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Effect of a Remedy Limitation Clause on Specific Performance: *S.E.S. Importers, Inc. v. Pappalardo*

VICTOR GARTENSTEIN* and LESTER B. HERZOG**

I. Introduction

Specific performance is an equitable remedy whereby a contracting party is compelled to fulfill its obligation precisely as set forth in the contract.¹ Where the contract concerns the conveyance of real property,² the remedy of specific performance allows a court of equity to force a recalcitrant seller to convey the property to the buyer, according to the terms of the contract.³ A court will only grant the remedy of specific performance, however, if the seller is in a position to comply with the court's order.⁴ If the seller cannot convey marketable title to the property at the time of closing but can convey such title at the time of trial, the buyer's right to specific performance can be enforced.⁵ In *S.E.S. Importers, Inc. v. Pappalardo*,⁶ the buyer's remedy to specific performance was preserved because title was marketable at the time of trial despite an express contractual provision limiting the buyer's remedies.⁷ In reaching its decision, the New York Court of Appeals held that the contingencies for limiting

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1. See generally J. POMEROY, *SPECIFIC PERFORMANCE* (3d ed. 1926). The primary criterion in determining whether it is appropriate to grant an equitable remedy such as specific performance is the inadequacy of available legal remedies. *Id.* at § 9.

2. Every parcel of real property is conclusively presumed to be unique; consequently, the legal remedy of damages is deemed inadequate. See, e.g., *Kitchen v. Her-ring*, 42 N.C. 190 (1851).

3. *Id.*

4. See, e.g., *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N.Y. 257, 126 N.E. 708 (1920).

5. *Haffey v. Lynch*, 143 N.Y. 241, 249, 38 N.E. 298, 300 (1894).

6. 53 N.Y.2d 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981).

7. *Id.* at 462, 425 N.E.2d at 845, 442 N.Y.S.2d at 457.

the buyer's remedies never arose because the seller was able to convey marketable title at the time of trial.⁸

*S.E.S. Importers, Inc. v. Pappalardo*⁹ is a case of first impression for the New York Court of Appeals. This article will analyze both the majority and dissenting opinions before concluding that the majority was correct in allowing the buyer to sue and awarding him the remedy of specific performance.

II. Facts¹⁰

The plaintiff, S.E.S. Importers, Inc. (S.E.S.), contracted to buy a building from the defendant, Pappalardo, whereby Pappalardo was to convey a fee simple to the premises, free and clear of all encumbrances.¹¹ According to an attached rider to the contract which referred to a pending action between Pappalardo and two tenants,¹² S.E.S. was not obligated to close title until "(a) the below action [was] determined in favor of the landlord and no appeals [were] pending, (b) the tenancy below [was] terminated, (c) the lease referred to below [was] terminated and cancelled."¹³ In addition, the contract provided:

If, for any reason not the fault of the seller hereunder, seller

8. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

9. 53 N.Y.2d 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981).

10. All facts, unless otherwise indicated, have been taken from the New York Court of Appeals opinion, *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d 455, 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981).

11. *Id.* at 459, 425 N.E.2d at 843, 442 N.Y.S.2d at 455. Pursuant to the terms of the contract, buyer placed a down payment deposit in escrow with the seller's attorney. The latter was fired by the seller prior to the closing and shortly thereafter he died. His estate was joined by the seller as a third party defendant. *Id.* at 462, 425 N.E.2d at 844, 442 N.Y.S.2d at 457.

12. The contract contained the following representations concerning one of the vacant units:

Seller represents that there was a lease covering the four (4) room suite, shown as a dwelling apartment upon the Building Department files and records, on the second floor, with Patrick Simonetti and Anthony Moscatiello. That a Summary Proceeding was instituted in the Civil Court, Queens County, Housing Part. That originally a Final Order and a Warrant were issued; and an application made by tenant Moscatiello to vacate same. That an appeal is now pending in Appellate Term, Second Department, from Order of Judge Herbert J. Miller. That tenants have paid no rent on such apartment since September 1977.

Record at 307.

13. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 459, 425 N.E.2d at 843, 442 N.Y.S.2d at 455.

cannot convey title in accordance with the terms of this contract, the purchaser shall, at its own election, have the right to accept such title as the seller is able to convey, without any claim on the part of the purchaser for abatement of defects or objections, or the purchaser shall have the right to rescind this contract, upon which rescission, . . . purchaser will be entitled to the return of the amount paid at the time of signing of this contract, plus the net cost of title examination, if incurred, . . . and upon such repayment this contract shall be null and void.¹⁴

At the closing,¹⁵ the buyer refused to accept title tendered by the seller, charging the seller with bad faith¹⁶ in two aspects of the deal. The first allegation was based on the continuing existence of the disputed tenancy. The buyer claimed that the seller was responsible for the continuation of the title impediment, the termination of which was made an express condition precedent to closing title.¹⁷ The buyer's second allegation of bad

14. *Id.* at 460, 425 N.E.2d at 843, 442 N.Y.S.2d at 455. In addition, the contract provided:

That the purchaser, at least ten (10) days prior to the closing of title, . . . shall furnish to seller's attorney, a written statement and notice of objections to title, if any, and the parties agree that the seller shall have a reasonable adjournment of the closing of title for the purpose of removing any such objections

Id. at 459-60, 425 N.E.2d at 843, 442 N.Y.S.2d at 455.

15. The closing date specified in the contract was July 17, 1978. With the acquiescence of both parties, nothing took place on that date. Subsequently, seller replaced his attorney. His new attorneys sent a letter to the buyer's attorney on September 21, 1978, fixing the closing date for September 29, 1978 (closing date referred to in the text). They also advised him that the buyer's failure to close on that date would constitute default and would terminate the contract. The buyer's attorney responded by letter on September 25, 1978, referring to the clause which provided that the buyer was not obligated to close until the landlord-tenant matter was cleared up. *See supra* text accompanying notes 12-13. The letter also requested that seller's attorneys forward to buyer evidence that the tenancy had been terminated. Although that request was not complied with, buyer and his attorney, nevertheless, appeared at the scheduled closing and represented themselves as ready, willing and able to consummate the sale pursuant to the terms of the contract. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 460-61, 425 N.E.2d at 844, 442 N.Y.S.2d at 456.

16. *See* Brief for Appellant at 16. The courts found that the seller's inability to convey good title was not occasioned by bad faith. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 462, 425 N.E.2d at 844, 442 N.Y.S.2d at 456-57. *See infra* text accompanying note 42.

