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# N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association

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# Message from the Section Chair

I am writing this message on the last day of November, having just finished a wonderful weekend with family. In that vein, I hope you all had the chance, and took that chance, to enjoy Thanksgiving with family and friends.

Similarly, due to the publication schedule for this *Journal*, I can only express my hope that you all had a wonderful holiday season. That said, I certainly wish you all a happy, healthy and prosperous New Year.

Following is a report on a few Section activities. In July, we created a Bylaws Task Force, capably and efficiently chaired by Karl Holtzschue. That group reviewed the Section bylaws and produced a report suggesting a number of revisions needed to allow the Section to operate more efficiently and consistent with its bylaws.

This report, with minor revisions, was adopted by the Executive Committee at its October 17, 2015 meeting, and will be circulated to the Section and voted on at the Annual Meeting on January 28, 2016.

Sincere thanks to Karl for his outstanding job and thanks to his task force members, David Berkey, Richard Fries, Brian Lustbader, Ben Weinstock, Larry Wolk and Dan Zinman for their contributions.

In my last column, I failed to acknowledge that Joe Walsh has been appointed as a delegate from the Section to the NYSBA House of Delegates, joining Steve Alden, Michelle Wildgrube and Sam Tilton. In addition, Nancy Connery has been appointed as our Alternate Delegate.

As a Section, we are expending considerable efforts on law students who may be interested in a real property practice. Our Student Affairs Committee, under the leadership of Ariel Weinstock, and Shelby Green and Dave Berkey, is continuing with the following initiatives:

- The student intern program continues to thrive. There are now eight law schools participating in this program, which allows law students to join law offices and legal departments as student interns, providing them with an introduction to the actual practice of real estate law, exposing them to networking opportunities and exposing law firms to many talented students. To date, sixteen law firms and businesses are participating in this program. Please contact any one of the chairs of this committee for further information as to how you or your firm can join this effort.

- The Section has sponsored two scholarships, each in memory of an outstanding New York State real estate lawyer, both of whom were former Chairs of the Section. There are scholarships of $5,000 each in memory of Lorraine Power Tharp and Melvyn Metzner. Through these scholarships, funds are made available to deserving law students. These scholarships are available to law students attending any of the New York State law schools. Further information and applications are available from the New York State Bar Foundation. Although applications for this coming school year are closed, I encourage you to publicize the availability of these scholarships to any law students with whom you come in contact.

- Recently, Ariel Weinstock and Spencer Compton attended a presentation and reception at Brooklyn Law School. They, as alumni of the school, active Section members and fine examples of real estate law practitioners, were able to meet with students to discuss the realities of real estate law practice and introduce the students to RPLS activities and benefits.

  The committee is looking for alumni of the New York State-based law schools who would be willing to participate in similar programs with current students interested in the practice of real estate law. Again, if you are willing to participate, please contact any of the chairs of the Student Affairs Committee.

- In order to further expose students to the benefits of the Section and the realities of practicing real property law, we offer free membership in the Section to all law students.

This Section will continue to grow and thrive only if members of the Section are willing to participate. I encourage all of you to review the list of committees at the end of this *Journal* and contact one of the committee chairs leading our effort in the areas of law in which you practice or you wish to practice. They would enthusiastically welcome your participation.

I hope to see many of you during the NYSBA Annual Meeting at the Section CLE program and luncheon being held at the New York Hilton Midtown and the 21 Club respectively on January 28, 2016.

Finally, mark your calendars and seriously consider attending the next annual summer meeting, July 14 to 17, 2016, at the Long Wharf Hotel in Boston. The chair of that program, Trish Watkins, promises further outstanding CLE presentations and a great venue.

**Best to all,**
**Leon T. Sawyko**

# Real Estate Closing Disclosure: What's "Consummation" Got to Do With It?

By Vincent G. Danzi

One of the main effects of the Dodd Frank Act,was the creation of the Consumer Financial Protection Bureau ("CFPB"). At the outset of its existence, the CFPB was given the mandate to promulgate new forms which would combine the overlapping disclosures presently required under the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA"). This culminated in the, "Know Before You Owe" rule, also known as the "TILA RESPA Integrated Disclosure" rule, or, "TRID" rule for short. Although the title insurance and lending industries have been diligently working to prepare for the substantial changes to be wrought by the TRID rule, one particular wrinkle has hidden in plain sight from many of us in New York State. To put it succinctly: the delivery of the so called "Closing Disclosure" is tied to, "consummation," of a transaction rather than the, "closing" or "settlement" of a transaction.

If you read through the TRID rule itself, you will see that the word "consummation" is used in the rule throughout, and in many cases where one would have otherwise expected to see the word, "closing," or "settlement" used. This seems to be a byproduct of the majority of the TRID rule being placed within the Truth in Lending Act's Regulation Z, rather than the Real Estate Settlement Procedures Act's Regulation X. Whereas RESPA's focus has long been to clearly show the settlement costs of RESPA-covered transactions,[1] TILA's focus has been to show the costs of credit,[2] and a different nomenclature for the terms of art has evolved, responsive to the needs of the respective statutes.

Although the integrated Loan Estimate and Closing Disclosure forms are creatures of TILA's Regulation Z, and that pedigree is immediately visible when one examines the forms, many of the figures which are disclosed on them, and many of the rules for correcting those figures, were imported from present constructs found in RESPA's Regulation X, where the time of "settlement" or "closing" is the fulcrum around which such provisions work. TRID provisions such as "changed circumstances affecting settlement charges," and "delayed settlement date on a construction loan" are modified imports from Regulation X's parallel provisions. These and some other traces of RESPA genes in the DNA of the TRID rule are only viable in practice if one engages in the fiction that "consummation" has the same meaning as "closing" or "settlement" as found in RESPA's Regulation X. However, RESPA's Regulation X definition of "settlement" is fundamentally distinct from TILA's definition of "consummation."

> *Settlement* means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.[3]
>
> *Consummation* means the time that a consumer becomes contractually obligated on a credit transaction.[4]

Unlike Regulation X's definition of "settlement," aka "closing," or "escrow," Regulation Z's definition of "consummation" requires further interpretation as to the point in time when a consumer becomes "contractually obligated on a credit transaction." For many years Regulation Z's commentary has instructed that that point in time is a question of state law.[5] While New York State does not have a statutory law definition of this event, case law in New York State which predates the TRID rule, and in some cases even predates the Truth in Lending Act itself, indicates that in New York State, "consummation," happens when the borrower accepts a loan commitment, and thereby agrees with the creditor upon the essential terms of the credit to be extended at the closing.[6]

However, certain aspects of the TRID rule seem to have been presented from the presumption that "closing" is operationally equivalent to "consummation." Indeed, in a recent blog post published on the website of the CFPB, the agency which created the TRID rule, the following news is provided: "One of the important requirements of the rule means that you'll receive your new, easier-to-use closing document, the Closing Disclosure, three business days before ***closing***" (emphasis added).[7] However, this is not what the TRID rule actually states. The TRID rule in fact states that "the creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than three business days before ***consummation***" (emphasis added).[8] However, since, "consummation" is derivative of state law, in some jurisdictions, "consummation" may not occur at the same time as "closing." New York State is one such jurisdiction.

A prominent example of the use of the word "consummation" in place of the word "closing" is found in Regulation Z, §1026.19(e)(3)(iv)(F), in a section labeled "Delayed **Settlement** Date on a construction loan" (emphasis added), which reads as follows:

> In transactions involving new construction, where the creditor reasonably expects that **settlement** will occur more than 60

> days after the disclosures required under paragraph (e)(1)(i) of this section are provided pursuant to paragraph (e)(1)(iii) of this section, the creditor may provide revised disclosures to the consumer if the original disclosures required under paragraph (e)(1)(i) of this section state clearly and conspicuously that at any time prior to 60 days before **consummation**, the creditor may issue revised disclosures. If no such statement is provided, the creditor may not issue revised disclosures, except as otherwise provided in paragraph (f) of this section.[9]

The Regulation X provision which the above is modelled upon uses the term "closing" where the above provision uses the term "consummation."[10] Both provisions preface the exception upon a likelihood that *settlement* may occur more than 60 days hence. Of course, in Regulation X "closing" is an explicit synonym of "settlement."

It might therefore seem that such guidance and regulatory text had been drafted with the thought that "consummation" can always be substituted for "settlement" or "closing," and vice versa. Were the TRID rule completely consistent in this equivalency, we might expect some simple clarification of the issue in future guidance. However, the TRID rule contains other provisions which indicate that the drafters of the TRID rule do perceive that "consummation" is not the practical equivalent of "settlement"[11] and may sometimes occur at different times.

