

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL ACTION
NO: 2377-0354-B**

**EMMERTON HOUSE, LLC,
Plaintiff**

vs.

**RODNEY A. MAURICE, TRUSTEE OF JON-HEATH REALTY TRUST,
Defendant**

**ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS SPECIFIC
PERFORMANCE COUNT AND TO DISSOLVE LIS PENDENS**

This suit arises out of a purchase and sale agreement (P&S) between the plaintiff, Emerton House, LLC, as the buyer, and the defendant, Jon-Heath Realty Trust, as the seller, of a six-unit residential building at 11 Summer Street in Salem (the Property). The agreed-upon sale price was \$2.1 million, and the plaintiff made a deposit of \$150,000. The P&S provided, in pertinent part, that the seller would: equip the Property with approved smoke and carbon monoxide detectors; provide a Certificate of Approved Installation from the Salem Fire Department regarding such detectors; and deliver the Property free of all occupants and tenants. The P&S and the seller's rider thereto provided that, in bringing the Property into conformity or delivering possession of it as agreed, the seller would not be required to incur costs or expenses totaling in excess of \$1,000. The closing date was extended by agreement to March 27, 2023. As of that date, the Property was not completely free of tenants, nor had the seller obtained or provided the certificate relating to smoke and carbon monoxide detectors. The transaction did not go forward.

On April 23, 2023, the buyer filed the instant action. In Count I of its verified complaint, the plaintiff-buyer seeks specific performance of the P&S in the form of an order compelling the

defendant-seller to sell the property pursuant to the P&S terms.¹ In connection therewith, the plaintiff also filed a motion seeking endorsement of a memorandum of lis pendens. The defendant opposed the motion, arguing that the plaintiff had omitted material information from its verified complaint, i.e., the fact that defendant's counsel had sent an email to plaintiff's counsel on March 29, 2023, offering to convey the Property, in its current condition, at a date to be identified within three weeks or, alternatively, to deem the P&S void and return the plaintiff's deposit. The court held a non-evidentiary hearing on the motion on May 4, 2023, after which it allowed the motion, for reasons it set forth in its Order dated May 5, 2023 (the court issued a corrected version of the Order on August 23, 2023, Paper No. 16). In so doing, the court stated:

For present purposes, the court need make no determination as to whether the plaintiff is likely to succeed on the merits of any of its claims, including the one for specific performance. It is certainly apparent to the court that issues such as the vigor of the defendant's efforts to comply with the terms of the P&S are very much contested. The court does conclude on the record presented, however, that, if the facts relating to the March 29, 2023 email were deemed material, their omission from the verified complaint "did not deprive [the plaintiff's] claims of factual or legal support[.]" *Ferguson [v. Maxim]*, 6 Mass. App. Ct. [385,] 393-394 [2019]. That being so, the court must allow the motion for a memorandum of lis pendens.

The defendant has now filed a special motion pursuant to G.L. c. 184, s. 15(c) to dismiss Count I and to dissolve the lis pendens. *See* G.L. c. 184, s. 15(c) (a party aggrieved by the approval of a memorandum of lis pendens "may file a special motion to dismiss the claimant's action if the party believes that the action or claim supporting the memorandum of lis pendens is frivolous"). The court held a non-evidentiary hearing on the motion on October 31, 2023.

Section 15(c) spells out the standard governing a special motion to dismiss thereunder: such motion "shall be granted if the court finds that the action or claim is frivolous because (1) it

¹ The plaintiff advances five other causes of action in its verified complaint: breach of contract (Count II); misrepresentation (Count III); fraud (Count IV); breach of the implied covenant of good faith and fair dealing (Count V); and violation of G.L. c. 93A (Count VI).

is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds.” G.L. c. 184, s. 15(c).² In ruling on a s. 15(c) special motion to dismiss, the court considers alleged facts beyond the plaintiff’s initial pleading (as set forth in affidavits and other documents), and it should only grant the motion if, after resolving all factual disputes and drawing all legal conclusions in the plaintiff’s favor, it concludes that the plaintiff’s claims lack a factual or legal basis. *Martorella v. Rapp*, 100 Mass. App. Ct. 1104, 2021 WL 3234312 *1, *3 (2021) (unpublished Rule 23.0 decision). The moving party bears the burden of proof as to that issue. *Ferguson*, 96 Mass. App. Ct. at 390.

