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1. Bankruptcy does not always discharge a mortgage lien, and recording a false mortgage discharge affidavit with the registry of deeds is not recommended

LaBrec Realty Solutions, LLC brought a quiet title action seeking a determination that the second mortgage on a property it had acquired out of a bankruptcy proceeding was unenforceable and should be discharged. It fell to Justice Jennifer S.D. Roberts, in *LaBrec Realty Solutions, LLC* v. *ARCPE 1, LLC*, 31 LCR 619 (2023) to untangle the effects of the bankruptcy court's discharge order and the borrower's associated surrendering of the property at issue, and how to deal with LaBrec's counsel having recorded a false mortgage discharge affidavit.

In 2007, Catherine Mallette signed a promissory note in favor of the Irwin Union Bank & Trust Company of Carson City, NV ("Irwin"), secured by a mortgage of even date that was recorded with the Worcester Registry of Deeds (the "Registry"). The Irwin note had a fifteen-year term and an interest rate of 9.136 per annum. It was junior to a mortgage held by Citicorp Trust Bank.

In 2010, Ms. Mallette filed a petition for Chapter 7 bankruptcy protection. Schedule D to her petition listed Citicorp's first mortgage and the Irwin second mortgage. The Individual Debtor's Statement of Intention stated that she intended to surrender the property. On November 3, 2010, the U.S. Bankruptcy Court issued an order granting Ms. Mallette a discharge. The Discharge Order instructs readers to "see the back of this order for important information." The back of the Order states that while the discharge:

> prohibits any attempt to collect from the debtor a debt that has been discharged, … a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien is not avoided or eliminated in the bankruptcy case.

Asset Recovery Companies, LLC ("ARC") purchased the Irwin mortgage, as part of a bundle of mortgages, on or about December 28, 2018. On or about August 28, 2019, ARC wrote off the Irwin mortgage as an uncollectable bad debt, for accounting and tax purposes, and adjusted to zero the balance due on its records. On January 21, 2021, presumably in response to an inquiry from LaBrec's counsel, ARC's loan servicer wrote that:

> Ms. Malletta's [sic] account was closed at the request of [our] client, ARCPE 1 ("Client")[1] on August 20, 2019. The loan was not paid off while serviced [by us], nor was the servicing of the loan transferred to another lender or servicer. The account was closed in our system at our Client's request and we have no additional information.

On May 13, 2021, LaBrec's counsel recorded a Discharge Affidavit with the Registry. In that affidavit, LaBrec's counsel stated that he had:

> ascertained that the mortgagor has satisfied all of the loan obligations of the indebtedness secured by the Mortgage and that the Mortgagor has never received notification that the payment and satisfaction of all the loan obligations has been rejected or that there is any other objection to the adequacy of the payment or satisfaction of all of the loan obligations and that the transmittal of the same has not been returned as undeliverable or for any other reason, without being retransmitted to and received by the Mortgagee, or note holder to whom payment and satisfaction of all of the loan obligations was made;

The affidavit also stated that:

> more than 45 days have elapsed since such payment and satisfaction of all of the loan obligations was made and received by the Mortgagee, Mortgage servicer or note holder.

ARCPE 1 is the current holder of the Irwin mortgage by virtue of an assignment recorded with the Registry.

Judge Roberts found the SJC's decision in *Christakis* v. *Jeanne D'Arc Credit Union*, 471 Mass. 365 (2015) dispositive of the question of the continued viability of a mortgage after the mortgagor's discharge in bankruptcy. As Chief Justice Gants had framed the issue in *Christakis*, do "judicial liens on real property remain valid after the owner of the property receives a discharge under Chapter 7 of the Bankruptcy Code"? 471 Mass. at 365. The *Christakis* court had observed that:

> Essentially, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem. As a matter of Federal law, an unavoided, otherwise valid lien perfected prior to the bankruptcy filing survives or passes through the bankruptcy. This distinction between in personam and in rem actions comports with the purposes of the bankruptcy process by striking a balance between the need for debtors to obtain a reprieve from their debts, while simultaneously protecting creditors' secured property rights. Thus, the lien may still be enforced, but because of the discharge of personal liability, the enforcement of the lien is an action in rem with no recourse available against the debtor for any deficiency.

