

## **WHEN IS A COMMITMENT LETTER NOT A BANK COMMITMENT: WHEN THE PURCHASER FORFEITS THE DEPOSIT BECAUSE OF IT**

All real estate agents and purchasers beware!! In residential real estate transactions where financing is involved and the contract of sale is contingent on the purchaser's ability to obtain financing (of course there are transactions which allow the purchaser to obtain financing that do not provide for a contingency), it is imperative the purchaser and the buyer's agent understand the complexities of the mortgage clause in the contract of sale.

The purchaser has been pre-approved by a lender and the transaction is well on its way to a successful conclusion depending on the application review by the cooperative corporation or condominium board of managers, if applicable. True to her word, the lender issues a commitment within forty-five days of the contract execution. Unfortunately for the purchaser, seller and the real estate agents, the commitment is anything but what it claims to be because it is subject to several conditions, one of which includes the review of the finances of the condominium or cooperative building. In all financed transactions including one to three family dwellings, the lender's commitment will be contingent upon a satisfactory bank appraisal and there will be conditions where the lender will seek to verify assets, income and continued employment. Unfortunately, within the next two weeks you learn that the commitment was rescinded by the lender because of the building's finances or possibly because the purchaser's employment or asset base changed between application and closing. The purchaser's attorney sends the letter of declination to the seller's attorney expecting the return of the contract deposit; however, the seller's attorney responds that unless the purchaser attends the closing and pays what is required according to the contract terms, the purchaser will be held in default and forfeit the contract deposit.

Pursuant to the standard form residential contract, a commitment which is conditional upon any factor other than an appraisal is considered a firm commitment and the purchaser cannot cancel the contract. Once a commitment is issued by the lender, whether two days after contract signing or two months later, if the lender does not complete the transaction for any reason other than a below market appraisal which causes the lender to reduce the principal amount of the mortgage to an amount less than what is stated in the contract, the purchaser can be held in default and lose her deposit. Even if the commitment letter is issued and not delivered to the seller's attorney, the terms of the standard form of contract mandates that the commitment is nonetheless deemed issued and the risk is entirely on the side of the purchaser.

The parties need to understand the difference between a mortgage or loan contingency and a funding contingency. Many attorneys representing prospective

purchasers attempt to modify the standard language to allow the purchaser to terminate the contract and obtain the return of the deposit if and when the lender rescinds a commitment after it is issued; however, most attorneys who represent sellers will not agree to modify the provision to allow for a funding contingency. In effect, if the bank issues the commitment and the bank chooses to not fund the loan, the risk is on the side of the purchaser. If the purchaser's financial status changes after the commitment is issued or if the building's finances are downgraded by the bank, the seller would have the right to claim the contract deposit as liquidated damages unless there is specific language in the contract that provides the purchaser the right to terminate the contract with the return of the deposit.

In every transaction where I represent a purchaser, considerable time is spent explaining the intricacies of the contract, most specifically the mortgage (loan) contingency clause. The purchaser is directed not to have the lender rush the issuance of the commitment unless it is a firm commitment not subject to any conditions or contingencies. The consequences of a commitment that does not actually commit may cause the triggering of a default if the transaction is not completed by the purchaser. It is certain that in a transaction where the seller refuses to return the deposit, the purchaser will not simply walk away from her money; litigation will almost certainly follow. For those real estate agents who are acting as buyer's agents, you are a fiduciary to your client and therefore held to a higher standard. Any representations you may have made to the purchaser concerning the mortgage process may determine whether you will be named in a lawsuit should the purchaser attempt to recoup her deposit from the seller so direct yourself accordingly.

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