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Is It Time To Retire Specific Performance's 'Land Is Unique' Mantra?

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Some say money cures all evils; others fervently disagree. The legal remedy of "specific performance," dating back to English Common Law, exposes this debate in the context of modern contractual disputes involving real property. Is it time to retire this approach in favor of monetary damages, or should land still be considered unique under the law?

An Alternative Approach: Money Damages—A Sufficient Standalone Remedy

Unlike in feudal England, when parcels of land were considered agricultural marvels, plots today are commonly cookie-cutter molds whose only difference is the number on the front doors. See, e.g., Steven Shavell, *Specific Performance Versus Damages for Breach of Contract*, Discussion Paper No. 532, Harvard L. Sch., at 24 n.67 (Nov. 2005). A buyer of such a building may willingly take a cash payout if a contract were to go wrong as the house next door could just as easily be purchased. Nancy Perkins Spyke, *What's Land Got To Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 Buff. L. Rev. 387, 397 (April 2004).

Even when properties possess distinct characteristics, we live in a world where the only limiting factor is the amount of money you are willing (or able) to spend to build a replica. The moniker of a "one-of-a-kind property" is largely an illusion in the real estate market today.

Equally as important are the dramatic improvements over the last century to land appraisal, which is now a sophisticated field of study. See Dep't of Taxation and Finance, *Property Tax and Assessment Administration: Valuation Standards*, New York State (Oct. 18, 2021). Today, appraisers are admitted as experts, accounting for purported "uniqueness" in their calculations and accurately valuing land to the dollar.

The premise that land is unique exemplifies our legal system's overreliance on tradition and failure to adapt to modern realities. With modern resources, it is time to relinquish the mantra of "it has

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been held time and time again that a tract of land is unique." See, e.g., *Barkho v. Ready*, 523 S.W.3d 37, 44 (Miss. Ct. App. 2017). Nowhere is this truer than in New York, where our state courts continue to implement "specific performance [a]s a proper remedy" on the assumption that 'the subject matter of the particular contract is unique and has no established market value.'" *Sokoloff v. Harriman Estates Development*, 96 N.Y.2d 409, 415 (2001).

It does not (and should not) have to be this way. Some U.S. states and international courts have begun to depart from the categorical approach and consider whether monetary damages are sufficient relief for a breach of a real property sale contract.

In *Roth v. Habansky*, 2003 WL 22309508 (Ohio Ct. App. 2003), the court determined that even where the seller "without question" breached the contract, specific performance was not warranted because it would have been an "undue hardship" for the seller to be forced out of his home, while the buyers sold their home, rented a condo, and bought a similar home in the same neighborhood as the property at issue just two months after the breach. See id. Importantly, the purchasers were interested in the subject property because of its unique characteristics, yet the court declined to award specific performance, instead opting to award money damages. Id.

Similarly, the Canadian Supreme Court discarded the traditional view that land is unique and clarified that "the progress of modern real estate development...implie[s] that this is no longer the case, and there are cases in which damages are an adequate remedy." See Hanoch Dagan & Michael A. Heller, *Specific Performance*, Columbia Law & Economics Working Paper No. 631; Columbia Public Law Research Paper No. 14-674 (2020) (citing *Semelhago v. Paramadevan* [1996] 2 S.C.R. 415, 425, 428-29 (Can.)). As a result of *Semelhago*, Canadian courts now eschew the automatic award of specific performance in favor of a more nuanced analysis that affords the possibility of monetary damages.

> The question of whether specific performance, monetary damages, or a combination of the two is the "best" remedy for a contractual dispute involving real property is ripe for healthy debate.

Specific performance as the sole remedy for real property disputes no longer makes sense today, with the advances in real estate development and appraisal. New York should therefore adopt the reasoning of Ohio and Canada and examine each case empirically and on its merits to determine the appropriate remedy.

