Michigan Law Review

Volume 47 | Issue 7

1949

SPECIFIC PERFORMANCE-MARKETABLE TITLE TO REALTY-COMPELLING VENDOR TO PURCHASE OUTSTANDING INTEREST

Robert Dilts
University of Michigan Law School

SPECIFIC PERFORMANCE—MARKETABLE TITLE TO REALTY—COMPELLING VENDOR TO PURCHASE OUTSTANDING INTEREST—Plaintiffs sued for specific performance of a contract for the sale of real estate. Their attorney had concluded that the abstract furnished by defendant indicated a possible outstanding undivided one-half interest in the property. Refusing to accept a conveyance unless the alleged defect was eliminated or protection offered against an attack on the title, plaintiffs sought a decree requiring defendant to clear title and convey according to the contract. There was no showing that defendant could obtain a conveyance of the alleged outstanding interest. *Held*, specific performance denied. *Bartos v. Czerwinski*, 323 Mich. 87, 34 N.W. (2d) 566 (1948).

Generally a vendee may have specific performance of a contract to convey real estate to the extent of the vendor's ability to convey and may receive damages for the difference between the actual performance and the performance which would have fulfilled the exact terms of the contract.[1] However, the courts have generally refused to grant specific performance to the vendee when the vendor has neither title nor an enforceable right to demand title.[2] Some of these courts have taken the strange view that because a vendor without title cannot enforce the contract against the vendee, the vendee cannot enforce the contract because of lack of mutuality.[3] Specific performance has been denied by other courts on the theory that the owner of the outstanding interest was not a party to the suit, thus making it impossible for the court to enforce its decree.[4] It appears that many of these cases have given preferential treatment to defaulting vendors who might have been able to acquire the outstanding interests. This preference could be overcome by requiring the vendor to make a reasonable effort to remove defects in his title. Where the vendor had a right to obtain the title, some courts have required him to do so,[5] although the title holder was not joined. It has been held, however, that where such a right does not exist, equity will not compel negotiations to secure title,[6] and this rule has been applied even though it was within the vendor's power to purchase the land at a reasonable price.[7] Such a limitation on the vendee's right to specific performance appears to have little justification. Either party to a fair contract for the sale of real estate should be entitled to specific performance,[8] and the vendor should not be permitted to plead

[1] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed., §438 (1926); 10 L.R.A. (n.s.) 117 (1907).

[2] 58 C.J. 886, n. 76; 171 A.L.R. 1300 (1947).

[3] Ten Eyck v. Manning, 52 N.J. Eq. (7 Dick.) 47 (1895); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed., §163 (1926). Under this view, a vendor desiring to avoid specific performance can do so merely by putting himself in a position in which he cannot obtain specific performance.

[4] 4 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §1405 (1919); Allen v. Hayes, 309 Ill. 374, 141 N.E. 188 (1923); 49 AM. JUR., Spec. Perf., §66.

[5] Beekman v. Sonntag Inv. Co., 67 Fla. 293, 64 S. 948 (1914). Where this right exists, performance will be decreed even though the legal title is in another. Brin v. Michalski, 188 Mich. 400, 154 N.W. 110 (1915).

[6] Laubengayer v. Rohde, 167 Mich. 605, 133 N.W. 535 (1911).

[7] Public Service Corp. v. Hackensack Meadows Co., 72 N.J. Eq. (2 Buch) 285, 64 A. 976 (1906).

[8] 49 AM. JUR., Spec. Perf., §92.

his own default in defense to the action. If performance by the vendor is truly impossible, then specific performance should be denied, but the fact that the vendor would incur an expense in acquiring the outstanding interest does not necessarily render performance impossible. Although there is a division of authority as to whether such expense constitutes a defense to an action for specific performance,[9] the decisions have not required the vendor with a defective title to perform according to the precise terms of the contract unless it was relatively certain that the outstanding interest could be acquired. The decision in the principal case might be justified on the basis that there was no assurance the vendor could acquire the alleged outstanding interest; however, it seems doubtful that such assurance should be required. The crucial issue should be whether it is reasonable to require the vendor to attempt to clear the title. If existence of the outstanding interest is questionable, it would seem reasonable to require the vendor to bring suit to quiet title. If there is an outstanding interest, the vendor should be required to make a reasonable effort to acquire it. Liability to contempt proceedings for failing to make a reasonable effort could supply the necessary coercive influence upon the vendor, and the decree could include an escape clause to safeguard the vendor from punishment in the event that a reasonable effort to secure the outstanding interest proved futile.[10]

Robert Dilts

[9] Expense was a defense in the following cases: Ormsby v. Graham, 123 Iowa 202, 98 N.W. 724 (1904); Saxon v. White, 21 Okla. 194, 95 P. 783 (1908); Snow v. Monk, 81 App. Div. 206, 80 N.Y.S. 719 (1903); Messenger v. Chambers, 53 Misc. 117, 103 N.Y.S. 1100 (1907). It is no defense to an action for specific performance of a contract to convey land that the land is subject to a mortgage, if such mortgage can be removed by a money payment by the vendor; Dennett v. Norwood Housing Assoc., 241 Mass. 516, 135 N.E. 866 (1922); nor that there is an outstanding perpetually renewable lease which reserved a peppercorn as rent, where the holder of the lease was willing to give the vendor a release merely for the cost of drawing the necessary papers; Meyer v. Reed, 91 N.J. Eq. 237, 109 A. 733 (1920). See also Douglass v. Ransom, 198 Wis. 445, 224 N.W. 473 (1929).

[10] It may be observed that the ideal solution in such a case would be to have the alleged owner of the outstanding interest joined as a party. This would enable the court to litigate all the conflicting claims in one action. See 47 MICH. L. REV. 102 (1948), discussing perfecting title through litigation as an incident to specific performance.