

Specific Performance

Everyone recognizes that a buyer and seller can sue each other – after mediation of course – in the event of a breach of contract.

Buyers have a special breach of contract remedy though, called “specific performance.” That is, a court can order a seller to specifically perform the contract, which means that the court will order the seller to sell the property to the buyer. If the seller does not obey that court order then the seller can be held in contempt of court or the court can appoint a third party to execute the deed to the buyer on the seller’s behalf.

Moreover, a buyer can file a notice *lis pendens* (Latin for pending litigation) in order to prevent the seller from selling the property to someone else while the lawsuit is pending. This document is filed in the courthouse land records, and constitutes record notice to any potential purchaser of the property that someone else claims an interest in it. As a result, other potential buyers cannot obtain clear title to the property thereby preventing its sale. This is a very powerful tool available to a buyer.

A recent case, *Alaragy v. Dengler* (VLW 004-8-178), out of Northern Virginia, illustrates this remedy clearly. In *Alaragy* the buyer and seller signed a time is of the essence contract calling for closing on June 30th, which was later amended by the parties to require closing on August 31st. The contract obligated the seller to provide the buyer with a written termite inspection no more than 30 days prior to settlement. The buyer had applied for financing and tentatively was approved, but the lender needed the termite inspection report in order to finally approve the loan and approve settlement. For reasons not published, it seems reasonably clear a dispute arose between the parties and the seller refused to provide the termite inspection report prior to the closing date. The seller argued providing the letter on the closing date was good enough because that is what the contract said. Of course, that prevented the buyer from getting final loan approval, which meant the buyer could not close. The buyer, having obtained the termite inspection report on the August 30th closing date, then faxed it to his lender,

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and the lender was ready and able to close on September 4th, but the seller refused to close after August 30th arguing that time was of the essence.

The buyer then filed suit seeking specific performance of the contract. The buyer alleged that the seller had breached by refusing to turn over the termite inspection report prior to the closing date. The court found for the buyer and ordered the seller to perform the contract and sell buyer the property.

The court wrote as follows: "Because the [Buyer] was ready, willing and eager to perform his duties as set forth in the contract, the delay in the [Buyer's] performance was due to the actions of the [Seller], and the [Seller] clearly stated his intention not to honor the contract, the [Buyer] should receive the remedy a specific execution of the contract, notwithstanding the [Buyer's] failure to tender the purchase price."

There is a lesson to be learned here. First, any party to the contract should be careful about relying on literal technicalities if that frustrates the performance of the other party. Second, when a buyer stands ready, willing and able to perform, and the seller refuses to perform, then the buyer may well be able to stop the seller dead in his tracks and force a sale. This can be particularly useful in the current market because too often we feel that a seller is trying to avoid performance because a better offer has come along.

Please do not hesitate to call or e-mail me bdlytle@lytlelaw.com if you have any questions about this topic or need help.