Id. at 367-368 (internal quotations and citations omitted).

Ms. Mallette had not obtained an order from the Bankruptcy Court avoiding the Irwin mortgage (or Citicorp's first mortgage). Instead, she had surrendered the property.[2] Judge Roberts found

1. ARCPE 1, LLC appears to have been the entity through which ARC held mortgages, including the Irwin mortgage.

2. The instructions to individuals filing under Chapter 7, provide that, "If you surrender the property to the creditor, your bankruptcy discharge will protect you

that there were no indications in the records of the bankruptcy proceeding that the Irwin mortgage was modified or avoided, nor at the Registry that it was foreclosed upon. The Irwin mortgage remained a valid encumbrance on the property.

LaBrec argued—without citation to any authority—that ARC's having written off the mortgage as an uncollectable bad debt rendered it unenforceable. Judge Roberts declined to consider this unsupported proposition. LaBrec argued that because ARC cannot establish what it paid to acquire it, the Irwin mortgage is invalid. But LaBrec provided no legal authority for the proposition that a mortgage secures only the amount a subsequent holder paid for it. Judge Roberts similarly declined to consider this unsupported argument. LaBrec argued that the Irwin mortgage, unsecured from the underlying note, is of no value. For this, it cited cases holding that where the note has not been discharged the mortgagee holds "bare legal title to the mortgage in trust for the note holder, who has an equitable right of assignment that may be effected by filing a court action to require the mortgagee to assign the mortgage to it." *Culhane* v. *Aurora Loan Servs. of Nebraska*, 826 F. Supp. 2d 352 (D. Mass. 2011). But the cited decisions did not address the circumstances before Judge Roberts, where the underlying debt has been discharged in bankruptcy, but the mortgage has not been avoided. She found that *Christakis* did address such circumstances and was binding.

LaBrec's final argument was that the Irwin mortgage secured a predatory loan in violation of G.L. c. 183C, § 1 and, consequently, was never "perfected". Judge Roberts was not persuaded. First, LaBrec did not appear to have standing to assert that claim, as it was not "a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan". *See* G.L. c. 183C, § 2. Second, LaBrec had not provided evidence that the Irwin mortgage secured a "high cost home mortgage loan", which the statute defines as one having an:

> annual percentage rate at consummation [that] will exceed by more than 8 percentage points for first-lien loans, or by more than 9 percentage points for subordinate-lien loans, the yield on United States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender.

G.L. c. 183C, § 2.5. LaBrec had provided no evidence of when the loan application was received by the lender and no evidence of the relevant yield rates on United States Treasury securities. Judge Roberts took judicial notice that the yield on United States Treasury securities for 10-year Treasury bills on April 13, 2007 was 4.76% and for 20-year Treasury bills on that date was 5.01%. The Irwin note, dated May 7, 2007, was for a fifteen-year term at an interest rate of 9.136 per annum.

Judge Roberts determined that LaBrec had failed to establish that it held title to the property free of the Irwin mortgage. She dismissed LaBrec's quiet title complaint with prejudice.

