ILLINOIS STATE BAR ASSOCIATION

MARCH 2023 VOL 68 NO. 9

Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

Cash Deals: How Do I Love Thee? Let Me Count the Ways

BY COLLEEN L. SAHLAS

You know a cash deal beats financing. But, have you counted the ways?

First of all, let's not mince words. A cash deal giving the buyer the discretion to obtain financing is not a true cash deal, even if the contract is not contingent on the buyer obtaining financing. This article is not referring to a pseudo-cash deal which allows a buyer the option to pay cash or obtain financing as described in the Multi-Board 7.0 contract at paragraph 7(c). A real estate deal pursuant to that paragraph will not avert the many lender issues which will or can complicate or kill the deal. This article is referring to a true cash offer such as described in paragraph 7(b) of the Multi-Board 7.0 contract.

Our clients often approach a residential real estate deal with ignorant bliss. They cannot fathom the minefield ahead. They don't know the potential pitfalls involved when a buyer requires financing or a home-sale contingency. And, they don't see the stark contrast of those offers compared to the simplicity of a "cash deal."

Recently, a client asked me whether she should accept a cash buyer over a buyer who needed financing, although the cash offer was lower in purchase price. My advice: a bird in the hand is worth two in the bush. Although the cash offer may be lower, a cash buyer showing proof of funds may be ready to close very quickly. The buyer offering a higher purchase price may delay the closing, needing additional time to get approved for a loan which might be denied. Meanwhile, the seller has taken the property off the market to contract exclusively with that buyer and may have missed a prime time to sell.

You've likely seen a myriad of problems that can make a "simple" real estate deal go sideways (or down in flames). For example, the parties cannot reach an agreement on a contractual term; a new issue arises; a better offer comes along; or an inspection reveals a deal-breaking defect. But, most often, the deal falls apart due to a financing-related issue.

As real estate attorneys, we know that the deal is at the mercy of the lender. Perhaps you warn your selling clients that the buyer might not be able to obtain financing. Your selling client innocently replies, "Oh, but the buyer is pre-approved." To that, my response is, "Almost every buyer who's been denied for a loan started out pre-approved."

Removing the lender from the equation simplifies the process and speeds up the timing of a real estate transaction. It avoids the 6 "Rs" of the lender: 1) Red Tape, 2) Ridiculous Requirements, 3) Remote, unresponsive, and unreachable staff, 4) Rigamarole, 5) Runaround, and 6) the Risk of renege.

In this article, I will attempt to list numerous ways that a cash deal is better than a financed deal, and will list them in a bullet-point style to help make this information more concise.

Let's Count the Ways a Cash Deal Beats Financing:

1. It avoids lender red tape and rigamarole.

- No loan appraisal required:

1. No scheduling appointment needed;
2. No issues of the appraiser getting access to the property;
3. No waiting around for the report; and
4. No risk of it not appraising at or above the sale price.

- No loan approval required:

No risk of loan denial if it doesn't appraise out;

1. No waiting 30 - 45 days for loan approval;
2. No risk of blowing the contract's mortgage contingency deadline;
3. No need to request a mortgage contingency extension(s);
4. No loan monitoring or need for status reports from the lender;
5. No risk of rate lock expiration;
6. No risk of the loan being denied for numerous other potential reasons such as poor credit, loss of income, etc.; and
7. No risk of inadvertent disclosure of the inspection report or the words, "Repair Credit" to the lender which

can trigger a lender inspection, required repairs, or loan denial.

2. Better Timing

Can close the deal sooner (in as soon as two weeks with a title commitment and survey, and homeowners' association documents, if applicable);

- No worry at the closing table that the lender may pull the plug; and
- No risk of closing being postponed due to the lender and, thus:

1. No need to adjust moving dates;
2. No post-closing possession negotiations, agreements, funds, and escrows;
3. No need to rearrange moving truck/ companies; and
4. No need to scramble for funds in order for sellers' purchase closing.

3. Fewer Fees

- In a cash deal, the parties customarily split the escrow closing fee (title company charge), which is advantageous to the buyer;
- Final walk-through credits can be given from seller to buyer to address property condition changes or defects, without the worry of them being subject to lender approval or TRID requirements;
- No FHA or VA charges to the seller;
- No risk of buyer incurring interest rate lock extension charges;
- No lender fees for buyer = less risk of buyer asking seller to pay these;
- Buyer does not lose or forfeit monies spent on the deal if the lender denies the loan, including:

1. Lender fees;
2. Appraisal fees;
3. Inspection fees; and
4. Attorney fees.

- No requirement for seller to pay property tax bills early;
- No additional title fees for lender's policy;
- No requirement for buyer to establish an escrow for property taxes and insurance (and association fees); and
- No requirement for buyer to pay for PMI.

