



9-1-1974

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Recommended Citation

Bobby L. Freeman, *Specific Performance Is Not Automatically Available to the Vendor of a Condominium Unit.*, 6 ST. MARY'S L.J. (1974).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol6/iss3/16>

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a resident than it is to make a similar determination for an older inhabitant.⁵⁴

As additional safeguards, states might set out strict penalties for fraudulent assertion of domicile,⁵⁵ or require a new resident to demonstrate his domiciliary intent by tangible evidence,⁵⁶ thus making intent a crucial factor in his suit. Such procedures would allow a newcomer's divorce action to go swiftly to the courts and at the same time discourage migratory divorce.

Until the United States Supreme Court definitively decides the question, it is doubtful that most states will follow the example of Alaska and adopt a subjective test to determine domicile. Perhaps if the subjective test proves successful in Alaska, other courts could be persuaded to follow suit. Until that time, however, most jurisdictions will probably continue to apply an individualistic version of the compelling state interest test and retain their residency requirement divorce statutes.

John R. Lenahan, Jr.

CONDOMINIUMS—Breach Of Contract Of Sale—Specific Performance Is Not Automatically Available To The Vendor Of A Condominium Unit

Centex Homes Corp. v. Boag,
320 A.2d 194 (N.J. Super. Ct. 1974).

Boag contracted with Centex Homes Corporation for the purchase of a condominium unit located in New Jersey.¹ On law day Boag tendered a check which, together with a previous deposit, represented approximately 10 percent of the total purchase price. Immediately thereafter Boag notified Centex that he would not complete the purchase agreement, and stopped payment on the check. The contract contained a liquidated damages clause limiting the vendor's recovery to such moneys as had been paid at the time of a default by

54. *Hall v. Beals*, 396 U.S. 45, 55 (1970) (Marshall, J., dissenting).

55. *Whitehead v. Whitehead*, 492 P.2d 939, 951 (Hawaii 1972) (Levinson, J., dissenting). Justice Levinson advocates penalties for false pleadings and affidavits to offset fears about forum shoppers.

56. For example, proof of voter registration or procurement of a driver's license would help establish this intent.

1. The condominium building into which the Boags purchased contained 3600 units divided into six different floorplans.

the purchaser. Centex instituted this action praying for specific performance or, in the alternative, for liquidated damages in the amount of the check Boag had tendered at law day.² The matter came before the Chancery Division of the New Jersey Superior Court on Centex's motion for summary judgment. Held—*Complaint dismissed*. In the absence of showing either economic injury beyond that for which the legal remedy of damages is adequate, or other equitable considerations, the vendor of real estate in general, and condominiums in particular, is not entitled to the equitable remedy of specific performance against a defaulting vendee.³

The social and economic importance attributed to real estate when the doctrines of equity were developed imbued land with a peculiar and special value for which the legal remedy of damages was deemed characteristically inadequate.⁴ A parcel of realty was considered unique in that it had no counterpart anywhere in the world.⁵ Consequently, contracts involving the sale of any interest in realty became specifically enforceable either by the purchaser or by the vendor.⁶ The recent appearance of the condominium in the United States, however, has precipitated a re-examination of the bases for invoking the equitable remedy for breach of contracts for the sale of realty. Condominiums, which may have hundreds of identical units, present the courts with the seldom treated problem of dealing with a non-unique form of realty.

The concept of condominium housing, often referred to as a horizontal property regime,⁷ was recognized by the Hebrews as early as the Fifth Century B.C.⁸ The recent proliferation of condominiums in the United States, however, is the result of a 1961 amendment to the National Housing Act which provides for Federal Housing Administration insurance of mortgages for condominium units "if condominium ownership is recognized under the laws of the state in which the condominium is located."⁹

2. The check Boag had tendered was for \$6,870, while the previously made deposit only amounted to \$525.

3. Centex was only permitted to recover the amount of the previously made deposit pursuant to the liquidated damages clause in the contract. *Centex Homes Corp. v. Boag*, 320 A.2d 194, 199 (N.J. Super. 1974).

