Case Digest and Summaries Re Time is of the Essence Opinions

History

- **1852-** Time in a Court of Equity is rarely considered as material where the value of the property contracted for and the circumstances of the parties remain unchanged, but performance will not be decreed where time has elapsed and an important change in respect to value or circumstances has taken place. In sales of stock in the public funds, time is of the essence of the contract; and in all cases where time is material, or of the essence of the contract, the rule in equity is the same at law- that is, if the contract is not carried into effect within a reasonable time, by the vendor or the purchaser, it is deemed to be dissolved or abandoned by mutual consent. Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359 (Fla. 1852)

- **1897-** Contract was for sale of land, and specifically said time is of the essence of this agreement. Court found that even where time is made material by express stipulation the failure of one of the parties to perform within the particular time is limited, and whill not in every case defeat his right to specific performance. If the condition is subsequently perofmred, without unreasonable delay and no circumstances have intervened that would render it inequitable or unjust to give such relief. The discretion which a court of equity has to grant or refuse specific performance and which is always exercised with reference to the circumstances of the particular case before it, may and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. Shouse v. Doane, 39 Fla. 95 (Fla. 1897)

- **1911-** Where, in a contract to convey lands, it is expressly covenanted by an indenture that time is of the essence of the contract, a plaintiff to have specific performance must perform or offer to perform within the time specified, unless his delay is sufficiently excused or waived. Non-performance of a contract for the conveyance of land within the specified time may be excused so as to authorize specific performance when the defendant caused the delay, as by evading tender or performance or by causing the plaintiff to be misled or to mistake his rights; or the delay may be waived expressly or impliedly by the agreement or conduct of the defendant. Where a party has paid no part of the purchase price and loses a right to purchase lands within a stated period by the mere expiration of the time definitely limited by an indenture in which time is expressly made of the essence of the contract, such loss is not a forfeiture requiring action by the opposite party and against which equity will give relief. L'Engle v. Overstreet, 61 Fla. 653 (Fla. 1911)

- **1946-** Time is of the essence in an option contract whether or not it is so expressed, and the conditions of the option must be performed within the time limited by the option in order for the option to constitute a contract of sale. Howard Cole & Co. v. Williams, 157 Fla. 851 (Fla. 1946)

- **1950-** In case of unilateral contracts, as the obligation is, before acceptance, on one said only, the proposer being bound to comply with his proposal, while the other party is under no obligation, and under no peril until acceptance, the provision of the offer as to time of acceptance is viewed with strictness. In such contracts the doctrine that time is not of the essence of the contract, does not apply; that doctrine applies to contracts when made, but not to offers to make them. In case of proposals, time is of the essence as to acceptance. And where a stipulated time is mentioned it becomes the essence of the contract, which must be performed by the broker within the period mentioned. C. W. Kistler Co. v. Hotel Martinique, Inc., 44 So. 2d 288 (fla. 1950)

- **1955**- Lease agreement contained a clause giving lessee the privilege of purchasing the property covered by the lease under stated conditions. Lessee tendered the purchase price but defendant refused to sell the property. Trial Court held in favor of lessee, finding that seller was stopped from contending that the tender of the full purchase price was too late to require specific performance of the agreement. Even where time is of the essence in a contract, specific performance will not be denied because of a delay in perfecting tender where the failure can be attributed to acts or omissions of the party to whom tender is due. Rosello v. Hayden, 79 So. 2d 682 (Fla. 1955)

- **1973**- Appellant seller and appellee buyer entered into an agreement for the purchase and sale of real property. Appellee put up a deposit in accordance with the agreement with a third party. Subsequently, the deposit was transferred to appellant. Appellee filed suit for the return of the deposit when appellee found that appellant had sold the property to another. Judgment was for appellee and appellant sought its review. Ordinarily, a purchaser in default cannot recover a deposit. And, where time is of the essence in a contract**,** no notice of default is required. However, there are exceptions to this rule. The court found that the actions of the agent of the seller were such as to warrant the trial court's finding that appellant was not entitled to forfeit the deposit without giving appellee a reasonable opportunity to close the transaction. This was particularly true in light of the fact that, by taking the proposed plans and specifications from appellee in trying to secure financing, appellant prevented appellee from seeking the adequate financing to close the transaction. Therefore, the judgment was affirmed. The court affirmed the trial court's judgment as the actions of appellant were such as to warrant a finding that appellant was not entitled to forfeit the deposit without having given appellant a reasonable opportunity to close the transaction. Delta Mobile Homes, Inc. v. Ehmann, 275 So. 2d 269 (Fla. 3rd DCA 1973)

