

I am Buying a Home and I Lost My Job! Now What?

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The loss of employment can be one of the most stressful events in a person's life. Purchasing a home, while it is a very exciting time, can also be an extremely stressful event. If one loses his or her job, however, while in contract to purchase a home it can certainly be devastating. A purchaser spends many years to save up enough of a downpayment to purchase a home and, in the end, could potentially forfeit his or her life savings upon the loss of his or her job after a mortgage commitment has been issued by a lender. Recent court decisions highlight the various issues and consequences that could exist when a purchaser loses his or her job, particularly after the lender has issued a mortgage commitment and the mortgage contingency under the contract of sale has been met.

The Mortgage Contingency Provision

In 2000, the New York State Bar Association and New York City Bar Association (*See* <https://bit.ly/2AVzGCW>) jointly prepared a form "Residential Contract of Sale" which is commonly used in residential real estate transactions. While this form is used in many transactions, often times it is not and different provisions may apply. This particular form of contract provides, in part, that "...[t]he obligation of Purchaser to purchase...is conditioned upon issuance...of a written commitment from an Institutional Lender" A mortgage contingency clause is a common provision that is included in most real estate contracts.

This form also provides that "[t]o the extent a Commitment is conditioned on the sale of Purchaser's current home, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions, Purchaser accepts the risk that such conditions may not be met..." and that "[o]nce a Commitment is issued, [a] Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason." The preceding language squarely places the burden on the purchaser to meet any conditions that may be included in any commitment issued by a lender, but also clearly indicates that should the lender "...fail or refuse to fund the loan for *any* [emphasis added] reason" the purchaser must still proceed with the closing. Therefore, it is important to note that while the courts have held, in the decisions discussed in this article, that a purchaser may be permitted to get out of a contract and receive a refund of the downpayment in certain very limited instances, such as losing one's job, each court, based on the specific provisions contained in the contract, may come to a very different decision.

Courts have held that “[a] mortgage contingency clause is construed to create a condition precedent to the contract of sale.” (See Blair v. O'Donnell, 85 AD3d 954 (2011) at <https://bit.ly/2AULRzS>). Therefore, if a purchaser is unable to obtain a mortgage commitment, after a diligent and good faith effort, within the mortgage contingency period, the purchaser would be entitled to the return of the downpayment. One critical issue, however, arises when a lender rescinds or withdraws the previously issued mortgage commitment or refuses to fund the loan after the mortgage commitment has been issued, and where the mortgage contingency has already been met by the purchaser. In such an instance, the court in Blair held that “...the contractual provision relating to [the] failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to any *bad faith* [emphasis added] on the part of the purchaser.”

Recent Decisions:

Chahalis v. Roberta Ebert Irrevocable Trust: Refund of the Downpayment Upon Loss of Employment

In Chahalis (see 2018 NY Slip Op 05135 (July 11, 2018) at <https://bit.ly/2MxYF0m>), the Appellate Division held that when a purchaser loses his or her job after the mortgage commitment contingency is satisfied, and as a result of the job loss, the lender rescinds the purchaser's mortgage commitment, the purchaser is entitled to a refund of his or her downpayment paid on contract, provided that the purchaser acted in good faith.

The plaintiff, Gregg Chahalis, entered into a contract of sale with the defendant, the Trustee of the Roberta Ebert Irrevocable Trust, to purchase a condominium located in Rockland County. The downpayment was paid by Chahalis upon executing the contract and was held in escrow by the seller's attorney. The contract was contingent on the purchaser obtaining a mortgage commitment. Mr. Chahalis satisfied the mortgage commitment contingency and delivered the mortgage commitment to the seller's attorney on June 22, 2015.

On July 21, 2015, Mr. Chahalis's employment was terminated effective July 31, 2015. The termination was due to a restructuring of the company and not through any fault of the purchaser. As a result, the lender revoked the previously issued mortgage commitment. The purchaser's attorney notified the defendants and requested a refund of his client's downpayment. The seller's attorney and seller refused to return the downpayment and the purchaser commenced a lawsuit against the seller.

The Supreme Court decided in favor of the purchaser and the seller appealed to the Appellate Division. The Appellate Division affirmed the Supreme Court's decision finding that the plaintiff “...acted in good faith in obtaining the mortgage commitment,

that the commitment was subject to re-verification of employment, and that the subsequent revocation of the commitment was not attributable to any bad faith on his part.” The appellate court held that the seller failed to present any evidence that the commitment was rescinded due to the purchaser’s bad faith and directed that the downpayment be returned.

Sanjan v. King: Was a Mortgage Commitment Actually Issued?

