**BUYER HAS OPTIONS WHEN A SELLER DEFAULTS**

**BY: WILLIAM G. MORRIS, ESQ.**

Seller’s remorse is an often-discussed topic among real estate professionals. It means a seller having second thoughts after entering a contract to sell real property. It is especially common in condominium sales, when a neighbor tells the seller that the neighbor has a friend that would have paid even more. The seller does not think about the long road between getting that neighbor’s friend to contract, but instead thinks the neighbor’s friend would buy for sure and the seller sold too cheap.

Seller’s remorse is not unusual. It can lead to the seller refusing to close on sale leaving the buyer standing alone at the closing altar. What can the buyer do when the seller refuses to close?

First thing is to review the contract and see if there are any limitations on what the buyer can do. Some contracts require the parties to mediate all disputes before suit can be filed. Others mandate arbitration. Some contracts limit the buyer’s options. Contracts which purport to limit the buyer’s option to return of deposit are generally held to provide an illusory remedy and that limitation is thrown out. Assuming no contract limitation, the buyer has options.

The buyer’s first option is to accept the seller’s refusal, get a refund of any escrowed deposit and look for another property. In some cases, the buyer, too, has remorse and may actually be happy the seller wants to call off the deal. That is pretty rare because once the seller decides not to close most buyers want the property even more. Some buyers don’t want to fight and will simply walk away.

A seller refusing to close makes most buyers want what they contracted to buy and they will not walk away. If the seller refuses to close after demand, these buyers can sue the seller for what is known as specific performance. Specific performance is just what it sounds like. It is a lawsuit to force the seller to perform the seller’s contractual obligations.

If the buyer wins, the judge orders the seller to closing. If the seller still refuses, the closing can be arranged through a receiver and the seller can be jailed for contempt of court. Those available options are why sellers almost always cooperate after they lose a specific performance lawsuit.

A specific performance lawsuit is not only to force the seller to close, but also can allow the buyer to recover any additional expenses the buyer has incurred as a result of the seller’s default. Those expenses generally limited to those which people would agree would be naturally expected from the seller’s breach and can include lost rent or fair rental value from original closing date to actual closing date interest on borrowed money and possibly additional cost for a loan or insurance or rates went up. Attorney fees are only recoverable if provided by contract.

Specific performance is not available in all breach of contract cases but is available in real estate sales. Specific performance is an equitable remedy that is limited to situations where the item being purchased is unique and the buyer could not buy the same item from another source. Real estate is considered unique, even though most of us would agree that a particular house or a condominium in a building is virtually the same as the neighbor. That is because Common Law inherited from England and applicable to all states except Louisiana (civil law from France) holds each real estate parcel is unique.

The buyer can also sue the seller for damages instead of specific performance. Damages are generally measured as the difference between the value of the property on the date of closing and the contract price. That might be an attractive option if the buyer was getting a bargain, the property value was substantially more than contract or had increased since date of contract and the buyer would prefer money to the property.

The measure of damages in a breach of contract case is generally the difference between the contract price and fair market value on the date of the seller’s breach plus any incidental expenses of the buyer. Actual value is usually established by appraisal but in some cases is determined by the seller entering contract with another buyer.

Defaulting sellers may also face additional expense of commission to a listing brokerage which the seller contracted to sell the property. Most listing contracts provide that the listing broker compensation is earned when the broker procures a ready, willing and able buyer. Payment is deferred until closing in most cases. Seller refusal to close mean the seller still owes commission. If the seller does not think about that aspect of refusing to close, the seller may be rudely surprised and left even poorer than the seller imagined.

Seller defaults are more common in hot markets but in those same markets buyers are even more committed to purchase. Seller’s remorse will not be enough to avoid a contract that the buyer wants to close.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***