In light of this conclusion, she also declared invalid the mortgage Discharge Affidavit recorded by LaBrec's counsel. That did not resolve all the issues related to the affidavit. At least two of its sworn statements were demonstrably false. The affidavit stated that all of the loan's obligations had been satisfied, despite counsel having received a letter from the loan servicer stating that the loan had not been paid off and had not been transferred to another lender or servicer. And the affidavit stated that more than 45 days had elapsed since the [nonexistent] payment and satisfaction. And G.L. c. 183, § 55(g)(9)—requiring lenders to timely record mortgage discharges and providing for the recording of an affidavit of discharge if a lender fails to comply— provides that:

> A person who causes an affidavit to be created in accordance with this subsection knowing that the information or statements contained therein, or in any documentary evidence relied upon therefor, or that the copy of any notice or document attached thereto or relied upon therefor is false, shall be punished by a fine of not more than $5,000 in addition to all other remedies at law, both civil and criminal and, in the event of civil liability to anyone damaged thereby, attorneys fees and costs shall be awarded in addition to any award of damages

As the Land Court is a court of limited jurisdiction—*see* G.L. c. 185, § 1—Judge Roberts found herself without authority to enforce that provision. However, she found that LaBrec's counsel also appeared to have violated two of the Massachusetts Rules of Professional Conduct for attorneys:

> Rule 4.1: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact to a third person; …
>
> Rule 8.4: It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; …

And Rule 2.15(B) of the Code Of Judicial Conduct states that, "A judge having knowledge that a lawyer has committed a violation of the Rules Of Professional Conduct that raises a substantial question regarding the lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer in other respects shall inform the Office of Bar Counsel." Accordingly, Judge Roberts found herself bound to report the circumstances of the mortgage discharge affidavit to the Office of Bar Counsel.[3]

Many people assume that the bankruptcy process will relieve the debtor of all obligations to third parties, including all liens on the debtor's property. As this case demonstrates, that assumption is wrong. And any attorney filing an affidavit—or drafting an affidavit for another—should take great pains to ensure that the sworn statements are true.

2. When the language of the statute is clear, that is what it means

Effective January 14, 2021, new language to facilitate the issuance of special permits for projects that include affordable housing was added to the Massachusetts Zoning Act:

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from any claim for the difference between what you owe the creditor and what the creditor receives from a sale of the property, unless the court determines that the debt is nondischargeable."

3. The decision lists two attorneys, at separate firms, as counsel for LaBrec but does not indicate which of them recorded the affidavit. For the curious, the decision indicates that the affidavit is recorded with the Registry at Book 65158, Page 4.

> A special permit issued by a special permit granting authority shall require a simple majority vote for any of the following: (a) multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184; …

G.L. c. 40A, § 9, para 13 ("paragraph thirteen").

In *50-56 Market Street, LLC* v. *Ipswich*, 31 LCR 638 (2023), Justice Howard P. Speicher resolved the interplay of this provision with provisions of the Ipswich Zoning Bylaw that allow a developer to buy its way out of providing affordable housing units.

50-56 Market Street, LLC sought a special permit for a ten-unit multifamily project. The project would construct a new, five-unit building behind an existing five-unit building on a site approximately 500 feet from an MBTA commuter rail station. The special permit was required to increase the number of dwelling units above the seven that would be allowed by right based on the lot area. Footnote 11 to the Zoning Bylaw's Table of Dimensional and Density Regulations provides that:

> The Planning Board may increase the number of dwelling units allowed under this requirement by special permit if it determines that a proposed multifamily dwelling or multifamily residential development would provide public benefit to the general public. … Multifamily dwellings or developments that provide at least 20% of the additional dwelling units allowed under this footnote as affordable …, or which pay an affordable housing fee, in accordance with the "Planning Board Regulation: Inclusionary Housing Payment-in-Lieu-of Option", adopted on June 19, 2008, as amended, for each unit allowed under this footnote, will satisfy the public benefit requirement

Rather than include affordable housing units in its project, the developer proposed to pay an affordable housing fee of $36,500 per unit to Ipswich's Affordable Housing Trust Fund. After several nights of public hearing, the Ipswich Planning Board voted 3:2 in favor of the application. Because the vote fell one short of the supermajority required to grant a special permit, the decision was filed with the town clerk as a denial.[4]

Nonetheless, the developer sought a building permit, arguing that the Planning Board's decision should be treated as an approval, based on a majority of members having voted in favor of the project and the project's close proximity to a commuter rail station. The Ipswich Building Commissioner denied the request because, in his view, paragraph thirteen's relaxing of the supermajority voting requirement did not apply to a project using the town's provision allowing payment in lieu of creating affordable housing units.