4. *McVoy v. Baumann*, 117 A.2d 725, 727 (N.J. Ct. Err. & App. 1922); 3 AMERICAN LAW OF PROPERTY § 11.68 (A.J. Casner ed. 1952).

5. *E.g.*, *Dickinson v. McKenzie*, 126 S.W.2d 95, 98 (Ark. 1939); *Bauermeister v. Sullivan*, 160 N.E. 105, 107 (Ind. Ct. App. 1928); *Mellin v. Woolley*, 115 N.W. 654, 655 (Minn. 1908); *McVoy v. Baumann*, 117 A. 725, 727 (N.J. Ct. Err. & App. 1922); 3 AMERICAN LAW OF PROPERTY § 11.68 (A.J. Casner ed. 1952).

6. See, for example, *Watts v. Waddle*, 31 U.S. (6 Pet.) 389, 393 (1832); *Hodges v. Kowing*, 18 A. 979, 980 (Conn. 1889); *Morgan v. Eaton*, 52 So. 305, 306 (Fla. 1910); *Clark v. Cagle*, 82 S.E. 21, 22 (Ga. 1914); *Tombari v. Griep*, 350 P.2d 452, 454-55 (Wash. 1960).

7. *State Sav. & Loan Ass'n v. Kauaian Dev. Co.*, 445 P.2d 109, 115-16 (Hawaii 1968).

8. Kerr, *Condominiums—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3 (1963).

9. 12 U.S.C. § 1715Y(a) (1970); see Note, 25 VAND. L. REV. 271, 272 (1972).

The condominium concept embraces a system of separate ownership of individual units in a multiple unit entity.¹⁰ The purchaser of a condominium unit owns his particular unit in fee simple, as well as an undivided interest in the common elements of the building regime such as corridors and stairways.¹¹ The New Jersey Condominium Act, recognizing this dual form of ownership provides that:

Each unit shall constitute a separate parcel of *real* property which may be dealt with by the owner thereof *in the same manner as is otherwise permitted by law for any other parcel of real property.*¹²

The right of any unit owner to the use of the common elements shall be a right in common with all other unit owners¹³

This fee simple ownership of the individual unit as realty distinguishes the condominium from the apparently similar "cooperative apartment" in which the purchaser merely acquires stock in a corporation, which is an interest in personalty.¹⁴

The distinction between a condominium unit and a cooperative apartment is important in that specific performance has traditionally been granted where realty is concerned and denied in cases involving personalty.¹⁵ It is not the nature of the property involved, however, which determines whether the equitable jurisdiction shall attach.¹⁶ Instead, the criterion for such a determination is the relative adequacy of the legal remedy.¹⁷ Professor Corbin notes that

10. *Susskind v. 1136 Tenants Corp.*, 251 N.Y.S.2d 321, 327 (Civ. Ct. of City of N.Y. 1964).

11. *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 107 Cal. Rptr. 123, 126 (Ct. App. 1973); Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 2 (1963).

12. N.J. REV. STAT. § 46:8B-4 (Supp. 1974) (emphasis added).

13. *Id.* § 46:8B-6.

14. *Silverman v. Alcoa Plaza Associates*, 323 N.Y.S.2d 39, 45 (App. Div. 1971).

15. In *Adams v. Messenger*, 17 N.E. 491, 494 (Mass. 1888) the court stated that contracts which relate to real property can necessarily only be satisfied by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market precisely similar property to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract.

See *Jones v. Newhall*, 115 Mass. 244, 248 (1874); *Simpson v. Green*, 231 S.W. 375, 380 (Tex. Comm'n App. 1921, holding approved); *Clarke v. Curtis*, 37 Am. Dec. 625, 629 (Va. 1841).

16. *Adams v. Messenger*, 17 N.E. 491, 494 (Mass. 1888). See also 5 A. CORBIN, CONTRACTS § 1142, at 123 (1964).

17. *Adams v. Messenger*, 17 N.E. 491, 494 (Mass. 1888); *Gulf Oil Corp. v. Rybicki*, 149 A.2d 877, 879 (N.H. 1959); *Eckstein v. Downing*, 9 A. 626, 627 (N.H. 1887).

