



Can a seller refuse access to a buyer who has failed to deliver the Due Diligence Fee?

Release Date: 6/16/2022

Bill Gifford, Martin & Gifford, PLLC

QUESTION: I am a listing agent. Several days ago, my clients accepted an offer. I immediately emailed the signed contract to the buyer's agent. The contract calls for the buyer to pay a substantial due diligence fee. Despite several reminders to the buyer's agent, the fee has not yet been delivered. The buyer's agent has called me to arrange a home inspection. My seller clients do not want to allow that inspection until the due diligence fee is paid. Do the sellers have the right to refuse access to their property until the due diligence fee is paid?

ANSWER: They do not. The contract between the parties became binding on all parties on the Effective Date, e.g., the date that you communicated to the buyer's agent that the seller had signed the buyer's offer. Standard Form 2-T includes the following language immediately above the signature lines: "Buyer's failure to timely deliver any fee, deposit or other payment provided for herein shall not prevent this offer from becoming a binding contract."

When a contract becomes binding, it becomes binding on all parties. At that point, all parties must comply with whatever obligations are imposed on them by the contract. One obligation of the buyer is to timely deliver the due diligence fee. One obligation of the seller (set forth in paragraph 8(c)) is to "provide reasonable access to the Property through the earlier of Closing or possession by Buyer, including, but not limited to, allowing Buyer and/or Buyer's agents or representatives, an opportunity to conduct Due Diligence."

Just as a buyer's failure to timely deliver the due diligence fee would be a breach of the contract, so would a seller's refusal to provide reasonable access to the buyer to conduct due diligence. The seller's obligation to provide access is not conditioned on buyer's compliance with the buyer's contractual obligations.

Listing agents are reminded that Form 2-T provides sellers with a remedy if a buyer should fail to deliver the due diligence fee on the Effective Date. The procedure involves delivering a written notice to buyer demanding payment of the fee within one banking day. Standard Form 355-T can be used for this purpose. If the buyer fails to comply with that demand, the seller has the right to immediately terminate the contract and pursue the other remedies outlined in paragraph 1(d) of the contract. Once the contract is terminated, the seller's obligation to provide access to the buyer terminates as well.

NC REALTORS® provides articles on legal topics as a member service. They are general statements of applicable legal and ethical principles for member education only. They do not constitute legal advice. The services of a private attorney should be sought for legal advice.

© Copyright 2022. North Carolina Association of REALTORS®, Inc. This article is intended solely for the benefit of NC REALTORS® members, who may reproduce and distribute it to other NC REALTORS® members and their clients, provided it is reproduced in its entirety without any change to its format or content, including disclaimer and copyright notice, and provided that any such reproduction is not intended for monetary gain. Any unauthorized reproduction, use or distribution is prohibited.