- **1975**- Appellant sellers agreed to sell their home to appellee buyers pursuant to a contract that required appellees to obtain a loan certification by a specified date and that provided that time was of the essence. Appellees were unable to obtain the certification until a few weeks after the specified date, and appellants cancelled the contract. Appellees sued, and the trial court entered a judgment in favor of appellees on their complaint for specific performance. On appeal, the court held that because the provision that time was of the essence was in the preprinted part of the contract in a paragraph that referred to the closing, because the failure of appellees to obtain the certification by the specified date was not substantial, and because appellants were not injured by the delay and wanted certification only to verify that closing would occur on time, it was

not clear from the contract that time was of the essence for the certification requirement. Therefore, the judgment was not clearly erroneous, and the court affirmed the judgment, but modified it so that payment would be simultaneous with delivery of the deed. The court affirmed the judgment for appellee buyer on their complaint for specific performance for the purchase of appellants sellers' home. The court held that because the contract did not clearly show that the provision providing that time was of the essence applied to the requirement that appellees obtain a loan certification by a specified date, appellees' delay in obtaining the certification did not terminate the contract. Jackson v. Holmes, 307 So. 2d 470 (Fla. 2nd DCA 1975)

- **1976-** Lessor leased property to lessee. Lease contained a provisions that gave lessee the option to purchase. Prior to expiration of the lease, lessee noticied leessor of its intent ot purchase property. Lessor sent a proposed warrenty deed. No further communication for over a month after lease expired. At that time, lessor advised lessee that the option expired due to lessee's failure to exercise it. lessee tendered purchase price and asked lessor to deliver the warranty deed. Lessor refused because it was not made before the end of the lease. Lessee sought specific performance of the option to purchase that was part of the lease. Trial court entered judgment in lessee's favor, on appeal court found that lessee connumicated its decision to purchase the property which was all that is required to exercise the option. Court found that the purchase money did not have to be paid before the lease ended because the option set no time for payment. Doolittle v. Fruehauf Corp., 332 So. 2d 107 (Fla. 2st DCA 1976)

- **1994-** Appellant seller and appellee buyer entered into an asset purchase agreement. The contractcontained a clause merging provisions of a letter of intent into the agreement with a proviso that the agreement provisions would supersede inconsistent letter of intent provisions. The letter of intent stated that time was of the essence, and there was no contrary term in the agreement. Appellee requested an extension of the closing date which appellant refused. Appellant filed a breach of contract action for failure to close, and appellee counterclaimed on the ground that the refusal to grant an extension was a breach of the covenant of good faith and fair dealing. The trial court entered judgment for appellee on his counterclaim. The court reversed. Time was of the essence because the letter of intent was incorporated into the contract, and there was nothing in the agreement contrary to the letter's time is of the essence provision. An interpretation of the contract giving effect to all terms was preferred. Seabreeze Restaurant v. Paumgardhen, 639 So. 2d 69 (Fla. 2nd DCA 1994)

- **1998-** The modern trend of decisions concerning brief delays by one party in performance of a contractor conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is to not treat such delays as a failure of a constructive condition discharging the other party unless performance on time was clearly an essential and vital part of the bargain. Time is considered to be of the essence when one of the following three circumstances apply: (1) where there has been an express recital by the parties; (2) where, from the nature of the subject matter of the contract, the treating of time as a non-essential would produce a hardship, and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss; and (3) where an express notice has been given by

a party not in default to the other party who is in default, requiring the contract to be performed within a stated time, which must be a reasonable time according to the circumstances. Edward Waters College v. Johnson, 707 So. 2d 801(Fla. 1st DCA 1998)

