

Thwarted buyer can't enforce 'right of first offer' provision

By refusing confidentiality agreement, effectively rejected offer

By: Eric T. Berkman ○ January 16, 2020

A plaintiff rejected an offer to purchase a property interest in accordance with a "right of first offer" provision by refusing to execute a confidentiality agreement presented in the offer, a Business Litigation Session judge has ruled.

Defendant LBV Hotel, LLC, holds "an estate for years" on Boston property on which it operates a hotel. The agreement includes a provision stating that should LBV or plaintiff Headquarters Hotel, LLC, which owns the premises, seek to market its interest in the property, it must first offer its interest to the other party at the same price and conditions that would be offered to any third party.

When LBV sought to market its estate for years for an \$83 million purchase price, it made Headquarters an offer in accordance with the ROFO provision. The terms included a confidentiality agreement that Headquarters refused to sign.

LBV withdrew its offer and Headquarters sued to enforce the ROFO, arguing that the agreement did not require it to sign a confidentiality provision.

Superior Court Judge Brian A. Davis, sitting in the Business Litigation Session, disagreed.

"LBV has the explicit right under the ROFO Provision to determine for itself the price and other terms and conditions upon which it wishes to offer its Estate for Years for sale to Headquarters and to others, if at all," Davis wrote, granting summary judgment to LBV. "The only limitation the ROFO Provision places on LBV's right to set the terms and conditions of any offer is that LBV first must make its Estate for Years available for purchase by Headquarters 'at the same price and upon all of the same terms and conditions upon which' LBV's interest 'shall be offered to the third party.'"

Because LBV intended to impose the confidentiality agreement condition on every potential purchaser, Davis continued, "Headquarters' out-of-hand rejection of that condition in its ROFO Response was, in a very real sense, an explicit rejection of LBV's ROFO Offer."

Appropriate guidance?

Defense counsel Scott C. Ford of Boston said he looked forward to litigating his client's remaining claims "and the corresponding damages."

Meanwhile, Robert S. Sinsheimer of Boston, the plaintiff's litigation counsel, said his client was "greatly disappointed" with the decision and was considering its options going forward.

"My initial view is that the decision, based on traditional notions of offer and acceptance, does not provide appropriate guidance to commercial practitioners dealing with ROFO provisions," said Sinsheimer, who was not involved in the underlying transaction.



Defense counsel prevails at BLS

Headquarters Hotel, LLC v. LBV Hotel, LLC, Lawyers Weekly No. 09-118-19 (7 pages)

THE ISSUE: Did a plaintiff effectively reject an offer to purchase a property interest in accordance with a "right of first offer" provision by refusing to execute a confidentiality agreement proposed in conjunction with the offer?

DECISION: Yes (Superior Court's BLS)

LAWYERS: Kenneth E. MacKenzie of Dalton & Finegold, Andover; Lisa Ann Parlagreco and Robert S. Sinsheimer, of

Sinsheimer & Associates, Boston
(plaintiff)

Scott C. Ford, Kelly Frey, Mathilda
McGee-Tubb and Julia Ong, of Mintz,
Levin, Cohn, Ferris, Glovsky & Popeo,
Boston (defense)



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— Robert S. Sinsheimer, Boston



Daniel P. Dain, a Boston real estate litigator, said that because the ROFO provision itself required that it be accepted on its same price, terms and conditions, the judge appeared correct in granting summary judgment.

However, Dain said, "I'm not sure that a confidentiality provision is a term and condition of the offer."

The ROFO offer would seemingly contain the price, terms and conditions for the purchase itself whereas the confidentiality provision seemed more like a condition for due diligence, not for the sale, based on the wording of the offer, he said.

"From that perspective, if confidentiality were important to LBV, then it would have been in the 2002 agreement explaining the process for making the ROFO offer, not in the ROFO offer itself," Dain said. "So I see an argument here that Headquarters was not given an appropriate opportunity to accept or reject the ROFO offer."

