When is the Closing Date?

Roulette Wheel or Handcuffs
The Impact of "Time of the Essence" Provisions on Real Estate Closings

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When it comes to closing dates in real estate contracts, three points need to be stressed:

- "Time of the Essence" (TOE) contracts seek to fix the closing date and create penalties for missing it.
- Absent TOE, "Reasonable Adjournments" of the contract closing date will be allowed.
- "On or Before" and "On or About" provisions should be avoided as confusing at worst and meaningless at best.

I. Time of the Essence (TOE)

If one or both parties want to avoid possible confusion as to when the closing should occur, a provision can be inserted which states that time is "of the essence." In such cases, any party not prepared to close on the given date will be in default, regardless of the reasons. In fact, the court ruled in Kulanski v. Celia Homes, Inc., 184 NYS 2d 234 (2d Dept, 1959) that if the date selected fell on a weekend or holiday, that date would still be held as the date by which closing must occur.

Even if the actual words "time of the essence" are not used, but there is other language implying finality, a deadline, or default by a given date, "essence" will be implied by the courts. This includes those situations where a definite date is given with no "essence" language, but with other words which may give rise to an interpretation of "essence."

What if a date is given in a real estate contract, no "essence" language is used, and that date passed? Believe it or not, time could still be made "of the essence" by a letter sent by one of the parties which:

1. Clearly establishes that time is now of the essence
2. Sets a reasonable time frame for performance
3. States that failure to perform within that time will be a default

The attorney of a party receiving such a letter should create a written record establishing a proposed closing date as unreasonable in order to protect his client in the future.

It is obvious that the party sending such a letter must be certain that he will be able to close by the date given in the letter. Also, behavior suggesting that one has waived notice should be avoided.

II. Non-"Essence" Situations

In those cases where there is no "time of the essence" provision in the contract, the cases indicate that the parties are entitled to a "reasonable adjournment" of the closing date.

According to the Court of Appeals, what is "reasonable" depends on the facts of the case. Factors such as the nature and purpose of the contract, whether or not the parties have acted in good faith, their previous experience and conduct, the odds of harm to any party, and the specific number of days provided for performance will be considered. In Zev v. Merman, 536 NYS 2d 739 (1988) less than one week was seen as reasonable, but in Fowler v. Surf Dive Corporation, 237 NYS 2d 75 (S.Ct. Nassau Cty, 1962), the court stated that two months might be reasonable, but eight probably was not, given the situation in that case.

Needless to say, the absence of an "essence" provision leaves the exact date at which closing must occur literally, "up in the air".

III. "'On or Before" and "On or About" Language

Some contracts will state that the closing will be "on or before" or "on or about" a given date. What is the effect of such language? Cases such as Broido v. Busick, 221 NYS 2d 181 (1961) and O'Connell v. Clear Holding Company, 510 NYS 2d 653 (1987) show that the law is split on the "on or before" language and could interpret "time of the essence" or, conversely, "time not of the essence".

In the case of the "on or about" language, the courts seem to hold those words alone do not constitute "time of the essence" absent additional language pushing in that direction.

Conclusion

Absent a clear "essence" provision in a real estate contract, the actual date at which closing will take place will be very much a moving target. While this ambiguity may not be very attractive to some parties, there are situations where one may not want to be tied by the bonds of the very strict "time of the essence" provision. In the end, it is up to the parties to decide which way to go and, once they do decide, to make sure that their intent is reflected in the language of the provision. Parties should clearly state "time of the essence" when they want time to be of the essence. To play with any other language is to play with confusion. If parties want room to play with, then they can avoid the "essence" provision and go with the "reasonable adjournment" path.

When it comes to closing dates, parties need to "say what they mean and mean what they say". If no "essence" provision is inserted in the contract, then all parties must be aware that the closing date will be on a roulette wheel and "round and round it goes, where it will land, nobody knows."