

AVOIDING MALPRACTICE: POSSESSION – MAKE THEM PAY

by Harold I. Levine

The situation where a seller remains in possession after closing under a so-called possession escrow poses heavy responsibilities for buyers and their lawyers. If the seller fails to live up to the possession escrow and extends his or her occupancy, a disastrous chain of events may occur. If the buyer must file a forcible entry and detainer action and litigate to evict the seller, untold wear and tear and loss may result to the buyer.

With that in mind, it must be stated that the average possession clause totally fails to protect the buyer. First, the amount is pitifully low, usually, 2% of the purchase price. At that price, it almost invites defiance by the seller. In these fast-moving times, lawyers must learn to think of possession escrows of 5 and 10% of the purchase price. If on a \$250,000.00 transaction, a 2% possession is a paltry \$5,000.00, it is almost worth the risk if the seller needs to retain possession past the agreed period. However, if the amount of the seller's money at risk is 5% - \$12,500.00, the seller will move.

In addition, the usual possession escrow is defective in the following respects:

1. The possession escrow usually provides for rent on a daily or monthly basis. But it often appears that the rent is to be deducted from the possession escrow, so after a fixed amount of time, it will all be exhausted as rent and there is no escrow amount left in insure possession.

What is required is clear drafting to indicate that the possession escrow has two separate components: (1) a set amount that will be forfeited in its entirety without being offset on a certain fixed date if possession is not delivered, (2) additional payments for use and occupancy (not rent), as will be discussed.

2. The possession escrow must provide that if the seller remains in possession, the seller must pay all utilities and maintain the property in good condition. Further, the insurance aspects should be examined. The buyer has no possession and the seller no title, so there may be serious gaps.
3. Great care must be taken not to create the relation of lessor/lessee, because if that happens, for the seller has all the benefits of the Forcible Entry and Detainer Act (*Ill. Rev. Stat.*, c. 110, ¶9-102): statutory notice, service of summons, trial, etc., and most likely at least 60 days delay. You may be unaware that a vendee in possession is also entitled to notice under the Forcible Act. Paragraph 9-102 of the Act provides:

The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided:

When a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with the agreement, withholds possession thereof, after demand in writing by the person entitled to such possession.

The possession agreement must clearly state that the agreement does not create the relation of landlord and tenant, and that seller waives all notices of every kind, whether required by the Forcible Act or other statutes, waives notice, appearance, and consents to an immediate judgment in forcible detainer.

Of course, the possession agreement should provide that the seller pay all costs and attorney's fees as a result of his or her failure to abide by the agreement.

Set out below is a suggested draft of a possession agreement. It should reduce the possibility of a claim against a lawyer whose client cannot get possession of his or her house for six months because the seller had a smarter lawyer:

Seller hereby deposits the sum of \$_____ with escrowee to guarantee the possession of the premises. If the premises are not vacated and delivered to the purchaser on the _____ day of _____, _____, then the escrowee shall immediately deliver said money to the buyer as liquidated damages and not as a penalty. In addition to the above, seller agrees to pay to the purchaser the sum of \$_____ per day for each and every day or portion the seller shall remain in possession thereafter, not as rent but as and for additional liquidated damages.

The parties agree that nothing herein contained is intended to create a relationship of landlord and tenant between them.

If seller shall fail, for any reason whatever, to vacate said premises on or before _____, the purchaser shall, in addition to all other remedies, have the right to commence any legal action or proceeding calculated to oust, evict, and remove the seller from the premises. Seller agrees to waive all notices required by the Forcible Entry and Detainer Act or any other statute, and waives any defense and consents to an immediate judgment for possession. Seller further agrees to reimburse purchaser for all reasonable attorneys' fees and expenses the purchaser may incur in this enforcement of the purchaser's right under this agreement.