Brockton real estate lawyer Kenneth J. Goldberg observed that the underlying agreement did not contain language requiring the buyer to sign off on all terms and conditions set forth in a seller's offer pursuant to the ROFO.

That appeared to create a loophole the buyer could try and slip through: get an offer, conduct due diligence, and then decide whether to buy, he said.

"But once an agreement is signed, what use is the confidentiality the seller sought during the due diligence period?" Goldberg continued. "Central to the opinion was the notion that confidentiality was not an illusory roadblock designed just to get this buyer out of the way."

Boston attorney Christian Habersaat said he thought the ruling provided a useful takeaway for the drafting of certain contracts.

"Where you've got a broad principle that the holder of an interest can offer the interest on terms of its choosing, if you want to limit that, it needs to be in the initial agreement," he said.

Donald R. Pinto Jr. of Boston said he found particularly interesting a footnote in the decision on a tangential issue unrelated to the ROFO.

In footnote 2, the court criticized Headquarters for not properly responding to LBV's statement of undisputed facts by stating clearly whether each alleged fact was disputed or undisputed as required in Superior Court Rule 9A. Here, Pinto noted, the judge stated that he would deem any fact Headquarters did not expressly controvert as required to by Rule 9A to be admitted.

"This serves as a warning that at least some Superior Court judges consider the procedural requirements of Rule 9A to be vitally important and will insist on strict compliance in the summary judgment context," he said.

Confidentiality provision

Headquarters owns property that once housed Boston Police headquarters and currently is the site of the Loews Boston Hotel.

In 2004, Headquarters executed an agreement with LBV's predecessor in interest, Berkeley Hotel Associates, LLC, under which Berkeley received a 129-year estate for years in the property.

In 2013, LBV acquired Berkeley's interest in the agreement and has operated Loews Boston there ever since.

The agreement contained a ROFO provision under which either party seeking to market its interest to someone else first offer it to the other party, at the same price with the same terms and conditions that it would extend to any third party.

At that point, the offeree would have 90 days after receiving all necessary valuation information to accept the offer.

On Jan. 11, 2018, LBV notified Headquarters that it was considering marketing its estate for years with an \$80 million to \$93 million asking price and requested Headquarters either confirm its interest or waive its ROFO rights.

Headquarters responded that it was interested and asked LBV to issue a ROFO letter. LBV did so on Feb. 5, at an \$83 million purchase price and with terms that included a confidentiality agreement that LBV deemed "necessary" to provide Headquarters with access to the premises and its business records for due diligence purposes.

Legal counsel for Headquarters responded in writing by neither accepting nor rejecting the financial terms but rejecting the confidentiality agreement, pointing out that the underlying agreement did not call for such terms in the ROFO.

Headquarters similarly rejected a slightly modified confidentiality agreement, and, on May 30, 2018, LBV notified Headquarters that it had withdrawn the ROFO offer.

The plaintiff then filed suit to enforce its ROFO rights, asserting claims of breach of contract, bad faith and estoppel. LBV moved for summary judgment.

Basic contract principles

Davis agreed with LBV that Headquarters rejected the ROFO offer as a matter of law by refusing to execute the confidentiality agreement.

"It has been and remains 'elementary law' in this Commonwealth that 'an offer must be accepted in the terms in which it is made in order to become a binding contract, and that a conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition,'" Davis said, quoting the Supreme Judicial Court's 1923 *Moss v. Old Colony Trust Co.* decision.

Here, Davis pointed out, LBV had the right under the ROFO provision to determine the price and conditions for itself regarding sale of its estate for years, limited only by the requirement that it would have to offer the same terms to other potential purchasers that it would offer to Headquarters.

Because LBV intended to require any purchaser to execute the confidentiality agreement, Headquarters rejected the ROFO offer by rejecting that provision, Davis concluded, granting summary judgment for the defendant.

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