

## Commercial Purchase/Sale Agreement Disputes and Litigation

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During the course of a transaction for land, property law and contract law intersect at the creation of the written purchase and sale agreement.<sup>1</sup> A considerable amount of litigation arises from disputes regarding the interpretation of these agreements. Although purchase and sale agreements concern property, the litigation issues surrounding the agreements are largely contractual issues.<sup>2</sup> As discussed below, typical contract disputes turn on offer and acceptance, indefiniteness/ambiguity, failure to close when scheduled, and earnest money provisions.<sup>3</sup> When these disputes arise, it is important to know your available remedies and the best vehicles for recovering damages.

### **I. Applying Relevant State Laws and Recent Cases.**

Before digging into the specifics, it is helpful to review the most recent cases analyzing and interpreting contracts and the disputes associated therewith. While some of the cases discussed in this section and throughout this paper are not specific to the interpretation of purchase and sale agreements, “contracts for the sale of real property are governed largely by the rules and principals applicable to contracts generally.”<sup>4</sup> As such, these cases provide insight as to how courts will interpret key provisions in purchase and sale agreements. The following are highlights from a few of the Georgia cases decided in the last 12 months:

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<sup>1</sup> The statute of frauds requires that contracts for the sale of land must be in writing. O.C.G.A. § 13-5-30(4).

<sup>2</sup> Daniel F. Hinkel, Pindar’s Georgia Real Estate Law and Procedure § 18-3 (6<sup>th</sup> ed. 2004).

<sup>3</sup> *Id.* at §§ 18-6.2-6.4.

<sup>4</sup> Daniel F. Hinkel, Pindar’s Georgia Real Estate Law & Procedure § 18-3 (7<sup>th</sup> ed.).

- On Line, Inc. v. Wrightsboro Walk, LLC:<sup>5</sup> Parties entered into a purchase and sale agreement for commercial real estate. Contract provided that upon execution, purchaser would deposit \$25,000 in earnest money into escrow, which it did. Within three days of the expiration of the due diligence period, purchaser was required to deposit an additional \$25,000 into escrow. However, purchaser terminated the agreement and did not pay this earnest money deposit. The agreement provided that if the deal failed to close for reasons other than seller's default or the inability to have a certain loan transferred (which would result in the return of earnest money), the earnest money would be paid to and retained by seller. The agreement also provided that purchaser had the right to terminate the contract at any time during the 30-day inspection period (which began on "the Effective Date" of the agreement) and that in the event of such termination, earnest money would be returned to purchaser. Purchaser terminated the contract. Seller brought action against purchaser alleging that purchaser breached the contract and acted in bad faith by failing to deposit the proper amount of earnest money into escrow. Trial court granted summary judgment in favor of seller. The appellate court reversed holding that there were issues of fact as to whether alleged misrepresentations by seller allowed purchaser to terminate the contract outside the inspection date. It was also clear that purchaser was unable to secure the loan transfer contemplated by the agreement. In response to purchaser's argument that the trial court erred by finding that the inspection period began on August 23, 2013 because purchaser had failed to tender the requisite documents per the contract, the court disagreed. The court noted that although the contract language was clear that the inspection period did not begin until purchaser delivered the requisite documents, seller

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<sup>5</sup> 332 Ga. App. 777 (2015).

provided a written receipt proposing that the inspection period be considered August 23 to September 23. Purchaser's representative signed the receipt thus completing a modification of the contract. The court held that the trial court did not err by finding that the termination did not occur during the inspection period as defined by the contract.

**Practice Pointer: Be careful what you sign post-contract. It could be considered a modification.**

- Carnett's Properties, LLC v. Jowayne, LLC:<sup>6</sup> At the time real property was conveyed, the parties executed a Declaration of Joint Easement and Joint Maintenance Agreement. The maintenance agreement provided purchaser with a drainage easement over the property seller retained and purchaser agreed to pay 12% of costs associated with the maintenance of a detention facility serving acres still owned by seller. Seller continued to sell off additional portions of his remaining acres to new property owners. Seller then added a new detention pond to the property to service all the various property owners and invoiced purchaser for his 12%. Purchaser refused to pay contending that the agreement did not encompass the construction of a "new" detention pond. Seller filed a breach of contract claim alleging that defendant failed to pay sums due under a maintenance agreement. Purchaser argued and the trial court found that the agreement only referred to "*the* Detention Facility" and did not encompass newly constructed facilities. Trial court granted summary judgment to purchaser. On appeal, the court found the contract to be ambiguous because although it referenced "*the* Detention Facility," the agreement also included references to expansion of such facility. Reversed and remanded.

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<sup>6</sup> 331 Ga. App. 292 (2015).

**Practice Pointer:** Be sure to make your terms consistent and as inclusive or exclusive as intended by the parties.

- McElvaney v. Roumelco, LLC:<sup>7</sup> Two individuals purchased an apartment complex in the name of an LLC. After closing, one of the individuals brought an action against the other and the LLC for breach of contract, specific performance, fraud, breach of fiduciary duty and unjust enrichment, among other claims regarding a dispute as to plaintiff's ownership interest in the entity (which now owed the property) based on an alleged oral contract reached prior to the closing. Trial court held that the parties never reached an enforceable agreement as to their respective ownership interests and granted summary judgment in favor of defendants. On appeal, the court found that there was an issue of fact as to whether the parties agreed to grant plaintiff an enforceable ownership interest in the LLC by the time the company purchased the property. Even assuming the oral agreement was not sufficiently definite as to their respective ownership interest in the LLC before the purchase, it was undisputed that on two occasions after closing defendants admitted in writing that plaintiff owned a percentage of the LLC. **Practice Pointer: Always remember that the court will look to parol evidence if the agreement is ambiguous.**
- RES-GA SCL, LLC v. Stonecrest Land, LLC:<sup>8</sup> In the context of an action by a creditor against a debtor and guarantor on loan agreements, the court noted that before partial failure of performance of one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be performed must go to the root of the contract. **Practice Pointer: A non-material failure to perform a contract does not excuse the nonperformance of the other party.**

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<sup>7</sup> 33 Ga. App. 729 (2015).

