Commonwealth of Massachusetts

Bristol, SS.

Supreme Judicial Court
No. FAR-

Appeals Court
No. 2021-P-0835

New England Preservation &
Development, LLC & another,
Plaintiffs/Appellants

v.

Town of Fairhaven,
Defendant/Appellee

Application For Further Appellate Review

Introduction

The Town of Fairhaven wished to repurpose the former Rogers School, a building of historic significance constructed in 1882. New England Preservation & Development, LLC (NEPD) agreed to purchase and redevelop the building and grounds, and the parties executed a purchase and sale agreement, contingent on six conditions. Four of those conditions were at issue in the appeal: (1) a requirement that within 180 days NEPD notify the Town when it "obtained financing commitments sufficient to fund the development of the project"; (2) a requirement that NEPD notify the Town

when it obtained the necessary permits and that the Town assist NEPD in obtaining them; (3) a requirement that NEPD apply to have the property placed on the National Register of Historic Buildings and notify the Town of the application; and (4) a requirement that NEPD "provide the [Town] with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans." The agreement permitted the Town to cancel the sale if NEPD did not satisfy the contingencies within one year.

On July 24, 2020, the Town terminated the agreement based on NEPD's failure to fulfil the above four conditions. NEPD sued the Town for breach of contract and breach of the implied covenant of good faith and fair dealing and obtained a memorandum of lis pendens.

The Town sought dissolution of the memorandum pursuant to G.L. c. 184, § 15(c), and a judge of the Superior Court agreed that NEPD had failed to meet three of the required contingencies. The Appeals Court subsequently reversed the trial court's decision, finding that NEPD's claims were not completely frivolous.

The Town challenges the Appeals Court's decision. Particularly as to the two financing conditions, NEPD cannot as a matter of law show that it satisfied its obligations. G.L. c. 184, § 15(c) provides a mechanism for seeking expedited relief where a plaintiff has raised a meritless action, and the Appeals Court's decision denied the Town the statutory relief to which it was entitled. This decision now creates a severe financial hardship for the Town—not only must it defend a baseless suit, but the decision will tie up the property for at least several years. The Appeals Court's decision is one of particular importance to the Town, and if allowed to stand it will potentially impact municipalities throughout Massachusetts.

A. Statement Of The Issue With Respect To Which The Defendants Seek Further Appellate Review

Whether further appellate review is appropriate (a) where the Appeals Court overturned a decision of the trial court which had correctly dissolved a memorandum of lis pendens upon finding that the underlying claims were frivolous as a matter of law; (b) where the decision imposes substantial hardships on the Town; and (c) where, if the

decision is allowed to stand, it has the potential to impose similar hardships on any municipality in Massachusetts.

B. Statement Of Prior Proceedings

On September 25, 2020, the plaintiff New England Preservation and Development, LLC (NEPD) filed a civil complaint and jury demand, as well as an emergency motion for endorsement of a memorandum of lis pendens, against the Town of Fairhaven in the Bristol Superior Court. The complaint alleged a breach of contract (Count 1) and a breach of the implied covenant of good faith and fair dealing (Count 2). Following an ex parte hearing on September 30, 2020, the court (Hopkins, J.) allowed that motion and issued a memorandum of lis pendens.

On November 23, 2020, the Town filed a notice of intent to file a special motion to dismiss the complaint and dissolve the memorandum of lis pendens. On December 28, 2020, the plaintiffs filed an amended complaint, adding Zachary Mayo as an additional plaintiff. On January 6, 2021, the Town filed a notice of intent to file a motion to dismiss the amended complaint and dissolve the memorandum of lis pendens pursuant to G.L. c. 184, §15(c).

On January 25, 2021, pursuant to Superior Court Rule 9A, the Town filed its motion with supporting materials, the plaintiffs' opposition, and its reply.

The court (McGuire, J.) held a hearing on the motion on February 25, 2021. On July 6, 2021, Judge McGuire issued a memorandum and order allowing the Town's special motion to dismiss, finding that NEPD had failed to meet three of the specified conditions. The court dissolved the memorandum of lis pendens and awarded the Town its attorney's fees. The order for dissolution of the memorandum of lis pendens issued on July 8, 2021.

On July 21, 2021, NEPD filed a notice of appeal. On August 11, 2021, NEPD filed a motion to stay the fee award pending appeal. On August 12, 2021, the court (Yessayan, J.) allowed that motion. The Appeals Court docketed the case on September 21, 2021. On July 14, 2022, the Appeals Court issued a memorandum and order under Rule 23.0 reversing the decision of the trial court. The panel concluded that the trial court had erred in allowing the Town's motion to dismiss, in dissolving the memorandum of lis pendens, and

in awarding attorney's fees. The court remanded the case to the trial court for further proceedings.

The Town seeks further appellate review of the subject matter.

C. Statement Of Facts

For purposes of this application, the Town will rely on the recitation of facts set forth in the trial court's memorandum of decision and order on defendant's special motion to dismiss and dissolve memorandum of lis pendens pursuant to G.L. c. 184, § 15(c), the relevant portions of which are as follows:

> In May of 2018, the town issued a request for proposals for the renovation of the Rogers School property. Mayo submitted a proposal on behalf of New England Preservation and Development, LLC ("NEPD.") During the town's review of the proposal, Mayo submitted a letter dated July 24, 2018 from The Raymond C. Green Companies. The letter provided:
>
> > This letter shall confirm our interest in providing funds towards the remediation of the Rogers School Building and for the construction of four single family homes at the Property. Said financing will be subject to the terms and conditions of a loan commitment letter to be issued by Lender upon its review and approval of the approved development plans. This letter shall not be deemed a formal loan commitment.
> >
> > Rees Affidavit, Exhibit A.

On July 23, 2019, the town entered into a written agreement to sell the former Rogers School premises to NEPD. Rees Affidavit, Exhibit C. The agreement was signed by Zachary Mayo, purportedly on behalf of NEPD. The agreement provided that the purchase price of $35,000 would be paid at a closing to be held thirty days after either party provided notice to the other "of satisfaction of the last of all the conditions" set out in paragraph two of Rider A:

> 2. **Conditions**: The performance of the Purchase and Sale Agreement shall be conditioned on the satisfactory completion of the following conditions.
>
> A. The Buyer shall prepare complete plans for development of the premises, including but not limited to, complete construction plans showing details of the components of the Rogers School building that are to be preserved, and new components to be added to the Rogers School building and to the premises, and the time line for project completion. Such plans shall be submitted by the Buyer to the Seller within one hundred twenty (120) days from the date of the full execution of this Agreement. Upon satisfactory completion of its review of those plans the seller will notify the Buyer, within thirty (30) days of receipt of the plans from the Buyer that the plans have been approved. In [the] event the Buyer is required to amend the plans prior to approval by the Seller, the Buyer shall be allowed an additional thirty (30) days to submit such amended plans. The plans as approved may not be further amended prior of the Seller [sic].
>
> B. The Buyer shall notify the Seller when it has obtained financing commitments sufficient to fund the development of the project, within one hundred eighty (180) days from the date of the full execution of this Agreement.

