White Paper

Basic Contract Law

and

Real Estate Purchase Agreements

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Basic Contract Law and Real Estate Purchase Agreements

I. INTRODUCTION

General contract principles apply to all real estate purchase agreements. The first part of this article will discuss the various contractual elements contained in all real estate purchase agreements and the issues that arise from them. The second part of this article will answer questions commonly asked with respect to real estate transactions.

A contract is defined as a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law some way recognizes as a duty. Contracts consist of three elements: offer, acceptance and consideration. The offer must be communicated to either the buyer or the seller. Next, the offer must be either terminated or accepted. An offer may be terminated by revocation either by the buyer or the seller, by the counteroffer, or by operation of law. If not terminated, an offer can be accepted. Last, a valid contract must contain consideration which is defined as a bargained-for change in the legal position between a buyer and a seller.

If these three elements exist, there is a contract. However, a buyer or seller may have certain defenses to the contract which would allow that party to avoid performance of the contract. In addition, all real estate contracts contain conditions which must be either satisfied, excused or waived before the parties have an absolute duty to perform. Finally, once the parties have been deemed to have a duty to perform, that duty must be either performed or discharged in order to avoid liability for breach of the contract. If not, the party could be liable for breach and obtain either monetary damages or equitable (non-monetary) relief. This article discusses these basic contract considerations as they relate specifically to real estate purchase agreements, and provides illustrations of the issues surrounding these considerations.

II. OFFER, ACCEPTANCE AND CONSIDERATION

All contracts begin with an offer. An offer is a commitment communicated to an identified person containing definite terms. The subject matter of an offer must be stated with certainty. For example, a description of the land and the price must be included in an offer for the sale of real estate. Other material terms can be supplied later. Advertisements, however, are usually invitations to deal and are not offers. They are invitations for others to make an offer to the advertiser.

Termination of Offers

The offeror can terminate the offer in many ways. One way in which the offeror can terminate an offer is by revocation. An offer may be revoked at any time prior to acceptance. When the offeror expressly revokes an offer, the revocation is deemed effective at the time it is received by the offeree. Most offers are revocable even if they state the contrary. For example, if an offer says it

will be held open until midnight tomorrow or for 30 days, it can still be revoked at any time unless the offeree has paid some sort of consideration to hold open the offer.

An offer can also be revoked indirectly. When conduct revokes an offer, the revocation is deemed effective when the offeree indirectly receives information from a reliable source about the offeror's acts that indicate to a reasonable person that the offeror no longer wishes to make the offer. For example, if Jones offers to sell his house to Campbell, but before Campbell can accept the offer she learns that Jones has sold his house to Smith, the offer from Jones to Campbell is deemed revoked. The best way to revoke an offer is to expressly revoke and then accept another offer from the third party. In this way, the first offeree cannot accept the first offer after the offeror has accepted another offer.

The offeree can also terminate an offer by rejection. A refusal or rejection is effective when it is received by the offerer. The rejection can be expressed by words, or by conduct in letting the offer lapse. For example, an offer states it is to be held open for 48 hours but the offeree accepts five days later. The original offerer can consider this late acceptance a counteroffer and the lapse of the original offer a rejection.

Another way in which an offer can be terminated is by operation of law. An offer is terminated when, for example, the subject matter is destroyed, one party becomes incapacitated by death or mental illness, or there is a supervening illegality such as Ohio passes a law stating there shall be no sales of homes in Summit County in the month of May, 1999. In this case, a sale of a home in May of 1999 in Summit County would be illegal and an offer to sell in that month would be terminated.

Counter Offers

The offeree can also reject the offer by making a counteroffer. A counteroffer is an offer made by the offeree concerning the same subject matter, but proposing a different bargain than the original offer. In other words, if the terms of an acceptance do not mirror the terms of the offer, the new or different terms constitute a counteroffer and a rejection of the original offer. For example, if Jones offers to Campbell, "I will sell you my house for $50,000" and Campbell replies, "I accept your offer, but will only pay $48,000," Campbell has rejected Jones' offer and has instead proposed a counteroffer. Rejections or counteroffers are not effective until received by the offeror. Therefore, if an offeree sends by mail a rejection and then changes his or her mind and sends an acceptance by express mail and the acceptance is received first, the acceptance of the contract is valid.