<sup>8</sup> 333 Ga. App. 289 (2015).

- Avery v. Grubb, et al.:<sup>9</sup> In a dispute with a trustee of a trust, plaintiff sued the trustee claiming breach of fiduciary duty and seeking a temporary restraining order and removal of the trustee. Although the facts are not particularly helpful, the black letter law is applicable to purchase and sale agreements. “In general, a party alleging fraudulent inducement to enter a contract has two options: (1) affirm the contract and sue for damages from the fraud or breach; or (2) promptly rescind the contract and sue in tort for fraud. Critical to rescission is the tender of benefits, the prompt restoration or offer to restore whatever the complaining party received by virtue of the contract.”<sup>10</sup> In this case, by waiting a year, the defrauded party did not act “promptly” or tender the amount she received per the subject settlement agreement. Moreover, plaintiff did not request rescission in her complaint. The court found that plaintiff affirmed the contract and the merger clause stated therein precluded a claim of fraud.

Now we turn to the specific issues that are typically involved in disputes associated with purchase and sale agreements and other real estate documentation.

## **II. Interpretation of Key Agreement Provisions; How Indefiniteness and Ambiguity Can Wreak Havoc.**

Your best defense in real estate litigation is good offense. Precise drafting on the front end can save a lot of headaches in litigation. A significant number of contract disputes turn on matters of the contract’s construction including the definition of a particular word or phrase, the placement of a clause within a sentence, or even the placement of a punctuation mark. It is important to note that most, if not all, of these disputes could have been avoided at the time of the contract’s drafting with a few “simple” changes to the document. The changes are only

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<sup>9</sup> 2016 WL 1176621 (Ga. App. March 28, 2016).

<sup>10</sup> Id. at \*4 (quoting Dodds v. Dabbs, Hickman, Hill and Cannon, LLP, 324 Ga. App. 337, 340-41 (2013)).

“simple,” however, if the attorney has done his or her due diligence on the pitfalls of drafting, including the dangers of both indefiniteness and ambiguity. It is extremely important for drafting attorneys to always bear in mind the specter of litigation.

#### **A. The Danger of Indefiniteness.**

“Under Georgia law, a contract does not exist unless the parties agree on all material terms. A contract cannot be enforced if its terms are incomplete, vague, indefinite or uncertain. Thus, a court will not enforce an agreement where it is left to ascertain the intention of the parties by conjecture.”<sup>11</sup> As the Georgia Court of Appeals consistently has held, the test of an enforceable contract is “whether it is expressed in language sufficiently plain and explicit to convey what the parties agreed upon.”<sup>12</sup> The time and subject matter of the agreement must be clear from the language used in the contract. Language that is indefinite, uncertain, or vague may render the contractual provision, or even the entire contract, unenforceable. “[I]ndefiniteness in subject matter so extreme as not to present anything upon which the contract may operate in a definite manner renders the contract void.”<sup>13</sup>

For example, in AMB Property, L.P. v. MTS, Inc., the Court of Appeals held unenforceable a renewal provision setting the new rental rate as “the greater of (1) the base rent for the last year of the original term or (2) *the then existing market rental rate for comparable shopping centers.*”<sup>14</sup> Rather than merely striking the vague language and enforcing the remainder of the provision, the Court held that the reference to the “market rental rate” was such an integral part of the renewal provision that no portion of the provision should be enforced.<sup>15</sup>

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<sup>11</sup> McElvaney v. Roumelco, LLC et al., 331 Ga. App. 729, 732-33 (2015) (quoting Kitchen v. Insuramerica Corp., 296 Ga. App. 739, 743 (2009)).

<sup>12</sup> Farmer v. Argenta, 174 Ga. App. 682, 683 (1985).

<sup>13</sup> Lemming v. Morgan, 228 Ga. App. 763 (1997) (citations omitted).

<sup>14</sup> 250 Ga. App. 513, 513 (2001) (emphasis added).

<sup>15</sup> Id.

In Farmer v. Argenta, the Court of Appeals went one step further when addressing the enforceability of the following stipulation in a real estate sales contract: “30 days after closing seller will pay buyer rent in the amount of the mortgage payment, taxes and insurance included if escrowed in an amount not to exceed \$300.00 per month *as long as necessary until seller finds another home.*”<sup>16</sup> The Court determined that the phrase “as long as necessary until seller finds another home” was too indefinite to be enforced, and further held that the indefinite term was so material to the sales agreement that its indefiniteness rendered the entire contract unenforceable.<sup>17</sup> Georgia courts can either strike an invalid term or find that the invalid provision renders the entire contract void.<sup>18</sup> In making this determination, the court will consider the intent of the parties as evidenced by the terms of the agreement. “If it appears that the contract was to take the whole or none, then the contract would be entire.”<sup>19</sup> For example, if it appears that the parties intended to sell an entire piece of land through a purchase and sale agreement, then an invalid term could render the entire contract void.<sup>20</sup>

### **B. The Danger of Ambiguity.**

Even if a provision does not contain terms too indefinite, uncertain, or vague to enforce, a term or phrase of the contract may be capable of more than one reasonable interpretation, thereby creating ambiguity. In Georgia, the threshold question for the court in matters of contract interpretation is whether or not the language of a disputed contractual provision is ambiguous.<sup>21</sup> “Ambiguity exists when a contract is uncertain of meaning, duplicitous, and indistinct; or when a

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<sup>16</sup> 174 Ga. App. at 682 (emphasis added).

<sup>17</sup> Id. at 684.

<sup>18</sup> Id.