A cogent example in the regulation of an to attempt to reconcile the difference between these terms rather than implying their equivalence is found in how Regulation X's rules for curing "tolerance violations" were adapted into Regulation Z. A "tolerance violation" occurs when one or more charges which are actually incurred by the consumer, as measured against the estimated amounts therefor previously depicted on the loan estimate, exceed the accuracy thresholds established as the measure of "good faith" for the type of charge, thereby obligating the creditor to reimburse the consumer for the amount of the excess within a specified time. Unlike the above example where both regulations prefaced the exception to the rule upon a likelihood that settlement may occur more than *60 days* after providing the loan estimate, the CFPB took a different approach in adapting provisions for curing tolerance violations and extended the number of days a creditor has to correct tolerance violations from *30 days from settlement* under Regulation X to *60 days from consummation* under Regulation Z in recognition that settlement may occur after consummation. In discussing the CFPB's rationale for promulgating a 60-day period from consummation for the correction of tolerance violations, rather than continuing the current 30-day period from settlement for correction, as is now the case under Regulation X, the CFPB, in the full TRID rule text, states as follows:

> Comment 19(e)(3)(i)-2 clarifies that, for purposes of § 1026.19(e), a charge "paid by or imposed on the consumer" refers to the final amount for the charge paid by or imposed by the consumer at consummation or settlement, whichever is later. Thus, in jurisdictions where settlement occurs after consummation, some tolerance violations may not be known until some time after consummation. The Bureau believes creditors in those jurisdictions should be permitted to have sufficient time to provide refunds for tolerance violations that may not be known until after consummation, and that a 60-day period after consummation will account for jurisdictions in which settlement occurs after consummation.[12]

Indeed, the CFPB's Small Entity Compliance Guide for the TRID rule also makes the distinction between "consummation" and "closing" explicit, and advises creditors and settlement agents to consult state law on the question of whether these events are simultaneous in their jurisdiction.[13]

The event of consummation has always been important to lenders in refinancing transactions because it is one of the events that could trigger the beginning of the borrower's TILA right of rescission.[14] The other events are (i) the delivery of the TILA disclosures and (ii) the receipt by the borrower of the required notice form to use to rescind the transaction itself.[15] This beginning of the right of the rescission period, i.e., the time when the last of these events happens, practically speaking, starts at the closing, and refinance transactions in New York State are not an exception. This is why title closers have to revisit a bank attorney's office to pick up refinance closing documents days after a closing, once the rescission period has expired. However, "consummation" is just one of those events, and since it is the last of these three events to occur that trigger the beginning of the right of rescission window, it could lead to a practical assumption that "consummation" "settlement" and "closing" are the same, though they are not. Lenders and title insurance professionals have not had to deal with this difference in this way previously because the other rescission period triggers besides consummation do occur at the closing, and furthermore, purchase money transactions, which could not work with a right of rescission that began at closing, are exempted from the right of rescission in the first place.[16]

In *Murphy v. Empire of America, FSA*, the U.S. Court of Appeals, Second Circuit, had to analyze when under New York law "consummation" took place in order to establish whether the proposed borrowers

had timely submitted their notice of rescission.[17] As the court held:

> By executing and returning the commitment letter to Empire on or about November 18, 1983, along with the non-refundable commitment fee of $715, the Murphys obligated themselves to accept the loan and conform to the terms of the commitment contract, subject only to their right under § 125(a) of TILA to rescind.
>
> …
>
> Appellant's contention that the "consummation of the transaction" does not occur until it is closed by execution of a note and mortgage confuses the term "consummation" with the parties' "performance" of the obligations that are the subject of the transaction. The transaction is consummated when the lender and borrower sign a contract obligating them, respectively, to lend and to borrow the funds. The signing of the contract is the event of central significance.[18]

So is this difference in the meaning of terms simply tilting at windmills? If the new construction and tolerance cure provisions are somehow reconcilable with the event of consummation, is "consummation" in New York State really unworkably different from "closing" or "settlement," in connection with providing the Closing Disclosure? Reviewing the timing rules in the TRID rule indicates there could be a problem even so.

The Closing Disclosure must be received three business days before consummation:

> The creditor shall ensure that the consumer receives the disclosures required under paragraph (f)(1)(i) of this section no later than three business days before consummation.[19]

The loan estimate must be delivered seven business days before consummation:

> The creditor shall deliver or place in the mail the disclosures required under paragraph (e)(1)(i) of this section not later than the seventh business day before consummation of the transaction.[20]

In short, applying TILA's definition of "consummation" to the above creates temporal paradoxes and/or ambiguities in interpretation for both terms. As regards new construction, the terms "settlement" and "consummation" seem to be used interchangeably whereas elsewhere in the rule they are explicitly distinguished from one another. As regards the timing of curing tolerance violations, the event of "settlement" seems to be presumed to occur simultaneously with, or shortly after, "consummation." Indeed the TRID rule seems to require such a presumption. As regards the delivery of the closing disclosure, the name of the disclosure itself seems at odds with the requirements established for its delivery, as it requires a statement of closing costs prior to even a commitment to lend.

Luckily for title insurance professionals, they are a step removed from direct liability for this, and the lenders (creditors) are the ones who must ultimately come up with a practical approach to this issue. Nevertheless, this is something that could cause confusion and will perhaps cause mischief down the road. The fact is that it is hard to conceive of the new integrated disclosures actually working around the date when the borrower accepts the loan commitment, which is what "consummation" has come to mean in New York State.

## Endnotes

1. 12 U.S.C § 2601(b)(1).
2. 15 U.S.C § 1601(a).
3. Regulation X, 12 C.F.R §1024.2(b).
4. Regulation Z, 12 C.F.R §1026.2(a)(13).
5. Regulation Z, 12 C.F.R. § 1026.2(a)(13); Regulation Z Comment 2(a)(13) Consummation, http://www.consumerfinance.gov/eregulations/1026-2/2015-01321#1026-2-a-13.
6. Murphy v. Empire of Am., FSA, 746 F.2d 931, 934 (2d Cir. 1984); see also Zelazny v. Pilgrim Funding Corp., 41 Misc. 2d 176, 244 N.Y.S.2d 810 (Dist. Ct. Nassau Cnty. 1963).
7. Diane Thompson, *Know Before You Owe: You'll get 3 days to review your mortgage closing documents* (June 3, 2015), http://www.consumerfinance.gov/blog/know-before-you-owe-youll-get-3-days-to-review-your-mortgage-closing-documents/.
8. Regulation Z, 12 C.F.R. § 1026.19(f)(1)(ii).
9. Regulation Z, Section 1026.19(e)(3)(iv)(F) (emphasis added).
10. Regulation X, 12 C.F.R. §1024.7(f)(6).
11. Integrated Mortgage Disclosures Under the Real Estate Settlement Procedure Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79370-01, 79824, *available at* http://files.consumerfinance.gov/f/201311_cfpb_final-rule_integrated-mortgage-disclosures.pdf.
12. *Id*.
13. Consumer Financial Protection Bureau, *TILA-RESPA Integrated Disclosure rule: Small entity compliance guide* (July 2015), at 53, *available at* http://files.consumerfinance.gov/f/201508_cfpb_tila-respa-integrated-disclosure-rule.pdf.
14. 15 U.S.C. §1635(a).
15. *Id*.
16. 15 U.S.C. §1635(e)(1); *see also* 15 U.S.C. §1602(x).
17. 746 F.2d 931, 933–34 (2d Cir. 1984).
18. *Id*. at 934.
19. Regulation Z, 12 C.F.R. §1026.19(f)(1)(ii)(A).
20. Regulation Z, 12 C.F.R. §1026.19(e)(1)(iii)(B).

**Vincent G. Danzi is a Senior Vice President and Senior Counsel at First Nationwide Title Agency, LLC. He is a frequent speaker and contributor to various legal and title-related organizations and periodicals. He is an Officer of the Suffolk County Bar Association's Academy of Law, a member of the editorial advisory board for *The Legal Description*, and produces continuing legal education materials for local bar associations, as well.**

# Real Estate Contracts and Closings: Contract Formation and Time of the Essence Issues in Contract Drafting, Contract and Enforcement

By Bruce H. Lederman

Getting the other side of a real estate transaction to close when you and your client desire to do so is often a source of frustration to lawyers and clients alike. Whether it's the simplest single-family house closing or the most complicated and sophisticated mega-transaction, the same principles govern. In this rising real estate market, sellers are looking for excuses to avoid closing on contracts when they think they can sell the property for more.

This article will provide an overview of basic issues surrounding the formation of a real estate contract. It provides guidance on what to do when it looks like someone is not going to close (and, to an extent, how to *force* someone to close). Materials are organized around the natural lifecycle of a transaction:

I. **Drafting Contracts.** What constitutes a *real* real estate contract? Are term sheets and/or letters of intent sufficient?

II. **Closings.** TOE Provisions; Do's and Don'ts for Scheduling (and Re-Scheduling) Closings; Proper Conduct During Closings.

III. **Refusal to Perform.** What happens when the other side refuses to close; how do you still tender performance during a failing transaction?

IV. **Obtaining Damages.** Enforcing liquidated damage provisions; Damages may be limited by contract; conditions precedent.

V. **Litigation Issues and Enforcing Defaults**. Obtaining specific performance and/or damages if you are the purchaser; retaining deposits if you are the seller.

You may note that there are common themes involved in the analysis of all these issues:

What does the contract say? Is the party acting in good faith? Are the parties being clear about what they are doing? Should modern circumstances be viewed differently in light of the courts' preference for tradition and stability in real estate contract interpretation and enforcement?

## I. Drafting Contracts. What constitutes a *real* real estate contract; are term sheets and/or letters of intent sufficient?

Before even considering the nuances of "time of the essence" issues (and how they practically play out in drafting, scheduling and enforcing contracts), it is worth pausing and reviewing the basic question: What constitutes an enforceable real estate contract? There often are competing tensions between the stringent writing requirements under the Statute of Frauds as interpreted by the courts and our clients' desire to quickly lock down a deal. In reality, transactions typically start with some sort of term sheet or letter of intent (which is supposed to be followed by a formal contract). Disputes often arise when no formal contracts end up being signed, and one party wants to enforce the term sheet while the other is claiming there was never an enforceable agreement.

### Formation of a Real Estate Contract

In New York state, the Statute of Frauds provision for real estate contracts is found in General Obligations Law § 5–703[2], which provides:

> A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.[1]

Courts generally recognize that real estate contracts are complex in nature and are more than just price, parties, and property. Courts may deem other aspects of the contract to be "essential" depending upon the circumstances.

