



## **Enforceability of time-of-the- essence clauses in N.Y. and N.J.**

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Enforceability of time-of-the-essence clauses in real estate contracts and amendments thereto in N.Y. and N.J.

### **New York**

"In a contract for the sale of real property in New York, it is well-settled that time is not assumed to be of the essence unless the parties have specifically so stated." *In re: Belle Harbor Washington Hotel, Inc.*, 4 Misc. 3d 1008(A), 5 (Queens Co. 2004). However, a clear and unambiguous time-of-the-essence clause in a real estate contract governed by New York law will be enforced. *Sherman v. Real Source Charities, Inc.*, 41 A.D.3d 946 (3d Dep't 2007) (holding that time-of-the-essence clause was enforceable even though it was contained in a different section of the original contract than the closing date). And this is true even if the time-of-the-essence clause is contained in an amendment to the contract and the original contract contained a cure provision. See *D&L Holdings, LLC v. RCG Goldman Co., LLC*, 287 A.D.2d 65, 67 (1st Dep't 2001); *Main Highway Realty Corp. v. Kravitz*, 22 Misc. 2d 903, 903 (Suffolk Co. 1960).

"Where . . . there is no contractual provision making time of the essence, either party may subsequently give notice to that effect so long as the notice is clear, distinct, unequivocal, and fixes a reasonable time within which to perform." *76 North Associates v. Theil Mgmt. Corp.*, 132 A.D.2d 695 (2d Dept. 1987) (holding that four days of notice was reasonable given the prior one-month extension to close).

And note that a general cure period for defaults does not apply to a time of the essence closing obligation. In the *Belle Harbor Washington Hotel* case the original contract contained a time-of-the-essence clause and a general 15-day cure provision which was inapplicable to defaults due to the nonpayment of money only. Despite receiving 15 days notice, the buyer failed to close by the law date, and the buyer argued that the cure provision provided extra time to close. The court held for sellers: "The court...rejects the interpretation of the default provision...which would require the sellers to give the purchasers a 15-day cure period after the law day, effectively extending the law day by 15 days and rendering the time-of-the-essence date in both the contract and the time of the essence notice a nullity."

### **New Jersey**

Likewise, N.J. courts have enforced time-of-the-essence clauses contained in real estate contracts so long as they are "clear and unambiguous." See *259 Holdings Co., LLC v. Union Dry Dock & Repair Co.*, 2007 WL 3274272 (N.J. Super A.D. 2007). A time-of-the-essence clause is enforceable even if it is contained in a stipulation executed by the parties subsequent to the original contract. *Brinn v. Mennen Co.*, 5 N.J. Super. 582 (N.J. Super Ch. 1950). As noted in *259 Holdings*, the primary issue is not whether the time-of-the-essence clause was contained in the original contract, or by contrast an amendment, but whether the plain language in the agreement is clear. See *259*

Holdings, Co. LLC, 2007 WL 3274272 at 3-4.

Similar to N.Y., N.J. courts have held: "[w]here time is not of the essence of the original contract, it may be made so by later notice but one of the essentials of such notice is that the time then allowed must be reasonable." *Paradiso v. Mazejy*, 3 N.J. 110 (N.J. 1949) (holding that the time-of-the-essence notice was not reasonable). A court should consider: "(1) the time originally fixed for performance; (2) the time the notice is given; and (3) the new deadline fixed by the notice." *Farnella v. Brana*, 2007 WL 2827554, 4 (N.J. Super A.D. 2007). Additionally, "the courts look at the time that has passed since the contract was made and the harm to the noticing party if the closing is delayed further." *Id.* at 4 (holding that the seller's notice period of only 10 days was unreasonable given the seller's failure to perfect title).

In both New York and New Jersey, a time-of-the-essence clause agreed upon by the parties is enforceable even if it is contained in an amendment to the contract. Moreover, in both states, a party, unilaterally, may specify a closing date, time being of the essence, so long as the notice period is "reasonable" given all of the circumstances. And in New York, at least, the case law indicates a generic entitlement to notice of a default and an opportunity to cure does not apply to a failure to close on a time-of-the-essence closing date. Although we found no cases in New Jersey on this particular point, if you assume the benefit of a notice and cure clause despite the time-of-the-essence closing obligation, we believe that you do so at your own, substantial risk.

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