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Free: Top 10 Reasons Why Closings Are Adjourned

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You can almost hear the cheers when a real estate closing is scheduled. For starters, there aren't that many of them these days, but more importantly a closing is usually a happy occasion for all involved. But what happens when things go wrong, so gravely wrong that the closing must be adjourned?

The buyers and sellers leave the conference room in confusion and disbelief, and the domino effect of an aborted buy-sell can affect closings from Westchester to California. Identifying the problems in advance can avert these tragedies.

Quite often the causes for these adjournments are practical rather than legal: The buyer does not bring homeowners insurance, or the seller neglects to obtain a payoff letter for his mortgage. Hopefully, we don't sink to a seller bringing a Derek Jeter baseball card as photo ID.

In this scholarly forum, we will focus primarily on the statutory and caselaw authority that can bring a closing to a grinding halt.

With that said, let's examine the "Top Ten Reasons Closings are Adjourned."

Reason #10

An executor or administrator gives a power of attorney to a third party. No! Fiduciaries cannot delegate their authority.

"The duty of a fiduciary is Personal and cannot be divested by delegation."[1] A decedent, for example, has placed his trust in the appointed executor.

An executor, guardian or other person acting in a fiduciary capacity can, however, delegate the performance of mere mechanical or ministerial acts to others by power of attorney. So, a title company will not accept a deed executed by the attorney-in-fact of an executor, but will accept a transfer tax return, as a ministerial act, when signed by that same attorney-in-fact.

A fiduciary who can't or won't act should resign.[2]

A corollary to this reason for adjournments, and equally as devastating, is the situation where a fiduciary cannot act at all. For example, a deed that conveys directly to a trust rather than to "John Smith as trustee of the Brown Qualified Personal Residence Trust" has conveyed nothing. Title remains in the grantor (who, invariably, is now deceased).[3]

Can this closing be saved? Unless the fiduciary or grantor to the trust is in close proximity to the closing, it will be adjourned.

Reason #9

Seller does not come to the closing with certified funds for transfer taxes. No! Title companies will not take a personal check for transfer taxes unless authorized prior to closing.

Under the contract, the party charged by statute is required to pay the transfer taxes by "certified or official bank check." As a result, the seller is required to pay both the New York City transfer tax,[4] and the New York state transfer tax.[5]

Unfortunately, these are not the only transfer taxes the practicing real estate attorney must be aware of these days. New York state also imposes a "mansion tax" of 1 percent on certain residential properties having a consideration of $1 million or more.

The statute calls for the purchaser to pay the mansion tax.[6]

In this area, two other municipalities impose transfer tax on the seller, Yonkers[7] and Mount Vernon.[8]

Another nasty surprise may await the attorney who does not regularly practice in certain areas of Suffolk County. Known as the "Peconic Bay Region" transfer tax, this is a 2 percent tax (with small allowances) and is payable by the buyer.

As an example, a $3 million cottage in East Hampton will result in a tax of $55,000. Not a small number, even for someone with the scratch to afford a $3 million summer house.

The burden of payment of all transfer taxes can be completely shifted, or shared, by negotiation between the parties. No such negotiation can take place if the parties are not made aware of the taxes by their attorneys.

Can this closing be saved?

Possibly. The party responsible for paying the tax could use a credit card, or the title closer might be able to verify the funds with the bank.

Reason #8

The buyer (and his attorney) is not aware that the lending institution will deduct the buyer's closing costs of $10,017.60 from the mortgage proceeds of $200,000. Instead of having the full mortgage proceeds available to the seller, the buyer puts a personal check for $10,017.60 on the table. No! The contract calls for the balance of the purchase price to be in certified funds. This is the "net proceeds trap."

The solution, of course, is for the buyer's attorney to obtain from the bank the exact amount that will be available to buyer at closing.

With mortgage documents often being e-mailed to the lender's attorney 10 minutes after the closing starts, it is difficult for the buyer to get to his bank in advance to obtain the correct certified checks.

And that is all that has really changed. The buyer still owes the seller the same amount; it is the form in which it is delivered at closing. Even if the seller likes the pictures on the buyer's checks, it could be malpractice for the seller's attorney to accept a personal check in that amount.

With the help of a "Truth in Lending" statement and the title company, the buyer's attorney should be able to calculate the net proceeds available.