A good recent discussion of this issue was in a decision by the Appellate Division, First Department, last year in *Argent Acquisitions, LLC v. First Church of Religious Sci.*[2] The Court held:

> "[I]t is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen v. Schumacher,* 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541 [1981]). Plaintiff asserts that, in the context of agreements to sell real estate, which must satisfy the statute of frauds, the only terms that are material are price, the identities of the buyer and seller, and a description of the property to be sold. …
>
> Defendant is correct that, while price, identity of the parties and the parcel of real estate to be sold are material in a real

> estate transaction, the list of essential terms is not a defined one. Indeed, those items which must be set forth in a writing are "those terms customarily encountered in" a particular transaction (*O'Brien v. West*, 199 A.D.2d 369, 370, 605 N.Y.S.2d 366 [2d Dept. 1993]). **Thus, courts have held that a writing to convey real estate must provide for a closing date, the quality of title to be conveyed, adjustments for taxes and risk of loss** (*see id.; Nesbitt v. Penalver,* 40 A.D.3d 596, 598, 835 N.Y.S.2d 426 [2d Dept. 2007]).[3]

An interesting Appellate Division, Second Department case in 2012 pointed out that the technical legal description of the property is not an essential term for a transaction.[4] Specifically, the Court held:

> To be enforceable, a contract for the sale of real property must be evidenced by a writing sufficient to satisfy the statute of frauds (*see* General Obligations Law § 5–703[2]; *Matter of Licata,* 76 A.D.3d 1076, 1077, 908 N.Y.S.2d 441). "To satisfy the statute of frauds, a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement." … "[T]he writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone. If the contract is incomplete and it is necessary to resort to parol evidence to ascertain what was agreed to, the remedy of specific performance is not available."…
>
> However, the description of real property in a contract of sale "need not be as detailed and exact as the description in a deed."[5]

The importance of the Statute of Frauds in real estate contracts was recently addressed by the Appellate Division, Third Department in *Post Hill, LLC v. E. Tetz & Sons, Inc.*,[6] where the Court wrestled with imposing traditional real estate requirements in a modern medium (i.e. "internet-based auctions"). The Court held that an auction bid was not enforceable where the essential terms were in unsigned forms. The Court noted the following:

> Supreme Court properly dismissed the complaint because no agreement existed which satisfied the statute of frauds. … The memorandum is not required to be contained in one document; separate "signed and unsigned writings [can] be read together, provided that they clearly refer to the same subject matter or transaction," contain all of the essential terms of a binding contract, and the "unsigned writing [was] prepared by the party to be charged. At least one document signed by the party to be charged must "establish[ ] a contractual relationship between the parties," with the unsigned documents referring on their face to the same transaction.
>
> Here, plaintiff asserts that an enforceable contract can be found by piecing together the bidding package documents that were provided to defendant prior to the auction—the real estate agent disclosure form (signed by defendant), auction notice, and terms and conditions for bidding and purchase of real estate at the online auction (signed by defendant)—and the bidding history and contract of sale that were created after the auction. Defendant did not prepare any of these documents, so the unsigned documents generally cannot be considered as binding on defendant for purposes of constructing a memorandum that would satisfy the statute of frauds.[7]

### Letters of Intent/Terms Sheets

While the Statute of Frauds can be stringently enforced, as shown above, there may be some room for flexibility given the circumstances of the transaction. For example, an older case from the Appellate Division, Second Department[8] explains that a "binder agreement" may be enforceable if it recites all essential terms of the agreement, which is rare in practice.

> The law is settled that a binder agreement such as the memorandum at bar may satisfy the Statute of Frauds and thus be subject to specific performance where it identifies the parties, describes the subject property, recites all essential terms of a complete agreement, and is signed by the party to be charged. Moreover, the essential terms which must be set forth for the binder to be enforceable include those terms customarily encountered in transactions of this nature. One can only find a true meeting of the minds where a binder constitutes a complete agreement reciting all essential terms and satisfying the other

previously mentioned conditions.

> To satisfy the Statute of Frauds, the writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone. If the contract is incomplete and it is necessary to resort to parol evidence to ascertain what was agreed to, the remedy of specific performance is not available. Parol evidence may not be received to supplement an insufficient writing so as to bring it into compliance with the requirements of the Statute of Frauds.[9]

Just so as to present this as fair and balanced report, in *Garnot v. LaDue*,[10] the Appellate Division, Third Department ruled that a term sheet was enforceable in the context of a single-family home sale, where the parties put down a $1,000 deposit.

> Generally, when there is an objective manifestation of intent to enter into a contract, a purchase offer agreement will "be subject to specific performance [if] it identifies the parties, describes the subject property, recites all essential terms of a complete agreement, and is signed by the party to be charged." …
>
> Here, evidence of the parties' intent to treat the purchase offer agreement as a contract is found in the deposition testimony of defendant Marjorie LaDue describing how the parties scheduled a date to sign "the purchase *agreement* " (emphasis added) in each other's presence. Notably, plaintiffs paid $1,000 as consideration for the agreement…. Thus, Supreme Court properly determined that the purchase offer constituted a valid contract of sale as opposed to an offer subject to withdrawal by defendants.[11]

*Best practice:* Advise clients to prominently write on any binder agreement or term sheet that the document is not intended to be a binding agreement (unless client desires otherwise). If the client desires for a term sheet to be binding, I usually advise the client that it's worth taking the extra time to quickly draft a basic contract.

### Issues Forming Contract in Era of E-mails and Wire Transfers

An interesting issue of contract formation was discussed by the Appellate Division, First Department in a 2012 case involving lengthy negotiations over a commercial contract.[12] Seller's attorney sent what was described as an "execution copy" of the contract via e-mail, along with wire instructions; buyer's attorney returned the signed contract and wired the escrow deposit. Notably, seller's attorney did not state in his cover e-mail that no contract would exist unless and until his client signed. Instead, he stated the attached contract was an "execution contract," and requested it to be signed and returned, with a wire transfer, so it could be executed by his client. The Court found that issues of fact existed as to whether a contract had been formed. Specifically, the Court held:

> In this action arising out of a failed real estate transaction, purchaser and seller met with their counsel and allegedly agreed upon the terms and conditions of the sale. Thereafter, the attorneys exchanged e-mail communications, culminating in seller's counsel's transmittal of an "execution version" of the contract that allegedly contained the previously agreed upon terms and provided the purchaser with wiring instructions for payment of the deposit. Unlike an earlier e-mail that transmitted a "proposed contract" subject to his client's "review and modification," the latter e-mail was not so qualified. In response to the offer e-mail, purchaser's counsel exchanged a signature page executed by his client and purchaser tendered payment of the deposit. Under these circumstances, triable issues of fact exist as to the viability of plaintiff's claim for specific performance, despite the lack of a fully executed contract (*see Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476 [2011]; *cf. Naldi v Grunberg*, 80 AD3d 1, 6 [2010], *lv denied* 16 NY3d 711 [2011]).
>
> Further, a triable issue of fact exists as to whether seller's attorney, who copied his client on the relevant e-mail communications without any protest, had apparent authority to act on seller's behalf (*see Korin Group v Emar Bldg. Corp.*, 291 AD2d 270 [2002]).[13]

*Best practices:* Be very careful when sending out final versions of contracts by email. Be clear that no contract is effective *unless and until* it is signed by your client, and that you reserve the right to modify and/or withdraw any contract until your client approves and signs.

## II. Closings. TOE provisions; do's and don'ts for scheduling (and re-scheduling) closings; proper conduct during closings

Once a contract has been formed and executed, the next step is to schedule a closing. In addition to understanding the basic "do's and don'ts" for closing scheduling and conduct, an attorney must always consider whether "Time Is of the Essence."

### Time of the Essence ("TOE"): Advantages/Disadvantage of TOE Provisions

It is hornbook law that in real estate contracts, time is never of the essence unless the contract explicitly says so. In that way, real estate contracts are different from other types of contracts—such as "option contracts"—where a "time of the essence" provision is normally implied.

The most frequently cited decision explaining the legal role that TOE provisions play is the 1979 Court of Appeals case *Grace v. Nappa*.[14] The Court stated:

> When a provision that time is to be of the essence is inserted in a real property contract, the date established as the law day takes on special significance. Ordinarily, the law will allow the vendor and vendee a reasonable time to perform their respective obligations, regardless of whether they specify a particular date for the closing of title. When there is a declaration that time is of the essence, however, each party must tender performance on law day unless the time for performance is extended by mutual agreement.[15]

A good example of a recent Appellate Division, Second Department decision reciting the rule of time of the essence is *184 Joralemon, LLC v. Brklyn Hts Condos, LLC*,[16] where the Court said:

> When a contract for the sale of real property contains a provision that time is of the essence, the parties bound by that clause must tender performance on the law day unless the time for performance has been extended by mutual agreement (*see Grace v. Nappa*, 46 N.Y.2d 560, 565, 415 N.Y.S.2d 793, 389 N.E.2d 107; *Rufeh v. Schwartz*, 50 A.D.3d 1000, 1001, 858 N.Y.S.2d 192). Where time is of the essence, performance on the specific date is a material element of the contract, and failure to perform on that date constitutes a material breach of the contract (*see Rufeh v. Schwartz*, 50 A.D.3d at 1001, 858 N.Y.S.2d 192).[17]

*Drafting tips:* When drafting a TOE provision in a real estate contract, consider the following:

- **The words "time of the essence" are required in a contract if you want time to be of the essence**. Phrases like "on or before," "not later than," etc., are generally not sufficient. Even crossing out the words "or about" in the phrase "on or about" in a preprinted standard form is not enough to make a closing "time of the essence" without those magic words.
- **Include a time of day (e.g., 10 a.m. or 2 p.m.).**
- **Reject general provisions that time shall be of the essence as to all contractual provisions**
- **TOE can be mutual or one-sided**. When representing a seller, consider closing dates like "time of the essence, as against purchaser."
- **When representing a purchaser** confronted with a requirement for a time of the essence closing date, consider a phrase such as "on or before _____, time of the essence" to give you the flexibility to advance the closing.
- **When representing a purchaser** faced with an unconditional requirement of a TOE closing, consider a phrase such as "notwithstanding the foregoing, purchaser shall be entitled to an adjournment of closing of up to 48 hours to accommodate bank financing."
- **When adjourning a TOE closing**, try to do so in an amendment signed by both sides (rather than simply a lawyer's letter).