Acceptance

If an offer is not terminated, it can be accepted. Acceptance of an offer is a manifestation of assent to the terms in a manner invited or required by the offer. If the terms of the offer are varied in any way, it is a rejection and a counteroffer. The offeror controls the terms of the offer and the manner of acceptance. The acceptance must comply with the requirements of the offer in order to be valid. For example, if the offer requires a certain method of acceptance, such as a written acceptance hand delivered, an oral acceptance will not be valid. Furthermore, only the express offeree has the

authority to accept an offer. For example, if Jones offers to Campbell, "I will sell you my house for $50,000," and Smith, after hearing this offer says, "I accept your offer, Jones," it is not a valid acceptance; only Campbell can accept.

If the offer is silent as to the manner of acceptance, acceptance must be by a reasonable method. A method of acceptance is reasonable if it is the same method used by the offeror to make the offer or one that is customary in similar transactions (i.e. hand delivery or mail delivery).

Delivery

Under normal circumstances, an acceptance is effective upon dispatch. However, there are five exceptions to this rule. The first exception involves an offer that states that acceptance is not effective until received. Also, in an option contract in which the offeree has paid consideration to hold the offer open, the acceptance is effective only upon receipt. If, however, an offeree sends a rejection, then sends an acceptance, the first received by the offeror is effective. If the offeree sends the acceptance first, then sends a rejection is effective. If the offeree sends the acceptance first, then sends a rejection and the offeror receives and acts on the rejection first, the rejection is effective. Therefore, an offer's revocation or rejection is valid upon receipt, but ordinarily an offer's acceptance is valid upon dispatch.

Questions arise when an acceptance is made by a seller by communicating acceptance to the seller's agent. If the agent fails to deliver the acceptance to the buyer, the acceptance is not effective. Similarly, if acceptance is made by a seller to a buyer's broker but the broker fails to deliver the acceptance to the buyer, acceptance is valid. In this way, acceptance can be seen as being effective when put out of the offeree's possession. Because the offeree's agent stands in the shoes of the principal, the offeree has not relinquished control of the acceptance until the agent sends the acceptance.

Examples

The following are some examples of valid and invalid and acceptances:

1.) A buyer makes a purchase offer that states it will stay open for 48 hours. The seller accepts the offer 50 hours later. No contract has been formed, for the offer has lapsed and the offeree has rejected. However, if the buyer acts in the acceptance and waives the time limit, the late acceptance can be seen as a counteroffer that is accepted by the buyer's actions.

2.) A buyer makes an offer that states it is open for 48 hours. The seller delivers the acceptance to the listing broker, his agent, within 48 hours. However, the seller has not accepted the contract unless the listing broker delivers the acceptance to the buyer within the 48 hours.

3.) A seller, negotiating with a buyer, makes a counteroffer to the buyer. Subsequently, the seller receives a better offer from a second buyer which he accepts. When the seller tries to revoke his counteroffer, he learns the first buyer has already delivered an acceptance to the selling agent. The acceptance and the first contract are valid because the buyer relinquished control of

the acceptance and delivery to the seller's agent constitutes delivery to the seller. Therefore, the seller is bound to two contracts.

4.) A buyer makes an offer and the seller accepts directly, but, subsequently the seller gets a better offer from another buyer. The seller cannot accept the second offer. If the seller accepts the second offer, the seller is bound to two contracts. However, if a buyer makes an offer and the seller accepts by giving the signed contract to a listing broker, then the seller gets a better offer, the seller can revoke the first acceptance because it is not out of his possession. The listing broker in this case is considered the seller's agent and because the seller's agent has not relinquished control of the acceptance, the first acceptance is not valid.

5.) The buyer makes an offer and the seller makes a counteroffer to the buyer, but subsequently the seller gets a better offer. The seller cannot accept that second offer if the buyer has accepted the counteroffer. If the first buyer has not yet accepted, the seller can revoke the counteroffer and accept the second, better offer. However, if the first buyer learns of the second contract before acceptance, even if the seller has not yet communicated to the buyer that the seller has accepted a better offer, the first buyer cannot force the seller into a contract because the first buyer has learned of this contract, and that effectively revokes the seller's counteroffer.

