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Pitfalls Involving Pre-Closing and Post-Closing Occupancy Agreements in Residential Real Estate Transactions

by:

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In Florida's real estate market, we've seen it all. We've seen the highest of highs and the lowest of lows regarding listings, contracts, closings, and everything in between. One aspect of a sale and purchase is becoming more prevalent: The Pre-Closing or Post-Closing Occupancy Agreements.

These agreements allow for buyers or sellers to occupy a home either before the close of escrow or after.

Pre-Closing Occupancy Agreement: An agreement between home Buyer and Seller when the Buyer would like the Seller to grant early possession to the Buyer before the closing occurs.
(READ: They want early access to the house)

Post-Closing Occupancy Agreement: An agreement between home Buyer and Seller when the Seller would like the Buyer to grant extended possession to the Seller after the closing occurs.
(READ: They want to stay in the house following closing)

Essentially, these are short-term leases based upon a number of factors. In a pre-closing occupancy agreement, the buyer may have already sold their previous home and rather than signing a lease for an apartment, they have asked the Seller of their new home to allow them early access to move in prior to closing.

A similar scenario applies for post-closing occupancy agreements. Maybe the Seller sold their home much faster than anticipated and has yet to secure another residence. They may ask the home Buyer to allow them to stay in the home past the closing date.

As real estate attorneys, we have noticed a significant increase in requests for Post-Closing Occupancy Agreements and, in some cases, Pre-Closing Occupancy Agreements based upon the current economic times and the interest of certain Sellers to sell their houses as quickly as possible before the Sellers have had the opportunity to secure alternate housing.

In addition, certain Buyers want to promptly take occupancy and may be in the same situation of having disposed of their own property or in need of housing and can't wait until closing to take occupancy thereby requesting early occupancy prior to closing.

In both instances: a.) with the Seller retaining possession or b.) the Buyer obtaining pre-closing possession, there is often an offer made by the party requesting such occupancy to pay for the reasonable use of the premises. The payment of a fee for possession, however, hardly addresses the significant legal issues that impact such possessory rights.

Serious Implications

As easy as these occupancy agreements sound, there are actually serious implications arising out of a Seller requesting to remain in occupancy of residential property after the Seller conveys title to the Buyer. In addition, there are also negative aspects when a Buyer is requesting pre-closing occupancy of the premises. This has always been a fact known to most experienced real estate practitioners. Oftentimes some of the real estate professionals fail to recognize that, under these circumstances such Post-Closing Agreements or Pre-Closing Agreements must be drafted by an experienced real estate attorney who understands the ramifications and the unintended consequences of either of these scenarios.

Unfortunately, many real estate agents take it upon themselves to draft these documents and simply insert language into the contract or addendum to address this significant legal right. This in and of itself, should be a red flag to anyone involved, since such documents have significant legal impacts upon the Seller and Buyer and need careful attention to detail. Drafting such a legal document effecting the real property rights of Seller or Buyer as a matter of law, in the authors' opinion, cannot be performed by a real estate agent or a title company.

Insurance Requirements

In either situation, the actual legal title holder of the property must confirm that its existing insurance policy allows for occupancy by a third-party. More fundamentally, the property owner should verify that there is full and adequate liability insurance coverage in the event of any acts which could create premises liability for the legal title holder. Failure to confirm and verify that appropriate insurance is in place could create significant issues to either party as a result of the occupancy of the subject residential premises. Without necessary or adequate insurance in place, there may be situations in which the occupancy by a third-party is not covered by the existing owner's insurance policy.

Adequate Documentation to Reflect Agreement of the Parties for Occupancy

One of the unintended consequences of Post-Closing Occupancy or Pre-Closing Occupancy discussions is the failure to have adequate identification of the rights, duties and obligations of

both the owner of the property as well as the potential occupier of the property have to have that documented in a proper legal instrument.

Let's address both types of occupancy: Post-Closing occupancy by the Seller of the property and Pre-Closing occupancy by the Buyer.

Below are the issues arising out of each type of occupancy when proper documentation is not created:

- A. Failure to Have Any Written Documentation of Occupancy Other Than an Oral Agreement to Allow for Post-Closing or Pre-Closing Occupancy. Under such situations, the person, under Florida law, would have the right to occupy the premises but without a lease, license agreement or other written agreement as to their occupancy, the person has no obligation to vacate the premises on any specific time frame or has no contractual obligations to uphold. In that case, the remedy for someone who refuses to pay rent or move out, is legal action.

Florida law allows for a legal action know as an Ejectment to remove a non-rent paying person living in your home, who has not signed a lease and has no title or interest in the property. This includes individuals who you voluntarily allowed to occupy the premises but who are not under a lease or written license. In order to remove such person, the property owner must initiate a court proceeding, under Florida Statute 66 "Ejectment" to remove the person from the premises if the person does not voluntarily vacate the premises. This creates a whole host of problems, as well as, the fact that there is no statutory summary proceeding under Ejectment.

If, for example, a person gained occupancy at pre-closing or post-closing and issues arose as to such occupancy (i.e. Seller taking occupancy post-closing and will not vacate or the Buyer taking occupancy in pre-closing and does not close or refuses to vacate) then, in such event, a lawsuit has to be initiated under Florida Statute 66.

The best-case scenario would be Default or Summary Judgment and ultimately leading to, an Ejectment judgment being provided but:

- a) that is not guaranteed and;
- b) the time period involved in the suit could be quite substantial.

