



From the Law Office of Ronald H. Gitter, Esq.

Addressing the Realities of Residential Real Estate

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## Houston, We've Got a Problem



### The Big Day

Buying or selling an apartment in New York City takes a lot of effort and a great deal of patience. It's unfortunate when everyone's hard work results in a delayed closing because a minor detail wasn't handled. To help avoid problems, here's my closing checklist to insure that everything goes smoothly at settlement.

### The Closing Date

Most people are unaware of how difficult it is to schedule a co-op or condo closing in New York City. With so many players involved in the closing (the buyer's bank, the seller's bank, the managing agent, the title company, as well as the attorneys for the respective parties), it becomes almost impossible to get everyone in the same room on the same date. As a result, the date stated in the contract for closing, in reality, is always an "on or about" date. If a closing takes place within a week of the scheduled date, for New York City purposes, that's "on or about." But what happens if the actual date of closing is important to either the buyer or seller? For example, the seller has to close on his or her new home on a specified date in the future, or alternatively, the buyer has to move out of an apartment because a lease is expiring. In those situations, the parties must let the attorneys and brokers know that the date of closing can't be an estimate and must occur when stated in the contract. Although you can impose penalties for a late closing (that is, a daily monetary penalty for not closing on a specified date) or make the closing "*time is of the essence*" (which means that the parties have to close on that date or all hell breaks loose legally), most attorneys will resist such scenarios because a penalty can always backfire on the party seeking to impose it. The best protection against a problem with the closing date is to communicate your needs up front and make sure the other party is capable of closing on the contractually specified date. If there is a real economic problem with a closing that does not take place on a particular date, the parties will have to consider imposing a penalty for a late closing at the time the contract is negotiated. Brokers often tell clients that either party can adjourn the closing for up to thirty days. Although this may be technically correct in some circumstances, as a matter of practice, a last minute closing adjournment usually creates

financial and emotional chaos and should only be used when a real emergency occurs that requires the closing to be adjourned.

### **Personal Property**

If you are purchasing an apartment and are buying any furniture or other personal property with the apartment, make sure those items are listed in the contract. Nothing should be left for negotiation at the end of the transaction, as you may be sorely mistaken as to what the seller intends to take or not take. People can get attached to their "stuff", as George Carlin would say, in a big way. If you want that tree on the terrace, it better say so in the contract or it won't be there when you move in.

### **Make Sure You Have "Good Funds"**

Several days before the closing, the seller's attorney will let the buyer's attorney know how to prepare the checks for closing. In almost all cases, those funds must be "good funds", usually in form of official bank checks, as unendorsed certified checks are not used much any more. Sellers will rarely accept an attorney's check or a brokerage account check (like Schwab) in payment of the purchase price. There are other payments to be made at closing which must also be made in official bank funds. If you're buying a condo, there will be [title insurance](#) issued by the title insurance company. That's the entity that searches your seller's title, to make sure you're not purchasing a title problem. The title bill must be paid in good funds or with an attorney's check. If your co-op or condo has a flip tax, those funds must always be paid with official bank checks. In addition, the mortgage recording tax payable by buyer (discussed below) and any future real estate tax payments made by buyer at closing must also be paid in good funds. Finally, the transfer taxes to New York City and New York State (including the "mansion tax" payable by the buyer where the price of the apartment is \$1,000,000 or more) must be paid with good funds or with an attorney's check. Forgetfulness on this issue will cause a closing delay, guaranteed.

### **Coordinate the Bank Funds and Transfer Buyer Funds Forty-Eight Hours in Advance of Closing**

Most buyers finance a portion of the purchase price. In today's lending environment, banks take a significantly longer period of time to "clear the loan" for closing and to actually fund the loan. In most cases, the bank funds don't show up in the bank attorney's account until sometime on the day of closing. The funding of the loan proceeds by the bank is now a major area of inconvenience and often causes closing delays despite the best efforts of the buyer's attorney. The clearance of the buyer's loan and the availability of the loan funds have become the focal point around which the closing gets scheduled and actually occurs. It is essential that the seller's attorney be aware of any issues with the funding of a loan by the buyer's bank.

The balance of the price comes from the buyer's funds. In many cases, the buyer has those funds in a brokerage or investment account and has to transfer the funds to a checking account to obtain certified or official bank funds. The buyer's portion of the closing funds should be wired or deposited at least two days in advance of closing. If you leave this task to the last minute, the bank where you have deposited the funds may not have clear funds upon which to issue official bank checks. If you don't have good funds, your seller won't close and you will have to reschedule the closing. One more thing: In that rare condo transaction where the settlement funds are being wired at closing, be prepared to sit around the closing table waiting for the funds to "hit" the bank account of the seller's attorney. The process can take two or three hours and sometimes longer...

### **Be Aware of the Expiration Date of Your Interest Rate Lock-In**

Even if the exact date of closing doesn't matter to you, there are other factors that impact the date of closing. If you are financing a portion of the purchase price, you must be aware of the date that your interest rate expires (known in the trade as your "lock-in"). If the closing does not take place before the expiration of your lock-in, and rates go in the wrong direction by the time the closing date rolls around, you may be forced to pay costly fees to extend the lock-in rate. Make sure your attorney is aware of the expiration date of your lock-in and your commitment letter as well (although the commitment letter usually gets extended without much difficulty), so that an otherwise glitch-free transaction does not suddenly become unnecessarily costly.

