North Carolina Central Law Review

Volume 7
Number 1 *Volume 7, Number 1*

Article 9

10-1-1975

Specific Performance for the Seller of Real Estate - A North Carolina Remedy

Michael F. Easley

NOTES AND COMMENTS

Specific Performance for the Seller of Real Estate— a North Carolina Remedy?

Specific performance, an equitable remedy, is generally available to enforce the terms of a contract if the party seeking enforcement has no adequate remedy at law.[1] In the case of contracts for the sale of real estate, it is presumed by the courts that the remedy at law is inadequate, due to the nature of the subject matter. The vendor may be specifically forced to sell his land as per the terms of the contract if the vendee so elects to seek specific performance as his remedy.[2] Clearly, a vendor under such a contract should be entitled to compel a conveyance of land in given situations. However, North Carolina has yet to decide this question specifically and the vendor is the more insecure for it. He cannot be certain that this jurisdiction will effectively recognize the vendor's right to a mutual remedy in the court of equity. Although the North Carolina Supreme Court has spoken to the issue of specific performance,[3] the Court has not specifically answered the basic question whether a vendor may compel a vendee to pay the purchase price for the real estate pursuant to the terms of a valid contract under the equitable remedy of specific performance. This remedy has neither been allowed nor disallowed in North Carolina. The North Carolina Supreme Court simply has not decided a case upon which precedent has been established regarding the availability of this remedy.

It is well established in other jurisdictions that where specific performance is otherwise a proper remedy, the vendor may obtain specific performance of a contract for the sale of real estate.[4] The question whether the vendor will be granted specific performance rests entirely in the sound discretion of the court.[5] It also must depend upon the circumstances of the case; but where there is no misunderstanding on the part of the vendee and no misrepresentation on the part of the vendor, specific performance may be granted as a matter of right.[6]

Generally, specific performance will not be decreed where the subject matter of the contract is personal property since there is usually an

1. *See* 71 Am. Jur. 2d *Specific Performance* § 8 (1973).
2. Byrd v. Freeman, 252 N.C. 724, 14 S.E.2d 715 (1960).
3. *See, e.g.*, Harding v. Southern Loan and Ins. Co., 218 N.C. 129, 10 S.E.2d 599 (1940), Pate v. Duke Univ., 215 N.C. 57, 1 S.E.2d 127 (1939).
4. *See* 81 C.J.S. *Specific Performance* § 63 (1953).
5. Denby v. Dorman, 261 Mich. 500, 246 N.W. 206 (1933).
6. Hotze v. Schlanser, 410 Ill. 265, 102 N.E.2d 131 (1951).

adequate remedy at law in the form of damages for the breach of contract.[7] However, where land, or any estate or interest therein, is the subject matter of a contract, the jurisdiction to enforce specific performance is undisputed and does not depend on the inadequacy of the legal remedy in the particular case.[8] Realty is presumed to have a peculiar value so as to give an equity for specific performance, without reference to its quality or quantity.[9] Thus, the jurisdiction to compel specific performance does not rest on any distinction between real and personal property, but on the ground that damages afforded at law will not assure a complete remedy.[10]

Many courts have adopted various reasons for the doctrine that specific performance may be granted the seller. The principle of mutuality of remedy has been the basis for some discussions.[11] The doctrine of "equitable conversion" by which the vendee is deemed the trustee of the purchase price for the vendor has been said to be the reason for the doctrine.[12] Essentially, the idea that the vendor's remedy at law is inadequate has prompted many courts to decree the equitable remedy of specific performance.[13] It is this idea, no adequate remedy at law, that this author suggests the court should closely scrutinize when considering a decree of specific performance. Often the vendor's remedy at law is not only inadequate but is completely absent. Frequently he cannot even measure his damages, thus, leaving a void in his remedy at law.