The developer appealed that decision to the Ipswich Zoning Board of Appeals. At the conclusion of a public hearing process that took ten months, the ZBA voted 5:0 to uphold the Building Commissioner's denial of the developer's application for a building permit. This litigation ensued.

The issue before Judge Speicher was whether paragraph thirteen meant that the project only needed a majority vote to receive a special permit. To resolve this question, he followed the general practice of statutory interpretation of looking first to the language of the statute as "the principal source of insight" into legislative intent. *CommCan, Inc.* v. *Mansfield*, 488 Mass. 291, 294 (2021). Plain and unambiguous statutory language ordinarily "is conclusive as to the legislative intent" unless the consequences adopting a literal construction would be "absurd or unreasonable". *Ciani* v. *MacGrath,* 481 Mass. 174, 178 (2019).

The developer argued that it had satisfied paragraph thirteen's requirement that at least 10% of the units be affordable to those earning less than 80% of the area median income by agreeing to pay the affordable housing fee under the Ipswich zoning bylaw. Judge Speicher found that, while the Ipswich zoning bylaw gives special consideration to multifamily projects in which at least 20% of the additional units are affordable or for which an affordable housing fee will be paid, paragraph thirteen does not offer such flexibility. Compliance with the zoning bylaw's additional density option does not equate to complying with paragraph thirteen's requirement that at least 10% of the housing authorized by a special permit be affordable if a majority vote is to suffice. The developer argued that payment of the affordable housing fee should be treated as equivalent to creating the required affordable housing. But nothing in its complaint alleged that the affordable housing fee would be used to create any particular number of dwelling units, or that those units would be affordable to those earning less than 80% of the area median income. The developer had failed to satisfy the plain language of paragraph thirteen's requirements prerequisite to a majority vote being sufficient to grant the required special permit.

The developer also argued that if Judge Speicher were to consider the legislative intent behind paragraph thirteen and the recent enactments of "similarly-themed statutes" he would find that the goal of the paragraph went "beyond the literal development of affordable housing, and seeks to arm a municipality with multiple means of addressing housing needs." Judge Speicher found that he could not reach such considerations when a statute's language is clear and explicit *E.g., Zoning Bd. of Appeals of Greenfield* v. *Housing Appeals Committee*, 15 Mass. App. Ct. 553, 561-562 (1983).

Finally, the developer argued that requiring a supermajority vote for its project penalized it for opting to pay the affordable housing fee rather than building affordable units. But the developer had chosen to use this option under the local zoning bylaw, preferring to build additional market rate units. And had it chosen to provide the affordable units required to be eligible for a majority vote special permit under paragraph thirteen it could have also

4. Ordinarily, the granting of a special permit requires "a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board." G.L. c. 40A, § 9, ¶ 12.

qualified for the density benefits under the local zoning bylaw. Instead, it chose to go a different route under the local bylaw and in so doing precluded the project from benefiting from paragraph thirteen. Any "injustice or hardship" was of the developer's own making, and the court could not insert words into a clear and unambiguous statute to reach a different conclusion. Judge Speicher upheld the Ipswich Zoning Board of Appeals' decision denying the developer's appeal, as it was based on the only proper reading of the statute.

Home Rule gives Massachusetts municipalities broad authority to restrict or prohibit multifamily (read: affordable) housing absent specific statutes to the contrary, *e.g.*, c. 40B. Episodically, the Legislature enacts statutes to curtail aspects of local resistance to affordable housing. Some, like the MBTA Communities Act[5], will take years to fully implement and require regulatory changes at the state and local levels. Others, like G.L. c. 40A, § 9, ¶ 13 are self-implementing. Anyone planning to use one of these statutes would be well served by carefully parsing its language (and that of any associated regulations) to ensure that their project tracks all of the statutory requirements.

