defendant



AFFIDAVIT OF PETER DAUS-HABERLE

I, Peter Daus-Haberle, hereby depose and say as follows:

1. I am the general manager for 180 Grant Street, LLC ("Seller"), owner of the real property located at 180 Grant Street, in Lexington, Massachusetts ("180 Grant Street" or the "Property"). I make this Affidavit in support of the Seller's Opposition to the plaintiffs' Motion for Lis Pendens. The statements contained herein are based on my personal knowledge. As to those statements made upon information and belief, I believe them to be true.

2. The Property consists of an improved 17,290 square foot parcel of land located in a residential neighborhood in Lexington, Massachusetts. Seller purchased the Property in October 2016. The existing structure was subsequently torn down and, between the fall of 2016 and the summer of 2017, a new home was constructed on the premises. The newly constructed home is a 7 bedroom, 6.5 bathroom residence, consisting of over 6,250 square feet of living space on three levels, including the basement. The home also includes an attached 3-car garage with a finished living space above the garage.

3. I am a designer of new homes and home renovations and do business as Daus-Haberle Design. Prior to 2005, I was also engaged as a builder. Since 2005, my practice has been limited to providing design work for clients. Approximately 20% of my time is spent in new construction and 80% in home renovations. For the past 2 years, I have been the manager of three (3) new construction projects, including the property at 180 Grant Street. I am a member of the American Institute of Building Design (AIBD).

4. I designed 180 Grant Street. I also prepared the building plans and oversaw the permitting process. In addition, I acted as the general contractor, which included overseeing the construction of the residence, managing sub-contractors, approving all construction-related invoices and arranging for the Property to be listed for sale. I am also the primary point of contact for brokers and prospective purchasers.

5. The Seller initially listed 180 Grant Street for sale on the Massachusetts Multiple Listing Service in April 2017. The original listing price for the Property was \$2.4 million.

6. Prior to September 2017, two written offers were made on the Property. Neither of these offers culminated in the negotiation of a final purchase and sale agreement.

7. On September 7, 2017, I showed the Property to the plaintiffs, Jack and Sandra DeCicco (collectively, the "Buyers"). Also present with the Buyers was their real estate broker, Sharon Mendosa of Engel & Völkers Concord ("Mendosa" or "the broker"). At that time, construction of the house was 95% complete, with the exception of the space above the garage, which was 60% complete. The remaining items to be completed in the main portion of the home included: the installation of hanging lights in the kitchen and dining room; installation of knobs on kitchen cabinets; the dishwasher hook up; the installation of finish flooring in the basement; the installation of shower doors; the installation of the faucet in the half bath; the installation of

trim in the third floor shower; and miscellaneous painting and touch-up work. The additional items which had not yet been completed in the space above the garage included: rough plumbing, finish plumbing, finishing of the HVAC system, some interior framing, some plastering, finish tiling, finish flooring, finish trim and finish painting.

8. On September 7, 2017, the broker forwarded to me a written offer from the Buyers in the amount of \$2,125,000.

9. Attached to the offer was the Greater Boston Real Estate Board Contingency Addendum standard form which checked off a number of contingencies, including a mortgage contingency, an inspection contingency, a radon contingency and a pest inspection contingency. The mortgage contingency provided that the Buyers would have until October 13, 2017 to secure mortgage financing in an amount of up to \$1,695,000. The inspection contingency permitted the Buyers to conduct an inspection of the property on or before October 9, 2017, and it allowed the Buyer until October 11, 2017 to withdraw the offer if the inspection revealed serious defects. The inspection contingency is missing an important provision however. It does not indicate the dollar amount of repairs that would permit the Buyers to withdraw their offer without penalty.

10. The offer also included a number of additional items reflected on an attached document prepared by the Buyers with the heading, "180 Grant Street Offer Summary" (the "Offer Summary"), further discussed below.

11. The offer called for the parties to execute a purchase and sale agreement by September 15, 2017 "which, when executed, shall be the agreement between the parties." It called for a closing date of November 13, 2017.

12. On September 8, 2017, I had a number of telephone conversations with the broker. We discussed some, but by no means all of the numerous changes and additions

referenced in the Offer Summary. As further described below, when I eventually counter-signed the revised offer on behalf of the Seller, no agreement had been reached on many of the requested changes and additions in the Offer Summary. My belief, understanding and expectation was that all of these items would be the subject of further discussion (and negotiations) with the Buyers, and that the items referenced in the Offer Summary – which were substantial – would be detailed and agreed upon in the purchase and sale agreement.

13. On September 8th, I discussed with the broker the Buyers' request to remove the refrigerator that had already been installed and to replace it with a Sub Zero brand refrigerator. I told the broker that in order to replace the refrigerator, the installed cabinets above the refrigerator would need to be removed and replaced. I also told her that the Seller would not do this work until the Buyers had secured mortgage financing, and that there would not be enough time between the mortgage contingency date (October 13, 2017) and the closing date (November 13, 2017) for the Sub Zero refrigerator, as well as the replacement cabinets, to be ordered, received and installed. Eventually, the Seller agreed to pay for the cost of removing and replacing the existing refrigerator and cabinets to accommodate the Sub Zero brand refrigerator requested by the Buyers. However, the Sub Zero model was never chosen by the Buyers and never agreed upon with the Seller.

14. The only other requested change item that I discussed with the broker on September 8th was the kitchen/ dining room lighting. The Seller had purchased, but not yet installed, 5 hanging lights for the kitchen and dining room. In regard to this item, the Offer Summary states, "***Install lighting fixtures throughout the house, subject to buyer review and approval of hardware.***" At the Buyers' request, the Seller was agreeable to a \$1,000 allowance for the hanging lights in the kitchen and dining room (since these lights had not yet been

installed). However, the parties never discussed, and the Seller never agreed to remove and replace any other lighting fixtures or hardware, or any other hardware in the house. The language in the Offer Summary is unclear as to whether other lighting fixtures or hardware could be removed and exchanged at the Buyers' discretion. Other than the kitchen/ dining room lighting, the Seller never agreed to replace any other lighting fixtures or hardware in the home, or provide an allowance.

15. On September 8, 2017, the Buyers agreed to increase their offer to \$2,260,000. Ms. Mendoza forwarded to me an updated and electronically signed offer which reflected some but not all of the changes that we had discussed. For example, the selling price was listed incorrectly on the Offer Summary and the Offer Summary did not reflect the \$1,000 allowance for the kitchen / dining room lighting which the Seller agreed to provide. In a subsequent phone call, Ms. Mendoza told me that the Buyers were not satisfied with this \$1,000 allowance. They wanted to visit the Property again before making a decision about replacing other lighting fixtures that had already been installed. I agreed to meet the Buyer (Jack DeCicco) the next day.

16. On Saturday, September 9, 2017, I met with Mr. DeCicco and showed him the hanging lights that had not yet been installed in the kitchen and dining room. We also inspected other lighting and hardware in the house, including in the bedrooms. I agreed to increase the allowance for the kitchen and dining room lighting to \$1,200, but I did not agree to provide an allowance for any of the other lighting fixtures or hardware. This item was explicitly left open for further discussion.

17. I had a copy of the written offer with me when I met with Mr. DeCicco. On the attached Offer Summary, we penned in the change to the offer price and wrote in by hand the \$1,200 allowance for the kitchen/ dining room lighting. No change was made to the expiration

date of the Offer (which still reflected an expiration date of September 8, 2017). No other revisions were made to the offer, the Addendum or the Offer Summary. A true and correct copy of the document which was signed and initialed on September 9, 2017 is attached hereto as Exhibit "A."

18. I did not consult with an attorney before I counter-signed the offer on behalf of the Seller. However, at the time I signed it, no agreement had been reached on the numerous material provisions contained in the Offer Summary which were explicitly left open for further discussion.

19. The items contained in the Offer Summary as to which the parties did not reach agreement at the time it was signed include each of the following material items (several of which were never even discussed):

- The Offer Summary describes several items "*as advertised*" or "*as discussed*" including:
 - The Basement ("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*").
- The Offer Summary calls for "Updated hardware throughout," lighting fixtures "subject to buyer review and approval" and "Shelving for all closets."
- The Offer Summary calls for the previously installed range and oven to be "replace[d] with Wolf brand" but it does not specify the model, the cost or the allowance for the replacement range and oven.

