

REAL ESTATE

Cash Offers on Real Estate Transactions: Option for Acquisition Mortgage Post-Closing

By Andrew Lieb

A cash offer on a home purchase can be paid for with a mortgage. Whether a purchaser is obtaining a mortgage is not relevant to a seller from a legal perspective. Instead, the only legally relevant factor is whether the deal is subject to (a/k/a, contingent on) the purchaser's ability to obtain a mortgage, on set terms. When a purchaser's offer is not contingent on a mortgage, but the purchaser nonetheless requires a loan to have the requisite funds to close, such purchaser is thereby taking a risk in that they are exposed to breaching the contract of sale if they are unable to obtain a loan and as a practical result, they can lose their down-payment. Alternatively, should a purchaser make their offer subject to a mortgage contingency on set terms, such contingent purchaser is avoiding risk because such purchaser can cancel the contract, as of right, if they cannot obtain a loan on set terms and incident thereto, the purchaser can demand the return of their down-payment.

Regardless, many sellers, and more so real estate brokers, are finicky about cash purchasers obtaining loans. To assuage their concerns, such sellers and their real estate brokers demand proof of funds and will not

accept an offer from a creditworthy purchaser who does not have the requisite funds readily available to close. In contrast, many well-to-do purchasers, with the requisite funds to close, nonetheless want to obtain a loan on the purchase of their primary or secondary residence for two reasons, to wit: interest rates are low; and taxpayers may deduct interest on up to \$750,000 of qualified residence loans. So, what is the solution for a well-to-do purchaser who would like to make a cash offer, not off-put the seller or real estate broker by obtaining a loan on such purchase, and nonetheless reap the benefits of obtaining a loan on the purchase?

The solution is a 90-day post-closing loan. According to the IRS, in *Publication 936*, a qualified residence loan, which can result in the deduction of interest payments for the purchaser, includes a home bought "within 90 days before or after the date you take out the mortgage." Therefore, a purchaser can pay cash at closing while having to arrange for financing to close within 90 days post-closing. To illustrate, the IRS provides the following example:



Andrew Lieb

You bought your main home on June 3 for \$175,000. You paid for the home with cash you got from the sale of your old home. On July 15, you took out a mortgage of \$150,000 secured by your main home. You used the \$150,000 to invest in stocks. You can treat the mortgage as taken out to buy your home because you bought the home within 90 days before you took out the mortgage. The entire mortgage qualifies as home acquisition debt because it wasn't more than the home's cost.

Alternatively, a purchaser who plans to improve/renovate the home is not restricted by the 90-day deadline. According to the IRS, in *IR-2018-32*, "despite newly-enacted restrictions on home mortgages, taxpayers can often still deduct interest on a home equity loan, home equity line of credit (HELOC) or second mortgage, regardless of how the loan is labelled." Specifically, a homeowner can deduct a HELOC if the funds are utilized to make a substantial improvement on the home. According to the IRS, in *Publication 936*, "[a]n improvement is substantial if it: [a]dds to the value of your

home, [p]rolongs your home's useful life, or adapts your home to new uses." As an illustration, the IRS explains that "[r]epairs that maintain your home in good condition, such as repainting your home, aren't substantial improvements. However, if you paint your home as part of a renovation that substantially improves your qualified home, you can include the painting costs in the cost of the improvements."

As a result, a homeowner wishing to renovate a home is not restricted by the 90-day post-acquisition rule but is instead required to "take out the mortgage within 90 days after the work is completed." Therefore, there are two options for a cash purchaser, who wishes to obtain a post-closing loan to avail such purchaser of the interest rate and mortgage interest deduction benefits of a loan, while not alienating a seller and real estate broker while making their cash offer.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for years.

Meet Your SCBA Colleague

By Laura Lane

You worked at Jacoby for over 14 years. What was it like? They advertised, unusual at that time, and it was at first resented and considered unprofessional. Now everyone does it. Back then, they sent the attorneys to small neighborhood offices. I was in Bohemia. I had 700 active cases and it was impossible.

What did you gain from the experience? I learned to do things quickly, but I never cut corners. As a result, I was treated well by the staff at the court. Today I serve on the 18b Panel. I don't treat an 18b client any differently than my other clients. I believe that it doesn't matter if you accept \$500 an hour or \$75. You chose the \$75. At Jacoby I also learned not to take advantage of your staff. I try to be very fair with my staff.

In what way? I raised my kids while I was working. If a member of my staff's child is sick they should stay home with them. My paralegal has been with us a long time and my secretary came with me from Jacoby.

What was it like 40 years ago when you were sworn in? I remember walking into the courtroom and I was the only woman. They thought I was a secretary. I remember early on what it

meant when a guy asked if there was a man or a woman "back there." We told him there was a trained monkey. I always kept up with the men because I've always been a sport's fan.

What do you enjoy about being an attorney? I'm proud to be an attorney. There are these moments when a person you are representing realizes you have done something wonderful for them and accept them. When you work in Family Court you see a lot of horrific things that you can't take home with you. If you become too involved it will suck you dry.

You work in two different courts — Supreme for divorce and Family. It's more time consuming in Family Court because it's harder to settle things these days. People don't see the other's position and they are all out for themselves. Technology is part of the problem. People don't hear the other person's point of view, they have lost the ability to interact and believe there is no reason to feel empathy or sympathy.

How did you become involved in the SCBA Charitable Foundation, where you are now the director? I got involved five years ago by accident. I didn't know they had their meetings in the District's Court's cafeteria. I thought I was just sitting with my friends but soon realized I was sitting in on a meeting.

Francine H. Moss, a matrimonial and family attorney, learned a great deal at Jacoby & Meyers, where she advanced from managing attorney to partner. She even met her future partner there.

How is it changing under your leadership? They used to run two events a year, the Halloween Party and a theater night. I always thought it could be bigger and better. This year we are doing a fashion show at the Irish Coffee Club on Jan. 24. We are planning a casino night in two months, and then there will be the theater night. We sponsored three families for Christmas this year, which we had never done before. Justice takes many forms, including charitable giving.

You've been chosen three times as Pro Bono Attorney of the Month. My goal is to do it four times before I retire. It is a learning experience always. The last client was a woman who only spoke Mandarin. I learned a lot about immigration law with that one. Doing this is another way of giving.

How has the profession evolved? I don't think attorneys are treated with the same level of respect as when I started. What's happening is some of the younger lawyers don't view it as a profession. They view it as a job. For the most part I like Matrimonial and Family lawyers. They are the salt of the earth, kind and generous. That makes the work easier when it is hard.

Why did you join the SCBA? I believe there is an expectation that if you are



Francine H. Moss

going to be a professional you join a bar association. We need to have one voice and the bar association does that for you. It's valuable to be a member of the SCBA. All of my CLE's have been from the Academy, where the presenters are always high quality. And there is a certain amount of camaraderie I've gotten at the SCBA. You can't be friends with everyone. You need to have a group of people that you trust, which you get at the Suffolk County Bar Association.