The "seller's concession" is an adjunct to this problem concerning certified funds.

The contract price is inflated to include a credit of $20,000 for repairs (the concession). The repairs are almost always imaginary, but the result is 100 percent financing or more.

If the concession was fully disclosed to the bank, all appeared to be well. If, however, the bank was not made aware of the concession, then the lender's attorney will be looking for the amount of the concession in the form of certified funds in order to bridge the gap between the mortgage and contract price, and will not disburse until he sees it.

The collapse of the sub-prime mortgage market will, in all likelihood, put an end to most seller's concessions.

An alarming trend in ethics opinions began in New Jersey. In 2006 a New Jersey Ethics Opinion disciplined the buyer's and seller's attorneys for participating in a real estate transaction that had a "seller's concession" built into the purchase price. Despite the fact

that full disclosure was made to the originating bank, the New Jersey Committee on Professional Ethics held that a lender acquiring the loan in the secondary market could be deceived. See N.J. Opinion 710.

New York has now (Nov. 2, 2007) issued a similar opinion. See Opinion 817:

> Participation in residential real estate transactions that include a "seller's concession" and "grossed up" sales price is prohibited unless the transaction is entirely lawful, the gross-up is disclosed in the transaction documents, and no parties are misled to their detriment.

There is much room for interpretation in the opinion. What is meant by "transaction documents?" Must the deed contain a recital concerning the concession so that there is record notice? Would a bank relying on an appraisal, which, in turn, relied on a grossed-up purchase price of an adjoining property, be considered as a party misled to their detriment? What has always been a slippery slope is now a sheet of ice. In a market looking for solutions this could be a serious roadblock.

Can this closing be saved? In the case of the net proceeds trap, the best thing that can happen is that the parties and attorneys agree to have a cup of coffee while the buyer goes to his bank to get certified or bank checks; if not, the closing will be adjourned with attendant adjournment fees charged to the buyer.

If a seller's concession is not disclosed to the bank, the closing will almost certainly be adjourned. And in light of the recent ethics opinion, lawyers who practice in this field must reflect on their ethical obligations.

Reason #7

The executor of an unprobated will arrives at closing to execute the deed. No! Without Letters Testamentary this person has no standing.

The authority of an executor to convey real property originates in EPTL 11-1.1, Fiduciaries' Powers, and more specifically EPTL 11-1.1 (b)(5) (B). "With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of:

> "B. to sell the same at public or private sale . . . " A fiduciary is a personal representative, that is, a person who has *received letters* to administer the estate of a decedent. A preliminary executor also has the authority to convey real property. "An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary or preliminary letters testamentary are granted . . . "[9]

Can this closing be saved? Only if luck brings all the heirs of the testator to the closing.

They could then convey, pursuant to an affidavit of heirship. The proceeds could be held in escrow until letters are obtained, or to guarantee compliance with any of the terms of the will.

Reason #6

A religious corporation arrives at closing without a Supreme Court order authorizing the sale. No! Without such an order, the conveyance is void.

A religious corporation is more heavily regulated than a not-for-profit. So the organizational documents of the entity must be examined in order to determine the requirements placed on the property owner. Never rely on the client for this information.

Since Sept. 1, 1972, the Not-for-Profit Corporation Law applies to religious corporations. In addition to court approval, the consent of two-thirds of the directors to the sale must be obtained.

A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the Court.[10]

The intent, of course, is to protect the congregation from the dissipation of church assets. This requirement extends to all property owned by the religious corporation, not merely the property used as a place of worship.

A mortgage also requires a court order. Without an authorizing order, the mortgage cannot be foreclosed. A purchase money mortgage does not require a court order.

The lack of a comma in the correct place in the statute has caused the erroneous belief that a mortgage for a term of less than five years does not require a court order. This is not true. All mortgages of real property owned by a religious corporation require a court order except purchase money mortgages.

Strict compliance with the order approving the transaction is required. If the contract or mortgage terms are amended, so must be the court order.[11]

A title company will not insure a mortgage or conveyance by a religious corporation absent a court order. This is something you cannot throw money at to make it go away in order to close.

So closely related are not-for-profit corporations that the requirements for conveyances of their real property should be examined.

Although there are four types of not-for-profit corporations, only Type B and C require court orders for the sale of all or substantially all of their assets.[12] Mortgages made by not-for-profit corporations, even of all or substantially all of their assets, do not require a

court order.

