

When the Seller is Not Ready to Move Out

By Seth G. Weissman

There are few things as frustrating as when a buyer does a walk-through the day of the closing only to discover that the seller is not anywhere close to being out of the property. The contract provides that possession of the property transfers at the closing. Should the buyer go ahead and close in this situation and risk having to evict the owner, or, not close and risk having the deal fall apart? In deciding what to do, the buyer should first remember that the seller is in breach of contract if the seller is not out of the property by the closing. The buyer therefore has some leverage and some options in this situation. First, the buyer can terminate the contract due to the breach of the contract by the seller. Second, the buyer can sue for specific performance where the buyer seeks a court order to have the seller sell the property and remove all of the seller's possessions from the property. Third, the buyer and seller can agree to amend the contract to change the closing date to a new date when the seller will have moved out of the property.



Buyers should think long and hard about ignoring the breach of contract and going ahead and closing without getting an amendment signed to the purchase and sale agreement specifying when the seller will be out. This is because if the seller refuses to move out and the buyer has to evict

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Most buyers will do one of two things when the seller is not out. First, the buyer can move the closing until the end of the day to give the seller more time to remove his or her possessions. Second, the buyer and seller can sign an amendment agreeing to extend the closing date until a new date when the seller will be gone. Since the buyer can terminate the contract due to the seller's breach or sue for specific performance, some buyers

also negotiate for the payment of some liquidated damages by the seller for not being ready in the first instance. Some sellers mistakenly think that if the closing date comes and goes with no closing having occurred, the parties are out of contract and the seller is now free to sell the property to someone else (usually a backup buyer willing to pay more money for the property). Nothing could be further from the truth. The seller cannot use his or her breaching the purchase and sale agreement to take advantage of the situation and sell to someone else. The key for buyers is to clearly document in writing the fact that they are not going to close because of the seller's breach of the contract.

Some buyers have asked whether the seller is truly in breach of the contract if a walk-through one hour before the closing reveals that the seller is not yet out of the property. This is because the seller technically has until the closing to be out of the property. My response is that if it is impossible for the seller to be out of the property by closing, the seller is in breach of the contract under what is treated as an anticipatory breach. Of course, to be safe, the buyer should ask the seller if they plan to be out by the closing, confirm a no answer in writing and take plenty pictures and/or video showing the seller's possessions in the property prior to closing.

