

REAL ESTATE CONTRACTS 101

A Conversation with Real Estate Attorney Chris Psomopoulos

Video Available At: <https://www.youtube.com/watch?v=7hlX4ygcxCI>

For further guidance you can contact attorney Chris Psomopoulos at:

(718) 433-9069 or Email Chris@Theclawoffice.com

Address: 30-97 Steinway St #301b, Astoria, NY 11103

This was a conversation we had with Chris about the basic legal considerations for Real Estate Contracts. Good information for buyers, real estate investors and real estate agents. It was done on 02/20/21 at his offices in Astoria, Queens, NY.

Can you tell us about a real estate contract? When is it valid? What do you need for it to be enforceable?

Typically, the process starts with a buyer getting a mortgage preapproval and looking for a house, negotiating and getting to the point of having an accepted offer by a seller of real estate. I advise buyers to get the attorney involved early in the process, before they sign any documents and even the offer or binder. The same thing goes for sellers, they should consult with their attorney before they put the house up for sale. So, you get a seller and buyer who have an agreement on price and general terms, what we call the meeting of the minds. Then the seller's attorney drafts contracts and send them to the buyer's attorney who may have comments or requests for modifications. Once they agree on the wording of the contract, the buyer's attorney have their clients sign the contract and make a check for a contract deposit. This package is sent to the seller's attorney, for the sellers to sign with their attorney. Once everyone signs, and the contract deposit clears, then you have a valid, enforceable contract. We call that a fully executed contract, signed by all parties and with moneys (called consideration by lawyers) that have changed hands.

Can you expand on the matter of the contract deposit? What form of deposit is acceptable? What is the amount required or the customary amount?

Great real estate question. This deposit does not have to be a certified check. It could be a wire transfer, a bank or certified check or a personal check. With the personal check the buyers have to make sure that money is available in their account, so the check clears. If the money is not there and the contract deposit check bounces, you don't have a valid contract. As to the customary contract deposit you can say that 10% of the price is the common practice, but many times buyers try to negotiate that down so as not to have too much money tied up. But the important thing about the contract deposit is that it is negotiable and negotiated between the parties. If you are in a hot market with multiple offers on the table, you probably have to do 10% or sometimes more, and vice versa.

It is important to note that this is deposited by the seller's attorney in a special escrow account, that it is insured (IOLA account). The money is held there in this seller's attorney's escrow account until the buyer has been approved and/or all contingencies in the contract are met and a closing can be scheduled. This money will then be credited to the seller at closing.

That brings us to the next point. Can you discuss about personal property included in a real estate contract? Also, how would you exclude personal property? What property has to be

included because they are considered fixtures? Please clarify this important point that is sometimes source of confusion for buyers and sellers.

The personal property typically included, but not limited to, is any appliance being sold with the house (stoves, refrigerators, dishwashers, washers, driers, wall or window air conditioning units, etc.). Again, this can be subject to negotiation and agreement between the parties. So, attorneys will include or exclude any appliance according to the actual agreement between buyer and seller. Now, anything permanently affixed to the house, a fixture, needs to be sold with the house. If you don't want it to be sold with the house, you need to exclude it. Personal property are appliances and furniture that can be easily moved, and that in order to be included with the sale, need to be listed in the contract. An example of a confusing situation is that cliché that is taught to real estate agents when they get their license, that chandelier that has emotional value to the seller, which is affixed to the house, that the seller wants to take, even though it is a fixture. What is done by lawyers is that the seller's attorney will exclude this specific fixture from the contract and then, most likely the buyer's attorney would add some language stating something like "to be replaced by a builder's fixture", meaning no wires are going to be left exposed and that the seller will replace the fancy chandelier with a simple home depot type of fixture. If you are working with experienced brokers and real estate attorneys, then this situation can be easily avoided and prevented from becoming an issue right before closing.

Another contract provision that is important is the mortgage contingency. Can you explain this in a basic way, for those who are thinking of buying or selling real estate houses, condominiums or other property subject to financing and explain its implications?

It's a hot topic nowadays and it causes a lot of confusion. Basically, the mortgage contingency is a condition that has to be met in order for the deal to happen, in order for the contract to close. It will state that the buyer has a certain number of days to get approved for the mortgage, typically 30-45 days. We could talk for hours about this subject, but I am going to keep it very simple, as you suggested, because this is why you hire an attorney for. So the contract provides for this contingency for the buyer, meaning that if the buyer does not get the mortgage approval (a loan commitment) on time due to no fault of their own (again, you lawyers out there, we know there can be many situations here which are not the topic of this conversation), then the buyer's attorney will notify the other side and request that the contract is cancelled and the contract deposit returned to the buyer. It also protects the seller in the sense that the seller does not have to wait indefinitely for this; if they buyer does not get approved in the required time, the seller can request that the contract is cancelled, return the downpayment to the other side, and engage in negotiations with a different buyer. When the buyer gets the mortgage commitment, this contingency has been met and the buyer is bound to buy, and the seller bound to sell if the remaining conditions in the contract are met.