<sup>19</sup> Peach Consolidated Prop. v. Carter, 278 Ga. App. 273 (2006).

<sup>20</sup> Id.

<sup>21</sup> See Brannen/Goddard Co., et al. v. PNC Realty Holding Corp. of Georgia, 238 Ga. App. 387, 389 (1999).

word or phrase may be fairly understood in more than one way.”<sup>22</sup> The court first considers the language contained in the “four corners” of the document when deciding whether a provision is ambiguous.<sup>23</sup> If the court determines that the contract language is unambiguous, the contract is enforced as plainly written.

If, after considering the language of the “four corners” of the agreement, the court finds that there is still the potential for ambiguity, then the court applies the rules of construction. The Georgia Code sets out some of the rules of construction employed by the court. These rules of construction provide that: parol evidence may be used to interpret a contract; words generally bear their usual meaning unless they are words of art or technical words; business custom may be considered when universally accepted; terms should be read to give effect to the entire contract; the contract should be read against the party that prepared the agreement; the rules of grammar usually govern; handwritten terms are given more effect than printed terms; grants by implication are not favored; and time is generally not of the essence.<sup>24</sup> If, after applying the rules of construction, there is still ambiguity in the contract, the court will submit the issue to a jury to resolve the ambiguity.

Even if the parties intended the provision to mean something different than what is stated in the contract, the court will apply the terms of the contract if they are not contradicted by other terms, and capable of only one reasonable interpretation.<sup>25</sup> In Bronner Bros. Mfg., Inc. v. Russell, the Court of Appeals addressed an employment contract provision setting a salesman’s base salary at \$25,000 plus “2% on all orders generated other than personally initiated by [the

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<sup>22</sup> Sheridan v. Crown Capital Corp., 251 Ga. App. 314, 315 (2001).

<sup>23</sup> Id.

<sup>24</sup> O.C.G.A. § 13-2-2.

<sup>25</sup> Twin Oaks Assoc. v. DeKalb Venture, Ltd., 190 Ga. App. 854, 855 (1989); First Data POS, Inc. v. Willis, 273 Ga. 792, 794 (2001).



salesman].”<sup>26</sup> Because the provision, as stated, allowed the salesman a two percent commission on all orders other than those personally initiated by him, the employer asked the court to insert a comma after the word “personally.” The court found that such an insertion, “in addition to arbitrarily rewriting the contract, would create nonsense, and make ambiguous what was not.”<sup>27</sup> The Court conceded that the provision was “not a brilliant specimen of draftsmanship,” but ultimately held that it was not ambiguous. Therefore, the Court refused to consider the existing evidence that the parties had never intended for the salesman to get a two percent commission on sales that were not his own.<sup>28</sup>

When considering a contract provision, a court properly may determine that a seemingly clear and unambiguous provision is in fact ambiguous because of the existence of a conflicting provision within the contract. For example, in Coker v. Coker, the Court of Appeals determined that an otherwise clear right-of-first-refusal provision was ambiguous because it conflicted with other contractual provisions.<sup>29</sup> While the right-of-first refusal provision contemplated third party offers for the entire property, other relevant contractual provisions contemplated third party offers for mere portions of the property.<sup>30</sup> Consequently, the Court read into the right-of-first refusal provision the parties’ intent to include offers for only a portion of the property.

If the Court determines that a provision is potentially ambiguous, then the court turns to the rules of construction in order to determine the parties’ intent in drafting the provision.<sup>31</sup> In Western Pacific Mut. Ins. Co. v. Davies, the Court considered how to interpret the word

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<sup>26</sup> 196 Ga. App. 832, 833 (1990).

<sup>27</sup> Id.

<sup>28</sup> Id. at 834.

<sup>29</sup> 265 Ga. App. 720 (2004).

<sup>30</sup> Id. at 721.

<sup>31</sup> Swisshelm v. Department of Human Resources, 253 Ga. App. 816, 817 (2002) (“The cardinal rule of construction is to ascertain the intention of the parties.”).

“failure.”<sup>32</sup> Where a disputed term or phrase is not otherwise defined by the contract, a court will give the words their ordinary meaning as defined by dictionaries.<sup>33</sup> Therefore, the Court turned to the dictionary definition of “failure” to determine the ordinary and customary meaning of a home warranty provision under which coverage was triggered by a “failure of...structural components.”<sup>34</sup> Because the dictionary indicated that “failure” could mean anything from “not succeeding in doing or becoming,” to “lost power or strength,” the Court held that it was for a jury to decide whether there had been a “failure” sufficient to trigger coverage.<sup>35</sup> Grammar and precision of language are never more important than when a court reviews only what the words say, without explanation or context from the litigants.

Note that in an effort to avoid ambiguity, it is important to define all capitalized terms and ensure that the title of the documents or labeling of the provisions therein are indicative of the intent of the parties. Also, it is important to remember that the actions of the parties can be considered by a court in resolving ambiguity. In Richard Bowers & Co. v. Clairmont Place, there was a dispute as to whether Clairmont, the owner of a commercial property, was required to comply with a provision in a Leasing Commission Agreement entered into by one of its predecessors to pay a broker’s commission.<sup>36</sup> It was undisputed that Clairmont assumed the Leasing Commission Agreement as part of its purchase. The Leasing Commission Agreement provided, in pertinent part, for payment of commissions equal to “five percent (5%) of the monthly rental paid by Tenant under this Lease” by owner to broker.<sup>37</sup> Subsequent to the

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<sup>32</sup> 267 Ga. App. 675, 676, (2004).

<sup>33</sup> Kerr-McGee Corp. v. Georgia Cas. & Sur. Co., 256 Ga. App. 458, 459 (2002).

<sup>34</sup> Davies, 267 Ga. App. at 676.

<sup>35</sup> Id. at 678.

