A FLORIDA BAR BOARD-CERTIFIED REAL ESTATE ATTORNEY'S SUGGESTIONS RELATING TO ESCROW DEPOSIT DISPUTES AS TO RESIDENTIAL REAL ESTATE CONTRACTS AND PRAGMATIC APPROACH FOR SMALLER DEPOSITS

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This article is devoted to escrow disputes relating to residential real estate contracts. Specifically, it is to address the FAR/BAR "AS-IS" contract. The FAR/BAR "AS-IS" contract is a Florida Association of Realtors Florida Bar Association approved residential contract form. It is the most widely used form in the state of Florida. It is generally used by most real estate brokers and agents throughout 66 of the 67 counties in Florida. It should be noted that Collier County, through the Naples Board of Realtors, has prepared its own contract identified as a Naples Area Board of Realtors real estate contract or commonly referred to as the "NABOR "contract. That contract does not contain the same provisions as the escrow dispute provisions contained in the Far/Bar "AS-IS" contract. It should also be noted that some real estate agents are using the FAR/BAR standard contract, which does have the same dispute resolution procedures, including mediation arbitration as the FAR/BAR "AS-IS". So, to the extent the discussion addresses paragraphs 16 and 17 of the FAR/BAR "AS-IS" or the FAR/BAR standard contract, the points contained herein and will be equally applicable

It should be recognized that no escrow agent will be able to release the escrow deposits if a dispute exists between seller and buyer. What the parties initially have to be concerned about is to have an agreement so that the escrow agent maintains such deposit without placing it into the court registry pursuant to an interpleader action because an interpleader action is a an action by an innocent stakeholder (in this case, the escrow agent), who deposits the money in the court registry and asks the court to decide who has the rights to it naming both seller and buyer as the defendants.

This approach should be avoided initially because it adds another layer of expense since the escrow agent will charge costs and reasonable attorney fees which might be avoided. The first step is to

secure acknowledgment by the escalation that at least for a limited period of time, the escrow agent will not file an interpleader action.

As to the FAR/BAR, here are the steps for resolving disputes, which require implementation of section 16:

(a) There must be an initial 10-day negotiation window during which time the seller and buyer should attempt to resolve their disputes amicably.

(b) If, in fact, no dispute is resolved within the first 10 days, then, in such event, the parties must submit their dispute to court-ordered mediation. This court-ordered mediation is required pursuant to paragraph 16 of the FAR/BAR contract and is a condition preceding to filing a lawsuit.

A mediator should be selected by the parties, and the mediator should have some experience in the area of real estate law and specifically, real estate contracts, if possible.

The parties should submit to mediation and attempt in good faith to resolve their issues.

If the mediation fails, then, in such event, either party may seek to pursue a lawsuit to address their disputes.

Depending upon the circumstances (see further discussion below regarding the size of the deposit,) the party to the escrow dispute should strongly consider getting advice from a qualified real estate litigation attorney conversant with escrow disputes before undertaking to do a mediation by themselves. It should be recognized that although mediation is non-binding and is totally confidential, oftentimes, statements that we are given in mediation can later be used separately in a lawsuit based upon the parties of mediation seeking discovery on statements that were made. While statements directly made in a mediation cannot be utilized in future legal proceedings, mediation often expose deficiencies or provides the opponent with information that they can later on develop by way of discovery. So, again the parties to such mediation should consider having legal advice before entering such mediation and be cautious on the position that they assert

<u>Escrow Deposit Disputes</u>

Again, under the FAR/BAR "AS-IS "contract, the benefit of that contract is the fact that if a timely notice is provided by the buyer pursuant to Section 12 of the contract, the buyer can cancel the contract for any reason the buyer deems appropriate, or, in fact, for no reason at all. Sometimes this is lost on the parties. I have seen occasions where no reason is required at all.

If a buyer cancels timely under the FAR/BAR "AS-IS" contract, then, in such event, they should be entitled to recapture the deposit since there is no obligation whatsoever under the FAR/BAR "AS-IS" Contract to proceed. The FAR/BAR standard contract is different since that has distinctly different section 12 in it, which indicates if the buyer does his inspection and determines there are existing issues at the property, then, in such event, those issues need to be dealt with by the buyer

obtaining an inspection, reporting and identifying non-working items under section 12, which is a detailed section identifying issues such as items that should generally be in working order and condition at the property.

The FAR/BAR contract is far more labor intensive than the FAR/BAR "AS-IS" and requires the real estate agent and the buyer to pay close attention to not only the time periods for inspection, but the specific written requirements under the FAR/BAR standard contract. This is one reason we recommend (for both sellers and buyers) the FAR/BAR "AS-IS "contract is, in fact, a more efficient contract and eliminates several issues. For example, arguments made that the FAR/BAR standard contract allows the buyer to ask the seller to make repairs and identify those repairs. Those must be specifically in writing identifying each one of the items, be in compliance with Section 12, be done timely, and identify, as best as the buyer as possible, the amounts for such repairs.

