

# Standing the Test Of 'Time Is of the Essence'

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Real estate purchase and sale contracts have included the magic language, “Time is of the Essence” (TOE), seemingly since time immemorial. This term of art has been imbedded in the lexicon of a multitude of commercial contracts to an indelible extent and has earned general acceptance and use in our culture. For example, “Time is of the Essence” is the name of a jazz album (Michael Brecker), and you do not see many records named after real estate contractual provisions.

Practitioners should be mindful, however, of the meaning of TOE and the significance of its absence from a contract. In 1989 and 2001, the lead author of this article co-wrote New York Law Journal articles discussing and interpreting New York law governing TOE provisions in real estate contracts. Recent decisions

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interpreting TOE indicate a consistency of interpretation, but with certain wrinkles of which attorneys should be aware.

### Is the 'T' in TOE Reasonable?

A TOE clause in a purchase/sale contract commonly provides that if the parties do not close on the specified date, or “law date,” then the party who is not ready, willing and able to close will be in default of the contract. When the contract does

not state that time is of the essence, New York law generally holds that the defaulting party (usually purchaser) is entitled to a reasonable adjournment of the closing date. Once the closing date set forth in the contract passes, either party may unilaterally declare TOE by providing the other party with the following: (1) clear, distinct, and unequivocal notice that time is now of the essence; (2) reasonable



time for the other party to act; and (3) notification that failure to appear or perform on the closing date is a default under the terms of the contract. *Nehmadi v. Davis*, 63 A.D.3d 1125, 882 N.Y.S.2d 250 (2d Dept. 2009). That “reasonable” notice period is generally assumed to be 30 days. However, recent case law casts some doubt on that.

When determining a “reasonable time,” courts will look at the facts

and circumstances of the particular transaction, and will consider: (1) the nature and object of the contract; (2) the conduct of the parties; (3) presence or absence of good faith; (4) the experience of the parties and existence of prejudice; and (5) the actual number of days provided in the notice. *184 Joralemon v. Brklyn Hts. Condos*, 117 A.D.3d 699, 985 N.Y.2d 588 (2d Dept. 2014).

In *2626 Bway v. Broadway Metro Associates*, 85 A.D.3d 456, 925 N.Y.S.2d 437 (1st Dept. 2011), the First Department held that three weeks' notice was a reasonable time to set a TOE real estate closing. There, seller contracted to sell property with a closing date set to occur within six months following contract execution. As the closing date neared, buyer sent a letter to seller requesting a two-month adjournment of the closing date. Seller responded to the request the same day and instead proposed a three-week adjournment with a "time is of the essence" clause. Buyer objected to the proposed closing date and the TOE designation clause and proposed another closing date without a time is of the essence clause. Seller ignored the objection and when buyer failed to appear at the closing three weeks later, seller declared buyer to be in default and retained the down payment. The court upheld the loss of the deposit, relying on the fact that the original contract contained a six-month period in which to close, and that an additional three weeks on

top of the extended contract period was reasonable.

Conversely, the Third Department in *Malley v. Malley*, 52 A.D.3d 988, 861 N.Y.S.2d 149 (3d Dept. 2008), held that 21 days' notice in a "time is of the essence" declaration was not reasonable under the circumstances. In *Malley*, as part of their judgment of divorce, the parties entered into an "opting-out agreement" wherein the husband was required to place approximately \$75,000 in escrow to be used to pay down the outstanding mortgage on the marital home. The wife

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had the option of either attempting to refinance the mortgage in her name alone by a certain date or to receive the net proceeds from the sale. The wife obtained a mortgage commitment for the refinancing by the specific date, and the husband in turn notified the wife by letter that closing was set for 21 days following the date of that letter, and that time was of the essence. When the wife failed to appear at the closing, the husband moved to compel the sale of the residence, and the wife cross-moved to compel the husband to attend the closing for the refinancing. Under the circumstances, the

court held that the wife had indeed attempted in good faith to obtain the mortgage commitment and that the husband was aware of the wife's difficulties in satisfying the lender's conditions. Furthermore, the court found that since the wife's failure to obtain refinancing would absolve the husband's responsibility of paying increased maintenance to the wife, he had an incentive to frustrate the refinancing. The court found that the law date selected in the husband's letter was unreasonable, and his letter failed to make the closing TOE.

Many purchase and sale contracts, commercial leases, and financing documents include a general provision, often in the "miscellaneous" section at the end of the instrument, providing that all obligations of the purchaser, tenant, borrower or guarantor are "of the essence." Direct case law was not found on whether such a general, conclusory clause would be applied to specific contractual obligations in the instrument. However, given the well-established precept that the law abhors a forfeiture, it is advisable that the TOE clause be included in the particular contract section (and bolded, capitalized and underlined) in which the obligation is specified, such as the closing date or renewal option deadline, rather than in a "catch all" provision.

### The Magic Words

Although expressly using the words "time is of the essence" is

good drafting practice to avoid any misunderstanding, a contract need not expressly use those magic words in order to acquire the desired legal effect. For instance, in *Jannetti v. Whelan*, 131 A.D.3d 1209, 17 N.Y.S.3d 455 (2d Dept. 2015), the Second Department, held that a clause providing that the contract would be “null and void” if closing did not occur on or before a specific date, was sufficient to make time of the essence. In *Jannetti*, buyer entered into a contract with sellers to purchase real property for \$6,050,000. To fund the purchase, buyer was to enter into a purchase money mortgage with sellers for a portion of the purchase price. The contract provided that closing was to occur on Dec. 24, 2010, and that if buyer failed to close on or before that date, the “contract shall become null and void and [seller] shall retain the deposit.” On December 3rd, sellers advised buyer by letter that they were prepared to close subject to buyer’s submission of financial information necessary for the purchase money mortgage. The closing date passed without a closing, and sellers sought to retain the down payment as damages. Buyer subsequently sued sellers for specific performance alleging that seller’s letter constituted an anticipatory repudiation of the contract. Crucial to the court’s decision was the “null and void” provision if buyer failed to close on the specified date,

while simultaneously notifying the buyer that such failure would jeopardize the return of their deposit. The totality of the language was sufficient to make the stated closing date strictly enforceable, as if “TOE” had been specified.

