

Limitation of Remedies

Clause Bars Claim for Specific Performance

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Contracts for the sale of real property often contain a clause specifically setting forth the remedies available to a buyer if the seller is unable to satisfy a stated condition of the contract. In a recent decision by the Appellate Division, First Department in *101123 LLC v. Solis Realty LLC*,¹ the court, enforcing such a restrictive remedies provision, affirmed the trial court's dismissal of a complaint seeking specific performance. The Appellate Division decision was written by Justice David B. Saxe. Justices Joseph P. Sullivan, Eugene Nardelli and Milton L. Williams concurred.

The parties had entered into a contract of sale by which Solis Realty LLC (Solis) agreed to sell an apartment building to 101123 LLC. The contract provided that the seller must convey the building "free and clear of leases, tenancies or occupancies." The contract also included a provision (paragraph 7(b)) that if the seller were unable to convey title in accordance with the terms of the contract, then the purchaser could elect either:

... (i) to terminate this Contract, or (ii) to accept such title as Seller may convey and shall complete the transaction as otherwise contemplated by this Contract, but in no event shall Purchaser be entitled to any abatement of the Purchase Price or to any lost profits or other damages, deduction, offset or credit.²

The contract specified that if the seller defaulted, the seller's sole liability would be "to instruct the Escrow Agent to return to Purchaser the Contract Deposit, together with any interest earned thereon, and pay the net title examination cost, without policy." Upon return of the contract deposit, the contract would automatically terminate and be deemed canceled. If the seller willfully defaulted under the contract, however, then the contract gave the purchaser the right "to bring an action for specific performance against Seller and exercise any other remedies at law or in equity."

When the contract was executed, there was only one elderly rent-stabilized tenant in the building. The closing date specified in the contract (July 18, 2001) was repeatedly adjourned in order to give the seller time to arrange for the relocation of that tenant. As of April 2, 2002, however, that tenant remained in his apartment. That day, the buyer's attorney sent a letter to the seller's attorney stating that his client had been extremely patient but that if title could not close within 20 days, his client "will have no other recourse but to declare the Seller in default."

The seller's attorney responded, stating that, despite its efforts, the seller was "unable to deliver the Property free and clear of tenants or occupants." The seller's attorney referred to the buyer's options under paragraph 7(b) of the contract (quoted above), interpreted the letter from the buyer's attorney as an election by the buyer to terminate the contract, and stated that the seller was prepared to instruct the escrow agent to release the contract deposit to the buyer provided that mutual releases would be exchanged.

The buyer's attorney then sent a letter explaining that the buyer was not electing to cancel the contract, and was disputing the seller's asserted inability to convey clear title, claiming that the seller had shown the buyer no evidence even

of having asked the tenant to leave. The buyer's attorney took the position that the seller's failure to remove the tenant was a breach of its obligation under the contract, and commenced an action for specific performance.

Both parties moved for summary judgment. New York County Supreme Court Justice Marilyn G. Diamond denied both motions, finding there was a question of fact as to whether the seller had made an adequate good faith effort to arrange for the tenant's relocation. A trial was then held, following which the trial court concluded that the seller had made reasonable efforts to induce the tenant to relocate, and dismissed the buyer's complaint for specific performance. The buyer appealed.

On appeal, the First Department summarized the issue before it as follows:

... [T]he question presented is whether the buyer is limited to the remedies provided for in the parties' contract, entitling it only to either take the property as it was or to rescind the contract, and precluding specific performance except in the event the seller willfully defaulted on its contractual obligations.³

In arguing for an entitlement to specific performance despite the lack of willful default by the seller, the buyer relied on the Court of Appeals decision in 1981 in *S.E.S. Importers, Inc. v. Papalardo*,⁴ where the court stated:

The buyer's right to specific performance in this circumstance [of a defect in title at closing that had disappeared at the time of trial] is not lost because the parties expressly agreed in the contract of sale as to the remedies to which the buyer would be entitled in the event the seller was unable to convey good title.⁵

The *S.E.S.* case, too, involved a contract for the sale of real property which included a restrictive remedies provision if the seller could not convey title in accordance with the terms of the contract that was similar to the provision in *Solis Realty*. The contract there required that for the seller to convey clear title, a summary proceeding against tenants (Simonetti and Moscatiello) in a particular

apartment had to be determined in favor of the landlord with no appeals pending, and with the tenancy and lease that were the subject of that proceeding terminated and canceled.

In *S.E.S.*, at the closing, the buyer refused to complete the transaction because it appeared the seller was "unable to dispose of the Simonetti-Moscatiello tenancy title criticism." The buyer then commenced a lawsuit seeking specific performance. About six months after the lawsuit started, but before trial, the tenants at issue surrendered their lease to the landlord. The Court of Appeals in *S.E.S.* reversed the Appellate Division and remitted the case to Supreme Court for entry of a judgment directing specific performance by the seller. The Court of Appeals engaged in a three-step analysis. First, it concluded that the title tendered by the seller at the closing was not in conformity with the terms of the contract since the seller had failed, at that time, to have cleared the objection to title based on the outstanding Simonetti-Moscatiello tenancy.