### Closing Notices and Responding to Request for Adjournments

An important concept in successfully navigating a closing is understanding the need to properly schedule a closing and responding to requests for adjournments. The classic Court of Appeals case regarding the time needed to schedule a closing is *Zev v. Merman*.[18] The Court of Appeals gave us the "non-answer" that it all depends on the facts.

> What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case. Included within a court's determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance. The determination of reasonableness must by its very nature be determined on a case-by-case basis.[19]

There is no hard and set rule that 30 days is the standard requirement. However, the cases are pretty clear that if you provide 30 days' notice of scheduling a closing, you are pretty safe. If you schedule a closing on less than 30 days, it may work, but you run a risk that the court may find an issue of fact that the closing was not on sufficient notice. If you try to schedule a closing on less than a week's notice, you have a very good chance that it will be considered insufficient as a matter of law.

> It is well established that, where a contract for the

> sale of real property does not specify that time is of the essence, "the seller may unilaterally convert the contract into one making time of the essence by giving the buyer 'clear, unequivocal notice' and a reasonable time to perform." "'What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case,'" but the relevant factors include, among others, "the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance." Although the question of reasonableness is generally one of fact, "where the facts are undisputed, what is a reasonable time becomes a question of law, and the case is appropriate for summary judgment."[20]
>
> On May 3, 2006, one day prior to scheduled closing, the seller clarified its position, stating that the failure to appear at the scheduled closing on May 4, 2006, would constitute a default and result in forfeiture of the down payment. However, when requiring performance on a specific date with time of the essence, the seller must give the purchaser reasonable time to perform. A time-of-the-essence letter which does not give the purchaser sufficient time to perform constitutes a nullity.[21]

So how many days is "reasonable" to set a TOE closing? A 32–day extension from June 28 to July 30 represented a reasonable time within which to perform considering that the contract called for an all-cash deal.[22] However, a 15-day TOE notice is likely insufficient. "Under the present circumstances [15 day TOE notice], in which only a single adjournment had been sought during a two-week period, it would be unreasonable to inflexibly hold the buyers to that date on the basis that the buyers had made the initial selection."[23] Somewhere in the middle (i.e. 21 days) will likely depend on the circumstances of the transaction.

> Under the particular circumstances of this case, a triable issue of fact exists as to whether the plaintiff's notice on January 26, 2004, setting a closing for February 17, 2004, was reasonable (*see Ben Zev v. Merman,* 73 N.Y.2d 781, 783, 536 N.Y.S.2d 739, 533 N.E.2d 669; *Miller v. Almquist,* 241 A.D.2d 181, 185–186, 671 N.Y.S.2d 746). The defendants also raised a triable issue of fact as to the reasonableness of selecting a law date for a time the defendants' attorney was known to be unavailable or whether the defendants' attorney was acting unreasonably in failing to make himself available at the scheduled closing or any agreed-upon closing date.[24]

*Best practice:* When sending a TOE notice, it is essential that you include a clear statement that at the closing, Seller will tender performance. If Buyer subsequently fails to tender performance, Buyer's down payment will be forfeited in accordance with the contract as liquidated damages. Make sure to include a time and place of closing in the notice, in addition to a day. The words "time of the essence" are not essential in closing notices, although best practices is to use the magic TOE words.

Generally, you cannot set closing TOE in advance of contractual date, or declare the contract date TOE in advance of initial closing.

In *Mercer v. Phillips*[25] the court stated:

> The language in the amended contract extending the closing date to March 23, 1996 was insufficient to establish that date as a time of the essence date (*see, Savitsky v. Sukenik, supra,* at 558, 659 N.Y.S.2d 48). Defendant's March 1, 1996 letter purports to make time of the essence; however, the date chosen, March 12, 1996, is *prior* to the closing date set forth in the amendment to the contract and was clearly premature as a matter of law (*see, id.*, at 558, 659 N.Y.S.2d 48; *3M Holding Corp. v. Wagner,* 166 A.D.2d 580, 560 N.Y.S.2d 865). As for defendant's March 27, 1996 letter demanding that the closing occur in the next two days or defendant would "seek legal redress," this notice did not provide plaintiff with a reasonable time to act (*see, 3M Holding Corp. v. Wagner, supra,* at 581, 560 N.Y.S.2d 865) and is thus ineffective.[26]

Similarly in *Weintraub v. Stankovic*[27] the court stated:

> A purported notice mandating a closing date prior to the one in the contract is unreasonable and premature (*see Mercer v. Phillips,* 252 A.D.2d 900, 901, 676 N.Y.S.2d 334 [1998]; *Savitsky v. Sukenik, supra* at 558–559, 659 N.Y.S.2d 48). Here, defendant's oral statements to plaintiff's broker did not constitute clear and unequivocal notice to plaintiff that time was of the essence, and his August 25 e-mail to the broker was premature and did not provide a reasonable time to prepare

> for closing (*see Mercer v. Phillips, supra* at 901, 676 N.Y.S.2d 334). Accordingly, defendant did not establish that time was of the essence and he was therefore required to comply with the contract.[28]

Once you declare TOE, you may have a problem undoing it:

> In this case, when the defendants sought to adjourn the "time of the essence" closing date which they themselves had set, their failure to perform constituted a material breach of the contract of sale, and the plaintiff "was well within his rights when he refused to consent to an adjournment of the closing and instead insisted upon immediate performance of the [defendants'] obligations" (*Grace v. Nappa*, 46 N.Y.2d at 565, 415 N.Y.S.2d 793, 389 N.E.2d 107). Contrary to the defendants' contention, this Court's decision in *Hegner v. Reed*, 2 A.D.3d 683, 770 N.Y.S.2d 87 does not require a different result, as the unique circumstances existing in that case are not present here.
>
> Thus, the plaintiff made a prima facie showing that the defendants materially breached the contract of sale, and that he was therefore entitled to the return of his down payment. In opposition, the defendants failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment on the complaint.[29]

Similar to formation of the underlying real estate contract, while there are "baseline" rules, there are always exceptions based on the circumstances. As such, acting reasonably and in "good faith" throughout the process will not only provide an often overlooked professional courtesy to the opposing counsel, but may well sway a Court to side with your client should things go sour.

> The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." … Yet the plain language of the contract in this case makes clear that any "fruits" of the contract were *contingent* on attorney approval, as any reasonable person in the Morans' position should have understood. …
>
> Further, considerations of clarity, predictability, and professional responsibility weigh against reading an implied limitation into the attorney approval contingency. Clarity and predictability are particularly important in the interpretation of contracts and "[t]his is perhaps true in real property more than any other area of the law."[30]

Along these lines, counsel must diligently respond to any notice or demand, as courts may later hold any failure to comply against your client in later proceedings.

> Assuming arguendo, that the notice was unreasonable, the plaintiff waived his right to raise that issue. As noted by the trial court, all of the plaintiff's actions were consistent with complying with the defendants' demand. Not only did the plaintiff and his attorney examine the premises to determine if defendants could deliver it vacant on law day as required under the contract, but the plaintiff also sought to expedite the mortgage approval process by notifying his lender of his intent to comply with the defendants' demands. Moreover, since the plaintiff did not voice his objection prior to his attorney's arrival at the closing on January 17, 1985, as a matter of law, he acquiesced in the reasonableness of that date.[31]

### III. Refusal to Perform. What happens when the other side refuses to close? How do you still tender performance during a failing transaction?

The issue of whether a Buyer must show it is ready, willing and able to perform in the face of the Seller's repudiation divided the appellate divisions until the issue was addressed by Court of Appeals in 2012:

> The main issue before us is whether a buyer in a damages suit like this one must show that it was ready, willing and able to close the transaction—i.e., that but for the seller's repudiation, the transaction could and would have closed. This issue has divided the Appellate Division departments. …
>
> The rule followed by the Third and Fourth Departments is the correct one.… Our agreement with that rule is implied by the language we used in *De Forest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co.*, 243 N.Y. 283, 153 N.E. 75 (1926), where we held that, when a contract has been repudiated, the non-repudiating party need not actually *tender* performance. We said: "Where one party

> to a contract repudiates it and refuses to perform, the other party by reason of such repudiation is excused from further performance, or the ceremony of a futile tender. *He must be ready, willing and able to perform,* and this is all the law requires."[32]

Wrongly declaring the other side in default may *itself* be a default. A wrongful declaration of default may be considered an anticipatory default.[33]

Situations are arising now where sellers are finding reasons to return deposits, alleging they are "unable to perform," and are seeking to terminate the contract upon the return of the deposit. The guiding principle that you should keep in mind is that "unable" is not the same as "unwilling." Courts tend to impose an overlapping obligation to act in good faith as a basis for forcing someone to comply even where they initially claim they are unable.[34]

*Closing and drafting tips:* When the other side is equivocating about whether or not they will close, notify opposing counsel that you will have a court reporter at the closing, and that your client is ready, willing and able to tender a performance. This is particularly important when you represent a Seller, and want to declare a Buyer in default (and keep the down payment). Though not strictly required, this approach has both a good psychological effect, and is good evidence in motion papers. Certain types of transactions may make Seller's performance impossible or impractical without both the cooperation of the Buyer, and certainty the Buyer will close (i.e., commencing a complex defeasance process or obtaining a mortgage payoff/assignment). In these circumstances, you should carefully document in advance that your client needs confirmation of closing to begin the process. Best practice would be to include a mechanism in the contract which provides for a pre-closing confirmation.

