New York Law Journal
Real Estate Update
Wednesday, March 8, 2006
ALM

Enforcing the Contract

Obtaining Down Payment or Specific Performance

BY ADAM LEITMAN BAILEY AND JOHN M. DESIDERIO

At the pinnacle of real estate law, the real estate closing may be the most basic and common real estate experience, but the familiarity ends once a provision of the contract of sale has been breached. Inspired by the number of telephone calls, e-mails, and general correspondence received from practitioners who have requested guidance in enforcing a contract to purchase or sell real estate, this article addresses recurring issues that arise again and again when either buyers or sellers default on their contractual obligation to complete the transaction. The article will also note some frequent misconceptions involving buyers' and sellers' legal rights.

'Time of the Essence'

If a contract of sale does not specifically state that the closing date is "time of the essence," then either the buyer or seller has the right to a reasonable adjournment of the closing date.[1] In fact, because there are many uncontrollable factors involved, and it is difficult to know when all parties will be prepared to close, most real estate contracts set a closing date which reads that the closing shall occur "on or about" the date chosen or that the closing is

Adam Leitman Bailey *and* **John M. Desiderio** *are partners in Adam Leitman Bailey, P.C., where they practice commercial and residential real estate.* **Carly Greenberg**, *a summer associate at the firm assisted in the preparation of this article.*

CLOSING

Adam Leitman Bailey

John M. Desiderio

"scheduled" for a certain date.[2]

Rather than stating an approximate scheduled closing date, the contract of sale may specify a "time of the essence" date, which means that the closing will take place on the exact date specified or a party will be in default. However, even if such a clause is not in the contract of sale, a "time of the essence" date may be declared in a letter once the "on or about" or "scheduled" date has passed and the other party refuses or fails to close.[3] Many practitioners believe that a party has to wait 30 days after the initial contract date before sending out a "time of the essence" notice. This belief is misconceived, as no statute or court decision requires a 30-day waiting period before sending a "time of the essence" letter.

The closing may be the most basic and common real estate experience, but the familiarity ends once a provision of the contract of sale has been breached.

The "time of the essence" letter must give notice to the defaulting party of a definitive closing date and time or an expressed "time of the essence" closing date. Then, if the closing does not occur on the specified date, the other party will be in breach of the contract of sale. A defaulting buyer will forfeit its down payment, and, if the seller defaults, the buyer will be entitled to commence an action for specific performance.

However, in contracts with an "on or about" or "scheduled" closing date, or where the contracts have a set date but no mention of urgency or default, a seller cannot retain the contract deposit and the buyer cannot sue for specific performance when the other party does not appear for the closing.[4]

Without a lawful excuse, once the "time of the essence" letter is sent and a closing date is set, both parties must perform on the date specified. Accordingly, the "time of the essence" letter should be employed carefully or even avoided, unless it is absolutely necessary, as any failure to perform by the moving side may endanger what may be the largest financial investment of a client in his or her lifetime.

Once the contract date passes and after the moving party has first made a good faith attempt to schedule another closing date, as we recommend, the party desiring to close can then unilaterally set a definitive and final closing date.[5] Notice should be given that this newly scheduled closing date is "time of the essence." However, New York law requires that the buyer/seller party be given a reasonable time in which the buyer/seller must appear for that final closing date.[6] The effectiveness of the "time of the essence" letter is determined by both the specificity of the notice and

the reasonableness of the adjourned closing date.[7]

Specificity of the Notice

In cases where the original contract does not provide a "time of the essence" clause, there must be "clear, distinct, and unequivocal notice to that effect, in order to give the other party a reasonable time in which to act."[8] Specifically, this means that the letter must include not only an exact date and time on which to close, but also must warn that failure to close on the specified date will result in default and in some instances the forfeiture of the buyer's down payment.[9] Practitioners must be aware that letters containing these terms could be held to be "time of the essence" letters even if the party giving notice does not use the actual phrase "time of the essence."[10] However, knowing that one of our appellate courts once went so far as to declare a property to be "haunted," in order to allow the return of a buyer's down payment after a default, the practitioner is well advised to use the traditional language.[11]

Reasonable Adjournment

The New York Court of Appeals has consistently held that the reasonableness of an adjournment of the closing date depends on a case by case analysis, leaving it to the attorney's discretion in the specific situation to choose a rational date.[12]