<sup>36</sup> 324 Ga. App. 673, 673 (2013).

<sup>37</sup> Id. at 674.

execution of the underlying lease but prior to Clairmont's acquisition of the subject property, the tenant on the subject property changed.<sup>38</sup>

Although Clairmont paid the 5% commission to the broker for a period of time, Clairmont later ceased paying the commission and the broker sued for the commissions owed.<sup>39</sup> The trial court denied the broker's motion for summary judgment finding, in part, that the subsequent tenant was not the "Tenant" for purposes of the Leasing Commission Agreement and, therefore, Clairmont did not owe the commissions. The trial court issued a certificate of immediate review.<sup>40</sup> The Court of Appeals granted the broker's application for interlocutory review and the broker appealed. The Court of Appeals determined that the lack of clarity regarding the meaning of "Tenant" created an ambiguity within the Leasing Commission Agreement.<sup>41</sup> Looking to the four corners of the contract, the Court noted that "Tenant" was not a defined term in the Agreement; and while the word "Tenant" was capitalized, the agreement contained several capitalized words that were not defined.<sup>42</sup> Importantly, the Court also looked to the actions of the parties to resolve the ambiguity in the contract.<sup>43</sup> In this case, Clairmont paid the commissions for years notwithstanding the fact that the tenant had changed. Concluding that the trial court erred in denying summary judgment, the Court found that under the parties' construction of the Leasing Commission Agreement, as shown by their actions and conduct, the subsequent tenant could be and was a "Tenant" for purposes of the Leasing Commission

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<sup>38</sup> Id.

<sup>39</sup> Id. at 675.

<sup>40</sup> Id. at 676.

<sup>41</sup> Id. at 677.

<sup>42</sup> Id.

<sup>43</sup> Id. at 678.

Agreement.<sup>44</sup> Also, in addressing another issue, the Court noted that the title of a document can also be evidence of the intent of the parties.<sup>45</sup>

### **C. Other Examples and Case Studies.**

#### Contract Ambiguity 1

“In the event that Seller sells or contracts to sell the Property to any buyer introduced to the Property by Broker within 90 days after the expiration of the Listing Period, then Seller shall pay the commission referenced above to Broker at the closing of the sale or exchange of the Property.” – Court found ambiguous as to what had to occur within 90 days of the listing period expiration date for the commission to be due.<sup>46</sup>

#### Contract Ambiguity 2

Real property sold with the stipulation that “all Equipment having to do with the cattle operation still belongs to the seller.” Property then sold to third party “together with all fixtures, landscaping, improvements, and appurtenances.” – Court found ambiguous because it did not identify the equipment to remain with seller.<sup>47</sup>

#### Contract Ambiguity 3

Purchase and sale agreement stated “transaction shall be closed on June 6, 2002, or on such other date as may be agreed to by the parties in writing, provided, however, that: (1) in the event the loan described herein is unable to be closed on or before said date; or (2) Seller fails to satisfy valid title objections, Buyer or Seller may, by notice to the other party (which notice must be received on or before the closing date), extend the Agreement’s closing date up to seven (7)

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<sup>44</sup> Id.

<sup>45</sup> Id. at 679.

<sup>46</sup> Snipes, et al. v. Marcene P. Powell & Associates, Inc., 273 Ga. App. 814, 815-16 (2005).

<sup>47</sup> Barrett, et al. v. Britt, et al., 319 Ga. App. 118, 122 (2012).

days from the above-stated closing date.” – Contract was ambiguous as to the process for extending the closing date if it was a cash sale as opposed to a loan.<sup>48</sup>

#### Contract Ambiguity 4

Special Stipulation No. 1 to the sales agreement provided: “Real Estate Commission of \$28,210.00 to be paid to [Prudential] on or before June 1, 2002, by sellers.” – Court noted that the provision failed to provide for a refund if the sale failed to close on stated date unlike other provisions to the agreement; because a genuine issue of fact existed for jury determination the trial court erred in granting summary judgment.<sup>49</sup>

### **III. Proving/Disproving Validity of the Contract.**

#### **A. Statute of Frauds.**

As an initial matter, Georgia’s Statute of Frauds requires that contracts for the sale of land must be in writing.<sup>50</sup> “To comply with the Statute of Frauds, a writing must be complete in itself, leaving nothing to rest in parol.”<sup>51</sup> Generally, “[w]hen a contract is required by the Statute of Frauds to be in writing, any modification of the contract must also be in writing.”<sup>52</sup> “A contract for the sale of land that is partly in writing and party in parol is unenforceable by reason of the Statute of Frauds.”<sup>53</sup>

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<sup>48</sup> Rolan, et al. v. Glass, 305 Ga. App. 217, 220-21(2010).

<sup>49</sup> Krogh, et al. v. Pargar, LLC, 277 Ga. App. 35, 38-39 (2005).

<sup>50</sup> O.C.G.A. § 13-5-30(4); but see O.C.G.A. § 13-5-31 providing exceptions to statute of frauds which may be applicable. Note that “part performance which will remove a contract from the statute of frauds refers to performance of the provisions of the contract and not acts done by one because of his belief in and reliance on the agreement.” Zappa v. Basden, 188 Ga. App. 472, 476 (1988) (internal citations omitted).

<sup>51</sup> Pettit v. Gray, 211 Ga. App. 439, 439 (1993).

<sup>52</sup> Walden v. Smith, 249 Ga. App. 32, 34 (2001) (holding that unless an oral modification falls within an exception to the Statute of Frauds, such modification is ineffective).

<sup>53</sup> Id.

