Lawsuit barred by dissolution of LLC

Letter of intent not enforceable

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By Eric T. Berkman

A real estate company that signed a letter of intent to jointly develop a parcel of property with its owner, but was unable to successfully negotiate the terms of the venture, could not sue to enforce an option to buy the property, a Superior Court judge has ruled.

The plaintiff developer argued that the letter of intent, or LOI — which the parties amended to incorporate the option two years after the LOI was originally executed — was an enforceable contract.

But Judge Peter M. Lauriat disagreed.

"The language of the LOI itself clearly contemplates a further agreement [by setting] out only 'general terms and conditions' under which the parties would pursue the joint venture, and [by providing] that the parties will negotiate 'a definitive Joint Venture Agreement,'" Lauriat wrote, granting summary judgment to the defendant property owner.

"Although rules of contract do not prevent parties from binding themselves in the face of future uncertainty, where they fail to specify formulae or procedures regarding future events, the contract cannot be binding," he added.

Lauriat also found that the plaintiff, a limited liability company that had been established for the purpose of developing the property, had no authority to exercise the option in the first place since it had been dissolved several weeks prior to its attempt to do so.

The 32-page decision is *485 Lafayette Street Acquisition, LLC, et al. v. Glover Estates, LLC, et al.*, Lawyers Weekly No. 12-132-12. The full text of the ruling can be ordered by clicking here.

Future promises unenforceable

Boston lawyer Kenneth J. Demoura, who represented the defendant property owner in the litigation, said Lauriat's ruling should serve as a warning to anyone relying on a letter of intent to enforce rights against another party.

"If you plan to do so, you really have to make sure all the material terms of the agreement between the parties have been arrived at and are set out in the letter," he said. "Otherwise, the courts in Massachusetts won't recognize promises to agree to something in the future as enforceable contracts."

Boston real estate and land use litigator Daniel P. Dain said letters of intent, along with accepted offers to purchase and settlement agreements, which all contemplate the execution of a more formal final agreement, can still be enforceable in certain situations.

For example, Dain, who was not involved in the case, cited the Supreme Judicial Court's landmark 1999 decision in *McCarthy v. Tobin*, in which the SJC enforced the terms of an offer to purchase real estate despite the failure of the parties to execute a more formal P&S agreement that was expressly required in the offer.

"In [*McCarthy*], the material terms for the final agreement were set forth in the accepted offer to purchase," said Dain, an attorney at Dain, Le Ray, Wiest, Torpy & Garner. "Without evidence of agreement [in this case] as to material terms, Judge Lauriat found, understandably, that there was nothing for him to enforce."

Donald R. Pinto Jr. of Rackemann, Sawyer & Brewster in Boston, who also handles complex real estate disputes, said he continues to be amazed that, with decades of caselaw establishing what is needed to make preliminary agreements binding, "parties still march ahead with business deals and invest substantial sums without ensuring that they have an enforceable agreement."

At the same time, Pinto called the issue of whether the plaintiff, as a dissolved LLC, could exercise its option to purchase "a closer question."

While Lauriat viewed the plaintiff's exercise as an attempt to continue its business after dissolution, "[the plaintiff's] counterargument — that the exercise was necessary to an orderly winding up of its business — has some force," Pinto said.

The dissolution issue poses an additional trap for the unwary, said Demoura, who practices at Demoura Smith. "The LLC statute in Massachusetts, unlike the Massachusetts Business Corporation Statute, does not have a relation-back provision," he said. "Thus, when you reinstate [as an LLC], it's not retroactive to the date of dissolution. Here, [the plaintiff] never even tried to reinstate, but the court recognized that it may have been a futile exercise because of the difference between these two statutes."

Demoura said the case offers another important takeaway: When a party holds an option to purchase something or to exercise a right, the court will hold the party to the exact terms of the option.

"In our case, the plaintiffs attempted to add a condition — the environmental remediation of the property — that was not in the option."

Michael C. Fee of Pierce & Mandell in Boston represented the plaintiff in the litigation but not the underlying contractual negotiations. He said his client is considering an appeal but declined further comment.