Analyzing every published and some non-published decisions on the subject involving our law firm, the following are some factors that practitioners should consider when scheduling a closing adjournment. First, the date chosen for the adjournment should be one that will not make it difficult for the other party to comply. Second, when choosing the length of time for the adjournment, the practitioner should consider that a court will decide what is "reasonable" in light of the nature and object of the deal as well as the previous conduct of the parties throughout the transaction.[13] In this regard, courts consider the specific number of days provided for performance, and they will question a party's good faith in setting an adjourned date where it appears that the goal of that party is to actually avoid closing with the other party.[14] Finally, the practitioner must be aware that, in deciding the "reasonableness" of the "time of the essence" date, the court will also consider the real estate experience of the parties against whom it is being asked to enforce a "time of the essence" clause.[15]

In order to have the lawful right to hold the other party in default and achieve either the forfeiture of the buyer's down payment or the option to seek specific performance of the contract of sale, the moving party must actually demonstrate its ability to comply with the terms of the contract of sale.

Considering all of these factors, attorneys representing buyers or sellers should set a reasonable "time of the essence" closing date and should be prepared to show that their unilaterally-set adjournment date did not impose any significant hardship on the other party. In many cases, the courts will sympathize with and attempt to assist a party who stands to lose a significant sum of money by forfeiting its down payment. Therefore, it is prudent to choose a "time of the essence" date that is far enough in the future to be perceived as more than fair to the defaulting buyer or seller.

Specific Contract Provisions

The practitioner should also be aware of, and comply with, the notice provisions in the original contract of sale. If the agreement provides that notices must be sent by certified mail, the attorney must comply and send the "time of the essence" letter by certified mail. Additionally, the attorney should take notice of any other contract provisions that may apply, such as a requirement to send a default letter after a party has failed to attend a "time of the essence" closing. This is important, because, if the attorney does not strictly comply with the contract requirement, a seller may have to return the down payment to a defaulting buyer even though the buyer breached the contract.[16] Therefore, to obtain the benefit of a "time of the essence" closing, the party seeking to enforce the "time of the essence" condition must be sure to carefully draft its "time of the essence" notices and to comply with all contractual requirements.

Ready, Willing, and Able

In order to have the lawful right to hold the other party in default and achieve either the forfeiture of the buyer's down payment or the option to seek specific performance of the contract of sale, the moving party must actually demonstrate its ability to comply with the terms of the contract of sale.[17] This can be effectuated at a one-party closing on the "time of the essence" date where a record is made of the client's ability to comply with the contract of sale.[18] Although the defaulting party's anticipatory breach relieves the buyer of its obligation to perform, the moving party must have complied with all of the terms in the contract and demonstrate that it would have the ability to sell or buy the premises if the defaulting party had appeared at the closing. Since time immemorial, the guide to such a demonstration requires the moving party to be "ready, willing, and able to perform" on the time of the essence date.[19]

Courts have analyzed a number of factors when determining whether a buyer or seller has been ready, willing, and able to close. First and most often disputed, the buyer must demonstrate that it had the purchase money to close the deal.[20] To demonstrate the ability to finance the deal, the buyer must be able to prove that on the critical date, it maintained an adequate amount of assets to pay for the property.[21] Courts have found adequate financing when the buyer maintained, in liquid assets, the difference between the

loan amount and the total contract price.[22] When applicable, the buyer must prove that its bank not only had the ability, but that it was willing to fund the loan. It should be emphasized that once the contract has been repudiated, the buyer is not required to tender performance, but it must prove that the funds were available.

A seller must demonstrate that it owns the property, and that it had the ability to sell said property and deliver marketable title.[23] Furthermore the seller should consider being ready to vacate at closing by hiring moving trucks or actually vacate the premises to show that it was willing and ready.[24]

Preparing for the Closing

Even though a "time of the essence" closing is not always necessary, we recommend that when one is conducted, it be done in a way that is likely to satisfy the demands of even the most stringent judge. When preparing for the "time of the essence" closing, we recommend that you invite all of the players that would ordinarily be required at closing, including the lending institution, the title company, and the management company if applicable. If this cannot be arranged, and even if it can, affidavits should be prepared listing what each attendee intended to do at the closing and that it was ready, willing, and had the ability to do so, whether it was to deliver marketable title, the purchase funds and/or the proprietary lease and stock certificate. Furthermore, all closings documents, including the deed, completed tax forms, and documentation, should be prepared as if the closing was definitely going to occur. In preparation for court action, these documents and affidavits will be crucial in demonstrating compliance with the "time of the essence" condition. To be even more prepared for an expected legal battle, our law firm has even videotaped some of these closings to demonstrate that the buyer or seller was ready, willing, and able to close and was prepared for a court action.

