

‘McCarthy’ 13 years later

By Vincent J. Pisegna
and Jonathan A. Scharf



PISEGNA



SCHARF

Thirteen years ago, the Supreme Judicial Court issued its groundbreaking decision in *McCarthy v. Tobin*, 429 Mass. 84 (1999), enforcing the terms of an Offer to Purchase, or OTP, notwithstanding the failure of the parties to execute a formal purchase and sale agreement that was expressly required in the OTP.

What has happened since? As will be described here, *McCarthy* has been cited many times. It remains vital in the realm of real estate transactions and, more importantly, but not surprisingly, has been applied in areas other than real estate transactions.

The ‘McCarthy’ holding

In *McCarthy*, the parties executed a standard form OTP, which provided, inter alia, that the transaction was “subject to a purchase and sale agreement satisfactory to Buyer and Seller.”

The defendant seller, who sold the subject real estate to a third party after the failure to obtain a formal, executed P&S

from the plaintiff buyer, argued that the OTP was not binding because no P&S was ever executed.

The buyer claimed the parties to the OTP intended to be bound by the OTP, and the execution of a P&S was a mere formality.

The SJC agreed with plaintiff buyer, finding that “the controlling fact is the in-

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tention of the parties” to be bound, that the OTP contained all the material terms of the deal, and that the P&S was merely to serve as “a polished memoranda” of a binding contract.

‘McCarthy’ as applied to real estate disputes

Over the past 13 years, the holding in *McCarthy* has been routinely applied to real estate disputes.

In *Fallon v. Batchelder*, 60 Mass. App. Ct. 1110 (2004), the Appeals Court held that the OTP executed by the parties fell squarely within the confines of the *McCarthy* OTP as it set forth all material terms of the transaction and reflected an intent by the parties to be bound.

The only alleged ambiguity in the OTP concerned the closing date, which was not explicitly specified.

The Appeals Court held, however, that although a specific date was not specified, the OTP unambiguously set forth a mechanism (contingent on a future septic system inspection by an outside party) for determining when the closing would occur.

The Appeals Court held that all other terms unresolved by the OTP were merely

subsidiary matters with established norms for their customary resolution. Thus, the OTP was held to be a binding contract.

Numerous lower court decisions have also held an OTP to be enforceable, citing *McCarthy*. See, e.g., *Gilchrist v. Fitzgibbons*, 2007 WL 6930042 (Mass. Super. Oct. 22, 2007); *Faucher v. Therrien*, 2006 WL 3293277 (Mass. Super. Sept. 27, 2006).

Most recently, in *Friedman v. Bonds*, 81 Mass. App. Ct. 1115 (2012), the Appeals Court rejected a purchaser’s effort to enforce a signed OTP that the purchaser described as “identical” to the form found binding in *McCarthy*.

In *Friedman*, the parties had indeed executed an OTP setting forth the same material terms as found in the *McCarthy* OTP — identification of the property, purchase price, closing date and expiration of the offer.

The Appeals Court, however, found that following the inspection of the property, the purchaser (a) attempted to renegotiate the purchase price, and (b) insisted on the inclusion of a material term in the purchase and sale agreement — i.e., that at least one unit in the building be vacant (which would have required the seller to issue a notice to quit to at least one tenant) to which the seller had already indicated he was not willing to agree.

The Appeals Court first held that the attempt to include in the purchase and sale agreement a new material term took the case outside the purview of *McCarthy*, because in *McCarthy* the remaining terms to be covered by the P&S were merely subsidiary.

Other Appeals Court decisions have likewise distinguished *McCarthy* where the facts of the case before the court were materially different.

Vincent J. Pisegna is a partner at Krokidas & Bluestein in Boston. Jonathan A. Scharf is an associate at the firm.

In *Corkery v. Scofield*, 69 Mass. App. Ct. 1114 (2007), *McCarthy* was held to not apply because the handwritten “gentleman’s agreement” at issue did not include material terms such as a closing date or location and did not contain language indicating that it was a binding agreement.

In *Walsh v. Morrissey*, 63 Mass. App. Ct. 916 (2005), the Appeals Court held that the addition of a two-page addendum to the OTP containing complex and ambiguous terms introduced elements too significant to be considered subsidiary and too vague to constitute a binding agreement.

Application of ‘McCarthy’ to commercial contract disputes

In *Fecteau Benefits Group, Inc. v. Knox*, 2005 WL 6112912 (Mass. Super. Oct. 3, 2005) (Fabricant, J.), the parties tried a contract action through verdict, but then reached a dispute over attorneys’ fees prior to entry of judgment.

Prior to an evidentiary hearing on the fee issue, counsel for the parties attempted to negotiate a resolution to the matter, communicating primarily via email.

Plaintiff’s counsel finally set forth a final proposal concerning the amount of the fees to be paid and other conditions, which defendant’s counsel accepted, adding: “We need to reduce this to a writing.”

Plaintiff’s counsel agreed that “it is crucial to get it spelled out in writing.”

The parties then postponed a status conference pending execution of a formal, written agreement. The following week, the defendant rescinded its acceptance of one of the points of the agreement, and the plaintiff filed a motion to enforce the agreement.

Relying on *McCarthy*, the court held that the email exchange between counsel for the parties reflected an intent by the parties to be bound by the terms set forth therein. The email exchange included all material terms and unequivocal language expressing agreement to those terms.

The court further found, citing *McCarthy*, that the only purpose of any subsequent writing would be “to serve as a polished memorandum of an already binding contract.”

Finally, the court in *One to One Interactive, LLC v. Landrith*, 2004 WL 1689790 (Mass. Super. July 8, 2004) (Van Gestel, J.), relied in part on *McCarthy* in enforcing a term sheet for a share repurchase and employment termination agreement, even though a formal repurchase agreement was never executed.

Specifically, the parties executed a term sheet setting forth the value of the shares and a specific repayment schedule over a period of five years. A formal redemption agreement and promissory note consistent with the term sheet was drafted, but never executed.

The employer immediately commenced making payments as set forth in the term sheet and continued to do so for 14 months.

After 14 months, the employer attempted to renegotiate the repayment amount based on an alleged reduction in the share value, but the parties never reached new terms. After the failure to renegotiate the deal, the employer ceased making payments.

Relying in part on *McCarthy* and its predecessors, the court held that because the term sheet set forth all of the material terms of the parties’ agreement, it was a valid, binding agreement notwithstanding non-execution of the contemplated formal share repurchase agreement.

Conclusion

McCarthy v. Tobin remains a vital doctrine, not only in the world of residential real estate, but in commercial transactions as well.

Where parties agree to the material terms of a transaction and reflect an intent to be bound, courts will not hesitate to enforce such an agreement, even absent the execution of an anticipated formal contract.

However, courts also appear to be careful to ensure that all of the *McCarthy* elements are clearly met before taking this important step.

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