4. Parties Have Greater Control

- Buyer can decide whose name is on title (rather than lender disallowing the spouse with poor credit to be on title; or buyer can opt for a business or trust name as owner);

No lender scrutiny of contract terms;

- No lender requirements for lender's addenda to the contract;
- No potential lender requirement for "owner occupied" property or that it be the buyer's primary residence;
- In certain municipalities, a buyer can opt to make repairs in lieu of seller, for violations found by the municipal inspection. Buyer may not have this option for FHA and VA loans; and
- Parties can negotiate without lender approval regarding:

1. Title exceptions a lender might require be cleared;
2. Survey issues a lender might require be addressed;
3. Homeowner association issues or documents that a lender may reject or may disqualify buyer for the loan, but a buyer would accept;
4. inspection issues a lender may require be fixed. Instead, the buyer can choose to purchase "as is" or even waive the inspection altogether; and
5. Credits between parties.

5. Less Time and Paperwork Involved

- Simpler closing process: The closing will be finished much more quickly (i.e., 30 minutes instead of 2 hours);
- The buyer will not have to sign hundreds of pages of loan documents; and
- Save dozens of hours of time spent on communications between the parties (and their real estate agents) giving updates on the loan status, scheduling the appraisal, providing information to the lender, last minute issues, etc.

6. Simplicity of the Deal

There are fewer deadlines for the attorney to monitor:

The contract loan application deadline;

- The contract disclosure mortgage contingency deadline;
- Fulfilling TILA-RESPA and TRID requirements such as loan estimate and closing disclosure deadlines;
- Timely scheduling and obtaining the lender's appraisal; and
- The flood insurance and hazard insurance deadlines at paragraphs 13 and 14 of the Multi-Board 7.0 contract, which affect final loan approval.

7. Lender's Term & Requirements Can Force the Buyer Into Breach, With No Remedy

Because the lender is not a party to the contract, it does not have to respect the contract's terms and conditions, including deadlines. If a lender cannot or will not provide a "clear to close," this can affect the scheduling of the closing. Some title companies may not allow you to schedule a closing without the lender's clear to close. In a "chain transaction" (where, for example, your clients need to close on their sale before they have the funds for their purchase), a lender's failure to provide a timely clear to close can have a domino effect on transactions downstream in which the lender is not even involved.

Paragraph 28 of the Multi-Board 7.0 contract contains a "time is of the essence" provision, which means that a missed deadline or a blown closing date is a material breach of the contract -- even if the buyer did nothing wrong. If the parties can't close, and the breach results in a lawsuit, the prevailing party can seek court costs and attorney fees, which can turn into thousands of dollars if the failure to close results in litigation. The seller probably does not have a cause of action against the lender because of lack of privity of contract. The buyer probably does not have a cause of action against the lender either, unless the lender guaranteed that it would provide a loan commitment by a date certain in writing -- which, of course, they never do.

8. Buyer Can't Blame the Lender if Buyer Defaults

Performance within buyer's and lender's control can be hard to discern or prove when the buyer defaults. If buyer defaults and cannot timely obtain a loan, they might argue it was out of their control and blame the lender. How can you prove it was buyer's lack of diligence in pursuing the loan? When the lender is not part of a transaction, you won't have to. The buyer can't pass the buck onto the lender for the buyer's default.

Proving buyer's default under these provisions of the Multi-Board 7.0 contract is difficult, and is obviated if the lender is not part of the deal:

- Paragraph 7 states that the buyer shall, by a certain date, "provide written evidence from Buyer's licensed lending institution confirming that Buyer has received loan approval subject only to 'at close' conditions, matters of title, survey, and matters within Buyer's control . . ." This allows buyer to argue that their default was due to matters that were not "within Buyer's control."
- Paragraph 7 at line 75: "A Party causing delay in the loan approval process shall not have the right to terminate under this subparagraph." You may suspect that the buyer did not timely turn in information and documentation, but can you prove it?

If a buyer defaults in a cash deal, they cannot make the lender the scapegoat since there is no lender involved.

Cash Deal Still Require Time to Close

Though a cash deal trumps a deal with financing, it is unrealistic to think that they can close within a few days. Set client expectations about the requirements and procedures involved in a cash deal. For example, the seller must order title and clear or insure over certain exceptions. Some title defects may delay or kill the deal altogether. In some municipalities, the seller must fulfill municipal requirements which may take time if an inspection or other rigorous requirements are mandated. The seller may need to provide a recent survey which typically requires two weeks or longer unless a rush order is placed. For residences which have a homeowner's association, the master association is allowed 30 days to produce the resale disclosure information. For residences having a condominium association, these associations are allowed 10 business days to produce information. Help your client maintain realistic expectations about the time frame for what needs to be accomplished to close, even in a cash deal.

Are all cash deals a breath of fresh air? They should be. Although financed deals can be a screaming pain, there is a silver lining to every cloud. The curve balls and complexities lenders bring into real estate deals only underscore the need for attorneys to be involved in the first place. ■

---

1. 12 C.F.R. § 1026 – Truth in Lending (Regulation Z).
2. Main TRID provisions and official interpretations can be found in: 12 C.F.R. § 1026.19(e), (f), and (g), Procedural and timing requirements; § 1026.37, Content of the loan estimate 12 C.F.R. § 1026.38, Content of the closing disclosure; Supplement I to Part 1026 (including official interpretations for the above provisions).
3. 765 ILCS 605/18.5(g).
4. 765 ILCS 605/22.1(b).