[i]f the subject-matter of a contract is such that its exact duplicate or its substantial equivalent . . . is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually in the absence of other factors be sufficient to show that money damages are an adequate remedy for breach.¹⁸

Because real estate is impossible to duplicate by the expenditure of any amount of money, the legal remedy of damages has been considered uniformly inadequate "without regard to quality, quantity, or location."¹⁹ Specific performance, therefore, has been applied to breaches of real estate contracts as a matter of course, without reference to the adequacy of damages.²⁰ Indeed, some opinions have gone so far as to say that where a contract concerns land, specific performance is a matter of right, independent of the adequacy of the legal remedy.²¹ Such holdings lend credence to the view that American courts have become progressively more liberal in granting specific performance, and "less astute in enforcing the requirement that the remedy of damages shall be inadequate."²² In short, suits involving realty have always been decided on equitable rather than legal principles.

Although it is well settled that specific performance is available both to the vendor and to the purchaser of realty,²³ the legal justification for invoking equitable jurisdiction is not always the same for one as for the other. While some jurisdictions grant specific performance to the vendor solely on the grounds that the legal remedy is inadequate,²⁴ many jurisdictions require that

18. 5 A. CORBIN, CONTRACTS § 1142, at 123 (1964).

19. 2 RESTATEMENT OF CONTRACTS § 360, comment a, at 643 (1932); see *McVoy v. Baumann*, 117 A. 725, 727 (N.J. Ct. Err. & App. 1922) (holding that land may have a peculiar and special value to the purchaser for whom the remedy of damages at law will not be complete, since damages must be predicated on the money value of the land).

20. The presumption is that where realty is involved, equity is available without a showing of an inadequate remedy at law. *Cathcart v. Robinson*, 30 U.S. (5 Pet.) 264, 278 (1831); *Dickinson v. McKenzie*, 126 S.W. 95, 98 (Ark. 1939); *O'Donnell v. Chamberlain*, 91 P. 39, 42 (Colo. 1906); *Hodges v. Kowing*, 18 A. 979, 981 (Conn. 1889); *Anderson v. Anderson*, 96 N.E. 265, 267 (Ill. 1911); *Jones v. Newhall*, 115 Mass. 244, 248 (1874); *Russell v. West Nebraska Rest Home, Inc.*, 144 N.W.2d 728, 731 (Neb. 1966); *Bennett v. Moon*, 194 N.W. 802, 804 (Neb. 1923); *Eckstein v. Downing*, 9 A. 626, 627 (N.H. 1887); *Tombari v. Gripp*, 350 P.2d 452, 454 (Wash. 1960).

21. *Dickinson v. McKenzie*, 126 S.W.2d 95, 98 (Ark. 1939); *Keogh v. Peck*, 147 N.E. 266, 268 (Ill. 1925); *Park v. Koopman*, 143 N.E. 80, 82 (Ill. 1924); *Bennett v. Moon*, 194 N.W. 802, 804 (Neb. 1923); *Simpson v. Green*, 231 S.W. 375, 380 (Tex. Comm'n App. 1921, holding approved).

22. 5 A. CORBIN, CONTRACTS § 1139, at 111 (1964).

23. Cases cited note 7 *supra*.

24. *Jones v. Newhall*, 115 Mass. 244, 248 (1874); *Gulf Oil Corp. v. Rybicki*, 149 A.2d 877, 879 (N.H. 1959); *Eckstein v. Downing*, 9 A. 626, 627 (N.H. 1887). See generally 3 AMERICAN LAW OF PROPERTY § 11.68 (A.J. Casner ed. 1952) where it is stated: The vendor's remedy at law should be no basis for denying specific performance, inasmuch as damages are not the same as being rid of all the liabilities of land, with the net purchase price in one's pocket, and since, therefore, the vendor's damages at law are inadequate.