17. The court of appeals agreed that termination of the title impediment was made an express condition precedent to closing title. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 463, 425 N.E.2d at 845, 442 N.Y.S.2d at 457. The trial court had held, conversely, that "[t]ermination of the lease was not a condition of the contract, the failure of

faith was that the seller attempted to withdraw from the deal by deliberately scheduling the closing on a date when he knew he would be unable to convey a marketable title as required by the contract.¹⁸ His alleged purpose was to force the use of the remedy limitation clause, so that the buyer had to rescind the contract or accept the defective title without an abatement in the contract price.¹⁹ The buyer maintained that these facts justified his refusal of the tendered title.²⁰

The seller claimed that neither title to the property nor the buyer's prospective ownership interest was impaired because the disputed tenancy had been terminated prior to the execution of the contract, and the pending landlord tenant action pertained solely to unpaid rent.²¹ The seller further claimed that even if the tenancy was not terminated at the time of closing, the buyer was forced by the remedy limitation clause to make a preclusive choice between rescission or acceptance of the defective title without an abatement in the contract price.²² Accordingly, the seller countercharged the buyer with bad faith for seeking to postpone the contractually mandated election for speculative purposes.²³

III. Procedural History

Within two weeks of the aborted closing, the buyer filed a

which would excuse plaintiff's duty of performance. Instead, an outstanding lease at the time of closing as set in the contract required a reasonable adjournment in the time set for the concurrent performances." S.E.S. Importers, Inc. v. Pappalardo [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980). The court was alluding to the provision set forth in note 14 *supra*, and also to the buyer's failure to attend a rescheduled closing set for October 20, 1978. *Id.* The trial court, however, failed to point out that the closing date fixed by the seller did not allow for a ten day notice as required by the provision, *supra* note 14, and also, that the buyer initiated the lawsuit prior to the date of the rescheduled closing, on October 12, 1978. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 461, 425 N.E.2d at 844, 442 N.Y.S.2d at 456. *But see infra* note 40.

18. See Brief for Appellant at 16; S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981).

19. See *id.*

20. The trial court disagreed with the buyer's contention. See *supra* note 17.

21. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 462, 425 N.E.2d at 845, 442 N.Y.S.2d at 457.

22. S.E.S. Importers, Inc. v. Pappalardo [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980); see *supra* text accompanying note 14.

23. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 466, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

notice of *lis pendens*²⁴ and instituted an action seeking to compel the seller to convey either good title to the premises or such title as he could convey, but with an abatement in the contract price. The seller's answer denied all of the buyer's material allegations, and contained several counterclaims for compensatory and punitive damages resulting from the buyer's refusal to close title, or otherwise terminate the contract according to its terms.²⁵

The trial court held that the continuing existence of the disputed tenancy was a valid objection to the title tendered at the closing²⁶ but it was not a condition precedent to closing title.²⁷ Having found no evidence of bad faith by the seller, however, the trial court held that the buyer was limited to the remedies provided by the clause.²⁸ The buyer deprived himself of the right to ask for specific performance by failing to elect a remedy and by instituting a lawsuit seeking an abatement in the contract price.²⁹ The court found that the buyer's demand for an abatement contravened the contractual terms, and constituted the buyer's election to rescind the contract, and to receive a refund of his down payment plus title examination costs.³⁰ The court, therefore, denied the relief sought by the buyer.³¹ Furthermore, by holding that the buyer could not compel specific performance even without an abatement, the court found no need to discuss the effect, if any, of the fact that the title defect had been cured at the time of the trial.³²

24. A notice of *lis pendens* is a notice filed on public records for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment. BLACK'S LAW DICTIONARY 840 (rev. 5th ed. 1979). See N.Y.Civ. PRAC. LAW § 6501 (McKinney 1980) and commentary at 438; N.Y. REAL PROP. ACTS. LAW § 1331 (McKinney 1979).

25. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 461, 425 N.E.2d at 844, 442 N.Y.S.2d at 456.

26. *Id.* at 462, 425 N.E.2d at 844, 442 N.Y.S.2d at 456.

27. S.E.S. Importers, Inc. v. Papalardo [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980). But see *supra* note 17.

28. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 462, 425 N.E.2d at 844, 442 N.Y.S.2d at 456-57. The clause expressly provides that it is applicable *only* in the absence of bad faith by the seller. See *supra* text accompanying note 14.

29. *Id.* at 462, 425 N.E.2d at 844, 442 N.Y.S.2d at 456-57.

30. *Id.*

31. *Id.* The court also denied judgment on the seller's counterclaims. *Id.*

32. *Id.* The buyer's theory was that the equitable remedy of specific performance

The appellate division affirmed the findings and judgment of the trial court in all material respects.³³ But the court of appeals, in a five to two decision, reversed the lower court.³⁴ The majority held that the denial of specific performance was an abuse of discretion, and ordered the entry of judgment for specific performance in favor of the buyer.³⁵

IV. Court of Appeals Decision

On appeal, the seller reiterated his primary contention that the disputed tenancy was terminated prior to the execution of the contract because the tenants had physically departed from the premises³⁶ and the buyer was allegedly aware of this at the time of contracting.³⁷ Dismissing the seller's argument as being

should be granted since "the court in equity decides the case as of the time the case is before it." *Id.* at 461, 425 N.E.2d at 844, 442 N.Y.S.2d at 456.

33. *S.E.S. Importers, Inc. v. Pappalardo*, 79 A.D.2d 653, 433 N.Y.S.2d 833 (2d Dep't 1980). The appellate division merely modified the judgment of the trial court with respect to the escrow deposit. Instead of ordering the seller to return the down payment to the buyer, the appellate division ordered that the payment be made directly by the executrix of the estate of the escrowee. *Id.*

34. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 462, 425 N.E.2d at 845, 442 N.Y.S.2d at 457. Judge Jones wrote the majority opinion, in which Judges Jasen, Gabrielli, Wachtler, and Meyer concurred; Judge Fuchsberg wrote the dissent, in which Chief Judge Cooke concurred.

35. *Id.* at 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460.

36. *Id.* at 462, 425 N.E.2d at 845, 442 N.Y.S.2d at 457. It is the issuance of a warrant for the removal of a tenant, and not its execution, that terminates the existence of the landlord-tenant relationship. N.Y. REAL PROP. ACTS. LAW § 749(3) (McKinney 1979). Here, a warrant for the removal of the tenants had been issued. Still pending was the seller's appeal from an order staying the final order and warrant. *See supra* note 12. The seller relied on various statements made by New York courts to the effect that a tenant's voluntary departure, after being served with a notice of petition, terminates his tenancy with the same force as would his involuntary removal by execution of a warrant. *See, e.g.,* *Cornwell v. Sanford*, 222 N.Y. 248, 253, 118 N.E. 620, 621 (1918), where the court stated: "[t]he removal is the precise act and effect the landlord sought through the service of the precept and proceeding, and it is entirely immaterial, within the law, whether it is produced through the warrant or the conduct of the tenant in obedience to the precept." *Id.* *See also* *Hoffmann Brewing Co. v. Wuttge*, 234 N.Y. 469, 138 N.E. 411 (1923); *International Publications, Inc. v. Matchabelli*, 260 N.Y. 451, 184 N.E. 51 (1933); 3 J. RASCH, N.Y. LANDLORD AND TENANT § 1400 (2d ed. 1971).

37. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 462, 425 N.E.2d at 845, 442 N.Y.S.2d at 457. Photographs were received into evidence showing the vacant apartment after the departure of the tenants before the contract was signed. Furthermore, the buyer's president admitted that he inspected the vacant apartment before the signing of the contract. Record at 208 and 242.

contrary to the factual findings of the lower courts,³⁸ the majority held that the tenancy clause³⁹ was expressly made a condition precedent to the buyer's obligation to close title,⁴⁰ and be-

38. See *supra* text accompanying notes 26-32. The lower court held that the title tendered by the seller did not conform to the terms of the contract.

39. See *supra* text accompanying note 13.

40. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 463, 425 N.E.2d at 845, 442 N.Y.S.2d at 457. In this respect, the court of appeals overruled the trial court's finding that the clause did not create a condition precedent. See *supra* note 28. The court of appeals' finding indicates that the clause effectively made the contract executory until the seller obtained a final warrant or until the purchaser, at his option, decided to close or rescind the contract. This, however, is not the same as stating that the clause imposed an affirmative duty on the seller to perform work for which the parties did not contract.

In *Sloan v. Pinafore Homes Inc.*, 34 A.D.2d 681, 310 N.Y.S.2d 731 (2d Dep't 1970) (mem.), the contract provided that if the house was not ready for occupation on the law day, then the closing was to be adjourned and rescheduled for later, in order to give the seller a chance to make the dwelling occupiable. Due to an unsafe slope that required the construction of a retaining wall, the building authorities refused to issue a certificate of occupancy until the hazardous situation was rectified. The court agreed that the purchaser's objection of failure to deliver premises suitable for occupancy was valid, but rejected his request for specific performance which was based on the contention that the provision delaying the closing should be construed as a covenant to perform any and all acts needed to close. *Sloan* is distinguishable from the present case because the emphasis is on the buyer not having an obligation to close, rather than on any affirmative duty of the seller to perform. It can be said in the present case that the buyer does not seek to impose on the seller a duty to take affirmative steps to remove the title impediment; he merely seeks to be free from any duty to perform until the seller fulfills his obligations. Furthermore, *Sloan* is distinguishable because the affirmative duty the buyer sought to impose upon the seller stems from general language which the court properly held should not be as broadly construed as suggested by the buyer. On this point, there are cases which imply an affirmative duty sometimes entailing an expenditure of money on the seller whose duty to convey is only stated in general terms. See, e.g., *Mokar Properties Corp. v. Hall*, 6 A.D.2d 536, 179 N.Y.S.2d 814 (1st Dep't 1958), where the court, dealing with a remedy limitation clause similar to the one in this case, stated:

If the vendor had contracted to convey, . . . if he is able with the reasonable expenditure of money and effort to remedy defects in title and neglects or refuses to do so, he has not acted in good faith, and he cannot then limit his damages by shielding himself behind such self-created or easily scaled barriers.

Id. at 539-40, 179 N.Y.S.2d at 819.

The present case, however, contains specific language (see *supra* the tenancy termination clause set forth in the text accompanying notes 12 and 13) delineating the parties' rights and obligations with respect to an existing and acknowledged title impediment. The *Sloan* case is, therefore, distinguishable because the affirmative duty in *Pappalardo* relates to the agreement.

The majority finding that the tenancy clause created "a condition precedent to the plaintiff's obligation to purchase the premises," S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 463, 425 N.E.2d at 845, 442 N.Y.S.2d at 457, poses still another problem. If the clause had the effect of making the contract executory until the condition precedent was fulfilled, as the court seems to indicate, then its entire analysis after this point was un-

cause the condition was not met, the buyer's refusal to close title on that date was warranted.⁴¹

With respect to the allegations of bad faith asserted by both parties, the court of appeals took the position that there was no bad faith on either side.⁴² To clarify its position and to vitiate

necessary. The court could have entirely omitted its discussion of *Haffey v. Lynch*, 143 N.Y. 241, 38 N.E. 298 (1894), *see infra* text accompanying notes 50-56, as well as its discussion of the remedy limitation clause. Its sole basis for the decision could have been that the seller continued to be obligated under the contract. The seller breached the contract by refusing to convey title as promised. Since he is now able to convey title, he should be compelled to do so.

Therefore, the court could not have meant to characterize the termination of the tenancy as a condition precedent. What the court probably meant is that seller could not charge the buyer with a breach if the latter refused to close because of the defect, not that the contract remains indefinitely executory until the seller removes the impediment or the buyer cancels. *See* the trial court's discussion in this regard *infra* at note 41.

41. The trial court, however, did not agree with this conclusion. *See supra* note 17. The trial court stated:

[T]he contract also provided that the buyer would not be obligated to close title until the Somonetti-Moscatiello [sic] lease was cancelled. This last provision did not, however, make the closing date open-ended. A much clearer contractual expression of consent by the seller to such an open-ended closing as here found would be necessary before such a gross deviation from normal commercial practice is recognized (*see* 3 CORBIN ON CONTRACTS § 556). Rather, a contractual provision stating that the plaintiff would not be obligated to close title until the Simonetti-Moscatiello appeal was finally resolved and the lease terminated must be understood as a recognition of the commercial practice of signing contracts for the sale of real property though marketable title has yet to be perfected, and as a further explication of the contractual provision which limited the buyer's remedies in the event that the seller was unable to convey clear title at the closing. The handwritten rider concerning the termination of the Simonetti-Moscatiello appeal further defined the "good title" to be here conveyed. An outstanding Simonetti-Moscatiello lease at the time of the closing *triggered plaintiff's contractual election of remedies*. Termination of the lease *was not a condition of the contract*, the failure of which would excuse plaintiff's duty of performance. Instead, an outstanding lease at the time of closing as set in the contract required a reasonable adjournment in the time set for the concurrent performances.

S.E.S. Importers, Inc. v. Papalardo [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980) (emphasis added). With respect to the last sentence, the trial court went on to hold that by "[f]ailing to attend the adjourned closing [rescheduled by the seller] and instead instituting suit, plaintiff waived any objections it may have had to being required by defendant to perform on that date." *Id.* at col. 2. Finally, the trial court concluded that "(b)y instituting such a suit seeking an abatement in price in contravention of the contract itself, plaintiff deprived itself of the right to compel defendant to specifically perform. Plaintiff's suit was thus, in effect, an election to receive back its down payment and title examination cost." *Id.* at col. 2 (emphasis added).

42. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981). Although the court of appeals did not expressly state that the

contrary remarks by the dissent and the trial court,⁴³ the majority made several references to the buyer's freedom from blame-worthiness throughout its opinion.⁴⁴

The majority stated that the buyer had the right to sue the seller for his alleged failure to comply with the conditions of the contract.⁴⁵ The buyer's right to seek judicial enforcement of his claim arose at the closing, but his entitlement to specific performance had to await the favorable adjudication of the substantive issue: the buyer's charge that it was always within the power of the seller to convey good title, and that seller's bad faith was primarily responsible for the presence of the defect at the time of the closing.⁴⁶ It became unnecessary to adjudicate the buyer's charges, however, since, at the time of the trial, the objections to title had been removed.⁴⁷ The court of appeals held, therefore, that if the court satisfied itself as to the present existence of a valid unexecuted contract, whose terms were now sought to be enforced by a party acting in good faith, a court of equity would enforce it.⁴⁸ It is immaterial that the seller was unable to convey good title when the action was started, as long as he can do so at the time of the trial.⁴⁹

buyer was free from bad faith, this conclusion can be inferred from the fact that the court went on to interpret the remedy limitation clause. *Id.*

43. The trial court stated explicitly that there was no reason to suspect the seller of bad faith. *S.E.S. Importers, Inc. v. Pappalardo* [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980), but it made no express statement exculpating the buyer. On the contrary, several of the trial court's remarks can be construed as characterizations of the buyer's lack of good faith. *Id.* at col. 2. Judge Fuchsberg, throughout his dissenting opinion, makes similar observations. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 472, 425 N.E.2d at 850, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting); see *infra* note 69.

44. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 466, 468, 425 N.E.2d at 847-48, 442 N.Y.S.2d at 459-60. In its concluding remarks, reversing the lower courts' decisions, the court made the following comment: "[o]n the record in the present case, . . . plaintiff has done nothing other than pursue the remedies available to it in aid of requiring defendant to abide by his agreement. . . ." *Id.* at 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460.

45. *Id.* at 466-67, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

46. *Id.*

47. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

48. *Id.* at 462, 425 N.E.2d at 844-45, 442 N.Y.S.2d at 457.

49. *Id.* at 464-65, 425 N.E.2d at 846, 442 N.Y.S.2d at 458. In reaching this conclusion, the court relied on WARREN'S WEED NEW YORK REAL PROPERTY, which states:

It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted where the vendor in consequence of a defect in his

The court of appeals relied on the case of *Haffey v. Lynch*⁵⁰ for this proposition. In *Haffey*, seller contracted to convey some land to the buyer, by the usual deed containing full covenants with warranty.⁵¹ At the time of contracting, the seller was able to comply with the terms of the contract.⁵² Subsequently, however, a third person brought an action of ejectment against the seller, and filed a *lis pendens*.⁵³ After the seller refused to convey, the buyer, aware of the claim and *lis pendens*, brought an action for specific performance.⁵⁴ Before that suit came up for trial, the ejectment suit was tried and conclusively determined in favor of the seller, thereby removing the encumbrance.⁵⁵ The court of appeals, reversing the lower court, held that the buyer was entitled to specific performance since the title defect was cured when the action came to trial, and the court was in a position to make an effective order for the requested relief.⁵⁶

title is unable to perform. However, the rule has no application to a case where the defect has disappeared at the time of the trial and the court can then give an effective judgment for the equitable relief demanded. A plaintiff in an equity action should not lose his day in court because of any defense interposed to his action, if at the time of the trial, the facts are such that if he then commenced his action, he would be entitled to the equitable relief sought. If a vendor has no title or a defective title to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled by his vendee to perform his contract.

There is no reason why the vendor should not be compelled to perform if he perfects his title while the action for specific performance is pending. A perfect title by the vendor is not necessary to the vendee's cause of action, and he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether the title of the vendor was perfected before or after the commencement of the action. Furthermore, *where objections to title are cured prior to determination on the trial, a party may be required to specifically perform his contract.*

5 O. WARREN, G. MARKUSON, J. ZETT & J. GUBALA, WARREN'S WEED NEW YORK REAL PROPERTY § 9.05 (4th ed. 1979) (emphasis added). It should be noted that the court cites this authority before considering the effect of the remedy limitation clause. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 464-65, 425 N.E.2d at 846, 442 N.Y.S.2d at 458. As the dissent points out, *id.* at 471, 425 N.E.2d at 849, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting), there is nothing in this quotation to indicate that the text writer would have applied the above principles to a contract that *does* contain such a clause. *Id.*

50. 143 N.Y. 241, 38 N.E. 298 (1894).

51. *Id.* at 244, 38 N.E. at 298.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 249, 38 N.E. at 300. There are several other cases that make the same

The initial stage of the court's analysis established that the buyer could be entitled to the relief of specific performance because the lease was surrendered prior to trial.⁵⁷ Having established that the relief could be granted, the court of appeals addressed the crucial issue: whether the presence of the remedy limitation clause deprived the buyer of his right to specific performance.⁵⁸ Because the issue was one of first impression, the court had to rely on its own judicial interpretation to arrive at its holding that the clause did not act to deprive the buyer of this remedy.⁵⁹

The application of the remedy limitation clause depended on the presence of two factors: first, seller's inability to convey title in accordance with the terms of the contract, and second, that this inability to convey was not caused by any act of bad faith.⁶⁰ If there were no dispute concerning the presence of either factor at the time of closing, then the rights and obligations of both parties would become fixed.⁶¹ Had that been the case in *Pappalardo*, even the majority would probably have denied specific performance on the grounds that it was implicitly excluded by the clause.⁶²

point as *Haffey*. See, e.g., *Rosenberg v. Haggerty*, 189 N.Y. 481, 82 N.E. 503 (1907); *Kahn v. Chapin*, 152 N.Y. 305, 46 N.E. 489 (1897).

57. S.E.S. Importers, Inc. v. *Pappalardo*, 53 N.Y.2d at 464-66, 425 N.E.2d at 845-47, 442 N.Y.S.2d at 458-59.

58. *Id.* at 466, 425 N.E.2d at 847, 442 N.Y.S.2d at 459. Had the contract not contained the remedy limitation clause, there would have been ample authority to indicate specific performance as the appropriate remedy. See *supra* note 49.

59. *Id.* at 462, 425 N.E.2d at 844-45, 442 N.Y.S.2d at 457. See *infra* note 89. It should be noted that the doctrine of stare decisis is less important in the context of an action brought in equity, than in an action brought at law. Thus, equitable relief cannot be demanded as a matter of right upon proving the same facts that constituted the basis for granting an equitable remedy in an earlier case. As the court points out in *Pappalardo*, an equitable remedy such as specific performance is within the "judicial discretion" of the court, and a judgment will not be disturbed unless it appears to have been "arbitrary" or wrong "as a matter of law." *Id.* at 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460; see *Rosenberg v. Haggerty*, 189 N.Y. 481, 82 N.E. 503 (1907). Nevertheless, the principles of consistency and precedent are desirable objectives in all parts of the law, and the presence of countless citations in most equity cases confirms this conclusion. See generally H. McCLINTOCK, *PRINCIPLES OF EQUITY* § 23 (2d ed. 1948) (a general discussion of the history of the discretionary power of the chancellor.).

