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"Time Is Of The Essence" In A Real Estate Contract, Redux

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Twelve years ago, the lead author of this article co-wrote a New York Law Journal article discussing and interpreting New York law governing a "time is of the essence" provision in a real estate contract. In the interim, several key decisions have been rendered on this topic, of which real estate practitioners should be aware.

The basic rules applicable to a "time is of the essence" clause are well settled and can be summarized as follows:

The mere insertion of a closing date in a contract for the sale of real property does not make that date "of the essence" and either party is entitled to a "reasonable" adjournment of the closing.

An agreement as to a "time is of the essence" closing is enforceable, and the failure to close on the law day will constitute a material breach of the contract.

Special circumstances surrounding the execution of the contract may make a closing date "of the essence" although the contract does not contain the magic language, "time is of the essence."

Assuming the closing is not made "of the essence" in the contract and the closing does not occur on the scheduled date, either party may set a new date and make that new closing date "time is of the essence" by providing clear, distinct and unequivocal notice affording the other party a "reasonable" time to close.

Remedies for the breach of a "time is of the essence" clause include specific performance to compel the transfer of title or the retention by the seller of

the down payment.

A party may be equitably stopped from enforcing a "time is of the essence" clause based upon an oral agreement or conduct-evidencing waiver.

Intention, not necessarily Language

Generally, a contract for the sale of real property containing the phrase "time is of the essence" creates the requirement that both parties to the contract perform within the time specified. Failure by one of the parties to perform on the closing date will constitute a material breach of the contract and may result in the forfeiture of the down payment. Courts have strictly enforced contracts containing this provision or language to its effect.

A contract need not expressly state that "time is of the essence" in order to have the legal effect of such provision provided the notice specifies the time of performance and warns that the failure to perform on that date will result in default. However, the mere designation of a closing date in a contract of sale does not necessarily make that date "of the essence" unless the contract contains a specific declaration to that effect. For instance, in North Triphammer Development Corp. v. Ithaca Assocs., the contract provided that "[t]he 'Closing' of the transaction contemplated by this Agreement . . . shall occur on or before a date which is no later than one hundred twenty (120) days from the date of this Agreement." In this case, the Southern District (applying New York law) held that the designation of an "on or before" closing date was insufficiently definite to create a "time is of the essence" obligation.

In North Triphammer, the seller also attempted to make time of the essence pursuant to a letter stating the following: "[b]y way of postscript, I merely want to note that time is of the essence for a closing and your cooperation would be greatly appreciated." Although the words "time is of the essence" were included in the contract, the court found that the language surrounding the phrase – "by way of post-script" and "your cooperation would be greatly appreciated" – was ambiguous and vague. Therefore, the court was unable to discern from such language the requisite intention of the parties to make the closing of the essence.

Even if the intent of a party to make time of the essence is apparent, the failure to provide the other party with clear, distinct and unequivocal notice

will serve to render any "time is of the essence" language ineffective. In Karmatzanis v. Cohen, the notice stated that the seller "will not consent to adjourn the closing beyond 10/3/85 for any reason." In this case, the First Department held that absent any clear and unequivocal warning that failure to close on this date would be considered a default, the provision was insufficient to make time of the essence.

While insufficient notice may bar a party from asserting that time is of the essence, the failure of the receiving party to object to improper notice may constitute a waiver of the defective notice. In AAP Art in Architectural Pavers Corp. v. Sanford Equities, notice was provided to only the purchaser's attorney when the contract provided for notice to both the other party and its attorney. In addition, the contract required notices to be sent prepaid registered or certified mail. Conversely, the notice was sent via facsimile and ordinary mail. The purchaser's attorney responded to the notice but failed to object to the method of service utilized by the seller. As a result, the failure of the purchaser's attorney to object at that time barred the purchaser from asserting that the notice was improper.

"Reasonable" Time

When a contract for the sale of real property does not specify that time is of the essence, either party is entitled to a reasonable adjournment of the closing date. In granting an adjournment, the other party may unilaterally impose a condition that time is "of the essence" as to the rescheduled date. The effectiveness of this condition is contingent on the specificity of the notice and on the reasonableness of the time period. In determining whether the buyers were afforded reasonable time to close, the courts will examine the facts and circumstances of the particular case. In making its determination, a court may take into account any of the following factors: the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties, the possibility of hardship or prejudice to either one, and the specific number of days provided for the performance.