Modern

- **2001-** Former husband challenged judgment against him on various issues. The appeals court however agreed with his contention that a two-day delay in making the first installment payment of child support arrearages under a mediation agreement was not a material breach. The situation involved a brief delay of performance where time was not of the essence. The terms of the agreement did not involve a commercial transaction, where performance within a time certain would be mandatory. Moreover, there was no grace period provided that would have put the former husband on notice that any brief delay in payment would accelerate payments due or otherwise trigger total default. As such, the deadline was not absolute; thus, late tender was not a material breach. Because the damage award was reversed, reversal of the prejudgment interest, attorney's fees, and costs was also warranted. Rose v. Ditto, 804 So. 2d 351 (Fla. 4th DCA 2001).

- **2003-** The modern trend of decisions concerning brief delays by one party in performance of a contractor conditions thereunder, in the absence of an express stipulation in the contract that time is of the essence, is not to treat such delays as a failure of a constructive condition discharging the other party unless performance on time was clearly an essential and vital part of the bargain. Sublime, Inc. v. Boardman's Inc., 849 So. 2d 470 (Fla 4th DCA 2003)

- **2004**- The parties entered a real estate contract for the sale of a motel.
The contract contained an expressed "time is of the essence" clause in the contract. An addendum, which referenced the contract, specifically addressed an earlier closing date, signifying a specific closing date. When the buyer missed the closing date, the seller sold the motel to a different buyer at a higher price. That sale was stopped by the buyer's lis pendens on the property. The buyer sued the seller for specific performance, arguing the buyer either waived or modified the time is of the essence provision. On judgment for the buyer ordering specific performance, the seller appealed. The court. looking at the evidence most favorably to the buyer, found that the evidence presented at trial did not demonstrate that the seller either agreed to modify the contract by postponing the closing date or intentionally relinquished a known right to insist on the early closing date. Therefore, it was error to find in favor of the buyer in specific performance. Arvilla Motel, Inc. v. Shriver, 889 So. 2d 887 (Fla. 2nd DCA 2004)

- **2004**- Seller cannot take advantage of a delay in performance that he created. Buyer and seller entered into a contract which included a time is of the essence clause. Parties disagreed over the construction of the home and buyer invoked the arbitration clause and requested damages and specific performance. Seller set a closing date and buyer objected b/c the arbitrators had not yet reached a decision. Seller didn't want to extend the closing date b/c it would cause them to incur damages. Arbitrators issued their

award in buyer's favor because the delay was at the hands of the seller. Gevas v. Fernandez, 905 So. 2d 149 (Fla. 3rd DCA 2004)

- **2004**- The parties entered into a contract for the sale of an aircraft. The contract contained no "time is of the essence" clause, nor was there any provision for damages or consequences in the event of a delay in delivery of the aircraft. It also contained a liquidated damages clause, providing that the $ 50,000 deposit was to be retained as liquidated damages and not as a penalty, in the event that the purchaser failed to accept delivery within seven days of notice that the aircraft was ready for delivery. The aircraft was not ready for the closing date or on a proposed delayed closing date. When the aircraft was ready, the purchaser was notified. After the purchaser failed to perform an acceptance flight, the seller declared the purchaser in default. The purchaser then sued for the return of his $ 50,000 deposit. The appellate court held that since the contract did not specify that time was of the essence and the purchaser suffered no undue hardship due to the delay, the purchaser was not entitled to terminate the contract. Because damages were not readily ascertainable at the time the contract was drawn up, the purchaser was not entitled to a return of its $ 50,000. Atlanta Jet v. Liberty Aircraft Servs., LLC, 866 So. 2d 148 (Fla. 4th DCA 2004)