- In regard to the first floor half-bath, the Offer Summary states that Buyer is to “select different sink of matching quality” but it does not state at whose cost or indicate an allowance.
- In regard to the Basement, the Offer Summary states that Buyer is to “select flooring materials of comparable matching quality” but it does not indicate whether Buyer or Seller will bear this cost or whether the Seller will provide an allowance.

20. At the time the offer was signed, no agreement had been reached between the Seller and the Buyer as to any of these items, many of which are “big ticket” items that could easily cost tens of thousands of dollars – if not more – to remove, install and complete. In addition, if the Buyers had decided to remove and replace these items, it would have been virtually impossible to meet the requirement called for in the Offer Summary to obtain a Certificate of Occupancy from the Town of Lexington by October 8, 2017.

21. Nevertheless, after the offer was signed, the Buyers continued to expand the list of changes and additions that that they wanted to make prior to closing.

22. On Monday morning, September 11, 2017, I received a voicemail message from the broker in which she stated that the buyer, Ms. DeCicco, wanted to remove and replace the kitchen and bath fixtures. The broker confirmed this request by email, a copy of which is attached hereto as Exhibit “B.” In the email, the Buyers state that they want to remove and replace the vanity in the master bathroom and receive an allowance towards another vanity of their choosing. The Buyers also wanted to remove the double sink and faucet in the kitchen, replace it with a single bowl and receive an allowance. Finally, the Buyers were requesting the installation of exterior shutters on the front and one side of the home.

23. I concluded that it would be impossible for the parties to reach agreement on all of the changes requested by the Buyers. Given that construction was already 95% completed (with the exception of the room above the garage), these changes were substantial and unreasonable in my opinion. It became clear to me that the Buyers would not be satisfied with the changes that the Seller would be willing to make.

24. Accordingly, on September 13, 2017, I informed the broker that, as a result of all of the changes, upgrades and requested allowances, the Seller would not be able to reach a definitive agreement with the Buyers. Attached hereto as Exhibit "C" is a true and correct copy of my September 13, 2017 email to Ms. Mendoza.

25. I spoke with Ms. Mendoza later that day, and explained to her that given the numerous changes requested by the Buyers, the cost to make the requested changes and the fact that construction was 95% complete, the Seller would not be able to satisfy the Buyers.

26. Ms. Mendoza then asked me to "make a counter offer." I told her that I would consider this request.

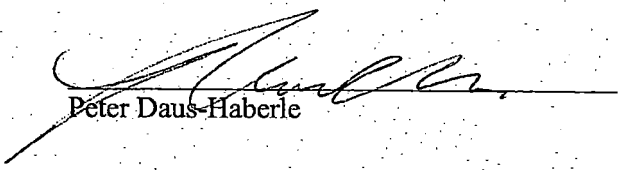
27. On September 14, 2017, I informed Ms. Mendoza that given the scope of the items left open in the Offer Summary, and the additional changes requested by the Buyer after the offer was signed, the Seller was not able to proceed with the sale. Attached hereto as Exhibit "D" is a true and correct copy of my September 14, 2017 email to Ms. Mendoza.

28. The Seller has received an offer from a third party to purchase the Property. The offer is in the amount of \$2,250,000, i.e., \$10,000 *less* than the offer received from the plaintiffs.

29. However, the filing of this lawsuit has prevented the Seller from proceeding with a sale of the Property to the new buyers. In fact, the new buyers have informed me, and my

attorneys, that they will not go forward with the purchase of the Property if the Court allows the plaintiff's Motion for Lis Pendens.

SIGNED under the pains and penalties of perjury this 30 day of October, 2017.



Peter Daus-Haberle

EXHIBIT A

GREATER BOSTON REAL ESTATE BOARD

OFFER TO PURCHASE REAL ESTATE

TO 180 Grant Street LLC

(Seller and Spouse)

180 Grant St
Lexington, MA 02420

Date: September 8, 2017

Engel & Volkers Concord
19 Main StreetFrom the
Office of: Concord, MA 01742

The property herein referred to is identified as follows: 180 Grant St, Lexington, MA 02420-2120

Special provisions (if any) re fixtures, appliances, etc. See Attached Addendum B

hereby offer to buy said property, which has been offered to me by Engel & Volkers Concord

(Buyers)

as the Broker(s) under the following terms and conditions:

CHECK ONE:

☒ Check, subject to collection☐ Cash

1. I will pay therefore \$2,260,000.00, of which

(a) \$ 1,000.00

is paid herewith as a deposit to bind this Offer

(b) \$112,000.00

is to be paid as an additional deposit upon the execution of the Purchase and Sale Agreement provided for below.

(c) \$2,147,000.00

is to be paid at the time of delivery of the Deed in cash, or by certified, cashier's, treasurer's or bank check(s).

(d) \$

\$

(e) \$2,260,000.00

Total Purchase Price

2. This Offer is good until 9 ☐ A.M. ☒ P.M. on September 8, 2017 at or before which time a copy hereof shall be signed by you, the Seller and your (husband) (wife), signifying acceptance of this Offer, and returned to me forthwith, otherwise this Offer shall be considered as rejected and the money deposited herewith shall be returned to me forthwith.
3. The parties hereto shall, on or before 9 ☐ A.M. ☒ P.M. on September 15, 2017 execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board or any form substantially similar thereto, which, when executed, shall be the agreement between the parties hereto.
4. A good and sufficient Deed, conveying a good and clear record and marketable title shall be delivered at 12:00 Noon on November 13, 2017 at the appropriate Registry of Deeds, unless some other time and place are mutually agreed upon in writing.
5. If I do not fulfill my obligations under this Offer, the above mentioned deposit shall forthwith become your property without recourse to either party. Said deposit shall be held by Engel & Volkers Concord as escrow agent subject to the terms hereof provided however that in the event of any disagreement between the parties, the escrow agent may retain said deposit pending instructions mutually given in writing by the parties. A similar provision shall be included in the Purchase and Sale Agreement with respect to any deposit held under its terms.
6. Time is of the essence hereof.
7. Disclosures: For one to four family residences, the Buyer hereby acknowledges receipt of the Home Inspectors: Facts for Consumers brochure produced by the Office of Consumer Affairs. For residential property constructed prior to 1978, Buyer must also sign Lead Paint "Property Transfer Notification."
8. The initialed riders, if any, attached hereto are incorporated herein by reference. Additional terms and conditions, if any:
See Attached Addendums to Offer. A 3% Co-Broke Fee on the purchase price is due to Engel & Volkers at the closing.

NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney. WITNESS MY HAND AND SEAL

Buyer Jack DeCicco

Buyer Sandra DeCicco

Address/City/State/Zip

Phone Numbers (Work & Home)

Receipt of deposit check for transmittal by: (Agent/Facilitator)

Check shall not be deposited unless offer is accepted.

This Offer is hereby accepted upon the foregoing terms and conditions at ☐ A.M. ☐ P.M. on

WITNESS my (our) hand(s) and seal(s)

Seller 180 Grant Street LLC

Seller (or spouse)

Date

RECEIPT FOR DEPOSIT

Received from Jack DeCicco, Sandra DeCicco

Buyer the sum of \$

1,000.00

and conditions of above Offer, to be held by

Engel & Volkers Concord

as escrow agent.

Under regulations adopted pursuant to the Massachusetts license law:
All offers submitted to brokers or salespeople to purchase real property
that they have a right to sell shall be conveyed forthwith to the owner
of such real property.