The Traditional Approach: Specific Performance—The Presumptive Redress

All latitude, longitude, and elevation data points are different. That is why New York, like essentially all jurisdictions, subscribes to the Anglo-American notion that "each parcel of real property is unique," and the law has evolved to protect that distinction. *EMF Gen. Contracting v. Bisbee*, 774 N.Y.S.2d 39, 44 (1st Dep't 2004)).

Though mere possession of land in New York and the United States may no longer connote the status it did centuries ago, "[e]ven today, land ownership is an indicium of wealth and status and is viewed differently from ownership of personal property." Spyke at 394. "Unlike money or most personal property, [real property] is not fungible. Its location can never be exactly duplicated, and each location has a unique value." Loren A. Smith, *The Morality of Regulation*, 22 Wm. & Mary Envtl. L. & Pol'y Rev. 507, 518 (1998).

One is also unlikely to find a home next door that is identical in aesthetics, amenities, and condition. Perhaps an argument could be made that dispels the foregoing reasoning when it comes to the

purported uniqueness of *commercial* real property, see, e.g., Tanya D. Marsh, *Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 Neb. L. Rev. 635, 647 (2010), but these societally ingrained views cannot be disconnected from *residential* real property.

Money also does not cure all woes. Oftentimes, a prospective purchaser will have invested weeks or months scouring listings and visiting properties. Regardless of wealth, this is a time-consuming and often stressful endeavor. And once a contract is signed, plans are put in motion for the relocation of an entire family. How can monetary damages compensate for the intangible impact of a seller backing out at the last minute due to a change of heart, leaving the buyer's family scrambling to find temporary accommodations?

Notably, specific performance is *not* automatic; it is within the court's equitable discretion. This discretion, however, "'is not unlimited; unless the court finds that granting a decree of specific performance would be a drastic or harsh remedy, or work injustice, the court must direct specific performance.'" *EMF Gen. Contracting*, 774 N.Y.S.2d at 45 (quoting 91 N.Y. Jur. 2d, *Real Prop. Sales & Exchanges* §204). Thus, the presumption that real property is unique is rebuttable. For more than a century, the New York courts have been examining each case on its merits. *Peters v. Delaplaine*, 49 N.Y. 362, 363 (1872). No hardship or injustice will be found to defeat specific performance where what is really going on is nothing more than "seller's remorse." See, e.g., *Alba*, 810 N.Y.S.2d at 540; *Bregman v. Meehan*, 479 N.Y.S.2d 422 (Sup. Ct. Nassau Cnty. 1984).

Generally, "[t]he word 'uniqueness' is not … a magic door to specific performance. A distinction must be drawn between physical difference and economic interchangeability." *Van Wagner Advert. v. S & M Enters.*, 501 N.Y.S.2d 628, 631 (1986). The question is whether the value of the unique qualities "could be fixed with reasonable certainty and without imposing an unacceptably high risk of undercompensating" the non-breaching party. Id. at 632. Regarding real property, although the appraisal of land "is now a highly sophisticated field of study," how does an appraiser fix—with reasonable certainty—the value of a desirable neighborhood or any of the subjective intangibles that go into the calculus of home purchasing and ownership?

Ultimately, dispensing with specific performance would undermine the binding nature of a contract, twisting a party's obligation to adhere to its terms into a mere business decision. This will always favor the wealthy. Specific performance puts the parties on equal footing—the bargained-for contract dictates the result, rather than the financial means of one party over the other.

Seemingly, the most effective way for a prospective seller to avoid specific performance—aside from not breaching—would be to explicitly provide in the sales contract that the sole and exclusive remedy for a breach is monetary damages. See, e.g., *Rubinstein v. Rubinstein*, 296 N.Y.S.2d 354, 358 (1968). The solution is not to disregard the centuries-old, fundamental notion that each parcel of real property is, in fact, unique.

Conclusion

The question of whether specific performance, monetary damages, or a combination of the two is the "best" remedy for a contractual dispute involving real property is ripe for healthy debate. While there may be "correct" answers jurisdictionally, we leave it to you, the reader, to continue the discourse and determine for yourself the appropriate remedy.