### **Where's the Stock and Lease?**

When you are selling your co-op and have an outstanding bank loan, the bank must be contacted in advance of closing to provide a pay-off statement and to arrange for the stock and lease to be brought to the closing. With many banks, the process of requesting the stock and lease from the bank's back office (that is, some missile silo in Iowa where they keep these things), can take several weeks. Your co-op sale can't take place without the existing stock and lease. Oftentimes, the bank can't find these documents and they will give your managing agent a *"lost stock and lease affidavit and indemnity"* so that the managing agent will issue a new certificate and lease to your purchaser. Even if the bank knows it can't find the stock and lease (some banks are notorious for losing those documents), they will make a best efforts search to find it. The pay-off bank has to be given at least thirty days notice of the closing or you will have a problem having the stock and lease present when you close. If no bank is involved and you have the stock and lease in your possession (at least you think you know where you put them ten years ago when you bought the place), make sure you can locate those documents and bring them to the closing. Managing agents may not accept a lost stock and lease affidavit and indemnity from a seller if the seller first raises the issue at closing. Remember, your

inability to find the stock and lease must be brought to the attention of the managing agent as soon as possible.

### **Mortgage Recording Tax**

Condo buyers should be aware that there is a mortgage recording tax in New York City. In order to have your mortgage recorded in the borough in which your condo is located, you will have to pay a fee of approximately two percent of the face amount of the loan (it's a little higher for loans over \$500,000). Factor this cost into your estimates, so that you don't have to scramble to come up with funds for this ridiculous expense. Attention co-op buyers: as discussed in "[A New Tax for Co-ops](#)", the mortgage recording tax could be coming to your transactions in the near future. You can send the New York State legislature a thank you...

### **Insurance Matters**

Unlike buying a house, where a paid receipt for a homeowner's policy is required at closing, with co-ops and condos, the insurance requirements are different. With a co-op, most banks only require a copy of the "declaration page" of the cooperative's insurance policy. With condos however, the name of your bank is usually added to the condominium's insurance policy. In order to obtain an "*insurance certificate*" from the condominium, naming your bank as a "*loss payee*", your attorney has to communicate with either the managing agent for the condo or with the insurance broker for the condo, to make sure that this detail is taken care of. If the bank's name has not been added to the condo's policy and the insurance certificate issued, the bank won't close. If there is a mistake in the bank's name or address on the insurance certificate, the bank won't close. Mindless, but nevertheless, important. Although usually not a closing requirement, don't forget to have insurance coverage in place for your co-op or condo on the date of the closing.

### **Schedule the Move In and Move Out**

Remember, you're not the only person who may be moving in or out of an apartment building on any given day. Make sure you contact the managing agent or resident building manager (the person previously referred to as the "super" before supers had Facebook and LinkedIn pages) sufficiently in advance of the closing, to make sure the date you need is available. There is only one service elevator in an apartment building and some buildings don't have service elevators. Scheduling, therefore, is important. Once other moves are scheduled for a particular date, you're out of luck. Not being able to move in or move out when you need to can really ratchet up the anxiety levels. Make sure to schedule your move no less than two weeks prior to closing.

### **Bring Photo ID and Extra Checks**

Managing agents and title companies require a picture ID to make sure you're who you say you are. Don't forget to bring picture ID with you as well as other

identification. In most cases, the managing agent or title closer won't complete the closing without proper identification. Make sure you also bring extra checks just in case there are minor adjustments or corrections to be made to the closing numbers.

### **Vacant and Broom Clean**

You'd think I wouldn't have to discuss this one, but it is New York. Unless the buyer is taking possession of the apartment subject to an existing tenancy (which happens infrequently, unless someone is buying an investor unit), the seller's obligation is to deliver the apartment "vacant and broom clean". The buyer will be inspecting the apartment right before the closing. The seller is obligated to remove all of the seller's possessions from the apartment and give the place a good once over. Nobody wants to pay McMillions for a dirty space. You would be shocked at how many people fail to extend this courtesy to their buyer. Hopefully, saying it here will shame those potentially sloppy sellers into cleaning up their act.

### **If It Costs Less Than a Flat Screen, Work It Out**

Invariably, minor issues arise right before a closing that may cause one or both of the parties emotional distress. The buyer reneges on buying a wall unit or furniture, the seller really doesn't have a guaranteed parking space in the garage, the leak in the bathroom wasn't repaired as promised. Usually there's a cost involved that no one wants to incur. You get the picture. In the alternate universe of Manhattan, people can get really cranky about these types of issues, and sometimes, rightfully so. If it should happen to you, try applying my "[Twenty Year Rule](#)":

*Will whatever I'm fighting about make any difference to me twenty years from today?*

In most cases, the answer to the above query will be a resounding "no." Keep my *Twenty Year Rule* in mind if a minor issue arises before or at closing that might sour you on the whole experience.

### **Residential Reality: Now Shake Hands and Go Away**

I realize that most of the above suggestions sound like "no brainers", but many tears have been shed over a delayed closing because someone forgot to do something simple. Just keep the above in mind as you approach your closing and have a good bottle of wine picked out for the post-closing dinner.

For what to expect when it comes to closing expenses, see "[The Skinny on Closing Costs](#)".

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