The defendant asserts that undisputed facts establish the following: prior to the extended closing date of March 27, 2023, the defendant filed a summary process action (the SPA) against the tenants of one of the six units at the property, Linda and Paul Morin, seeking to evict them, the Morins had the SPA transferred to the Northeast Housing Court, and a status conference regarding the SPA was scheduled in that forum for March 23, 2023; on March 24, 2023, the defendant notified the plaintiff in writing that it could not convey the Property on March 27, 2023 in conformity with the P&S because four tenants had failed and refused to vacate their rental units and the Property was not compliant with fire control requirements, that it had expended in excess of \$10,000 to deliver possession as agreed, and that it stood ready to deliver Property in its current condition, should the plaintiff exercise its option to proceed with the transaction; the plaintiff did not respond to that offer; in a letter dated March 29, 2023, the

² “[T]he special motion to dismiss offers defendants whose property has been encumbered by a lis pendens a speedy and cost-effective method of addressing frivolous claims and removing an unfounded lis pendens.” *Ferguson*, 96 Mass. App. Ct. at 389. Upon the filing of such a motion to dismiss, discovery is stayed, and if the moving party prevails, it is entitled to an award of costs and reasonable attorney’s fees. *Id.* at 389-390.

plaintiff made what it characterized as a “final” offer for the plaintiff to accept the Property in its current condition, provided the plaintiff identified a date and time for the conveyance no later than 5:00 p.m. on March 30, 2023, and the defendant stated that, if no such date and time was identified by the plaintiff, the defendant would deem the P&S void and it would return the plaintiff’s deposit; the plaintiff made no response to that second “as is” conveyance overture, either before or after the March 30, 2023 deadline; on June 2, 2023, the City of Salem’s Fire Marshall altered his previous determination that monitored full fire alarm systems were required for the property to be in compliance with state law requirements, stating that the defendant could install a “Knox Box,” rather than an entirely new fire control system; the defendant then had a Knox Box installed; on June 14, 2023, the City of Salem issued Residential Smoke and Carbon Monoxide Detector certifications for the Property, an event about which the defendant notified the plaintiff in a letter of June 16, 2023; in a letter dated June 21, 2023, the defendant notified the plaintiff of a “second and final opportunity for the plaintiff to elect to accept the Property in its current condition on or before June 27, 2023,” which opportunity the plaintiff was required to exercise by confirming its intention to do so by 5:00 p.m. on June 23, 2023, failing which, the defendant would deem the P&S void and would return the plaintiff’s deposit; and the plaintiff timely responded in writing, declining the defendant’s offer on the stated ground that the plaintiff could not convey the Property in compliance with the P&S.

Based on those asserted facts, the defendant argues that the plaintiff is not entitled to specific performance because the defendant complied with its obligations under the P&S to try to bring the Property into conformance with the vacancy and fire control provisions and that it was the plaintiff who declined to exercise either of its contractual options under the P&S, i.e., to proceed with the transaction and accept the Property as is or take its deposit back and walk away.

In other words, the defendant contends that the plaintiff was not ready, willing, and able to perform itself, and that it is therefore not entitled to the equitable relief of specific performance. Fundamental to the success of the defendant's argument is its contention that it did everything it was required to do under the P&S to deliver the premises free of tenants and in compliance with fire code requirements, and that it had both made reasonable efforts and expended well over \$1,000 to bring the property into compliance. With respect to the fire control issues in particular, the plaintiff asserts that, once the City's Fire Marshall expressed satisfaction with the fire control system on the premises after installation of the Knox Box, and after the Fire Marshall had issued the smoke and carbon monoxide detector certifications for the premises, there was no legal impediment to performance by the plaintiff. The defendant thus asserts that the plaintiff is, in effect, seeking specific performance of a new or amended P&S.

The plaintiff supports its opposition to the motion to dismiss with an affidavit of the manager of Emerton House, LLC, Richard Pabich. Pabich avers as follows, in material part: two apartments in the Property are presently occupied (the one by the Morins and one other);³ the defendant filed an eviction action only against the Morins, it twice agreed to continuances of court dates in that SPA action, and it settled the action with an agreement that permits the Morins to remain in possession of their apartment; in February 2023, the defendant was cited for twenty-five violations of the State Sanitary Code in the Morins' apartment; thirteen of the twenty-five violations had not been corrected as of May 1, 2023; the defendant's installation of a Knox Box made the four unoccupied units accessible only to the City of Salem's Fire Department, and it was that inaccessibility that permitted inspection of the Property as a two-family dwelling;

³ The court was told at the motion to dismiss hearing that only the apartment occupied by the Morins now remains tenanted, the other tenant(s) having now moved out.