C. The Buyer shall provide the Seller notice when it has obtained the necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project. The Seller agrees that to the extent the Buyer is required to pay permit application fees, water and sewer tie in fees and BPW filing fees, the purchase price set forth in Paragraph 7 of the Purchase and Sale Agreement shall be reduced by the aggregate amount of all such payments, provided that the purchase price shall not be reduced by this, or any other reduction, or combination of reductions, below a price of $17,500.00. The Seller also agrees to provide assistance to the Buyer in obtaining all necessary Town of Fairhaven municipal permits.

D. The Buyer agrees to commence the application process to have the Rogers School building placed on the National Register of Historic Buildings and shall provide the Seller notice of such application. In the event such application is not approved within one hundred twenty (120) days of the full execution of this Agreement the Buyer will provide the Seller with a covenant or other legally enforceable mechanism, which shall be entered into a[t] time of conveyance of the deed, to guarantee the preservation of the historical component of the Rogers School building. In such event the Seller shall notify the Buyer when it is satisfied with the form of covenants or other documents, within thirty (30) days of the date of receipt by the Seller of such documents.

E. The Buyer shall provide the Seller with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans. The Seller shall notify the Buyer when it is satisfied with such Letter of Credit within thirty (30) days of the date of receipt by the Seller of such documentation.

***

> 3. **Right of Termination**: If each of the conditions set forth in paragraph 2 of this Rider A has not been satisfied, with notice thereof given as provided in each of the conditions, no later than one (1) year following the date of this Agreement, then either party may terminate this agreement by written notice [to] the other, and this agreement shall thereupon be void and without recourse.

Rider A was signed by the town administrator on behalf of the town, as "Seller," and by Zachary Mayo, as "Buyer."

Sometime thereafter, Mayo filed an application to register the building with the National Register of Historic Buildings. Mayo Affidavit, par. 8. Amended Verified Complaint, par. 21.

On December 28, 2019, NEPD was organized as a limited liability company with Zachary Mayo as its manager. Crotty Affidavit, Exhibit A.

On February 14, 2020, Mayo, on behalf of NEPD, submitted a letter to the town from Millers River Development, LLC. The letter provided in part:

> This is a letter to confirm my interest and commitment to the project in Fairhaven, Ma. presented and being permitted by Zachary Mayo and **New England Preservation and Development, Inc**.
>
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> I have spoken to one of our long time bankers at Cambridge Trust Company about the Fairhaven project and they have indicated that financing it would not present any kind of problem for them. They would require 20% equity or about 500K in cash. This does not present a problem for myself and my partners.

> Rees Affidavit, Exhibit D (emphasis in original).

On February 19, 2020, the town administrator, Mark Rees, advised Mayo that the letter from Millers River Development did not satisfy the purchase and sale agreement because it was not a binding agreement to provide financing. Rees Affidavit, Exhibit E.

On May 21, 2020, Mayo submitted a timeline for obtaining required permits for the project. On May 28, 2020, Rees advised Mayo that the timeline was inadequate due, in part, to the lack of a date on which Mayo would submit architectural plans to the town's planning board. Rees Affidavit, Exhibit F.

On June 15, 2020, the town notified Mayo that the board of selectmen would consider terminating the purchase and sale agreement at their meeting on June 29, 2020 unless Mayo provided an executed agreement with an architectural or engineering firm with a timeline prepared by an architect or engineer. Rees Affidavit, Exhibit G.

On June 26, 2020, Mayo submitted a timeline for the project and a contract between NEPD and Civil Environmental Consulatants [sic], L.L.C. The contract provided for the design of the project for$ 35,000. Rees Affidavit, Exhibit H.

On July 15, 2020, Rees sent a letter to Mayo informing him and NEPD that the board of selectmen had decided to terminate the purchase and sale agreement based on the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit J. The letter stated that, notwithstanding the termination, the board of selectmen proposed that Mayo, his attorney and financial backer meet with Rees no later than July 23, 2020. The letter stated that if Mayo provided "written proof of a legally binding financial

commitment, satisfactory to the Board of Selectmen in its absolute and sole discretion, in both form and amount," the board would consider amending the purchase and sale agreement to extend the time for the buyer's performance. *Id*.

Although a video conference between Mayo and Rees was scheduled for July 20, 2020, the meeting was cancelled when an employee at town hall tested positive for COVID-19. Rees Affidavit, par. 14 & 15.

On July 24, 2020, at Mayo's suggestion, town counsel spoke to Bart Bussink, managing partner of Millers River Development, LLC. Bussink said that Millers River Development would not finance the project. Crotty Affidavit, par. 16 & 17.

That same day, the town administrator sent a notice of termination of the purchase and sale agreement to Mayo and NEPD. Rees stated that the town terminated the agreement due to the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit L.

In his affidavit, Mayo states that he "attempted to obtain the Town's assistance with permitting and preparing acceptable plans. However, the Town repeatedly rebuffed, and failed to respond to, my requests, despite its contractual obligations. The Town also repeatedly demanded additional documents and information not required by the Agreement. I complied with a number of these serial requests, although I was not contractually obligated to do so." Mayo Affidavit, par. 8-11. Mayo did not provide further details.

[Addendum 26-30]. Additional facts will be referenced in the argument section below.

Argument

D. The Decision Of The Appeals Court Wrongly Precluded The Town From Disposing Of A Frivolous Lawsuit And Will Tie Up The Rogers School Development For The Foreseeable Future

Under NEPD's stewardship, the Rogers School redevelopment went off the rails early and often. The Town ultimately terminated the agreement, citing NEPD's failure to meet four listed conditions. After NEPD sued and obtained a memorandum of lis pendens, the Town sought dissolution of the memorandum pursuant to G.L. c. 184, § 15(c). The trial court agreed that NEPD failed to meet three conditions, two involving its ability to finance the project. The Appeals Court reversed, however, rejecting the trial court's finding that all three grounds were frivolous. For purposes of this application, the Town will focus on the two financial conditions—Condition B (financial commitment) and E (letter of credit)—as those two issues failed as a matter of law. As to the former, the trial court properly determined that the letter from Bart Bussink did not qualify as a financing commitment. As to the latter, NEPD's claim that the parties orally modified the requirement that it

provide a letter of credit sufficient to complete the project fails where the agreement specifically required that all modifications be in writing. By overturning the trial court's decision, the Appeals Court has effectively prevented the Town from developing the Rogers School property for the foreseeable future. It will spend tens if not hundreds of thousands of dollars maintaining an empty building and now must litigate a baseless action to its conclusion before it can seek alternate proposals to develop the project. Further appellate review is appropriate where the Appeals Court denied the Town the relief to which it was legally entitled under G.L. c. 184, § 15(c). Moreover, the decision, if allowed to stand, could potentially impose similar hardships on any municipality in Massachusetts. For these reasons, the Town asks that this Court grant its application for further appellate review.