3. Time is not of the essence when the parties continue discussions well past the deadline

When a purchase and sale agreement for land includes a time for performance and language indicating that time is of the essence, courts will strictly construe the parties' self-imposed deadline. If the deadline is not satisfied, then the parties' obligations to each other are extinguished. *Owen* v. *Kessler*, 56 Mass. App. Ct. 466, 467 (2002) *citing McCarthy* v. *Tobin*, 429 Mass. 84 (1999). The parties may waive a "time is of the essence" clause expressly or implicitly by their words and conduct. But such a waiver requires unequivocal action by the waiving party, *e.g.*, conduct that indicates a continued intent to be bound by the agreement.

In *Dossantos* v. *Myers*, 31 LCR 664 (2023), Justice Kevin T. Smith had to decide whether conduct that continued for more than three years after an agreement's time is of the essence deadline sufficed to waive the provision. And if there had been waiver, was the putative purchaser entitled to specific performance? Louis Meyers, the record owner of 67 Ceylon Street in Boston (the "Property"), died intestate on March 14, 1994. Shortly thereafter, his son, Leroy Myers, filed a petition to probate the estate and was appointed as the estate's personal representative. Fast forward to May 2018 and Louis Myers was still the Property's record owner. Leroy Myers, as Trustee of the Estate of Louis Myers, and Joao Dossantos entered a written purchase and sale agreement for the Property. The agreement specified a closing date of July 6, 2018, and contained a "time is of the essence" clause.

When the parties discovered that Leroy Myers did not have authority to sell the Property—he had not yet obtained a license to sell from the Probate and Family Court—the parties agreed to extend the closing to July 30, 2018. Thereafter, they agreed to a further extension to September 3, 2018 so that Myers could reopen his father's estate and obtain a license to sell the Property.

Reopening the old probate action took longer than expected; the parties were unable to close by September 3rd. The parties agreed that Myers would continue to pursue the steps necessary for him to sell the Property to Dosantos. Myers finally reopened the probate action in November 2018.

In March 2019, the parties agreed that Dossantos would move into the Property as a tenant while Myers continued working to obtain a license to sell. Dossantos moved in and began paying monthly rent of $1,200, plus electricity. Dossantos has lived at the Property since then.

On May 10, 2021, Dossantos wrote to Myers seeking a further written extension of the closing date until June 1, 2021. Myers did not sign the extension. E-mail correspondence between the attorneys for Dossantos and Myers, in August and September of 2021, indicated that both parties intended to move forward with the closing as soon as the probate action concluded. On November 1, 2021, Dossantos filed this action. On September 13, 2022, Myers filed a motion in the probate action to allow his final accounting and for an order to complete settlement of the estate. The Probate and Family Court issued that decree and order on May 22, 2023.

Dossantos asked the Land Court to declare that the parties' agreement was still binding on Myers and the Estate of Louis Myers. To prevail, he needed to show that the parties had waived the agreement's "time is of the essence" clause; otherwise, the agreement had long since expired.

Conduct that shows a continued intent to be bound by an agreement may be sufficient to unequivocally imply waiver of a "time is of the essence" clause. The question of waiver is usually for the finder of fact. When, however, no facts are in dispute, waiver is a question of law. *McCarthy* v. *Tobin*, 429 Mass. 84 (1999). Judge Smith found there were no disputes of fact concerning the parties' actions after they failed to close on the date set forth in the agreement, July 6, 2018. The chronology was clear and undisputed.

