

## **Industry Partners Conference**

**2013**

### **The Scenario**

#### **The Escrow That Actually Closes**

An Exclusive Residential Listing Agreement is executed using DocuSign. The listing agent's contact is Margaret Windsor, the daughter of the sellers. The sellers are her parents, Jasper and Dorothy Windsor, elderly folks who live in London, England and are not going to be present for the transaction.

The listed price is \$250,000.00.

The buyers, Sam and Janet Evening, (husband and wife taking title as individuals) offer \$248,000 with 3.5% down and new, FHA financing. The down payment is being provided by gift funds from Sam's parents. Sam provides the earnest money of \$2,000 by a personal check drawn on the parent's LLC, Enchanted Evenings, LLC. The seller counters and writes on the counter offer "earnest money will be non-refundable after the Inspection Period". The contract is accepted.

The Pre-Qualification form is attached to the contract indicating that the loan officer has reviewed several items that are marked on the pre-qualification form in lines 23-26, including paystubs, W-2's, personal tax returns, corporate tax returns – all marked "yes".

Also marked, is that the buyer IS relying on the seller concessions of \$3,000 for buyer's loan costs and pre-pays.

Escrow is opened with the escrow company, the loan application has been submitted to the lender and the designated brokers have reviewed the contract.

Everyone gets to work.

The inspection period defaults to the contract provision of 10 days after contract acceptance.

The buyer completes all of their desired inspections and submits a BINSR to the seller on day 8 and requests some repairs be completed:



- Seller to provide a roof certification from licensed roofing contractor that the roof is in good condition with a 1-year roof guarantee;
- Seller to replace the broken tiles in the entryway with tiles to match OR replace entire entry area with new, matching tiles;
- Provide evidence that the pool motor and spa are in working order.

Seller agrees to complete everything EXCEPT he will not supply any roof certification and he counters that his agreement is conditioned upon the buyer “waiving the appraisal”.

While waiting for the seller’s response, the buyer finally receives the termite report and is informed that there is termite infestation. The buyer submits a “revised” BINSR to the seller and requests that the seller also treat the property for termites.

The Buyer and Seller finally come to an agreement that the Seller will correct the entry tiles, provide evidence of the pool motor and spa being in working order and that’s it. The Seller will not provide any certification for the roof or termite treatment. Buyer accepts that the Seller will only do certain repairs, is OK with that and we are done negotiating the repairs. The Inspection issues are resolved and we’re once again moving forward.

During this time period, the title company delivered the Title Commitment to the parties. When the current Sellers purchased this property back in 1998, they originated a Seller carry-back loan from the seller. From what the daughter, Margaret Windsor, has told everyone, this loan was paid off a long time ago, but the prior seller never recorded any release of the loan to remove it from public record. After discussion with Ms. Windsor, she has no idea where any of the papers would be for this loan and the beneficiary/prior seller is now deceased. She thinks the estate may have been probated but she would not know how to get in touch with any of these folks.

It’s now day 14 into the contract. The buyer’s agent notices that they have not received the SPDS or the Claims History report. The Buyer sends a 3-day Cure Period Notice to the Seller for their failure to provide these items.

While that is going on, the lender receives the appraisal and it comes in with an acceptable appraised value that will cover the purchase price on this contract. The appraisal comes with pictures showing some peeling paint in the living room and some exposed wires in the family room.



On day 16, the seller provides the SPDS and claims history report to the buyer. The Buyer notices on the SPDS that the seller has disclosed that they have remodeled/added on the original garage into the new family room. The buyer is now concerned that the addition/remodeling was done without permits, so he goes to the city's zoning department and discovers that there was no permit pulled for this remodel. He also notices that the MLS Plano stated that the property was 2,000 sq. ft. and the appraisal states it's only 1,800 sq. ft. Did the appraiser truly measure the property or simply go by the Assessor's records? The buyer is discussing with their agent that maybe they want to ask for a price reduction because of the discrepancy in the square footage. He presumes that the difference in the square footage is because the seller never got a permit when he converted the garage to a family room, so the city would not know that there was more square footage on the property. The buyer is getting concerned about this property and wants to know if he can request that the seller amend the SPDS and provide him a new SPDS disclosing the fact that he did not get permits for the remodeling OR provide copies of the permits.

