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Specific performance of real estate contracts

By: Justin M. Perrotta and Michael Pill October 30, 2014



The forthcoming 2014 update for "28 Massachusetts Practice: Real Estate Law with Forms" includes a new §3.43 on specific performance of real estate contracts, added because there did not appear to be any comprehensive coverage of the subject in Massachusetts treatises. This column summarizes the new section.

Specific performance may be defined as a court order for transfer of title or an interest in property. Bryan A. Garner (Ed.), *Black's Law Dictionary* (9th ed. 2009).

The action may be brought in the Superior Court, Land Court or Probate Court, all of which have jurisdiction. G.L.c. 214, §1 (Superior Court); G.L.c. 185, §1(k) (Land Court); G.L.c. 215, §6 (Probate Court).

A seller as well as a buyer may sue for specific performance. *Cavanagh v. Cavanagh*, 33 Mass. App. Ct. 240, 244, 598 N.E.2d 677, 679-680 (1992).

If title to the property does not meet the standard specified in the contract, that may be a sufficient buyer's defense against a seller's action for specific performance. *Mishara v. Albion*, 341 Mass. 652, 653-654 (1961).

Because real estate is generally considered to be unique, specific performance is presumptively appropriate even though the alternate remedy of money damages is available. *Olszewski v. Sardynski*, 316 Mass. 715, 717-718 (1944).

A liquidated damages provision in a contract may bar specific performance by providing for liquidated damages as the sole remedy. 28 Mass. Practice §3.27, "Elements of agreement — Default by buyer — Liquidated damages."

Generally, specific performance and damages are alternative remedies, although judgment for specific performance may be accompanied by an award of compensatory damages such as carrying costs (e.g., taxes, insurance, interest on a mortgage) to place a seller in as good a position as if the closing had occurred at the time specified in the agreement. *Perroncello v. Donahue*, 448 Mass. 199, 204, 205-206 (2007).

Specific performance may not be granted to a plaintiff who has acted inequitably; although such inequitable conduct may not be enough to invalidate the contract, it must directly affect the claim for specific enforcement. *Galipault v. Wash Rock Investments, LLC*, 65 Mass. App. Ct. 73, 85 (2005).

Specific performance may be denied if it will impose "undue hardship" on the defendant. *Greenfield Country Estates Tenants Ass'n., Inc. v. Deep*, 423 Mass. 81, 90 (1996).

Delay either in commencing an action or in bringing the action to trial may provide grounds for denial of specific performance. *City of Boston v. Roxbury Action Program, Inc.*, 68 Mass. App. Ct. 468, 473-474 (2007); *Charles River Park, Inc. v. Boston Redevelopment Authority*, 28 Mass. App. Ct. 795, 815-816 & nn. 27-29 (1990).

Where real estate is involved, a trial court's refusal to grant specific performance is reversible error if it is not based on a finding of such circumstances. *Raynor v. Russell*, 353 Mass. 366, 367-368 (1967).

If the contract appears to have been fair when made, change in value of the property over time does not by itself bar specific performance, *Normandin v. Eastland Partners, Inc.*, 68 Mass. App. Ct. 377, 391-392 & n. 14 (2007), provided the increase or decrease is not due to undue delay or misconduct by a party to the action. *Gevalt v. Diwocky*, 319 Mass. 715, 715-716, 67 N.E.2d 481, 481-482 (1946).

To establish a claim for relief, the plaintiff must prove all of the following:

- (a) that there is a contract and the specifics of its terms, or that a statutory right of first refusal has been properly exercised (thereby creating an obligation to convey), *Levenson v. L.M.I. Realty Corp.*, 31 Mass. App. Ct. 127, 129-130 (1991);
- (b) that the agreement was signed by an authorized person in the appropriate capacity (e.g., did the signor(s) have authority to bind a corporate owner or limited partnership, or if the property is held in trust did the trustee(s) sign in that capacity and not individually), *Rogaris v. Albert*, 431 Mass. 833, 835-836 (2000); *Weisman v. Saetz*, 11 Mass. App. Ct. 440, 440-441 (1981); and
- (c) that the contract has been breached by the defendant, which may be shown by
 - (i) the defendant's clear repudiation of the entire agreement, which can be based on a course of conduct rather than express words, *Leigh v. Rule*, 331 Mass. 664, 668-669 (1954), with the plaintiff ready, willing and able to proceed to a closing, *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 609-610 (2010); or
 - (ii) the plaintiff's tender of performance, *A.B.C. Auto Parts, Inc. v. Moran*, 359 Mass. 327, 331 (1971), *Flynn v. Wallace*, 359 Mass. 711, 716 (1971);
 - (iii) a demand for performance with the plaintiff ready, willing and able to proceed to a closing, *Hunt v. Bassett*, 269 Mass. 298, 302 (1929), *Marlowe v. O'Brien*, 321 Mass. 384, 386 (1947).

