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Insisting on Time of Essence Closing May Backfire

Guidelines to consider when
deciding whether to assert timing
as an essential component

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Making the date specified for a real estate closing “of the essence” is a time honored tool. It is a doctrine that has evolved over time without a concrete set of rules. There are general guidelines to consider when determining whether to assert — either at the time of contract formation or following the parties’ failure to close on the projected date — that timing is an essential component of a real estate contract. Parties must take care to avoid having a time of the essence notice backfire.

It is widely recognized, where time is not originally made of the essence in a real estate contact, that the time period between delivery of a time of the

essence notice and the date set for closing must be reasonable in relation to circumstances leading up to delivery of the time of the essence notice. The party delivering such notice, however, must ensure that the notice itself is sufficiently specific to enable the recipient to comply, that the sender can perform on the date set for closing, that there are no open issues to be resolved between the date of the notice and the date set for closing, that the sender has not prevented the recipient from being able to perform on the date set for closing, and that, after delivering the notice, the sender does not waive its rights established thereunder by continuing to negotiate an alternative closing date. Unfortunately, as shown in a recent unpublished case, *Farnella v. Brana*, 2007 WL 2827554 (App. Div. Oct. 2, 2007), the party that first asserts a time of the essence closing date can be held in default of the real estate contract when the assertion is invalid and such party subsequently refuses to complete the real estate transaction.

Parties to a real estate contract are obligated to perform their duties within a reasonable period of time following execution of the contract unless otherwise agreed. *In Re Estate of Yates*, 368 N.J. Super. 226, 236 (App. Div. 2004). If the time of performance is material to the real estate contract, then the real estate contract or subsequent amendments thereto should expressly state this understanding. *Gorrie v. Winters*, 214 N.J. Super. 103, 105 (App. Div. 1986). Simply specifying a particular closing date in a contract generally will not make time of the essence, as this date is generally considered a formality rather than a requirement. *Paradiso v. Mazejy*, 3 N.J. 110, 115 (1949).

Generally, for a stated closing date to be considered an essential component of a real estate contract, the real estate contract must clearly establish that the parties understood at the time that a failure to perform on such date, and in some cases even at a particular hour on such date, would result in the failing party’s forfeiture of all rights to enforce its rights under the real estate contract. *Marioni v. 94 Broadway*, 374 N.J. Super. 588 (App. Div. 2005).

While any intent to make time of the essence at the time of contract formation should be expressly stated in the real estate contract, contracting parties should also be aware that, while not common, a court could conclude, based on extrinsic evidence, that the parties

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intended the projected closing date be time of the essence.

In another recent unreported case, *Steliga v. Ostrum*, 2007 WL 1215033 (App. Div. April 26, 2007), the Appellate Division considered, but declined to uphold, a trial judge's decision that a time of the essence requirement could be inferred from the seller's testimony that the purchaser understood that the seller was agreeing to a certain price because of an urgent financial need to close. The *Steliga* court's acknowledgment that it did not "quarrel with the proposition that the intention of the parties to make time of the essence may be shown by persuasive circumstances" leaves open the ability of a New Jersey court to find in the future, based on extrinsic evidence, that contracting parties intended for time to be of the essence.

Even if time is not originally made of the essence in a real estate contract, either party can declare it to be following the date set for closing in the real estate contract when demanding a new closing date, provided that the closing date fixed in the demand notice is reasonable in light of the circumstances and in relation to the time already elapsed. The common practice is to set a new closing date not less than 10 calendar days following the demand date. 13A N.J. Prac., *Real Estate Law and Practice* § 26.192 (2d ed.). However, there is no set "mathematical calculation" and courts will examine three pivotal points in time and their relation to each other in determining whether a new closing date is reasonable: (a) the date originally set for closing; (b) the date notice is given; and (c) the new date fixed for closing. *Finn v. Glick*, 42 N.J. Super. 514, 518-19 (App. Div. 1956). A party, to make time of the essence by demand notice, must ensure that these three dates are reasonable in relation to one another in light of the specific circumstances.

Timing was held unreasonable in *Almeida v. Ward*, 2006 WL2571227 (App. Div., Sept. 8, 2006) (unreported), where the seller served the purchaser with a time of the essence notice setting forth a new closing date two weeks

later, after the purchaser had waited approximately seven months beyond the original closing date for the seller to cause his brother to vacate the property. At that point, the purchaser discovered that his mortgage commitment had expired and that a new appraisal would be required. However, the purchaser was unable to have the appraisal performed because the seller had shut off the utilities at the property and refused to have them turned back on. The court held that the timing of the notice was unreasonable, because several months had passed since the original closing date and the purchaser could not comply with the seller's new closing date due to such passage of time and the seller's actions. A two-week notice period was also held insufficient in *Paradiso v. Mazejy*, 3 N.J. 110 (1949), where two months following the original closing date passed, in part by agreement and in part by inertia, before the seller attempted to set a time of the essence closing date.