Mutuality of remedy simply accentuates the basic idea that both parties to a contract should have the same remedy available to them in case of breach. Thus, one party should not have an equitable remedy if it be a remedy that the other party could not have obtained from equity. This is the basic idea upon which the doctrine of mutuality of remedy rests.[14] It is not sufficient that there is merely mutuality of obligation. It has been held to be fundamental that before specific performance will be granted mutuality of remedy must exist.[15] Stated otherwise, the court will not grant specific performance to one party and at the same time leave the other party to the contract only the legal remedy of damages for possible future breaches of the contract.[16] Accordingly, specific performance will not be granted in favor of the vendee unless it can also

7. Pugh v. Tidwell, 53 N.M. 386, 199 P.2d 1001 (1948).
8. Danciger Oil and Ref. Co. v. Burroughs, 75 F.2d 855 (10th Cir. 1935).
9. Rice v. Griffith, 349 Mo. 373, 161 S.W.2d 220 (1942).
10. Ohlendiek v. Schuler, 299 F. 182 (6th Cir. 1924).
11. Greene v. Marshall, 108 F.2d 717 (1st Cir. 1940).
12. State ex rel. Place v. Bland, 353 Mo. 639, 183 S.W.2d 878 (1944).
13. Jones v. Bashaw, 193 Iowa 1245, 188 N.W. 769 (1922).
14. Genola Town v. Santoquin, 96 Utah 88, 80 P.2d 930 (1938).
15. Besche v. Murphy, 190 Md. 539, 59 A.2d 499 (1948).
16. Knox V. Allard, 90 N.H. 157, 5 A.2d 716 (1939).

be granted in favor of the vendor.[17] Otherwise, one party would have a choice of forums in which to bring an action while the other party is limited strictly to a remedy at law. However, the idea of mutuality of remedy being the sole reason for granting specific performance must be suggested to be somewhat fictitious. One must question this doctrine if there is no mutuality of obligation or mutuality of damages or harm consistent with the remedy decreed. Stated differently, if one party to the contract could be severely damaged by a breach and the other party suffer almost negligible harm, then it hardly seems practical that the application of the doctrine of mutuality of remedy, without more, would be in keeping with the spirit of equity that it purports to so sacredly preserve.

A decree of specific performance prompted by the idea that there is no adequate remedy at law appears to rest on more sound judicial logic. The mere existence of a remedy at law is not sufficient to defeat a suit for specific performance if the legal remedy is inadequate.[18] The remedy at law must be as certain, plain, complete, adequate, and as practical and efficient to the ends of justice and to prompt administration as is the remedy in equity.[19] Specific performance may be granted on the grounds that it furnishes the most complete remedy. Accordingly, the right to a decree of specific performance rests on the inadequacy and incompleteness of the remedy at law, and equity will award specific performance because of the inadequacy of the remedy at law and because equity can do more and complete justice under the circumstances.[20] Thus, where a contract for the sale of land is in writing, signed by both parties, is certain and fair, is for an adequate consideration, and is capable of being performed without undue hardship, it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for a breach of the contract.[21]

Suppose Seller is a small contractor and is nearing completion of a speculative house in a new subdivision. Buyer notices the house is on the market for sale and decides to purchase it if Seller agrees to some alterations in the finishing of the house. Both agree and Buyer signs an offer to purchase and submits an earnest money deposit. Seller accepts the offer and likewise signs the contract. The house is then taken off the market and other interested customers are told that it is sold. Seller finishes the house, making the alterations as requested by the Buyer.

17. Schultz v. Anderson, 117 Tenn. 533, 151 S.W.2d 1068 (1941).
18. Snip v. City of Lamar, 239 Mo. App. 824, 201 S.W.2d 790 (1947).
19. Hinkel Dry Goods Co. v. Wichison Indus. Gas Co., 64 F.2d 881 (10th Cir. 1933).
20. Fleischer v. James Drug Stores Inc., 1 N.J. 138, 62 A.2d 383 (1948).
21. Clay v. Landreth, 187 Va. 169, 45 S.E.2d 875 (1948).

