Ross & Ross Attorneys at Law, L.L.C.
Steven P. Ross, Esq.
52 Main Street
Hackensack, NJ 07601
201-488-4300
201-488-7650
SPRoss@RossEsq.com

SHORT SALES ---- SOME BASIC INFORMATION

Short sales may be an alternative to a foreclosure or a bankruptcy and some believe that it does not carry the stigma that is sometimes associated with a foreclosure or bankruptcy. Under the rules of the Federal debt relief package it is likely that the short seller of an owner occupied residential home will not incur a forgiveness of debt tax liability. However, each seller must consult his or her own tax advisor to confirm if a taxable event will be triggered.

Lately, second mortgage lenders are a problem and increasingly the lenders will not release the seller from liability. This may defeat the theory behind the seller's motivation to perform a short sale in the first place. In many cases the seller will be compelled to file a bankruptcy at a later date to avoid the collection efforts of the second mortgage lender.

To complete a short sale it is important to have the full cooperation of the seller. The seller will have to deliver numerous documents and may be called upon to speak with the lender during the transaction. In addition, the seller will have to perform all of the ordinary functions of a seller, as required in a normal sale transaction, i.e. providing access to the house for various inspections and appraisals, as well as obtaining the certificate of occupancy and smoke detector certificate.

Customarily, other than an outlay of a few hundred dollars of expenses at the inception of the transaction, the short sale seller will not be required to pay any other expenses relating to the sale. Generally, the legal fees, realty transfer tax, adjustments, and real estate commission *(lenders are generally accepting 5%)* are all paid out of the sales price. These sums are effectively deducted from the amount, which the lender will ultimately receive. Also, in many cases the seller remains in the home until the time of closing without making further mortgage payments. The seller may, in effect, live rent-free for several months.

Note: It is very important to evaluate whether the seller will be required to pay estimated taxes to the State of New Jersey, such as a Non-Resident Seller or the Seller is selling rental property and the Bulk Sale Requirements are triggered. The banks will not permit these deductions from the bottom line because they are estimated taxes and a credit to the seller. If the seller does not have any money to pay these estimated taxes, or refuses to do so, this could doom the short sale from the start.

While the seller generally does not bear any of the expenses directly relating to the sale, the seller cannot derive any payment from the sale of the home. On the day of closing the HUD-1 Closing Statement must reflect that the seller receives no compensation from the sale of the home. This is an absolute. There cannot be any “side deals” or other form of consideration changing hands.

In order for the short sale to take place, the seller must first find a qualified buyer. A buyer who lacks money for a down payment or requests a "seller’s concession" is much less attractive due to the decreased probability that the buyer will be able to obtain a mortgage and complete the deal. Especially during this recent credit crunch, it becomes even more important to determine the viability of the buyer at the inception of the transaction.

A "seller's concession" or closing cost credit presents a specific problem beyond that of a mere lack of sufficient funds to close. If the home appraises for the artificially inflated sales price *(agreed sales price + seller’s concession)* then, why would the seller’s lender be inclined to grant a release of the lien for less than the full-appraised value? If the home does not appraise for the increased sales price, then the purchaser's mortgage loan will be declined due to a lack of sufficient funds to close. Either way the sale cannot proceed. This is not to say that the lender will not permit a closing cost credit in certain circumstances. However, it adds another difficult element to the process and analysis. Also, it may take several months before the short sale lender advises that the buyer’s proposal of a seller’s concession is rejected. If the only prospective buyer requires a seller’s concession, but can otherwise display the ability to qualify for the mortgage, the maximum closing cost (seller's concession) credit should be 3% of the sales price.

Once a qualified buyer is located and a contract is signed, the contract will follow the usual route through attorney review. Certain and specific language must be incorporated into the terms of the contract in order to protect the seller in the event the short sale is not approved by the lender. The buyer must be prepared to move forward immediately. The buyer must perform the home inspection right away, apply for and obtain a mortgage commitment, and order the title work for the property. This should be done as soon as the contract is firm. This method is contrary to the Realtor® Form Addendum, but it quickly discloses motivated and non-motivated buyer. Often times a buyer will attempt to sit back and wait for a short sale approval from the seller’s lender before performing these functions. However, this is not at all preferable; the seller's lender generally expects that the buyer has satisfied all contingencies before hand. Also the full title insurance report must be received and reviewed almost immediately after attorney review is complete. This search will also disclose additional liens, which must be cleared. The full title search is necessary in order to prepare and deliver the complete and accurate short sale package to the lender. The lender must know how much it will receive on the proposed closing date.

Some of the documents required to complete the transaction are:

- Copy of seller's monthly mortgage statement with loan number and lender's phone number;
- If applicable, copy of the second mortgage or home equity loan statement along with the loan number and phone number;
- Realtor's Listing Agreement;
- Length of time the home has been listed and copies of the MLS listings
- Copy of a recent Appraisal of the property if applicable;
- Copy of seller's most recent pay stubs (last three);
- Seller's Most Recent W-2
- Completed and signed Financial Worksheet;
- Copy of seller's last two most recent Federal Income Tax Return, with all schedules;
- Hardship letter, prepared by seller, explaining why seller no longer can pay the mortgage payment;
- Copy of the deed for the property;
- Copy of the most recent survey of the property, if available;
- Copy of the title insurance policy for the property, if available;
- Signed Client Representation and Authorization Notice.