Obviously and all cash sale is not subject to a mortgage and in these cases, the mortgage contingency paragraph will be crossed out in the contract. I see something that troubles me as an attorney, which is that in some hot markets, like Nassau and Suffolk real estate markets right now, agents would suggest to their buyers to make offers without a mortgage contingency in order to compete with other offers and make the offer more attractive to the sellers, when in reality they do need the money from the bank to buy. What can happen is a disaster, because if they sign a contract with no mortgage contingency and they don't get approved by the bank, and don't have the necessary funds to close, then the seller's side can declare the buyer in default and the buyers could

end up losing their contract deposits. This is why I advise every person thinking of transacting in real estate to engage their attorney early on.

Now, even if the buyer has exhausted the agreed time to get the loan, say the 45 days, both parties can agree on extending this time to allow the buyer to finish the process of obtaining a mortgage commitment.

It is important to note that the mortgage contingency has several other provisions, besides the time, like getting a prevailing mortgage rate, for a certain number of years, etc. and that this is something best left to the attorneys to deal with.

Another concern of buyers and sellers is the condition of the house. You hear sellers saying they want to sell their house “as is” and most buyers saying they need to inspect the house before signing the contract. What does the real estate contract say, how can it be modified to reflect the true agreement between the parties?

Thank you for this question, because there is a lot of confusion about this issue. The regular real estate contract would state that the house is sold as is. This means the way it is at the time of the contract, so if there is a scratch on the floor or a window is not working, or the paint is cracked, this is sold as is. Sold as is at the time of contract means that if something changes between the contract and closing, beyond normal wear and tear, the seller it is still responsible. Also, even with this “as is” clause found in most contracts, sellers represent that all major systems, electrical, plumbing, and heating are in working order and that the roof would be free of leaks. So, 24-48 hours before the closing the buyers would come for the “final walkthrough”, which is a visit to the property one more time to make sure that everything is the way they saw it and that the major systems are working.

When buyers get an accepted offer, before they sign contracts, most of the times they do order a home inspection by a licensed home inspector. They do a thorough inspection of the house to check if the electrical, plumbing, heating, the roof, the windows, the foundation, etc are in acceptable condition or that the buyers are aware of the issues before they proceed with the deal. It is important to remember that sometimes when you do the home inspection or the final walkthrough, some details are overlooked when you are out of season, meaning, you may not test the boiler property in the middle of the summer, or you may not be able to check the inground pool completely in the middle of the winter. In this respect the attorneys should be able to work something out because the economic repercussions could be quite large, whether we are talking about a luxury property or an entry level home.

I do sell a lot of Estates, REO’s (foreclosures) and distressed property. These properties are typically sold as is, completely, without any representations that anything works. Can you explain this type of sales?

Yes, in these cases, typically an investor or a buyer who is handy or comfortable with doing repairs and renovations, would buy a property like this, sometimes called a handyman special, where the seller does not guarantee that any system works, because they perceive they are getting the property at a price that reflects the condition and may be advantageous to them. For the sellers that sell “as is with no guarantees”, the advantage is that in exchange for adjusting the price, they are not responsible if they boiler does not work or the roof leaks.

Can you touch upon the termite clause briefly?

The regular contract provides for the opportunity to do a termite inspection by the buyer. Now, sometimes this is not necessary because many home inspectors do this as part of the pre-contract home inspection. But if they don't the buyers have 8-10 days after contract to do an inspection by a licensed termite inspector. If they find termites the contract provides for some remedies by the seller, which are sometimes subject to negotiation, so the transaction can proceed or, in cases with grave damage to the wood structures, so the contract can be cancelled. Again, this is something that may change on a case by case and that your attorney should address. I think we will leave it at that since we want to keep this basic. For specific questions on specific transactions please feel free to contact me at any time.

Thanks, that was great as far as the physical condition of the house. Can you please talk about the legality of the structures of the house, certificates of occupancy, garages, violations, etc.? Who is concerned about them or who should care about them? What is the lender's perspective?

