

Alternative Resolution of Pennsylvania Real Estate Agreement of Sale Disputes: Part One- Residential Agreement Mediation

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Sooner or later most real estate investors face a real estate agreement of sale dispute. It is less likely for consumers but always a possibility. There are required non-court processes in both the PA Association of Realtors' residential agreement of sale form (ASR) and its commercial agreement of sale form (ASC). The procedures are different, in front of different types of authorities, but both types of mandatory alternative dispute resolution have a lot in common, too.

As I write this article, my last mediation representing an investor was just over a week ago and I am presently serving as an arbitrator in the resolution of a dispute under a commercial agreement. This article will examine mediation under the ASR and a second article will discuss arbitration under the ASC.

For residential agreements of sale used for single family homes and up to four unit residential apartment buildings, the process is mediation. Parties to an agreement of sale need to understand what mediation is and is not. Mediation is an opportunity for both parties to the agreement of sale to be heard by an impartial mediator, who hears both sides, typically together in the same room, then works with each, typically one at a time, to try to reach a compromise which both sides can accept, to avoid going to court against each other.

The parties required to participate in the mediation of their disputes over the agreement of sale are the seller and the buyer. Sometimes real estate

agents and brokers, home inspectors or others involved in the real estate transaction may agree to participate in the mediation as parties with respect to claims against them but those parties are not bound to go through the mediation process.

The buyer and seller can each make the demand to submit their dispute to mediation and each pays an equal share of the mediator's fees. If one party requests mediation the other is bound under the agreement of sale to participate. As a practical matter, however, if a party refuses to pay his or her share of the mediator's fees, the mediation is reported as unsuccessful and the parties are able to proceed to court.

Each party is allowed to be represented by counsel but no party is required to have counsel to participate in the mediation. Certain local associations of realtors, like the Realtors' Association of Metropolitan Pittsburgh, have contracts in place to refer mediations which are presented to them to a particular mediator or service. Other associations send their mediation requests to the Pennsylvania Association of Realtors which identifies potential available mediators and provides a list of several to the parties. One advantage of the mediation process is its relative speed. Once a request is made and a mediator is selected, it often takes only a few weeks to have the face to face, sit down mediation. This contrasts to time delays of many months or even a year to get to court. Despite the required payment of the mediators' fees by the parties, mediation is often less expensive than filing a court action because even if the parties hire lawyers for the mediation it typically only consumes a couple of hours of attorney time, as opposed to time drafting complaints and answers, going to court for motions, asking and responding to discovery, preparing witnesses and attending trial. These types of activities typically consume ten hours or more, sometimes much more attorney time.

Of course, if either party is not prepared to compromise and reach a settlement through mediation, all the time and costs of mediation are spent already and the case still has to proceed to court. The type of court action which follows a failed mediation depends on the amount of money claimed as damages by the party bringing the action, typically the buyer. Sometimes the seller brings the action if the buyer fails to close, has not liquidated damages and the seller claims to have suffered a loss as a result of buyer's failure to close.

For actions involving \$12,000 or less, the parties can file in Magisterial District Court and get a quick hearing in front of a Magisterial District

Judge. While many of these judges are lawyers, many are not and some do not have experience with real estate contracts.

For cases involving up to \$50,000 in at least Philadelphia, Montgomery, Bucks and Lehigh Counties, up to \$35,000 in Dauphin and Allegheny Counties (among others), and caps as low as \$25,000 in some other counties, suits can be filed to be heard in front of three lawyers who practice in the county, who take turns serving as arbitrators and who may or may not have experience in real estate contract matters. When the dispute involves amounts above the arbitration limit for the particular county, such cases go directly to a judge of the county Court of Common Pleas where they are heard either with, or more often without a jury.

Like mediation, the hearings or trials in front of Magisterial District Judges or Arbitrators can be appealed to a trial *de novo*, or to a brand new trial in front of the Arbitrators from the Magisterial District Judge, or in front of a judge from arbitration. Each of those appeals requires more time and more preparation from attorneys, so the fast, easy result in a smaller case can turn into a long, expensive process in any event.

The potential costs and time consumed by litigation create an incentive for all parties to participate in mediation. Any party who does not understand the potential costs, and those who do not care about the costs and just want to exact punishment on their opponents, do not heed the economic incentive to mediate.

In my experience there are some parties who are by nature more or less likely to successfully mediate. First time homebuyers who confuse seller disclosure claims with a warranty or guarantee, are often made to understand the difference by a mediator. Lawyers and engineers as parties, who often approach mediation as only the first phase in a process, are less likely to reach a settlement by sitting with a mediator.

Consider the parties as well. Claims against real estate sellers which also involve claims against brokers, agents, inspectors or others may not be able to be mediated effectively if those parties decline to participate.

For parties ready and willing to resolve their disputes quickly and efficiently, mediation remains an extremely effective tool and should not be overlooked. If you have a dispute over a residential agreement of sale for which the Pennsylvania Association of Realtors ASR form was used, consider the factors above and determine whether you want to pursue mediation. If you receive notice that mediation has been requested by the other party to such an agreement, be prepared to respond. In either

instance, you should consult with an attorney familiar with the mediation process before you go it alone.

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June 2017