1. Standards For Applying G.L. c. 184, § 15

"A lis pendens is a written notice that alerts prospective buyers of property to pending lawsuits that claim an interest in that property." *Ferguson v. Maxim*, 96 Mass. App. Ct. 385, 388 (2019). *See Wolfe v. Gormally*, 440

Mass. 699, 702 (2004). G.L. c. 184, § 15 establishes procedures for obtaining a lis pendens, which "shall" issue if the "subject matter of the action constitutes a claim of right to title to real property", regardless of the merits. G.L. c. 184, § 15(b). *See Id*. at 388-389; *DeCroteau v. DeCroteau*, 90 Mass. App. Ct. 903, 905 (2016).

However, the Legislature, recognizing the potentially harsh consequences, provided for "an expedited mechanism for dissolving a lis pendens". *Id*. at 389. *See* G.L. c. 184, § 15(c). The aggrieved party may at any time "file a special motion to dismiss the claimant's action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous." G.L. c. 184, § 15(c). Section 15(c) defines an action as frivolous if "(1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in the law; or (3) the action or claim is subject to a dismissal based on a valid legal defense such as the Statute of Frauds." *Id*.

This standard is akin to a motion to dismiss under Mass. R. Civ. P 12(b)(6), *see Faneuil Investors Group v. Board of Selectmen of Dennis*, 458 Mass. 1, 2 (2010), except

that "a special motion to dismiss under §15(c) requires the motion judge to consider alleged facts beyond the plaintiff's initial pleading and, based on those allegations, to determine whether the plaintiff's claims are devoid of a factual or legal basis." *Ferguson v. Maxim*, 96 Mass. App. Ct. at 390. "[T]he burden is on the defendant to demonstrate, by a preponderance of the evidence, that the plaintiffs claim is completely lacking in 'reasonable factual support . . . or . . . any arguable basis in law.'" *Id.*, quoting G.L. c. 184, § 15(c).

Finally, if the court grants the special motion to dismiss, it must award costs and attorney's fees to the aggrieved party. G.L. c. 184, § 15(c).

2. The Trial Court Correctly Concluded That NEPD Failed To Satisfy Critical Conditions Specified In The Contract

The judge correctly noted that "[t]he town's duty under the contract was to convey the land. However, that duty was subject to conditions precedent set out on Rider A." [Addendum 34]. "A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract." *Massachusetts Municipal Wholesale Electric Co. v. Danvers*,

411 Mass. 39, 45 (1991). *See Malden Knitting Mills v. United States Rubber Co.*, 301 Mass. 229, 233 (1938). "If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced." *Id. See generally* 5 S. Williston, Contracts § 663 (3d ed. 1961 & Supp. 1990); Restatement (Second) of Contracts § 225 (1981).

Two of the named conditions involved the financing of the project—Condition B required NEPD to notify the Town within 180 days of the execution of the agreement "when it obtained financing commitments sufficient to fund the development of the project," and Condition E required it to furnish "a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans."

While NEPD claims to have satisfied both of these conditions, it satisfied neither, instead attacking the judge's definition of a financing commitment. In fact, a financing commitment is a legally defined term—it is "'[a] binding pledge made by the lender to the borrower to make a loan usually at a stated rate within a given period of time for a given purpose subject to the compliance of the borrower with stated conditions.'" *Charing Cross Corp. v. Comfed Mortg.*

Co., 25 Mass. App. Ct. 924, 926 (1987), quoting American Bankers Association, Banking Terminology 58 (1982).

Turning first to Condition B, contrary to the panel's conclusion, the trial court interpreted the language of a written contract and applied its legal interpretation to undisputed facts. *See Suffolk Constr. Co. v. Lanco Scaffolding Co*., 47 Mass. App. Ct. 726, 729 (1999). More specifically, the court recognized that at no time within 180 days, or indeed, within a year, did the plaintiffs obtain a commitment from a qualified person or institution meeting the legal definition of that term.

The judge noted that "[o]n February 14, 2020, Mayo provided the town administrator with a letter from Millers River Development, LLC" that confirmed "the company's 'interest and commitment to the project . . ..'" But "[t]he letter stated that Miller's River would provide twenty percent of the financing" and that the remaining eighty percent would come from Cambridge Trust Company.[1] The letter further "stated that Bart Bussink, managing partner

[1] Miller's River was, however, only proposing to finance $2.5 million of a $4.65 million project.

of Miller's River, spoke to an unidentified person at Cambridge Trust Company, who said that providing such financing 'would not present any kind of problem for them.'" Yet Cambridge Trust never provided a commitment letter, and as the judge noted, "on July 24, 2020—the day the town sent its termination letter to the plaintiffs—Mr. Bussink informed town counsel that Miller's River would not finance the project." [Addendum 35, n.11]. Ultimately, "[t]he plaintiffs never provided the town with notice that any lender committed itself to provide financing 'sufficient to fund the development of the project . . .'" [Addendum 35]. Where NEPD was not legally excused from fulfilling Condition B, as a matter of law it failed to meet this critical condition, and the Town had the right to terminate the contract. *See Churgin v. Hobbie*, 39 Mass. App. Ct. 302, 305 (1995) ("financing provisions typically impose a deadline; [t]he seller then has a date when the deal may abort and the property is returned to the market or, following which, the seller knows the buyer is bound to go through with the purchase.").

As to Condition E, NEPD conceded that it failed to provide the required letter of credit guaranteeing the completion of the work, but argued that the parties orally modified the agreement to substitute a performance bond for the letter. However, "[t]he written agreement provides that the document 'sets forth the entire contract between the parties . . . and may be cancelled, modified or amended only by a written instrument executed by both the SELLER and the BUYER.'" [Addendum 37]. The Town disputes the claimed oral modification, and where the source of that claim was a vague, conclusory statement in the amended complaint, the integration clause is sufficient to establish that no such modification took place. *See Wells Fargo Business Credit v. Environamics Corp.*, 77 Mass. App. Ct. 812, 817 (2010). Absent a written modification, the trial court could rely on the Town's contention that no oral modification occurred, coupled with "the presumption that the integrated and complete agreement, which requires written consent to modification, expresses the intent of the parties." *Cambridgeport Savings Bank v. Boersner*, 413 Mass. 432, 439 n.10 (1992). The judge correctly found that

the Town was entitled to terminate the agreement on that basis.

