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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2281CV00480

LIBERTY HILL, LLC

vs.

SETH FERNALD, as PERSONAL REPRESENTATIVE OF
THE ESTATE OF WILLIAM H. ROWE

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER (DOCKET # 14)
AND PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT
(DOCKET # 13)**

Plaintiff seeks to enforce a settlement agreement which resulted in a signed purchase and sale agreement with William Rowe, whereby Rowe agreed to sell a condominium to Plaintiff. Mr. Rowe died before the property could be transferred. His estate, the substituted defendant, is refusing to honor the purchase and sale agreement and is soliciting other offers for the property. Plaintiff moved for issuance of a Temporary Restraining Order seeking to restrain the estate from marketing the property to other potential buyers until the legal issue of whether the Estate is bound by the pre-death purchase and sale agreement is resolved.¹

After a hearing on July 11, 2022, in which the court heard arguments from both parties, and consideration of the pleadings submitted by both parties, the motion is **ALLOWED**.

Plaintiff previously filed a Motion to Enforce Settlement Agreement for Specific Performance (Docket # 13) and Defendant filed an Opposition to that motion (Docket # 13.1).

¹ The docket indicates that Plaintiff filed an Application for a Temporary Restraining Order (Docket # 14) which was allowed on June 16, 2022. On that same day, an order issuing a preliminary injunction was also issued (Docket # 15). On July 6, 2022 Defendant filed an opposition to the Application for Temporary Restraining Order (Docket # 16). I am treating the July 11 hearing as a hearing on a motion for preliminary injunction. Both parties were present and had the opportunity to present their arguments to the court.

Although the clerk set a hearing on the motion to enforce the settlement agreement for September 15, 2022, I decide that issue here. The papers submitted by the parties at the July 11 hearing on the Application for Temporary Restraining Order are substantially similar to the papers submitted in connection with the motion and opposition to enforce the settlement agreement. As both parties have had an opportunity to argue their points, and the resolution turns on an issue of law, there is no reason to wait until September and hold a second argument to decide the issue. For the reasons set forth below, Plaintiff's Motion to Enforce Settlement Agreement is **ALLOWED**.

BACKGROUND

On November 23, 2021, Plaintiff (buyer) made an offer to purchase property from William Rowe (seller), for a residential condominium located at 72-3 Newbern Avenue in Medford ("the Property") in the amount of \$216,000. The offer was accepted that same day. The accepted offer required a purchase and sale agreement to be executed on or before December 3, 2021, with a closing to occur within 45 days of signing the purchase and sale agreement. From the November signing until December 3, Seller did not return Plaintiff's phone calls for access to the property for inspection. Plaintiff alleges that in January 2022 it learned that William Rowe was negotiating with one or more third party buyers interested in purchasing the Property. Shortly thereafter, Plaintiff filed this lawsuit seeking specific performance of the terms outlined and accepted in the offer to purchase.

The Verified Complaint contains three counts. Count I for Specific Performance of the November offer to purchase, Count II for Breach of Contract regarding the November Offer to Purchase and Count III for Breach of the Covenant of Good Faith and Fair Dealing of the November offer to Purchase.

After the Complaint was filed, on February 24, 2022, Rowe's counsel sent an email to Plaintiff's counsel stating in part, "The following is an offer of settlement. My client proposes to sell the condo unit to the Plaintiff for the sum of \$260,000.00." Plaintiff's counsel responded "Thank you-my client accepts. I will follow up with you next week as to a standard form P&S and closing." There is no dispute that this communication occurred.

Following this email exchange, on March 25, 2022, William Rowe and Plaintiff, entered into a purchase and sale agreement for the Property with an increased purchase price of \$260,000.² Mr. Rowe was represented by counsel in connection with the negotiation and signing of the P&S. On April 5, 2022, before a closing took place, Rowe died. Rowe died intestate and his nephew Seth Fernald has been appointed personal representative of his estate and substituted as a defendant in this litigation.

Following Rowe's passing, Plaintiff learned that Fernald had listed the Property with a broker. At least one offer was received above the agreed upon price in the March 25, 2022 Purchase and Sale Agreement. Upon learning this, Plaintiff filed a Motion to Enforce Settlement Agreement. The court denied the motion without prejudice, pending the substitution of Fernald, as personal representative, as a Defendant. After the party substitution was made, the clerk set a hearing on the motion to enforce the settlement agreement for September 15, 2022. Subsequently, Plaintiff filed the Application for Temporary Restraining Order which a judge of this court granted on June 16, 2022. The parties then appeared before the court on July 11, 2022, on the plaintiff's motion for a preliminary injunction.