Myers claimed that the agreement expired when he was unable to obtain a license to sell by September 3, 2018, the last extension to which the parties had agreed in writing. Judge Smith found that, notwithstanding the absence of a further written extension, Myer had finally reopened the probate action and began to take the necessary steps to obtain authorization to sell the property. Myer and Dossantos continued to communicate about the pace of the probate action. Myers entered an oral, month-to-month lease with Dossantos, allowing him and his wife to live at the Property until the probate action concluded. The landlord-tenant relationship proceeded smoothly until late summer or early fall of 2021, when Dossantos's counsel began repeatedly asking about the status of the probate action and for a forecast of a new closing date.

5. Enacted in 2021, the MBTA Communities Act added definitions to G.L. c. 40A, § 1A and created G.L. c. 40A, § 3A (subsequently amended) which requires the approximately 177 communities served by the MBTA (other than Boston) to adopt zoning that allows multi-family housing by right in proximity to transit stations. The Act depends on regulations promulgated by the Executive Office of Housing and Livable Communities, and directs affected communities to revise their zoning accordingly.

Dossantos filed this action only after the probate action appeared stalled.

Judge Smith found "three unequivocal actions" that showed that the parties no longer considered time to be of the essence. First, the parties stayed in communication, directly and through counsel about a closing date after September 3, 2018, with no mention of the deadline for closing under their agreement having passed. Dossantos never asked for the return of his $15,450 deposit, and Myers never indicated a willingness to release the deposit back to Dossantos.

Second, the parties agreed that Dossantos and his wife would move into the Property as tenants at will until Myers could complete the probate action and sell the Property to Dossantos. Dossantos and his wife moved in and began paying rent.

Third, on August 18, 2021, in response to an inquiry from Dossantos's counsel, Myers' counsel stated that the probate action was nearly closed and "Then we can schedule a Closing." This response confirmed the parties' understanding that the agreement had not expired. For these reasons, Judge Smith found that Myers had waived the "time is of the essence" clause in September 2018 and had implicitly agreed to a general extension of the closing until he completed the probate action. Dossantos's actions, particularly his moving into the Property as a tenant at will, showed that he had relied on Myers' promise to sell the Property to him as soon as the probate action concluded. And Myers never took affirmative steps to reestablish a deadline.[6] Judge Smith found that the agreement remained in full force and effect and that Myers, as personal representative of his father's estate, must perform accordingly.

Dossantos also sought an order for specific performance of the agreement. Specific performance is most often appropriate with respect to contracts to convey land because of the unique nature of real property and the inadequacy of money damages to redress a deprivation of an interest in land. *Pierce* v. *Clark*, 66 Mass. App. Ct. 912, 914 (2006) *quoting Raynor* v. *Russell*, 353 Mass. 366, 367 (1967). Judge Smith found specific performance to be an appropriate remedy and ordered Myers to specifically perform and abide by all of the terms of the agreement.[7]

Drafters routinely include "time is of the essence" clauses in purchase and sales agreements, leases, and other contracts concerning interests in land. Sometimes these clauses apply only to specific elements of a contract, such as the time and place of closing or the need to timely pay rent. Sometimes the clauses purport to make time of the essence for each and every contractual provision. If the parties really want time to be of the essence, they need to behave accordingly. If the parties proceed to act as if a deadline did not matter after it is missed, the "essence" can be restored, but only if the party wishing to do so gives clear notice with a reasonable deadline to the other, stating unequivocally that the new deadline will matter.

4. Repeatedly lying to your counterparty is not good faith and fair dealing

Massachusetts common law implies a covenant of good faith and fair dealing in every contract. *UNO Restaurants, Inc.* v. *Boston Kenmore Realty Corp*., 441 Mass. 376, 385 (2004). Where a contract involves the obligation to construct improvements to real property contingent on the issuance of the required approvals, there is an implied obligation for the constructing party to make a good faith effort to obtain the required permits and approvals. *See Sechrest* v. *Safiol*, 383 Mass. 568, 570-571 (1981); *Stabile* v. *McCarthy*, 336 Mass. 399, 402-403 (1957). In *Balasar* v. *76 Litchfield Street Realty Trust*, 31 LCR 672 (2023), Justice Kevin T. Smith had to decide the appropriate remedy where the trustee had lied repeatedly about efforts to obtain required approvals and, in fact, had made no efforts whatsoever.