Under the plain language of the contract, the Town was entitled to terminate the contract upon a failure of a single condition. Without reaching Conditions C and D, NEPD clearly never had the financing necessary to proceed with the project. As a matter of law, the trial court was entitled to find that NEPD failed to satisfy Conditions B and E, either or both of which supported termination.

The Appeals Court never reached the claimed breach of the implied covenant of good faith and fair dealing, but the trial court correctly concluded that this claim fails as well. In some circumstances one party may be found to have destroyed another party's contractual rights even in the absence of a breach of contract. *See Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 471-473 (1991). *See also Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367, 385 (2005); *PH Group Ltd. v. Birch*, 985 F.2d 649, 651 (1st Cir. 1993).

Here, the court found that:

> [t]he town's good faith in dealing with the plaintiffs is amply demonstrated by the attempts it made to salvage

> the project when the plaintiffs failed to fulfill the conditions of the agreement. In the premature termination letter sent to the plaintiffs on July 15, 2020, the town offered to consider amending the agreement to give the plaintiffs more time to fulfill the conditions if they could show that they had the financial ability to complete the project. Rees Affidavit, Exhibit J. The town administrator later scheduled a meeting with Mayo to find out if the plaintiffs had the financial ability to complete the project. *Id*. at par. 13-15. Crotty Affidavit, par. 14 & 15. Even after the town sent its proper termination letter on July 24, 2020, town counsel spoke with Bart Bussink of Millers River Development and the plaintiffs' attorney to explore the possibility of continuing with the project. Crotty Affidavit, par. 1,4-27.
>
> It is clear from these facts that the town repeatedly attempted to work things out with the plaintiff so that the project could proceed.

[Addendum 39]. The record amply supports that "[t]he failure of the project was not due to a lack of good faith by the town but due to the plaintiffs' inability to secure financing." [Addendum 39]. Notably, NEPD did not allege that the Town hindered its ability to obtain financing. *See Chokel v. Genzyme Corp*., 449 Mass. 272, 276 (2007).

Ultimately, the Town carried its burden. The trial court did precisely what the statute directed and applied the correct legal standards. The Appeals Court misapplied the statutory standards. The Town will now suffer severe financial hardship. Especially where other cities and towns

may well suffer similar fates if the Appeals Court's misinterpretation of G.L. c. 184, § 15 stands, further appellate review is appropriate.

E. Conclusion

Based on the authorities cited and the reasons aforesaid, the Town respectfully requests that this Court allow its application for further appellate review.

Respectfully submitted,
Town of Fairhaven,

By its attorney,

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#17

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss. Civil Action No. 2073CV00650

NEW ENGLAND PRESERVATION AND DEVELOPMENT, LLC and ZACHARY MAYO,
Plaintiffs

v.

TOWN OF FAIRHAVEN,
Defendant

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS AND DISSOLVE MEMORANDUM OF LIS PENDENS PURSUANT TO G.L. c. 184, § 15 (c)

The plaintiffs, New England Preservation and Development, LLC and its manager, Zachary Mayo, bring this action against the defendant, the town of Fairhaven, for breach of an agreement to sell premises that previously served as the Rogers School. The plaintiffs seek specific performance of the agreement or, in the alternative, compensatory damages.

The defendant town has filed a special motion to dismiss the amended verified complaint and to dissolve a memorandum of lis pendens, issued by the court on September 20, 2020, pursuant to G.L. c. 184, § 15 (c). The town also seeks an award of attorney's fees. The plaintiffs have filed a written opposition to the motion.

FACTS

"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).

In May of 2018, the town issued a request for proposals for the renovation of the Rogers School property. Mayo submitted a proposal on behalf of New England Preservation and Development, LLC ("NEPD.") During the town's review of the proposal, Mayo submitted a letter dated July 24, 2018 from The Raymond C. Green Companies. The letter provided:

> This letter shall confirm our interest in providing funds towards the remediation of the Rogers School Building and for the construction of four single family homes at the Property. Said financing will be subject to the terms and conditions of a loan commitment letter to be issued by Lender upon its review and approval of the approved development plans. This letter shall not be deemed a formal loan commitment.
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D. The Buyer agrees to commence the application process to have the Rogers School building placed on the National Register of Historic Buildings and shall provide the Seller notice of such application. In the event such application is not approved within one hundred twenty (120) days of the full execution of this Agreement the Buyer will provide the Seller with a covenant or other legally enforceable mechanism, which shall be entered into a[t] time of conveyance of the deed, to guarantee the preservation of the historical component of the Rogers School building. In such event the Seller shall notify the Buyer when it is satisfied with the form of covenants or other documents, within thirty (30) days of the date of receipt by the Seller of such documents.

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3. **Right of Termination:** If each of the conditions set forth in paragraph 2 of this Rider A has not been satisfied, with notice thereof given as provided in each of the conditions, no later than one (1) year following the date of this Agreement, then either party may terminate this agreement by written notice [to] the other, and this agreement shall thereupon be void and without recourse.

Rider A was signed by the town administrator on behalf of the town, as "Seller," and by Zachary Mayo, as "Buyer."

Sometime thereafter, Mayo filed an application to register the building with the National Register of Historic Buildings. Mayo Affidavit, par. 8. Amended Verified Complaint, par. 21.

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On June 15, 2020, the town notified Mayo that the board of selectmen would consider terminating the purchase and sale agreement at their meeting on June 29, 2020 unless Mayo provided an executed agreement with an architectural or engineering firm with a timeline prepared by an architect or engineer. Rees Affidavit, Exhibit G.

On June 26, 2020, Mayo submitted a timeline for the project and a contract between NEPD and Civil Environmental Consulatants [*sic*], L.L.C. The contract provided for the design of the project for $ 35,000. Rees Affidavit, Exhibit H.

On July 15, 2020, Rees sent a letter to Mayo informing him and NEPD that the board of selectmen had decided to terminate the purchase and sale agreement based on the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit J. The letter stated that, notwithstanding the termination, the board of selectmen proposed that Mayo, his attorney and financial backer meet with Rees no later than July 23, 2020. The letter stated that if Mayo provided "written proof of a legally binding financial commitment, satisfactory to the Board of Selectmen in its absolute and sole discretion, in both form and amount," the board would consider amending the purchase and sale agreement to extend the time for the buyer's performance. *Id.*

Although a video conference between Mayo and Rees was scheduled for July 20, 2020, the meeting was cancelled when an employee at town hall tested positive for COVID-19. Rees Affidavit, par. 14 & 15.