Consideration

If there is mutual assent by a valid offer and acceptance, consideration is the next element necessary in order for a contract to be enforceable. Consideration is a bargained for change in legal positions between the parties of the contract. Consideration can be in many forms, including cash or a binding promise to perform. Gifts and pre-existing duties are not usually sufficient consideration. For example, a promise to give property without other consideration is not an enforceable contract. In the context of a real estate purchase agreement, consideration is often in the form of bilateral promises to perform under the contract. However, there are substitutions for consideration when circumstances warrant. For example, if one party's justifiable reliance upon the other party's promise to sell causes detriment in some way that the other party should have reasonably foreseen (such as expenses in anticipation of moving), consideration is not required by the relying party. Instead, a valid contract will be found to have been formed and both parties will be required to perform.

Examples

1.) An uncle promises to give his farm to his nephew when the nephew reaches the age of 21. When the nephew turns 21 and demands the farm, the uncle refuses. The nephew sues to enforce the promise.

Result: The uncle wins because the nephew paid no consideration. The promise was a gift and not an enforceable contract.

2.) An uncle promises his nephew, "If you pay me $50,000, I will give you my farm when you turn 21." The nephew pays $50,000. When the nephew turns 21 and demands the farm, the uncle refuses. The nephew sues to enforce the promise.

Result: The nephew wins because the nephew paid valid consideration of $50,000 to make the contract enforceable.

Offer and acceptance constitute the heart of real estate contracts. Many of the controversies and conflicts of transactions occur at these stages. Therefore, a strong grasp of the fundamental basics of offer and acceptance will keep real estate purchase transactions smooth and trouble-free.

III. PERFORMANCE OF A REAL ESTATE CONTRACT

Conditions

Ordinarily, a seller's obligation under a real estate contract is to convey property to a buyer, while the buyer's obligation is to pay the purchase price agreed upon by the parties. However, every real estate contract contains conditions which must be satisfied, excused, or waived before the parties have a duty to perform. A condition is anything which the parties agree must happen before one or both of the parties must perform under the contract. A condition can be a "condition precedent", which means that one party is not obligated to perform until the other party has performed or satisfied the condition. For example, most real estate contracts contain the condition precedent that a buyer must secure financing before he or she is obligated to tender the purchase price of the real estate contract to the seller.

A condition may also be a "condition concurrent" which means that neither party is obligated to perform the contract until the other party either performs the condition, or is ready, willing and able to perform. For example, virtually all real estate contracts contain the concurrent condition that the seller agrees to convey his interest in the real estate upon the payment by the buyer of the purchase price at a specified time.

Satisfaction

Parties can satisfy conditions in several ways, the most obvious being complete satisfaction. When a condition is completely satisfied, the condition has been met and both parties become obligated to perform the contract. In the scenarios described above, for example, if the buyer is able to obtain financing, or the buyer tenders the purchase price and the seller conveys his interest in the real estate within the specified time, the conditions have been completely satisfied.

Conditions can also be satisfied by substantial satisfaction. Substantial satisfaction occurs when the party performs the condition to a degree such that the other party becomes obligated to perform the contract. Whether substantial satisfaction has occurred is generally a factual question, but one which may usually be answered using common sense.

Example

1.) If a real estate purchase contract contains the condition that the house to be purchased must be painted by the seller before the buyer is obligated to pay the purchase price, and the seller paints the house but neglects to paint the trim around one of its windows, the seller would most likely be considered to have substantially satisfied the condition. The buyer would then become obligated to perform the contract and tender the purchase price.

Excuse

Even if a condition is not satisfied, a party can be excused from its duty to perform under certain circumstances. For example, if a party who is obligated under the contract to satisfy a condition does not do so, but makes a good faith effort to satisfy it, that party will be excused from performance. Also, if one party fails to cooperate with the other party, or prevents the occurrence of the condition, the latter party will be excused from performance under the contract.