In 1992, Suniena Balasar purchased 76 Litchfield Street in the Brighton section of Boston. She has lived there ever since. By 2017, she was experiencing financial difficulties and fell into default under a mortgage she had given on the property. The mortgagee began taking steps to foreclose on the property.

In 2018, Kevin J. Mullen, as trustee of 76 Litchfield Street Realty Trust (the "Trust"), made an unsolicited visit to the property. He told Balasar that he was a real estate investor and financial consultant. He proposed a deal that could "save" her house from foreclosure. She would sell the property to the Trust, after which the Trust would lease the property back to her with an option for her to repurchase the property in the future. The option price was based on a formula that assumed that Mullen or the Trust would construct a second-floor addition to the existing house within a reasonably short period after the closing.[8] Under the lease, Balasar would pay $3,800 per month, plus utilities, for a term from April 25, 2019 to October 31, 2020, or 18 months after completion of the work or when an occupancy permit was issued, whichever came later. Two paragraphs of the lease addressed the construction of the second-floor addition:

> 28. OPTION TO PURCHASE: Landlord grants Tenant the option to purchase the property during the term of this lease, for Landlord's original purchase price plus $53,400.00, plus any improvements, costs and expenses related to the improvements to the property, including construction costs, permitting, zoning, building and attorneys fees and costs, at a final purchase price not to exceed Seven Hundred Thousand ($700,000.00) Dollars.
>
> The Tenants Option to purchase shall be deemed waived if the tenant is in default of any provisions of this lease agreement, including its obligation to pay rent. The monthly rent shall increase

6. After parties have waived their "time is of the essence" clause, either may re-establish the clause by giving notice to the other providing a reasonable time for closing, making clear the time and place of closing, and indicating that nonperformance at that time would terminate the agreement. *Blum* v. *Kenyon*, 29 Mass. App. Ct. 417, 422 (1990).

7. Judge Smith ordered that Dossantos would have a period of 60 days from the date of the decision in which to secure financing in accordance with the terms of the agreement. Upon Dossantos's receipt of a commitment letter from a lender, the parties were ordered to schedule a closing on a date and time convenient to the parties and the lender.

8. Balasar intended to rent the addition to her adult son, thereby generating income to help her resolve her financial problems and repurchase the property.

> to $5,000 per month once construction is completed ("completed" is defined as all construction permits signed off and final Certificate of Occupancy issued by the City of Boston). If tenant does not opt to purchase the property, the tenant's lease shall extend to one year from the date construction is completed at $5,000.00 per month. If Tenant is unable to purchase during the Term of this agreement, the option to purchase and lease agreement will expire.
>
> 29. CONSTRUCTION: Landlord agrees during the term of this lease to construct a second floor in size similar to the first floor as a second unit. This provision is contingent upon Landlord obtaining all necessary permits for the City to construct a second unit. If the tenant needs to vacate the property during construction any rent shall be suspended during the tenant's vacancy. Any suspended rents will be collected at the end of the lease or as part of tenant's option to purchase.

Upon execution of the agreement, Balasar conveyed the property to the Trust for $495,850 and continued there, paying rent to the Trust.

Within months, Balasar began to ask Mullen about his efforts to secure approvals from the City of Boston, and when construction of the addition would begin. He had told her that he expected to secure the approvals by July 2019 and that construction would begin in September 2019. Mullen always responded that he was attempting to secure permits, but that the city was rejecting his applications. On January 28, 2020, Mullen told Balasar by email that he had "hit a wall" and that, "The local Zoning lawyers I've spoken with have deferred on handling the appeal."[9] He suggested that he sell the property and share the profits with her. Balasar declined.