On July 24, 2020, at Mayo's suggestion, town counsel spoke to Bart Bussink, managing partner of Millers River Development, LLC. Bussink said that Millers River Development would not finance the project. Crotty Affidavit, par. 16 & 17.

That same day, the town administrator sent a notice of termination of the purchase and sale agreement to Mayo and NEPD. Rees stated that the town terminated the agreement due to the buyer's failure to fulfill conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit L.

In his affidavit, Mayo states that he "attempted to obtain the Town's assistance with permitting and preparing acceptable plans. However, the Town repeatedly rebuffed, and failed to respond to, my requests, despite its contractual obligations. The Town also repeatedly demanded additional documents and information not required by the Agreement. I complied with a number of these serial requests, although I was not contractually obligated to do so." Mayo Affidavit, par. 8-11. Mayo did not provide further details.

ANALYSIS

The plaintiffs have asserted two claims in their amended verified complaint: (1) breach of contract and (2) breach of the implied covenant of good faith and fair dealing. The town contends that the plaintiffs' claims are frivolous. The town seeks dissolution of the previously issued memorandum of lis pendens and dismissal of the amended verified complaint pursuant to G.L. c. 184, § 15 (c). The town also seeks an award of attorney's fees pursuant to that statute.

G.L. c. 184, § 15 provides a procedure by which a person asserting a claim to real property may obtain a memorandum of lis pendens, which the claimant may record in the appropriate registry of deeds or register in the appropriate division of the Land Court in order to provide notice of the litigation to third parties. G.L. c. 184, § 15 (b) provides that the court "shall" issue the memorandum "if the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof or the buildings thereon...."

The statute also provides a mechanism by which a defendant may seek dissolution of a memorandum of lis pendens and dismissal of such an action if the claim is frivolous:

> A party may also file a special motion to dismiss the claimant's action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous. ...The special motion to dismiss shall be granted if the court finds that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds. In ruling on the special motion to dismiss the court shall consider verified pleadings and affidavits, if any, meeting the requirements of the Massachusetts rules of civil procedure. If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorneys fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery.
>
> G.L. c. 184, § 15 (c).

"[A] special motion to dismiss under § 15(c) requires the motion judge to consider alleged facts beyond the plaintiff's initial pleading and, based on those allegations, to determine whether the plaintiff's claims are devoid of a factual or legal basis.... [T]he burden is on the defendant to demonstrate, by a preponderance of the evidence, that the plaintiff's claim is completely lacking in 'reasonable factual support ... or ... any arguable basis in law.' ...'[T]he question to be determined by a judge in deciding a special motion to dismiss [under § 15(c)] is not which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight,' but whether the party with the burden of proof (here, the defendants) has shown that the claim made by the moving party was devoid of any reasonable factual support or arguable basis in law." *Ferguson v. Maxim,* 96 Mass. App. Ct. 385, 390 (2019).

NEPD's Claim. The town argues that NEPD's claims are frivolous because NEPD was not formed until December 28, 2019, which was five months after the contract was signed. The town argues that NEPD therefore has no right to enforce the contract.

Under an 1889 Supreme Judicial Court decision, a corporation that was not formed until after a contract was signed in its name is not a party to the contract. "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." *Abbott v. Hapgood,* 150 Mass. 248, 252 (1889). Whether the Court would adhere to this rule today is questionable. "While never renounced, the rule has been gradually eviscerated...." *Copp v. Hague,* 1994 Mass. App. Div. 11. "This rule is the extreme minority position. Most states hold that a corporation can be bound to a pre-incorporation agreement by some signal of knowing ratification or adoption of the contract." *Framingham Savings Bank v. Szabo,* 617 F.2d 897, 898 (1st Cir. 1980).

The *Abbott* rule "does not mean that after the organization of the corporation it cannot enter into a contract such as previously had been prepared." *Pennell v. Lothrop,* 191 Mass. 357, 360 (1906). "Massachusetts appears willing to bind a corporation to the terms of a preincorporation contract... by means of theories of continuing offer and implied contract." *Framingham Savings Bank, supra,* at 899 (footnote omitted), citing *Holyoke Envelope Co. v. United States Envelope Co.,* 182 Mass. 171 (1902).

NEPD's claim is not "devoid of any reasonable factual support [or] devoid of any arguable basis in law," G.L. c. 184, § 15 (c), merely because the company came into existence after the contract was signed. There is, at least, an arguable basis to conclude that the Supreme Judicial Court would overturn the *Abbott* rule and bring Massachusetts in line with the majority rule. There is little, if any, reason to prohibit a corporation or other legal entity from enforcing its rights under a contract, where the other party to the contract understood it was entering into a contract with the corporation.

Even if the *Abbott* rule remains good law, a reasonable jury could find that NEPD accepted the town's "continuing offer" to enter the contract on February 14, 2020 when NEPD submitted to the town a letter from Millers River Development, LLC as evidence that NEPD had financial backing for the project.

Breach of Contract. The town argues that the plaintiffs' claim for breach of contract is devoid of "any reasonable factual support" and "any arguable basis in law," G.L. c. 184, § 15 (c), because the undisputed facts demonstrate that the town properly terminated the contract.

The contract provided that the town could terminate the contract if the plaintiffs failed to fulfill certain conditions:

> If each of the conditions set forth in paragraph 2 of this Rider A has not been satisfied, with notice thereof given as provided in each of the conditions, no later than one (1) year following the date of this Agreement, then either party may terminate this agreement by written notice [to] the other, and this agreement shall thereupon be void and without recourse.
>
> Rees Affidavit, Exhibit C, Rider A, par. 3.

On July 24, 2020, the town sent written notice to the plaintiffs terminating the contract due to the buyer's failure to fulfill Conditions B (financial commitment), C (necessary permits), D (National Register of Historic Buildings) and E (letter of credit) set out on Rider A to the agreement. Rees Affidavit, Exhibit L.[1]

The plaintiffs argue that the termination clause is "irrelevant" because the town breached the contract prior to the purported termination by its "refusal 'to accept Plaintiffs' submission of documents required by the Agreement, its imposition of requirements and standards not contained in the Agreement, its failure to assist Plaintiffs in obtaining necessary permits, and its improper purported termination of the Agreement.'" Plaintiffs' Opposition, p. 9.

[1] The town sent an earlier notice of termination for the same reasons on July 15, 2020. Rees Affidavit, Exhibit J. However, that notice was ineffective since it was sent less than one year after execution of the contract.

