SCOTT B. UMSTEAD, P.A.

ATTORNEY AT LAW

AGENT ON THE STREET

Episode 18: What happens when a buyer breaches the contract?

Call from the Agent: The buyer has defaulted on the contract -- what remedies does my seller have?

The Response: It's worth noting that it isn't always clear whether or not a party has breached. For this question/answer, we will assume the buyer did breach and the seller was ready to perform. In the last episode (Agent on the Street #15), we discussed the remedies available to a buyer when a seller breaches. Now we address the seller's remedies when a buyer breaches. Happily, the law reflects a general symmetry between remedies available to buyers and sellers where a contract is breached.

The current SC Real Estate Commission contract in use in Horry County contains the following provision:

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

Agent on the Street #15 explained remedies "at law or in equity." To recap, a remedy "at law" is an action to collect monetary damages for the seller's losses emanating from the buyer's breach. The remedy "in equity" is primarily "specific performance." For the most part, the seller's remedies where a buyer breaches are equivalent to the buyer's remedies where a seller breaches.

Remedy in Equity: This is an action for "specific performance" – in such an action the court is asked to compel the buyer to buy. 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, in that a sale involves the payment of money to the seller, a seller will have a very difficult time convincing a court that a monetary award is now somehow inadequate. I won't say it can't be or hasn't been done, but the degree of difficulty increases to the extreme. If a seller can get past that first question, the court would then move to determining whether: (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.

An action seeking to compel a buyer to buy is a far different matter than one compelling a seller to sell. The beauty of a specific performance action against a seller is that the property itself is held (through the filing of a Lis Pendens) pending the court outcome. Where a buyer breaches, though, nothing (other than the earnest money) can be similarly be"held." And even if a court enters an order requiring the buyer to buy, the court typically cannot, as a practical matter, enforce the order against an unwilling buyer.

The buyer may need a loan – the court cannot force a lender to lend. In fact, it seems hardly possible to force the buyer to even apply for a loan, much less do all the things necessary to consummate it. Where the buyer lives out of state, the court's grip on the buyer slips away fairly completely where "specific performance" is sought and ordered.

In fact, the notion of a court being able to enforce an order of "specific performance" against a buyer is so remote and unlikely that it is seldom sought. Instead, sellers who pursue buyer's in court almost always limit their claim to monetary damages.

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. General damages logically fall into three categories: First, damages specifically tied to the transaction (real estate attorney's fees/costs, inspections paid for by the seller, etc.). Second, continuing costs of ownership between the time of the breach and the eventual sale of the property (mortgage payments, taxes, insurance, HOA dues, etc.). This is a good time to briefly explain the duty to mitigate damages. The law imposes this duty pretty much anytime unliquidated monetary damages are sought. Simply put, where a buyer does not close, the seller must do what is reasonably necessary to minimize his damages. It would seem re-listing and actively marketing the property is a must (please note the mitigation/offset paragraph below). Whether a party has mitigated his damages or has done so to a reasonable extent is decided in court. Third, 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. If the property value has decreased, the seller may seek to collect the amount of the decrease. In many cases, general damages will make the seller whole. In other cases, though, the seller be financially harmed far more extensively and "special damages" may be appropriate.
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> 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 buyer breach), special damages are only recoverable only if, when the contract was formed, the buyer had reason to foresee or was clearly warned of their consequence. It is not necessary that the buyer 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 will result. Let's say, for example, the seller moved out of the home and purchased a new home. Many people cannot afford two homes and the financial impact on a given seller can be catastrophic. 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 buyer'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 a guaranteed outcome.**

Tender: When a buyer breaches, a wise seller will "tender" title. This essentially means the seller states he is "ready, willing and able" to deliver title under the terms of the contract. While this is generally considered a legal 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 seller may send notice of termination and pursue equitable remedies. If the seller terminates the contract, the seller will likely be precluded from seeking equitable relief (specific performance). While I noted the doubtfulness of a seller being awarded specific performance against a buyer, it is very important to note specific performance seeks to enforce the contract, so if the seller has already terminated the contract, he cannot later seek to have it enforced. Therefore, if the seller 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 seller only intends to seek money damages, the seller should "tender" and, following same, serve a "notice of default and termination."

Mitigation/Offset: I again emphasize the seller's duty to mitigate (attempt to reduce) his damages. Alongside what is said above, let's consider an example: If the value of the property has increased and it sells for a greater price, the increase is offset against the seller's damages. For example, if the seller files an action seeking $20,000 in damages and, during the lawsuit, the property sells for $12,000 more than the original price, the seller's damages are reduced by $12,000. Obviously, if the increased sale price exceeds the seller's damages, it is unlikely the seller will recover damages against the original buyer.

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

Oftentimes, the mere existence of these remedies is enough to convince a buyer to buy or to forfeit some or all the earnest money or, in more extreme situations, pay even more. In short, life is better for both parties without a lawsuit, so working out a resolution should be the goal.

[In the next episode, I will discuss some of the practical considerations underlying a decision to litigate.]