

Important Elements of The Real Estate Transaction: The “On or About” Closing Date and “Time of the Essence” Letter

By John Dolgetta, Esq.

Real estate closings in parts of New York State do not always go as smoothly as one would like. In many other states, real estate transactions are handled primarily by the real estate agents, and not the attorneys, who negotiate the offers between sellers and buyers and primarily deal with the preparation of contracts. Title companies and escrow or settlement agents usually facilitate the actual closing process. In these “escrow states,” the closing process is many times quicker, usually occurring within 30 to 60 days.

The Agent and Real Estate Attorney in New York

In New York, however, the real estate agents negotiate the initial offer and counter-offer phase, and once the seller accepts a buyer’s offer, the agent prepares the memorandum of sale which the real estate attorneys use to prepare contracts. The attorney then handles the rest of the transaction. The closing process in New York takes customarily 60 to 90 days, if everything proceeds smoothly. It is not uncommon, however, for a closing to extend beyond the 90-day or even the 120-day range, if unexpected issues arise.

While there are different issues that can cause delays, some delays arise simply from the fact that: (1) attorneys engage in extensive negotiations regarding the specific terms (including, surprisingly, the “closing date”) to be included in the contract of sale; (2) many attorneys do not use the standard form of contracts that have been jointly prepared and approved by the local Bar Associations and REALTOR® associations; and (3) most attorneys include extensive riders in order to protect the interests of their respective buyer or seller clients.

Therefore, it is very important for all of the parties involved, especially real estate agents and attorneys (and even mortgage representatives), to understand and be able to explain to clients critical components of the closing transaction, the “Closing Date” and the customary time frames in a New York real estate transaction.

Customary Closing Time Frames

It usually takes attorneys anywhere from seven to ten days to prepare, negotiate and finalize contracts for signature by the parties. Once the contract is signed, it takes approximately 30 to 45 days for the buyer to obtain a mortgage commitment from the lender. Then, upon the issuance of a mortgage commitment (provided the appraisal contingency has been met), it normally takes the lender approximately 20 to 30 days to issue a “clear to close” or “CTC”. Even when all of this has occurred, new regulations issued by the Consumer Finance Protection Bureau (the “CFPB”) in October, 2015 require that a closing date can only be scheduled on a date that is at least three (3) business days after the borrower has been provided with, reviewed and approved the Closing Disclosure or “CD”. Therefore, if all goes smoothly, a closing can usually occur within 60 to 75 days after the contract has been fully executed by the seller and purchaser. However, not all real estate transactions proceed as planned.

What Happens When There is Delay or a Default?

While many of the transactions do eventually close (unless a buyer is unable to obtain financing or an appraisal comes in too low), there are some that do not and end up in a dispute or litigation. Many times, before litigation is commenced, however, the attorney for one party will send out a “Time of the Essence Letter” (“TOE Letter”) if the other party is unable to close within a “reasonable” time after the “Closing Date”. Real estate agents are usually not involved when a TOE Letter is sent, however, it is important for them to understand the wishes of the parties when negotiating the “Closing Date” that is to be included in the contract of sale, because many times this can avoid issues later in the process.

The “On or About” Closing Date – What Does It Mean?

In New York, unlike many other states, the “Closing Date” contained in the contract, especially if the words “on or about” precede it, is a fluid date. It is rare that a Closing actually occurs on the date specified in the contract. It is imperative that both the real estate agent and the real estate attorney understand the “on or about” standard so that they can explain it to their clients and manage the expectations of their clients rather than add to an already stressful process.

For instance, a buyer who is in a rental situation needs to know that he or she may be required to extend the lease or make other arrangements. Similarly, sellers must be aware that they may need to move out of their house before they may be ready to do so, if they have delayed beyond the closing date for an unreasonable amount of time. The TOE Letter is an important tool that attorneys use, although sparingly, when buyers or sellers unreasonably delay and fail to close within a “reasonable time” (discussed below) after the “on or about” date specified in the contract. It is important, however, to understand that the TOE Letter is not the “silver bullet” and once one is sent to an opposing party, that it may end up delaying the closing even more.

The “Time of Essence” Letter: *11-01 36 Avenue, LLC v. Quamar*

In a recent decision, *11-01 36 Avenue, LLC v. Quamar* (704864/2016, NYLJ 1202775695126, at *1 (Sup., QU, Decided Nov. 28, 2016)) (*see* <http://bit.ly/2pdPoOZ>), the New York Supreme Court provides a useful analysis of the TOE Letter and the requirements for sending one to an opposing party. In this case, the plaintiff entered into a contract of sale with the defendant on December 17, 2015 to purchase commercial property. Shortly thereafter, the purchaser’s attorney delivered a title report which showed judgments and violations in the amount of \$36,893. The sellers refused to pay off the judgments and the liens arguing that the contract did not require them to do so. The contract of sale provided for a closing date of “on or about January 29, 2016.”