The termination clause is not "irrelevant." "A breach of contract is a failure to perform for which legal excuse is lacking." *Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co., Inc.*, 327 Mass. 535, 537 (1951). The town's duty under the contract was to convey the land. However, that duty was subject to conditions precedent set out on Rider A. "A condition precedent is an act which must occur before performance by the other party is due." *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 763 n. 5 (1980).

The issue before the court is whether the town was entitled to terminate due to the plaintiffs' failure to fulfill Conditions B, C, D and E on Rider A. If the town prevented the plaintiffs from fulfilling those conditions by, for example, refusing to accept required documents or by failing to assist the plaintiffs in obtaining permits as the town promised, that conduct would excuse the plaintiffs from their obligation to fulfill the conditions. A condition "may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing." *Restatement of Contracts (Second)* § 225 comment b. *See Lobosco v. Donovan*,30 Mass. App. Ct. 53, 56 (1991).

Under G.L. c. 184, § 15 (c), therefore, the town has the burden of proving that its termination was proper, i.e. the plaintiffs failed to fulfill at least one of the four conditions precedent without legal excuse. If there is evidence in the record – even doubtful and disputed evidence, *Ferguson, supra,*– that the plaintiffs fulfilled all four conditions precedent or that fulfillment of the conditions was legally excused, the court must deny the town's motion.

Condition B on Rider A, which relates to financing, provides:

> The Buyer shall notify the Seller when it has obtained financing commitments sufficient to fund the development of the project, within one hundred eighty (180) days from the date of the full execution of this Agreement.
>
> Rees Affidavit, Exhibit C.

A "commitment" to provide financing is "[a] lender's binding promise to a borrower to lend a specified amount of money at a certain interest rate, usu. within a specified period and for a specified purpose (such as buying real estate)." Black's Law Dictionary, "Loan Commitment" (11th ed. 2019).

The plaintiffs did not notify the town of any "financing commitments sufficient to fund the development of the project" by January 19, 2020, which was one hundred eighty days after the parties executed the agreement.[2] On February 14, 2020, Mayo provided the town administrator with a letter from Millers River Development, LLC. Rees Affidavit, Exhibit D. The letter confirmed the company's "interest and commitment to the project...." However, the letter was not a "commitment[] sufficient to fund the development of the project" as required by Condition B. The letter stated that Miller's River would provide twenty percent of the financing. The other eighty percent would come from Cambridge Trust Company, which did not provide a "commitment" for the financing. The letter merely stated that Bart Bussink, managing partner of Miller's River, spoke to an unidentified person at Cambridge Trust Company, who said that providing such financing "would not present any kind of problem for them." The plaintiffs never provided the town with notice that any lender committed itself to provide financing "sufficient to fund the development of the project...."[3] Therefore, the plaintiffs failed to fulfill Condition B. There is no evidence in the record that the plaintiffs were legally excused from fulfilling that Condition. The town therefore had the right to terminate the contract.

[2] A year prior to execution of the agreement, Mayo provided the town with a letter from the Raymond C. Green Companies confirming its interest in financing the project. However, that letter expressly stated: "This letter shall not be deemed a formal loan commitment." Rees Affidavit, Exhibit A.

[3] In addition, on July 24, 2020 – the day the town sent its termination letter to the plaintiffs – Mr. Bussink informed town counsel that Miller's River would not finance the project. Crotty Affidavit, par. 16 & 17.

Condition C on Rider A, which relates to permits, provides:

> The Buyer shall provide the Seller notice when it has obtained the necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project. The Seller agrees that to the extent the Buyer is required to pay permit application fees, water and sewer tie in fees and BPW filing fees, the purchase price set forth in Paragraph 7 of the Purchase and Sale Agreement shall be reduced by the aggregate amount of all such payments, provided that the purchase price shall not be reduced by this, or any other reduction, or combination of reductions, below a price of $ 17,500.00. The Seller also agrees to provide assistance to the Buyer in obtaining all necessary Town of Fairhaven municipal permits.
>
> Rees Affidavit, Exhibit C.

The plaintiffs never obtained "necessary permits, including zoning permits and planning board approvals or endorsements necessary to proceed with the project." However, the plaintiffs argue that the reason they did not obtain the permits is that the town failed to provide assistance, as the town promised. Mayo states in his affidavit that he "attempted to obtain the Town's assistance with permitting and preparing acceptable plans. However, the Town repeatedly rebuffed, and failed to respond to, my requests, despite its contractual obligations." Mayo Affidavit, par. 8 & 9. In addition, the amended verified complaint alleges that in May of 2020 the town selectmen "instructed Plaintiffs to reach out to the Town's Planning Department to organize the necessary permit applications and plan requirements. Plaintiffs did so numerous times, but did not hear back for weeks." Amended Verified Complaint, par. 22-24. This evidence provides at least an arguable basis in fact and law to conclude that the plaintiffs' compliance with Condition C was legally excused.

Condition D on Rider A, which concerns registration of the school building with the National Register of Historic Buildings, provides:

> The Buyer agrees to commence the application process to have the Rogers School building placed on the National Register of Historic Buildings and shall provide the Seller notice of such application. In the event such application is not approved within one hundred twenty (120) days of the full execution of this Agreement the Buyer will provide the Seller with a covenant or other legally enforceable mechanism, which shall be entered into a[t] time of conveyance of the deed, to guarantee the preservation of the historical component of the Rogers School building. In such event the Seller shall notify the Buyer when it is satisfied with the form of covenants or other documents, within thirty (30) days of the date of receipt by the Seller of such documents.
>
> Rees Affidavit, Exhibit C.

In his affidavit, Mayo averred that after the contract was signed, he "filed an application to have the Property listed on the National Register of Historic Buildings...." Mayo Affidavit, par. 8. However, he does not claim – and there is no evidence to indicate – that he "provide[d] the Seller notice of such application," as required by Condition D. Accordingly, the plaintiffs did not fulfill Condition D and the town was justified in terminating the contract.

Condition E on Rider A, which concerns a letter of credit, provides:

> The Buyer shall provide the Seller with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans. The Seller shall notify the Buyer when it is satisfied with such Letter of Credit within thirty (30) days of the date of receipt by the Seller of such documentation.
>
> Rees Affidavit, Exhibit C.

The plaintiffs do not dispute that they failed to provide the town with a letter of credit. Instead, they argue that the parties modified the condition. The amended verified complaint alleges that "[t]he Town and Plaintiffs also agreed that Plaintiffs could provide a performance bond at closing in lieu of the letter of credit." Amended Verified Complaint, par. 15.

