

## Ripping Your Escrow Deposit from the Iron Grip of Your Closing Agent

I have said it before and I will keep saying it – “If you want to keep an escrow you are entitled to, take action before the buyer/seller defaults.” Even very experienced investors may go for years and not have an escrow problem when a buyer doesn’t close. Then I get a phone call asking if a title agent is allowed to keep the escrow without a signed release from the buyer who defaulted.

The answer is very simple; the title agent should not release an escrow deposit no matter how obvious it is to all parties that the buyer defaulted. The reason is that the title agent is making a legal decision as to the validity of the contract and should be sued by the buyer for releasing the deposit – despite what the contract says (there is an exception).

Here is a recent example that personifies this issue. A very seasoned realtor and mentor student (he should have listened better in class), takes an \$8,000 deposit from a buyer for a property the agent has under contract with a deposit he put up of \$3,000. The buyer has to get hard money to close and he is warned that if he doesn’t close, he will lose his deposit. The realtor picks his personal friend as the title agent.

As would be expected, the buyer’s hard money lender has a change of heart (very common) and won’t lend the money to close. The realtor is in the game to collect deposits and tries to find another hard money lender but none will consider it. The buyer passed the closing date and is unable to close. He calls the realtor and asks for his deposit back.

Since this buyer wasn’t closing and the realtor had no back-up buyers, he decides not to close and to forfeit his \$3,000 deposit after his inspection period has passed. Seems like lose \$3,000 and make \$8,000 so the realtor/investor/student will make \$5,000 for not closing or buying the property.

Sounds like a plan except for one sticking point – the buyer won’t sign the Release of Escrow Form the closing agent needs. The realtor calls his buddy at the title company and says, “send out the deposit” but is greeted by a resounding, “I can’t – need the Release”. The Realtor gets cranky and calls me to ask how to fix the problem. My response is to ask did he use the paragraphs we showed him in the mentoring class, and the answer comes back, “No”.

So now we have a Mexican stand-off – the escrow won’t go anywhere unless both parties agree or the seller (realtor) sues in court. Suing the buyer will likely cost more than the deposit with no guarantee he will win. So the easiest solution is to make a settlement offer to the buyer for a percentage of the deposit. The obvious offer is 50% to each party, but sometimes less to the buyer will suffice. Have your attorney make the offer to the buyer’s attorney so your emotions don’t

fog your mind. It will cost a few bucks but you may be able to get the closing agent to do this gratis.

The realtor still has the issue of his \$3,000 deposit and I got the question, “What about my deposit?” and my answer was the same – make a settlement offer and don’t sign anything. All the parties involved are currently cooking in their own juices so the outcome isn’t complete. But likely the realtor will lose \$1,500 and make \$4,000 for a net profit of \$2,500 on the deal less expenses (attorney’s and closing fees charged by his closing agent).

Besides the issue of the escrow release, the document should include a Release of Contract because the buyer may still have a legal interest in the property. Your closing agent should know this and have both forms, or both releases, on one form for the buyer and the seller (you) to sign. The issue of releasing the contract is even more important than the escrow if you have a decent profit in the deal.

In the above case of the realtor, the deal would have had a \$15,000 profit had it been completed so there are no real winners in these situations – usually. The exception is when you write the Purchase and Sale Agreement properly in the first place. The same thing happened to me once when I trusted a buyer of a property who bragged to me about all the properties she owned and I filled out the contract by hand and didn’t take the time to use my special clauses to get the escrow immediately if she didn’t close on or before a specified closing date.

To make a clause or a few sentences that will do the job for you, ask your real estate attorney what document he would like signed by a buyer. He will likely draft a one or two page document that should be shortened into a few sentences.

The whole idea is to fit the clause in to a few sentences so it becomes part of the Contract, not a lengthy addendum. It should basically say, *“If for any reason the buyer is unable to close timely, including the inability of the buyer to get financing, the buyer immediately forfeits his escrow deposit. The signing of this Contract is the authorization by the buyer for the closing agent to release his escrow deposit to the seller without any further written authorization from the buyer. Likewise, should the seller be unable to close for any reason that is the fault of the seller, this Contract is the authorization for the closing agent to release the escrow deposit to the buyer without any further written authorization from the seller.”*

WARNING – do not use the above clause without having an attorney review and make the appropriate changes that he wants so he is comfortable to pay you out at closing if your buyer walks, but still wants his deposit.

To your unlimited success,  
Dave Dinkel