The purchaser’s attorney sent a TOE Letter to the seller’s attorney on March 11, 2016, which the seller’s attorney rejected. On March 26, 2016, the sellers attempted to renegotiate a higher price for the purchase of the property by requiring the purchaser to pay off the judgments

and the liens. The sellers claimed that the judgments and liens were “title defects”, for which, according to the sellers’ interpretation of the contract, they had limited responsibility. However, the purchasers claimed that the judgments and liens were “encumbrances” which the sellers were required to clear according to their interpretation of the contract.

On March 30, 2016, the purchaser’s attorney sent another TOE Letter to the seller’s attorney by e-mail and Federal Express. The seller’s attorney quickly responded and stated that the TOE Letter, “...received via email on March 30, 2016 is hereby rejected as untimely, improper and not in accordance with the contract of sale herein.” The purchaser subsequently commenced the lawsuit against the seller for breach of contract and specific performance. The Seller moved for summary judgment arguing that the TOE letter was defective, arguing, among other things, that the purchaser failed to give the sellers “...a reasonable amount of time to perform their obligations under the contract.”

The Basic Requirements Necessary to Issue a “Time of the Essence” Letter

The court explained that where an initial contract of sale for real property “...does not make time of the essence, a party may subsequently give notice making time of the essence.” The notice making time of the essence must: “(1) provide clear, distinct, and unequivocal notice to that effect, (2) allow the other party a reasonable time in which to perform his [or her] obligations, and (3) tell the other party that a failure to perform by the designated date will be considered a default under the terms of the contract.” It is important to note that the “time of the essence” standard is not a statutory standard but rather one established by the courts and case law, and is constantly changing depending on each case that is decided by the courts.

Does “Reasonable Time” Mean 30 Days? Not Always!

Most real estate agents and attorneys believe that a “reasonable time” or the “on or about” standard means thirty (30) days. However, that is not the case! The Court in *Quamar* explained that a TOE letter must permit “...the other party a reasonable time in which to act...” and that “[w]hat amounts to a reasonable time to perform depends on the circumstances of the case.”

Whether we are dealing with a TOE Letter or an “on or about” closing date, the closing date and closing time frames can quickly change and extend far beyond the “on or about” closing date depending on the circumstances. It is important for real estate agents to explain this to their clients early on when they are negotiating the closing date with the opposing party.

In the *Quamar* case, the TOE Letter stated that the contract’s original closing date was to be on or about January 29, 2016. The purchaser’s attorney informed the seller’s attorney of title issues on January 12, 2016. The Court points out that the seller had “...nearly three months to clear the objections, which were merely obtaining payoffs and lien releases.” The court found that the sellers had failed to demonstrate that a “...determination of reasonableness can be made as a matter of law,” and therefore, the court denied the sellers’ motion for summary judgment allowing the purchaser to move forward with the case. *Quamar* shows the importance of a TOE Letter and that one party must provide the other party with a “reasonable opportunity” to

perform. Therefore, in some instances, a somewhat longer period of time may be necessary to close if the parties need additional time to fulfill their contractual obligations.

Managing Expectations - What Should We Tell Clients?

The closing attorney and real estate agent should make it clear that while many times a real estate transaction will close within a few weeks after the date in the contract, the “on or about” closing date is not set in stone and very rarely provides the finite timeframes that most people would expect in a transaction as important as this. And, even when a TOE Letter is sent, it too is subject to the “reasonable time” standard - which means that a closing date may not happen for a while regardless of the contract date or the “Time of the Essence” date set forth in the TOE Letter.

It is important for the agent and attorney to ask the client at the initial stages of the transaction and determine if there are any important circumstances, such as another sale or purchase, the existence of a lease that may be expiring, etc. before an appropriate closing date is agreed upon and set forth in the memorandum of sale and eventually the contract of sale.

Another common issue, which comes up after the contracts have been signed, is where the buyers “lock in” their interest rate. The rate lock-in usually ends up expiring before the “on or about” closing date or within a short time after it. This adds pressure on everyone and it is due mainly because the buyer is not informed of the “on or about” date or “reasonable time” standard. The buyer is then usually required to extend the rate lock at a considerable cost. This is where the mortgage brokers need to be made aware of the fluidity of closing dates.

A main goal of the real estate professional is to manage expectations and explain that an “on or about” closing date could mean that a client may not be able to close for 30, 60 or even 90 days after the date specified in the contract, depending on the specific circumstances of each case. The anxiety of the parties can be reduced considerably if they are all made aware of the “reasonable time” and “on or about” standards. While it may be impossible to avoid delays, if the parties understand that delays do and will occur and that the time frames in the contract relating to the closing date are projected, estimated dates rather than hard and fast dates, it will make the process much smoother with less adversity, even though it may still take longer than the parties would like.

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