In the meantime, the seller has accepted a back-up offer with a purchase price of \$252,000; also with FHA financing. This offer is opened with a different escrow company, but clearly states it's a back-up offer.

The lender submits the loan to their underwriter. The underwriter notices the pictures of the peeling paint and exposed wiring and calls for these items to be remedied as a condition of the loan approval. What about the square foot discrepancies?

Will the lender approve the loan when the Buyer is not putting any of their own funds into the transaction? Will the underwriter approve the loan if the Buyer gets a gift letter from Mom and Dad?

Will the seller supply the permits for the remodel?

Will the lender be able to approve the loan?

Will the title company be able to clear the title?

Will this transaction be able to close?

And more importantly, will we all get paid?

The suspense is building!



## Questions:

### REALTOR® Questions

Instead of writing “the earnest money deposit becomes non-refundable after expiration of the inspection period on the contract, what would be a better idea? Would using the Additional Clause Addendum which would extend the non-refundable period until after all the 6i provisions are met, be a better idea?

Are the brokers concerned about the ER and the Contract both being signed by Docu-sign? Have they actually had personal contact with the sellers themselves or have they only worked through the daughter? Does the daughter have a valid power of attorney? Has it been disclosed?

Can the buyer revise/amend his BINSR once he has submitted it? Must the inspection notice be delivered in ONE notice?



What happens if the seller has to amend the SPDS? Does the buyer get an additional 5-days for approval? Does the approval of the SPDS and the claims history report HAVE to be completed during the inspection period?

Since the earnest money was written as non-refundable after the inspection period, what happens if the seller cannot deliver marketable title or perform because they can't get this private loan released? If the agent had used the Additional Clause Addendum, they would have protected their buyer by having the non-refundable language to include the provision that if the Seller cannot perform, then the non-refundable provision does not apply.

What might occur if the buyer chooses to add a contingency to 'waive the appraisal contingency'?



## **Lender Questions**

Should the lender question that the earnest money is coming from an LLC that is NOT the Buyer's LLC? Or even from the buyers themselves?

Will the underwriter approve this loan if the buyer gets a gift letter from Mom and Dad?

Will the lender permit a \$3,000 seller concession for closing costs The \$3,000 concession was on the Pre-Qualification form but not on the contract itself....does it apply or not?

The Pre-Qualification form has been marked ALL in the boxes on lines 23-26 when the buyers are qualifying individually and NOT using corporate tax returns. Do some lenders just mark ALL automatically?

What does it mean when the buyer "waives" the appraisal contingency? Does this mean that the lender cannot require repairs noted on the appraisal?

Does the lender care about there being no permits for the remodel?



## **Title Questions**

Would the title company question that the earnest money is coming from an LLC that is NOT the Buyer's LLC? Or even from the Buyers themselves.

Since the earnest money was written as non-refundable after the Inspection Period, what happens if the Seller cannot deliver marketable title or perform because they can't get this private loan released? If the agent had used the Additional Clause Addendum, they would have protected their buyer by having the non-refundable language to include the provision that if the Seller cannot perform, then the non-refundable provision does not apply.

Can the Buyer revise/amend his BINSR once he has submitted it? Must the Inspection Notice be delivered in ONE notice?

How is the title company going to get that old loan released? Since it's so old, do they really need a release or can they just "insure over it"?



Is the title company aware that the sellers are in England? Will they have to get the closing documents to them or will they accept a Power of Attorney giving the daughter authority to sign? Is the title company concerned that the daughter is selling the property without the parents really knowing what she's doing?

What about FIRPTA?

What about the 1099-S?

Do we need a hold back for repairs?