Agent for Seller

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Form ID: RA101



Engel & Volkers Concord, 199 Sudbury Rd. Concord, MA 01742
Sharon Mendes

Phone: (978) 560-0386
Produced with zipForm® by zipLogix 18070 Fifteen Mile Road, Fraser, Michigan 48026 www.ziplogix.com

Fax:

180 Grant Street

GREATER BOSTON REAL ESTATE BOARD

OFFER TO PURCHASE CONTINGENCY ADDENDUM

The BUYER, if checked, hereby incorporates the following contingencies into this Offer to Purchase Real Estate-

☒ **MORTGAGE CONTINGENCY**

In order to help finance the acquisition of the property, the BUYER shall apply for a conventional bank or other institutional mortgage loan of \$1,695,000.00 at prevailing rates, terms and conditions. If despite the BUYER's diligent efforts a commitment for such loan cannot be obtained on or before October 13, 2017, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER prior to the expiration of such time, whereupon all deposits made by the BUYER shall be forthwith refunded, and this agreement shall become null and void and without further recourse to either party. In no event will the BUYER be deemed to have used diligent efforts to obtain such commitment unless the BUYER submits a complete mortgage loan application conforming to the foregoing provisions on or before September 19, 2017.

☒ **INSPECTION CONTINGENCY**

The BUYER may, at the BUYER's own expense and on or before October 9, 2017, have the property inspected by a duly-licensed person engaged in the business of conducting home inspections. If it is the opinion of such inspector that the property contains serious structural, mechanical or other defects and if the repair of such defects would cost the BUYER in the aggregate more than \$, then the BUYER shall have the option of revoking the agreement by written notice to the SELLER and/or Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the inspector's opinion and cost estimates.

☒ **RADON CONTINGENCY**

The BUYER may, at the BUYER's own expense and on or before October 9, 2017, have the property inspected for the presence of radon gas. In the event a customary test for the presence of radon gas indicates the presence of radon gas in excess of levels deemed acceptable by the federal Environmental Protection Agency, then the BUYER shall have the option of revoking the agreement by written notice to the SELLER and/or Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the test results.

☒ **PEST INSPECTION CONTINGENCY**

The BUYER may, at the BUYER's own expense on or before October 9, 2017, have the property inspected by a person engaged in the business of pest inspection and control. If it is the opinion of such inspector that the property is infested by termites or other wood boring pests, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER on or before October 11, 2017. Such notice shall be accompanied by a copy of the inspector's opinion and any related inspection report.

☐ **LEAD PAINT CONTINGENCY ADDENDUM**

~~The BUYER may, at the BUYER's own expense and within ten (10) days after the acceptance of this agreement, have the property professionally inspected for the presence of paint, plaster or other accessible materials containing dangerous levels of lead (as such terms are defined by applicable Massachusetts laws and regulations). A copy of the inspector's report shall be furnished to the SELLER upon receipt by the BUYER. If it is the opinion of such inspector that any such materials are present on the property, then the BUYER shall have the option of revoking this agreement by written notice to the SELLER and/or the Broker representing the SELLER prior to the expiration of such time.~~

~~In the event the BUYER revokes the agreement consistent with the terms of the above selected Contingencies, then any deposits made by the BUYER shall be forthwith refunded, and this agreement shall be null and void and without further recourse to either party.~~

Initials:

SELLER

180 Grant Street LLC

SELLER (or Spouse)

BUYER

Jack DeLicio
Jack DeLicio LLC

BUYER

DocuSigned by:
Sandra DeLicio
Sandra DeLicio

Broker(s)

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This form may not be copied or reproduced in whole or in part in any manner whatsoever without the prior express written consent of the Greater Boston Real Estate Board.

Form ID: RA102 PD: 03/10

Engel & Volkers Concord, 199 Sudbury Rd. Concord, MA 01742

Sharon Mendosa

Produced with zipForm® by zipLogix 18070 Fifteen Mile Road, Fraser, Michigan 48028

Phone: (978)580-0386

Fax:

www.ziplogix.com



180 Grant Street

180 Grant Street
Offer Summary

Offer Price: \$2,425,000 ~~\$2,760,000~~ *PDH*

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 *\$1,200 ALLOWANCE PDH*
 - 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

DocuSigned by:

Jack Delico

86FD0DCA419945C...

DocuSigned by:

Sandra Delico

B0C184FE9FD6473...

*THANK YOU
FOR 180 GRANT ST
LLC*

EXHIBIT B

-----Original Message-----

From: dhhomedesign <dhhomedesign@aol.com>
To: sharon.mendosa <sharon.mendosa@engelvoelkers.com>
Sent: Mon, Sep 11, 2017 3:54 pm
Subject: Re: Changes to 180 Grant

Hi Sharon,

I am out of my office today. I will put some numbers on these items tonight and get shutter costs tomorrow morning and then get back to you mid day.

Thanks

Peter

-----Original Message-----

From: Mendosa, Sharon <sharon.mendosa@engelvoelkers.com>
To: dhhomedesign <dhhomedesign@aol.com>
Sent: Mon, Sep 11, 2017 8:56 am
Subject: Changes to 180 Grant

Morning Peter

I left you a voicemail as well but here is the detail of what Sandra wants to change:

~She doesn't like the master vanity and wants to get a different one of her choosing. They would like to have the allowance for the existing vanity and then purchase another.

~She doesn't like the double sink & faucet in the kitchen and would like to get a single bowl--again they would take your allowance and buy new ones.

Lastly, are you planning on exterior shutters on the front of the house? She would like to have them. What would the cost be? (I believe there is one window on the side that would be visible as well)

EXHIBIT C

-----Original Message-----

From: dhhomedesign <dhhomedesign@aol.com>

To: sharon.mendosa <sharon.mendosa@engelvoelkers.com>; msf.franklin <msf.franklin@gmail.com>

Sent: Wed, Sep 13, 2017 8:59 am

Subject: Re: Attorney Contact

Hi Sharon,

Sorry for the delay. We have been working on the pricing for the house changes. We had based our initial calculations on "guestimates" from our subs. However, we are now getting firm numbers that are much higher than expected. Based on these new numbers and based on the additional requests that Jack and Sandra made after the offer was executed we do not believe that we will be able to make the Deciccos happy and still turn a reasonable profit for the house. I am sorry but I do not think that this deal will go through.

We appreciate the time and effort you put in on this.

Thanks

Peter

-----Original Message-----

From: Mendosa, Sharon <sharon.mendosa@engelvoelkers.com>

To: dhhomedesign <dhhomedesign@aol.com>

Sent: Tue, Sep 12, 2017 8:38 pm

Subject: Attorney Contact

Hi Peter,

I'm concerned that we don't have your attorney contact info to get the draft P&S out to buyers & their attorney.

Also, how are you doing on the pricing of the items requested.

Kindly let me know the status of above

Thank you.

--

Sharon Mendosa

Principal/Broker

Private Office Advisor

ENGEL & VÖLKERS Concord

Engel & Völkers U.S. Holdings, Inc.

19 Main Street

Concord, Ma 01742

Office 978 341-5400

Mobile 978 580-0386

Website: mendosabalboni.com

Email: sharon.mendosa@evusa.com

Proud Sponsors of the Special Olympics

This e-mail and any attachments are confidential. If you are not the intended recipient of this e-mail, please immediately delete its contents and notify us. This e-mail was checked for virus contamination before being sent - nevertheless, it is advisable to check for any contamination occurring during transmission. We cannot accept any liability for virus contamination.

EXHIBIT D

-----Original Message-----

From: dhhomedesign <dhhomedesign@aol.com>

To: sharon.mendosa <sharon.mendosa@engelvoelkers.com>

Sent: Thu, Sep 14, 2017 10:40 am

Subject: 180 grant st

Hi Sharon,

My business partner and I have closely examined the original requests and the requests made after the offer was executed and I am sorry but we cannot make this deal work.

Good luck to Jack and Sandra.

Thanks again for all your time.

Peter

7

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 1781-CV-02777

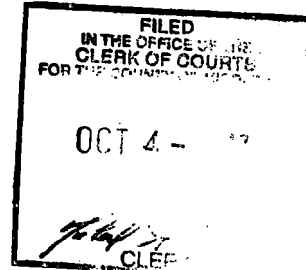
JACK DECICCO and SANDRA DECICCO,

Plaintiffs,

v.

180 GRANT STREET, LLC

Defendant



AFFIDAVIT OF JAMES M. LYLE, ESQ.