In the fall of 2021, Balasar secured pre-approval for a mortgage loan to purchase the property. She told Mullen that, based on the lease's pricing formula, she was prepared to pay the Trust $549,250, representing the price paid by the Trust plus $53,400. The Trust refused to sell the property and made a counteroffer to sell the property to her for $650,000. The Trust's attorney also asserted that Balasar was in default under the lease and, therefore, no longer had a repurchase right. On November 5, 2021, the Trust brought a summary process action seeking possession of the property for Balasar's alleged failure to pay rent. On February 7, 2022, Balasar brought this action. It was around that time that she discovered that neither Mullen nor the Trust had ever attempted to obtain any approvals from the city to construct the second floor addition, *i.e.*, that Mullen apparently had repeatedly lied to her.

Balasar's complaint asserted three claims against the Trust: breach of the lease, for which she sought specific performance of her option to repurchase; an injunction preventing the Trust from selling, encumbering, or collateralizing the property; and money damages for breach of the lease. To prevail on a breach of contract claim, the plaintiff must show that there was an agreement between the parties, that the nonbreaching party was ready to perform, and that the breaching party failed to fulfill its promised obligation. A party that makes these showings is entitled to the benefit of his or her bargain. When the contract involves real property, the court may grant the equitable remedy of specific performance. *Greenfield Country Estates Tenants Ass'n, Inc.* v. *Deep*, 423 Mass. 81, 87-88 (1996). The unique nature of real property and the inadequacy of money damages make specific performance an appropriate remedy for breaches of contracts to convey land. *Pierce* v. *Clark*, 66 Mass. App. Ct. at 914.

The parties' agreement was a unilateral contract giving Balasar the right to buy the property in the future under certain terms and conditions. She has the right, at her election or option, to demand conveyance in the manner specified. Massachusetts common law implies a covenant of good faith and fair dealing in every contract. *UNO Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004). This covenant "provides that neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc.* v. *HBC Associates*, 411 Mass. 451, 471-472 (1991). Thus, the parties' agreement included the implied obligation that the Trust make a good faith effort to obtain the required approvals for the contemplated second floor addition.

Judge Smith found that the record reflected that the Trust took no steps to obtain a building permit and that Mullen repeatedly lied to Balasar by claiming to have made such attempts. And Mullen then compounded his lies by claiming that none of the lawyers with whom he claimed to have consulted would take the appeal. Judge Smith found that construction of the second floor addition appeared to be permitted as a matter of right under the Boston Zoning Code. The failure to even attempt to obtain a building permit for the promised addition breached the express terms of Paragraph 20 of the parties' agreement and breached the implied covenant of good faith and fair dealing. This destroyed the fundamental premise of the agreement, which was for the Trust to create additional living space and then sell the property back to Balasar.

Judge Smith also found that Balasar was ready, willing, and able to repurchase the property based on the formula set forth in the parties' agreement. The Trusts refusal to sell was unjustified; it had received "a substantial amount of rent" since April 2019, notwithstanding its failure to perform its fundamental obligation. Judge Smith found that money damages for the breach would not adequately compensate Balasar for the harm she had suffered. He ordered the Trust to complete the sale of the property to Balasar in accordance with Paragraph 28 of their agreement. He gave the parties until January 5, 2024 to submit their respective positions on the appropriate purchase price under the agreement if they were unable to agree. As of the date of the writing of this commentary, the docket shows that the parties did not agree, and that Judge Smith had ordered them to attend a REBA mediation screening and then to submit a joint report indicating whether they intend to pursue mediation. One wonders how the legal fees the parties will incur to resolve the final repurchase price compares to the difference in what they believe is the appropriate price.[10] ■

9. In Boston, one seeks zoning relief by applying to the Inspectional Services Department for a building permit and then appealing ISD's refusal letter to the Zoning Board of Appeal.

10. From the docket, the price dispute appears to be over whether Balasar should be required to pay anything more than Trust's original purchase price in light of the Trust having breached the agreement from the start.