

## COMPELLING SPECIFIC PERFORMANCE OF A REAL ESTATE CONTRACT

In a rising real estate market, deals are difficult to find and sometimes even more challenging to close. What happens when you finally enter into a contract to buy, but the seller refuses to proceed to closing?

Your remedy as a buyer is an action for specific performance. But as a would-be plaintiff, you must exercise your rights in a thoughtful and legally appropriate manner. An action for specific performance can fail if you delay or fail to take the proper immediate steps.

The first thing for a plaintiff to do may be to record a *lis pendens* (or notice of pendency of action) on the property. This places the public on notice of your claim, discouraging a third party from purchasing the property. Even if the contract at issue contains a clause requiring mediation or arbitration, the plaintiff can still attach a *lis pendens* to the property. Without a *lis pendens*, a bona fide third-party purchaser for value can steal the deal. The plaintiff may have no recourse except money damages against the seller, which in many instances is an indefinite and poor substitute for performance of the purchase agreement.

After recording the *lis pendens*, the next step is to prosecute the action diligently. Stubborn sellers may balk and delay mediation, or postpone and play games in arbitration. If there is a binding mediation and/or arbitration agreement (as is often found in home purchase contracts approved by the parties), and the seller refuses to participate in mediation or agree to arbitration before a qualified neutral, the best strategy is to move to compel arbitration. A petition to compel arbitration may force the seller not only to accede to an arbitration demand quickly, it may also enable the recovery of your attorneys' fees from the seller if the contract includes a provision for payment of attorneys' fees.

The next step is factual discovery. Even if the matter goes to arbitration, limited discovery with the permission of arbitrator will be allowed unless the arbitration agreement provides otherwise. Normally fertile areas exist to be explored. Inquire why the seller is seeking out

of the deal. Has another offer been made on the property? Take the deposition of the real estate broker. Subpoena records from escrow. Serve subpoenas and employ written discovery to determine who has made offers for the property, and find out what has occurred, or who has intervened, to cause the seller to change his mind.

Arbitration will typically move much faster than an action in court. In arbitration, more formal rules of procedure and evidence may be relaxed. Regardless of whether the action is tried in court or arbitrated, however, the same legal principles will govern the case.

To prevail in a specific performance case, the plaintiff must prepare and present his or her case with care. Specific performance of a contract may be ordered whenever: (1) the contract terms are sufficiently definite; (2) consideration is adequate; (3) the contract is just and reasonable to the defendant; (4) there is substantial similarity of the requested performance to the contract terms; (5) there is mutuality of remedies; and (6) the plaintiff's legal remedy is inadequate. Specific performance cannot be obtained on oral contracts, not only because of the bar of the statute of frauds (the rule that requires real estate contracts to be memorialized in writing), but because the courts will not order specific performance if an agreement is uncertain or indefinite and does not make clear and unambiguous the precise act to be done. Common defenses by a seller focus on construing express and implied conditions to the contract narrowly or broadly, interpreting and applying ambiguous or small print contract terms regarding timing or approvals, or relying on alleged representations or misstatements by the buyer or his agents, or on equitable principles.

There are traps in presenting a specific performance

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*By Geoff Gold*

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case. Often, a plaintiff will combine a claim for money damages with a request for specific performance. Although it is permissible to plead alternative remedies, ultimately the plaintiff will have to decide what he or she wants. If the plaintiff urges too strongly that he has suffered tremendous financial harm by being denied the property, considering the market value of the property versus the contract price, this could boomerang to hurt his specific performance case. Why? If the contract price of the property was for inadequate consideration (i.e., substantially below market), or for example, if equity would otherwise forbid the transaction (such as if the sales terms were somehow unfair to the seller under the circumstances, unjust, one-sided or fraudulent), specific performance may be denied.

In residential cases, such as for the purchase of single-family homes, there is a statutory presumption that specific performance is the correct course. Homes are deemed to be unique and are assumed to be harder to locate or replace. However, many of the most hard fought specific performance disputes concern investors seeking to develop land. There is a rebuttable

presumption that specific performance is proper, but a seller may be able to undermine a buyer's case by taking discovery on the buyer's perhaps inconsistent damage claims and development plans.

The key to winning a specific performance case is evaluating the facts at an early stage and properly readying the case for settlement or litigation. Buyers must diagnose the strength of their claims at the outset and act quickly to prosecute their actions. Sellers need to consider their defenses and can achieve better results by exploiting the weaknesses of their adversaries. Like the land in controversy, each party and fact pattern will differ. Success depends on identifying the important legal and factual issues and meeting the unique challenges presented in an equitable action for specific performance.

**Geoff Gold's practice focuses on civil litigation. He specializes in resolving complicated real estate and business disputes. If you have any questions about your entitlement to land, or any real property dispute, please call Geoff at (310) 286-1700, or e-mail him at [ggold@rutterhobbs.com](mailto:ggold@rutterhobbs.com).**

## A VESTED INTEREST holding title to your house

You and your spouse are about to join the throng of Southern Californians who are purchasing a new home or refinancing an existing one, and the escrow officer presents you with a form entitled "Vesting Instructions." Really, the question is: "HOW DO YOU WANT TO HOLD TITLE?" If you and your spouse do not have a revocable trust, then the three fundamental vesting choices, and descriptions of each, are as follows:

**1. Joint Tenancy.** By electing to take title as joint tenants, you have determined that, on the death of you or your spouse, the entire interest in the property automatically belongs to the surviving joint tenant. However, this choice can create problems.