consequently, at the time of the defendant's June 21, 2023 renewed offer to close, four of the six apartments were under the control of the Fire Department and full possession could not be delivered to the plaintiff.⁴

The crux of the plaintiff's opposition to the motion to dismiss is that it justifiably rejected the defendant's various offers to convey the Property in a condition that did not comply with the requirements of the P&S. Most significantly, the plaintiff argues that it was not until long after the time for performance that the defendant finally obtained the required smoke and carbon monoxide detector certifications, but they were based on the Knox Box "ruse" to create an appearance of compliance with the P&S provision. The plaintiff asserts that the certifications pertain only to what were the two occupied apartments, and not to the building as a whole, and that it was therefore being offered a building that was not in compliance. The plaintiff also contends that the defendant did not use "reasonable efforts," as was required under the P&S, to bring the Property into compliance, asserting that the defendant's alleged lackluster performance was a consequence of its desire to take advantage of an improved real estate market and sell the Property at a higher price. Finally, the plaintiff notes that there were many Sanitary Code violations in the Morins' apartment about which it was not notified, and which went uncorrected up to the time for the defendant's performance, in violation of the P&S's requirement that there

⁴The record before the court provides scant information about the Salem Fire Marshall's determination that the installation of a Knox Box alleviated the necessity of a full monitored fire alarm system for a building with six or more units. Nor does the record make clear the significance and import of the Certificate of Compliance that the City issued regarding smoke and carbon monoxide detectors that the City issued for the Property after the Knox Box was installed. The court is uncertain as to what the certificate means with respect to access to, and occupancy of, the various units in the building, or its impact on the future development of the Property in a manner contemplated by the plaintiff. No documentation or correspondence from the City has been provided to explain such things. At the motion to dismiss hearing, counsel for the parties did explain to the court that the certification made in the certificate was based on the non-occupancy of the four units for which the Knox Box holds keys.

be no outstanding violations of any building or health law, bylaw, code, or regulation.

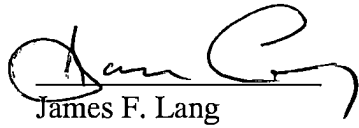
The court concludes that there are contested facts that preclude a determination by the court, at this juncture, that the plaintiff's claim for specific performance is devoid of any reasonable factual support or any arguable basis in law. The court ventures no opinion as to the strength of the claim for specific performance. It determines only that, on the record presented, and applying a standard that is generous to the non-moving party, the claim is not bereft of the minimal factual and legal support that is required to sustain it at this juncture.⁵ It follows that the defendant's special motion to dismiss and to dissolve the lis pendens must be denied.

⁵ Based on the evolution of events since the plaintiff's claim for specific performance was first filed, it appears that that claim is now principally focused on delivery of the premises in compliance with legal requirements regarding fire detection/suppression if the Property, such that there is no post-sale impediment to the plaintiff using or developing the Property in whatever manner it sees fit. Such compliance is, to the court's understanding, a necessary legal obligation on the part of the defendant, even if the defendant has expended over \$1,000 with respect to its efforts to "make the Premises conform," i.e., to "equip the residential structure on the Premises with approved smoke detectors and carbon monoxide detectors and furnish BUYER with Certificate of Approved Installation from the Local Fire Department."

With respect to the vacancy requirement, the defendant's expenditure of well in excess of \$1,000 to evict the remaining tenants would appear to relieve it of any further responsibilities to achieve compliance with that provision. That seems so even if the defendant's efforts in that regard have been less vigorous than the plaintiff contends they ought to have been. It is therefore not clear to the court that the plaintiff has a viable claim at this juncture for conveyance of the Property free of all tenants.

As for the code violations, the defendant represented through counsel at the motion to dismiss hearing that they have all now been cured. The violations were unknown to the plaintiff when it filed its complaint and first sought specific performance. Nevertheless, the P&S requires that, at the time of conveyance, "there shall be no outstanding notices of any violation of any building, zoning, health or environmental law bylaw, code or regulation, except as agreed." It does not appear that, at the time that the defendant offered to convey the Property to the plaintiff as is, in May 2023 and again in June 2023, it could do so in compliance with that requirement. The plaintiff's assertion that the defendant was not ready to perform at the time that it rejected those "as is" offers, and that it therefore justifiably rejected them, is not without some factual and legal support.

SO ORDERED

A handwritten signature in black ink, appearing to read "James F. Lang", written over a horizontal line.

James F. Lang
Justice of the Superior Court

Dated: November 6, 2023