The FAR/BAR "AS-IS" contract, however, can easily be used in the same manner: (1) if there are items of repair that buyer under FAR/BAR "AS-IS" contract wants to make, the buyer can simply provide notification to the seller that the buyer is electing its right to cancel the contract. However, the buyer would be willing to reinstate the contract if the seller would give the buyer an agreed-upon credit of X number of dollars and with a buyer providing a list of those repair items to the seller. That, in practice, is far more efficient than the Section 12 provisions of the FAR/BAR standard contract and that is why the FAR/BAR "AS-IS "contract is the most widely used contract in Florida. In the opinion of the two board certified attorneys in our office, we do not think it is appropriate for a an agent to place a buyer into a standard FAR/BAR contract vs. an "AS-IS" contract for the reasons set forth above: it simply eliminates some ability of the buyer to cancel the contract without further engagement as a standard FAR/BAR contract requires. With that said, generally, buyer disputes relate to sellers' and buyers' objections to the contract, which includes claims for example that buyer has not timely provided notification of the cancellation or the Buyer has not diligently sought financing.

In the event of a financing contingency and the buyers have not exhibited good faith reasonable efforts to obtain financing, it should be noted that Florida law requires that a buyer, even if turned down by the first lender, might need to apply with a secondary lender to demonstrate good faith ability to secure financing.

There are a host of other reasons (some valid and some invalid) that come up regarding cancellation of real estate contracts both by the buyer and disputes arising between buyer and the seller as to the release of the deposit.

<u>Pragmatic issues: Amount of Deposit in Dispute: Size of Deposit Amount</u>

One of the pragmatic issues involving these disputes relates to retaining legal counsel. Again, both contracts provide for recovery of reasonable attorney fees and costs and litigate the case, but those are not applicable and cannot be demanded at the initial stages when the parties ask for mediation.

That presents an issue: should a client hire an attorney to act as a representative in mediation? There are plenty of pros indicating why a client should have a qualified real estate litigation attorney assist them in recapturing their deposit. However, keep in mind the amounts involved and the cost. Also, as an example, let's use a $10,000 deposit. If a buyer has a dispute with a seller and decides to demand mediation and retains legal counsel and retains an arbitrator, you can anticipate that there will be an approximate half day mediation, since most mediations need at least a half day to get items resolved and most mediators will also require a half day charge.

With that said, using our example of a $10,000 deposit, if a buyer retains an attorney who charges $500 per hour and charges a review and preparation fee for the mediation of one to two hours and then charges four hours, and then, the mediator is charging $400.00 per hour, each party pays half. So, for a four-hour mediation to recapture $10,000, a buyer would end up paying its own attorney six hours of time at $400.00 per hour plus 4 hours of time at $200 per hour for the mediator or total sum of $3,200 on a $10,000 deposit.

You can see why once that occurs the ability to negotiate a settlement becomes very problematic. Using our example, if there was a decision by both parties to split the difference, and if both parties were similarly situated fee-wise and represented by legal counsel, there would be a $10,000 deposit and the amount of attorney fees incurred by both parties would be $6,400 leaving $3,600 to split. That is why the pragmatic approach is to consider consulting with but not necessarily hiring legal counsel to mediate deposits that are not significant to the extent of true dollars to be spent regarding mediation on both sides fighting over a finite amount of a deposit.

That is not to indicate that a $10,000 deposit is not a significant amount of money to be lost by the buyer or to compensate the seller for claiming damages, only that deposit disputes take time and attorney fees. Further, using my example, the cost of attorney fees and mediators involving a deposit of this amount lends itself to a more pragmatic approach. With that said, there are numerous cases, which, as indicated, are for disputes that are fact intensive and may require a buyer or seller to seek legal advice. For example, there may be issues involving *Johnson v. Davis* non-disclosure, there may be issues involving specific material misrepresentations relating to the home, or a whole host of other actionable facts, which should be considered by both seller and buyer regarding the specific case.

One purpose of this article, however, is to address the fundamental basic escrow dispute for amounts at issue on residential closings, which are not amounts that are practical or pragmatic to litigate, or, in certain cases, to engage in pre-suit mediation. Using my example above, it would seem far better if the seller and buyer would discuss resolving their dispute under the circumstances by coming to an agreement to some sort of division (whether it's 50/50, 60/40, etc.) to avoid both parties incurring attorney fees and cost which is a reality facing both parties

In the event there is disputes existing between seller and buyer, it is recommended that at least initially the seller and buyer seek legal advice to advise them of the of the legal and pragmatic approach to take to make sure there are not facts or claims that would be available to either party, which would be overlooked by not retaining counsel. Caution, however, is given since most

qualified and experienced real estate litigation attorneys will caution the client and provide good counsel to indicate that litigating over a deposit in the $10,000, for example, generally is not beneficial to either seller or buyer. Keep in mind that if litigation is elected, then under the standard FAR/BAR contract, the prevailing party gets attorney fees. This means that often in smaller deposit disputes, the attorney fees that would be awarded by one party against the other may in fact be larger than the actual deposit in dispute. Sellers and buyers should give consideration at that point.

The Law Office of Jursinski and Murphy stand ready to assist you in your escrow disputes involving residential real estate contracts. We can provide you with the legal services necessary to evaluate your claim and if necessary, pursue recovery based upon those circumstances.

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