I, James M. Lyle, hereby depose and say as follows:

1. I am an attorney admitted to practice law in the Commonwealth of Massachusetts in good standing. I represent the defendant, 180 Grant Street, LLC ("Seller") in connection with the real property owned by the Seller and located at 180 Grant Street, Lexington, Massachusetts.
2. The statements contained herein are based on my personal knowledge. As to those statements made upon information and belief, I believe them to be true.
3. I have been a member of the Massachusetts bar for 28 years, since 1989. My area of practice is in real estate. Over the years, I have represented hundreds of buyers and sellers of residential and commercial real estate. It is a regular and common part of my practice to advise buyers and sellers concerning offers to purchase real estate, and purchase and sale agreements. I regularly draft such documents.
4. I did not represent the Seller at the time that the Offer to Purchase Real Estate, which is the subject of this lawsuit, was signed. I first became involved on or about

September 15, 2017, after my client was contacted by Attorney David J. Murphy, who represented the buyers, Jack and Sandra DeCicco (the "Buyers"). Mr. Murphy demanded that my client execute the Purchase and Sale Agreement ("P&S") he had prepared that day.

5. I reviewed the P&S prepared by Attorney Murphy. The P&S included as an attachment and incorporated the terms of a document entitled, "180 Grant Street Offer Summary" (the "Offer Summary"). Upon information and belief, the Offer Summary was prepared by the Buyers. Unlike the Offer to Purchase Real Estate and the Offer to Purchase Contingency Addendum, which the parties also signed, the Offer Summary is not a standard form of the Greater Boston Real Estate Board. On its face, the Offer Summary lists a number of open items that anticipated further discussion. This demonstrated to me that the parties had not reached agreement on the material terms for the purchase and sale of the Property at the time the offer was signed.

6. The numerous open items are accurately detailed in the Affidavit of Peter Daus-Haberle, which I have reviewed. They include references to construction, finishes and upgrades in various areas of the home, which are described as "as advertised," "as discussed" and "as described." In my experience, these vague descriptions are inadequate for purposes of preparing a valid and enforceable purchase and sale agreement – absent further discussion and agreement between the parties.

7. The Offer Summary is also vague as to whether the Buyers could make changes to the appliances, fixtures and finishes that had already been installed, and at whose cost. The Offer Summary is vague about whether the Buyer would receive an allowance for these items, and if so, how much of an allowance. Absent further discussion and agreement between the

parties on these open items, it would have been impossible to draft a valid and enforceable purchase and sale agreement.

8. In addition, upon information and belief, the parties never reached agreement as to the build-out of the space above the garage which was only 60% complete at the time the offer was signed. Concerning this item, the Offer Summary states only, "*Complete construction of space as advertised of matching quality and workmanship.*" This provision is hopelessly vague in expressing the parties' intentions and does not indicate that an agreement was reached.

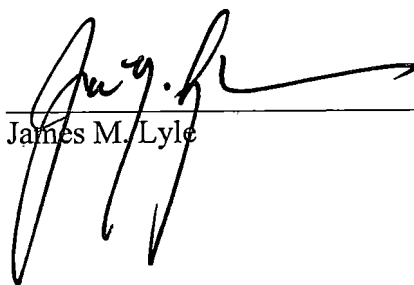
9. In my experience, it is not unusual for a seller and buyer to continue to negotiate the terms for the purchase and sale after an offer is signed, and for terms to be agreed upon and incorporated in a binding purchase and sale agreement. This is especially true with respect to new home construction where all of the specifications for the remaining improvements have not been rendered. Until an agreement is reached as to the remaining, incomplete items and the specifications for additional work, it is impossible to create a mutually agreeable purchase and sale agreement.

10. The offer is invalid and unenforceable for an additional reason, in my opinion. The Contingency Addendum contains an inspection contingency which allows the Buyers to withdraw their offer if an inspection reveals serious defects. However, the contingency does not indicate the dollar amount of repairs that would permit the Buyers to withdraw their offer without penalty. This omission is a material term which would need to be addressed in a purchase and sale agreement. However, upon information and belief, the parties never reached an agreement concerning this contingency.

11. I have had a number of telephone conversations with counsel for another potential buyer of the Property. That other buyer has signed an offer and made a deposit to secure the offer. Upon information and belief, the offer is for a lower amount than the offer made by the plaintiffs in this lawsuit.

12. I have informed counsel for the other buyer about this lawsuit and that the Buyers are seeking the issuance of a lis pendens. Counsel for the other buyer informed me that her client will withdraw their offer to purchase the Property if the Court endorses a Memorandum of lis pendens. Accordingly, if this motion is allowed, the Seller will lose its opportunity to sell the Property to the other buyer and will have to refund the deposit securing that offer.

SIGNED under the pains and penalties of perjury this 3 day of October, 2017.



James M. Lyle

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: 1781-CV-02777

JACK DECICCO and SANDRA DECICCO,

Plaintiffs,

v.

180 GRANT STREET, LLC

Defendant

SUPPLEMENTAL AFFIDAVIT OF JAMES M. LYLE, ESQ.

I, James M. Lyle, hereby depose and say as follows:

1. I represent the defendant, 180 Grant Street, LLC (the "Seller") in connection with the real property located at 180 Grant Street, Lexington, Massachusetts (the "Property") which is the subject of this dispute. The statements contained herein are based on my personal knowledge. As to those statements made upon information and belief, I believe them to be true.

2. I submit this Affidavit to supplement the statements contained in my previous affidavit, dated October 3, 2017. Since then, over the course of approximately eight (8) weeks, I continued to engage in discussions with David J. Murphy, the real estate lawyer who represents plaintiffs Jack and Sandra DeCicco (the "Buyers"), in a good faith effort to come to terms for conveyance of the Property. As further described below, ultimately no agreement was reached. The fact that these discussions and negotiations took place but never resulted in a mutually agreeable purchase and sale agreement make it clear to me that no agreement had been reached at the time the preliminary offer was signed on September 9, 2017.

3. Most of my discussions with Mr. Murphy revolved around attempting to interpret, define and allocate the cost of the various changes, upgrades and construction build-out items listed in the addendum which the Buyers attached to their offer ("Buyers Addendum").

4. The Buyers also continued to make additional requests and demands for changes and upgrades to the Property after September 9, 2017 and through November 2017. Although some progress was made in sorting out some of these items, many other differences between the Buyers and the Seller could not be resolved.

5. On October 27, 2017, Mr. Murphy wrote an email to me in which, among other things, he stated that the Buyers were requesting a credit from the Seller in the amount of \$114,815, purportedly for the cost to complete the changes and upgrades listed in the Buyers Addendum. Mr. Murphy also requested that the Seller reimburse the Buyers for legal fees "with respect to the lis pendens." Attached to Mr. Murphy's e-mail was a copy of the Buyers Addendum which (according to Mr. Murphy), the Buyers had marked up with their notes and calculations. A true and correct copy of the October 27, 2017 email and its attachment is attached hereto as Exhibit "A."

6. Upon information and belief, with the exception of the change in the purchase price and the \$1,200 allowance for lighting (both of which were contained in the Buyers Addendum when the offer was signed), all of the hand-written notations and calculations were added by the Buyers after the offer was signed. These newly added notes are in red and blue colored text.

7. Mr. Murphy sent me a second e-mail on October 27, 2017, enclosing a list of the Buyers' specifications for "Interior Door Levers," "Kitchen Cabinets Knobs and Pulls" and "Basement Flooring." Mr. Murphy did not indicate who was to be responsible for the cost of

materials and labor for these items. Upon information and belief, the Buyers expected the Seller to bear these costs, but the Seller never agreed to do so. A true and correct copy of Mr. Murphy's second email of October 27, 2017 and attachment is attached hereto as Exhibit "B."

8. The parties continued to discuss the Buyers' various and evolving requests for changes, upgrades and build-out items through November 2017. On November 17, 2017, Mr. Daus-Haberle and Mr. DeCicco met at the Property to discuss the status of the Buyers' requests.