New Jersey courts have also held, in certain circumstances, that a party can unilaterally declare time to be of the essence before the closing date set forth in the real estate contract passes if the other party has anticipatorily repudiated the real estate contract. In *Earlin v. Mors*, 1 N.J. 336 (1949) (overruled on other grounds), the purchaser's attorney informed the dual real estate broker three weeks before the closing date set forth in the real estate contract that the purchaser would be unable to complete the purchase due to financial inability. In response, the seller's attorney delivered a time of the essence notice for the original closing date. The New Jersey Supreme Court held that this time of the essence notice was valid. However, it is unclear whether a time of the essence notice would be upheld in similar circumstances in the absence of affirmative notice that one party anticipates breaching the real estate contract.

Where time is made of the essence for a real estate closing date, either in a reasonably timed demand notice or in the original real estate contract, a party to a real estate contract, in order to both

benefit from the doctrine and to avoid being held in breach, must be ready to perform and not have caused the other party to be unable to perform on such date. In *Marioni v. 94 Broadway*, 374 N.J. Super. 588 (App. Div., 2005), the seller's attempt to set a time of the essence closing date was held invalid, because the seller himself had failed to remove substantial debris and otherwise put the property into "broom clean" condition as required by the real estate contract, incorrectly believing that he should be relieved of such obligation after spending thousands of dollars to remove a tenant from the property. In *Cornerstone Management, Inc. v. Corcoran*, 2002 WL 31432746 (App. Div., Oct. 25, 2002) (unreported), the purchaser contracted to purchase the land for development purposes, but the seller retained approval rights with respect to the purchaser's architectural plans. The closing was delayed for several months due to a necessary delineation of wetlands, unanticipated when the real estate contract was signed, after which the seller attempted to set a time of the essence closing date for two weeks hence. This was not reasonable because the seller had not yet approved the buyer's architectural plans, which meant that the buyer had not yet been able to apply for and obtain septic system design approval and building permits to satisfy its own real estate contract contingency.

In a case where the time for closing of a real estate contract is made of the essence by subsequent notice from one party to the other, any open issues should have been resolved prior to delivery of such notice. In *Farnella v. Brana*, 2007 WL 2827554 (App. Div., Oct. 2, 2007) (unreported), the sellers were still working to resolve a mortgage that had previously been satisfied but not discharged as of the closing date set forth in the real estate contract — the closing date was not time of the essence. The purchasers promptly sent a 10-day time of the essence notice to the sellers, even though the parties had not yet resolved responsibility for removal of dead trees and

limbs at the property. On the 11th day, when the sellers had agreed to remove the dead trees and branches but were still resolving the open mortgage issue, the purchasers declared the sellers to be in default and demanded return of their deposit monies. Three days later, when the open mortgage issue had been resolved, the sellers sent a time of the essence notice to the purchasers, setting closing for 17 days later. Once this date had passed, the sellers declared the purchasers to be in default of the real estate contract and, months later, sold the property to a third party.

The court held that the purchasers' time of the essence notice was ineffective, because 10 days was not a reasonable period in which to resolve responsibility for the dead trees and branches and to arrange for removal. Consequently, the purchasers were held to have breached the real estate contract when they refused to close on the subsequent

date set by the sellers and were held liable to the sellers for monetary damages. In this case, the purchasers' reliance on a time of the essence notice was misplaced and they suffered monetarily as a result.

A party that intends to rely on the time is of the essence doctrine must also be careful to avoid waiving the requirement that the real estate transaction close on the set date. In *Cornerstone*, the previously discussed case in which the court held that the seller's time of the essence notice was invalid because the seller had yet to approve the purchaser's architectural plans, the court further held that, even if such notice had been valid, the seller waived any rights that would have been created in his favor by continuing to negotiate an acceptable closing date with the purchaser. In fact, it has been held in New Jersey that a time of the essence requirement in a real estate

contract can be waived by the parties' conduct, even if the real estate contract states that any provision thereof can only be modified in writing. *Salvatore v. Trace*, 109 N.J. Super. 83 (App. Div. 1969).

The time of the essence doctrine has evolved in New Jersey through the resolution of disputes as to its application. However, judicial decisions show that a totality of the circumstances must support a party's reliance on this doctrine and that any such reliance can be misplaced if the timing is unreasonable or the asserting party has caused a delay. Therefore, to avoid having the doctrine backfire, the party asserting that the other party has breached must be certain that the circumstances support its assertion. Otherwise, as exemplified by *Farnella*, such party could ultimately be held in breach of the real estate contract and liable to the other party for its damages. ■