Similarly, a party will be excused if the other party anticipatorily repudiates the condition. Anticipatory repudiation occurs when one party refuses to perform or makes it clear that they intend not to perform before the time fixed for performance arrives. If a party anticipatorily breaches a contract, the other party is released from its obligation to tender performance so long as the latter party shows that it was ready, willing and able to perform.

Additionally, if one of the parties is unable to perform a condition, the other party is excused from its obligations under the contract. For example, if an encumbrance upon a property exists which the seller is unable to remove, the seller is considered unable to perform and the buyer is released from requiring to tender the purchase price under the contract. The seller, however, remains liable to the buyer for damages incurred as a result of the failure to remove the encumbrance.

A condition itself can be excused pursuant to the doctrine of estoppel. Estoppel occurs when a party says it will not perform the condition and the other party changes its position in reliance on this statement. If the first party then chooses to perform the condition, the latter party will not be required to perform under the contract because it relied on the statement that the condition would not be performed.

Examples

The following are examples of situations discussed above in which a party may be excused from performance even though a condition has not been satisfied:

1.) A real estate purchase contract states that the buyer must obtain financing before becoming obligated to tender the purchase price to the seller. If the buyer has acted in good faith and made reasonable, genuine efforts to obtain financing, yet has been unable to do so, the buyer's duty to tender the purchase price is terminated without liability to the buyer. Whether a party has used reasonable efforts to satisfy the condition, thereby releasing that party from liability, is usually a factual question that is decided on a case by case basis. To protect both parties

from having to guess as to what are reasonable efforts, the financing contingency should be spelled out in the contract.

2.) A real estate agreement states that the buyer has a right to inspect the property before closing. If the seller refuses to permit the buyer onto the property to inspect it, the seller would have prevented the occurrence of a condition, thereby excusing the buyer from performance.

3.) The buyer tells the seller that he or she has not made any applications to obtain financing for the purchase price and does not intend to make any applications. This is considered anticipatory repudiation that would excuse the seller from conveying the property. Furthermore, the buyer would be considered to have breached the covenant upon repudiation, and the seller could bring an action for breach immediately.

4.) Suppose in example 3, above, the seller, after being told by the buyer that the buyer was not going to perform the contract, relies on the buyer's statement and sells the property to another party. The buyer would be prevented, or estopped, from holding the seller to the contract pursuant to the doctrine of estoppel.

Waiver

Conditions are contained in a contract for the benefit of either one, or occasionally, both of the parties. If a condition is not satisfied the party for whose benefit a condition was included can waive the condition to a contract. Waiver occurs when the time in which the condition was to be performed passes, but one party either performs anyway or says that it will perform regardless of the fact that it is no longer obligated to do so. The party's conduct waives the condition and invokes upon both parties an absolute duty to perform the contract.

Example

1.) Suppose the real estate agreement states that the parties must close in 30 days, within which time the buyer must obtain financing. If the buyer is not able to obtain financing until a later day, but the parties agree to close at this later date, the parties become obligated to perform even though the condition was not satisfied. In this case, both parties must waive the condition because it was placed in the contract for the benefit of both parties, namely, to prevent the parties from being obligated to perform for an indefinite period of time.

Performance

Once all the conditions to the contract have been excused, waived, or satisfied, both parties have an absolute duty to perform which must be discharged or performed, else the parties will be deemed to have breached the contract. Usually, the preferred method of satisfying one's duty to perform is either complete or substantial performance. Obviously, if both parties perform their obligations, they have satisfied performance of the contract. If one or both parties substantially perform their obligations, they will be deemed to have performed the contract, although they may be held responsible for damages to the other party to the extent their non-performance harmed

the other party. Using one of the examples described above, if the seller agreed to convey a newly painted house and conveys the house, but failed to paint the trim around one of the windows, the seller would have substantially performed the contract and would be liable only to the extent the buyer was damaged, which would be nominal in this example: the cost of painting the trim around one of the windows.

If a duty is not performed, it may be discharged, and neither party will be considered to have breached the contract. Parties can discharge their duties by the doctrines of mutual rescission which is a mutual agreement not to perform the contract, impossibility, novation, and frustration.