60. See *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 460, 425 N.E.2d at 843, 442 N.Y.S.2d at 455; See *supra* text accompanying note 14.

61. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459-60.

62. *Id.* The court does not discuss this point expressly. It would seem, however, that

In *Pappalardo*, however, there was sharp disagreement between buyer and seller at the time of closing concerning both critical factors.⁶³ First, the buyer disputed whether the seller had the ability to convey.⁶⁴ Second, the buyer charged the seller with bad faith in failing to take appropriate action to secure a release from the tenants prior to the closing.⁶⁵

The majority held that the remedy limitation clause related only to procedural remedies, not to substantive rights.⁶⁶ Thus, the buyer's right to seek a judicial resolution of the critical substantive issues—whether the seller could give good title and whether the seller acted in good or bad faith—was not barred by the clause.⁶⁷ Because of these disputed issues, the buyer's election was postponed until after trial.⁶⁸ In *Pappalardo*, the contingency envisaged by the clause never arose because the seller was found to have acted in good faith,⁶⁹ the title defect was cured at

if the buyer initially acknowledged the presence of both factors, and then, before either one of the two options was fulfilled, decided to institute an action, the court would not allow the remedy of specific performance. The court would probably not allow a buyer to change his mind, since that in itself would be inequitable.

63. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 460.

64. *Id.*

65. *Id.*

66. *Id.* at 466, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

67. *Id.*

68. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 460.

69. *Id.* Implicit in the court's decision to grant equitable relief is a determination that a party seeking equitable relief must present himself to the court with "clean hands." See *id.* at 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460. Surprisingly, the court did not state this expressly. Instead, it made some indirect references in this regard. See *supra* note 46.

The issue of bad faith was a threshold factor in this case because its presence on either side would affect the substantive rights of both parties. Thus, if the seller had dealt in bad faith, he would not have been able to avail himself of the protection afforded by the remedy limitation clause because the clause limits the buyer's remedies only in situations where "for any reason not the fault of the seller, hereunder, seller cannot convey title in accordance with the terms of the contract." *Id.* at 460, 425 N.E.2d at 843, 442 N.Y.S.2d at 455.

The seller had claimed that the relief of specific performance should be denied because the buyer delayed in the commencement of the action and unfairly took advantage of rising property values. A court of equity will not grant specific performance to a plaintiff who takes his time in bringing the action until the subject matter increases in value. Equity will generally not allow a party to sleep on his rights if such sleep is prejudicial to the interests of the other party. Prejudicial delay, or laches, is a defense to specific performance. "Equity aids [only] the vigilant." H. McCLINTOCK, *PRINCIPLES OF EQUITY* § 28

the time of the trial, and the seller was able to convey good title according to the terms of the contract.⁷⁰ The presence of the clause, therefore, did not affect the outcome of this case.⁷¹

V. The Dissent: Construing the Provision as an Absolute Termination Clause

Contrary to the majority's position, the dissent viewed the remedy limitation clause as an irrevocable contract termination provision.⁷² This would require the buyer to always make his election at the time of closing, whether or not he conceded that the seller was in good faith in being unable to convey good title.⁷³ The dissent noted that the purpose of the clause was to obviate disputes and minimize the risks of litigation.⁷⁴ In the event the seller could not convey good title, the operation of the clause would serve to terminate the rights and obligations of both parties at the closing.⁷⁵ Therefore, the dissent maintained that even though the clause would not prevent a buyer from starting a lawsuit,⁷⁶ it would remove the incentive to initiate a

(2d ed. 1948). The dissent charges that "the majority's claim, that there is no unjust advantage to the seller here because the 'action was instituted within two weeks of the aborted closing . . .'" misses the point. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 472, 425 N.E.2d at 850, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting). According to the dissent, there was "unjust advantage" to the seller because of the "delay which . . . occurred between the closing and the actual adjudication." *Id.* The buyer having brought his action within two weeks of the aborted closing was found by the court not to have taken unwarranted advantage of the seller. *Id.* at 466, 425 N.E.2d at 847, 442 N.Y.S.2d at 459. The fact that there was a delay before the action was tried was not the buyer's fault. Thus, the majority held that he should not be denied the opportunity to seek a resolution of his claim because of the delay in the judicial process. *Id.*

70. See *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

71. *Id.*

72. *Id.* at 469, 425 N.E.2d at 848, 442 N.Y.S.2d at 460 (Fuchsberg, J., dissenting).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 470, 425 N.E.2d at 849, 442 N.Y.S.2d at 461 (Fuchsberg, J., dissenting). It has been said that "[it is] the unalienable right of any person to start a lawsuit . . ." *Minister, Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co.*, 214 N.Y. 268, 279, 108 N.E. 444, 447 (1915). This right is only circumscribed by a subsequent finding that the plaintiff's suit was "spurious" or "frivolous." When a court characterizes a lawsuit by these or similar terms it will dismiss the case. In addition, the defendant may be able to recover, in a separate action, the fees paid to his attorney and all the costs incurred in connection with defending the original action. See, e.g., *Kolka v. Jones*, 6 N.D.

suit solely predicated on baseless assertions of bad faith, since if the buyer's charge of bad faith proved to have been baseless, he would stand to lose the right to receive the property even without an abatement. According to the dissent's analysis, if the buyer is not satisfied with the title tendered at the time of the closing, he must, nevertheless, make a preclusive election under the clause. He cannot postpone this election until after it is judicially determined that "for any reason not the fault of the seller hereunder, seller cannot convey,"⁷⁷ since the election is triggered by the "objective fact" that there exists a title defect, and not by the allegations of either party that it does, or does not exist.⁷⁸ The dissent claims that the buyer is generally not entitled to bring suit.⁷⁹ If, however, he did sue and proved that "some act of bad faith on the part of the seller had relegated [him] to a choice between a bad title and the deposit" then, the dissent admits "that a court of equity might [seek] to right the wrong as of the time of trial when the bad faith was first established."⁸⁰

In *Pappalardo*, the buyer's failure to take the tendered title, his first option under the clause, implicitly constituted an election to receive his down payment deposit, the remaining option under the clause.⁸¹ Accordingly, "[w]hen either of these op-

461, 71 N.W. 558 (1897).

77. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 469, 425 N.E.2d at 848, 442 N.Y.S.2d at 460-61 (Fuchsberg, J., dissenting).

78. *Id.* at 473, 425 N.E.2d at 850, 442 N.Y.S.2d at 462-63 (Fuchsberg, J., dissenting).