Can this closing be saved? No! If a court order is required, the closing will be adjourned.

Reason #5

Seller arrives at closing with a payoff letter showing legal fees due. No! This means seller is in default of his mortgage and must act in compliance with the Home Equity Theft Protection Act.

Effective Feb. 1, 2007, the Act amends §595-a of the Banking Law, §295-a of the Real Property Law, and adds new §1303 to the Real Property Actions and Proceedings Law.

The Act requires among many other things:

• notice in the contract that the equity seller can cancel the contract within five business days;

• provision of a form to cancel the contract;

• a complete description of the payments that will be given to the equity seller in return for his home;

• a description of the services the equity purchaser will provide;

• the terms of any lease, if the equity seller may remain in the house;

• the term of any buy-back agreement;

• if Spanish is the equity seller's primary language, that the contract be in Spanish; and

• that the contract be in 12 point print.

The Act is triggered by a default in the equity seller's mortgage or taxes if it is two months in arrears.

Title companies are strictly construing these transactions due to the fact that any "equity seller" can cancel a transfer that is in material violation of the Act for two years after the recording of the deed.

Purchasers who will use the house as their primary residence are exempt from the Act. There are a number of other exemptions.

Can this closing be saved? No, at this point in time such titles are uninsurable.

Reason #4

The intestate decedent owner's daughter, who lives in the house, arrives at closing to execute the deed. No! Either an administrator or all the heirs must convey the property.

It has happened that at closing the daughter admits that she has a brother, but that he has no interest in the property. Of course, legally, he certainly has a 50 percent interest in the property. His sister means he is "not interested" in the property. Notwithstanding, the legal interest of all intestate heirs must be disposed of at closing by execution of the deed.

Where a decedent leaves no will he dies intestate. A fiduciary known as an administrator can be appointed to handle the decedent's affairs.[13]

Where an administrator is the seller of the property, a bond in the amount of the purchase price must be posted to protect the other heirs.[14] If there are no heirs, the People of the State of New York become the owners, and only the Public Administrator can convey.[15]

Title companies do not put simple estates through the expense and time of an administration proceeding, but will accept an affidavit of heirship. After all, an administration proceeding is little more than a formal affidavit of heirship.

In *Matter of Bell*, a 1989 Nassau County Surrogate's Court case, the court stated that it would not entertain an administration proceeding in these simple single asset cases. "In intestacy, decedent's real property devolved by operation of law to her distributes at the time of her death . . . "; the distributees may act "without the necessity of subjecting the estate to the burden" of an administration proceeding.[16]

Can this closing be saved? No! All the heirs must be present at closing, and execute the deed.

Reason #3

A seller with a docketed judgment against him, who has been discharged in bankruptcy, believes he can sell his real property free of that judgment. No! There are two parts to a judgment, debt and lien. Bankruptcy only discharges the debt portion.

Bankruptcy is federal in nature. Bankruptcy rules require the filing of the petition in the county clerk's office in order to put a purchaser on notice.

This is almost never done. The title company is not responsible if that filing is not done. However, the title company, by running independent searches in the Eastern and Southern districts, has extended its liability and must deal with the findings. The issue here is judgments against a discharged debtor. This is one of the most difficult phone calls title counsel can take because at first blush the title company position seems to make no

sense. If the judgment has been discharged in bankruptcy how can it remain a lien on real property?

It is settled law that a discharge in bankruptcy only relieves a debtor from his personal obligation to repay the discharged debts. When a debt has been reduced to a judgment, a mere discharge does not remove the judgment as a lien against the debtor's real property.[17]

The *Carman* case states that "[a] 'qualified discharge' . . . serves as notice to third parties that, notwithstanding the debtor-owner's discharge in bankruptcy, the property may, nonetheless, still be burdened by liens," and further, that "[d]espite homestead exemptions a lien against the exempt realty remains valid unless the debtor takes affirmative steps to avoid the lien by making an appropriate application under federal bankruptcy law."[18]

Experienced bankruptcy practitioners believe that it could be malpractice when this extra step is not taken by the attorney for the debtor.

The *Bank of New York* case is instructive as to the history and meaning of §150 of New York's Debtor and Creditor Law.[19] Section 150 is a post bankruptcy discharge proceeding in state Supreme Court to remove the lien against debtor's property, and supplies a corrective remedy for failure to avoid the lien in the original bankruptcy proceeding. Standing under §150 is broad and includes the purchaser from the discharged debtor.