some standard of mutuality must be satisfied.²⁵ The doctrine of mutuality originally entailed not only mutuality of obligation, a prerequisite of any valid bilateral contract, but also mutuality of remedy.²⁶ Under this doctrine, postulated as the "Fry Rule,"²⁷ the vendor's right to specific performance depended on the availability of the same remedy to the purchaser at the inception of the contract.²⁸ That is, the remedies of the parties had to be identical from the time the contract was made.²⁹

The original doctrine has since been replaced with the much weakened modern concept of mutuality.³⁰ That which remains of the rule is that the court must be capable of compelling performance by both the plaintiff and the defendant before it will invoke equity.³¹ Mutuality is satisfied "if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation;" it is no longer necessary that the parties have identical remedies.³²

In New Jersey, the original doctrine of mutuality of remedy was the sole justification relied upon for extending the equitable remedy of specific performance to the vendor.³³ Following the lead of other jurisdictions, however, New Jersey abrogated the original doctrine, and recognized the modern con-

25. Almost every jurisdiction requires that some concept of mutuality must be satisfied. A good discussion of the concept can be found in *K & J Clayton Holding Corp. v. Keuffel & Esser Co.*, 272 A.2d 565 (N.J. Super. 1971). See also Durfee, *Mutuality in Specific Performance*, 20 MICH. L. REV. 289, 291 (1922); Lewis, *A Vendor's Right to Specific Performance*, 41 AM. L. REG. (n.s.) 65, 66 (1902); Note, 1959 WASH. U.L.Q. 424, 426 (1959); Note, 6 U. OF NEWARK L. REV. 287, 289 (1941).

26. 3 AMERICAN LAW OF PROPERTY § 11.68 (A.J. Casner ed. 1952).

27. The doctrine of mutuality of remedy was originally stated by Lord Justice Fry in the mid-Nineteenth Century. See Note, 1959 WASH. U.L.Q. 424, 426 (1959).

28. *Hopper v. Hopper*, 16 N.J. Eq. 147, 148 (Ch. 1863) offers a good example. See also Lewis, *The Present Status of the Defense of Want of Mutuality in Specific Performance*, 42 AM. L. REG. (n.s.) 591, 626 (1903) where it is posited that the Fry Doctrine rested on two incorrect assumptions: that the plaintiff would not live up to his part of the contract after obtaining a decree; and that the decree would become unfair if the plaintiff failed to perform, although it was fair when made.

29. 11 W. WILLISTON, CONTRACTS § 1433, at 883 (3d ed. 1968) outlines the mutuality of remedy doctrine. There it is stated that whenever one party cannot specifically enforce the contract, for any reason whatsoever, then neither can the other party specifically enforce the contract.

30. See *K & J Clayton Holding Corp. v. Keuffel & Esser Co.*, 272 A.2d 565, 567 (N.J. Super. Ct. 1971); *Epstein v. Gluckin*, 135 N.E. 861, 862 (N.Y. 1922). Mr. Justice Cardozo wrote in *Epstein*: "The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle." *Id.* at 862. See also Note, 6 U. OF NEWARK L. REV. 287, 289 (1941); 11 W. WILLISTON, CONTRACTS § 1433, at 883 (3d ed. 1968).

31. *Epstein v. Gluckin*, 135 N.E. 861, 862 (N.Y. 1922).

32. *K & J Clayton Holding Corp. v. Keuffel & Esser*, 272 A.2d 565, 567 (N.J. Super. Ct. 1971).

33. *Hopper v. Hopper*, 16 N.J. Eq. 147, 148 (Ch. 1863). See also Lewis, *A Vendor's Right to Specific Performance*, 41 AM. L. REG. (n.s.) 65, 72 (1902).

cept of mutuality.³⁴ As a result, much of the jurisdictional rationale for granting the vendor of realty specific performance was destroyed.

*Centex Homes Corp. v. Boag*³⁵ resolves the uncertainty of the vendor's remedy in equity as a result of the demise of the mutuality of remedy doctrine. The Chancery Division of the New Jersey Superior Court has established instead the relative adequacy of the legal remedy as the criterion for determining the availability of specific performance to the vendor of realty.³⁶ As a result, the term "realty" will no longer automatically invoke the equitable jurisdiction: the court will be required to examine the underlying jurisdictional rationale—the adequacy of the remedy at law—in each case where the vendor seeks specific performance.