Every structure in the house should have a certificate of occupancy. If you are buying a 2-family house, the property should have a certificate of occupancy (C of O in the language of real estate professionals) for a two-family house. If the property does not have it, the department of buildings could issue a violation in the future. As to the lender, they are not obligated to lend in this case and the mortgage could be denied on this basis. So, the buyers have great exposure if the seller has done modifications without the proper permits and the buyer closes on a house like this. The buyer could be given violations and fines, and if the modifications are grave the sanctions could even be tougher.

Here in Queens, I find houses where the previous owners have done some modifications, probably thinking they were improving the property or maybe for their own enjoyment, without an application, plans, sign offs, permits and c of o. A typical example is that beautiful deck in the backyard. What can be done and how could it be handled?

Yes, this is a common example. The department of buildings have specific rules about decks, enclosures, inground pools, extensions, etc. If you find one of this without proper paperwork, both buyers and sellers should be aware of what the requirements to legalize the structure are and whether it can be legalized at all. Several options are the seller tearing it down and bringing it to the original condition (again, with the proper permits) before closing or legalizing the structure or working out a credit so the buyer takes this structure as is and legalizes it in the future. If there is a mortgage lender involved, they will also have a say about this and may require an escrow to be deposited until this situation is cleared. A similar situation arises when there are violations on the property.

Can you discuss the title? What does it mean to get a property with clear title? What are title issues? What is title insurance?

A title report is usually ordered by a buyer's attorney through a title company. What they do is review the chain of title and ensure that the seller is the legal seller and that they have the legal right to transfer the property, that the purchaser is getting the title free and clear of any encumbrances, liens, clouds, debts, judgements, or legal issues that may be affecting the seller or the property. Then they will issue a policy, the title insurance policy, guaranteeing that the title is free and clear. The lender for the buyer will also require this to protect the collateral property they are lending the money on. In the future, if someone would come up with a claim against the

ownership or title of the property, the new owner and lender would be covered by the title insurance.

That is pretty clear, brief, and simple for our clients and customers. Can you please talk about time constraints, meaning deadlines in the contract, again in a general way, without getting into details pertaining to specific cases?

Sure. We already talked about the termite inspection and that the buyers have 8 or 10 days after contract execution to perform one. A similar deadline is allowed for a lead paint inspection, although for all practical matters, buyers may decide to waive the right to the lead paint inspection. The next important date is the time to get the mortgage contingency, and we said it is typically 45 days (more or less, depending on the agreement) after a contract is fully executed. Then the next date with great significance is the closing date, usually, in a regular transaction, 60 to 90 days after a contract is executed. So, if a contract is signed on 02/01/2021, the closing date would be something like “on or about” 04/01/2021, which gives both parties the flexibility of doing the closing 30 days before or after that date. Again, there are many legal considerations about closing dates which are beyond the scope of our conversation today. The date of the contract, in the first page, is important because it rules all other dates if the contract was delivered back to the buyers on that date.

Thanks, this has been very helpful, and it underlines the need to be advised by a real estate attorney, not necessarily someone that specializes in divorce or criminal law. I think you had said earlier and made a really good point, that selling and buying a property is not an adversarial procedure, that people do it willingly and it is important to have a smooth transaction while keeping everyone protected. Now a final question, what happens at the closing? We all have the image of sellers sitting on one side of the table, buyers ready to sign a bunch of documents, a representative from the title company and the bank and some people get stressed out because they don't really understand what is happening. Can you please summarize the closing of a property?

Yes. Most of the work has already been done. The buyer has been approved by the lender, the title is clear, you have agreed and negotiated all items (in an ideal situation) and the ownership of the property is about to be transferred. If there is a mortgage involved, the buyers have to sign many documents pertaining to their obligation to pay the debt back and detailing how the property is a collateral for the debt they are incurring. The seller and buyer will sign the transfer documents. The seller will sign the deed and give the keys to the buyer. This is provided everyone have done their jobs and there are no unexpected issues. Being in the industry we always strive to have smooth closings by anticipating the issues or working them out, if need be, while keeping our clients protected.

Thanks again, Chris. I am going to put you on the spot by asking you if you a final question: would you give our audience your personal cell phone?

Yes, it is 347-804-6013 and I will gladly answer any of your questions and I always return phone calls and emails.

Ladies and Gentlemen, I cannot emphasize enough the value of having a good team, a good mortgage person, a good real estate broker and a good real estate attorney. And this is why we are talking to Chris today, because he is experienced but also approachable and

responsive. You can get through to him. You really don't want to deal with someone who is too busy, or who hides behind a secretary, an assistant and who is more difficult to get in touch with than the king of Spain.