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Purchase and Sale of Real Estate - Part 1 - by Michael Brangwynne

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This is the eighth article in a series on the circumstances that can give rise to a civil lawsuit. Earlier articles in the series can be found on Fletcher Tilton's website under ARTICLES and on the NEREJ website.

Introduction: Agreements for the purchase and sale of real estate are governed by the same general contract principles that apply to any binding agreement between two or more parties. Nevertheless, there are certain legal issues that often arise in the purchase and sale of real estate which can make such conveyances somewhat more complicated than other types of transactions.

First, it is common that parties to such a real estate conveyance will make and accept written offers to purchase (OTP) setting forth the key terms of the transaction, before a detailed formal purchase and sale agreement (P&S) is signed.

Second, all real property is considered unique in the eyes of the law. Under a contract for the sale of goods, if one party fails to deliver the agreed upon goods at the time and for the price agreed upon, the other party's remedy is typically to sue for breach of contract and seek the damages he has suffered as a result of the other party's breach. Because of the unique nature of real estate, a purchaser may sue a seller that has breached the terms of the parties' agreement and seek specific performance - that is, the purchaser may ask a court to order the seller to perform his obligations and to convey to the purchaser the agreed-upon parcel of real estate for the agreed-upon purchase price.

The first consideration relates to the creation of a binding and enforceable contractual agreement. The second relates to the parties' remedies upon breach. In this installment, we will consider creation of the contractual agreement; and in a later installment we will discuss breach and remedies.

Creating a Binding Contract for the Sale of Real Estate: To be binding and enforceable, a contract for the conveyance of land must be in writing, must set forth the material terms of the conveyance, and must be agreed to with the mutual intention that it is a binding agreement.

An OTP executed by both parties may satisfy all of these criteria, even if the OTP contemplates that the parties will execute a formal P&S agreement before some later date. The question that often arises when a deal falls apart after the execution of an OTP, but before the execution of a P&S, is whether the parties intended to be bound by the OTP itself or only by the subsequent formal P&S. The answer to this question depends on the intention of the parties.

In order to determine the parties' intent, a court will look to the express language included in the OTP and the parties' course of conduct. If the parties have left open key terms relating to the transaction, this suggests that the parties did not intend to be bound by the OTP. On the other hand, if the parties have agreed to all material terms - e.g. deposit, price, contingencies, closing date - then the court may determine that the later execution of a standard form P&S is only a formality that

creates a polished memorandum of an already binding contract.

The parties may of course express their intentions in the OTP, and this is indeed the best practice. If the parties wish to create a binding agreement, the OTP should state as much and include all key terms of the transaction. Similarly, if the parties do not wish to be bound by an OTP, they should state that a binding agreement will not be created unless and until the parties have executed a formal P&S setting forth all terms. Once the parties have executed a formal P&S, there is rarely any question as to whether a binding and enforceable contract has been created.

Conclusion: Offers to purchase real estate must be carefully considered, as they may give rise to substantial and legally enforceable obligations upon acceptance by the seller. Once a binding and enforceable contract has been created, both parties can seek redress for breach of the agreement. In the next installment, we will consider the breach of such agreements and the remedies available to both buyer and seller.

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