## IV. Obtaining Damages. Enforce liquidated damage provisions; damages may be limited by contract; conditions precedent.

Real estate contracts typically have down payments/deposits and contractual provisions that state the down payment will be considered liquidated damages in the event purchaser defaults. The Court of Appeals has periodically considered and determined that liquidated damage in real estate contracts are enforceable. The most recent time the Court of Appeals expressly analyzed whether New York allowed forfeiture of down payment in real estate contracts was in 1986 in the *Maxton Builders*.[35] "For more than a century it has been well settled in this State that a vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment."[36] In 2013, Court of Appeals reaffirmed *Maxton Builders* that forfeiture of down-payment is permissible in New York in *White v. Farrell*.[37]

Even though liquidated damage provisions are generally enforceable, courts also tend to avoid handing down judgments that act as forfeitures. Moreover, the analysis is typically very nuanced, focusing on the exact wording of the contract. One thing that I see increasingly asked for by knowledgeable purchaser attorneys is a "willfulness" standard before liquidated damages can arrive.

In a 2005 Appellate Division, Second Department case, the Court found that, even though there was a default, because of language of contract, purchaser was able to have its down-payment returned when, in good faith, purchaser was unable to obtain financing.

> Contrary to Fortini's contention, IBC provided a reasonable period of time for performance. Further, he did not object to the time fixed for the closing. Fortini did not have sufficient funds to complete the purchase on the law day. Consequently, the trial court's determination that he was not entitled to specific performance was supported by a fair interpretation of the evidence.
>
> The evidence also supported the trial court's determination that Fortini was nevertheless entitled to the return of his down payment. Pursuant to the specific terms of the contracts, IBC could retain the down payment only if Fortini "willfully" failed to close. The evidence demonstrated that Fortini acted diligently and in good faith, but was unable to procure financing prior to the closing date.[38]

Thus, the analysis comes full circle, and the theme of "good faith" is once again essential to the Court's decision-making process.

In the absence of a liquidated damage provision, you have factual issues of the difference in value at the time of breach.

> The time-of-the-breach rule is longstanding in New York, as illustrated by the preceding Cook's tour of appellate decisions from throughout the State and as early as 1916; "seems to be the rule everywhere" in the United States (*see* Calamari & Perillo, *supra* at 495); and is consistent with the general contract principles that damages "are properly ascertained as of the date of the breach," and "the injured party has a duty to mitigate" (*see Brushton–Moira Cent. School Dist. v. Thomas Assoc.*, 91 N.Y.2d 256, 262–263, 669 N.Y.S.2d 520, 692 N.E.2d 551 [1998] [measuring damages for breach of a construction contract from the date

> of the breach rather than from the date of the damages trial held 13 years later]).[39]

**Limiting Remedies Based Upon Particular Language**

Parties may be able to limit remedies based upon the particular language of the contract.

> When a contract for the sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that we limit the buyer to the remedies for which it provided in the sale contract.[40]

Another example is a contractually limited right to file a *lis pendens*.

> The court properly vacated plaintiff's notice of pendency. The third amendment states that plaintiff "shall not file a Lis Pendens against the Premises *for any reason*" (emphasis added), not "for any reason having to do with the Return Deed." "[W]hen parties set down their agreement in a clear, complete document, their writing should… be enforced according to its terms" (*Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 [2004] [internal quotation marks omitted]). This rule is especially important "in the context of real property transactions" (*id.* [internal quotation marks omitted]).[41]

Thus, in the context of real property transactions, courts will enforce the terms of a clear and complete writing between the parties.

> "Construction of an unambiguous contract is a matter of law…a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." That rule is of "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where…the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length."[42]

*Contract review and drafting tips*: Read "limitation of remedy" provisions carefully. Be wary of contracts which say that in the event of a default, a Buyer's remedy is limited to return of down payment or specific performance. Buyers should demand that in the event of a Seller's default, Buyer is entitled to all remedies available at law or in equity. If a Seller objects, insist that in the event of a willful default, Buyer shall be entitled to all remedies available at law or in equity. Alternatively, ask that, in the event any action of Seller has made specific performance unavailable, Buyer shall be entitled to damages in addition to the return of the down payment. In representing Buyers, consider emboldening the standard "inability to perform" provision by adding that, notwithstanding anything to the contrary, Seller shall be obligated to cure any title defect which can be cured by the payment of money only.

**Contractual Conditions**

When negotiating a contract (or considering litigation over contracts) it is exceptionally important to be aware of things identified as conditions or conditions precedent. Whenever I am representing someone, and see language to the effect that "XXX" shall be deemed a condition precedent or condition to my client's obligation to perform, alarm bells go off. In the context of items identified with a contract as "conditions," I will typically say that things can be contractual obligations, but not conditions, because as a general rule you cannot have substantial compliance with a condition.

The leading Court of Appeals case on conditions is actually a landlord-tenant case.[43]

In *Oppenheimer*, the Court of Appeals stated:

> A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Calamari and Perillo, Contracts § 11–2, at 438 [3d ed.]; *see,* Restatement [Second] of Contracts § 224; *see also, Merritt Hill Vineyards v. Windy Hgts. Vineyard,* 61 N.Y.2d 106, 112–113, 472 N.Y.S.2d 592, 460 N.E.2d 1077). Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself (*see, M.K. Metals v. Container Recovery Corp.,* 645 F.2d 583). In the latter situation, no contract arises "unless and until the condition occurs" (Calamari and Perillo, Contracts § 11–5, at 440 [3d ed] ).

Conditions can be express or implied. Express conditions are those agreed to and imposed by the parties themselves. Implied or constructive conditions are those "imposed by law to do justice" (Calamari and Perillo, Contracts § 11–8,

> at 444 [3d ed] ). Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient.[44]

A good example of a true condition made pursuant to an existing contract is a mortgage contingency clause. In 2011, the Appellate Division, Second Department, explained, as follows:

> A mortgage contingency clause is construed to create a condition precedent to the contract of sale. The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period. However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to any bad faith on the part of the purchaser.[45]

## V. Litigation Issues and Enforcing Defaults. Obtaining specific performance and/or damages if you are the purchaser; retaining deposits if you are the seller

Specific performance may not be granted on a cancelled contract.

> [A] party cannot seek specific performance of a cancelled real estate contract (*Degree Sec. Sys., Inc. v. F.A.B. Land Corp.*, 17 A.D.3d 402, 403, 794 N.Y.S.2d 62 [2005] [specific performance unavailable where a contract for sale of real estate was validly cancelled]; *see also Gartner v. Lowe*, 299 A.D.2d 198, 749 N.Y.S.2d 134 [2002], *lv. denied* 100 N.Y.2d 501, 760 N.Y.S.2d 764, 790 N.E.2d 1193 [2003]; *Abely v. Hayden*, 155 A.D.2d 254, 256, 547 N.Y.S.2d 25 [1989]; *Bennett v. John*, 151 A.D.2d 711, 543 N.Y.S.2d 143 [1989] ).[46]

Closings may be scheduled during litigations while appeals are pending.[47]

Damages may be awarded in specific performance cases if not contractually precluded.[48]

Specific performance is always discretionary.

> Although "equity will not relieve parties from bargains simply because they are unreasonable or unprofitable,"[49] the right to specific performance is not automatic, and a court has the discretion to deny this remedy "where it would cause unreasonable hardship or injustice." However, the "denial of specific performance would constitute an abuse of discretion as a matter of law if there is no evidence to sustain the conclusion that requiring it would be a drastic or harsh remedy."[50]

## VI. Conclusion

Navigating the issues of setting and enforcing closing dates in real estate contracts is often more art than science. It is important to act in good faith and give clear notices establishing that your client is acting in good faith. It is equally important to clearly respond to notices when received. When possible, advise clients against sharp practices which may seem like a good idea at the time in efforts to gain some advantage, but often look bad when in litigation and can backfire.

## Endnotes

1. N.Y. Gen. Oblig. Law § 5-703(2) (McKinney).
2. 118 A.D.3d 441, 443-44, 990 N.Y.S.2d 1, 4 (1st Dep't 2014).
3. *Argent Acquisitions*, 118 A.D.3d at 443-44, 990 N.Y.S.2d at 4 (emphasis added).
4. *See* Del Pozo v. Impressive Homes, Inc., 95 A.D.3d 1268, 1270-71, 945 N.Y.S.2d 368, 370-71 (2d Dep't 2012).
5. *Id.* (citations omitted).
6. 122 A.D.3d 1126, 997 N.Y.S.2d 525 (3d Dep't 2014).
7. *Post Hill*, 122 A.D.3d at 1127-28, 997 N.Y.S.2d at 527-28 (citations omitted).
8. O'Brien v. West, 199 A.D.2d 369, 605 N.Y.S.2d 366 (2d Dep't 1993).
9. *O'Brien*, 199 A.D.2d at 370, 605 N.Y.S.2d at 367 (citations omitted).
10. 45 A.D.3d 1080, 845 N.Y.S.2d 555 (3d Dep't 2007).
11. *Garnot*, 45 A.D.3d at 1082, 845 N.Y.S.2d at 557-58 (citations omitted).
12. Aristone Realty Capital, LLC v. 9 E. 16th St. LLC, 94 A.D.3d 519, 941 N.Y.S.2d 840 (1st Dep't 2012).
13. *Aristone Realty*, 94 A.D.3d at 519, 941 N.Y.S.2d at 840-41. (*NOTE—The author of this article represented the Seller in the* Aristone *litigation, although he was not transactional counsel. The case was settled without trial or application to the Court of Appeals. The author continues to respectfully believe that the Court of Appeals might have accepted the case and reversed because the decision creates very dangerous precedent of lawyers binding clients who did not intend to be bound based upon email transmissions*).
14. 46 N.Y.2d 560, 389 N.E.2d 107, 415 N.Y.S.2d 793 (1979).
15. *Grace*, 46 N.Y.2d at 565, 389 N.E.2d at 109, 415 N.Y.S.2d at 796 (citations omitted).
16. 117 A.D.3d 699, 985 N.Y.S.2d 588 (2d Dep't 2014).
17. *184 Joralemon*, 117 A.D.3d at 702, 985 N.Y.S.2d at 590-91.
18. 73 N.Y.2d 781, 533 N.E.2d 669, 536 N.Y.S.2d 739 (1988).
19. *Zev*, 73 N.Y.2d at 783, 533 N.E.2d at 669-70, 536 N.Y.S.2d at 739-40 (citations omitted).
20. Mills v. Chauvin, 103 A.D.3d 1041, 1044-1045, 962 N.Y.S.2d 412, 417 (3d Dep't 2013) (4 days' notice is unreasonable as a matter of law) (citations omitted).
21. Iannucci v. 70 Washington Partners, LLC, 51 A.D.3d 869, 871, 858 N.Y.S.2d 322, 324 (2d Dep't 2008) (citations omitted) (1 day notice is unreasonable as a matter of law).

