

What Do You Mean “The Contract is Binding”?

Avoiding inadvertent agreements

By Nisha Koshy, Esq.

With very few exceptions, any agreement for the purchase or sale of real estate in Massachusetts must be in writing to be enforceable. For decades, real estate agents, developers, sellers and buyers have used preprinted forms titled “Offer to Purchase” to set forth the essential but initial terms of the deal. The Offer to Purchase forms typically include the address, price, anticipated closing date, inspections to be conducted and other fundamental terms. Offers to Purchase often contain a contingency that the ultimate transaction is, however, subject to the execution of a more comprehensive and superseding Purchase & Sale Agreement. Usually, the execution of a mutually satisfactory Purchase & Sale Agreement follows without any problems. The terms of the detailed Purchase & Sale Agreement then will supersede the relatively skeletal terms of the Offer to Purchase. Sometimes, however, issues arise that derail the execution of a Purchase & Sale Agreement. When that happens, one party often points to the Offer to Purchase form and seeks to enforce its terms notwithstanding the absence of the contingent Purchase & Sale Agreement.

A newly recalcitrant seller might be surprised to learn that Massachusetts law often allows for the enforcement of an Offer to Purchase form notwithstanding the failure to obtain the stipulated signed Purchase & Sale Agreement. If the Offer to Purchase form contains the essential terms of the transaction, then the seller may confront a lawsuit by the buyer to compel the transfer of the property upon these essential terms. Anyone signing the Offer to Purchase form should be aware of the possibility that the Offer to Purchase could prove to be a dispositive agreement in and of itself.

Brokers and agents have a business pecuniary interest in garnering both the seller’s and the buyer’s signatures on an Offer to Purchase form as swiftly as possible. Resist the pressure and the temptation to sign such a form without the guidance of counsel. Do not wait for the Purchase & Sale Agreement stage to engage counsel. Have your attorney review the Offer to Purchase form before you sign.

If you do not want the Offer to Purchase form to be binding without a signed Purchase & Sale Agreement, then you should include an express provision to the effect that, “Notwithstanding anything to the contrary stated herein, this document is not intended to be a binding agreement and/or an enforceable agreement.”

If you prefer that the Offer to Purchase form does serve as an enforceable agreement even in the absence of a signed Purchase & Sale Agreement, then ensure that all the essential terms are included within the Offer to Purchase. Spell out the deal precisely and completely. Do not leave any ambiguities or vague terms that contradict the notion that the parties reached final agreement on all essential terms.

The lesson here is that the Offer to Purchase form often does not represent a “maybe.” Quite often, it represents a commitment. As with all meaningful financial commitments, a prudent person should consult with counsel too soon rather than too late.

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