**FORCING A SELLER TO CLOSE**

**By: William G. Morris, Esq.**

The real estate market is red-hot. Sellers can have seller’s remorse in a normal market, thinking property was sold too cheap. When the market is on fire, even more sellers think they sold too cheap and try to get out of their contract.

Some buyers think they paid too much, but that does not happen often in a hot market. The current market is so hot that a lot of sellers get multiple offers at the same time. In a hot market, most buyers are happy just to get a seller under contract for property the buyer wants. It is usually a seller and not a buyer who wants to cancel the contract in a hot market. That can leave a buyer with a seller who simply refuses to close.

Contract law provides that the parties to a contract are entitled to the benefit of their bargain. If one party breaches a contract, the other is usually entitled to money damages that would place him or her in the position they would occupy without a breach by the other party. When a contract seller refuses to sell on terms in the contract, the buyer is usually entitled to anything extra the buyer has to pay to buy a comparable property plus additional expenses incurred by the buyer that resulted from the seller’s breach. Another way of measuring a buyer’s damages is the difference between market value and the contract price.

One problem with money damages for a buyer is there may not be comparable property available at any price. At least there may not be property the buyer wants to buy. Another problem is arguing about what is “comparable” or market value. The result can be a lengthy and expensive lawsuit rolling the dice to find out what the jury or judge decides.

Perhaps the biggest problem with a claim for damages when the seller refuses to close is that the buyer really wanted the seller’s property and does not want to buy anything else. Location, view, amenities all combined to create uniqueness. Even houses next door to each other are different enough that a buyer might want one and not the other.

Real estate is considered unique. The law agrees that each piece of real estate is different. When a seller is selling something that is unique and could not be replaced by purchasing another, the law provides buyers with a remedy in addition to a claim for money damages. That remedy is specific performance.

Specific performance is just what it says. A buyer can sue the seller to force the seller to perform under the contract. That means a real estate buyer can sue the seller to force the seller to closing. Biggest drawback of this process is that it can take months or even years to conclude before the buyer gets the property. That might be okay with an investor, but not too attractive to a buyer who needs a home right away.

If the buyer wins, the court orders the seller to convey title and close in accordance with the contract. If the seller still refuses, the seller may be held in contempt of court. It is a rare seller who does not comply with the court order, albeit some may file an appeal.

Forcing the seller to convey title is a big victory for a buyer, but might be expensive. Attorney fees in a lawsuit can be $50,000 or more. The buyer may find interest rates have gone up on the mortgage the buyer was using to buy the property. The property may need repairs.

Good news for the buyer is that the court can also award damages to go along with a judgment for specific performance. Bad news is attorney’s fees are not available in a specific performance lawsuit, unless the contract between the parties provides for award of attorney’s fees to the prevailing party. A buyer might want to make sure the contract provides for attorney’s fees to the prevailing party before filing a lawsuit arising from the contract.

A buyer can face a lot of expenses from a seller’s breach and forcing the seller to convey title is not going to make the buyer whole. The buyer is entitled to the benefit of the buyer’s bargain, which is why a court can award damages in addition to specific performance.

The benefit of the bargain is getting the property as it should have been received on the date it was supposed to be received. Damages awarded by the court must naturally flow from the breach of contract and the circumstances known to the parties at the time. Repaid costs may be recoverable. Rent collected by the seller for time after the original scheduled closing are one example of damages that can be awarded.

The court might also award increased interest expense if rates go up on the buyer’s mortgage. If the contract was a cash purchase and obtaining a mortgage not part of the transaction, the court may not award the buyer increased interest expense. In that case, mortgage was not part of the “deal.” Each case is different and the buyer should review all of the facts with an experienced attorney before filing suit.

Forcing the seller to convey title is one thing; collecting money damages from the seller is another. The buyer might find the seller uncollectible. In most cases, the buyer better make sure the buyer really wants the property and is willing to pay the cost of a lawsuit to get it without counting on the seller reimbursing those costs.

Sometimes even buyers in a hot market refuse to close. If a buyer refuses to close, the seller can sue for money damages calculated as the difference between what the buyer was going to pay and what the property was worth (or more likely what the property eventually sells for). Most form contracts take away that seller right and replace it with a clause which states that in the event the buyer defaults, seller is limited to keeping any deposit made, and in some contracts any deposit that was supposed to be made. That means a seller should ask for a big deposit.

Sellers can also seek additional damages which would naturally be expected to flow from a buyer’s failure to close, such as carrying expenses and possibly even repairs that are required after the scheduled closing date. Attorney’s fees? Once again, attorney’s fees can be obtained only if provided by the contract.

Under the doctrine known as mutuality of remedy, Florida law also allows the seller to sue a buyer for specific performance. It is rarely done because the buyer will probably still not perform, which means the seller has to sell the property and apply the proceeds of sale to the court judgment and chase the buyer for the difference. That is cumbersome. Most sellers prefer to simply sue for damages.

Specific performance is a powerful tool for a buyer when a seller defaults. It is not without drawbacks. For that reason, a seller’s default should not result in a rush to the courthouse before careful pre-suit analysis with an experienced attorney is essential.

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