- **2007**- The trial court found that the buyer was "present and ready to close" the contract and that the only reason the sale did not close was because the seller and/or her attorney failed to attend the closing. The appellate court held that this finding was supported by clear, definite, and certain proof, and the trial court did not err in reaching this conclusion. The buyer had arranged financing through a lender, and on receipt of the lender's package, the financing commitment was binding. The trial court's ruling indicated that it believed the testimony of the title agent that the lending package arrived on time and that the sale could have closed on the day scheduled. Nothing contradicted this testimony. Thus, the buyer was ready, willing, and able to close on the scheduled date. A faxed note from the buyer's attorney did not create a duty on the part of the buyer's attorney to notify the seller's attorney when the package arrived. Further, the appropriate inquiry in situations like this was an objective one-whether the buyer was ready, willing, and able, not whether the seller knew the buyer was ready, willing, and able. Shapiro v. Jacobs, 948 So. 2d 880 (Fla. 3rd DCA 2007)

- **2010**- The seller and the buyer executed a real estate contract for the purchase of certain real estate. The contract required the seller to use its best efforts to obtain properly-executed terminations from each of the holders of outstanding purchase agreements on or before closing. It also provided that time was of the essence. Prior to closing, the buyer informed the seller that due to pending litigation between the seller and a third party, as evidenced by a lis pendens in the public records, the closing would not occur. Although the seller informed the buyer that the litigation had been resolved, the buyer failed to appear at the closing. The appellate court found, inter alia, that the buyer breached thecontract by failing to participate in the time-is-of-the-essence closing. Its anticipatory repudiation obviated further performance by the seller. The seller could have performed such that the buyer would not have been permitted to terminate the contract. Accordingly, the trial court properly granted summary judgment to the seller. Trinity Quadrille, LLC v. Opera Place, LLC, 42 So. 3d 884 (Fla. 4th DCA 2010)

- **2011-** The parties entered into the contract before the condominium was constructed. The buyer never closed, and both parties claimed that the contract was breached by the other. The seller never sent to the buyer, as required by the contract, a commitment for title insurance. However, the buyer examined the title himself and determined that the seller had not recorded the Declaration of Condominium. As a result, he notified the seller that there was a defect in his title and, thus, that his title was unmarketable. The buyer argued the contract was breached by the seller because it failed to close within 30 days after receiving the Notice of Defect, as required by the contract. The appellate court agreed with the buyer. The buyer complied with the contract by giving notice of the title defect and the seller failed to close within 30 days of receiving that notice.
  The contract had a "time is of the essence" clause. The buyer's interpretation gave meaning to all the contract terms, all the terms were harmonious with each other, and each term had effect. The buyer was entitled to return of his deposits under the contract and he was entitled to attorney's fees. Lowe v. Winter Park Condo. Ltd. P'ship, 66 So. 3d 1019 (Fla. 5th DCA 2011).

- **2012-** At issue was whether the deadline for seeking a post-closing purchase price adjustment was material to the contract. The court observed that the contract did not specify that time was of the essence and found that there was no evidence of hardship in the record due to the delay of twenty-two days in appellant notifying appellee by letter pursuant to a provision in the purchase agreement outlining how appellant could seek an adjustment in the purchase price. Nor was there evidence of any notice given to the alleged defaulting party to perform pursuant to the contractual section within a reasonable time. Finally, there was no evidence in the record that the nature of the subject matter would inform the parties that time was of the essence. Appellee was not prejudiced by appellant's delay of twenty-two days. The contract contained only a date for performance, which, standing alone, was insufficient to make time of the essence. Accordingly, because time was not of the essence, appellant's twenty-two day delay in tendering the calculations was not material, and effect needed to be given to the intent of the parties by considering the calculations as stated in appellant's letter. If time is not of the essence in a contract, then the parties have a reasonable time in which to tender performance after the specified date. Time is considered to be of the essence where an agreement specifies, or where such may be determined from the nature of the subject matter of the contract, or where treating time as nonessential would produce a hardship, or where notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be a reasonable time according to the circumstances. Where one claims that time is an essential provision, the party is bound, before he can support such a claim, to serve a clear, distinct, and unequivocal notice fixing a reasonable time within which the thing must be done. Placing in the contract the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract. Even if a contract contains a specified date for performance, when the contract does not specify that time is of the essence, a delay will not necessarily invalidate the provision. Command Sec. Corp. v. Moffa, 84 So. 3d 1097 (Fla. 4th DCA 2012)

