

## **Sellers Beware: Buyers Often Prevail In Litigation Compelling The Sale Of Property**

By Dale Alberstone, Esq.

Two recent cases point up problems a seller may have when seeking to cancel a buy/sell contract which does not consummate by the scheduled close of escrow.

In Ninety Nine Investments vs. Overseas Courier Service (decided December 2, 2003) a buyer sued a seller for the purchase of the seller's one-half interest in a 39-unit apartment building and in a 62-unit apartment building, both located in Los Angeles. The contract provided that escrow was to close on or before January 14 and that time was of the essence. When the escrow did not close on January 14, the seller cancelled the escrow and sought to be relieved of any further obligation to sell the apartment buildings to the buyer. The basis of the seller's contention was that the buyer had failed to obtain his loan funding by the scheduled close, and payment of the purchase price was a condition to the seller's obligation to sell the property. Because the condition failed (i.e. the buyer did not receive timely funding by the lender), the seller claimed that he was discharged of his obligation to sell.

The buyer filed suit for specific performance, alleging that his failure to tender the purchase price by procuring loan proceeds was due to the seller's lack of cooperation in providing the buyer with the relevant documents and information which the lender was requesting as a condition to loan approval.

The court found that the seller did not deposit his signed escrow instructions into escrow until January 11 and that because of that late deposit, it was not possible for the lender to prepare the loan documents until after the January 14 scheduled close of escrow. Also, the court noted that the seller did not submit his rent roll or certain other important information until the date for the scheduled closing of escrow. The court found that it was impossible for escrow to prepare the closing statement on January 14 because of the dilatory deposit of seller's closing information.

The court held that the seller breached the so-called implied covenant of good faith and fair dealing, which states that neither party will frustrate the other party's right to receive the benefits under the contract. Even though the contract provided that time was of the essence and that the escrow was required to be closed on January 14, the court found that the seller's delays excused the buyer's timely obligation to fund the transaction (i.e. pay the purchase price) as of the closing date. The court held that the buyer was entitled to specific performance (i.e. a court order compelling the seller to sell the property) even though it was beyond the scheduled closing date.

In Galdjie vs. Darwish (decided December 4, 2003), the buyer entered into a contract on February 5 to purchase an apartment building from the seller located on Yale Street in Santa Monica. Escrow was scheduled to close on April 9. On April 1, the seller wrote a note addressed to the buyer stating that the contract would not be extended beyond April 9 and that by that date, everything should be wrapped up. The contract also provided that time was of the essence.

The escrow did not close on April 9. On May 11, the seller wrote a letter to escrow stating that she wanted the transaction to be terminated because the escrow had not closed on time. On May 12, the buyer obtained a commitment letter from Washington Mutual, as the lender, for a loan in the amount of \$279,000. Although the buyer was then prepared to consummate the escrow, the seller refused to proceed.

The buyer then sued the seller for specific performance alleging that the seller had waived the time is of the essence provision of the contract.

In analyzing the case, the court observed that even after the April 9 scheduled closing date, the seller continued staying in communication with the buyer and approving and assisting his efforts to locate a willing lender. Because of the seller's conduct in acting as though the contract remained in existence, and the seller's failure to promptly cancel the escrow following the April 9 scheduled closing date, the seller waived the time is of the essence clause. The effect of that waiver was to allow the buyer a reasonable time to thereafter perform his obligations to purchase the apartment building.

Of significance is the fact that the court held that in order to have reinstated the time is of the essence element of the contract, the seller was first required to give the buyer reasonable notice of a new date for the close of escrow. Having failed to do that, the seller could not just unilaterally cancel the escrow on May 11.

Accordingly, the court entered judgment compelling the seller to sell the property to the buyer, even though the buyer's performance was tardy.

### **CONCLUSION**

Under the holding of the Ninety-Nine Investments case, a buyer is entitled to obtain specific performance of a contract for the purchase of an apartment building if the seller frustrates the buyer's actions to perform, such

as not providing the buyer with the information necessary for the buyer to timely obtain loan approval, or not timely providing the escrow with relevant data.

The Galdjie case held that if a seller, who nevertheless cooperates with a buyer (such as by providing data necessary for the buyer to obtain his loan), fails to act expeditiously in cancelling the escrow and contract following the scheduled closing date, the seller may be deemed to have waived the *time of the essence* provision, thereby empowering the buyer to compel the sale of the property even though the escrow did not timely close.

In order for a seller to avoid the adverse application of these two recent cases, it is imperative that sellers act responsibly and in good faith throughout the term of the escrow. It is also important that the seller perform everything on the seller's part to be performed in a timely fashion prior to the close of escrow if the seller wishes to be able to cancel the contract upon the escrow's failure to close on the scheduled date. Any such cancellation by the seller should be on the first business day following the scheduled close if time is declared to be of the essence in the contract. The seller should prepare for such cancellation by discussing the same with competent real estate counsel at least two weeks before the scheduled closing date.

Similarly, buyers who anticipate that they will be unable to perform by the scheduled closing date, should promptly seek counsel's advice as to how to preserve their rights to purchase the property following the scheduled close of escrow. Buyers should also discuss with counsel about the propriety of recording a *lis pendens* (i.e. a lien) against the seller's property in order to prevent the property from being resold during the time that the buyer seeks judicial relief to compel the sale.

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*The foregoing discussion is intended solely as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

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