Secondly, the Court of Appeals noted the general rule that a court will not grant the equitable remedy of specific performance of a contract to convey real estate where such an order would be futile because the seller could not comply. In *S.E.S.*, however, even though the seller at the time of closing could not convey good title, that had changed by the time of trial. Accordingly, the court stated, the general rule had no application to a case "where the defect [in title] has disap-

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peared at the time of trial, and the court can then give an effective judgment for the equitable relief demanded."

The final issue which the Court of Appeals addressed was whether the restrictive remedies clause of the contract deprived the buyer of specific performance relief to which it would otherwise be entitled. It concluded that the clause did not preclude the buyer from seeking specific performance given the circumstances of the case.

The Court of Appeals reasoned that the restrictive remedies provision only defined and limited the buyer's relief in the circumstances described in the provision, namely, when "for any reason not the fault of the seller hereunder, seller cannot convey title in accordance with the terms of this contract." The case before it, however, was "not a case in which both parties acknowledged on the date of closing that the seller was unable to give good title."

Rather, on the day of closing, the parties were in sharp disagreement as to whether the seller could convey good title. The seller's position, both at the closing and on appeal, was that there was no defect in title, and the buyer took the opposite view. The Court of Appeals concluded that nothing in the restrictive remedies provision operated to deprive the buyer of the right to go to court for resolution of the issue whether the seller was able to give good title, "and in that action, to seek specific performance by way of remedy should the court conclude that the seller could do so."

The Appellate Division in the *Solis Realty* case concluded that the holding of the *S.E.S.* case, awarding specific performance notwithstanding the restrictive remedies provision, was not controlling—because, despite similarities between the two cases, there were key differences. One significant difference was that in *S.E.S.*, the seller had not conceded that there was any defect in its title, had not invoked the restrictive remedies clause and had demanded that the buyer close on the contract. The buyer, therefore, had no option but to litigate. By contrast, in *Solis Realty*, the Appellate Division pointed out, the seller had from the outset conceded it was unable to convey clear title and had invoked

the restrictive remedies clause, thereby "leaving the buyer with all the options contemplated in the contract for an inability to convey clear title, as intended."

Another distinction between the cases which the Appellate Division saw related to whether there was any colorable claim for specific performance at the time the lawsuit was commenced. The Appellate Division believed that in *S.E.S.* there was such a claim. There, the seller had the right to legally evict the remaining tenants, had contractually undertaken to do so, and had commenced such a proceeding but apparently thereafter neglected or abandoned it. Therefore, concluded the court, "the buyer in *S.E.S.* had a legally viable right to demand that the seller deliver clear title to the building, which amounts to a right to seek specific performance at that time."

By contrast, in *Solis Realty*, the seller could only rely upon offering the remaining elderly, rent-stabilized tenant inducements to persuade him to voluntarily relocate. The seller had no viable legal basis upon which to evict him. Therefore, stated the court, the buyer in *Solis Realty* had no colorable claim to specific performance when the lawsuit was commenced.

Having concluded that the holding of *S.E.S.* was not controlling, the Appellate Division in *Solis Realty* applied what it considered fundamental rules of contract construction to determine the issue before it. Those guidelines include that "when parties set down their agreement in a clear, complete document, their writing should...be enforced according to its terms." A corollary of that rule is that "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."

Applying those rules of contract construction, the Appellate Division in *Solis Realty* held that "the court may not look beyond the agreed item upon remedies [for seller's inability to convey title] to award the buyers specific performance in circumstances other than those in which the parties agreed that it would be available." Accordingly, the Appellate Division affirmed the Supreme Court's order and judgment dismissing the complaint for specific performance.

In short, it would appear that the court in *Solis Realty* was motivated by a concern that buyers not be afforded carte blanche to evade contractually agreed upon limited remedies provisions designed to protect sellers. In the *S.E.S.* case, the seller had not even invoked the limited remedies provision and, in fact, had denied the existence of the factual predicate for invoking it, namely, inability to convey clear title. The buyer could hardly be accused of seeking to evade a provision the seller did not rely on or even acknowledge as applicable to the given fact situation.

By contrast, in the *Solis Realty* case, the seller had invoked the limited remedies provision and the buyer asserted its inapplicability. In such a context, the concern that logically had no place on the facts of *S.E.S.* became a paramount concern to the *Solis Realty* court, and the holding of *S.E.S.* accordingly was not extended by the *Solis Realty* court to the case before it.

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1. 801 N.Y.S.2d 31, 2005 N.Y. Slip Op. 06756 (1st Dep't 2005).
 2. 801 N.Y.S.2d at 32.
 3. 801 N.Y.S.2d at 33.
 4. 53 N.Y.2d 455, 442 N.Y.S.2d 453 (1981).
 5. 53 N.Y.2d at 459.