

May 9, 2005

## Appeals Court Holds Buyer's Rights Under Unrecorded Purchase and Sale Agreement have Priority Over Mortgage

In the case of *Queeno v. Colonial Co-Operative Bank* decided by the Massachusetts Appeals Court on May 4, 2005, Saturday Company entered into an agreement with the plaintiffs to sell a parcel of land to the plaintiffs and construct a residence on it. Saturday Company obtained a mortgage loan from the bank and as part of the application process gave the bank a copy of the Purchase and Sale Agreement (the "Agreement"). The bank made the loan and recorded a mortgage on the land. Saturday Company stopped construction and refused to convey. The plaintiffs sued for a specific performance and obtained a *lis pendens*. Saturday Company defaulted on the bank loan and the bank started foreclosure. The plaintiffs sought a judgment that declared the mortgage subject to the Agreement. The Trial Court entered partial summary judgment in favor of the bank. The Appeals Court reversed and held that since the bank had actual notice of the Agreement, the plaintiffs' rights under the Agreement, which constituted an equitable interest in the land, have priority over the mortgage. The case was remanded. The opinion does not discuss what rights, if any, the bank has to the purchase price and to what extent the price would be abated by virtue of the incomplete construction. However, this case makes it clear that in real estate mortgage lending, if the lender is aware of outstanding purchase and sale agreements at the time of the recording of the mortgage, it should require the purchaser to subordinate its rights to the mortgage.