² Plaintiff claims that the Purchase and Sale Agreement was entered into as part of a Settlement Agreement with William Rowe. Whether this is the case or not is not relevant to the enforceability of the March Purchase and Sale Agreement signed by Rowe before his death. But it is relevant to deciding the Application for TRO/Motion for Preliminary Injunction. The Verified Complaint does not contain a cause of action for breach of contract or specific performance related to the March 25, 2022 Purchase and Sale Agreement. Instead, Plaintiff has filed a Motion to Enforce Settlement Agreement. Plaintiff seeks the TRO/Injunction to prevent the sale of the Property before that motion can be ruled on by the court.

Fernald contends that M.G. L. c. 202 §38 requires him to obtain the highest possible price for the Property and consequently he is not obligated to honor the March 25 Purchase and Sale Agreement. Defendant further contends that the Property cannot be sold until a license to sell is obtained from the probate court. Plaintiff, relying on M.G. L. c. 204 §1, contends that the purchase and sale agreement signed by Rowe before his death is enforceable, no other offers may be considered, and the closing may occur according to the terms in the March 25, 2022 Purchase and Sale Agreement.

DISCUSSION

In considering a motion for a preliminary injunction a judge must initially evaluate the moving party's claim of injury and likelihood of success on the merits. *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 616 (1980). The court's task is to balance the risk of irreparable harm to the plaintiff and defendant "in light of [each] party's success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.* at 617. If the moving party will suffer irreparable harm without injunctive relief, the judge must then balance any similar risk of irreparable harm an injunction would cause the non-moving party.

In other words, preliminary injunctive relief is permissible in cases involving private interests where the plaintiff "may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980). "It is well-settled law in this Commonwealth that real property is unique;" "that money damages will often be inadequate to redress a deprivation of an interest in land;" and that injunctive relief to enforce property rights should therefore be granted to a prevailing party or one likely to succeed on the merits. See *McCarthy v. Tobin*, 429 Mass. 84, 89

(1999), quoting *Greenfield Country Estates Tenants Ass'n, Inc. v. Deep*, 423 Mass. 81, 88 (1996).

Massachusetts law holds that a court has the inherent authority to summarily enforce an agreed-upon settlement between litigating parties. See *Correia v. DeSimone*, 34 Mass. App. Ct. 601, 604 (1993) ("It defies logic and fundamental principles of fairness to allow a represented party who has sought justice in a forum to contradict and undermine an agreement it reached and acknowledged in that same forum...."). Whether parties to litigation have entered into an enforceable settlement agreement may be resolved by a motion to enforce, rather than by asserting a new claim for breach of contract. See *Duff v. McKay*, 89 Mass.App.Ct. 538, 541-43 (2016). And a motion to enforce a settlement agreement may be decided without an evidentiary hearing where, as here, no material facts are in dispute; such a motion is "akin to one for summary judgment." *Id.* at 542. *Basis Technology Corp. v. Amazon.Com, Inc.* 71 Mass. App. Ct. 29 (2008) (Email communications outlining terms of settlement are enforceable when parties intended to be bound).

Here the emails between counsel for William Rowe and Plaintiff clearly indicate a settlement offer and acceptance. That agreement was memorialized by the execution of a Purchase and Sale Agreement. The remaining issue is whether Mr. Rowe's death changes the enforceability of the March 25, 2022 Purchase and Sale Agreement.

Mass. G. L. c. 204, § 1, states

if a person who has entered into a written agreement for the conveyance of real estate or holds real estate which by operation of law is subject to be conveyed to others, dies . . . without having made such conveyance, the probate court shall have jurisdiction in equity concurrent with the supreme judicial and superior courts to enforce specific performance of such agreement.

“upon a petition therefor by any person interested in the conveyance, [the court] shall, after notice, if upon hearing it appears that the deceased, were he living, . . . would be required to make the conveyance, order the executor or administrator . . . to make the same, which conveyance shall have like force and effect as if made by the person who agreed.”