Examples

The following are examples of various ways to discharge one's duty to perform:

1.) If the buyer does not want to pay the purchase price, and the seller does not want to convey the property, the two parties can agree to rescind the contract. Neither party will be held liable for breach of the contract because both agreed not to perform the contract.

2.) If the seller attempts to convey the real estate, but then discovers that he does not have title to it, assuming the absence of fraud, the parties would be discharged from their obligations to perform under the contract, because performance is impossible.

3.) A buyer and seller have contracted to sell real estate, but the buyer no longer wishes to purchase the property. If the buyer provides the seller with another ready, willing and able buyer, the latter buyer can be substituted in the place of the former buyer. Actually, the agreement between the seller and the new buyer is a new agreement, but has the effect of releasing the former buyer from obligation to perform under the contract. This substitution of parties is called novation.

4.) Suppose a buyer and seller have contracted to convey real estate, but before the transfer an earthquake occurs and the property disappears. The contract is voided by the doctrine of frustration. In this fact scenario, neither party would be obligated to perform, and their duty to do so would be discharged.

IV. DEFENSES TO ENFORCEABILITY OF A REAL ESTATE PURCHASE CONTRACT

Statute of Frauds

As with contracts in general, there are a number of defenses to the enforceability of a real estate purchase contract. The first of these defenses is the statute of frauds. To be valid, certain contracts are required by statute to be in writing. Section 1335.05 of the Ohio Revised Code requires a "contract or sale of lands, tenements or hereditaments, or interest in or concerning them" to be in writing and signed by the party to be charged. The contract, therefore, need not be signed by both parties. However, the party against whom the contract is sought to be enforced must have signed the contract to be bound by it. If the contract for the purchase and sale of real property is an oral

contract, either the buyer or the seller may invoke the defense of the statute of frauds in an action brought to enforce such contract.

Example

1.) A seller and buyer enter into a contract for the purchase and sale of real property. The contract is in writing and signed by the buyer. However, the contract is not signed by the seller. The seller may invoke the statute of frauds as a defense to an action by the buyer for the enforcement of the real estate purchase contract. However, the buyer would not be able to invoke the defense of the statute of frauds in an action against the seller because the seller did not sign the contract. The contract must be signed by the party against whom it is sought to be enforced.

Incapacity

The second defense to the enforcement of a real estate purchase contract is incapacity. Incapacity is the lack of capacity of a party to enter into a contract. Certain classes of individuals are incapable of entering into binding contracts. The most important of these classes are infants, mentally incompetent individuals and intoxicated persons. Infants are defined as persons under the age of eighteen. Contracts entered into by infants are voidable by the infant. However, the party with who the infant has contracted is bound by such contract. Upon reaching the age of majority, an infant may affirm any contract entered into by him or her as an infant, and thereafter be bound by such contract. Although contracts entered into by infants generally are voidable by the infants, some contracts are not voidable, such as those for necessities like food, shelter and clothing.

There are two subclasses of mentally incompetent persons — adjudicated incompetents and non-adjudicated incompetents. A contract entered into with an adjudicated incompetent is void and unenforceable. Non-adjudicated incompetents are those individuals who are incapable of understanding the nature and significance of a contract, but have not been adjudicated incompetent. Contracts entered into by non-adjudicated incompetents are voidable. The non-adjudicated incompetent may void the contract when lucid or at any time by a legal representative. He or she also may affirm the contract during a lucid interval or upon complete recovery. Mental incompetents, like infants, are bound by contracts entered into for necessities.

Intoxicated persons are those persons who are so intoxicated they do not understand the nature and significance of their conduct. A contract entered into by an intoxicated person may be voided or affirmed by such person once he or she is sober. Again, however, the intoxicated person may be liable for contracts entered into for necessities.

Example

1.) A buyer and seller enter into a contract for the purchase and sale of real property. The buyer is seventeen years old. The buyer may void the contract, but the seller is bound by it. However,

when the buyer reaches age eighteen, he or she may affirm the contract and be bound by its terms.

Illegality

The next defense is illegality. Contracts entered into for an illegal purpose or contracts involving illegal subject matter are void and unenforceable.

Example

1.) A buyer and seller enter into a contract for the purchase and sale of real property which the buyer is going to use as a "crack house." The contract is void and unenforceable by either party.