9. I also continued to discuss the terms of the sale with Mr. Murphy, by phone and via e-mail. A true and correct copy of an e-mail chain between Mr. Murphy and me, between October 27 and November 24, 2017, is attached hereto as Exhibit "C."

10. I exchanged several other e-mails with Mr. Murphy, and spoke with him numerous other times by telephone in an attempt to negotiate mutually acceptable terms for the sale. These efforts were unsuccessful.

11. By the first week of December 2017, it became clear to me that the Buyers and the Seller would not be able to reach mutually agreeable terms for the purchase and sale. Further discussions and negotiations were suspended at that time.

12. Between October and December 2017, no draft Purchase and Sale agreement was exchanged between the attorneys which would have been the normal course for a transaction, like this one, in which a large number of details needed to be worked out and memorialized in a written document. This was because the parties remained too far apart to make the exercise of drafting appropriate language for a purchase and sale agreement worthwhile.

SIGNED under the pains and penalties of perjury this 14th day of February, 2018.


James M. Lyle

CERTIFICATE OF SERVICE

I, Jon C. Cowen, hereby certify that on this 16TH day of February, 2018, I caused a copy of the foregoing Supplemental Affidavit of James M. Lyle, Esq. to be served by U.S. mail and via e-mail on:

Scott A. Spencer, Esq.
Law Offices of John J. Bonistalli,
160 Federal Street, 15th floor
Boston, MA 02110
scott.spencer@bonistallilaw.com



Jon C. Cowen

Exhibit A

Exhibit A

Jim Lyle

From: David J. Murphy <dmurphy@murphypc.com>
Sent: Friday, October 27, 2017 4:03 PM
To: Jim Lyle
Subject: 180 Grant Street
Attachments: 180 Grant Street Offer Summary_Update with Estimate to Complete.pdf

Jim,

Please find attached the 180 Grant Offer Summary with my client's notes.

My client's contractor estimates the value of the work included in the original agreement that my client would need to complete is \$114,815. My client requests a credit for that cost.

My client has received a bill for \$5884 representing legal fees as a direct result of seller's actions with respect to the lis pendens. My client requests a credit for that cost.

In addition, your client has agreed to complete certain items which should be clearly set forth in a new P&S which we need to sign asap in order for my client to avoid a rate lock.

The P&S should also include a copy of the Seller's limited warranty for new construction.

Please review these items and let me know when you are available to discuss.

Thank you.

David

David J. Murphy, Esquire
MURPHY PC
160 Federal Street, 15th Floor
Boston, MA 02110
Phone: 617.423.1150
Fax: 617.507.5696
Email: dmurphy@murphypc.com
www.murphypc.com

In compliance with IRS requirements, we inform you that any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties or in connection with marketing or promotional materials.

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180 Grant Street
Offer SummaryOffer Price: \$2,125,000 **\$ 2,260,000** J.D. PDH

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
 - o Hardwood flooring **\$52,130** : Includes cost to sand, stain, polish floors and cleaning and painting afterwards. Also repair darker stain - Buyer to select color water-damaged wood on 2nd Floor.
 - o Gloss finish
 - o Updated hardware throughout : See attachment for model numbers.
 - o Alarm system wiring : Seller noted home is sufficiently wired.
 - o Install lighting fixtures throughout the house, subject to buyer review and approval of hardware **\$1,200 ALLOWANCE** PDH
 - o Shelving for all closets : Buyer to inspect home to validate seller claim that shelving is sufficient. J.D.
- > Appliances:
 - o Fridge - Replace with comparable Sub Zero] **\$34,760** - Material Appliances
 - o Range and oven: Replace with Wolf brand] **\$5,620** - Labor and cabinet work and material
- > Showers: Install frameless glass with stainless steel hardware
- > Electrical
 - o Install speakers on first floor and basement] **\$18,507** - Includes costs to run wiring, patch holes, paint and clean.
 - o Location: to be determined
 - o Buyers to purchase hardware
- > 1/2 Bath on First Floor (nearest kitchen)] **\$3,798** - labor only
 - o Buyer to select different sink of matching quality
 - o Replace flooring with tile
 - o Buyer to purchase material
- > Basement : Seller to install flooring selected by buyer. See attached
 - o Complete work as described for model number.
 - o Buyer to select flooring materials of comparable matching quality
- > Room over garage : Seller has begun construction. Seller to provide specification of work to be completed for Buyer review and approval.
 - o Complete construction of space as advertised of matching quality and workmanship
 - o Construction complete no later than 45 days after closing
- > Fencing: Complete as advertised and discussed
 - o Along driveway : Installed by neighbor.
 - o Fenced in back yard : Seller to provide specifications for Buyer review
- > Offer Valid Through: September 8, 2017 and approval.

Total = \$114,815

Legal Costs = \$5,884 : Litigation counsel billable hours and expenses.

DocuSigned by:

Jack Delico

9BFDDCA419946C

DocuSigned by:

Sandra Delico

8DC484FEBFD0423

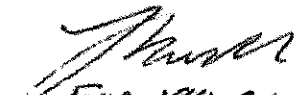

 FOR 180 GRANT ST
 LLC

Exhibit B

Exhibit B

Jim Lyle

From: David J. Murphy <dmurphy@murphypc.com>
Sent: Friday, October 27, 2017 4:39 PM
To: Jim Lyle
Subject: 180 Grant Street_Hardware and Basement Flooring
Attachments: 180 Grant Street_Hardware and Basement Flooring.docx; ATT00001.htm

Jim,

Please find an attachment to review with the Offer summary.

David

Interior Door Levers

Emtek Merrimack Lever with Wilshire Rosette.

Finish: Polished Chrome (US26)

Passage Set Product Code: 8161

Privacy Set Product Code: 8261

Retail Price: \$97

Emtek Steel Hinges

Finish: Polished Chrome (US 26)

Kitchen Cabinets Knobs and Pulls

Knob

Emtek Lido Crystal Knob. Base Polished Nickel (US 14)

Color: Clear

Product Code: 86403

Retail Price: \$14.40

Pull

RK International Hardware

Finish: Polished Nickel

Retail Prices (DecorPlanet.com and Wayfair)

- **Small:** CP 815 PN \$19.47
- **Medium:** CP 816 PN \$22.02
- **Large:** CP 817 PN \$33.92

**180 Grant Street, Lexington MA
Hardware and Basement Flooring**

Basement Flooring

Armstrong Timbercuts | Specialty Hardwood | Engineered Wood (contractor recommended for basements)

Product Code: EAMTCM5L402 Woodland Hill

Retail Price per Square Foot: \$5.99 (American Carpet Wholesalers)

Exhibit C



Jim Lyle

From: David J. Murphy <dmurphy@murphypc.com>
Sent: Friday, November 24, 2017 12:37 PM
To: Jim Lyle
Subject: RE: 180 Grant Street

Jim,

My client met Peter (Seller) at the property on Friday, November 17, 2017 in the afternoon. My client's objective was to inspect the status of the items noted on the Offer Summary as work to be completed by the Seller. The latest Seller proposed closing credit does not include those items. My client assumed these items would be completed because Peter verbally agreed to complete these items last time my client met Peter at the property. For the hardware and basement flooring items, at Peter's request, more than 2 weeks ago, my client promptly provided model numbers to him.

The items in question are as follows:

- 1) The room over the garage
- 2) Frameless glass with stainless steel hardware for all showers
- 3) Basement flooring (Buyer provided model numbers at Peter's request)
- 4) Hardware (i.e., door handles, hinges, knobs and pulls) throughout the house (Buyer provided model numbers at Peter's request)
- 5) Fencing in the back yard; and,
- 6) Shelving in closets

Based on a physical inspection of the property on November 17, 2017, the Seller has made no progress to complete any of the items noted above since my client last visited the property. Furthermore, Peter was unable to confirm what items, if any, Seller plans to complete prior to closing. Peter indicated to my client that Peter will check with his team and get back to Seller's attorney with an update on each of the items above.

In addition, my client asked Peter to provide my client with model numbers for all the existing appliances so my client can evaluate the adequacy of the Seller's proposed \$15,000 credit for my client assuming the risk of selling the existing appliances and purchasing the new appliances in the Offer Summary. Peter indicated to my client that Peter would get back to my client with model numbers for all the existing appliances in question. Please provide the model numbers for the existing appliances.