79. *See id.* at 469, 425 N.E.2d at 848, 42 N.Y.S.2d at 460-61 (Fuchsberg, J., dissenting). *See supra* note 69.

80. S.E.S. Importers, Inc. v. Pappalardo 53 N.Y.2d at 473, 425 N.E.2d at 851, 442 N.Y.S.2d at 463 (Fuchsberg, J., dissenting).

81. *Id.* The dissent stated: "by refusing to take the property at the time of closing, the buyer elected the refund and his rights became fixed accordingly." *Id.* It will be noted that the dissent's reasoning is somewhat different from that of the trial court which declared that "[b]y instituting . . . a suit seeking an abatement in price in contravention of the contract itself, plaintiff deprived itself of the right to compel defendant to specifically perform. Plaintiff's suit was thus, in effect, an election to receive back its down payment and title examination costs. S.E.S. Importers, Inc. v. Pappalardo [sic], 183 N.Y.L.J. 54, Mar. 19, 1980, at 13, col. 2 (N.Y. Sup. Ct. Mar. 6, 1980). As the majority notes, the causal connection between instituting a suit seeking an abatement, and depriving oneself of the right to ask for specific performance is tenuous or "unsound." S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y. 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460.

The trial court's statement may be read as an implication of bad faith by the buyer, *see supra* note 43. It may, alternatively, be read as implying that the contract was repudiated and rescinded by the initiation of a suit seeking a remedy barred by its terms.

tions is fulfilled, the affair is at an end. . . ."⁸² The buyer's institution of an "unmerited suit" could not operate to allow him to benefit from the disappearance of the defect at the time such suit was tried.⁸³ Thus, the dissent seeks to remove the incentive for bringing actions which are aimed at exploiting the changing conditions of the real estate market at the seller's expense by postponing the contractually mandated election until after the trial, which in many cases may mean several years.⁸⁴

The latter meaning seems to come closest to what the trial court meant. This conclusion is supported by the court's reliance on *Renol Holding Corp. v. Lankenau*, 116 N.Y.S.2d 861, 865-66 (Sup. Ct. Westchester County 1952) which states that:

To allow a party to *disaffirm the contract on one hand*, and then later, on the other hand, to *demand its enforcement* is to shift all hazard to the other party to the contract, and is *contrary to equitable principles*. To countenance such a course of action . . . would have the effect of obligating the defendants to hold the land indefinitely *under the option*, without receiving the down payment agreed upon, and subject them to be summoned to appear in an action for specific performance, at the whim of the plaintiff A purchaser will not be permitted without the consent of the seller to hold a land contract open indefinitely after the closing date and then have it specifically enforced.

Id. (citations omitted) (emphasis added). However, that case dealt with an *option* to purchase real property, where payment on the deposit check was stopped by the purchaser, and thus constituted a repudiation of the contract. In *Pappalardo*, the deposit was being held by the seller's attorney. *See supra* note 11.

In the final analysis, as the majority points out, the proper interpretation pursuant to New York statutory provisions should have been that the buyer exercised his procedural right to demand alternative relief. Such a request does not in any way prejudice the plaintiff's rights. *See* N.Y. CIV. PRAC. LAW § 30.17(a) (McKinney 1974); *see also* 55 N.Y. JUR. *Specific Performance* § 3 (1967), which states in part:

Although the courts in some other states have considered a suit for damages for breach of contract to be inconsistent with an action for specific performance, this is apparently not true in New York, where it has been held that an action for specific performance and an action for breach of contract are not inconsistent, since both recognize the existence of the contract.

Id. Furthermore, even the dissent acknowledged that if the seller is proven to have dealt in bad faith, the buyer could succeed when he asks for an abatement. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 473, 425 N.E.2d at 851, 442 N.Y.S.2d at 463 (Fuchsberg, J., dissenting). *See also id.* at 463 n.2, 425 N.E.2d at 845 n.2, 442 N.Y.S.2d at 457 n.2.

82. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 470, 425 N.E.2d at 849, 442 N.Y.S.2d at 461 (Fuchsberg, J., dissenting) (citing M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 1.5 (3d ed. 1975)).

83. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 472, 425 N.E.2d at 850, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting).

84. *Id.* *See supra* note 69.

VI. Analysis

The majority and the dissent disagree on the issue of whether the buyer was justified in bringing a lawsuit. The majority's position is that the suit was warranted because there was a dispute concerning the factors that determine the clause's applicability;⁸⁵ it would seem illogical to require the buyer to elect a remedy under a clause that may be wholly inapplicable.⁸⁶ It would have been quite difficult to convince the buyer that a clause which begins with "If, for any reason not the fault of the seller," requires that he make a preclusive election before he has had a chance to challenge the clause's applicability in a court of law. The dissent maintains that the suit was unmerited since "it is now conclusively established, by way of an affirmed finding of fact, that the seller at all times acted in good faith"⁸⁷ and, therefore, the rights of the parties became fixed at the time of closing.⁸⁸

Close analysis reveals that the dissent's logic, as the majority points out, "finds no support in the clause itself"⁸⁹ The

85. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459-60. See *supra* text accompanying notes 45-47.

86. See *supra* text accompanying note 60.

87. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 470, 425 N.E.2d at 849, 442 N.Y.S.2d at 461 (Fuchsberg, J., dissenting) (citations omitted). See *supra* note 69.

88. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 473, 425 N.E.2d at 850-51, 442 N.Y.S.2d at 463 (Fuchsberg, J., dissenting).

89. *Id.* at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459. The facts in *Pappalardo* have not been encountered in previous New York cases. Thus, the cases cited in the opinion do not lend direct support to the majority and dissenting opinions.

Although the majority position is recognized as the correct one, the *Haffey* case, which the majority relies upon, does not lend direct support for the majority's position. As the dissent correctly points out, in *Haffey* there was no clause limiting the remedies of the purchaser.

The cases cited by the dissent, like *Haffey*, are also distinguishable upon their facts from the present case. In *Scerbo v. Robinson*, 63 A.D.2d 1096, 406 N.Y.S.2d 370 (1978), the plaintiff sought to compel specific performance of a contract of sale for real property; or in the alternative, an abatement in the contract price if the title was imperfect. The contract also provided that "[i]n the event the Seller is unable to convey title in accordance with the terms of this agreement, Seller's sole liability will be to refund the amount paid on account of the purchase price *Id.* at 1096, 406 N.Y.S.2d at 370-76. Although the contract stated that there were twenty-five acres, a survey disclosed that the property to be transferred pursuant to the contract consisted of only seventeen acres. The court, relying on the case of *Artstrong Homes, Inc. v. Vasa*, 23 Misc. 2d 608, 201 N.Y.S.2d 138 (1960), concluded that the sole remedy available to the plaintiff was the return of his deposit.

dissent recognizes that the provisions of the clause are inapplica-

In *Scerbo*, however, the plaintiff-buyer did not allege that the deficiency in the acreage was an attempt to deceive him; bad faith was not an issue. Furthermore, the acreage deficiency did not disappear at the time of the trial. There is nothing in the majority's opinion in *Pappalardo* that contradicts the holding in *Scerbo*. *Scerbo*, however, stands only for the proposition that a clause limiting a purchaser's remedies is valid and fully enforceable. The majority in *Pappalardo* agrees with that basic notion. Its main argument is that if there is a dispute concerning the applicability of the clause, then compliance with its terms should await judicial determination of the disputed issue. The majority opinion clearly indicates that it would have reached a different conclusion in *Pappalardo* if the contract had contained an explicit provision whereby the buyer agreed to relinquish his right to the remedy of specific performance in all contingencies. Its conclusion was primarily based on the fact that the contract in *Pappalardo* contained no such explicit provision. The court simply held that the clause was not broad enough to preclude a court of equity from exercising its discretion to grant the remedy.