Conclusion

Despite all of this effort and preparation, it should be noted that even if you follow all of the guidelines in this column, viable defenses do exist that either will defeat an action for specific performance or require the return of a down payment. Such defenses include laches and the possibility of unreasonable hardship or injustice that specific performance might cause for the seller.[25] However, in one case, an unsubstantiated loss of a business opportunity, which allegedly would have allowed the seller to move to Florida, was found insufficient to deny specific performance of the contract.[26]

It is clear though that, if the practitioner is careful to follow the guidelines discussed in this article, the courts will allow the seller to keep the entire contract deposit without a hearing on the amount of the seller's actual damages from the default.[27] It should be noted that most contracts limit the amount of damages permitted to be collected by a seller after a default to the buyer's down payment.

Following the steps we recommend will assist the practitioner in competently advising his or her clients to successfully and safely avoid that amorphous piece of real estate called the "unknown."

•••••••••••••●●●•••••••••••••

1. See *Zev v. Merman*, 134 A.D.2d 555, 521 N.Y.S.2d 455 (2d Dept. 1987), aff'd 73 N.Y.2d 781 (1988).

2. See Blumberg Form M146-Contract of Sale, Condominium (see para.4 "purchase price shall be made, at the closing of title to be held on or about..."); See also Standard Residential Contract of Sale created by Adam Leitman Bailey, P.C. (see para. 15 "closing shall take place at the office of...on or about..."); 123 Cooperative Apartment Contract of Sale, 7-01 (see para. 1.15 "the date scheduled for Closing is on or about" or "scheduled closing date"); 154 Contract of Sale for New York Office, Commercial and Multi-family Residential Premises, 2-95 (see section 3 "except as otherwise provided in this contract, the closing of title pursuant to this contract shall take place on the scheduled date and time of closing specified in Schedule D at the place specified in Schedule D").

3. See *Bardel v. Tsoukas*, 303 AD2d 344, 755 NYS2d 648 (2d Dept. 2003); see also *Zev*, supra note 1.

4. Although a "time of the essence" letter may be sent immediately in these circumstances, it is recommended that the moving party's counsel first telephone the other party's counsel and then follow-up with correspondence requesting compliance with the contract on a definitive closing date. This will assist in preparing for a potential lawsuit and will demonstrate the moving party's good faith in seeking a closing date.

5. *Miller v. Almquist*, 241 A.D.2d 181, 671 N.Y.S.2d 746 (1st Dept. 1998).

6. See *Zev*, supra note 1.

7. See *Miller*, supra note 5.

8. See *Zev*, supra note 1.

9. See *Karmatzanis v. Cohen*, 181 A.D.2d 618, 581 N.Y.S.2d 339 (1st Dept. 1992) (holding that a letter which stated the seller "will not consent to adjourn the closing beyond 10/3/85 for any reason" was insufficient to make the closing "time of the essence").

10. See *Sohayegh v. Oberlander*, 155 A.D.2d 436, 547 N.Y.S.2d 98, 100 (2d Dept. 1989) (where seller sent buyer a letter which stated only "a final adjournment of closing until June 6, 1985" and warned that the buyer would be in default if he failed to close on that day, the Court held that the notice was specific enough to be a "time of the essence" letter, despite the fact that it did not contain those exact words, and the sellers were permitted to keep the down payment). See also *Hand v. Field*, 15 A.D.3d 542, 790 N.Y.S.2d 681 (2d Dept. 2005).

