



Time-of-the-Essence Closing Dates and Adjournment Rights

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When entering into a contract to purchase residential property in New York City, be it a cooperative or condominium apartment or residential house, one of the most important issues for both the purchaser and the seller is the closing date.

The majority of closing dates provided in residential transactions are “on or about” dates. These closing dates are simply “target” dates from which certain deadlines are calculated. In New York, the courts have held as precedent that either party to a transaction has the right to a “reasonable adjournment period” of the closing date. While it is widely accepted and common practice in the industry that this “reasonable adjournment period” is to be thirty (30) days from the date provided for closing in the contract, “reasonableness” is determined on a case-by-case basis. For this reason, the parties must be advised by their attorneys prior to entering into a contract as to what events, or nonevents, may cause delays to the expected closing timeline.

A party’s reason for needing the adjournment period is specific to each transaction. Sellers commonly will postpone the closing if they have not yet found or are unable to move into a new home (whether renting or purchasing). A purchaser may postpone the closing in the event that the purchaser is obtaining financing and the lender is not “cleared to close” or if the purchaser has a lease that is not yet expiring and does not want to carry two properties simultaneously.

Sometimes a delay in closing is outside the control of either party. In the sale of a co-op apartment, the co-op board must approve the purchaser. The standard form of the co-op contract addresses the issue of the board’s failure to issue its approval prior to the closing date provided in the contract. It states that in the event that the board’s approval is not issued prior to the date set for closing in the contract, the closing date is automatically adjourned for thirty (30) business days to give the board time to make its decision.

A purchaser or seller who is ready, willing and able to close but the other party refuses to close within the thirty- (30-) day reasonable adjournment period may deliver to the party refusing to close a time-of-the-essence notice. This notice, setting the closing as being time of the essence, must contain three elements to be considered valid: (1) the notice must be clear, distinct and unequivocal. This means that the letter must clearly state that the party declaring time to be of the essence is ready, willing and able to close and the other party’s failure to close will cause harm to the declaring party; (2) the notice must inform the other party that their failure to perform by that specific date will be considered to be a default of the contract; and (3) the notice must fix a reasonable time within which to perform. Again, as with the adjournment period, there is a “reasonableness standard” specific to each transaction, but it is common that ten (10) days’ notice is sufficient for purposes of setting a time-of-the-essence closing. In the event that the closing does not take place on or before the date set forth in the time-of-the-essence notice, then the nondefaulting party could seek the remedies provided in the contract pursuant to the default. For a purchaser in default that may mean the cancellation of the contract and forfeiture of their down payment (usually 10% of the purchase price), which is then delivered to the seller as liquidated damages. For a seller defaulting that could mean a cancellation of the contract or a forced sale, called specific performance, in addition to the recovery by the purchaser of expenses related to the seller’s default.

It is imperative to explain to purchasers and sellers at the onset of the transaction that the date of closing specified in the contract is likely not going to be the actual date of closing and to explain to each the rights of adjournment both they and the other party have pursuant to law. ■

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