The dissent's reference to *Artstrong Homes, Inc. v. Vasa*, 23 Misc. 2d 608, 201 N.Y.S.2d 138 (1960), is also distinguishable from *Pappalardo* on the ground that it does not purport to preclude a plaintiff who alleges bad faith by the seller from instituting a lawsuit. In *Artstrong*, as in *Scerbo*, there was no dispute regarding the validity of the seller's inability to convey. In *Artstrong*, the seller warranted that the subject parcel of vacant land "is a proper building plot on which a one family residence can be erected and maintained." *Id.* at 610, 201 N.Y.S.2d at 140. The closing meeting broke up without adjournment when it appeared that the subject parcel was not a proper building plot according to zoning authorities. After the aborted closing, the defendant contracted to sell the property to a third person. The court dismissed the action for specific performance by the original buyer stating that the rights of the parties, under the same remedy limitation provision as in *Scerbo*, were fixed on the closing date. *Id.* at 612, 201 N.Y.S.2d at 141. Accordingly, the plaintiff-buyer was adjudged to be entitled only to the return of his deposit. *Id.*

An analysis of the facts in *Artstrong* reveals that there was no dispute concerning the seller's inability to convey the contracted title on the closing date. While the seller did allege that the authorities were in error in their interpretation of the applicable zoning ordinances, he conceded that their rejection of the application rendered the title doubtful in view of the provision which warranted that the land was "a proper building plot on which a one family residence can be erected and maintained." *Id.* at 611, 201 N.Y.S.2d at 140. *Pappalardo* "was not a case in which both parties acknowledged on the date of the closing that the seller was unable to give good title . . ." S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459-60, which is, according to the majority "the prerequisite for invoking the restricted remedies clause." *Id.* If there was no question concerning the seller's inability to convey good title and, therefore, the applicability of the clause, the court could have properly stated that the parties' rights were fixed on the closing date. Given those facts, the majority in *Pappalardo* would not disagree.

Lanna v. Greene, 175 Conn. 453, 399 A.2d 837 (1978), is another case cited by the dissent. In *Lanna*, there was a dispute concerning the seller's good faith, and his alleged inability to convey unencumbered title. The buyer alleged that the seller was at fault because he knew of a lease on the property but failed to disclose it before the contract was signed. The buyer further alleged, that subsequent to the execution of the contract with plaintiff, seller purported to rely on the lease as an excuse for his nonperformance. The suit was initiated before the closing date, and the buyer sought a declaratory judg-

ble if the seller has acted in bad faith. It concedes, therefore, that the buyer would have succeeded if he had sued "for specific performance of the unencumbered property, or, in the alternative, for specific performance of the encumbered property with an abatement . . . but only if the seller had been guilty of bad faith."⁹⁰ The problem with this position, however, is that the dissent does not acknowledge the buyer's right to sue on the contract.⁹¹

If the plain reading of the remedy limitation clause dictates a preclusive election at the closing, as the dissent claims, how will the buyer ever get a chance to prove his allegations concerning the seller's bad faith? The buyer's failure to make his election at the closing is in defiance of his obligations and, in the dissent's vernacular, constituted the buyer's attempt to "follow a course of 'heads I win, tails you lose.'"⁹² These characterizations of the buyer's conduct do not connote equitable conduct, good faith, or "clean hands," the prerequisites to obtaining equitable relief.⁹³ While acknowledging "that a court of equity might [seek] to right the wrong" when a seller's bad faith forces a buyer to make an election,⁹⁴ the dissent does not describe the circumstances that would warrant a court of equity's retention

ment setting aside the lease in order to enable the seller to convey to him an unencumbered title.

The primary distinction between *Lanna* and *Pappalardo* was the seller's willingness in *Lanna* to convey the property to the buyer, even at the time of the trial, subject to the interests of the lessee. In *Pappalardo*, the seller was vigorously opposed to the granting of specific performance at the time of the trial. The *Lanna* court states expressly that it does not decide "whether, under the terms of this contract, the plaintiffs could have delayed their election of remedies pending a determination of the validity of the encumbrance. The record does not reveal that the defendants . . . demanded such an election on the performance date" *Lanna v. Greene*, 175 Conn. at 462 n.2, 399 A.2d at 842 n.2. By this statement, the *Lanna* court clearly declines to adjudicate the precise issue which the dissent seeks to support by invoking the authority of the case.

90. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 473, 425 N.E.2d at 851, 442 N.Y.S.2d at 463 (Fuchsberg, J., dissenting) (emphasis in original).

91. *See id.* at 472, 425 N.E.2d at 850, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting). The dissent refers to the buyer's action as an "unmerited suit" because he was "seeking a choice to which [he] had no right" at the time when he commenced suit. *Id.*

92. *Id.*

93. *Id.* A plaintiff will be denied equitable relief if he comes into court with "unclean hands." H. MCCLINTOCK, *PRINCIPLES OF EQUITY* § 26 (2d ed. 1948). It is well established that "he who seeks equity, must do equity." *Id.* at § 25.

94. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 473, 425 N.E.2d at 851, 442 N.Y.S.2d at 468 (Fuchsberg, J., dissenting).

of what is always initially an "unmerited lawsuit."⁹⁵

There is another related point to consider. The dissent characterizes the remedy limitation clause as a "standard termination provision"; upon the buyer's election, the contract became null and void.⁹⁶ Furthermore, the dissent considers the clause to be self-executing. If the buyer did not make an explicit election, his nonelection would be construed as an implicit election to a return of his money.⁹⁷ The contract, therefore, became null and void after the closing.⁹⁸ Thus, the question raised earlier becomes even more difficult: how can any court entertain an action that is based on a contract which is "null and void" for all practical purposes?