- a) The transfer of the interest of the deceased spouse is automatic, and therefore may not necessarily represent the intent of the deceased spouse. For example, in the event of a marital dissolution in which the joint tenancy was not terminated, the surviving joint tenant may assert a claim for the entire property, even though the marriage has ended and the deceased did not wish to dispose of his or her interest in this manner. It is essential that, in the event of any marital dispute or dissolution, the joint tenancy be terminated to avoid this result.
- b) In another instance, a spouse may intend that his or her interest be transferred to heirs, rather than to the surviving spouse. If title remained in joint

tenancy, the intended transfer to heirs would not occur.

- c) On the death of the first spouse, only one-half of the tax "basis" of the property may be "stepped up" to the current fair market value for tax purposes. In the event the surviving spouse elects to sell the property, a lower tax basis of one-half the property could result in a larger capital gains tax.

**2. Community Property.** In California, residences purchased with community property become community assets unless the couple agrees to the contrary. Taking title as community property will, on the death of one spouse, result in a new tax basis stepped up to the fair market value of the property (as opposed to one-half, if the property were held in joint tenancy). However, the surviving spouse must either a) record an Affidavit Distributing to Surviving Spouse Without Administration, b) file a Spousal Petition with the Superior Court, or c) probate the deceased spouse's interest. The Affidavit requires a delay of forty days to determine if another heir makes a claim on the deceased spouse's interest. Contrary to statements by certain escrow officers and real estate agents, it is not always necessary to probate the interest of the deceased spouse if title to the property is held "as husband and wife as community property."

**3. Community Property with Right of Survivorship.** This

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relatively new designation of title became effective in California as of July 1, 2001. The purpose is to allow married couples to hold property as community property, while providing that the surviving spouse will automatically acquire the interest of the first spouse to die. This designation would provide for the automatic transfer of the interest of the deceased spouse, but for tax and other purposes would be treated as community property. If this designation is chosen, the buyer should continue to be aware that, if the marital relationship changes due to separation or marital dissolution, the right of survivorship should be terminated.

Alternatively, title may be held in trust. A Revocable or "living" trust is a common estate planning vehicle for managing and distributing property after death. A revocable trust is essentially transparent for tax and other purposes during the lifetime of its creator – that is, the law "looks through" the trust relationship, since the trust may be amended or revoked at any time. At death, however, the trust becomes irrevocable and serves as an effective will-substitute that eliminates the need for probate of an estate.

Often, lenders or escrow officers discourage taking title in trust. A little persistence, however, may overcome this resistance. Alternatively, you may easily transfer title into your trust after closing, but, before doing so, you should consult with your title insurer and, if necessary, obtain Endorsement Number 107.9. This endorsement will allow you to add the trustees of the trust as named insureds under the policy and is generally available for a nominal fee.

It may seem surprising to learn that something as apparently simple as vesting title to your home can involve family, real estate, and estate planning laws. As you continue to review the vesting instructions with the escrow officer, you may note a recommendation to "consult an attorney."

***If you are in need of assistance or have any questions regarding the issues of vesting title on the purchase or refinancing of your residence or other real property, please contact Marc Petas or Sara Harris of our Real Estate Department, Marshall Rutter of the Family Law Department, or Terence Nunan or William Burford in the Estate Planning Department at (310) 286-1700.***

## RECENT ACHIEVEMENTS IN REAL ESTATE

**Marc Petas** has been busy assisting investors, landowners and developers in a variety of activities. Among his recent transactions, Marc has represented (1) the sellers of a 25-acre parcel near the entrance to the Ontario Airport entitled for 1,000,000 square feet of commercial development, (2) the owner of a large office project in Beverly Hills in obtaining a historically low interest-rate loan used to reduce debt service and finance significant property improvements, (3) the seller of two luxury apartment buildings in Beverly Hills, (4) the seller of a development property in Phoenix and the related tax-deferred acquisition of an exchange property, and (5) the purchaser of three sites in Ventura County for the construction of mixed use developments. These projects, together with an active practice in negotiating and documenting office and industrial leases, are indicative of the current, dynamic real estate market.

**Sara Harris** represented a client in a deferred section 1031 exchange involving the acquisition and simultaneous closing of nine replacement properties valued in excess of \$50,000,000 and located in five different states. Sara also assisted a client in a "reverse" section 1031 exchange sale of the client's industrial property following the acquisition of a replacement property requiring the removal of hazardous contaminants. In addition, Sara has recently handled the purchase and financing of real property in Gulf Shores, Alabama for retail and residential development, as well as the acquisition of a \$48,000,000 apartment complex.

**Geoff Gold** obtained a complete dismissal of a specific performance and damages action against a triplex owner, including an order requiring payment by the other side of all of our client's attorneys' fees and costs.

**Geoff Gold and Greg Sater** successfully represented a commercial property lessee in litigation over the terms of a lease renewal, negotiating a significant decrease in rent despite the landlord's claim that the agreement required a substantial increase to bring the rent to fair market value. The client recovered attorneys' fees and costs in full.

**Terence Nunan** obtained a multi-million dollar settlement in contested trust proceedings between our client and a trustee managing substantial family-owned commercial real estate.

# *Practicing the Possible*

Rutter Hobbs & Davidoff offers decades of experience in diverse real estate transactions. We provide counsel and assistance to our clients in the acquisition, financing, development, construction and leasing of real estate projects throughout the United States. Projects include residential (both multifamily and single family), industrial, hotel, recreational and retail properties. We also assist our clients in tax deferred exchanges and reverse exchanges. Our extensive experience facilitates creative solutions for all real estate matters.



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