Fraud or Misrepresentation

Fraud or misrepresentation is another defense to the enforcement of a real estate purchase contract. For fraud or misrepresentation to constitute a valid defense to a real estate purchase contract, the fraud or misrepresentation must go to a material fact in the contract. A distinction must be made between fraud in the factum (fraud in the execution) and fraud in the inducement. Fraud in the factum occurs when a party does not know it is entering into this particular contract; there is no intent on the part of the buyer to enter into the contract. All contracts entered into as a result of fraud in the factum are void.

Fraud in the inducement, on the other hand, occurs when a party knows it is signing a contract, but is deceived as to provision in, or facts surrounding the contract. All contracts entered into as a result of fraud in the inducement are voidable by the defrauded party.

Examples

1.) A seller obtains the buyer's signature on a contract for the purchase and sale of real estate by stating that the paper the buyer is signing is simply a petition to stop the construction of a nuclear power plant. In this case, the buyer does not know he or she is signing a contract for the purchase and sale of real estate. Therefore, the contract is void because it is a product of fraud in the factum.

2.) Because of the seller's words and conduct, the buyer believes he or she is purchasing the house on the southeast corner of the intersection at Broad Street and Elm Avenue. In reality, however, the buyer is signing a contract for the purchase of the house on the northeast corner of the intersection. This contract is voidable by the buyer because it is a product of fraud in the inducement.

Duress

Duress is another defense to the enforceability of a real estate purchase contract. Duress occurs when a party is subject to the undue influence of another. Contracts entered into as a result of duress are voidable by the party subjected to the duress.

Example

1.) The seller threatens to defame and ruin the buyer's character and reputation unless the buyer signs the real estate purchase contract. The contract is a product of duress and is voidable by the buyer.

Unconscionability

Unconscionability may be used as a defense by a party to an action for the enforcement of a real estate purchase contract. Unconscionability exists when a contract, at the time of its formation, is oppressive or unfair to one of the parties. A contract is not unconscionable if it becomes oppressive or unfair after the contract is signed; the unconscionability must be present at the time of contract formation. Unconscionability is always a question for the court, not the jury. When unconscionability exists, the court may do anything necessary to make the contract fair.

Examples

1.) Buyer and seller agree on a purchase price of $100,000. The purchase price of $100,000 is set forth in the real estate purchase contract. Both parties believe the price of $100,000 accurately reflects the value of the home. After the contract is signed, an appraisal of the home is conducted. The appraisal reveals that the value of the home is $50,000. This is not unconscionable. People are free to make bad deals for themselves; the law does not protect individuals from entering into bad deals. It protects people only from entering into oppressive or truly unfair contracts. Thus, unconscionability is not a valid defense for the buyer in this example.

2.) Buyer and seller enter into a real estate purchase contract. The contract provides, in small inconspicuous type, that the seller is not liable to the buyer for any misrepresentations made by the seller or for any omissions of material facts regarding the real property and that the buyer must pay the purchase price regardless of any fraud or misrepresentation by the seller. The buyer may assert unconscionability as a defense to the enforcement of this contract.

Mistake

Mistake constitutes a valid defense to the enforcement of a real estate purchase contract. There are two types of mistakes – mutual mistake and unilateral mistake. In instances of mutual mistake, the parties are mistaken as to the subject of the contract. When mutual mistake occurs, the contract is void.

Unilateral mistake is a defense if only one of the parties is mistaken about facts regarding the agreement and the non-mistaken party is or should be aware of the mistake made by the other party. If a contract is the product of unilateral mistake, it is voidable by the mistaken party.

Examples

1.) The buyer and seller both believe that the northern boundary of the property is three miles from the road. In fact, it is one mile from the road. The contract is void and unenforceable by either party because it is a product of mutual mistake.

2.) The buyer believes that the northern boundary of the property is three miles from the road. The seller knows that it is one mile from the road. If the seller knows of the buyer's mistaken belief regarding the location of the boundary, the real estate purchase contract is voidable by the buyer because it is a product of unilateral mistake.