The written agreement provides that the document "sets forth the entire contract between the parties... and may be cancelled, modified or amended only by a written instrument executed

by both the SELLER and the BUYER." Rees Affidavit, Exhibit C, par. 21. The plaintiffs do not contend that the parties modified the contract in writing.

"[A] provision that an agreement may not be amended orally but only by a written instrument does not necessarily bar oral modification of the contract." *Cambridgeport Savings Bank v. Boersner,* 413 Mass. 432, 439 (1992). However, "[t]he evidence of a subsequent oral modification must be of sufficient force to overcome the presumption that the integrated and complete agreement, which requires written consent to modification, expresses the intent of the parties." *Id.* at 439 n. 10. In the context of a summary judgment motion, the Appeals Court has held that a party's claim that such a written contract was modified orally, without more, is insufficient to raise a genuine issue of fact for trial. "[I]n order to support the existence of an oral modification, the parol evidence must be sufficiently weighted and of competent probity to present a material issue for trial; that is, the parol evidence must be of sufficient strength to present an ambiguity between the actual conduct of the parties and the contract.... [A]mbiguity cannot be predicated solely on statements in affidavits." *Wells Fargo Business Credit v. Environamics Corp.,* 77 Mass. App. Ct. 812, 817 (2010). (citation omitted.)

The same rule should apply to a special motion to dismiss under G.L. c. 184, § 15 (c) since such motions are also decided on verified pleadings and affidavits. The only evidence in the record of an oral modification of Condition E, agreed to by the parties after execution of the written contract, is Mayo's conclusory claim of an oral modification in the verified amended complaint. That claim does not indicate who agreed to modify the written contract on behalf of the town or when or how the town agreed to the modification. There is no way to know from the conclusory assertion whether the town official (whoever it was) had authority to bind the town. The conclusory assertion is insufficient to overcome the written contract language.

Breach of Covenant of Good Faith and Fair Dealing. The plaintiffs also allege that the town breached the implied covenant of good faith and fair dealing in the purchase and sale agreement.

"Every contract implies good faith and fair dealing between the parties to it. ...The implied covenant of good faith and fair dealing 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...." *Anthony's Pier Four, Inc. v. HBC Associates,* 411 Mass. 451, 471 (1991) (internal quotations and citations omitted). The implied covenant "exists so that the objectives of the contract may be realized." *Ayash v. Dana-Farber Cancer Institute,* 443 Mass. 367, 385 (2005).

The town's good faith in dealing with the plaintiffs is amply demonstrated by the attempts it made to salvage the project when the plaintiffs failed to fulfill the conditions of the agreement. In the premature termination letter sent to the plaintiffs on July 15, 2020, the town offered to consider amending the agreement to give the plaintiffs more time to fulfill the conditions if they could show that they had the financial ability to complete the project. Rees Affidavit, Exhibit J. The town administrator later scheduled a meeting with Mayo to find out if the plaintiffs had the financial ability to complete the project. *Id.* at par. 13-15. Crotty Affidavit, par. 14 & 15. Even after the town sent its proper termination letter on July 24, 2020, town counsel spoke with Bart Bussink of Millers River Development and the plaintiffs' attorney to explore the possibility of continuing with the project. Crotty Affidavit, par. 14-27.

It is clear from these facts that the town repeatedly attempted to work things out with the plaintiff so that the project could proceed. The failure of the project was not due to a lack of good faith by the town but due to the plaintiffs' inability to secure financing.

Conclusion. The plaintiffs failed to fulfill three conditions precedent – Condition B (financial commitment), Condition D (National Register of Historic Buildings) and Condition E (letter of credit) – to the town's performance under the contract. The town had the right to terminate the contract, as provided in paragraph 3 of Rider A. The town exercised that right by giving written notice as the contract required. The town has therefore carried its burden of proving by a preponderance of the evidence that the plaintiff's claim is completely lacking in "'reasonable factual support ... or ... any arguable basis in law.'" *Ferguson, supra,* quoting G.L. c. 184, § 15 (c).

ORDER

The defendant's special motion to dismiss (Paper # 16) is **ALLOWED**. The memorandum of lis pendens is **DISSOLVED**. The amended verified complaint is **DISMISSED**. The court **AWARDS** the defendant its attorney's fees incurred in this action to be paid by the plaintiffs.

The defendant shall file and serve an affidavit of attorney's fees within thirty days. The plaintiffs may file an opposition to the amount of attorney's fees sought by the defendant within thirty days after service of the defendant's affidavit.

July 3, 2021

Thomas F. McGuire, Jr.
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-835

NEW ENGLAND PRESERVATION AND DEVELOPMENT, LLC & another[1]

vs.

TOWN OF FAIRHAVEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, New England Preservation and Development, LLC and Zachary Mayo (collectively, buyer), appeal from an order of a Superior Court judge allowing the special motion of the town of Fairhaven to dismiss and to dissolve a memorandum of lis pendens and awarding attorney's fees. Concluding that the buyer's claim of breach of contract is not "frivolous" within the meaning of G. L. c. 184, § 15 (c), we reverse the judge's order and remand to the Superior Court for further proceedings consistent with this memorandum and order.

1. Background. We rely on the facts in "the verified pleadings and affidavits that were before the judge." Citadel Realty, LLC v. Endeavor Capital N., LLC, 93 Mass. App. Ct. 39,

[1] Zachary Mayo.

40 (2018). On July 23, 2019, the parties executed a purchase and sale agreement (agreement) for the sale of real property. A rider to the agreement stated that the sale was contingent on six conditions, four of which are relevant to this appeal: (1) that, within 180 days, the buyer notify the town when it "obtained financing commitments sufficient to fund the development of the project," (2) that the buyer notify the town when it obtained the necessary permits and that the town assist the buyer in obtaining them, (3) that the buyer apply to have the property placed on the National Register of Historic Buildings and notify the town of the application, and (4) that the buyer "provide the [town] with a Letter of Credit sufficient to guarantee the completion of the work as shown on the approved plans." The agreement gave the town the right to cancel the sale if the buyer did not satisfy the conditions in the rider within one year.

On July 24, 2020, the town terminated the agreement because the buyer failed to fulfil the four conditions above. The buyer sued the town for breach of contract and breach of the implied covenant of good faith and fair dealing. The buyer argued below, as they do on appeal, that the town refused to accept the buyer's submission of documents required by the agreement, imposed requirements beyond those in the agreement, failed to

assist the buyer in obtaining the necessary permits, and prematurely terminated the agreement.

