

Sometimes the Timing of Obligations is Crucial – (Real Estate Contract Interpretation)

As part of a real estate deal, a Buyer and Seller entered into an addendum to their existing contract, whereby the Seller agreed to install property improvements at an unspecified time after closing and pursuant to an agreed upon “Landscaping Plan.” When the Seller failed to install the improvements, the Buyer sued to recover damages for breach of contract. In response, the Seller filed a Motion to Dismiss the Buyer’s case, arguing that the claim for damages was precluded by a common contract provision in the underlying purchase and sale contract between the parties. Specifically, the contract stated:

FAILURE OF PERFORMANCE: If Buyer fails to perform this Contract within the time specified, including payment of all deposit(s), the deposit(s) paid by Buyer and deposit(s) agreed to be paid, may be retained by or for the account of Seller as agreed upon liquidated damages, consideration for the execution of this Contract and in full settlement of any claims; whereupon, Buyer and Seller shall be relieved of all obligations under Contract, or Seller, at Seller’s option, may proceed in equity to enforce Seller’s rights under this Contract. If, for any reason other than failure of Seller to make Seller’s title marketable after diligent effort, Seller fails, neglects or refuses to perform this Contract, the Buyer may seek specific performance, or elect to receive the return of Buyer’s deposit(s) without thereby waiving an action for damages resulting from Seller’s breach.”

Based upon that language, the Seller’s position was that the only contractual remedies available to the Buyer were that of retaining the deposit related to purchase of the property (which would now be unrealistic post-closing) or of seeking specific performance. The trial court agreed, dismissing the Complaint for damages and awarding attorney’s fees to the Seller. The Buyer appealed, and the appellate court reversed.

In reaching its conclusion, the appellate court focused on a key contractual distinction under Florida law, viz., the distinction between dependent covenants (or obligations) and independent covenants (or obligations). As explained by the court:

“A dependant covenant... is one that depends on the prior performance of some act or condition, or, as otherwise defined, is an agreement to do or to [not] do something with reference to the thing on which it depends and to which it relates. . . . [An example of such a covenant in a real estate contract is an agreement to pay the purchase price in exchange for the delivery of a deed conveying the property.] In contrast, when an undertaking in the same contract is to be performed at a different time, the covenant is independent.”

Because the deal itself had successfully closed, the Buyer could not have sued for damages had the Seller been obligated to perform its obligations under the terms of the

addendum at or before the time of closing. However, because the contract addendum contemplated installation of the “Landscaping Plan” after the closing, it was deemed by the court to be an independent covenant (or obligation) from those obligations related to the closing. As a result, the discussed contract language did not limit the remedies of the Buyer, and the Buyer could seek to recover damages as a result of any failure by the Seller to perform as promised in the contract addendum.

The result of the appellate court’s decision was that the case was sent back to the trial court for the Seller to answer for any failure to make the agreed upon improvements and to possibly pay damages as a result. In this instance, the timing of the Seller’s obligations was certainly crucial.

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