This statute permits the superior court to enforce specific performance of a contract for conveyance of real estate. *Kelley v. Neilson*, 433 Mass. 706, 713 (2001). (“General Laws c. 204, § 1 authorizes a judge at the request of a buyer to order specific performance of a purchase and sale agreement entered into by a person before her death[.]”) There is nothing in the statute to indicate that the Buyer or Seller first needs to obtain approval for the sale. In fact, c. 204, § 1 gives the superior court the authority to order the sale.

Defendant alleges that G.L. c. 202 §§19 and 38 controls and he must offer the Property for sale to the highest bidder. Section 19 requires a personal representative to petition the Probate Court for a license to sell real estate belonging to a decedent’s estate; while Section 38 provides that, upon the Probate Court’s approval of said license, a conclusive presumption exists that the personal representative obtain the highest possible price in satisfaction of his or her fiduciary duty.

Sections 19 and 38 of Chapter 202 provide for the sale of real estate that is part of a decedent’s estate, primarily in cases where the heirs cannot agree on what to do with the property. In *Terry v. Terry*, 305 Mass. 113 (1940), the Supreme Judicial Court described Section 19’s purpose as follows:

The parties [the decedent’s heirs] were not in accord that there should be any division of the real estate and it is apparent that, on account of the feeling existing between some of the heirs, they are unable to agree upon any plan for the distribution of the assets of the estate. *This is an appropriate case for the application of the statute, G.L. c. 202, § 19, which furnishes an expeditious method providing in a single proceeding for the sale of the real estate, if found to be advantageous to all those having an interest in the land, for the payment of creditors, and for the distribution of the balance of the proceeds proportionately among those who had an interest in the land. The operation of the statute*

facilitates the settlement of the estate. It obviates the necessity for bringing a petition for partition. *It enables the heirs and devisees to make a sale of the realty during the administration of the estate.* It protects those who have a lien upon the land.

Id. at 114-115 (emphasis added). Thus, Section 19 is employed “during the administration of the estate” to sell the estate’s real property.³

Here, Rowe signed the purchase and sale agreement with the plaintiff prior to his passing. There are no conditions or contingencies within the agreement that would prevent either party from completing the sale.⁴ Were Rowe alive, the agreement could be enforced against him by the plaintiff; that same right of enforcement now extends as against the defendant, as personal representative of Rowe’s estate. See *Kelley*, 434 Mass. at 714. at 714 (noting that “by operation of law, G. L. c. 204, § 1, the time for performance of the purchase and sale agreement was extended beyond the testatrix’s death, and the agreement could be specifically enforced by the buyer’s postmortem”).

The defendant cites to *Onanian v. Leggat*, 2 Mass. App. Ct. 623, 628 (1974), for the proposition that “an agreement which is conditioned upon the procurement of a license will not be enforced unless and until the license has been obtained[.]” However, that case is inapposite here, as it involved an executor’s agreement, under a power granted by the decedent’s will, to sell real estate belonging to the estate, not an agreement to sell real estate entered into by the decedent himself prior to his death. The defendant would have the court insert a provision into the purchase and sale agreement conditioning the sale of the Property upon the defendant’s receipt of a license to sell; the court declines this invitation.⁵

³ Citations to Section 38 are few, and all inapplicable to the instant case, but by the statute’s plain text, it merely states that if a sale of real estate is approved by the Probate Court, there exists a conclusive presumption that the personal representative obtained the highest price for it, as the representative is bound to do by fiduciary duty to the estate.


⁴ For example, the mortgage contingency clause has been deleted.

⁵ The other cases cited by the defendant also have no bearing on the instant case; those cases all concern the disposition of real property after the owner’s death.

ORDER

For the foregoing reasons, it is **ORDERED** that the plaintiff's motion for a preliminary injunction (paper # 14) is **ALLOWED**. The defendant is hereby enjoined from listing, or causing to be listed, the Property for sale, and shall not entertain, solicit, or accept any offers, from any source, to purchase the Property. It is further **ORDERED** that the March 25, 2022 Purchase and Sale Agreement between Plaintiff and Rowe is enforceable and the Motion to Enforce the Settlement Agreement (Paper # 13) is **ALLOWED**. It is hereby **ORDERED** that the sale of the Property occur within thirty days (30) after the entry of this Order or on another date agreed to by the Parties.

Dated: July 22, 2022



Maureen Mulligan
Assoc. Justice of the Superior Court