Ambiguity

Ambiguity is another defense to the enforcement of a real estate purchase contract. Ambiguity occurs when a term in a contract is capable of different interpretations. If both parties are aware of the ambiguity or both parties are unaware of the ambiguity, there will be no contract unless both parties intended the same meaning. However, if one party knows of the ambiguity and the other does not, the contract will be enforced according to the intention of the party who is unaware of the ambiguity.

Examples

1.) Suppose there is a house at 112 Green Street and a house at 112 Green Avenue. The real estate purchase contract identifies the property as simply "112 Green." If neither party is aware of the ambiguity, and the buyer believes the subject property is located at 112 Green Avenue but the seller believes the property is located at 112 Green Street, there will be no contract. There also will be no contract in the above situation if both parties are aware of the ambiguity.

However, regardless of whether both parties are aware or unaware of the ambiguity, there will be a contract if both the buyer and seller believe the subject property is located at 112 Green Avenue, or both believe it is located at 112 Green Street. If the seller knows of the ambiguity and the buyer does not, and the seller intends the subject property to be located at 112 Green Avenue, but the buyer intends the subject property to be that located at 112 Green Street, there will be a contract for the purchase and sale of the property located at 112 Green Street.

Lack of a Party

For a real estate purchase contract to be enforceable, it is necessary that the whole fee of the real property be transferred. Therefore, all fee owners of the subject property must be parties to the

contract. If they are not, assertion of this fact constitutes a valid defense to the real estate purchase contract.

Examples

1.) A husband and wife jointly own a house. The husband signs the real estate purchase contract, but the wife does not. The wife's failure to sign the contract constitutes a valid defense to the enforcement of the contract.

2.) A husband and wife want to sell their house. Both the husband and wife and the buyer are present during negotiations. Although the wife does not actively participate in the negotiations, she listens to everything, and does not raise any objections. The husband sign's the real estate purchase contract, but the wife refuses to do so. The wife is estoppend from asserting her failure to sign as a defense to the enforcement of the contract. This is an exception to the general rule that all parties must sign the real estate purchase contract.

V. BREACH OF CONTRACT AND REMEDIES

Once a valid, mutually binding contract has been created, both the buyer and the seller must perform or be discharged, or they will breach the contract. In the event of a breach, the remedy is to put the non-breaching party in as good a position as performance of the contract would have done. One way this can be accomplished is by the award of damages.

Sellers' Remedies

Under Ohio law, ordinarily when a buyer defaults on a contract for the sale of real estate, the vendor recovers the difference between the contract price and the fair market value of the property at the time of the breach. If this calculation is less than zero, only nominal damages are awarded. Although the resale price is not determinative, it is allowed as some evidence of the fair market value of the property. Courts only consider the resale price when the sale is made within a reasonable time and at the highest price obtainable after the breach of the contract.

The remedies of the seller will also include special damages if they are alleged and proved. Special damages, including consequential and incidental damages, must be reasonably expected as a probable result of the breach at the time of the contract. An example of special damage is the recovery of the amount required for the removal of the cloud on the title of the property because the purchase agreement was recorded though not valid. Other expenses that are incidental to ownership, such as maintenance and utility expenses for the months in between the contract breach and the resale, are not often awarded to the seller. These expenses may be foreseeable by the parties when making the contract, but the duration and extent of those expenses cannot be reasonably calculated at the time of the breach.

Example

1.) A seller signs a listing agreement that contains a provision requiring the seller to pay a commission if the broker produces a ready, willing and able buyer. The broker produces a buyer who eventually breaches the purchase contract. Although the seller must pay the commission under the listing agreement, the seller can recover that amount from the buyer as a special damage resulting from the breach of the purchase contract.

Buyers' Remedies

When the seller breaches the contract, the purchaser is entitled to damages. The purchaser receives the difference between the fair market value and the contract price at the time conveyance should have been made. The purchaser can receive special damages as compensation for the loss of the bargain, but only actual losses and expenses in performing their part of the contract, and the loss of their time engaged in performing the contract. Again, these damages must be reasonably foreseeable at the time of the parties' contract. Unreasonable or speculative damages will not be awarded.

