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Episode 15: What happens when a seller breaches the contract?

Call from the Agent: It's 2 days before closing and the seller says he refuses to close. What remedies does my buyer have?

The Response: A seller breach can take many forms (e.g. failure to allow inspections, failure to make required repairs, failure to deliver vacant premises, failure to deliver marketable title, etc.). The question above concerns a seller's absolute refusal to close – this form of breach brings the transaction to a complete stop and best illustrates the options available to the buyer.

The current SC Real Estate Commission contract contains the following provision:

If the seller defaults in the performance of any of the seller's obligations under the contract, the buyer may:

- i) Deliver "notice of default" to the seller and terminate the contract; and*
- ii) Pursue any remedies available to the buyer at law or in equity; and*
- iii) Recover attorney's fees and all other direct costs of litigation if the seller is found in default/breach of contract*

But what are remedies "at law or in equity?" A remedy "at law" is an action to collect monetary damages for the buyer's losses emanating from the seller's breach. This stands in contrast to the remedy "in equity" of "specific performance" in which the buyer seeks to have the court compel the seller to sell. Stated another way, an action for "specific performance" seeks to secure title to the property, whereas an action at law for damages proposes to leave title with the other party and, instead, have money damages. Neither remedy is necessarily better than the other – the choice between them is unique to each circumstance and I'll come back to this below. First, though, let's look at each remedy in more detail.

Remedy at Law: Again, this an action seeking monetary damages. The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach. An action can consist of a claim for both general damages and special damages.

General Damages: General damages are those the law infers because they are the proper and necessary result of the wrong. For example: loan fees, title search fees, inspection fees, real estate attorney's fees/costs, etc. South Carolina case law also views the difference between the contract price and the fair market value of the property at the time of the breach (note: sellers who refuse to close because they think they can get a higher price should beware of this "difference in value" element). This is a good time to touch on the duty to mitigate damages. The law imposes this duty pretty much anytime unliquidated monetary damages are sought. Simply put, where a seller does not close, the buyer must do what is reasonably necessary to minimize his damages. In many cases, general damages will make the buyer whole. In other cases, though, the buyer may be financially harmed far more extensively and "special damages" may be appropriate.

Special Damages: Special damages aren't always present; instead, they are occasioned by facts unique to the situation. Unlike "general damages" (those every contracting party knows are likely to ensue in the event of a seller breach), special damages are recoverable only if, when the contract was formed, the seller had reason to foresee or was clearly warned of their consequence. It is not necessary that the seller foresee the exact dollar amount of the loss, but he must know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage would result. Let's say, for example, the buyer intended to occupy the home as his primary residence and, in preparation for this, sold his current home, moved out of his home and the moving trucks are barreling toward Myrtle Beach. Here, the buyer will almost certainly incur rent payments and storage fees and, beyond this, might have to pay more for a similar home and might, as well, end up with a higher interest rate on his purchase loan. Then there's the cost of moving his belongings from storage into the home he eventually purchases. Frequently, a buyer will demand reimbursement for his travel expenses to view the home – not so easy. After all, if the buyer came to town to look at many properties or even just this one prior to entering into the contract, those travel expenses cannot be said to have been occasioned by the seller's breach because no contract existed at the time they were incurred. If, though, after the contract was signed, the buyer flew to town to inspect, take measurements, etc., he will have a better chance of recovering those expenses. There is no formula for knowing what damages may be compensated and, for this reason, no respectable litigation attorney will make promises along those lines. Consider, too, the seller's attorney will challenge the damages and, where a jury trial is held, the jury will decide them. As with nearly all litigation, it is a matter of advancing a position without any guaranteed outcome.

Remedy in Equity: At its core, this is an action in "specific performance" – in such an action the court is asked to compel the seller to sell. To award "specific performance," a court must first find there is no adequate remedy at law. This means the court must find monetary damages will not compensate the plaintiff and courts seem inclined to this belief where a buyer seeks to enforce a real estate contract. Once the court makes this initial finding, the court can award specific performance if it also finds: (1) there is clear evidence of a valid agreement; and (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who seeks specific performance has performed his part of the contract or has been and remains able to perform his part.

If done correctly, an action for "specific performance" is accompanied by the filing of a Lis Pendens. This document puts the public on notice that a lawsuit concerning the property has been commenced. While a Lis Pendens does not legally prevent the sale of the property, in practical terms, the seller will not be able to sell the property because almost no purchaser will be willing to take title subject to the lawsuit.

The recovery of real estate under "specific performance" excludes the recovery of "general damages" (because those expenses would have been incurred anyway). Nevertheless, a party seeking "specific performance" may recover "special damages" to which he may be entitled if those damages are specifically pled in the action.

It is worth noting, if the court compels the sale, the decree will order the transaction be performed as nearly as possible according to its terms – one of those terms is the closing date. In that the closing date will have passed, the court relates the performance back to it – in other words, it equalizes any losses occasioned by the delay by offsetting them with money. This portion of the award is often more like an accounting between the parties than an assessment of damages.

Tender: When a seller breaches, a wise buyer will “tender” performance. This essentially means the buyer states he is “ready, willing and able” to immediately pay the entire purchase price pursuant to the contract. While this is sometimes said to be a prerequisite to a lawsuit, at least one South Carolina case says the “tender” to be made in the lawsuit pleading itself, at least where equitable (as opposed to legal) relief is sought. Also, tender can be excused if the other party has made it clear the tender would be futile.

Notice of Termination: Allow me to remark upon what I see as a flaw in the contract language quoted at the top. The language says the buyer may send notice of termination and pursue equitable remedies. If the contract is terminated, the buyer will likely be precluded from seeking equitable relief (specific performance). Remember, specific performance seeks to enforce the contract, so if the buyer has already terminated the contract, he cannot later seek to have it enforced. Therefore, if the buyer intends to pursue an equitable remedy (specific performance) as opposed to a legal remedy (money damages), I suggest a “tender” followed by a “notice of default,” but not a “notice of termination.” If, though, the buyer only intends to seek money damages, the buyer should “tender” and, following same, serve a “notice of default and termination.”

Attorney’s Fees/Costs: In the contract language quoted at the top, the buyer in a successful lawsuit may be award attorney’s fees and costs incurred in litigation.

Oftentimes, the mere existence of these remedies is enough to convince a seller to sell or voluntarily pay money to the buyer. Life is better for both parties without a lawsuit, so they should try to work it out.