A formal legal tender may be made by appearing at the agreed time and place for closing, with all closing documents prepared and checks or checkbook in hand, with funds in the bank or financing in place. *King v. Allen*, 9 Mass. App. Ct. 821, 822 (1980).

But such formalities are not necessary where both parties are to perform simultaneously with seller delivering a deed and any other required closing documents (e.g., title insurance affidavit and documents required by buyer's mortgage lender) and buyer paying the purchase price. Chief Justice Lemuel Shaw described the tender requirement in the following words in *Irvin v. Gregory*, 79 Mass. (13 Gray) 215, 218 (1859):

"The performances must be simultaneous. In such case, it is not necessary on the part of the purchaser to make a strict tender, and actually to deliver over the money unconditionally, without his deed; it is sufficient that upon reasonable notice to the owner he is ready and willing to perform, and when the performance is the payment of money, that he has the money and is able and prepared to pay, and demands the deed, and the other absolutely refuses to receive the money and execute the deed; that is a sufficient tender of performance to warrant the party so offering to maintain his action."

A demand for performance should state: (a) closing date, time and place; (b) what the demanding party understands to be its obligations at the closing, and that it is ready, willing and able to fulfill those obligations; and (c) what it believes are the other party's obligations at the closing. *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509, 520-521 (1998).

For a buyer, being ready, willing and able to proceed to a closing means "that he has the money and is able and prepared to pay." *Irvin v. Gregory*, 79 Mass. (13 Gray) 215, 218 (1859). Being able to pay can be based on having financing. *Carigg v. Cordeiro*, 26 Mass. App. Ct. 611, 614 (1988).

For a seller, being ready, willing and able to perform requires the ability to deliver at closing a fully executed and acknowledged deed in recordable form, conveying the quality of title required by the agreement between the parties, plus any other closing documents (such as signing a title insurance affidavit and documents required by the buyer's mortgage lender). *Flynn v. Wallace*, 359 Mass. 711, 716 (1971); *Judkins v. Charette*, 255 Mass. 76, 83 (1926).

"A material breach of contract by one party excuses the other party from performance as a matter of law." *Hastings Associates, Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997), citing *G.M. Abodeely Ins. Agency, Inc. v. Commerce Ins. Co.*, 41 Mass. App. Ct. 274, 278 (1996).

"[W]hether a material breach has occurred is a question of fact." *Coviello v. Richardson*, 76 Mass. App. Ct. 603, 609 (2010), citing *Hastings Associates, Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997).

Specific performance will not be granted where both parties either breach the contract or indicate an unwillingness to fulfill the agreement, or where neither has put the other in breach. *Mayer v. Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 354-355 (1969); *Lafayette Place Associates v. Boston Redevelopment Authority*, 427 Mass. 509, 519 (1998).

A right of first refusal or an option can be enforced by specific performance, because when exercised it ripens into a bilateral contract. *Town of Sudbury v. Scott*, 439 Mass. 288, 297-298 (2003), and cases cited in *Greenfield Country Estates Tenants Ass'n., Inc. v. Deep*, 423 Mass. 81, 89 (1996).

An option or right of first refusal may be enforced by an action for specific performance against a third-party purchaser with actual or constructive notice of the existence of the option. *Id.*

The right of first refusal may be statutory. *Town of Sudbury v. Scott*, 439 Mass. 288, 297 n. 12 (2003); G.L.c. 61, §8 (forest land); G.L.c. 61A, §14 (agricultural land); G.L.c. 61B, §9 (recreational land); G.L.c. 140, §32R(c) (Residents of a "manufactured housing community," also known as a mobile home park).

If the right of first refusal is statutory, then a third-party purchaser has notice of it as a matter of law. *Greenfield Country Estates Tenants Ass'n., Inc. v. Deep*, 423 Mass. 81, 89-90 & n. 15 (1996); *Town of Sudbury v. Scott*, 439 Mass. at 297-298 (2003).

Lawyers considering trying to evade a real estate contract because someone has made a better offer should consider whether the time, expense, uncertainty of outcome and stress of potential litigation are justified by the benefit to be gained for the client. It may be in the client's best financial interest to honor the contract. E.g., *Hunt v. Rice*, 25 Mass. App. Ct. 622, 625-628, 635 (1988) (Brown, J., concurring) ("[A]s happens all too often when phalanxes of attorneys become involved, improvident advice bred the instant lawsuit, which in turn bred the appeal now before us."); *Energy Resources Corp., Inc. v. Porter*, 14 Mass. App. Ct. 296, 304 (1982) (Brown, J., concurring) ("When lawyers have the opportunity to keep their clients at least at the moral level of the market place, they have a public duty to avail themselves of it.").

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