Sometimes, using the magic words is not successful. If delivered before the contractual performance date, unilateral notice of time is of the essence is premature and ineffective. For example, in *Baltic v. Rossi*, 289 A.D.2d 430, 735 N.Y.S.2d 148 (2d Dept. 2001), the contract stated that closing would take place on June 30th, but did not declare that time was of the essence. In response to seller’s request for a one month adjournment of the closing date, buyer sent a letter to seller on June 1st, characterizing the adjournment request as an anticipatory breach and declared that time was now of the essence. The closing never occurred and seller retained the down payment as liquidated damages. The court held that the buyer was not entitled to declare that time was of the essence before the date set forth in the contract.

### **TOE and Equitable Relief**

Courts will enforce TOE clauses as to non-closing obligations with the same exactitude. In *Trieste Group v. Ark Fifth Avenue*, 13 A.D.3d 207, 787 N.Y.S.2d 258 (1st Dept. 2004), the parties entered into a 10-year sublease, which provided that “the term of this

sublease may be renewed for one (1) additional five (5) year term ... providing that the Lessee ... must give the Lessor written notice that the Lessee is exercising its option to renew on or before [a date certain] which time is hereby made of the essence of this sublease.”

On or about the deadline, lessor notified lessee that due to its failure to timely exercise the renewal option, the sublease would expire by its terms. Lessee quickly attempted to exercise the renewal option arguing that it was entitled to equitable relief due to the substantial improvements it made to the premises during the term. The Appellate Division affirmed the trial court’s finding that the option to renew was TOE and modified the trial court’s findings by holding that since only \$67,000 worth of improvements were made after the initial build-out, “the improvements made by [lessee] did not warrant equitable relief for [lessee’s] failure to exercise its renewal option in a timely manner.” Query whether the decision would have been different if the value of the improvements was more substantial, perhaps affecting the analysis of the equities of the situation.

In *ADC Orange v. Coyote Acres*, 857 N.E.2d 513, 7 N.Y.3d 484 (2006), the Court of Appeals held that the phrase “in no event later than” was not sufficient to make time of the essence in connection with an additional installment payment as mandated under a contract of

sale. In *ADC Orange*, the contract for the sale of land required that the buyer make an interim payment of \$250,000 upon the later occurrence of two events, “but in no event later than Dec. 31, 2001.” The contract contained no TOE clause and did not provide that the buyer’s failure to make the interim payment by Dec. 31, 2001 would constitute a default. On Dec. 26, 2001, seller sent buyer a fax reminding it of the additional payment required under the contract to “be made no later than Dec. 31, 2001.” The fax, likewise, did not contain the “magic words” of TOE, nor did it provide that failure to make the payment would trigger a buyer default. Buyer acknowledged the interim payment requirement as of Dec. 31, 2001 and informed seller that its principal was out of the country and that it would transfer the funds upon his return on Jan. 14, 2002. On Jan. 10, 2002, seller wrote to buyer informing him that seller considered buyer in default. Buyer responded the next day by enclosing a \$250,000 check and insisting that the delay in making the payment did not constitute a default under the contract.

After several months of failed negotiation attempts, buyer brought an action seeking specific performance of the contract. Both parties moved for summary judgment; the Appellate Division held that buyer’s “late payment constituted a material breach of the contract, entitling [seller] to keep

the down payment.” The Court of Appeals, however, reversed determining that whether the late installment payment constituted a material breach depended on whether time was “of the essence” with respect to that payment. Applying the long held precedent that “mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract,” the court concluded that there was “no reason why the same rule should not be applied ... with respect to the installment payment.”

In *Imperatore v. 329 Menahan Street*, 130 A.D.3d 784, 13 N.Y.S3d 526 (2d Dept. 2015), the parties entered into a contract to sell real property in which the closing date was set for Oct. 30, 2013 and provided that the seller was to retain the down payment as liquidated damages in the event of a buyer default. On Nov. 8, 2015, seller sent a letter to buyer informing him that closing was scheduled for Dec. 3, 2013, that time was of the essence and that seller would be in default if the closing did not occur on that date. Prior to the December 3rd closing date, seller sent email to buyer offering to extend the closing date for additional consideration. Buyer did not respond to the email. When buyer failed to appear at closing, seller notified buyer that it was declaring buyer in default and was retaining the down payment as liquidated damages.

Buyer argued that the seller’s email offering to extend the closing date voided the time is of the essence declaration. The Second Department, reversing the trial court, held that seller had established that it was ready, willing and able to perform on the law day and that buyer failed to proceed with the closing. The court also held that there existed “no evidence of any post-closing negotiations that might have estopped the seller from asserting that the buyer was in default.” In *Imperatore*, the court did not find any grounds for asserting equitable relief to assist buyer from avoiding the harsh impact of TOE.

## Conclusion

The immutability of TOE could be as well-settled a proposition as there is in real estate contract law. There may be factual issues as to whether it is properly invoked, but once recognized, parties defy it at their peril.