Example

1.) A buyer who lives in Columbus enters into a valid purchase contract for the sale of a house in Toledo. In anticipation of the move, the buyer moves into an apartment in Toledo for 30 days before closing and gives a moving company a deposit to contract, the buyer can claim as special damages the rent and the deposit paid.

Specific Performance

As an alternative to damages for breach of a real estate contract, courts have the discretion to award specific performance. Specific performance is the court-ordered performance of each party's duties under a contract. Courts often award specific performance as an alternative to damages when the subject matter of the contract is unique. This is the case with real estate purchase agreements because each parcel of land is unique. However, courts hesitate to decree specific performance, especially when the results would be oppressive or inequitable. Courts do not often force parties into relationships with each other.

Examples

1.) A buyer and seller enter into a contract for the sale of three adjacent parcels of land on which the buyer intends to build a shopping center. The seller breaches the contract by refusing to relinquish possession of the middle parcel. When the buyer sues, instead of awarding damages, the court orders specific performance. The court forces the seller to perform under the purchase contract and transfer all three parcels of land because the outer two parcels alone are useless to the buyer.

2.) A seller enters into a contract for the sale of real estate with a buyer on April 1st. On April 4th, the seller is approached by another buyer and contracts to sell the same real estate at a higher price. The second buyer takes possession and makes substantial improvements to the property. When the first buyer tenders the purchase price, the seller refuses and explains the property belongs to the second buyer. When the first buyer sues, demanding specific performance, the court refuses and instead awards damages in the amount of the difference of the sale price as evidence of the property's fair market value and the first contract price.

Another alternative to consequential and special damages is the award of liquidated damages. Liquidated damages are damages that are provided for in the contract. If at the time of contracting the damages resulting from a breach would be difficult to ascertain, the parties can agree in advance to a specific amount as damages in the event of breach. These liquidated damages will be upheld if not unreasonable.

SPECIFIC REAL ESTATE PURCHASE AGREEMENT ISSUES FAQS

Q. When is earnest money required to create a binding contract?
A. Never, unless it is expressly stated in the contract itself.

Q. What about oral acceptance?
A. Oral acceptance is valid unless the offer (as is usually the case) states that acceptance must be in writing. However, the purchase agreement must be in writing to make the contract enforceable.

Q. Must the seller accept the first offer received?
A. No. There is no hierarchy of offers and the seller can accept the best offer received. However, the seller must be careful to accept only one offer or be bound to two contracts.

Q. What is the effect of only one spouse's signature on a contract when both spouses own the property?
A. Both spouses' signatures are necessary to create a valid contract. If one spouse does not sign, the contract will not transfer a clear title to the land.

Q. What happens when the purchase offer says it is to stay open for 48 hours and the buyer changes his or her mind and revokes it before it is accepted?
A. It is revoked. Unless the seller has paid consideration to keep the offer open, the buyer can revoke at any time prior to acceptance.

Q. What happens when the seller accepts an offer, but the potential buyer's financing falls through?
A. Assuming the contract contains a financing contingency, the buyer is held to a standard of a good faith effort to obtain financing. If the buyer exercises good faith, but fails to obtain financing the buyer is excused from performance. If the contract does not contain a financing contingency, the buyer is still obligated to perform.

Q. What if the broker offers a cash incentive to prospective buyers or sellers to enter into a purchase agreement?
A. Under Ohio law, a broker's offer of inducements to enter into a real estate purchase agreement is grounds for suspension or revocation of the broker's license unless the inducement is recited in the contract.

Q. What happens if the seller makes a counteroffer then accepts a better offer?
A. The seller could be bound to two contracts if the first buyer accepts the seller's counteroffer before he or she learns of the other contract.

Q. Are real estate purchase contracts enforceable if they do not give the buyer a right to inspect the property prior to closing?
A. Yes. However, it is considered to be in the best interest of both the buyer and seller to include an inspection contingency in the purchase contract.

Q. Can a real estate licensee (non-lawyer) draft a real estate purchase contract?
A. No. The drafting of a real estate purchase contract by a non-lawyer constitutes the unauthorized practice of law. However, a real estate licensee (non-lawyer) can assist a party in "filling in the blanks" of a form contract prepared by a lawyer.

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