“In Georgia, a contract requires agreement on all essential terms and ‘the failure to agree to even one essential term means that there is no agreement to be enforced. If a contract fails to establish an essential term, and leaves the settling of that term to be agreed upon later by the parties to the contract, the contract is deemed an unenforceable agreement to agree.’”<sup>54</sup> However, a seller cannot escape an agreement to purchase and sell real estate when a more beneficial opportunity arises just because the agreement contains contingencies (*i.e.*, the securing of financing).<sup>55</sup> At a minimum, the purchase and sale agreement should address the following: identity of parties (as well as reflect the signatures of such parties), price and terms of payment<sup>56</sup>, accurate and detailed description of the property, disposition of existing mortgages, time of closing and transfer of possession, due diligence deadlines and parameters, current taxes and other liens, fixtures to be retained or sold and any deed restrictions.<sup>57</sup>

It is important to remember that there are some exceptions to the Statute of Frauds.<sup>58</sup> For example, courts have enforced oral modifications to written contracts when the parties have partly performed pursuant to the oral modification.<sup>59</sup> In *Hernandez v. Carnes*, buyer Hernandez sued seller Carnes seeking damages and specific performance of an installment purchase contract

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<sup>54</sup> Miami Heights LT, LLC v. Home Depot U.S.A., Inc., 283 Ga. App. 779, 782 (2007) (quoting Kreimer v. Kreimer, 274 Ga. 359, 363 (2001)).

<sup>55</sup> Id.

<sup>56</sup> Zappa v. Basden, 188 Ga. App. 472, 475 (1988) (holding that the agreement did not provide for every essential element of the contract because no agreement was reached on the specifics of payment of that portion of the sale price not paid at closing: “Where the amount of the purchase price fixed by the contract is certain and definite, but the terms of payment are indefinite and uncertain, the writing is not a contract and confers no rights and imposes no liability.”).

<sup>57</sup> Barnes v. Whatley, 221 Ga. App. 110, 111 (1996) (“In order for a contract for the sale of land to be valid, binding and enforceable, the description must describe the property to be sold with the same degree of certainty as that required in a deed conveying realty.”)

<sup>58</sup> O.C.G.A. § 13-5-31.

<sup>59</sup> See Dobbs v. Dobbs, 270 Ga. 887 (1999) (court ordered specific performance of an oral contract against the seller where the purchaser had partly performed the contract).

(the “Contract”) which involved commercial real property.<sup>60</sup> Per the Contract, Hernandez was required to make monthly amortized payments towards the purchase as well as additional payments for property taxes on tax bills which Carnes had to provide 30 days prior to the due date. If Hernandez failed to pay the tax amount, Carnes could then pay the bill and add any such amounts to the outstanding amount due under the Contract.

In practice, however, Hernandez paid the tax bills directly to the City for 2001 and 2002 (instead of paying Carnes per the Contract), as well as back taxes owed for 1998 and 2000. When Hernandez tried to make the tax payment to the City in 2003, he learned that the City had mistakenly misallocated the payments for 1998 through 2001 and sold the property at a tax sale in 2002. Once Hernandez notified Carnes of the tax sale, they both orally agreed that Hernandez did not need to make further monthly payments until Carnes’ title to the property was restored. In return, Hernandez promised to engage an attorney, at his expense, to resolve the title issue. The City admitted its error in 2005 and the tax sale purchaser quitclaimed the property back to Carnes. Hernandez attempted to resume monthly payments per the Contract but Carnes refused to accept them claiming that Hernandez’s failure to make payments from 2003-2005 constituted a breach of the Contract.

Based on the parties’ oral agreement to modify the Contract, Hernandez filed suit for damages and seeking specific performance to enforce the Contract. Carnes argued that the oral agreement was unenforceable and Hernandez remained obligated to make monthly payments under the Contract. Summary judgment was granted to Carnes. The Georgia Court of Appeals reversed holding that the parties’ oral agreement modifying the written contract fell within an exception to the Statute of Frauds. As such, the oral modification was enforceable. Although

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<sup>60</sup> Hernandez v. Carnes, 290 Ga. App. 730 (2008).

Hernandez was not under an obligation to do so under the written Contract, he engaged an attorney, at his expense, to cure Carnes' title problem in return for Carnes' agreement to suspend payments under the Contract. Hernandez fully performed his obligations under the oral modification. Moreover, Carnes accepted the benefit of such performance. The Court of Appeals held that the trial court erred, under these circumstances, in ruling that the oral modification was unenforceable as a matter of law. There was ample evidence of Hernandez's part performance entitling him to get to the jury.

While there are statutory exceptions to the general Statute of Frauds, it is always better to get any modification to a purchase and sale agreement or other real estate contract in writing, signed by all parties. Remember that an oral modification is ineffective unless it falls within one of the narrow exceptions to the Statute of Frauds.

### **B. Proving a Valid Contract.**

Offer and Acceptance: A purchase and sale agreement is incomplete until assented to by both parties: "The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract; until assented to, each party may withdraw his bid or proposition."<sup>61</sup> An agreement to agree is not sufficient to produce a binding contract.<sup>62</sup> In addition to signing the contract, the contract must be vitalized by delivery to create a binding contract.

A contract should require that an offer be accepted within a stated time and the power of acceptance continues as long as the offer remains open (unless the offer is terminated by

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<sup>61</sup> O.C.G.A. § 13-3-2.

<sup>62</sup> See Sierra Associates, Ltd. V. Continental Illinois Nat. Bank & Trust Co. of Chicago, 169 Ga.App. 784 (1984).



rejection).<sup>63</sup> Remember that a counteroffer is generally equivalent to a rejection and requires acceptance before the creation of a contract.<sup>64</sup>

Consideration: Like all contracts, a contract for the sale or purchase of land must be supported by valuable consideration. “A nominal consideration is sufficient to support a written promise to convey at a future date for a stated price, and actual payment of the recited sum is unnecessary, since if not paid, it may be sued for and recovered.”<sup>65</sup> For example, a standard provision sufficient so support consideration typically appears just before the “meat” of the agreement stating: “NOW, THEREFORE, for and in consideration of Ten and No/100ths Dollars (\$10.00), the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the parties hereto, the parties agree as follows ...” Note that any agreements ancillary to the purchase and sale agreement will likely require separate, independent consideration.

