

# ‘1st refusal’ buyer need not match enhanced offer

## Judge determines bids ‘substantially the same’

By: Eric T. Berkman May 22, 2014



A party who executed a right of first refusal to purchase real estate after a third party had made an offer on the property had no obligation to match the third party’s subsequent enhancements to its offer, a Superior Court judge has ruled.

After the plaintiff holder of the right exercised his option, the third party — which also had more cash immediately available to complete the sale — offered to advance its payments and push up the closing date. In response, the plaintiff moved to block the defendant property owner from selling to the third party.

The plaintiff argued that he had offered to purchase the property under “substantially the same terms” as presented by the third party and would suffer “irreparable harm” should the sale to the third party go through.

Judge Robert L. Ullmann agreed.

“[The plaintiff’s] offer was substantially the same as the [third party’s] offer,” Ullmann wrote in granting the plaintiff’s motion for a preliminary injunction to prevent the sale or encumbrance of title to the property. “It does not matter if [the third party] has more cash on hand than plaintiff has, or if it is now willing to make advance payments and expedite the closing. Plaintiff has demonstrated a reasonable likelihood of success by timely exercising his right of first refusal and matching the terms of the third-party offer that was communicated to him.”

The four-page decision is *Serrano v. Serrano*, Lawyers Weekly No. 12-053-14. The full text of the ruling can be ordered by clicking [here](#).

## How close a match?

F. Jay Flynn Jr. of Bletzer & Bletzer in Brighton represented the defendant seller. He said the decision raises the issue of how closely the holder of a right of first refusal must match another party's offer in order for it to be considered "substantially similar."

In *Serrano*, the third party had demonstrated that it had the cash on hand to pay, at the closing, the full \$2.2 million it had offered, Flynn said. On the other hand, the plaintiff had shown that he had some cash on hand and a letter from a bank that discussed lending the rest but not committing to anything.

"We believe that what the plaintiff presented was not a substantially similar offer and put our client at risk if the plaintiff didn't get financing, because then our client could lose the third-party cash offer during the period that the plaintiff required to close," he said.

In the end, however, it all came down to a factual determination by the judge, Flynn noted.

"I do believe the decision, based on these facts, could have gone either way," he said. "I guess you might have the real estate bar asking the question: What is a "substantially same" offer?"

Brockton real estate lawyer Kenneth J. Goldberg called the case a classic example of "be careful what you wish for because you just might get it."

Here, Goldberg said, the third-party purchaser appeared to have tried to elevate the situation into a bidding war. But the law is clear that when the seller agrees to terms with a third-party buyer, the right of first refusal ripens into an option to buy on those terms.

"To allow the third-party purchaser to change the terms of the deal, to sweeten the pot so to speak, would violate the rights of the party that is now elevated to the status of an option holder," Goldberg said. "For practitioners, the takeaway is to remind parties to put their best foot forward when finalizing the terms of such deals."

**Daniel P. Dain, a Boston real estate lawyer, agreed.**

**"Any other ruling would render the right of first refusal meaningless," said Dain, a partner at Dain, Torpy, Le Ray, Wiest & Garner. "The benefit of holding such a right, presumably obtained in exchange for some kind of consideration, is that the holder does not have to get into a bidding war with another interested buyer who makes an acceptable offer to the seller."**

**Dain also characterized Ullmann's ruling as an extension of *McCarthy v. Tobin*, a 1999 Supreme Judicial Court decision holding that a real estate purchase offer that was signed by the seller was binding even without a purchase-and-sale agreement.**

**"The holder of the right of first refusal essentially steps into the shoes of the original offeror," Dain said. "That accepted offer, assuming it contained the material terms, is enforceable."**

Robert D. Costello of Costello & Landrigan in Somerville represented the plaintiff. He declined to comment.

## Upping the ante

In 1993, plaintiff Dennis Serrano received a right of first refusal to purchase two parcels of land located about 100 yards from the business district in the Davis Square area of Somerville. He received the right through a separate grant on each parcel.

The land, which was owned by the plaintiff's now-deceased father, Vincent, and Vincent's wife, defendant Catherine Serrano, had been in the Serrano family since the early 1970s and abuts a parcel owned by the plaintiff.

In March of this year, the defendant listed the property for sale with a local real estate agency, Bremis Realty, Inc., advertising it as a "rare blue chip Davis Square parcel."

The defendant subsequently received an offer from a third party, DG Realty & Development, to purchase the property for \$2.2 million. Under the terms of the offer, the third party was to pay a \$5,000 deposit, another \$95,000 upon execution of the P&S agreement and \$2.1 million at a closing scheduled for May 30, 2014. The offer contained no inspection or financing contingencies.

On April 10, the plaintiff provided timely notice to the defendant that he was exercising his right of first refusal on the property and enclosed a deposit check for \$5,000.

Since making its initial offer, DG Realty & Development, which apparently had more immediate cash on hand than the plaintiff, offered to increase its deposit to \$1 million and to move up the closing date.

The plaintiff — who was not in default of any terms of the offer that was communicated to him — sued the defendant in Superior Court, alleging breach of contract and bad faith, and seeking both specific performance and damages.

He also moved for a preliminary injunction barring the defendant from selling, encumbering or in any way affecting title to the property in the interim.

### **Preliminary injunction**

Following an April 30 hearing, Ullmann found that the plaintiff was, indeed, entitled to a preliminary injunction.

First, the judge determined that the plaintiff was likely to win his case on the merits. In other words, he was reasonably likely to obtain a judgment enabling him to enforce his right of first refusal and purchase the property.

Specifically, Ullmann said, the plaintiff is required to purchase the land on substantially the same terms and conditions presented in the original third-party offer. In *Serrano*, the plaintiff offered to purchase the property for the same price, paid the same initial deposit and — while he may have had less cash on hand than the prospective buyer — was still reasonably likely to have the remaining funds required by the offer.

Ullmann also distinguished *Christian v. Edelin*, a 2006 Appeals Court decision relied on by the defendant to support her argument that the terms were not substantially the same. Unlike *Serrano*, the holder of the right of first refusal in *Christian* included a mortgage contingency in his offer, the judge noted.

"Not surprisingly, the Appeals Court concluded that a contingent offer to purchase real estate is substantially different than an unconditional offer to purchase," Ullman said. "Here, Dennis Serrano's offer was substantially the same as the Bremis Realty, Inc. offer."

The fact that the third party in *Serrano* had more resources and had sweetened the offer was irrelevant, Ullmann continued. The plaintiff had timely exercised his option and matched the terms of the offer.

The judge further found that the plaintiff would suffer irreparable harm if the property was sold to a third party, given the unique characteristics of the property and its desirable location.

Accordingly, he concluded, the plaintiff's motion for a preliminary injunction should be granted.

**CASE:** *Serrano v. Serrano*, Lawyers Weekly No. 12-053-14

**COURT:** Superior Court

**ISSUE:** Was a party who exercised a right of first refusal to purchase real estate after a third party had made an offer on the property obligated to match the third party's subsequent enhancements to its offer?

**DECISION:** No, even though the third party had more financial resources and was arguably more likely to successfully close on the property in the designated time frame