22. 76 N. Associates v. Theil Mgmt. Corp., 132 A.D.2d 695, 696, 518 N.Y.S.2d 174, 176 (2d Dep't 1987) (32 day notice is reasonable).

23. Miller v. Almquist, 241 A.D.2d 181, 188, 671 N.Y.S.2d 746, 751 (1st Dep't 1998) (15 day notice is not reasonable).

24. Sternlicht v. Ferrara, 35 A.D.3d 440, 440, 826 N.Y.S.2d 371, 372 (2d Dep't 2006) (issue of fact of reasonableness of 21 day notice).

25. 252 A.D.2d 900, 676 N.Y.S.2d 334 (3d Dep't 1998).

26. *Mercer*, 252 A.D.2d at 901, 676 N.Y.S.2d at 336.

27. 43 A.D.3d 543, 840 N.Y.S.2d 487 (3d Dep't 2007).

28. *Weinstraub*, 43 A.D.3d at 544, 840 N.Y.S.2d at 488-89.

29. Rufeh v. Schwartz, 50 A.D.3d 1000, 1001-02, 858 N.Y.S.2d 192, 193-94 (2d Dep't 2008).

30. Moran v. Erk, 11 N.Y.3d 452, 456-57, 901 N.E.2d 187, 190-91, 872 N.Y.S.2d 696, 699-700 (2008) (citations omitted); *see also* Miller v. Almquist, 241 A.D.2d 181, 184-85, 671 N.Y.S.2d 746, 749 (1st Dep't 1998) (citations omitted) ("We have long been guided by the rule that 'every contract contains an implied obligation by each party to deal fairly with the other and to eschew actions which would deprive the other party of the fruits of the agreement' in furtherance of the covenant of good faith implied in every contract."); *see also* Sevilla v. Valiotis, 29 A.D.3d 775, 776, 815 N.Y.S.2d 229, 229-30 (2d Dep't 2006) ("Where, as here, a provision in the contract provides that in the event that the seller cannot convey a clear title, the seller may refund the buyer's deposit, terminate the contract, and the buyer shall have no further claims against the seller, that limitation 'contemplates the existence of a situation beyond the control of the parties' and implicitly requires the seller to act in good faith.'"(quoting Naso v. Haque, 289 A.D.2d 309, 310, 734 N.Y.S.2d 214, 215 (2d Dep't 2001), quoting Mokar Props. Corp. v. Hall, 6 A.D.2d 536, 539, 179 N.Y.S.2d 814, 819 (1st Dep't 1958))(citations omitted)).

31. Zev v. Merman, 134 A.D.2d 555, 558, 521 N.Y.S.2d 455, 458 (2d Dep't 1987) *aff'd*, 73 N.Y.2d 781, 533 N.E.2d 669, 536 N.Y.S.2d 739 (1988); *see also* Sanchez v. Hay, 122 A.D.3d 533, 534, 997 N.Y.S.2d 392, 393 (1st Dep't 2014) *leave to appeal dismissed*, 24 N.Y.3d 1213, 28 N.E.3d 29, 4 N.Y.S.3d 594 (Mem.) (2015) ("…[d]efendants failed to present evidence sufficient to raise a triable issue of fact as to plaintiff's ability and willingness to close on February 6, 2012. Although plaintiff and her counsel were not present at the date and time stated in her time of the essence letter, the record reflects that defendants' counsel had previously rejected a closing on that date and declared the time of the essence letter a nullity. Plaintiff reasonably declined to appear in the face of that rejection."); *see also* Mohen v. Mooney, 162 A.D.2d 664, 665, 557 N.Y.S.2d 108, 109-10 (2d Dep't 1990) (12 days' notice was sufficient; default permitted based upon Oct 31 date. "On October 5, 1988, the sellers advised the buyers that the closing would take place on October 12, 1988 and that time would be of the essence. When the buyers failed to appear at the closing, the sellers informed the buyers on October 19, 1988, that a new closing date was set for October 31, 1988, and again stated that time would be of the essence. The buyers objected to this closing date and insisted that the closing occur on November 9, 1988.").

32. Pesa v. Yoma Dev. Grp., Inc., 18 N.Y.3d 527, 531- 32, 965 N.E.2d 228, 230, 942 N.Y.S.2d 1, 3 (2012) (some citations omitted); *see also* Cohen v. Kranz, 12 N.Y.2d 242, 246, 189 N.E.2d 473, 475, 238 N.Y.S.2d 928, 932 (1963) (citations omitted) ("While a vendee can recover his money paid on the contract from a vendor who defaults on law day without a showing of tender or even of willingness and ability to perform where the vendor's title is incurably defective, a tender and demand are required to put the vendor in default where his title could be cleared without difficulty in a reasonable time."); 3801 Review Realty LLC v. Review Realty Co. LLC, 111 A.D.3d 509, 509, 975 N.Y.S.2d 36, 37 (1st Dep't 2013) (citation omitted) ("Plaintiff is not entitled to specific performance of its contract to purchase real estate, because it was unable to demonstrate that it was ready, willing and able to fulfill its contractual obligations at closing."); Gjonaj v. Sines, 69 A.D.3d 1188, 1190, 896 N.Y.S.2d 176, 179 (3d Dep't 2010) (citations omitted) ("As defendant argues, plaintiff's right to obtain specific performance requires a showing that he is ready, able, and willing to perform his own obligations under the contract. We have recognized, however, that the requirement of tender of performance may be waived or obviated by acts of the other party amounting to an anticipatory breach. In light of defendant's utter failure to comply with any portion of her contractual obligations or to communicate in any manner with plaintiff or respond to his correspondence prior to commencement of the action, we find that tender was waived in this instance."); Martocci v. Schneider, 119 A.D.3d 746, 748, 990 N.Y.S.2d 240, 243 (2d Dep't 2014) (emphasis added) ("To prevail on a cause of action for the return of a down payment on a contract for the sale of real property, the plaintiff must establish that the defendant breached or repudiated the contract and that the plaintiff was ready, willing, and able to perform on the closing date…. '[W]hile a purchaser must normally first tender performance and demand good title to place a seller in default, 'when the vendor is given notice of the defect prior to the scheduled closing date and does nothing to correct it until after the closing date, the purchaser need not tender performance as such tender would be meaningless.'" ); Huang v. Shih, 73 A.D.3d 981, 982, 904 N.Y.S.2d 433, 435-36 (2d Dep't 2010) (citations omitted) ("The certificate of occupancy problem did not present a title issue, as the buyer's title company deemed the sellers' title to be marketable. Nevertheless, the sellers breached their contractual duty to either provide a certificate of occupancy or provide proof that none was necessary. Moreover, the record reflects that they did not engage in any good faith efforts to solve the problem. Accordingly, the sellers were not entitled to cancel the contract unilaterally under rider paragraph 12. The buyer established that she was ready, willing, and able to perform the contract.").

33. Velazquez v. Equity LLC, 28 A.D.3d 473, 474-75, 814 N.Y.S.2d 182, 183 (2d Dep't 2006) (citations omitted) (Contrary to plaintiff's contentions, the defendant was entitled to consider the plaintiff's defective notice of cancellation an anticipatory repudiation of the contract. Thus, the defendant could elect either to treat the repudiation as a breach and rescind the contract, or to await the expiration of the time for the plaintiff's performance and bring an action thereafter.); *see also* Smith v. Tenshore Realty, Ltd., 31 A.D.3d 741, 742, 820 N.Y.S.2d 292, 293 (2d Dep't 2006) (citations omitted). ("At 5:28 P.M. on June 14, 2004, the plaintiffs faxed a second letter to the defendant asking it to 'disregard the fax that was sent earlier today' and stating that the plaintiffs no longer needed an extension of the mortgage contingency period. The defendant, however, took the position that the contract had already been cancelled and could not be revived. We agree. The plaintiffs' notice of cancellation was defective in that it failed to include the documentation required under the contract of sale. The defendant was entitled to consider such defective notice an anticipatory repudiation of the contract.").