Citing *Dover Shopping Center, Inc. v. Cushman's Sons*³⁷ in which a lessor of a semi-cooperative shopping center was granted specific performance of a lease agreement, the court in *Centex* made it clear that the adequacy of the legal remedy would depend on the uniqueness of the subject-matter of the contract, and the practicality of ascertaining the extent of the injury to the plaintiff.³⁸ Logically, the *Centex* decision represents a corollary of *Dover*. Where the court in *Dover* granted specific performance on the basis of "the uniqueness of a percentage lease" and the impracticability of determining damages at law,³⁹ the court in *Centex* denied specific performance on the grounds that the condominium unit involved was not unique, and that it so resembled personalty that damages would be easily ascertainable.⁴⁰

Strong support for the *Centex* holding, although not cited by the court, can be found in *Suchan v. Rutherford*, an Idaho Supreme Court case.⁴¹ In denying specific performance to the vendor of farm land common to that general area, the court held that the legal remedy was adequate because "[t]he land here involved is not unique," and "[s]ales of similar land are frequent and it is not difficult to establish its market value."⁴²

In essence, the effect of the *Centex* holding is that realty is no longer an absolute term denoting uniqueness, necessarily resulting in inadequacy of the legal remedy, and therefore, specific performance. It should be noted, however, that the fact that *Centex* was precluded from obtaining a decree of specific performance does not mean that any other vendor of a condominium

34. *Fleischer v. James Drug Stores*, 62 A.2d 383, 388 (N.J. 1948).

35. 320 A.2d 194 (N.J. Super. Ct. 1974).

36. *Id.* at 198.

37. 164 A.2d 785, 791 (N.J. Super. Ct. 1960).

38. *Id.* at 791.

39. *Id.* at 791.

40. *Centex Homes Corp. v. Boag*, 320 A.2d 194, 198 (N.J. Super. Ct. 1974).

41. 410 P.2d 434 (Idaho 1966).

42. *Id.* at 438.

unit will also be denied equitable relief. The exercise of a court's equitable jurisdiction is always discretionary.⁴³

Even so, discretion must be founded upon established principles in order to avoid arbitrariness.⁴⁴ Formerly, realty was one of the primary ingredients in the New Jersey courts' recipe for specific performance in favor of a vendor. Now, with the introduction of the condominium concept, the term "realty" can no longer be used by the courts as a shorthand way of representing uniqueness and inadequacy of the legal remedy. Because realty and uniqueness are no longer synonymous, neither then are realty and equity. As a result, where realty is non-unique, its vendor in New Jersey will be limited to his remedy at law—the difference between the contract price and the market value of the property—in the absence of a contract provision pertaining to liquidated damages.

The *Centex* decision restores flexibility to the discretionary power of courts to grant specific performance to vendors of realty. It remains to be seen whether the New Jersey courts will also choose to re-examine the *purchaser's* right to the equitable remedy where realty is involved. The tenor of the court's argument in *Centex*, that the modern concept of mutuality does not require that a vendor and a purchaser have identical remedies, indicates that the purchaser will probably continue to enjoy specific performance whenever realty is involved in a contract of sale. Having made the first big step in re-evaluating the jurisdictional rationale for invoking equity with respect to the vendor, New Jersey, as well as other jurisdictions, should likewise investigate the purchaser's right to specific performance where realty is involved. Every argument favoring the denial of specific performance to the vendor of non-unique realty is equally applicable to the purchaser of such realty.

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43. *E.g.*, *Stehr v. Sawyer*, 192 A.2d 569, 571 (N.J. 1963).

44. *Anderson v. Anderson*, 96 N.E. 265, 267 (Ill. 1911); *Bennett v. Moon*, 194 N.W. 802, 804 (Neb. 1923). *See also* 4 POMEROY, EQUITY JURISPRUDENCE § 1404 (5th ed. 1941) where it is stated that the term "discretionary" really depends on the presence of certain incidents and elements.

The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain