

## **Seller has a change of heart and why the buyer can't do a thing about it!**

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Who in the world signs an agreement of sale promising to sell a home then suffers a change of heart and refuses to budge? It happens, or at least is threatened, many more times than you might expect. And who are these seller-offenders? Many times they are older sellers who have lived many, many years in the homes they are selling. After the ink on the agreement is dry, reality strikes. Moving is stressful both physically and emotionally. The security of the known and familiar may outweigh the uncertainty of the new and "improved."

Sometimes the refusal to follow through with the sale is the result of a physical setback such as when an elderly seller takes ill. Imagine how guilty a buyer may feel requiring that the seller, attached to an intravenous line, move into his new digs via ambulance! Of course, not all reluctant sellers are elderly. There are many reasons why a seller may wake-up the day after signing an agreement with a bad case of seller remorse.

What is buyer to do when a seller refuses to proceed with the transaction? That depends! (You expected anything else?) It depends on what your buyer perceives to be in his or her best interest. If the home is not particularly unique, a buyer may be willing to look elsewhere, especially if the seller is willing to make a financial contribution (return of buyer's deposit plus an additional sum in exchange for a release of the buyer's contractual right to purchase). This type of resolution is not particularly rare.

What legal remedies are available to a buyer when a seller refuses to proceed? While the agreement of sale is silent on the subject, remedies exist. Courts generally restrict remedies to monetary damages, but real estate is unique and therefore the law provides that courts may require sellers to transfer the property pursuant to the contract between the parties. In addition to ordering that title be transferred, courts may also award monetary damages reflecting the additional losses suffered as a result of seller default.

The problem with seeking specific performance is the time and money that may be required. The buyer will have legal expenses and the court process can take years! Is the buyer willing to wait and pay in order to enforce the transaction?

As you might expect in situations where sellers have changed their mind about selling, they will look to any pretext available that might allow them to get out of the agreement without any consequence. Do such avenues exist? Certainly they do. Take the example provided by one recent Hotline caller. The seller woke up after signing the agreement of sale with cold feet. In order to avoid moving, he offered the buyer \$20,000 to go away. The buyer who very much liked the property in question was also tempted by the \$20,000. While she was debating, her buyer agent received email from the listing agent stating that the agreement of sale was terminated and that the listing broker would return the deposit upon receipt of a release signed by the buyer. The basis for the termination as was explained in the email, was the buyer's

failure to “promptly deliver a copy of the commitment to seller” within the time set forth in the mortgage contingency clause of the agreement of sale! In fact, the buyer had received a mortgage and that information was communicated to the listing agent. The commitment, however, was never delivered to the listing agent (or the seller) in keeping with the agreement. The buyer agent never thought that the commitment was an issue, and indeed it wasn’t. The lapse, however, provided the seller with the basis for terminating the agreement. By not adhering to the time limits imposed by the agreement, the buyer gave the seller an out.

A buyer has the right to expect that her agent will keep her informed of the tasks that need to be satisfied pursuant to the agreement. Our Real Estate Licensing and Registration Act includes a section entitled *Duties of Licensee Generally*, which provides that a licensee must “advise the consumer regarding the status of the transaction.” One can reasonably expect that this would mean that a buyer agent should advise the buyer that the date for providing the commitment is approaching and that the failure to provide the written commitment to the listing agent will give the seller the opportunity to terminate the agreement.

The standard agreement of sale provides that time is of the essence. Dates cannot be overlooked and one cannot act in disregard of the temporal obligations imposed by the agreement. The consequences may not be foreseen, as the example provided here suggests.

I should add that sellers who indicate that they don’t want to proceed with the sale can usually be convinced otherwise. When they learn that they can be sued for breach of contract, they usually muster the courage to proceed with the move. In the case at hand, however, that will never happen because the seller was able to latch onto a failure on the part of the buyer. The message here is . . . Well, pretty obvious.

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