

Walking Away, or You Can Have My Deposit

All too often, buyers think they can simply walk away from a contract and all they have at risk is their deposit; and, worse, real estate agents often think the same. Nothing could be more wrong.

In a recent case a buyer looked for an out of the contract (down market buyer's remorse?) and decided that the seller's failure to provide a POA package might provide one because the property had deed restrictions, an architectural control committee, and the ability to levy assessments. So the buyer elected to walk away from the deal. Seller, not satisfied with a mere deposit (which the buyer may not have tendered anyway), brought suit against the buyer for breach of contract..

First, the judge ruled that the Virginia Property Owners Association Act required more than the three indicia noted above and ruled against the buyer. Second, the jury then concluded the buyer had breached the contract and granted the sellers judgment against the buyers for \$155,000. By the time the case had come to court the sellers had sold the property for \$79,000 less than the first contract price, plus they had other expenses attributable to the 15 month delay in the sale, including interest, maintenance, utilities and taxes.

We should note that a seller has a duty to mitigate his damages, and also it is difficult (but not impossible) to ascertain damages without a subsequent sale. So, just as in the above case, I always advise seller clients to put the house back on the market. As the case illustrates, a seller can collect the price differential between the breached contract and the subsequent sale, and the seller can collect consequential damages, that is, those damages that are reasonably foreseeable, which includes carrying costs until the later sale.

Legal Corner

Please do not advise your clients that they can walk away from a sale if they are in breach of contract and stand to lose their deposit only. It may well be appropriate to seek a written release in exchange for losing the deposit, but that is not the same thing as saying that that is the only remedy available to a seller. And as a reminder, both the Code of Ethics and Virginia law would obligate you to advise clients to seek legal counsel in a situation where they may be in breach of contract.

Please do not hesitate to email me at bdlytle@lytlelaw.com if you have any questions about this article or suggestions for a future topic.