

NUTS AND BOLTS NEWSLETTER FOR BUSY PRACTITIONERS



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TIME OF THE ESSENCE; MAKING IT WORK

As prices continue to ‘soften’ you probably have that file sitting on your desk where the purchaser is having second thoughts about closing on the contract. You know the file - it’s the one where your adversary will start sending you “time of the essence” notices while you are out of the office on vacation.

In the back of your mind you think you remember the rules about establishing a ‘law day’ to close, but it’s been a long time since the last soft real estate market and you’d like to refresh your recollection on exactly how it works.

Well, here are some questions and answers that may be helpful:

Question:

If a contract does not specify that “time is of the essence” with regard to closing, what time period applies?

Answer:

Where a contract for the sale of real property does not specify that time is of the essence, either party to the contract is entitled to a reasonable adjournment of the closing date.¹

Question:

Where a contract is silent as to time of the essence for closing, can it be established later on?

Answer:

Yes. After the closing date prescribed in the contract has passed, either party may “declare time of the essence by giving a clear, distinct, and unequivocal notice along with a reasonable time for the other party to act”²

Question:

What constitutes a reasonable time for the other party to act?

Answer:

“[w]hat constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case.”³ Included within the 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.

Courts in New York have upheld 5 weeks⁴, 1 month⁵, 3 weeks⁶ 14 days⁷, 12 days⁸, and even as short as 7 days⁹ as reasonable.

In *Barstow Grace Apts., Inc. v. Merlis*¹⁰ the court held 5 days was not reasonable.

Question:

Once time is of the essence has been established as to closing, does it apply to both parties?

Answer:

Yes. “Once time is of the essence, it is of the essence for both parties.”¹¹ Each party must then tender performance on the law day unless the time for performance is extended by mutual agreement. Further, excluding circumstances where an anticipatory breach has occurred, a purchaser who seeks specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform the contract. In order for the seller of real property to be found in default for failure to provide insurable or marketable title, the purchaser must first tender performance and demand good title.

Question:

Do the concepts of “time of the essence” and a “reasonable time to act or perform” apply only to closing performance in real estate contracts?

Answer:

No. They apply to the performance of all obligations in a real estate contract. In fact, the performance demanded by seller in *ADC Orange, Inc. v. Coyote Acres, Inc.*, 7 NY 3d 484 (2006) did not

deal with closing at all. It involved the contract requirement by purchaser to provide an additional down-payment. The seller attempted to establish a time of the essence date for the purchaser to make this payment. The NY Court of Appeals saw little reason why the same rules that apply to establishment of time of the essence for a closing obligation would not apply to other obligations in a real estate contract as well.

Question:

Does language in a real estate contract like: “no later than” or “on or before” create a time of the essence obligation?

Answer:

No. The New York Court of Appeals in *ADC Orange, Inc. v. Coyote Acres, Inc.* settled this question once and for all.

¹ *3M Holding Corp. V. Wagner*, 166 AD2d 580 (2d Dept. 1990), citing, *Sohayegh V. Oberlander*, 155 AD2d 436 (2d Dept. 1989). See also: *Bardel v. Tsoukas*, 303 AD2d 344 (2003) and *Baltic v. Rossi*, 289 AD2d 430 (2001).

² *Bardel v. Tsoukas*, supra, *Baltic v. Rossi*, supra. See also: *Guippone v. Gaias*, 13 AD3d 339 (2004) and *Rozenfeld v. Triangle Holdings, Inc.*, 11 AD3d 668 (2004).

³ *Zev v. Berman*, 73 NY2d 781, 783 (1988), see also: e.g. *Savasta v. Newport Associates*, 82 NY2d 763, 765 (1993).

⁴ *International Baptist Church, Inc. v. Fortini*, 20 AD3d 507 (2005).

⁵ *Palmiotto v. Mark*, 74 NY 2d (1989).

⁶ *Liba Estates, Inc. v. Edryn Corp.*, 178 AD2d 152 (1991).

⁷ *Michaels v. Flapman*, 23 AD2d 967 (1965).

⁸ *Shannon v. Simon*, 128 AD2d 859 (1987).

⁹ *Oregon Mtn. v. Soules*, 6 AD3d 1193 (2004).

¹⁰ *Barstow Grace Apts., Inc. v. Merlis*, 11 Misc. 3d 1053A (2006).

¹¹ *Stefanelli v. Vitale*, 223 AD2d 361 (1996).