The New York Law Journal
Remedies in Real Estate Transactions, Part 2: Specific Performance
May 2, 2023
By Adrienne B. Koch and Neil S. Miller

Although most are familiar with the well-established axiom that real estate is a unique asset, it does not necessarily follow that specific performance is generally available for breach of an agreement that involves real estate. This article—the second in a four-part series on remedies in real estate transactions—will discuss why, and will suggest some ways parties can achieve more certainty in this regard.

Both litigators and transactional lawyers know the basic drill: specific performance is available for breach of a contract whose subject matter is so unique that money damages will not adequately compensate the non-breaching party. All are also familiar with the axiom, well-established in New York law, that real estate is a unique asset. But it does not necessarily follow that specific performance is generally available for breach of an agreement that involves real estate.

This article—the second in a four-part series on remedies in real estate transactions—will discuss why, and will suggest some ways parties can achieve more certainty in this regard.

A Brief Primer

First, a word on specific performance. The concept itself is deceptively simple: the remedy—an order directing a party to perform contractual obligations that it has breached—is available where money damages cannot provide an adequate remedy for the breach.

The classic case for specific performance is a contract for the conveyance of real property. The buyer will almost always have the right to enforce such a contract through specific performance if (a) the buyer is ready, willing, and able to perform by paying the contract price and taking title to the property, and (b) and the seller has the ability to convey that title.

Because under these circumstances the parties can complete the transaction and be on their way—and because real property is presumptively unique—courts generally will not hesitate to order the seller to specifically perform its obligation to convey the property. *See* 96 N.Y. Jur.2d Specific Performance §45 (collecting cases).

Real estate transactions, however, are not always so simple. Often they involve ongoing relationships like joint ventures or leaseholds. An interest in a venture that owns real property may or may not be considered sufficiently unique to support an award of specific performance. *See Kheel v. Kheel*, 72 A.D.3d 1543, 1544 (4th Dept. 2010) (collecting cases).

The same is true of a leasehold. *See Van Wagner Advertising Corp. v. S&M Enterprises*, 67 N.Y.2d 186 (1986).

Moreover, even if the underlying asset is unique, courts are reluctant to award specific performance where the result would be to force parties to continue in a relationship that has become hostile. *See*, *e.g., Litho Prestige, Div. of Unimedia Group, Inc. v. News America Publishing, Inc.*, 652 F. Supp. 804, 809-810 (S.D.N.Y. 1986).

And in all events, a court will decline to award specific performance against a party that is not "capable of complying" (such as, for example, where the party lacks the funds necessary to complete a transaction, or is incapable of conveying clear title to an asset, or cannot act without regulatory approval). *See, e.g., Edge Group WAICCS LLC v. Sapir Group LLP*, 705 F. Supp.2d 304, 318-19 (S.D.N.Y. 2010) (collecting cases).

Drafting Considerations

What does this mean for parties entering into a real estate transaction? For one thing, it means they cannot always count on specific performance being available—even if they expressly provide for that remedy. *See, e.g., LDC USA Holdings, Inc. v. Taly Diamonds, LLC*, 121 A.D.3d 529, 530 (1st Dept. 2014).

But parties need to consider not only whether specific performance will ultimately be available, but also whether it will actually be desirable. That is, do they want to leave it to a judge to determine whether one of the parties will be forced to remain in the transaction (and/or the relationship) against its will?

Maybe they do. But if they do not, parties can often use their agreement to craft alternative forms of relief that they can better control. For example:

- Contracts for the purchase and sale of real property often provide that the seller's remedy in the event of a purchaser default is limited to retention of the purchaser's deposit as liquidated damages. But what if the seller defaults? The purchaser might seek specific performance; however, that remedy will not be available if the seller is incapable of delivering clean title. It can also be complicated (and expensive) to enforce, even when it is theoretically possible. Such contracts therefore often also provide that in the event of the seller's default the purchaser may instead opt for restitution—that is, reimbursement for all of its out-of-pocket expenses in connection with the contract. This remedy does not give the purchaser the benefit of its bargain, but it puts the parties back into the same position as when they entered into the contract.

- Joint venture agreements often specify that certain kinds of disputes will be resolved not through any claim for specific performance, but rather through a buy-out mechanism. While such mechanisms vary, one approach that avoids leaving it to a court to determine whether the buy-out mechanism itself will be specifically enforced is to provide that if a party required to purchase another party's interest refuses to do so, the non-defaulting party can elect either to acquire the defaulting party's interest at a substantially-discounted price or to force a sale of the venture's assets.

- Parties to virtually any kind of agreement may choose to provide that a defaulting party will be liable for liquidated damages (a remedy discussed in greater detail in the first article in this series)—which, absent specification to the contrary, may be awardable in addition to other remedies. *See, e.g., World Gold Trust Services, LLC v. GoldCoin Developers Group LP*, 2021 WL 4134681, *4 (S.D.N.Y Sept. 10, 2021); *APW, Inc. v. Marx Realty & Improvement Co., Inc.*, 291 A.D.2d 333, 334 (1st 2002).

Some of these provisions expand the universe of available remedies; others contract it. What they all have in common, however, is that they represent an ex ante agreement on the scope of that universe. Such an agreement decreases the likelihood that a party will find itself either (a) on the receiving end of a specific performance award it did not contemplate; or (b) without a meaningful remedy because a court has determined that specific performance is impossible, impracticable, or otherwise unavailable.

Conclusion

Parties entering a transaction may understandably prefer to invest most of their energy in planning how the transaction (and/or the relationship it creates) will proceed through to its natural conclusion. But they are almost always better off if they also spend some of that energy planning for what will happen if it does not.

This principle applies with particular force in real estate transactions, where the availability and potential impact of specific performance may be difficult to predict at the outset. Expressly planning for the ways that remedy might work—and providing for alternatives to that remedy—can help the parties avoid unwelcome surprises.

Adrienne B. Koch is a litigation partner and Neil S. Miller is a real estate partner with Katsky Korins LLP in New York.