In Sanjan v. King (see 2018 Slip Op 31172 (June 8, 2018) at <https://bit.ly/2Mw924T>), the Supreme Court addressed the rescission of a mortgage commitment after its issuance and provided a three-prong test. First, it must be determined whether a mortgage commitment was, in fact, issued. Secondly, was a “firm” mortgage commitment issued? Once the first two prongs have been satisfied, the third factor to consider is whether the lender’s mortgage commitment rescission was attributable to any bad faith on the part of the purchaser.

In Sanjana, the purchaser entered into a contract to purchase a condominium located in Manhattan. After receiving a conditional mortgage approval from the lender, the purchaser was later denied financing on the grounds that the premises was an unacceptable property type.

The first issue addressed by the court was whether the “conditional approval” issued by the lender would be deemed to be a “mortgage commitment”. The Court held, relying on Black’s Law Dictionary, that a “mortgage commitment” is defined as “[w]ritten confirmation from a buyer’s bank to a property seller that the buyer will complete the purchase as the buyer’s mortgage loan will occur.” Further, Black’s Law Dictionary defines a “loan commitment” as a “[l]ender’s binding promise that the loan amount or line-of-credit is available to the named borrower at a certain interest rate, time-bound, with a stated purpose. The commitment letter states all of the justification needed to advance the loan.”

In Sanjana, the lender issued a conditional approval (not a formal commitment) which identified 18 separate items that the purchaser had to satisfy before the mortgage would be approved. The conditional approval also indicated that the lender would undertake a final review of the loan documents once those 18 items were received. The conditional approval further required information relating to the condominium corporation’s bylaws and master deed. For these reasons, the Court held that a formal commitment was never issued and therefore, the court did not go further in determining whether the plaintiff acted in bad faith. Again, it is important to note that each case is decided based on different facts and circumstances.

MD3 Holdings, LLC v. Buerkle: Did the Purchaser Act in “Bad Faith”?

In MD3 Holdings (see 2018 NY Slip Op 01836 (March 16, 2018) at <https://bit.ly/2OnyqKx>), the purchaser was issued a valid mortgage commitment and satisfied the mortgage commitment contingency. After the mortgage commitment was issued, the purchaser "...provided the bank with additional projections from his accountant that cast doubt upon the financial viability of the planned use of the building." As a result, the lender rescinded the mortgage commitment. The purchaser requested that the downpayment be refunded and the seller's attorney refused. The seller argued that the purchaser wrongfully induced the lender to rescind the mortgage commitment by providing undesirable information to the lender and that the purchaser should have known that the information would result in the lender's rescission.

The Court rejected the seller's argument and held that by providing new information to the lender, said information, although it caused the lender to rescind the commitment did not, by itself, establish that the purchaser acted in bad faith. The Court explained that the purchaser had a duty to the bank to deal with it honestly and fairly, and was required to provide the additional information. The Court, therefore, held that the seller had to present evidence that the purchaser acted in bad faith and failed to do so.

**Applied Behavior Analysis, Inc. v.
Greater N.J. Annual Conference of United Methodist Church**

In contrast to the previous decisions, the Appellate Division in Applied Behavior (see 67 AD 3d 714 (2009) at <https://bit.ly/2vSt4iK>), held that the plaintiff (i.e., the purchaser) failed to establish whether the plaintiff's "...financial condition leading to the rescission of the loan commitment was through no fault of its own and was not intended to bring about the failure of the real estate contract." The purchaser entered into a contract of sale to purchase a building from the seller. After a mortgage commitment was issued "...the purchaser extended its lease at its former location and notified its lender that its lease 'will, undoubtedly, put a significant strain on the budget'. The lender determined that the plaintiff's additional obligation to pay rent under the extended lease was a change in financial condition and rescinded the loan commitment." It is important to note that the lease was extended by the purchaser because plaintiff became concerned that it could not make the repairs needed to the building they were purchasing before the school year started and would not have a location within which to operate its business. The trial court held that the purchaser did not produce any evidence that it did *not* act in bad faith and, therefore, denied a refund of the downpayment. The Appellate Division affirmed the lower court's decision.

The Purchaser and A Good Faith Loan Application

It is clear from the caselaw that if a purchaser engages in bad faith acts that cause his or her mortgage commitment to be rescinded or revoked, the consequences will be

severe, and the purchaser will likely forfeit the downpayment. It is very important for all parties (i.e., brokers, agents, attorneys, lenders, etc.) to work with their clients to ensure that they are submitting their mortgage paperwork in good faith, in a timely fashion, and are not intentionally engaging in conduct that would cause a lender to revoke a mortgage commitment. While some of the decisions clearly favor purchasers when they lose a job through no fault of their own, if a purchaser is terminated for wrongful acts or behavior which leads to same, the likely result will be that the purchaser will be deemed to be in default of the contract and forfeit his or her downpayment.

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