



Overview

Specific performance is an alternative equitable remedy to a cause of action for breach of contract. Hence, the statement of a cause of action in a suit for specific performance calls for two kinds of allegations: those that establish the right to recover for breach of contract, and those that are essential to the granting of the equitable remedy of specific performance.

The equitable remedy sought in an action for specific performance is a court order requiring the defendant to perform the action he promised to perform. For example - where a contract is for purchase of real estate, an action for specific performance asks the court to order the defendant to sell the property to the plaintiff on the terms stated in the contract.

When specific performance is impossible or the pleading or proof does not justify that remedy, and the court may give damages in lieu of specific performance if the complaint sufficiently alleges the pecuniary loss suffered.

Elements Of A Specific Performance Cause Of Action

The complaint for specific performance must allege:

1. The making of a specifically enforceable type of contract, sufficiently certain in its terms
2. Adequate consideration, and a just and reasonable contract
3. Plaintiff's performance, tender, or excuse for nonperformance
4. Defendant's breach
5. Inadequacy of the remedy at law
6. In addition, the defense of the statute of frauds must be anticipated in the complaint

Inadequacy of Remedy at Law

Inadequacy of the remedy at law is a fundamental condition of any kind of equitable relief. Accordingly, the complaint must set forth facts to show that the breach cannot be adequately compensated for in damages; failing this, it does not state a cause of action. (Flood v. Templeton (1905) 148 C. 374, 378, 83 P. 148; Morrison v. Land (1915) 169 C. 580, 586, 147 P. 259; Sheppard v. Banner Food Products

(1947) 78 C.A.2d 808, 813, 178 P.2d 455; 11 Summary (9th), Equity, §21; infra, §§760, 761.)

Examples:

Contract Concerning Personal Property: Specific performance of an agreement to transfer personal property depends on pleading and proof of the facts of inadequacy of remedy, e.g., the unique nature of the property or its lack of determinable market value. (See *Emirzian v. Asato* (1913) 23 C.A. 251, 256, 137 P. 1072)

Contract to Purchase Real Property: In the case of a contract for the transfer of land, or an interest in land, whether by sale or lease, it is presumed that damages would not adequately compensate. The plaintiff need not establish inadequacy of the legal remedy in the particular case; historically, land is treated as unique, and specific performance will therefore be granted as a matter of course unless some other equitable reason for denial is shown. In the case of a single-family dwelling that the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is one affecting the burden of proof. (C.C. 3387; see *Remmers v. Ciciliot* (1943) 59 C.A.2d 113, 119, 138 P.2d 306; *Fleishman v. Woods* (1901) 135 C. 256, 261, 67 P. 276; *Pike v. Hayden* (1950) 97 C.A.2d 606, 612, 218 P.2d 578 [agreement to lease service station and cafe]; *Ellison v. Ventura Port Dist.* (1978) 80 C.A.3d 574, 579, 145 C.R. 665, citing the text; *Abadjian v. Superior Court* (1985) 168 C.A.3d 363, 374, 214 C.R. 234

- Gene Kinsey

Gene Kinsey Kinsey Law Offices 1198 Pacific Coast Hwy., Suite 353 Seal Beach, CA 90740	Phone: (562) 596-8177 Email: KinseyE@ix.netcom.com Web: www.kinseylaw.com www.realpropertypartition.com
---	---