34. *See* Progressive Solar Concepts, Inc. v. Gabes, 161 A.D.2d 752, 753, 556 N.Y.S.2d 105, 107 (2d Dep't 1990) (citations omitted) ("It is clear that the parties to a contract for the sale of real property may agree, as they did here, to restrict the liability resulting from a breach, or may agree that no damages will be payable at all once the status quo has been restored. However, an obligation to act in good faith will be implied in connection with such liability-limiting clauses, in the event of an inability to convey good title."); *see also* Mokar Properties Corp. v. Hall, 6 A.D.2d 536, 539-40, 179 N.Y.S.2d 814, 819 (1st Dep't

1958) (citations omitted) ("A party under circumstances such as have been alleged cannot exculpate himself from liability by reliance on a condition precedent when his own conduct is the cause of the nonperformance of that condition. . . . If the vendor has contracted to convey, knowing that there are circumstances that will render it impossible to do so, or if he is able with the reasonable expenditure of money and effort to remedy defects in title and neglects or refuses to do so, he has not acted in good faith; and he cannot then limit his damages by shielding himself behind such self-created or easily scaled barriers.").

35. Maxton Builders, Inc. v. Lo Galbo, 68 N.Y.2d 373, 502 N.E.2d 184, 509 N.Y.S.2d 507 (1986).

36. *Lo Galbo*, 68 N.Y.2d at 378, 502 N.E.2d at 186, 509 N.Y.S.2d at 509.

37. 20 N.Y.3d 487, 500, 987 N.E.2d 244, 253, 964 N.Y.S.2d 467, 476 (2013) ("[W]e reaffirmed a seller's right to retain the down payment when the buyer in a real estate transaction wrongly fails to perform, adherence to tradition is 'particularly apt in cases involving the legal effect of contractual relations.'" (quoting *Lo Galbo,* 68 N.Y.2d at 381, 502 N.E.2d at 188, 509 N.Y.S.2d at 511)); *see also Lo Galbo*, 68 N.Y.2d at 382, 502 N.E.2d at 189, 509 N.Y.S.2d at 512 ("If the parties are dissatisfied with the rule of *Lawrence v. Miller (supra),* the time to say so is at the bargaining table.").

38. Int'l Baptist Church, Inc. v. Fortini, 20 A.D.3d 507, 509, 799 N.Y.S.2d 145, 146 (2d Dep't 2005) (citations omitted).

39. White v. Farrell, 20 N.Y.3d 487, 499, 987 N.E.2d 244, 252-53, 964 N.Y.S.2d 467, 475-76 (2013).

40. Mehlman v 592-600 Union Ave. Corp., 46 A.D.3d 338, 343, 847 N.Y.S.2d 547, 551 (1st Dep't 2007) (quoting 101123 LLC v. Solis Realty LLC, 23 A.D.3d 107, 208, 81 N.Y.S.2d 31, 31 (1st Dep't 2005).

41. B&C Realty, Co. v 159 Emmut Properties LLC, 106 A.D.3d 653, 657, 966 N.Y.S.2d 402, 406 (1st Dep't 2013).

42. Thirty One Dev., LLC v. Cohen, 104 A.D.3d 1195, 1196, 960 N.Y.S.2d 795, 797 (4th Dep't 2013) (citations omitted).

43. Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 660 N.E.2d 415, 636 N.Y.S.2d 734 (1995).

44. *Oppenheimer*, 86 N.Y.2d at 690, 660 N.E.2d at 418, 636 N.Y.S.2d at 737.

45. Blair v. O'Donnell, 85 A.D.3d 954, 955, 925 N.Y.S.2d 639, 641 (2d Dep't 2011) (citations omitted) (quoting Creighton v. Milbauer, 191 A.D.2d 162, 165, 594 N.Y.S.2d 185, 187 (1st Dep't 1993).

46. Jericho Grp., Ltd. v. Midtown Dev., L.P., 32 A.D.3d 294, 298, 820 N.Y.S.2d 241, 246 (1st Dep't 2006).

47. *See* Nehmadi v. Davis, 121 A.D.3d 871, 872, 994 N.Y.S.2d 665, 666-67 (2d Dep't 2014).

48. *See* Coizza v. 164-50 Crossbay Realty Corp., 73 A.D.3d 678, 682-83, 900 N.Y.S.2d 416, 421 (2d Dep't 2010) (citations omitted) ("The Supreme Court improperly denied that branch of the plaintiffs' motion [where plaintiff was separately awarded specific performance] which was for summary judgment on so much of the amended complaint as sought to recover, as damages, an abatement of the purchase price and purchase money mortgage in the sum of the costs incurred by them in obtaining the certificate of occupancy, and recoupment of their losses arising from the seller's alterations, modifications, and changes to the property without their consent. Inasmuch as these claims are consistent with the parties' contract and, therefore, implicate the plaintiffs' receipt of the benefit of the bargain, the matter must be remitted to the Supreme Court, Queens County, for a hearing on the issue of damages. At the hearing, the plaintiffs should be afforded an opportunity to present evidence of these claimed damages."); *see also* Cooperstein v. Patrician Estates, 117 A.D.2d 774, 775, 499 N.Y.S.2d 423, 424 (2d Dep't 1986) ("The appellants-respondents' contention that the Special Referee erred in awarding damages in addition to directing specific performance is simply without merit. It is well established that, in an action for specific performance, a party may recover such damages as have been sustained by him as a result of a vendor's unreasonable and unwarranted delay in performing.").

49. Spira v. Acceus, 114 A.D.3d 663, 663, 979 N.Y.S.2d 836, 836-37 (2d Dep't 2014) (quoting Khayyam v. Diplacidi, 167 A.D.2dd 300, 301, 562 N.Y.S.2d 43 (1st Dep't 1990).

50. *Spira,* 114 A.D.3d at 663, 979 N.Y.S.2d at 837 (2d Dep't 2014) (quoting Concert Radio, Inc. v. GAF Corp., 108 A.D.2d 273, 278, 488 N.Y.S.2d 696, 699 (1st Dep't 1985), *affd,* 73 N.Y.2d 766, 532 N.E.2d 1280, 536 N.Y.S.2d 52 (1988)).

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# *Aurora Loan Services, LLC v. Taylor*: New York Court of Appeals Opens the Door for a Less Stringent Standing Requirement in Residential Foreclosures

By Briana Hart

In recent years, defendants in residential foreclosure actions have increasingly been using the "lack of standing" defense, a defense stating that the loan servicer does not possess the proper standing to bring the foreclosure action, in an attempt to cause the dismissal of otherwise clear-cut mortgage default foreclosure cases. When used, this defense shifts the burden onto the plaintiff to prove that it possessed the original promissory note prior to the commencement of the suit through affidavits expressing extensive details regarding the physical delivery of the note.[1] In its recent decision in *Aurora Loan Services, LLC v. Taylor*, the Court of Appeals alleviated this issue by giving the lower courts the discretion to accept a lesser standard of proof from the loan servicer in their affidavits in order to establish acquisition.[2] With a less burdensome standing requirement, plaintiffs have one less hurdle to overcome in their grueling foreclosure process. Ultimately, one less step is a step in the right direction.

On July 5, 2006, Monique and Leonard Taylor executed and recorded a mortgage through Mortgage Electronic Registration Systems, Inc. (MERS) to secure their adjustable rate note from First National Bank of Arizona.[3] The note, due to a pooling and servicing agreement (PSA), became part of a residential mortgage-backed securitized trust owned by Deutsche Bank Trust Company Americas.[4] Pursuant to a master servicing assignment and assumption agreement, Aurora assumed the loan servicer responsibilities under the PSA and was assigned the mortgage by MERS a year later.[5]

On January 1, 2010, the Taylors defaulted on the mortgage and note for failure to make payments for the month of January and every month thereafter.[6] Various notices were mailed to the Taylors regarding their default, but they failed to cure the default.[7] Aurora claimed through an affidavit written by its legal liaison Sara Holland (Holland affidavit), who personally reviewed the original note, that Aurora took physical custody of the original promissory note on May 20, 2010.[8] The affidavit included an attached copy of the original note and allonge.[9] On May 24, 2010, Aurora commenced a residential foreclosure action against the Taylors for defaulting on their loan payments.[10] The Taylors claimed that Aurora did not possess standing to foreclose since: (1) Aurora did not possess a valid and enforceable mortgage at the time the action was commenced; and (2) the affidavit, along with the copies of the note and allonge, did not sufficiently demonstrate the possession of the note and Aurora was obligated to produce the original note.[11]

The Court stated the first issue was irrelevant to the question of standing, since possession of the mortgage is not required at the commencement of the foreclosure action.[12] In order to transfer the mortgage obligation and create standing to foreclose, the Court stated that "the physical delivery of the note to the plaintiff from its owner prior to the commencement of a foreclosure action may, in certain circumstances, be sufficient."[13] The Court reaffirmed the legal principle that "the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law" and "once a note is transferred, however, the mortgage passes as an incident to the note."[14] Therefore, whether or not the assignment of the mortgage from MERS was valid is irrelevant to the question of standing, since the evidence showed the original note was transferred to Aurora prior to the commencement of the suit.[15]

On the second issue, the Court stated that Aurora adequately proved it possessed the note prior to the commencement of the suit through the Holland affidavit.[16] The Taylors did not cite to any authority requiring production of the original note, they did not request the original note in discovery, nor did they ask the Supreme Court to compel the production of it.[17] The Court ruled that the affidavit was sufficient to provide standing since Holland expressed she examined the note personally and attached copies of the adjustable rate note and allonge, showing the note's chain of custody.[18]

Interestingly, the Court did not directly and firmly address the conclusion of the dissent at the Appellate Division. The Appellate Division dissent stated that "a bare statement from the plaintiff's agent that the original note was in the possession of the plaintiff at the commencement of the action is not sufficient as a matter of law, if no 'factual details' are given with respect to the physical delivery of the note."[19] However, the Court here opined that "although the better practice would have been for Aurora to state how it came into possession of the note…we conclude that, under the circumstances of this case, the court did not err in granting summary judgment to Aurora."[20] The Court's decision is open-ended and allows the lower courts to decide how to apply the new ruling. The decision can either be read broadly to allow for standing in similar cases without details on the note's delivery or it can be read narrowly and only apply to the facts presented in this case.