2. General Laws c. 184, § 15 (c). General Laws c. 184, § 15 (c), provides "an expedited mechanism for dissolving a lis pendens," Ferguson v. Maxim, 96 Mass. App. Ct. 385, 389 (2019), and "permits a defendant to bring a 'special motion to dismiss' any 'frivolous' action or claim on which a lis pendens is based." Id., quoting St. 2002, c. 496, § 2. A claim is "frivolous" for the purposes of § 15 (c) if "(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." Ferguson, supra, quoting G. L. c. 184, § 15 (c). On a special motion to dismiss, the defendant bears the burden "to demonstrate, by a preponderance of the evidence, that the plaintiff's claim is completely lacking in 'reasonable factual support . . . or . . . any arguable basis in law.'" Ferguson, supra at 390, quoting G. L. c. 184, § 15 (c). The Supreme Judicial Court has described "reasonable factual support" as "evidence that, if believed, would support a finding in the [party's] favor." Benoit v. Frederickson, 454 Mass. 148, 154 n.7 (2009) (discussing special motions to dismiss in anti-SLAPP context).

In reviewing a special motion to dismiss, the judge must "consider alleged facts beyond the plaintiff's initial pleading," Ferguson, 96 Mass. App. Ct. at 390, and should not consider "which of the parties' pleadings and affidavits are entitled to be credited or accorded greater weight." Id., quoting Benoit, 454 Mass. at 154 n.7. We review the motion judge's ruling for an abuse of discretion or error of law, examining "the same factors properly considered by the judge in the trial court." Citadel Realty, 93 Mass. App. Ct. at 44. The motion judge's "conclusions of law are subject to broad review and will be reversed if incorrect." Id. at 44-45.

3. Breach of contract. a. Financing commitment. Before one year had passed, the buyer sent the town a letter from Bart Bussink of Millers River Development, LLC. In the letter, Bussink stated that he was "confirm[ing] [his] interest and commitment to the project" and that his bank had assured him "that financing [the project] would not present any kind of problem for [the bank]." In addition, Bussink stated that he and his business partners own real estate valued at more than $14 million; that he owns real estate valued at $3 million; and that he has "liquid assets" valued at $2.7 million. The town rejected this letter on the ground that the agreement requires that the buyer execute a binding contract to finance the project. The judge, accepting the town's position, found that

the documentation that the buyer provided did not evidence "financing commitments sufficient to fund the development of the project," as the agreement requires.

Even if the buyer's position is ultimately unsuccessful, it is not frivolous. In the letter, Bussink declared his "commitment to the project" and asserted that he has financial resources that are quantitatively "sufficient to fund the . . . project." The terms of the parties' agreement do not expressly require a binding contract. See McMann v. McGowan, 71 Mass. App. Ct. 513, 517 (2008), quoting Continental Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 147 (1984) ("We read the [contract] as written" and "are not free to revise it"). Whether the agreement should be interpreted to require more than the buyer provided need not be resolved at this stage; it is enough that the buyer's position is not frivolous.

b. Permits. The buyer claimed in his pleadings and affidavit that he sought the town's help in getting permits and preparing plans, but the town ignored his requests and demanded additional documents and information that the agreement does not require. The judge found that "[t]his evidence provides at least an arguable basis in fact and law to conclude that the [buyer's] compliance with Condition C was legally excused." We agree.

c. National register of historic buildings. The buyer claimed in his pleadings and affidavit that he applied to have the property listed on the National Register of Historic buildings, as the agreement requires. The town argued in its special motion to dismiss that the buyer did not do so.

The judge found that, notwithstanding the buyer's alleged application, there is no evidence that the buyer notified the town after applying, as the agreement requires. The judge concluded that, as a result, the buyer did not fulfil this condition. The buyer argues that the town's refusal to accept certain documents and demand for documents not required under the agreement made it difficult for the buyer to comply strictly with the notification requirement. Whether this argument is ultimately successful, it is not frivolous, especially in light of the arguable immateriality of the breach. Cf. Dalrymple v. Winthrop, 97 Mass. App. Ct. 547, 556 (2020), quoting Duff v. McKay, 89 Mass. App. Ct. 538, 547 (2016) ("A party to a contract generally is relieved of [its] obligations under that contract only when the other party has committed a material breach, that is, 'a breach of "an essential and inducing feature of the contract[]"'").

d. Letter of credit. The buyer claims that, after the agreement was formed, the town modified the agreement by telling the buyer "that it could provide either a letter of credit or

performance bond at closing." The agreement, however, requires that modifications be in writing. The judge found that the buyer's claim of an oral modification was insufficient to overcome the presumption that the agreement is complete as written. "[A] conclusion to that effect was premature." Schinkel v. Maxi-Holding, Inc., 30 Mass. App. Ct. 41, 46 (1991) (judge improperly dismissed breach of contract claim where plaintiff alleged that oral agreement reached before contract was executed modified contract). The buyer must have a chance to "present evidence that the parties reached an agreement as to [the] terms" of the alleged oral modification. Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 217 (2018). If, after discovery, the buyer has not met his burden of introducing evidence that is "sufficiently weighted and of competent probity to present a material issue for trial," Wells Fargo Bus. Credit v. Environamics Corp., 77 Mass. App. Ct. 812, 817 (2010), on whether the parties orally modified the agreement, summary judgment may be appropriate. See Sea Breeze Estates, supra at 218. The claim, however, is not frivolous.[2] Accordingly, we

[2] Because the breach of contract claim was not frivolous, we need not consider whether the claim of breach of the covenant of good faith and fair dealing was supported or whether that count, by itself, constitutes a "claim of a right to title to real property" that could support a memorandum of lis pendens, rather than simply a claim for monetary damages. G. L. c. 184, § 15 (b).

conclude that the judge abused his discretion in dismissing the buyer's amended complaint, dissolving the memorandum of lis pendens, and awarding attorney's fees.[3]

4. Conclusion. The order allowing the motion to dismiss, dissolving the memorandum of lis pendens, and awarding attorney's fees is reversed and the matter is remanded for further proceedings.

So ordered.

By the Court (Milkey, Sullivan & Ditkoff, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: July 14, 2022.

[3] Because the buyer's claims are not "frivolous" within the meaning of G. L. c. 184, § 15 (c), the town's request for appellate attorney's fees is denied.

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

Certification Pursuant To Mass. R. App. P. 16(k)

I certify that this document complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 18 (appendix to the briefs); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); Mass. R. App. P. 21 (redaction).

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Commonwealth of Massachusetts

Bristol, SS. Supreme Judicial Court
No. FAR-

Appeals Court No. 2021-P-0835

New England Preservation and
Development, LLC and Another
Plaintiffs/Appellants

v.

Town of Fairhaven
Defendant/Appellee

Certificate of Service

I certify that on July 29, 2022, I served one (1) copy of the attached application for further appellate review by sending it through the eFileMA system to:

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