

Is Performance Enough?

New Law Changes the Rules on Contracts

By MICHAEL J. GRILLI

In today's business environment, you most likely deal with contracts on a daily basis. You draft and negotiate and can quote boilerplate language in your sleep. You could always rely on the fact that, regardless of the battles that must be fought to get both sides to perform duties under a contract, once it was done, it was done.

This was until recently.

The Massachusetts Appeals Court has recently held that even if a contract is completed, and both sides got what they bargained for, one party may still sue the other for breach of contract.

The case of *Perroncello v. Donohue*, may very well change the way that many practitioners draft their contracts and how they negotiate with each other while performance of the contract is pending. What follows is a brief description of the case.

In *Perroncello*, the buyer and seller negotiated the purchase of a piece of real estate for \$2,250,000. The contract called for the purchase to take place on a certain date with a non-refundable deposit of \$150,000. The contract also stated that "time is of the essence," and called for the deposit to be the measure of damages, should the closing not take place on time. The buyer was unable to get his financing in place, and he asked for an extension to the closing date. There was

no written extension, and subsequently the seller sued the buyer seeking consummation of the deal.

After a period of litigation, the deal finally closed. The seller received the entire purchase price, and the buyer paid a considerable amount of carrying costs on the

property during the period between the original closing date and the date upon which the property did actually close. In the case at hand, it can be assumed that counsel for the buyer felt that as long as the deal closed, there would not be any further issues. After all, the seller got the contracted price and suffered no real harm by the delay in the closing.

Unfortunately, harm or dam-

ages is not the issue. Either you do breach the contract or you do not. In dealing with instances where either you or your client has this type of exposure, the simple rule of 'get it in writing' should prevail. Had extensions to the closing date and a release from any liability been signed at the time of the closing, this situation could have been avoided.

quences. In the *Perroncello* case, the attorney for the buyer likely assumed that the "time is of the essence" provision was not important because the parties kept working toward the eventual closing. His attitude is not unusual. Too often, a laissez faire attitude is taken and people assume that as long as you get the deal done, it doesn't matter how you get it accomplished. This 'ends justify the means' approach doesn't always work. A little attention to detail can prevent a huge issue later. In daily practice, most people like to think that they cover all bases; however, a situation such as this amplifies the need to be detail-oriented and take nothing for granted.

There is still a chance that the Supreme Judicial Court could overturn this ruling, however, a case such as this should enlighten all business people as to how they should handle negotiation and drafting of contracts. They must watch their clauses because they will be expected to abide by them.

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Under most circumstances, you would think this is where the story ends. However, in this case, the seller was not satisfied and sued for the \$150,000 in damages, as previously agreed upon under the terms of the contract. The Appeals Court held that, regardless of the eventual outcome, the buyer did not perform on time, and the seller was entitled to the \$150,000.

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In today's business climate, especially in the hectic world of real estate, people often take the attitude that everything is just boilerplate language and that any additions or modifications can be handled outside of the terms of the contract and put into effect later. This is a dangerous way to do business and one that can often have disastrous conse-