In Miller v. Almquist, the First Department focused on whether the post-notice period provided a reasonable time period in which to close. The Court considered this factor especially important because the sellers had unilaterally imposed the condition that time was "of the essence" after the

buyers had selected a very short adjourned closing date. The parties entered into a contract for the sale of a cooperative apartment on February 15, 1997. The contract specified an April 1, 1997 closing date (but did not specify that time was of the essence). On March 31, 1997, the buyers requested an adjournment of the closing until April 16, 1997. The sellers responded by letter, dated April 2, 1997, agreeing to the adjournment but claiming that time was now of the essence. Through no fault of the buyers, the buyers communicated to the sellers that the closing could not take place on April 16, 1997 and that they would not be able to close for seven days. To compensate, the buyers offered to pay the sellers $300 per day for maintenance and opportunity cost. On April 16, 1997, the sellers informed the buyers that their failure to appear that day constituted a default as time was of the essence and that the down payment should be delivered to the sellers. The buyers responded by informing the sellers that they were now able, willing and ready to close by April 18, 1997, to which the sellers replied that they would not appear on that day or any other day. The buyers arranged for an April 23, 1997 closing date but the sellers cancelled the arrangement.

In making its determination that the adjournment was reasonable, the court in Miller found that the conduct of the buyers did not reveal extensive delays or acts of bad faith. In addition, the sellers were unable to show any injury resulting from the delay (which amounted to only a few days) since they would still benefit from the deal and from the several thousand dollars received for expenses. Based upon these findings, there was no reason to hold that the adjournment was unreasonable.

In AAP Art in Architectural Pavers Corp. v. Sanford Equities, the court held that notice to the purchaser that provided 17 days in which to perform was a reasonable amount of time. In this case, the contract of sale was conditioned upon the purchaser obtaining a mortgage commitment within 60 days. If the commitment could not be obtained within that time, through no fault of the purchaser, then either party could cancel the contract by giving written notice to the other party and its attorney. Upon cancellation of the contract, the down payment would be returned to the purchaser. If the purchaser failed to give notice of the cancellation or accepted a mortgage commitment not in compliance with the contract terms, then purchaser was deemed to have waived its right to cancel and receive a refund of the down

payment. After the parties failed to close on November 30, 1999, the date provided for in the contract, the seller sent a letter, dated January 10, 2000, to the purchaser. While it did not specifically state that time was of the essence, it did provide that the closing must take place on January 27, 2000 and the failure to close on that date would result in default.

Here, the court found that the inability of the purchaser to secure a mortgage commitment in compliance with the terms of the contract by January 27, 2000 was not a basis for finding the 17-day period to be unreasonable. In making this determination, the court stated that the purchaser failed to give notice of cancellation or accept a commitment in compliance with the contract terms and thus, had waived its right to cancel the contract and receive a refund of the down payment. Therefore, the court held that the purchaser was afforded reasonable time in which to perform and its failure to perform on the set closing date constituted a default.

Discussion and Proposals

In making its determination of whether time is of the essence in a real estate contract, a court will examine the intentions of the parties to the contract. Inasmuch as courts abhor forfeiture, any ambiguity regarding the parties' intentions will cause the court to find that time was not of the essence. Therefore, a party wishing to impose this condition should ensure that contract explicitly states the date on which to close and also includes a clear warning that the failure to close on such date will result in default; any ambiguous language may serve to negate the intended effect.

Counsel should keep in mind that a "time of the essence" obligation could be made unilateral as to one contracting party; it need not be made mutual. Accordingly, the party imposing a unilateral "of the essence" obligation can safely obtain an adjournment of the closing date if they are not prepared to close on the appointed date.

If your client is on the receiving end of a "time is of the essence" clause, counsel must be acutely aware of any factors or events that may prevent their client from closing on the law day. A power of attorney should be obtained and approved by the title company. The designated attorney-in-fact in the power of attorney should have the authority to designate another

person to act as attorney-in-fact in the event the designated attorney-in-fact is unavailable.

If an adjournment of a "time is of the essence" closing is required, counsel must document all pertinent facts and circumstances underlying the adjournment request. The reasonableness of the adjournment request should be documented. The party requesting the extension should also be prepared to prove that its counterpart has not incurred any additional meaningful costs, or been otherwise prejudiced in any manner.

Courts will generally be sympathetic to parties who may be in danger of losing substantial down payments; the more evidence of reasonable behavior and lack of prejudice to the opposing party, the more likely the court will find that the "time is of the essence" clause has been waived. Recent case law reiterates the principle that a "time is of the essence" clause, properly invoked and not waived, is fully enforceable. Counsel seeking to impose this condition, or avoid its consequences, need to proceed diligently, decisively, and with due regard for controlling legal principles.

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