11. See *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672 (1st Dept. 1991).

12. See *Zev v. Merman*, 73 N.Y.2d 781 (1988).

13. See *Miller*, supra note 5 at 100 (in determining the reasonableness of a "time of the essence" date that the sellers sought to enforce against the buyers, the court looked at the previous conduct of the parties: that the buyers had repeatedly assured the sellers that there would be a closing, that the buyers had provided documentation of their reasons for the delay in closing, and that the buyers had shown other acts of good faith); see also *Liba Estates v. Edryn Corp.*, 178 A.D.2d 152, 577 N.Y.S.2d 19 (1st Dept. 1991) (court found the adjourned closing date to be reasonable since the sellers would be burdened by keeping their buildings vacant for a longer period of time).

14. Id. (Where the sellers set a "time of the essence" date and then rejected the buyers' request for a minor adjournment, even though the adjournment would not have prejudiced the sellers, the court found the sellers' conduct unreasonable as they had unilaterally set a short closing date, held the buyers to that closing date, and were inflexible in rejecting the minor adjournment requested by the buyers).

15. See *Zev*, supra note 1 (Court took into account that plaintiff was an experienced dealer in real estate and should have known to seek a reasonable adjournment). See also *Miller*, supra note 5 (Court returned down payment to buyer relying on the factors including the hardship buyers suffered as a result of not being experienced in real estate).

16. See NYLJ, Contract of Sale is Deemed Cancelled by Seller, but Down Payment Must Be Returned, April 20, 2005, at 19. Id.

17. See *Cipriano v. Glen Cove Lodge*, 1 N.Y.3d 53, 801 N.E.2d 388, 769 N.Y.S.2d 168 (2003) (there was no proof that seller acted in good faith to convey title, and therefore the buyer had a lawful excuse not to close).

18. See *Contreras v. Klein*, 17 A.D.3d 395, 792 N.Y.S.2d 633 (2d Dept. 2005); *Zelmanovitch v. Ramos*, 299 A.D.2d 353, 750 N.Y.S.2d 310 (2d Dept. 2002).

19. See *Huntington Mining Holdings Inc. v. Cottontail Plaza*, 60 N.Y.2d 997, 459 N.E.2d 492 (1983) (buyer lacked its own funds to purchase property on closing date); *Madison Equities v. MZ Management Corp.*, 17 A.D.3d 639, 794 N.Y.S.2d 404 (2d Dept. 2005) (buyer had no documentation to prove it had necessary funds).

20. See *Madison Equities*, supra note 19. See also *Jewell v. Rowe*, 119 A.D.2d 634, 500 N.Y.S.2d 787 (2d Dept. 1986) (buyer did not establish he was ready, willing, and able because the evidence showed he did not have the requisite funds or financial commitments to meet his obligations under the contract). See also *Marinoff v. Natty Realty Corp.*, 17 A.D.3d 412, 792 N.Y.S.2d 491 (2d Dept. 2005) (buyer demonstrated he was ready, willing, and able to close by submitting copies of checks dated with the closing date for the balance due under the contract).

21. See *Spuches v. Royal View*, 202 N.Y.S. 2d 51 (1960). See also *Marinoff*, supra note 20.

22. Id.

23. See *Bosco, Bisignano & Mascolo, Esqs, LLP v. Turyan*, 8 A.D.3d 418, 779 N.Y.S.2d 125 (2d Dept. 2004) (where seller failed to close claiming that she could not convey marketable title, but plaintiff established that the seller had been ready, willing, and able to close because she had the ability to convey good and marketable title to the property, the court ordered specific performance of the contract).

24. See *Zev*, supra note 1.

25. See *Concert Radio v. GAF Corp.*, 108 AD2d 273, 488 NYS2d 696 (1st Dept. 1985), affirmed, 73 NY2d 766 (1988); see also *Groesbeck v. Morgan*, 206 N.Y. 385 (1912) (holding buyer was not guilty of laches or unreasonable delay in demanding the deed from the defendant).

26. See *Cheemanlall v. Toolsee*, 17 A.D.3d 392, 792 N.Y.S.2d 360 (2d Dept. 2005).

27. See *Uzan v. 845 UN L.P.*, 10 A.D.3d 230, 778 N.Y.S.2d 171 (1st Dept. 2004) (The Court enforced a contract provision providing for a 25 percent non-refundable down payment provision if buyer defaulted, noting that "more than a century ago, the Court of Appeals held that a vendee who defaults on a real estate contract without lawful excuse cannot recover his or her down payment.").