CORPORATE MATTERS:

DON'T BE LATE – TIME IS OF THE ESSENCE

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Time Is of the Essence

When purchasing New York real estate, whether a commercial building or residential property, choosing the correct words with which to provide for the closing date in the contract of sale can make the difference between a smooth closing and a calamitous default. This article discusses the nuances of various terms of art so that a purchaser can protect its contract deposit and position as contract vendee.

New York is unusual in that a contract may recite a specific date for the closing of title but without the addition of certain talismanic words it is not the "Law Date" with regard to the property, meaning the date on which title must close. In order for a closing date specified in a contract of sale to become a Law Date, the specified date must be qualified by the phrase time is of the essence. "Time Is of the Essence" is a term of art that renders the specified closing date an ironclad date. Consequently, when Time Is of the Essence a purchaser's failure to close on a specified date will result in default; by the purchaser and typically the loss of its contract deposit.

Thus, a closing scheduled for "on," or "on or about," or "on or before" or "in no event later than" a specified date does not lock-in the parties to close on that date. Such phrases assure that the parties will be afforded a reasonable time within which to perform the closing, beginning on the specified date. Generally, utilization of one of the foregoing phrases is regarded as permitting a 30-day adjournment of the closing date set forth in the contract.

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Often, however, the seller will attempt to set an initial closing date or agree to adjourn a closing date only if Time Is of the Essence with regard to the new date. The purchaser must beware because the new date will be set on an iron-clad basis.

So what happens when a purchaser is confronted with a seller who demands a Time Is of the Essence closing date? There are various strategies which can be implemented by the purchaser to avoid a default if it is not ready to close on the specified date.

The simplest arrangement would be to build an adjournment of the closing date into the contract itself. Under this scenario, there would be an initial closing date, followed by a 30-day extension of the closing date for which Time Is of the Essence would apply.

Alternatively, a purchaser could build an adjournment of the closing date into the contract accompanied by an additional deposit toward the purchase price payable

on a certain date before the initially scheduled closing date. That adjourned date could be identified as being Time Is of the Essence, or the contract may provide for additional adjournments with additional deposits, and designating the final adjourned date as a date for which Time Is of the Essence. An interesting twist on this scenario results if there is no Time Is of the Essence condition attached to the `date on which the additional deposit is to be delivered. In such an event, since the initial date was not a Law Date, the purchaser could argue that even though no additional deposit were timely delivered, the purchaser would still be entitled to a 30-day adjournment, since the initial closing date was not specified as a date for which Time Is of the Essence.

That said, it bears emphasizing that the term Time Is of the Essence is one which is very strictly construed given the harsh penalty that can be imposed upon the purchaser. Consequently, there are circumstances in which even the presence of Time Is of the Essence language may not automatically result in a default by the purchaser if it does not close on the Law Date.

Such a situation may arise when a purchaser does not close on a scheduled date and, rather than agree to adjourn the closing, the seller delivers a letter to the purchaser unilaterally declaring a Law Date closing date. Should this occur, it behooves the purchaser to carefully examine the letter which may not satisfy all of the criteria required to trigger a default by the purchaser in the event it does not close by the purported Law Date.

New York case law requires that for a Time Is of the Essence notice to be effective, it must:

- Set forth a clear, unequivocal notice that Time Is of the Essence;
- Afford the purchaser a “reasonable time” within which to close under the circumstances; and
- Advise that the failure to perform on the scheduled closing date and at the time and place specified will result in a default under the contract of sale and a retention of the deposit by the seller.

In the event that the seller’s letter does not set forth all of these items, it is imperative that the purchaser object to the letter, depriving the seller of a claim that the failure to object constituted a waiver by the purchaser of the insufficiency of the letter.

Alternatively, the conduct of the parties may constitute a waiver of the Time Is of the Essence provision. For example, if the parties agree to schedule the closing on a date subsequent to the expressed Law Date, the Time Is of the Essence provision is deemed waived, and said later date will not automatically be a Time Is of the Essence date unless it is expressly stated to be one. A closing scheduled before the Time Is of the Essence date is also deemed a waiver. Even correspondence between the parties agreeing to adjourn the closing date in the event that a certain condition is satisfied may be deemed a waiver of the Time Is of the Essence provision.

While this article is drawn from the perspective of a purchaser being confronted with a Time Is of the Essence provision, a contract may be drafted such that both purchaser and seller are bound by the provision. However, since most contracts

provide the purchaser with a remedy of specific performance, *i.e.*, allowing it to bring an action to force the seller to sell the property pursuant to the contract, a Time Is of the Essence provision does not afford the purchaser with any greater remedy than it would have under the contract. Moreover, it would almost certainly be more efficient to afford the seller an adjournment than to claim default. A claim of default is effective only if it triggers the commencement of a lawsuit for specific performance to obtain title to the property. It is not self-enforcing in the absence of legal action.