The recent effect of this decision in the Appellate Division, notably the Second and Third Departments, has been to allow for standing in cases devoid of the details of the note's delivery.[21] The courts have upheld plaintiff's standing to foreclose when the affidavits produced by agents of the loan servicers attested to the possession of the note prior to the commencement of the suit regardless of delivery details.[22] While foreclosure proceedings are not to be taken lightly and all legal requirements are equally important, this newfound discretion to accept a lesser standard of proof was sorely needed in the lower courts. Where there is no original note presented the production of copies of the original note, the allonge, and affidavits attesting to the possession of the original note prior to the commencement of the suit should be more than enough to prove standing to foreclose.

## Endnotes

1. *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120, 122 (2d Dep't 2012).
2. *See* 25 N.Y.3d 355, 362, 12 N.Y.S.3d 612, 615-16 (2015).
3. *Id.* at 358-59, 12 N.Y.S.3d at 613.
4. *Id.* at 359, 12 N.Y.S.3d at 613.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 360, 12 N.Y.S.3d at 614.
10. *Id.* at 359, 12 N.Y.S.3d at 613.
11. *Id.* at 362, 12 N.Y.S.3d at 615.
12. *Id.* at 361, 12 N.Y.S.3d at 615.
13. *Id.* (citing *Bank of N.Y. Mellon Trust Co. NA v. Sachar*, 95 A.D.3d 695, 943 N.Y.S.2d 893 (1st Dep't 2012); *Deutsche Bank Natl. Trust Co. v. Pietranico*, 33 Misc. 3d 528, 535, 928 N.Y.S.2d 818 (Sup. Ct. Suffolk Cnty. 2011); *In re Escobar*, 457 BR 229, 240 (Bankr. E.D.N.Y. 2011)).
14. *Id.*
15. *Id.* at 362, 12 N.Y.S.3d at 615.
16. *Id.*
17. *Id.*
18. *See id.* at 362, 12 N.Y.S.3d at 615-16.
19. *Aurora Loan Servs., LLC v. Taylor*, 114 A.D.3d 627, 631, 980 N.Y.S.2d 475, 479 (2d Dep't 2014) (Hinds-Radix, J., dissenting) (citing *HSBC Bank USA v. Hernandez*, 92 A.D.3d at 844).
20. *Aurora*, 25 N.Y.3d 355, 362, 12 N.Y.S.3d 612, 615.
21. *See HSBC Bank USA, N.A. v. Spitzer*, 2015 N.Y. App. Div. Lexis 6943 (2d Dep't 2015); *see also Deutsche Bank Natl. Trust Co. v. Monica*, 131 A.D.3d 737, 738-39, 15 N.Y.S.3d 863, 865-66 (3d Dep't 2015).
22. *Id.*

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# Bergman on Mortgage Foreclosures:
# Condo Lien as a Continuing Lien—and Why Lenders Care

By Bruce J. Bergman

A new case *firmly* confirms an important principle: a condominium common charge lien is a *continuing* lien [*Board of Mgrs. of Netherlands Condominium v. Trencher*, 128 A.D.3d 452, 9 N.Y.S.3d 213 (1st Dept. 2015).] What precisely that means to condominiums and why it is quite meaningful as well to mortgage lenders is our focus here.

## The Continuing Lien Concept

Just as it is with a mortgage lender, a condominium (through its Board of Managers) will wait a certain amount of time before it feels the need to file its condominium common charge lien. However many months (or years) that may be, when the lien is filed it represents a finite number of the various sums due, which include, among other things, common charges, assessments, late charges, interest, penalties, among other possible charges. Even if the unit owner eventually pays the past due amounts, the amount due will be *greater* than is recited in the lien, for the obvious reason that the passage of time caused further items to accrue.

Of similar import, if a condominium common charge lien action is begun, and whether it is paid off sometime during the action or actually proceeds to foreclosure sale, the sum due is considerably larger than the amount identified in the lien—for the same apparent reasons. In that regard, a referee in the foreclosure is required to make the computation and his numbers will need to reflect accruing sums, not merely the number in the lien.

Must a condominium file liens periodically to address the growing sums? And if they do, do they need to start separate actions? How does this all relate to the condominiums foreclosure action? Happily, the simple answer (as confirmed by the new case) is that the condo lien is a *continuing* lien, that is, the lien encompasses, and the foreclosing condo plaintiff is entitled to receive, not only the amount claimed in the lien, but also the aggregate of unpaid common charges and fees that have accrued since the filing of the lien.

While we have long believed that this was indeed the law, it had not been directly addressed by an *appeal* court—although that is solved with this new case. Thus, higher court authority has stated what all the lower courts had concluded so that there can be no issue but that a condominium common charge lien is a continuing lien—obviously good and comforting news for any condominium board of managers.

## Why This Matters to Mortgage Lenders

Some of our readers will be aware that statute affords to condominiums a *special* priority to the condominium common charge lien. It is declared to be senior to (essentially) all other liens and mortgages *except* a first mortgage. (This is pursuant to RPL §337-z.)

Thus, while the holder of a first mortgage is not concerned with the growing sum due on the *junior* condominium common charge lien, the holder of a second or more inferior mortgage upon the condo unit *does* care. The subordinate mortgagee is subject to an ever increasing sum due on the condominium lien and, depending upon that amount, this could be consequential. In sum, that a condominium lien is a continuing lien has meaning both to condominiums and to lenders.

**Mr. Bergman, author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures*, Lexis-Nexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers*.**

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### *N.Y. Real Property Law Journal*

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For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors, or if e-mail is not available, on a CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

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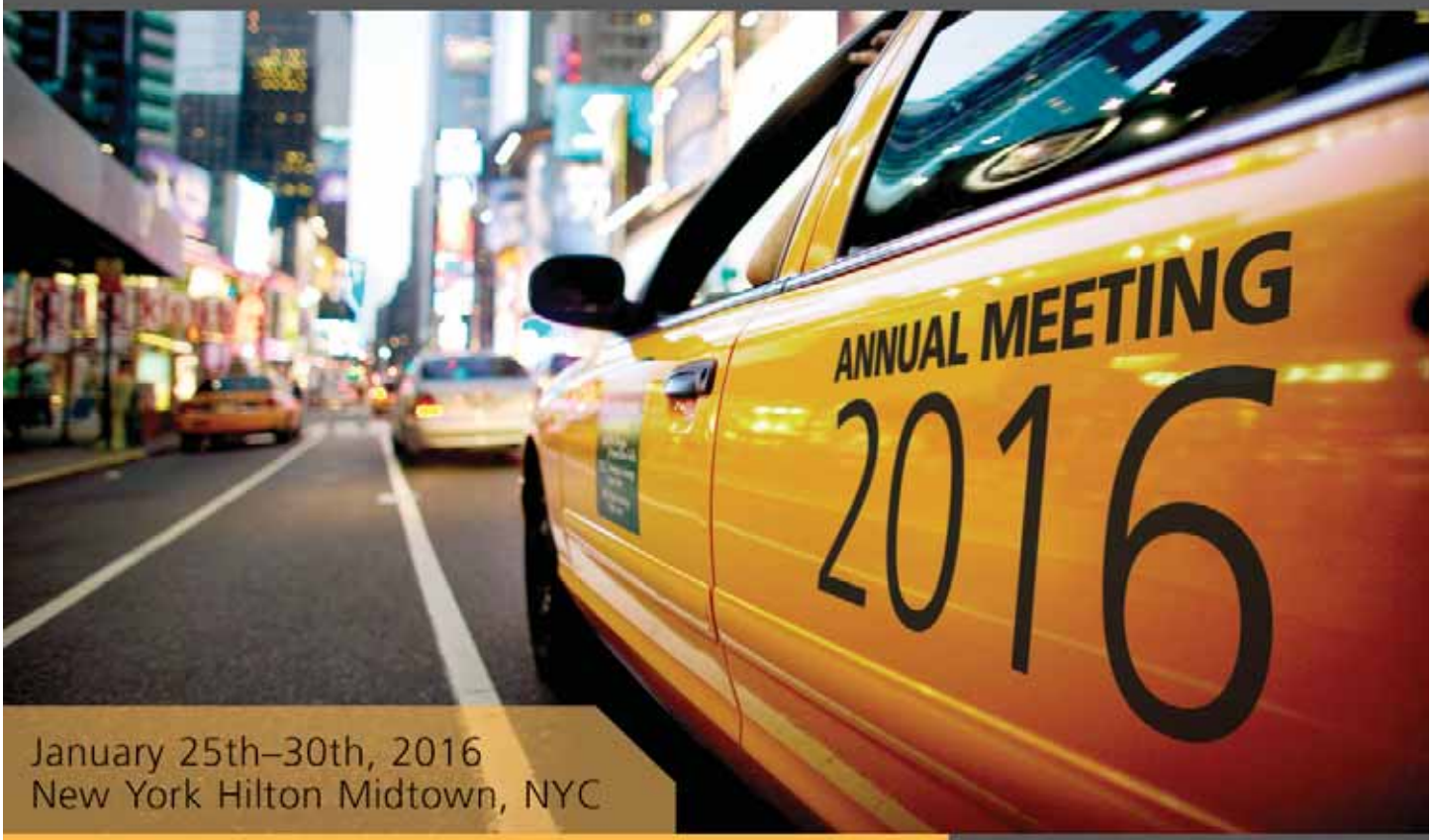


# ANNUAL MEETING 2016

## REAL PROPERTY LAW SECTION PROGRAM

Thursday, January 28, 2016