#### **IV. Disputes Over the Return of Earnest Money and Discrepancies Over Purchase Agreement Dates.**

##### **A. Earnest Money.**

A seller typically requires the purchaser to pay a deposit of some agreed upon amount to “seal the deal.” These funds, the earnest money, are held in escrow until the transaction closes. The amount of earnest money required by the contract can range from nominal to hundreds of thousands of dollars. Depending on the complexity of the transaction and the length of the due diligence period, some contracts provide that a certain percentage of the earnest money becomes

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<sup>63</sup> See Century 21 Pinetree Properties, Inc. v. Cason, 220 Ga. App. 355 (1996); see also Panfel v. Boyd, 187 Ga. App. 639 (1988).

<sup>64</sup> Daniel F. Hinkel, Pindar’s Georgia Real Estate Law & Procedure § 18-13 (7<sup>th</sup> ed.).

<sup>65</sup> Daniel F. Hinkel, Pindar’s Georgia Real Estate Law & Procedure § 18-9 (7<sup>th</sup> ed.).

non-refundable after a certain number of days. This structure can be beneficial to both parties as it provides some protection to the seller but also limits the purchaser's exposure on the front-end.

Often the contract will provide that purchaser must pay the earnest money within 3 or 7 days. If you are the seller, it is important to make sure that the purchaser actually pays the earnest money on the stated date to avoid a waiver defense to the payment of same.<sup>66</sup> Although a provision for forfeiture of earnest money in the event of purchaser's default has been held to constitute an illegal penalty, such amounts have been considered valid liquidated damages.<sup>67</sup>

You would be surprised at how often the attorneys responsible for drafting the purchase and sale agreement fail to include an escrow provision in the agreement (which would also be signed by the escrow agent) or fail to draft a separate escrow agreement as part of the transaction documentation detailing how the return of earnest money is to be handled. As a drafting attorney (or the individual or firm responsible for holding the escrowed funds), you WANT a formal provision or document clearly establishing the role of the escrow agent. The formal provision or agreement generally will help to minimize exposure should the transaction not be completed and the earnest money need to be returned (partly or wholly), especially if the provision provides that the escrow agent can pay the funds to one of the parties upon a certain threshold event without consent of the other or that the escrow agent can simply interplead the funds to a specific court upon notice of a dispute by one of the parties.

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<sup>66</sup> DuPree v. South Atlantic Conference of Seventh-Day Adventists, Inc., 299 Ga. App. 352 (2009) (seller may have waived its right to object to the purchaser's failure to satisfy the earnest money payment by saying nothing about the lack of payment for more than a year after the deadline passed).

<sup>67</sup> Swan Kang, Inc. v. Kang, 243 Ga. App. 684 (2000) (holding that a \$20,000 earnest money deposit was an enforceable reasonable liquidated damage amount under a contract. The court held that the earnest money payment represented approximately two percent of the purchase price and in the absence of any evidence to the contrary, the amount was reasonable).

If a formal earnest money or escrow agreement is to be executed after the execution of the purchase and sale agreement, be sure to consider the effects, if any, of the Merger Doctrine. Under the Merger Doctrine, discussed in more detail below, all prior inconsistent agreements are merged or superseded.<sup>68</sup> You want to make sure that the subsequently executed agreement does not contain inconsistent terms that would supersede the purchase and sale agreement unless that is the intention of the parties.

### **B. Purchase Agreement Dates.**

Disputes often arise over the Effective Date of a purchase and sale agreement or perhaps the beginning or termination of an Inspection Period. For example, does the agreement become effective for purposes of calculating subsequent deadlines on the date it is signed by the purchaser, the date it is signed by the seller, the date it is signed by the escrow agent (in addition to the parties) or the date listed in the first paragraph of the agreement regardless of date of execution. It is extremely important that the benchmark date used to calculate subsequent deadlines, typically the Effective Date of the agreement, is specifically defined in the agreement (*i.e.*, June 30, 2016 or “the date executed by the last Necessary Party as defined herein”). While it is nice to have some flexibility, it is best to be as definite as possible. After all, depending on the dynamic between the parties, an amendment modifying such dates can be very easy. Also, be sure that if you modify a date or range which affects subsequent deadlines, you state how such deadlines will be affected in the written modification. Making sure that dates, deadlines and ranges set forth in the agreement do not contradict can be tedious. However, the dates set the framework for the entire transaction and should be thoroughly vetted during the drafting process.

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<sup>68</sup> See Atlanta Integrity Mortg., Inc. v. Ben Hill United Methodist Church, 286 Ga. App. 795 (2007).

It is also helpful to create an actual timeline which can be attached as an exhibit to the agreement.

## **V. Demanding Specific Performance or Rescission.**

Parties to purchase and sale agreements that go wrong often seek recovery based on breach of contract, *i.e.*, recovery of monetary damages. However, two other potential remedies which should be considered are specific performance and rescission.

### **A. Specific Performance.**

Specific performance is an equitable remedy for breach of contract. It is an order of a court which requires a party to perform a specific act, usually what is stated in the contract. It is an alternative to awarding damages and is known as the remedy most effective in protecting an innocent party's expectations and interest in a contract. "Specific performance, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance."<sup>69</sup> It can be an attractive remedy in real estate disputes because real property is "unique" and, therefore, it is usually proven easily that monetary damages are inadequate. "It is well established that monetary damages are not an adequate remedy where ... the contract sought to be enforced involve[s] the sale of unique real property."<sup>70</sup> As such, parties often argue that specific performance is the only way to put the innocent party in the position for which it contracted. This rule applies equally when specific performance is sought by the seller or the purchaser.<sup>71</sup>

In granting specific performance, a court compels the performance of specific acts. As such, the purchase and sale agreement must be sufficiently certain to make the act which the court is compelling ascertainable. If the purchase and sale agreement is not sufficiently certain

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<sup>69</sup> Hampton Island, LLC v. HAOP, LLC, 306 Ga. App. 542, 548 (2010).

