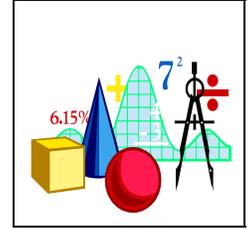


# CONSTRUCTION LAWLETTER

For Industry Professionals, Managers, Trades & Suppliers



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## SPECIFIC PERFORMANCE

Specific performance is an equitable remedy at law. It is the remedy requiring performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon in a writing. This differs from other remedies for a breach of contract, most notably money damages.

A party seeking specific performance of a contract must initially establish the requisite elements for this remedy, namely: (1) that he has a valid, enforceable contract, (2) that he has performed or tendered performance, and (3) that he is ready, willing or able to promptly perform all acts required of him in the specific execution of the contract.

Specific performance, as an equitable remedy, considers done that which ought to be done. *Specific performance of a contract rests on the ground that ordinary money damages will be inadequate or insufficient to put the non-breaching party in the position it expected to be in, if the breach had not occurred.*

Courts will carefully weigh and consider that where the granting of money damages is enough to be fair to each side, it ( the Court) will grant that relief before specific performance. A person seeking specific performance as a remedy must demonstrate a unique nature of the contract such that money damages are not an

adequate remedy, otherwise it be presumed that specific performance is neither warranted nor necessary.

Courts are more likely to grant specific performance when the contract terms are complete, certain, unambiguous, mutual, and some form of valuable consideration is given. Even then the facts must support that such determination, if granted, will be eminently fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; and not an unconscionable or hard bargain. A party seeking specific enforcement of its contract as an equitable remedy must itself be free of fault or blame, with "...clean hands and pure heart...".

\* \* \*

### References:

- (1) Black's Law Dictionary (5<sup>th</sup> Ed. 1979) 1024.
- (2) Bahner's Auto Parts v. Millard Bahner. 1998 Ohio App. Lexis 3453, Quoting 84 Ohio Jurisprudence 3d (1988) 311-312, Specific Performance, Section 34.
- (3) Wiedemann Brewing Co. v. Maxwell. 78 Ohio St. 54 (1908).
- (4) Robert Manning v. David A. Hamamey, et al. 1998 Ohio App. Lexis 493.

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