

**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



June 2020

## **Massachusetts Land Court Dismisses Claim Asserting COVID-19-Related Impossibility Defense**

In a June 1, 2020, decision and order, the Massachusetts Land Court dismissed the complaint of Christopher Martorella, who sought relief resulting from his failure to secure financing and inability to close a real estate transaction in the midst of the Coronavirus Disease 2019 (COVID-19) pandemic. Among other things, Martorella sought an injunction to continue the closing date of the subject real estate closing to July 6, 2020, on the basis that his performance was rendered impossible by the effects of the pandemic.

In February 2020, Martorella was the winning bidder for a property (the Property) that had been subject to a partition action. In that action, the court appointed a commissioner (the Commissioner), who recommended selling the Property and distributing the proceeds to relevant parties. After failing to sell the Property on the open market, the Commissioner held a public auction. Martorella attended and won the auction, bidding \$1,827,000. As the winning bidder, Martorella signed a purchase and sale agreement (the Agreement), pursuant to which Martorella paid a \$50,000 deposit and an additional deposit of \$132,700 a few days later, with the balance due at closing on March 16, 2020. Pursuant to the Agreement, if Martorella failed to close, the Commissioner could retain the deposits. Notably, the Agreement had no financing contingency clause.

Martorella attempted to obtain financing for the Property through a mortgage in the name of his wife and business partner. After “difficulty obtaining financing for the closing because of the effect of the

coronavirus pandemic on the economic markets,” Martorella requested and obtained from the Commissioner two extensions of the closing date — to March 23, 2020, and then to April 6, 2020. During that period, Martorella’s wife (co-applicant for the mortgage financing for the Property) was diagnosed with COVID-19 and later hospitalized.

Still unable to close because of his lack of financing by April 2020, Martorella attempted, but failed, to negotiate another extension of the closing date. Thereafter, Martorella filed the complaint in this action against the Commissioner and other parties with interest in the Property (collectively, the Defendants), while also seeking a temporary restraining order (TRO) restraining the Commissioner from selling the Property. The court refused to issue the TRO. Martorella stated in his complaint that his wife’s health and the “COVID-19/coronavirus crisis has made it impossible for me to continue with the closing on April 6, 2020” and noted “the financial effect it has had on the financing process for the closing.” Martorella further asked for a 90-day continuance of the closing to allow for closing as “initially planned before the unforeseen coronavirus emergency.”

Defendants filed special motions to dismiss the complaint. Under Massachusetts law, in a proceeding affecting title to real property or concerning the recordation and registration of a memorandum of *lis pendens*, a special motion to dismiss will be granted if the court finds that the action or claim is frivolous because (1) it 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.

The court granted Defendants’ motions to dismiss on the basis that the impossibility doctrine under Massachusetts law did not excuse Martorella’s failure to perform. Generally, under the impossibility doctrine, the parties must have contemplated the continued existence of “some particular specified thing as the foundation of what was to be done” and in the “absence of any warranty that the thing shall exist,” the parties’ performance may be excused when the “performance becomes impossible.” However, according to the court, the risks must be beyond the scope of the assignment of risks inherent in the contract.

In seeking excusal for his lack of performance on the basis of impossibility, Martorella argued that he and the Commissioner had not contemplated the effects of COVID-19, and how the resulting complications would prevent Martorella’s wife from doing what she needed to do to aid him in financing the transaction. The court rejected this argument because it was “undisputed” that the Agreement addressed financing “albeit in the simplest of ways” through Martorella’s agreement to pay the remainder due at closing, and Martorella had “assumed” that risk. Further, the court concluded that the impossibility doctrine did not apply because Martorella’s wife was the one who suffered from “incapacity,” and she was not a party to the Agreement. Moreover, Martorella had acknowledged in the Agreement that there were no contingencies to his performance. While the court recognized that the result “may feel harsh,” it noted that the decision was in accordance with precedent. For these reasons, the court dismissed the complaint.

### **Implications**

Although decisions from the Massachusetts Land Court are not binding precedent, the decision underscores that a contracting party should understand and consider risks inherent in a contract — including potential pandemics and other acts of God — and allocate those risks accordingly in the contract language itself as well as consider including a specific “force majeure” clause to excuse nonperformance and breach should a foreseeable or unforeseeable risk occur.

For more information and updates on the developing COVID-19 situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

## Authors

This GT Alert was prepared by:

- [John C. Molluzzo, Jr.](#) | +1 212.801.6809 | [molluzzoj@gtlaw.com](mailto:molluzzoj@gtlaw.com)
- [David G. Thomas](#) | +1 617.310.6040 | [thomasda@gtlaw.com](mailto:thomasda@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. <sup>~</sup>Houston. Las Vegas. London. <sup>\*</sup>Los Angeles. Mexico City. <sup>+</sup>Miami. Milan. <sup>»</sup>Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. <sup>∞</sup>Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. <sup>^</sup>Tokyo. <sup>»</sup>Warsaw. <sup>-</sup>Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. <sup>~</sup>Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>\*</sup>Operates as a separate UK registered legal entity. <sup>+</sup>Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>»</sup>Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>∞</sup>Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. <sup>^</sup>Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. <sup>»</sup>Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>-</sup>Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*