

Legal Alert

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QUESTION: CAN I REPUDIATE A BAD DEAL AND GET MY MONEY BACK?

ANSWER: USUALLY BREACHING A CONTRACT FIRST WILL COST YOU DAMAGES!

"Buyer's remorse" is only one reason why people try to get out of contracts. Maybe the other side is doing a lousy job with the contract work. Maybe your costs have gone up and made the agreement a bad deal. Maybe the market has tanked. Be careful when you try to get out of a contract or it may cost you!

The tale of the \$3.3 million villa in Paradise Valley.

Ralph and Carolee Thomas signed a contract to buy a new luxury home for \$3,295,000, not including upgrades, in January 2006. Mr. and Mrs. Thomas paid \$659,000 in earnest money deposits during construction. They needed to pay the rest of the \$3,295,000 on or before the close of escrow on May 16, 2008. By then, Mr. and Mrs. Thomas didn't want to pay another \$2.6 million and wanted their \$659,000 in advance payments returned. *Thomas v. Montelucia Villas, LLC, Ariz. 92, 302 P.3d 617 (2013).*

Mr. and Mrs. Thomas sent Montelucia a letter 10 days before the scheduled escrow closing saying they were "terminating the agreement" because the Town of Paradise Valley had not issued a Certificate of Occupancy for the villa. The letter from Mr. and Mrs. Thomas demanded that Montelucia tell the title company to return their earnest money deposit. Montelucia refused to return the \$659,000 and Mr. and Mrs. Thomas sued.

Who breached first?

Mr. and Mrs. Thomas alleged breach of contract and breach of the covenant of good faith and fair dealing, along with accusing Montelucia of violating statutory obligations. Montelucia counterclaimed for breach of

the purchase agreement because the Thomases had refused to close the purchase. Montelucia also asked the Court to compel Mr. and Mrs. Thomas to buy the house.

The Thomases argued that Montelucia breached the contract by not completing resort amenities, access points, and infrastructure. They also said that Montelucia did not have a Certificate of Occupancy for the property, a condition for the closing of escrow. In fact, Montelucia unsuccessfully attempted to get a Certificate of Occupancy on May 8 and May 14. The Certificate of Occupancy for the property was finally obtained on August 27. The Court said the Thomases had already "anticipatorily repudiated" the contract by their letter of May 6, 2008, however.

Damages for anticipatory repudiation?

"An anticipatory repudiation is a breach of contract giving rise to a claim for damages and also excusing the necessity for the non-breaching party to tender performance." When Mr. and Mrs. Thomas breached the contract with their letter to Montelucia, they were no longer "entitled to demand performance from the innocent party...." The Arizona Supreme Court said Montelucia might not get to keep the \$659,000 paid by the Thomases, however.

Anticipatory breach, by itself, does not entitle the injured party to recover damages. To get damages, the non-breaching party has to show that it would have been ready, willing and able to perform the contract, if the other party had not repudiated the contract. The party that repudiates the contract is not responsible for damages if there would have been a total failure by the injured party to complete its end of the bargain.

The payments by Mr. and Mrs. Thomas were "progress payments," rather than "earnest money," even though the contract said otherwise. The deposits were not to demonstrate the good faith of Mr. and Mrs. Thomas, but instead allowed the homebuilder to fund the construction. Thus, the payments made by Mr. and Mrs. Thomas amounted to "liquidated damages."

"Although the contract stipulated the amount of damages, this provision did not relieve Montelucia of the burden to demonstrate its willingness and ability to perform before recovering or retaining any damages." The Supreme Court sent the case back to the trial court to determine whether Montelucia was able to perform its obligations under the contract. "If it is ultimately determined that Montelucia was ready, willing and able to perform as required by the contract, the court can then determine the appropriate remedy available to Montelucia under the contract."

Practical lessons on terminations!

What do we learn from this case? Be careful when you try to get out of a contract! Read the contract carefully and seek legal advice in advance. Ask the other side to prove that it will be able to perform the contract. If the other side refuses to assure you that it will be able to perform the contract, it may be in breach for anticipatorily repudiating the contract. You want to make sure that the other guy breaches first!

If you have any questions about interpreting or terminating contracts, please call me.

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