To omit the judgment, the title company will require either:

- an Order Avoiding Lien in the original bankruptcy proceeding, or

- an order pursuant to §150 of the Debtor and Creditor Law directing the clerk to mark the judgment discharged (as opposed to "qualified discharge").

The *Bank of New York* case also affirms the fresh start philosophy of the Bankruptcy Code by establishing that a judgment against a discharged debtor is not a lien against new real property acquired by the debtor after the discharge, if the judgment was discharged in the bankruptcy proceeding. As the court said, the discharged debtor may purchase new real property "unhampered by the pressure and discouragement of pre-existing debt."[20] A nice sentiment, not shared by most creditors.

Reason #2

A probated will results in Letters Testamentary issued to two executors, but only one attends the closing to execute the deed. No! Where there are only two executors appointed, both must execute the deed.

The statute is clear. Where there are two fiduciaries, their actions must be unanimous;

where there are three or more, a majority is required.[21]

If there are more than two executors appointed, a majority must act.

As we know from Reason #10, a fiduciary cannot delegate his authority, so where two executors are appointed, a power of attorney from one to the other will not enable the deed to be signed. Both executors must sign the deed - it is not a ministerial act.

There is a saving statute. A deed executed by one or more but not all of the executors who have been appointed will become valid 10 years after the deed has been recorded.[22]

Can this closing be saved? Not unless the other executor is readily available.

Reason #1

A probated will names a specific devisee, but the executor attends the closing to execute the deed. No! The executor has lost the power of sale, and only the specific devisee can convey the real property.

As previously discussed, the authority of an executor to convey stems from EPTL 11-1.1 (b) 5 (B):

> "With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of:
>
> "(B) To sell the same at public or private sale . . . "

As the statute gives the executor power to sell real property, so it takes it away with the phrase "except where such property or any estate therein is specifically disposed of . . . "

Where a will reads "I give my house at 123 Fifth Avenue to Mary Brown," a specific devise has been established, and only Mary Brown can convey the real property.

If the specific devisee is also the executor, the deed must be clear that the conveyance is made in an individual capacity; it would be ineffective to convey by using an Executor's Deed.

A residuary devisee is not a specific devisee. A specific devise is a "disposition of a specified or identified item of the testator's property."[23]

Can this closing be saved? No, unless the executor also happens to be the specific devisee.

Unfortunately, these are not the only time bombs ticking out there. Constant vigilance will

help to avoid the troubling consequences associated with the adjournment of a real estate closing.

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Endnotes:

1. 41 NY Jur. 2d. Decedents' Estates Sec 1479.

2. SCPA 715.

3. EPTL 7-2.1.

4. NYC Admin Code Title 11, Chap. 21.

5. NYS Tax Law 1402.

6. NYS Tax Law 1402.

7. City of Yonkers Transfer Tax, Chapter 15 Taxes, Article V. General Ordinance 8-1973 as amended by G.O. 10-1989, G.O. 3-1998.

8. City of Mt. Vernon Real Property Transfer Tax, Chapter 234 of the Code of the City of Mt. Vernon.

9. EPTL 11-1.3.

10. Religious Corporation Law Sec. 12.

11. *Greek Orthodox Archdiocese of North and South America v. Abrams,* 505 N.Y.S.2d 327 (Sup. Ct. Westchester Cty. 1994).

12. NPCL Sec. 510 (3).

13. SCPA 1001.

14. SCPA 805-3.

15. Abandoned Property Law §200.

16. New York Law Journal, Volume 201, Number 103, May 31, 1989.

17. *Fred D. Carman v. European American Bank & Trust Company,* 78 N.Y.2d 1066, 576 N.Y.S.2d 90 (1991).

18. 576 N.Y.S.2d at 90, 91; 11 U.S.C.A. §522 (b)(2)(A); 11 U.S.C.A. §522 (F) (1).

19. *Bank of New York v. Michael J. Nies et al.*, 468 N.Y.S.2d 278 (4th Dept. 1983).

20. *Bank of New York*, 468 N.Y.S.2d at 281.

21. EPTL 10-10.7.

22. EPTL 11-1.4, EPTL 11-1.2.

23. EPTL 1-2.17.