

Breach of Contract: Is the deal dead or on life support?

Published on Aug 2, 2021 by Peoples Company



Blog by Lindsey Brown, Land Sales & Cameron Lawler, Staff Attorney

One of the most difficult barriers to a successful real estate transaction is when one party to a contract begins to waiver or back out of the agreement that was executed. Generally, both the buyer and seller are motivated to honor their commitment and close the transaction. However, situations may arise where a buyer or seller attempt to renege on the contract. Before the party trying to complete the transaction seeks legal remedies for damages or to enforce the original contract, it is important to identify whether a breach of contract has in fact occurred that would lead to a successful action. Before entering an agreement, individuals or businesses must understand that the typical real estate contract provides outlets for parties to withdraw from the agreement without consequence. Known as contingencies, these conditions to the contract allow a party to cancel the agreement if the conditions are triggered or occur.

One example of a common contingency is that the seller must be able to find a new property to purchase. If the seller has made a good-faith effort and has not been able to identify a new property, the seller can rescind the contract and the buyer will not have a legal basis on which to pursue damages or fulfillment of the contract. In a farmland transaction, typical contingencies are due diligence requirements. Due diligence requirements allow a buyer to access information about a farm property to ensure that the farm meets the

buyer's standards before the transaction is closed. Due diligence requirements for farmland often include things such as certain production records, soil testing, water rights, and financial information. During the due diligence period, the buyer will be given access to the property and relevant information to make sure the farm is worthy of investment and can be operated profitably. If any of the due diligence standards for a property are not met, the buyer can exit the contract and receive a reimbursement for any earnest money paid.

Sometimes, however, a party attempts to cancel a real estate contract for reasons unrelated to a contingency or other avenue that is included in the contract. When a difficult situation like this arises, it is important that the other party understand its options and where to rely on a realtor. When a transaction begins to fall apart due to one party trying to cancel the agreement, the best thing a realtor can do for a client trying to preserve the deal is keep the lines of communication open between the two parties. A realtor should work to keep each side informed on the status and timelines of items that are key to a successful closing such as the appraisal, abstract, title opinions, surveys, and financing decisions. When each party feels they are being well informed, they are more likely to cooperate when issues arise. A realtor can also use their experience to advise their client on certain things that may help keep the transaction together like closing extensions or allowing an amendment of the contract to alter a term that created a problem for the transaction.

If a transaction breaks down over an issue and the parties cannot agree on a path to resolve a breach of the agreement or whether a breach has in fact occurred, some real estate contracts provide a method for dispute resolution. Two common dispute resolution methods are:

- **Arbitration** - This dispute resolution method involves the parties submitting the dispute to an individual "arbitrator." An arbitrator is someone who is not an officer of the court but who will review the information underlying the dispute, consider the arguments of the parties (made in writing and sometimes in person) and ultimately decide the matter. In "binding arbitration," the parties are bound by the arbitration decision and are not entitled to a court's review of the arbitrator's decision, except under special circumstances.
- **Mediation** - This is a process in which a neutral third party guides the buyer and seller through negotiations about the underlying dispute and attempts to help find a mutually agreeable solution to the issue. Often times the solution is financial in nature, other times it results in parties agreeing to alternatives to a term or condition of the contract. Mediation can help parties avoid the expense of pursuing a claim in court. However, if mediation fails, the matter may proceed via litigation.

Not all transactions can be saved however, and in the case of a party violating a contract by refusing to complete the transaction, the other party must evaluate the situation and weigh its options. Most real estate contracts provide for liquidated damages if one party breaches the contract and the sale is canceled. A set amount of money is provided for in the contract, often the amount of the buyer's earnest money, that will be the monetary damages the party receives if a breach of the agreement occurs and the transaction fails.

Although liquidated damages or other monetary damages for expenses are the most common way to resolve a breach of contract scenario, another form of remedy may be available. Real estate contracts differ from almost all other contracts because real estate is considered unique, meaning that an identical piece of property does not exist and cannot be purchased by a party. Thus, if a party has breached a real estate contract, the injured party can sue the breaching party and request that the court force the transaction to proceed due to the fact that the property is unique in nature and financial damages will not adequately restore the injured party for its loss. This remedy is known as specific performance, and to be successful a court must first decide the contract is valid, decide that specific performance is the proper remedy, and compel the breaching party to proceed with the transaction based on the terms of the contract. While it may sound like the ideal resolution, there is no guarantee that a party will be successful in its suit, and it can be an expensive and burdensome remedy to pursue.

Real estate transactions are often complicated and typically involve multiple variables prior to closing that can be susceptible to complications. An experienced realtor can help remove the burden of these challenges from a client as well as be an advocate for the client if the opposite party in the transaction begins to waiver

in their commitment. In this situation, it is extremely important for a party to understand possible dispute resolution methods as well as the forms of legal recourse that may be available.