WHEN IS TIME REALLY "OF THE ESSENCE"

We can probably all agree that time is a precious commodity in short supply during the course of our working day. We change the clock in March of each year to make better use of daylight hours and preserve energy; yet, we complain that this annual event negatively impacts our time to sleep. As real estate professionals we encounter the issue of time when clients tell us they are not ready to sign a contract of sale because the due diligence period is not completed, the buyer has to liquidate funds for the requisite contract deposit, the bank has not issued a loan commitment within the time period required in the contract of sale, the seller cannot close when anticipated because the property she is purchasing has met some unexpected delays or the buyer would rather close at the end of the month so as to not incur additional per diem mortgage interest. No matter what the excuse or the reasoning behind the request of a party for additional time, the agent invariably encounters the question asked by the client "how much time do I have before I am forced to close." The manner by which the agent answers that question will determine if both the agent and the firm will be subject to future litigation.

In a contract for the sale of real property in New York State, it is well settled that unless the contract specifically adds the statement in the closing date paragraph "time being of the essence" it is understood that neither party can force the closing on that date. In effect, "time is not assumed to be of the essence…" unless the parties have specifically so stated. Many agents mistakenly believe that a party to a contract of sale cannot compel a closing for at least thirty days from the closing date paragraph. If the agent informs the client that this is so and the client relies to his or her detriment based on that information, the agent and the brokerage firm can be held accountable for any loss sustained by the client if the other party initiates a breach of contract action. While many real estate attorneys also believe that custom and usage in the industry permit an adjournment of a closing for up to thirty days, there is no statutory or case law to support this position. Although one party to a contract may not unilaterally make time of the essence without reasonable and sufficient notice to the other party, time may be made of the essence by "clear, distinct and unequivocal notice to that effect giving the other party a *reasonable* time in which to act." While there is no statutory guideline as to what is "reasonable" under the circumstances, the courts throughout New York State have provided guidance in this regard, albeit with no hard and fast interpretation.

Let's review some recent court cases in an attempt to get a better understanding of what may be reasonable when a party requests an adjournment of the closing date. In 2017, the Appellate Division, First Department examined the case of a purchaser who brought an action seeking the return of its deposit on the purchase of a commercial condominium unit and the Court held that the seller breached the contract of sale by failing to close by the date specified by the purchaser when the purchaser unilaterally set "time of the essence" after the date specified in the contract of sale and the purchaser's letter giving the seller a thirty day notice was sufficient to make the closing date "time of the essence."

Contrast this case with a 2018 case from the Appellate Division, Second Department where the seller's unilateral setting of the closing giving nine days' notice to the purchaser was deemed sufficient. The Court reasoned "When, as here, a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance…Where there is an indefinite adjournment of the closing date specified in the contract of sale, some affirmative act has to be taken by one party before [it] can claim the other party is in default; that is, one party has to fix a time by which the other must perform, and [it] must inform the other that if [it] does not perform by that date, [it] will be considered in default."

What constitutes a reasonable time for performance depends upon the facts and circumstances of each particular case. Neither an agent nor an attorney can use a broad brush and inform a client that in all instances, an adjournment of up to thirty days from the date specified in the contract of sale is reasonable. This simply is not the proper way to address the client's concerns. Included within a court's determination of reasonableness are 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 and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance. As many courts have opined, "The determination of reasonableness must by its very nature be determined on a case-by-case basis." The question of what constitutes a reasonable time is usually a question of fact to be determined by a judge or jury.

It has been my practice for the past thirty-five years to inform my clients, be they sellers or purchasers, that the closing date in the contract of sale should reflect the comfort level of the clients in being able to complete the transaction and that although the clients cannot be forced to close on or by that date, they could be compelled to close in as little as one week after the closing date or as late as several weeks thereafter…there is no clear cut formula to employ and the deciding factor on what is "reasonable" may very well depend on circumstances beyond the clients' control. If the attorney representing the other party to the transaction believes that a "reasonable adjournment" of the closing date is thirty days, then my clients will be given up to thirty days to adjourn; however, if the other party to the transaction cannot and will not afford my clients that much additional time, the other party does have the means to unilaterally set a closing date much earlier with the proper notification that "time is of the essence."

As I have recommended "time and time" again in articles to the real estate brokerage community, one should always attempt to shift the risk when given the opportunity to do so. If you are asked by your client to identify the outside date for a closing, rather than respond with an answer that may lead the client to make arrangements that will invariably put the client in harm's way, always suggest that the client speak with his or her attorney

to better understand the nuances in answering this question. To do otherwise will subject both the agent and the brokerage firm to potential liability, so direct yourself accordingly.

Submitted by Alfred M. Fazio, Esq. of Capuder Fazio Giacoia LLP. Visit our website at CFGNY.com for copies of recent articles as well as other areas of interest to the real estate community. If you would like to be added to our mailing list and receive future articles, please click the link below.
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