If the case had to be tried in court with issues that could not be resolved at a Summary Judgment hearing, the average case in Florida could last from eighteen (18) to twenty-four (24) months without an appeal.

As such, the concept of having only an oral agreement for occupancy or a few lines added by the real estate agent into the contract is inviting significant issues for the property owner and certainly a great deal of attorney fees and legal expense if the occupier will not vacate.

- B. Occupancy Agreement Contained Only in the Real Estate Contract. This is an extremely poor approach taken by real estate agents and one that real estate attorneys, unfortunately, see often. The Pre-Closing Occupancy Agreement or Post-Closing Occupancy Agreement needs to be set forth in a separate written document containing far more expansive information as to the parties rights, duties and obligations than the Addendum in the Contract which might indicate, “*Seller and Buyer agree that Seller can remain in occupancy for thirty (30) days post-closing at no rental charge.*”

Florida real estate agents that fail to advise their clients to have a specific, separate written agreement drafted by a qualified real estate attorney are, in the opinion of the authors’, failing to exercise “*skill, care and diligence*” in performing their duties given the significant issues that can arise out of Pre-Closing Occupancy Agreements or Post-Closing Occupancy Agreements by the parties.

- C. Licensing Agreement. There are some real estate practitioners that suggest that a lease would not be the appropriate document for pre-closing or post-closing occupancy agreements but rather, only a license be issued.

The distinction between a residential lease and residential license is as follows:

- i. **Residential Lease Agreement:** A legal contract specifying the terms under which one party agrees to rent property from another party for a specified period of time in exchange for regular payments.
- ii. **Residential License Agreement:** A license is permission from the owner to a licensee to do something on the owner's property.

The position advanced of having a license instead of a lease is not shared by the authors’ and here is why: even though a license allows for revocation, which would allow the licensor to claim possession, that only results in the property owner claiming rightful possession. The very same remedy would be to file suit to enforce the license, which in essence is the same as the Ejectment. A legal action under the license would have to be initiated and there are no statutory summary proceedings for a license.

Therefore, again, the party seeking to revoke the license would have to initiate a lawsuit on the license, seek relief for an Ejectment and hope that the matter could be resolved in court by a Summary Judgment.

Summary Judgments in Florida require that all material disputed facts be resolved and not be at issue. If for some reason the occupant can claim a disputed fact to avoid Summary Judgment, then, in such event, the parties would be faced with not only the lengthy period of time to obtain Summary Judgment but also the extended period of time to seek ejectment under the statute or relief under the License Agreement.

The goal is to have the pre or post occupancy lease contract specify the terms of the agreement to AVOID A LAWSUIT and the time, money and frustration that will inevitably be expended.

Lease Agreement

While the authors suggest that no Pre-Closing Occupancy Agreement or Post-Closing Occupancy Agreement should be considered without significant forethought and only under circumstances where it is absolutely necessary for the transaction to move forward, there are certain circumstances in which a Pre-Closing Occupancy Agreement or a Post-Closing Occupancy Agreement cannot be avoided and the parties would agree to engage in such Agreement. With that said, a suggested recourse would be as follows:

1. A qualified real estate practitioner become involved;
2. The parties each seek their own independent legal advice from a qualified real estate attorney who can advise them of their rights both as to the persons providing the occupancy and the persons seeking occupancy;
3. That a Lease Agreement is prepared which would specifically provide for the rights, duties and obligations of the parties which also identifies whether a) the occupant will be paying rent, b) whether there will be a rental period with no charge, c) what takes place in the event that the occupant does not timely vacate.

This Lease Agreement must include identification of the following:

- a. That if the occupant breaches the Contract there may be a recapture of the rent that was not charged;
- b. Identification of the reasonable rent that would have been charged but for the Agreement;
- c. Identification of any holdover rent that would be charged;
- d. An acknowledgement that the lease terminated matter of law as of the date of the agreed upon the parties and absent or written extension of that, the lease is included.
- e. Ability to collect statutory double rent until possession was obtained.
- f. Ability to recover reasonable attorney fees and costs
- g. That summary procedure would be invoked

This allows the landlord to seek summary procedures under the Florida Residential Tenancy Statute under Florida Statute §83 and specifically, the actual summary procedures for eviction contained therein which allows for prompt notification to the occupant who is defined as a specific tenant under Florida law and being subject to a five (5) day summary requirement to respond to the Court and deposit monies into the Court registry in order for the tenant to raise defenses.

This also allows for the expedited procedures under the Florida Residential Tenancy Statute rather than the protracted and potentially time-consuming procedures for Ejectment or a Judgment to obtain possession based upon a license.

Summary

Interestingly, Pre-Closing Occupancy Agreements and Post-Closing Occupancy Agreements have been brought to the authors' attention in recent times based upon certain circumstances in parties being able to sell and move for economical and medical emergencies that have arisen based upon the COVID-19 pandemic. This recent pandemic seems to have created a great deal of issues involving Sellers and Buyers having to adjust occupancy dates and deadlines which normally are completed at the closing.

Please feel free to call or email us and we can provide further information:

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Before making any decisions, it is suggested that the reader retain appropriate legal counsel to provide specific advice on their particular issue and not intended to provide specific legal advice to any particular reader of this article on his/her specific situation.

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