Buyer's loan is approved and he is able to perform his part of the contract. But thirty days after the signing of the contract and the day before the date set for closing, Buyer decides that the house is really not what he is looking for and refuses to pay the purchase price. Seller immediately sees his attorney, and realizing the possibility of litigation, lists his damages as follows:

> Two different parties were interested in the house on the same day but Buyer's offer was accepted.
>
> The house has been off the market for thirty days and many potential customers were told that the house has been sold.
>
> The appliances and colors were changed at the request of Buyer.
>
> Many decorative ornaments were installed or altered at the request of Buyer.
>
> Time was spent with Buyer discussing other changes he desired and working with suppliers in order to finalize billing arrangements for Buyer.
>
> The seed in the lawn was changed and re-graded at the request of Buyer.
>
> All appliances were installed to make the house ready for Buyer, thereby increasing the risk of theft.
>
> Relying on the contract of Buyer, construction was commenced on a new house in this subdivision thereby increasing Seller's liability to $100,000.00 in a subdivision not yet proven to be a sound residential market.
>
> Mental anguish of having double liability, of having lost the sale due to breach by Buyer, and of having to bring suit against Buyer.

Among other damages, the Seller has lost on potential customers, interest on the loan, insurance coverage, utilities and attorney's fees.[22] If he does not sell the house soon he may be bankrupt and many damages cannot be measured until the house is sold. Most importantly, many damages cannot be measured at all. Seller would have a remedy at law but one would be hard pressed to suggest that it could be adequate. A subsequent change of circumstances not contemplated by the parties, occuring after the contract was entered into, may warrant refusal of specific performance. However, a mere change in value or a change of taste is not, in absence of fraud or bad faith in the inception of the contract, grounds for refusing specific performance.[23] In circumstances similar to the aforementioned example, specific performance should be granted the vendor; the vendee being ordered to accept the deed and to

22. These facts are taken from an actual problem with which this author was confronted while interning for a law firm. The case was eventually settled without litigation and the original purchaser bought the house as per the terms of the contract.

23. Rogers v. Roop, 19 Tenn. App. 579, 92 S.W.2d 423 (1935).

pay the purchase price. If he refuses to do so the land may be sold to satisfy the vendor's so-called "lien", and execution issue for any unsatisifed balance of the purchase price remaining after the sale of the land.[24]

CONCLUSION

The seller in a land contract ordinarily has neither full possession of the land, the purchase money, nor complete title to the land, since while the contract is in force there is outstanding against it the purchaser's right, upon performance of the terms, to have title to the land. If the purchaser should fail to perform and the seller is driven to an action for damages, the contract takes on the characteristics of an option; the option price being determined by the measure of damages. Thus, without the remedy of specific performance, the seller is bound and the purchaser has the option of performing the contract or breaching and suffering damages at law. Specific performance is a necessary remedy for the seller if he is to rely upon the contract. As a matter of public policy specific performance must be granted the seller in order to afford him some security in land sale contracts. Otherwise business endeavors will be hindered as the seller will have nothing more to rely upon than the good faith of the purchaser. In the many different modes of proceedings and doctrines available to enforce the contract, the court has the control. The court may enlarge or limit a remedy or may alter it to the tune of the facts of a case. This author suggests that the court should not deny the remedy of specific performance, or so insult it with conditions and restrictions as to materially impair the value of the equity.

MICHAEL F. EASLEY

Benign Discrimination in Employment Viewed as Protection of the Restitution Interest of Minority Persons

In recent years federal courts have rendered some very controversial decisions in cases involving employment discrimination against minority persons.[1] In these cases the courts have attempted to compensate minority persons for the loss of jobs and positions which they are presumed to have suffered as a result of impermissible racial discrimination in em-

24. Lutz v. Dutmer, 286 Mich. 467, 282 N.W. 431 (1938).

1. As used herein the term "minority person" refers to persons who are Black, Spanish—surnamed, Oriental and American Indian.