Failed negotiations

On June 1, 2004, defendant Glover Estates LLC, owner of a 4.4-acre parcel of land that straddles Salem and Marblehead and that overlooks Salem Harbor, executed a letter of intent with plaintiff Lafayette Street Acquisition, LLC, a limited liability company that a real estate developer had created for the purpose of acquiring and developing the property.

The LOI called for the two parties to negotiate a joint venture agreement to develop the parcel for residential housing. Under the terms of the LOI, the defendant was to contribute the property while the plaintiff was to secure all permits, undertake all architectural and construction work, and secure financing.

Additionally, the LOI set out the "general terms and conditions" under which the parties would pursue the joint venture and, contemplating that the parties might not reach agreement, allowed either party to terminate the letter on 45 days' notice.

Two years later, the parties had not yet successfully negotiated a joint venture agreement and, on June 13, 2006, amended the LOI to provide that, in exchange for the plaintiff's efforts to pursue the project, the defendant would grant the plaintiff an irrevocable option to buy the property for $3.1 million, to be exercised no later than May 30, 2009.

A host of complications arose over the next three years, including issues involving the environmental remediation of the parcel, which had been identified as a hazardous waste site in 1995, and the project's potential impact on the harbor views from other parcels owned by the defendant.

On April 30, 2009, the plaintiff was administratively dissolved under the state LLC statute for undisclosed reasons. Nonetheless, on May 29, the plaintiff exercised its option to buy the parcel, conditioned on the defendant's environmental remediation of the property.

The defendant did not tender the parcel, contending that the plaintiff's exercise of its option was invalid because it changed the terms of the option by adding conditions.

In June 2011, the plaintiff sued the defendant for breach of contract, breach of the covenant of good faith and fair dealing, and other related claims.

The defendant moved for summary judgment.

Invalid exercise

Addressing the defendant’s motion, Lauriat found first that the dissolution of the plaintiff LLC prior to its attempt to exercise the option rendered the exercise invalid.

As the judge pointed out, once a corporation is dissolved, “some dormant germ of life” continues for three years to allow the corporation to wind up its affairs, but not to enable it to continue the business for which it was established.

The LLC in question was established for the sole purpose of acquiring and developing the parcel at issue, Lauriat said.

“Purchasing the parcel pursuant to the option agreement is clearly continuing the business for which [the plaintiff] was established. [The plaintiff’s] argument that it was merely winding up its business … is simply unpersuasive.”

The judge also found the exercise void because it did not conform to the terms of the option, which did not require environmental remediation by the defendant.

“When exercising an option, the optionee, who has a unilateral right, must turn the corners of the option squarely,” Lauriat said. “While most [relevant] cases … involve flaws in the exercise of the option, the plaintiffs’ insertion of a new condition precedent to the conveyance of property, to which the parties had never agreed, renders the exercise invalid.”

Finally, Lauriat threw out the plaintiff’s claim that the defendant violated the covenant of good faith and fair dealing by breaching the letter of intent. He found the LOI did not include material terms and conditions for the formation of a joint venture and thus was not an enforceable contract.

Not only did the LOI set out only general terms and conditions under which to negotiate, it did not include such material terms as the parties’ respective shares of the potential venture, nor did it identify any purchase price the plaintiff might pay for the parcel, the judge observed.

Additionally, by allowing either party to terminate the letter of intent with 45 days’ notice, the letter itself contemplated the possibility that the parties might never come to terms on a joint venture agreement, Lauriat said.

When parties fail to specify specific formulae or procedures regarding future events, a contract cannot be binding, the judge concluded, granting summary judgment to the defendant.

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CASE: *485 Lafayette Street Acquisition, LLC, et al. v. Glover Estates, LLC, et al.*, Lawyers Weekly No. 12-132-12

COURT: Superior Court

ISSUE: Could a real estate company that signed a letter of intent to jointly develop a parcel of property with its owner, but could not successfully negotiate the terms of the venture, sue to enforce an option contained in the LOI to buy the property outright?

DECISION: No