In summary, my client is not satisfied with the condition of the home at his visit on November 17. My client's current offer assumed the items above would be completed by Seller as Peter stated two weeks ago. In order to settle this matter, my client requests the Seller to (1) complete the above items to Buyer's satisfaction or (2) increase the Seller's closing credit by the value of the incomplete items in which case, my client's contractor will need to visit the property again to estimate the value of the incomplete work.

Please let me know if the Seller will work to settle this matter under option 1 or 2, or if we should continue down the litigation path which, as you know, does not benefit anyone.

Regards,
David

David J. Murphy, Esquire
MURPHY PC
160 Federal Street, 15th Floor
Boston, MA 02110
Phone: 617.423.1150
Fax: 617.507.5696
Email: dmurphy@murphypc.com
www.murphypc.com

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From: Jim Lyle [mailto:jlyle@PBL.COM]
Sent: Friday, November 17, 2017 12:25 PM
To: David J. Murphy <dmurphy@murphypc.com>
Subject: RE: 180 Grant Street

David – I understand that Jack and Peter connected and that a site visit has been scheduled for this afternoon.

Peter also confirmed my understandings outlined below to the effect that (1) no customized changes have been implemented and (2) that Peter never agreed to, nor intended to make, any such changes unless and until all open matters and other conditions were fully resolved.

Please let us know if your client is satisfied with the current condition of the home after he has a chance to inspect it today,

Thanks,

Jim

James M. Lyle, Esq.

Posternak
POSTERNAK BLANKSTEIN & LUND LLP

Posternak Blankstein & Lund LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-8004
617.973.6293
617.722.4934 fax
www.pbl.com [biography](#)

From: Jim Lyle
Sent: Friday, November 17, 2017 11:01 AM
To: 'David J. Murphy'
Subject: RE: 180 Grant Street

David – Peter is the proper contact person for access.

I'll also inquire but I don't believe that any "customization" requests were implemented pending resolution of ALL issues. Moreover, as we discussed, my client never intended to make any such customized changes, especially to completed work, until all financing and other contingencies had been satisfied.

Jim

James M. Lyle, Esq.

Posternak

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617.722.4934 fax

www.pbl.com [biography](#)

From: David J. Murphy [<mailto:dmurphy@murphypc.com>]

Sent: Friday, November 17, 2017 10:41 AM

To: Jim Lyle

Subject: RE: 180 Grant Street

Jim,

Would you please have your client confirm with Peter whether or not they've installed the hardware (throughout the house) and flooring (in the basement) my client identified by model number?

My client would like access to the house this afternoon. I assume he should contact Peter for access?

Please confirm the above.

Thank you,
David

David J. Murphy, Esquire

MURPHY PC

160 Federal Street, 15th Floor

Boston, MA 02110

Phone: 617.423.1150

Fax: 617.507.5696

Email: dmurphy@murphypc.com

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From: Jim Lyle [<mailto:jllyle@PBL.COM>]
Sent: Thursday, November 16, 2017 6:37 PM
To: David J. Murphy <dmurphy@murphypc.com>
Subject: RE: 180 Grant Street

David – The short answer is for your client to make arrangements to visit the property and inspect its current condition.

To be clear: This is an ongoing settlement negotiation with no agreements reached until all elements have been resolved and documented..

Peter is by nature perhaps overly polite - BUT he "agreed" to nothing pending reaching an overall settlement.

To use your framework: How could he rationally agree to your client's individual requests without knowing what else was contemplated, including the \$ amount of new contractor bids ?

More accurately, consistent with his desire to avoid unproductive hostility, Peter merely took notes as to your client's wish list and relayed that discrete information for further consideration by the seller team in conjunction with the outstanding financial and other components of the anticipated settlement.

Let me know if your client would like to visit the project site.

Jim

James M. Lyle, Esq.

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From: David J. Murphy [<mailto:dmurphy@murphypc.com>]
Sent: Thursday, November 16, 2017 6:08 PM
To: Jim Lyle
Subject: FW: 180 Grant Street

Jim,

Please see attached the Offer Summary provided to you on October 27. You indicated as part of your client's offer to settle this matter that my client accept the property in its condition now with a Certificate of Occupancy.

It is difficult for my client to consider your client's offer to accept the home in its current condition without knowing what condition it is in. For example, my client's notes on the attached Offer Summary indicating

Seller will install updated hardware and basement flooring resulted from my client's agreement with Peter after my client accessed the property with his contractor. Peter asked for model numbers for those items and my client provided them to Peter. Were those items installed? What is the status of the room over the garage? How can my client consider a credit amount without knowing the status of the those other items in the Offer Summary?

Please let me know.

David

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From: David J. Murphy
Sent: Friday, October 27, 2017 4:03 PM
To: 'jllyle@pbl.com' <jllyle@pbl.com>
Subject: 180 Grant Street

Jim,

Please find attached the 180 Grant Offer Summary with my client's notes.

My client's contractor estimates the value of the work included in the original agreement that my client would need to complete is \$114,815. My client requests a credit for that cost.

My client has received a bill for \$5884 representing legal fees as a direct result of seller's actions with respect to the lis pendens. My client requests a credit for that cost.

In addition, your client has agreed to complete certain items which should be clearly set forth in a new P&S which we need to sign asap in order for my client to avoid a rate lock.

The P&S should also include a copy of the Seller's limited warranty for new construction.

Please review these items and let me know when you are available to discuss.

Thank you.

From: Jim Lyle [<mailto:jllyle@PBL.COM>]
Sent: Thursday, November 16, 2017 6:37 PM
To: David J. Murphy <dmurphy@murphypc.com>
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Please let me know.

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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 SUMMARY JUDGMENT DISMISSAL OF THE
PLAINTIFFS' COMPLAINT BY THE SUPERIOR COURT,
MIDDLESEX COUNTY
LOWER COURT NO. 1781CV02777

Brief for the Plaintiffs/Appellants
Jack DeCicco and Sandra DeCicco

Submitted by,

John J. Bonistalli, BBO# 049120
Jennifer Lee Sage, BBO# 677949
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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the plaintiffs' complaint is frivolous, as that word is defined in G.L. c. 184, § 15(c), and whether the judge erred in granting summary judgment in favor of the defendant.

II. STATEMENT OF THE CASE

The plaintiffs sought specific performance of a contract for the sale of a home in Lexington. R.A. 6-12. They sought additional relief, and other damages. R.A. 6-12. As an adjunct to their complaint, they sought endorsement of a memorandum of lis pendens, which was granted, after hearing. R.A. 59.

Six months later the defendant filed a special motion to dismiss pursuant to G.L. c. 184, § 15(c). A second superior court judge granted summary judgment to the defendant finding under subsection (c) that the complaint lacked any reasonable factual support "under the first prong of Section 15(c)." R.A. 171-183. The judge also ruled that the defendant is entitled to attorneys' fees and costs. R.A. 198.

A. The Standard of Review

This is an interlocutory appeal under G.L. c. 231, § 118. (See Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 81 (2005)).

Because the judge treated this matter as a summary judgment, and despite a litany of disputed material facts¹, found for the defendant, the standard of review of this matter must be de novo review on the record below. Starkey v. Deutsche Bank Nat'l Tr. Co., 94 Mass. App. Ct. 1, 6 (2018), see also 1A Auto, Inc. v. Dir. of the Office of Campaign & Political Fin., 480 Mass. 423, 428 (2018); and Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc., 480 Mass. 480, 483 (2018).

This appeals court review must involve "... an examination of the same factors *properly* considered by the judge in the trial court in the first instance. His conclusions of law are subject to broad review and will be reversed if incorrect. While weight will be accorded to his exercise of discretion, an order predicated solely on documentary evidence permits the appellate court to draw its own conclusions from the record..." Galipault, citing, Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25-26 (1981) (citations omitted, italics added).