<sup>70</sup> Id.

<sup>71</sup> Id.

(*i.e.*, there is doubt as to whether the agreement is supported by adequate consideration or is legally binding) or does not specify the act that is to be performed (*i.e.*, conveyance of certain property via a warranty deed), seeking specific performance will be of little help. For example, a court may deny specific performance of a contract for an inadequate price.

It is also important to remember that Georgia law specifically requires the tender of the contract sales price to obtain specific performance.<sup>72</sup> Payment of earnest money is not sufficient.<sup>73</sup> Even if the seller cannot deliver title to the subject property, the tender of the purchase price must still be made for specific performance to be awarded. An allegation that the plaintiff seeking specific performance is “willing and able” to close is insufficient.<sup>74</sup> “[T]ender cannot be avoided by a promise to pay or an assertion in pleadings of a willingness to pay.”<sup>75</sup>

Finally, when considering the remedy of specific performance, be sure to carefully read the contract to make sure all the elements necessary to establish a valid and enforceable contract can be satisfied. Specific performance will not be granted when the contract lacks in certainty in any material respect.<sup>76</sup> Also, make sure that the party seeking performance is not guilty of unclean hands which will also bar the remedy of specific performance.<sup>77</sup>

## **B. Rescission.**

In contrast to specific performance, parties involved in a real estate dispute may want to consider possible rescission of the purchase and sale agreement. Parties often seek rescission on

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<sup>72</sup> Peaches Land Trust v. Lumpkin County School Board, 286 Ga. App. 103 (2007).

<sup>73</sup> Gilleland v. Welch, 199 Ga. 341 (1945).

<sup>74</sup> Peaches Land Trust, *supra*.

<sup>75</sup> Cummings v. Johnson, 218 Ga. 559, 562 (1963).

<sup>76</sup> Daniel F. Hinkel, Pindar’s Georgia Real Estate Law & Procedure § 18-20 (7<sup>th</sup> ed.).

<sup>77</sup> Under Georgia law, a party can be barred from obtaining the equitable relief of specific performance if he is guilty of unclean hands. Hampton Island, LLC, 306 Ga. App. at 546.

several grounds including failure of consideration, invalidity of the contract, default by one party, fraud or mistake and inadequacy of purchase price.

Rescission is possible by mutual agreement of the parties or by one party seeking rescission via litigation. In the context of mutual rescission, assuming it takes place before closing, it may be as easy as returning the earnest money paid. If mutual rescission is agreed upon post-closing, re-conveyance of the property from buyer to seller is required. In this situation, each party will want to make sure that any mortgages or security deeds on the property are handled appropriately and, if necessary, canceled.<sup>78</sup>

Often, purchasers seek to rescind the contract via litigation to recover purchase money paid. For example, a purchaser may seek rescission where a contract is invalid, the seller is guilty of fraud<sup>79</sup> or defaulted, title was defective or there was a deficiency in acreage.<sup>80</sup> Purchasers seeking rescission must be very careful not to affirm the contract. If purchaser affirms, rescission will not be granted. For example, affirmation is typically found (and rescission barred) where the purchaser, after learning of the seller's alleged fraud, continues to make improvements on the property.<sup>81</sup>

While a party seeking rescission may sue for fraud or some other type of wrongdoing surrounding the contract, it cannot recover based on a cause of action for rescission and breach of the contract. This is referred to as the "election of remedies." It is important that a purchaser seeking rescission via litigation be careful not to waive a cause of action for rescission by filing a

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<sup>78</sup> Daniel F. Hinkel, Pindar's Georgia Real Estate Law & Procedure § 18-45 (7<sup>th</sup> ed.).

<sup>79</sup> O.C.G.A. § 13-4-60.

<sup>80</sup> See Roberts v. Grover, 156 Ga. 386 (1923).

<sup>81</sup> See Lakeside Investments Group, Inc. v. Allen, 253 Ga. App. 448 (2002) (holding that purchaser affirmed a contract when, after learning of the alleged fraud, it had the property rezoned and continued to build office buildings thereon; rescission of the contract based on alleged fraud was barred).

complaint for seller's alleged fraud without requesting such relief. For example, the Georgia Court of Appeals has held that a complaint filed by a purchaser seeking damages resulting from alleged fraud of the seller, without alleging any cause of action for rescission, constituted an election of remedies and the purchaser waived any potential rescission claim.<sup>82</sup>

Before electing to rescind a contract, the party should consider the effect of a merger clause on its potential claims. Many purchase and sale agreements contain a merger clause, also referred to as an "entire agreement clause," which states that the terms contained in the purchase and sale agreement are the only terms of the agreement. A typical merger clause states: "This Agreement constitutes the sole and entire agreement between the parties to this Agreement. No representation, promise, or inducement not included in this Agreement shall be binding upon any party hereto."

Merger clauses make it very difficult for purchasers to sue sellers for misrepresentations not contained in the text of the purchase and sale agreement once it is executed. Generally, a merger clause bars reliance on any alleged misrepresentations not contained in the contract itself.<sup>83</sup> A seller is protected from a claim of fraud or misrepresentation based upon statements made prior to the agreement.<sup>84</sup> Put another way, the merger clause is like a disclaimer stating that the written contract "completely and comprehensively represents the parties' agreement."<sup>85</sup>

## **VI. Assessing Economic Loss/Economic Loss Rule.**

Economic loss/damage is a broad term that encompasses all types of economic or monetary loss to businesses or individuals. When dealing with purchase and sale agreements, the party seeking relief is often faced with seeking remedies in contract or tort, or possibly both.

