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## Appeals Court Finds that COVID-Related Hospitalization does not Excuse Performance of Contract

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The Massachusetts Appeals Court recently affirmed an Order of the Land Court dismissing a Complaint and awarding attorney's fees to a Rich May client. The Appeals Court affirmed that a COVID-19 diagnosis, even one resulting in lengthy hospitalization, does not excuse performance under a contract.

The case arises out of a partition action brought on behalf of a Rich May client involving property on Nantucket. The Commissioner appointed by the Land Court conducted an auction to sell the property. The winning bidder then breached the terms of the purchase and sale agreement by failing to perform, thereby forfeiting the \$182,700 deposit. He sued the Commissioner and our client asserting that his performance was excused because his wife (a party to the partition action but not a buyer under the terms of the Purchase and Sale Agreement) contracted COVID-19 and that interfered with his ability to obtain financing and close the transaction. The Land Court granted a Special Motion to Dismiss, dismissing the case and awarding attorney's fees.

The issue before the Appeals Court was whether the Court should affirm the grant of the Special Motion to Dismiss because the Amended Complaint was devoid of any arguable basis in law. The underlying Purchase and Sale Agreement between the Plaintiff and the court-appointed Commissioner did not have a financing contingency that the Plaintiff-Appellant could rely upon to excuse his performance and he had no other contractual basis to unilaterally extend the closing date.

The Appeals Court affirmed the dismissal of the Plaintiff's case and awarded additional attorney's fees. The Court ruled that while the Plaintiff might have been excused from physically appearing at the closing while he was quarantined, that did not excuse his performance as he was no longer quarantined when the closing was supposed to occur. The Court then rejected the Plaintiff's argument that the doctrine of impossibility excused his performance where he asserted that his wife's illness made it impossible for him to obtain the necessary financing. This argument failed (a) because the Plaintiff's wife was

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not a party to the Purchase and Sale Agreement and (b) because there was no financing contingency in the Purchase and Sale Agreement. The Court reaffirmed that for the impossibility doctrine to have applied the Plaintiff's wife's COVID-19 diagnosis must have impacted on a bargained-for risk. In other words, COVID-19 cannot give rise to a financing contingency that was not in the contract to begin with.

A [full copy of the Appeals Court's decision](#) can be found online.

Jeff Loeb, a Managing Director of Rich May and Chair of its [Real Estate and Title Litigation Practice Group](#), represented the Petitioners in the Partition Action and argued the case in the Appeals Court on their behalf.

As a result of the Appeals Court's decision a new auction has been scheduled for Oct. 22, 2021. Information about the property and the auction can be found at <http://www.jjmanning.com/property.cfm?id=920>

*Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Jeffrey B. Loeb.*