

LIQUIDATED DAMAGES



COUNSEL'S CORNER

In the Spring of 2008 Todd Phillips listed property for sale with a real estate agency. Richard Gomez submitted an offer to purchase the property, which was accepted in October 2008.

The purchase price was \$660,000, and required a 10% earnest money deposit. If Gomez did not close, Phillips had the option of accepting the earnest money as liquidated damages, *or* pursuing a claim for damages or specific performance.

Later the Purchase and Sale Agreement was amended. One of the amendments provided that the \$66,000 earnest money deposit became non-refundable following a due diligence inspection period and Gomez's attorney's approval of the deal.

Although not stated in the Court's opinion, presumably all inspections were satisfactory and Gomez's attorney approved, since the full \$66,000 earnest money deposit was released to Phillips without restriction before closing.

In early December 2009 Gomez advised Phillips that Gomez would not be able to close on time. In February 2010 Phillips sent Gomez a letter demanding that Gomez perform under the Agreement (as amended), or Phillips would pursue Gomez for a deficiency after the property was re-sold.

Gomez did not respond.

In June 2010 Phillips sold the property for \$527,500, creating a deficiency of \$132,500. Phillips had already received the earnest money deposit of \$66,000, and consequently Phillips applied the amounts already received from Gomez to the deficiency balance.

In November 2013 Phillips filed a lawsuit against Gomez for breach of contract and money damages. Gomez defended by claiming that Phillips had the right to receive the earnest money deposit *or* litigate for consequential damages, *but not both*. And, since

Phillips had already received the earnest money deposit, Phillips had no right to claim anything more.

The district court agreed and entered judgment for Gomez.

Phillips appealed, claiming that he had the right to both receive the \$66,000 earnest money deposit as liquidated damages, *and* then recover a judgment against Gomez for additional sums. Gomez' defense, as accepted by the district court, was unchanged.

The Appellate Court reviewed the Purchase and Sale Agreement, as well as the Addenda, and determined that sellers and buyers are allowed to use liquidated damages provisions as a singular and exclusive remedy. And that contracting parties may pre-select a remedy in their contract.

By accepting the \$66,000 earnest money deposit, Phillips waived his ability to pursue actual damages. The choice was his to make, but it had a lasting (and legally binding) effect. The earnest money payment Phillips received was not a 'down-payment' toward actual damages, but rather it was an exclusive remedy.

It may not have been what Phillips intended, but the Agreement and Addenda were clearly drafted on this point.

Judgment was affirmed for Gomez. See *Todd J. Phillips v. Richard D. Gomez*; Docket No. 44594; Idaho Supreme Court; November 8, 2017: <http://caselaw.findlaw.com/id-supreme-court/1879295.html>.

Lessons learned:

1. Typically our Courts will uphold a properly drafted liquidated damages clause. Most of my contracts contain them, as they can be beneficial to both sellers and buyers. Do yours?
2. This case is helpful to illustrate that liquidated damages provisions should be clearly written, and leave no doubt that it is an exclusive remedy if selected by the party entitled to it.
3. We use liquidated damages provisions in commercial leasing too, particularly with regard to delayed occupancy and early termination options to be exercised by either Landlord or Tenant.

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