

Breach of Contract (Specific Performance vs Damages)

Recent case law has dealt extensively with the problem that faces developers, builders or individuals when there is a breach of a purchase and sale agreement whether it be to purchase an apartment building, a condominium property or a new home. In the circumstances where the sale collapses, the innocent party is entitled to sue for damages for breach of the contract or for specific performance.

The questions of how best to proceed are relevant to all vendors and purchasers of property whether it be a single family dwelling or a large commercial transaction.

In what circumstances could the innocent party compel the offending party to deliver the property in question, instead of suing for damages caused by the breach of the contract?

It used to be clear that when dealing with a breach of contract as regards real estate, the innocent party could sue for specific performance on the basis that all property was by its very nature unique. It was therefore appropriate for the innocent party to compel the other party to perform the contract and deliver the property.

However the current law has decidedly changed in this regard. It is no longer a given that property will be considered unique. Therefore a party suing for a specific performance should also sue for damages in order to preserve his rights against the offending party. The current state of the law is that if you are suing for breach of contract in respect of a property transaction, you will only be able to obtain specific performance if you are able to prove that the property in question is unique, as regards its purpose to the purchaser, otherwise you will be limited to monetary damages.

In a rising market where the transaction is breached by one of the parties, the innocent party may want to sue for specific performance because it will be entitled to the property if it succeeds in the litigation for the price it bargained for, where the property may have substantially risen in value by the time the court orders specific performance.

For example, if a party agrees to purchase an apartment building or home in 1998 but the vendor fails to close and is in breach of contract, the successful purchaser in the action will be entitled to the increased value of the property when the lawsuit is concluded if he can establish the property was unique. If the contract is breached in 1998 and the purchaser then buys a similar building for an additional \$100,000.00 in 1998, his claim in damages are limited to the \$100,000.00, not the difference in the value of the initial property in 1998 and when the trial is concluded. On the other hand, if the purchaser sues for specific performance and is successful, he is entitled to specific performance provided the property is found to be unique. Should the property have risen in value by a million dollars, he would benefit from specific performance in the amount of a million dollars rather than \$100,000.00, because in a claim for specific performance there is no obligation to mitigate one's damages. If the person sues for specific performance and damages and then elects damages at trial, he is entitled to the difference in value by way of damages without mitigation. The measure of these damages is the difference in the value (market) of the unique property when the contract was breached compared to the value of the property at trial.

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