Additional inconsistencies in the dissent's analysis are found in an examination of the remedy limitation clause. The dissent's assertion that the buyer had no right to sue, appears to be precluded by the wording of the clause. Words such as "fault," and "bad faith," are legal conclusions and, therefore, cannot be termed as "objective facts" unless they were adjudicated to be so by a court of law.⁹⁹ Thus, by using the word "if" in conjunction with "fault," the clause implicitly indicts that its applicability is subject to prior judicial determination. These questions were never addressed in the dissent's analysis.

It should be noted that the majority and the dissent in *Pappalardo* disagree only on the extent of the clause's applicability. The majority concedes that to a certain degree, the clause does effectively limit the buyer's remedies.¹⁰⁰ The majority, however, limits the clause's applicability to "circumstance[s] there described": when "for any reason not the fault of the seller," the seller cannot convey.¹⁰¹ The majority recognizes that the buyer gave up a substantial remedy by assenting to the inclusion of the

95. See *supra* text accompanying note 80.

96. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 469, 425 N.E.2d at 848, 442 N.Y.S.2d at 460 (Fuchsberg, J., dissenting); see M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 1.5 (3d ed. 1973).

97. See *supra* note 81 and accompanying text.

98. *Id.*

99. See generally 37 AM. JUR. 2d *Fraud & Deceit* § 468 (1968) (general discussion of sufficiency of proof).

100. S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d at 466, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

101. *Id.*

remedy limitation clause: the conveyance of the defective title with a reduction in the purchase price.¹⁰² The buyer agreed, however, to deprive himself of this remedy only if the seller acted in good faith.¹⁰³ It is fair to assume that if the buyer knew that the seller would act in bad faith, he would not have agreed to a provision giving the seller a method to back out of the deal with impunity. If, as the dissent maintains, the buyer must always make an election, and may not bring a suit, the good faith qualification of the clause, bargained for by the buyer, is meaningless and entirely worthless to a "clause abiding," nonsuing buyer. This result could not have been within the buyer's intention.

The majority's conclusion, as the dissent maintains, does not increase the risks of unmerited litigation. When a buyer brings a suit alleging defective title and bad faith by the seller, the court can reach one of two results. First, if the court finds that there was no defect and the buyer's suit was brought in bad faith, it could rectify the situation so that the buyer's unjust delay would not result in his benefit or harm the seller.¹⁰⁴ Second, if there was a defect which persisted at the time of the trial, the buyer could elect to take the property "as is" without an abatement, or to rescind.¹⁰⁵ According to the dissent, the buyer, in this situation, is limited to a refund of his deposit.¹⁰⁶ The dissent's fear of groundless suits seems to be unwarranted, since the buyer would gain only a postponement of the mandated election. The dissent is concerned that a postponement of the election would give the buyer an undeserved leverage against fluctuating conditions in the real estate market.¹⁰⁷ If the property has appreciated after the closing, the buyer may force the sale. If the prices have gone down, however, "any title imperfection presumably would allow [him] to fully recoup the . . . funds . . .

102. *Id.*

103. *Id.* See *supra* note 40 for discussion of *Mokar Properties Corp. v. Hall*, 6 A.D.2d 536, 179 N.Y.S.2d 814 (1st Dep't 1958).

104. "Equity will not suffer a wrong without a remedy." See H. McCLINTOCK, *PRINCIPLES OF EQUITY* § 29 (2d ed. 1948).

105. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 467, 425 N.E.2d at 847, 442 N.Y.S.2d at 459.

106. See *supra* text accompanying note 81.

107. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 472, 425 N.E.2d at 850, 442 N.Y.S.2d at 462 (Fuchsberg, J., dissenting).

advanced."¹⁰⁸ This analysis, however, ignores an important factor. If real estate values are down and the buyer seeks to withdraw, it follows that the seller is anxious to dispose of the property at the contract price. Thus, if it becomes evident to a court of equity that a buyer, in his quest to speculate, raised any title imperfection as a pretext for his procrastination, a court could grant the seller the remedy of specific performance. In other words, the court would force the buyer to purchase the property, with an abatement for the implicitly insignificant title imperfection.¹⁰⁹

Considering all the possibilities, it is evident that the only incentive a buyer may have to sue is the hope that a material title defect may disappear at the time of trial. In such a case, however, the dissent would have to agree that suits alleging bad faith will continue, in the hope that the court will find bad faith, and will grant the remedy of specific performance.¹¹⁰

VII. Conclusion

The case of *S.E.S. Importers, Inc. v. Pappalardo*,¹¹¹ stands for the proposition that as long as the person seeking specific performance has acted in good faith, a court of equity should grant his request, unless there are some valid defenses against it, or the plaintiff has relinquished his right to the remedy in an unequivocally explicit contractual provision.¹¹² The majority found that neither one of the two factors was present. Accordingly, it held for the buyer.¹¹³

108. *Id.*

109. The basis for granting the remedy of specific performance in contracts for the sale of real estate is predicated upon the uniqueness of land and the inadequacy of the legal remedy of money damages. Although these reasons are inapplicable to a seller who is seeking to dispose of his unique real property, on occasion a seller has been granted specific performance with an abatement in an action against the buyer. In many of these situations, the buyer is seeking to escape his obligation by relying on a slight default of the seller as an excuse. See, e.g., *Binder v. Hejhal*, 347 Ill. 11, 178 N.E. 901 (1931); *Tolchester Beach Improvement Co. v. Boyd*, 161 Md. 269, 156 A. 795, (1931); *Keepers v. Yocum*, 84 Kan. 554, 114 P. 1063 (1911).

110. See *supra* text accompanying notes 80 and 94.

111. 53 N.Y.2d 455, 425 N.E.2d 841, 442 N.Y.S.2d 453 (1981).

112. *S.E.S. Importers, Inc. v. Pappalardo*, 53 N.Y.2d at 468, 425 N.E.2d at 848, 442 N.Y.S.2d at 460. The majority concedes that a buyer could relinquish his right to specific performance in all contingencies, if such intent is unequivocally expressed. *Id.*

113. *Id.*

The final adjudication of the issue of bad faith should not be given retroactive effect as suggested by the dissent. The buyer should not be denied access to court because of a remedy limitation clause, which at best, is subject to dual interpretation. To suggest otherwise, is to contravene the traditional standards, not only of equity, but also of contract interpretation.¹¹⁴

In the final analysis, the majority does not change the law; it merely extends the rationale of past decisions to a previously unencountered situation. The dissent fails to give any weight to the basic legal and social principle that every person, right or wrong in the final adjudication, has an elementary right to seek a judicial resolution of his or her grievances unless he or she expressly, unequivocally and consciously contracted away this right.¹¹⁵ It is very difficult to comprehend how the dissent can interpret the clause as relinquishing this essential right.

114. If the terms of a contract are susceptible of two interpretations it is well established that the one which is more equitable, reasonable and rational should be given preference. *See, e.g., Lanna v. Greene*, 175 Conn. 453, 399 A.2d 837 (1978).

115. *See supra* notes 85-86 and accompanying text.