Waiver

- **1973-** Appellee purchased an automobile financed by appellant credit company. Appellee often fell behind on payments. Appellant established a practice of notifying appellee of the missed payments. Appellee would thereafter make payment. This pattern went on for some time. Then, without any notice of late payments being due, appellant repossessed the automobile. Appellant lost some of appellee's personal property that was inside the car. Appellee brought suit and was awarded compensatory damages for the lost personal items, compensatory damages for the wrongful repossession of his car, and punitive damages for the conversion of his personal property. The judgment was subsequently amended to eliminate the award for wrongful repossession. On appeal, the award of punitive damages was found to have been proper because appellant had shown a wanton disregard of the rights of appellee in and to his personal property. The elimination of the compensatory damages for the wrongful repossession was reversed because appellant's prior pattern of conduct led appellee to believe late payments would be accepted. Notification of a change in the pattern should have been given prior to repossession. A seller after default on the part of a buyer may extend the time of payment and waive his right to retake possession for such default, and his promise to do so, even though no additional consideration is given therefor aside from the buyer's promise to make payment at the time extended, will preclude him from exercising his right to retake possession before the expiration of the extended time. And if the purchase money is payable in installments, a large portion of which has been paid, and the seller accepts partial payments, after the day when payment should have been completed, he cannot retake the goods without notice, and without demand for the unpaid balance of the price and, in such case, a tender of the amount remaining due is sufficient to retain in the buyer the right of possession. Ford Motor Credit Co. v. Waters, 273 So. 2d 96 (Fla. 3rd DCA 1973)

- 1981- Plaintiff buyer contracted for the purchase of a condominium unit. She made an initial deposit and was obligated to provide an additional deposit that she failed to timely provide. Defendant seller notified her that the initial deposit was being returned and rejected her offer to pay the additional deposit. Nevertheless, she forwarded a check. Defendant refused to reinstate the contract. Plaintiff sued for specific performance and declaratory relief. Defendant answered and counterclaimed for attorney fees. After both parties moved for summary judgments, the trial court granted plaintiff's motion. The summary judgment was incorporated into a final judgment, awarding plaintiff attorney fees and granting specific performance. Defendant appealed. The contract made time of the essence; it clearly indicated that no notice would be given if a default were occasioned by the failure to pay monies when required. The provision waiving specific performance as a remedy was valid. Plaintiff admittedly failed to make the additional deposit as required. Defendant declared a default; plaintiff's attempt to cure the default came too late. Reversed in all aspects and remanded with directions. The appellate court reversed the final judgment and summary judgment in favor of plaintiff buyer on a contract. The contract made time of the essence; it indicated that no notice would be given in the event of a default by the failure to pay monies when required, and the contract contained a valid waiver of specific performance as a remedy. The award of

attorney's fees to plaintiff was reversed. The cause was remanded with directions. Sun Bank of Miami v. Lester, 404 So. 2d 141 (Fla. 3rd DCA 1981)

- **1982-** Appellee lessee entered into a contract with appellant lessor for the lease of a condominium with an option to purchase. When appellee expressed his intent to exercise the option to purchase, appellant declined, citing appellee's failure to timely pay the rent due under the lease and his failure to comply with the requirement that certain improvements be made to the premises by a specified date. Appellee contended that appellant was estopped from asserting non-performance, based upon appellant's acceptance of appellee's late performance. Appellee sued for breach of contract and a judgment was entered for him, from which appellant sought review. The court reversed the judgment in favor of appellee and remanded the cause for further proceedings, finding that a provision in the parties' contract stipulated that acceptance by appellant of late performance by appellee would not constitute a waiver of appellant's rights under the contract. The court concluded that, without an express waiver by appellant of his rights reserved under the contract, he did not waive appellee's failure of performance as a defense to an action for breach of contract. A lessor is estopped to assert a forfeiture for a breach of covenant or condition in a lease, or waives his right to such a forfeiture, if, after the breach of covenant, he accepts rent from his tenant with knowledge or full notice thereof. When time is made of the essence of a contract, such provision can also be waived by the party to whom the benefit. Philpot v. Bouchelle, 411 So. 2d 1341 (Fla. 1st DCA 1981)