¹ The intention of the parties, established by the offer summary and signed offer to purchase, is a disputed material fact at the core of this case that ought to have been left for a fact finder. The lower court judge identified many of the disputed facts surrounding the parties' intention to be bound, but nonetheless entered judgment in the defendant's favor.

B. The Documents Properly Before the Trial Court

This is a case predicated solely on documentary evidence, and the only documents properly before this court are the plaintiff's verified complaint with its attachments, and only one of the three affidavits submitted by the defendant. The defendant's answer is not verified, and two of the three affidavits submitted by the defendant are clearly insufficient and do not comply with the statute.

"In ruling on a 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) (emphasis added).

While affidavits are mentioned in several places in the Rules of Civil Procedure, the sufficiency of an affidavit is addressed in two places: Rule 56(e), in the context of summary judgment, and Rule 4.1(h), in the context of a motion for an attachment.

Rule 4.1(h) provides that information contained in an affidavit may be based upon information and belief, if the affiant states in the affidavit that "he believes it to be true."

Unlike Rule 4.1(h), Rule 56(e) provides that:

"affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Affidavits not based upon personal knowledge are insufficient. Roe v. Fed. Ins. Co., 412 Mass. 43, 44 fn. 4 (1992). Expressions of "belief" do not rise to the level of personal knowledge required by the rules. Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 433 (1987).

Under either standard, facts alleged in an affidavit must be admissible to be properly considered. Mass. R. Civ. P. 56(e); see also, TLT Constr. Corp. v. A. Anthony Tappe & Assocs., 48 Mass. App. Ct. 1, 12 (1999) (affidavit of attorney containing inadmissible hearsay should be stricken).

As demonstrated below, two of the three affidavits submitted by the defendant are non-compliant. If anything, these affidavits demonstrate the existence of many unresolved material facts and highlight the necessity for discovery, and likely, resolution by a fact finder. Summary judgment is clearly inappropriate.

1. The First Lyle Affidavit

Lyle begins his affidavit by admitting that he has no personal knowledge of the activities of the parties prior to their signing of the offer to purchase and that he was retained only after the offer to purchase was executed. R.A. 55. Nonetheless, he purports to affirm what the parties were thinking at the time defendant accepted the offer. R.A. 55-58. He states that in his estimation the parties did not intend to be bound by the signing of the offer documents. R.A. 55-58. The statement is inappropriate in offering proof as to what other people were thinking and intending, and the statement cannot be considered by this or any other court.

First, Lyle has no personal knowledge, nor has he expressed a basis for knowing what the parties intended. Second, any information conveyed to Lyle by the defendant would be inadmissible hearsay and therefore impermissible as a basis to form the affiant's knowledge.

Lyle's first affidavit also asserts legal and other opinions that cannot be considered. He argues his view that the signed offer summary was "vague" and "does not indicate that an agreement was reached."

R.A. 57. He also offers opinion that "the offer is invalid and unenforceable... ." R.A. 57. He opines that "in his experience" matters that are left vague are negotiated in a purchase and sale agreement. R.A. 57. Lyle's statements of opinion are improper and an affront to the fact finder who is required to make these decisions.

2. Lyle's Second Affidavit

Lyle's second affidavit contains inadmissible statements describing settlement negotiations, impermissible legal conclusions, and opinions as to how contested material facts are to be resolved by the court in dispositive summary judgment. However, statements made during settlement negotiations are not admissible to prove or disprove the validity of a disputed claim. Massachusetts Guide to Evidence § 408 (2013). Lyle's entire supplemental affidavit is based on settlement negotiations between the parties.

Lyle impermissibly opined in his second affidavit that the existence of ongoing negotiations "make it clear... that no agreement had been reached at the time the preliminary offer was signed on September 9, 2017." R.A. 106.

The second affidavit, to the extent that it is not based upon personal knowledge, contains legal conclusions, opinions and inadmissible hearsay, and cannot be considered by this court in its de novo review.

3. The Daus-Haberle Affidavit

Peter Daus-Haberle is one of the two members of the defendant, 180 Grant Street, LLC. He submitted an affidavit in opposition to the plaintiffs' initial request for an endorsement of lis pendens. The defendant resubmitted the affidavit in support of its special motion to dismiss.

Much of his affidavit contains facts asserted upon his personal knowledge. Many, if not most of those facts are disputed by plaintiffs' verified complaint and the documents appended to it.

By way of example, Daus-Haberle asserts in his affidavit that the parties did not reach an agreement on the items contained in the offer summary. R.A. 39 This is clearly contradicted by the verified complaint at paragraph 20 ("the addendum contained features to be completed by defendant/seller prior to closing in order to bring the property to its advertised condition"). R.A. 8. The Daus-Haberle assertion is

further contradicted by the fact that Daus-Haberle signed the offer summary without condition. R.A. 21.

The affidavit contains impermissible opinion testimony and conclusions. Daus-Haberle states that "no agreement had been reached between the Seller and Buyer as to any of these items...", referring to the items listed in the offer summary. R.A. 39. This statement goes beyond personal knowledge to the realm of speculation and conjecture of another party's state of mind and should not be considered by the court.

Daus-Haberle goes on to offer his opinion as to the reasonableness and substantiality of the items contained in the offer summary. R.A. 41. These statements are lay opinions, inadmissible and cannot be considered in this review.

III. STATEMENT OF FACTS

A. The Home and Advertised Listing

The property is a 7 bedroom, 6 ½ bathroom, single family home in Lexington. R.A. 36. It was newly constructed, although incomplete when the parties contracted for sale. R.A. 8. The property was listed in the multiple listing service (MLS) by the defendant as a completed home, and described as having many features that, at the time that the defendant accepted

the plaintiffs' offer, were not completed. R.A. 8, 36-38.

B. The Offer to Purchase (OTP)

On September 8, 2017, the parties executed a binding "Offer to Purchase Real Estate" (OTP) for the home. R.A. 21. The agreed price was \$2,260,000.00. R.A. 21.

The OTP contained all material terms of a contract. R.A. 7-9, 21. The parties recited in the OTP that they would execute a purchase and sale agreement (P&S) on or before September 15, 2017. R.A. 21. A closing date was specified as November 13, 2017. R.A. 21. Additionally, the OTP contained the following language:

"NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney." R.A. 21.

The parties executed the OTP. R.A. 21. Because the home was incomplete, though offered and advertised as a completed home, the parties executed an addendum to the OTP entitled "180 Grant Street Offer Summary," restating the offer price of \$2,260,000.00, and containing a list of incomplete items, and reciting the "offer price subject to delivery of home in move-

in condition as advertised, subject to Buyer review and approval of the following... [items enumerated thereafter included color selection for hardwood floors, selection of hardware, alarm system wiring, installation of lighting fixtures, shelving, kitchen appliance selections, shower doors and hardware, speakers for audio throughout the house, sink selection for a first floor bathroom, tile selection for the same, completion of basement as described in the advertisement for the home, and selection of flooring materials, completion of the room over the garage (as advertised), and fencing, as advertised]."

R.A. 23.

C. The Breach by the Defendant

In the week between September 8, 2017 and September 14, 2017, inquiries were made to the seller regarding a draft purchase & sale agreement. R.A. 8. No proposed P&S was ever received by the plaintiffs from the defendant. R.A. 8, 13-20.

On September 14, 2017, a mere six days after the seller had accepted the offer, the defendant emailed the buyers' broker and declared that he "could not make this deal work." R.A. 16. On September 15, 2017, plaintiffs' conveyancing attorney, Murphy, emailed a

proposed P&S to the seller. R.A. 19-20. Murphy advised that the buyers would consider any changes to the agreement proposed by the seller. R.A. 19-20. Also, on September 15, 2017, the plaintiff/buyers delivered an executed copy of the P&S and a check in the amount of \$112,000 to the escrow agent, as was required by the OTP. R.A. 13-14. There was no substantive response to the proposed P&S from the seller, but rather, Murphy received a call from seller's attorney, Lyle, indicating that the sellers would not execute the P&S or convey the property. R.A. 14.

IV. ARGUMENT

A. There is Ample Factual Support for the Plaintiffs' Claims.

G.L. c. 184, §15(c), 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.