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<sup>82</sup> See Holloman v. D.R. Horton, Inc., 241 Ga. App. 141 (1999).

<sup>83</sup> Ainsworth v. Perrault, 254 Ga. App. 470, 474 (2002).

<sup>84</sup> Harkins v. Channell, 274 Ga. App. 478 (2005).

<sup>85</sup> Ainsworth, 254 Ga. App. at 472.

Remember that oftentimes the purchase and sale agreement will attempt to limit the types of damages or causes of action that may be brought in the event of a dispute. For example, the agreement may limit damages to a set amount (*i.e.*, liquidated damages) or disclaim/exclude certain types of damages (*i.e.*, consequential damages or punitive damages). As such, it is very important to make sure the contractual provisions sufficiently address the possible remedies for both parties prior to execution.

In determining what your damages might be, depending on the terms of the contract and/or the causes of action alleged, consider the following possibilities:

- Expectation damages (intended to cover what the injured party expected to receive from the contract);
  - Consequential damages (damages associated with delay, lost business or lost profits);
  - Liquidation damages (specifically stated in the contract);
  - Punitive damages (rarely awarded in contract cases but may be available in fraud or tort cases that overlap with contract law);
  - Nominal damages (awarded when injured party doesn't actually incur a monetary loss but was still "wronged"); and
  - Other financial losses caused by the failure of the transaction to close.

It also important to consider the possible application of the economic loss rule. The purpose of the economic loss rule is "to distinguish between those actions cognizable in tort and those that may be brought only in contract."<sup>86</sup> The Supreme Court of Georgia has stated:

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<sup>86</sup> City of Cairo v. Hightower Consulting Engineers, Inc., 278 Ga. App. 721, 728 (2006) (quoting Flintkote Co. v. Dravo Corp., 678 F.2d 942, 949 (11<sup>th</sup> Cir. 1982)).



The ‘economic loss rule’ generally provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort. Under the economic loss rule, a plaintiff can recover in tort only those economic losses resulting from injury to his person or damage to his property...<sup>87</sup>

However, there is a “misrepresentation exception” to the economic loss rule:

[o]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly.<sup>88</sup>

While there is very little law in Georgia addressing the economic loss rule in the context of purchase and sale agreements, it is important to consider this doctrine in electing the causes of actions to be pursued and the types of damages associated therewith.

## **VII. Practical Options for Settlement of Disputes.**

### **A. Agreement on Extension.**

Don’t wait until the last minute to request an extension if necessary. Open communication is key to settling any dispute regarding a purchase and sale agreement. If a purchaser knows that it will be unable to complete due diligence by the date specified in the contract, give seller as much advance notice as possible and attempt to negotiate a modified completion date. While the seller (or even the contract) may require a payment of additional earnest money to extend, it beats the alternative of breaching the contract and causing the deal to fall apart.

### **B. Enforce the Contract Terms.**

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<sup>87</sup> City of Cairo, 278 Ga. App. at 728 (quoting Gen. Elec. Co. v. Lowe’s Home Centers, 279 Ga. 77, 78 (2005)).

<sup>88</sup> City of Cairo, 278 Ga. App. at 728 (quoting Holloman v. D.R. Horton Inc., 241 Ga. App. 141, 147-148 (1999)).

Don't be afraid to play ball and enforce the contract terms and provisions. If seller doesn't provide you with the title policy information by the deadline set forth in the contract, demand it. Oftentimes parties to commercial transactions will use as much leeway as the other party is willing to give.

### **C. Early Mediation.**

Mediation can be an excellent way to resolve a dispute, even prior to initiating litigation, but only if both parties are willing and interested in mediation. If you have a matter with a significant emotional aspect (*i.e.*, the President of the company is just ticked off and perhaps can't see the bigger picture), mediation in a controlled manner is an excellent forum for the parties to "get it off their chests." However, if you do not already have a good idea about the strengths and weaknesses of yours and your opposition's position, mediation may be nothing more than a waste of time.

### **D. Performance of Additional Inspections or Surveys.**

If the dispute involves issues beyond the contract such as boundary lines or status/condition of property, additional inspections or surveys performed by independent third-parties can help to bridge the gap.

### **E. Money Talks.**

If all else fails, there are not many real estate disputes that can't be resolved by either paying more money or by reducing the purchase price via an amendment to the contract.

## **VIII. Common Sense Drafting Reminders to Help Avoid Litigation**

### **A. Be Careful When Using Form Documents and Boilerplate Provisions.**

All attorneys who handle commercial real estate transactions have their "go by" or "standard" documents such as a form commercial purchase and sale agreement. However, sometimes, the attorney's use of the form document results in transaction-specific, key terms

being accidentally omitted by the drafting attorney. For example, if the transaction contemplates the sale of a business along with the commercial real estate, the “form” purchase and sale agreement likely would not include issues critical to the sale of the business such as a non-compete provision for the seller and principal owner. Be sure to review even your “boilerplate” or “miscellaneous” provisions for each transaction as these are not one-size-fits-all propositions. For example, you would not want to include a “time is of essence” clause for a transaction where timely performance is not required or cannot be assured. Analyze each specific transaction to determine which, if any, non-standard provisions must be added to your form documents for that particular transaction.

**B. Review All Title Documentation Thoroughly – and then Review Again – and then Have Someone Else Review.**

Title to commercial property is generally more complex than title to a residential property. Most commercial property is subject to easements, restrictions, regulations, etc. You cannot properly draft the requisite commercial provisions without understanding and digesting the implications of title issues with the underlying real estate.

**IX. Conclusion**

While the aforementioned insight better prepares parties and their real estate lawyers to avoid litigation, or at least evaluate the issues associated with various contract terms, thankfully for the authors, litigation is inevitable and abundant.