- **1986-** Appellants, the sellers of real property and the purchasers under a second contract, sought review of a judgment granting specific performance in an action brought by appellees, claimants under an earlier contract to purchase. Appellant sellers had purportedly cancelled the contract for failure of appellees to satisfy certain conditions within a specific time period. The court reversed the decision. It found it clear that a "time is of the essence" clause in the contract for sale and purchase was not a stock phrase, but was intended to give appellant sellers an immediate right to cancel the contract if appellees were unable to timely demonstrate an ability to purchase. Appellees did not obtain a commitment for financing until three weeks after the 30 day period had expired, which was 17 days after appellant sellers had notified them of the cancellation, and 9 days after a new contract had been entered into with the new purchasers. Thus, the court held that appellees were not entitled to specific performance, and reversed and remanded with instructions to enter judgment for appellant sellers. The trial court's grant of specific performance to appellees, claimants under an earliercontract to purchase, was reversed. The court upheld a "time is of the essence" clause, as it was intended to give appellant sellers an immediate right to cancel the contract if appellees could not satisfy financing within 30 days. Because appellees failed to obtain such financing, they were not entitled to specific performance. Garcia v. Alfonso, 490 So. 2d 130 (Fla 3rd DCA)

- **1991-** Apellant sellers commenced an action for breach of contract to purchase real estate and to quiet title when appellee buyer failed to close by the agreed upon date as provided for in a time is of essence clause in the agreement for purchase and sale. Appellants and appellee filed motions for summary judgment on the breach of contract

count and the trial court granted the motion in favor of appellee. The court reversed the order on the breach of contract claim and held that the trial court erred when it ignored the unambiguous contractual language and disregarded both the time of the essence clause and the anti-waiver clause of the contract. The court held that no notice of default was required where time was of the essence and that appellee defaulted when he failed to set a closing date. The court held that appellants did not waive the time of essence clause by reason of prior written amendments and that the affirmative defenses of waiver and estoppel were defeated as a matter of law. The grant of summary judgment in appellants' favor as to the other affirmative defenses was affirmed as appellee confirmed in writing that appellants had fully performed their contractual obligations. Rybovich Boat Works, Inc. v. Atkins, 587 So. 2d 519 (Fla 4th DCA 1991)

- **1996-** Appellee buyers entered into a contract to purchase real estate from appellant seller. Thecontract provided that appellant seller would repair certain damage prior to closing, but the contract did not set a specific closing date, no time limit was set for making the repairs, and the standard "time is of the essence" clause was crossed out of the contract. Appellee buyers did not make a formal demand for completion. Appellant seller informed appellee buyers that all repairs had been completed pursuant to thecontract terms. Appellees disagreed and brought suit. A jury verdict was rendered in favor of appellees. The lower court denied appellant's subsequent motion for judgment notwithstanding the verdict. This appeal followed. The court found that the lower court erred in failing to enter a judgment notwithstanding the verdict in favor of appellant. The **contract** did not make time of the essence as to closing, and appellees never demanded completion of the repairs by a date certain. The court remanded the matter with directions to enter a judgment notwithstanding the verdict in favor of appellant. Caronte Enters. v. Berlin, 668 So. 2d 233 (Fla. 3rd DAC 1996)

- **2011-** We reverse the final judgment in favor of appellee on its breach of **contract** claim. First, we find that the record does not support appellee's claims of substantial compliance. Because time was "of the essence" in the post-closing agreement, appellee's failure to complete construction of RCA Boulevard by the deadline in the contract constituted a material breach. The doctrine of substantial performance is generally unavailable where a party has materially breached the terms of the agreement. A time is of the essence provision may nevertheless be waived. Because the trial court did not consider appellee's waiver arguments, we remand for the trial court to make specific findings of fact and conclusions of law regarding whether appellant waived its right to demand compliance with the time provision. The trial court may rely on the record established at trial or may take additional evidence at its discretion. Legacy Place Apt. Homes, LLC v. PGA Gateway, Ltd., 65 So. 3d 644 (Fla. 4th DCA 2011)