The complaint here sets out a cognizable claim, firmly grounded in facts supported by the verified complaint with its attachments, is based in well-

settled law, and there is no valid legal defense that would render any of the plaintiffs' claims frivolous.

The verified complaint alleges that the parties entered an agreement for the sale of a single family, new construction, home. Described in and appended to the complaint is the Greater Boston Real Estate Board standard OTP form, executed by the parties. These two documents provide all of the necessary factual basis to survive a special motion to dismiss.

The complaint and accompanying documents contain all material facts that support the plaintiffs' claims for breach of contract, specific performance, breach of the implied covenant of good faith, and misrepresentation. The parties entered into a contract for the sale of the property. The OTP was signed by both parties, as was the offer summary, attached as an addendum. Those combined documents, verified by the plaintiffs, contained all material terms of the sale and included the phrase "this is a legal document that creates binding obligations."

These verified facts form the factual basis of the plaintiffs' claim that the OTP was binding and enforceable, that the defendant breached that enforceable contract by refusing to convey the

property, and that the plaintiffs suffered damages as a result.

B. The Verified Complaint is Predicated Upon Established Contract Law.

The plaintiffs' complaint relies on long-settled contract law, i.e., that a contract is created when there is a valid offer and acceptance. An offer is defined as a representation of the offeror's willingness to enter a bargain such that another party (the offeree) would rely on the representation. Restatement (Second) of Contracts § 24 (1981). Acceptance occurs when the offeree responds as requested in the offer. Restatement (Second) of Contracts, § 50(1) (1981). In the formation of a contract, the element of agreement or mutual assent is often designated as a "meeting of the minds." Restatement (Second) of Contracts § 17, comment (c) (1981). The parties have an agreement only when they have reached a "meeting of the minds," i.e., the same interpretation of the same contract terms at the same time. Situation Mgmt. Sys. Inc., v. Malouf Inc., 430 Mass. 875 (2000). "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." Click or tap here to enter text.

There is some leeway allowed to account for the possibility of future uncertainties that are difficult to define at the moment the contract is entered into. "If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding." See Lafayette Place Assocs. v. Boston Redev. Authy., 427 Mass. 509, 517-519 (1998) (approving a formula for calculation of the price of redevelopment land amid later major uncertainties); Situation Mgmt. Sys., Inc. v. Malouf Inc., 430 Mass. at 878-879 (a party's general oral promise to renew the terms of a prior commercial agency contract was sufficiently definite for enforcement); Basis Technology Corp. v. Amazon.com, Inc., 71 Mass.App.Ct. 29, 38-39 (2008) (a party's acceptance of a referenced and discoverable stock conversion formula was binding upon it even though it had not specifically consulted the formula at the time of agreement).

However, all material terms must be present and sufficiently complete and definite, and the parties

must have a present intent to be bound by those terms. McCarthy v. Tobin, 429 Mass. 84, 87 (1999) (an executed offer to purchase real estate that contains the material terms of the parties' agreement constitutes a legally binding contract).

McCarthy is directly on point and should inform this court's analysis. There the buyer and seller of real estate each executed an OTP on a pre-printed, standard form. Id. at 85. The OTP contained, among other provisions, a description of the property, the price to be paid, title requirements and the time and place for the closing. Id. The OTP stated that the parties shall execute a purchase and sale agreement and stated that time is of the essence. Id. The OTP there also contained the exact caveat as in the case at bar: "NOTICE: This is a legal document that creates legally binding obligations. If not understood, consult an attorney." Id. The parties then exchanged a series of drafts of purchase and sale agreements before the seller repudiated the contract and sold the property to another. Id. at 86-87. The buyer then sued seeking specific performance and claiming that the OTP constituted a binding contract among the parties. Id.

The court ruled that the OTP constituted a binding contract because it contained all the material terms of a contract. Id. The Court rejected the seller's argument that his several requested changes contained in the exchanged drafts of the P&S agreement manifested his intent not to be bound. The court referred to them as "ministerial and nonessential terms of the bargain." Id. at 87. More specifically, the Court explained:

"[T]he inference that the OTP was binding is bolstered by the notice [that this is a legal document] that creates legally binding obligations. . . . The OTP also details the amount to be paid and when, describes the property bought, and specifies for how long the offer was open. This was a firm offer, the acceptance of which bound [the parties]. We conclude the OTP reflects the parties' intention to be bound." Id. at 88.

In this matter, as in McCarthy there is ample legal support for the plaintiffs' claims that the parties entered into a binding contract for the sale of real property, and that the defendant, in repudiating the contract, breached.

C. There is Ample Factual and Legal Support the Plaintiffs' Claims of Breach of Implied Covenant of Good Faith and Fair Dealing.

"Every contract implies good faith and fair dealing between the parties to it." Anthony's Pier

Four, Inc. v. HBC Associates, 411 Mass. 451, 471 (1991). The covenant provides "that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...", Id. at 471-72. The implied covenant exists so that the objectives of the contract may be realized. Crellin Technologies, Inc. v. Equipment Lease Corp., 18 F.3d 1, 10 (1st Cir.1994). The concept of good faith and fair dealing in any one context is shaped by the nature of the contractual relationship from which the implied covenant derives. Ayash v. Dana Farber Cancer Institute, 443 Mass 367, 385 (2005). The scope of the covenant is only as broad as the contract that governs the relationship. Id. To succeed on such a claim, a party must show bad faith by the breaching party. See Fortune v. National Cash Register Co., 373 Mass. 96, 104-05 (1977) (abusing the timing of termination of an employment contract to avoid paying commissions already earned by the employee was in bad faith and accordingly violated the implied covenant of good faith and fair dealing).

It is obvious that the parties understood that the house was incomplete, that the plaintiffs

nevertheless wished to purchase it, that the defendant nevertheless wished to sell the house to the plaintiffs, and that it would be necessary for the parties to engage in making certain selections, and refining certain details, for the completion of the home.

Thusly, the parties obligated themselves to work together to effect their agreement to confer, define, redefine, and result in an executed purchase and sale agreement with the refined details resolved. The defendant never acted in conformity with this obligation. There are ample facts to support this failure and the defendant's breach of the implied covenant of good faith and fair dealing.

D. There is Ample Factual and Legal Support for the Plaintiffs' Claims of Misrepresentation.

In summarily dismissing the plaintiffs' complaint, the judge also dismissed the plaintiffs' count for misrepresentation. Misrepresentation sounds in tort, because it is, in fact, a tort. While linked factually to the breach of contract action, it is not subject to a special motion to dismiss under the lis pendens statute. Misrepresentation is a separate cause of action.

A claim of misrepresentation requires a showing that the defendant made a false statement of material fact to induce the plaintiff to act, and that the plaintiff relied on the false statement by the plaintiff and suffered damages as a result. Zimmerman v. Kent, 31 Mass. App. Ct. 72, 77 (1991).

The defendant offered to sell the property to the plaintiff and promised the home in the condition it was advertised, in "move-in condition" while contractually granting the plaintiff the right to "review and approve" all of the items listed in the offer summary. Despite these promises, the defendant, without justification, breached the contract.

The defendant represented that it intended to go forward with the execution of the P&S and the selling of the property, in move-in condition, when they agreed to do so in the OTP. When the defendant made these representations, they knew or should have known that they were false, and the plaintiffs relied on these false representations to their detriment.

There is clearly a factual and legal basis for a claim for misrepresentation, independent of the breach of contract, and a dismissal of that claim by the trial court was reversible error.

V. CONCLUSION

Judgment dismissing the plaintiffs' complaint should be reversed and the remanded for further proceedings.


CERTIFICATE OF COMPLIANCE

**PURSUANT TO RULE 16(K) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to R. A. P. 16, 18 and 20.

Respectfully submitted,

Jack DeCicco and Sandra DeCicco,
By their attorneys,




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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I, John J. Bonistalli, attorney for Jack and Sandra DeCicco, hereby certify, under the penalties of perjury, that on this 12th day of October, 2018, I have made service of two copies of the appellants' brief and record appendix by first class mail, postage prepaid to:

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