

COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

SJC Opens the Door to Buyer's Suit Before Closing

JUNE 6, 2014

Robert Sudmyer and Jared Otte – Recently, the Massachusetts Supreme Judicial Court ("SJC") affirmed a lower court's decision which held that a prospective buyer was permitted to bring an action for specific performance upon the seller's anticipatory repudiation of a contract for the sale of land. The doctrine of anticipatory repudiation has not been recognized in Massachusetts in the context of purchase and sale contracts for real estate. In K.G.M. Custom Homes, Inc. v. Prosky, KGM Custom Homes (the "Buyer") entered into a contract to purchase 45.7 acres of land in Norton from Stephen Prosky, Karen Monteiro and Joan Stormo (the "Sellers"). Under the contract, the purchase price for the land was determined by the number of approved residential lots the Buyer was able to obtain from the Zoning Board of Appeals of Norton.

After the Buyer obtained its permits, the Sellers' counsel informed the Buyer's counsel that the Sellers had received another offer to purchase the land at a substantially higher price, that the Sellers no longer intended to sell the property to the Buyer and that, accordingly, the Buyer's remedy was to calculate damages pursuant to the liquidated damages clause in contract. The Buyer then sued the Sellers, alleging that the Sellers had breached the implied covenant of good faith and fair dealing, seeking specific performance of the contract. After the Buyers filed suit, the parties met to attempt to close the transaction, but were unsuccessful, in part, due to the outrageous conduct of the Sellers' counsel. At the closing, the Sellers' counsel refused to provide the Sellers' closing documents to the Buyer's counsel. Instead, the Seller's counsel held up the documents from two feet away and asked the Buyer's counsel if he could read them. The Sellers' counsel also had a videographer present to record the closing as a "defense strategy".

The Superior Court judge ruled for the Buyer, but determined that the purchase price under the contract formula was almost $300,000 more than anticipated by the Buyer. In light of the higher purchase price, the Superior Court allowed the Buyer to elect to purchase the property at the higher purchase price, or to receive liquidated damages for the Seller's breach under the contract, which provided that "the [Sellers] shall pay [the Buyer], as liquidated damages, a sum of money equal to all charges and fees paid by [Buyer] in connection with this transaction, including but not limited to, attorneys fees." The SJC affirmed the decision, but did not allow the award of Buyer's attorneys fees with respect to litigating the breach of the contract.

©2026 Bowditch & Dewey LLP. All Rights Reserved.

This is a significant change in Massachusetts law with respect to when a non-breaching party can sue a breaching party for remedies in a real estate transaction. Where a party to a contract does not act in good faith and attempts to sell property at a higher price, the non-breaching party may bring an action at the time of repudiation and does not have to wait until the time for performance under the contract. This case also confirms and emphasizes that liquidated damages provisions will be strictly construed with respect to awards of attorneys fees associated with litigating a breach. Such clauses should be carefully negotiated, drafted and reviewed by the parties and their counsel. The Buyer would have likely been able to collect attorneys fees associated with litigating Sellers' breach if the liquidated damages clause in K.G.M. Custom Homes, Inc. v. Prosky had specifically referenced such fees.

©2026 Bowditch & Dewey LLP. All Rights Reserved.