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Forgery Fallout

Q&A
ASK AN ATTORNEY

Q. *My client owns acres of unfenced mountainous land and is concerned about hikers or others gaining a prescriptive easement by constantly crossing this land. What can my client do to avoid this from happening?*

A. In order to create a prescriptive easement, it must be shown that the easement was all of the following: (1) used continuously for a period of five years; (2) possessed in a manner that was open; (3) notorious; (4) clearly visible to the owner of the burdened land; and (5) hostile and adverse to the owner. However, giving someone permission (which is a "license") will defeat a claim of a prescriptive easement. In order to defeat an action for a prescriptive easement, California Civil Code Section 1008 provides that the owner of the property must post signs by any entrance(s) to the property or at intervals of 200 feet or less along the boundary of the property containing the following notice: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code."

The case of *Behniwal* v. *Mix* (2005) deals with two appeals after a real estate sale fell through. One appeal involved disappointed buyers, the Behniwals, who had sued the sellers, the Mixes, for specific performance to force the sale. The other appeal was by the listing agent, Seidenberg and her Prudential real estate office, who had been held responsible for paying the Behniwals' attorney fees because Seidenberg had forged the sellers' signatures to the contract, leading the buyers to believe they were entitled to the property.

The Behniwals had presented an offer on the C.A.R. purchase agreement. The Mixes' agent, Seidenberg, drafted C.A.R. counteroffer #1. Instead of having the sellers, the Mixes, sign the documents, Seidenberg "forged" their names on the purchase agreement, the counteroffer and an addendum to the counteroffer, with the Mixes' oral authorization. Despite the fact that the Mixes hadn't signed the offer, counteroffer, or addendum, they admitted at trial that they intended to sell their property to the Behniwals. The sellers, the Mixes, signed a series of disclosure forms to be given to the buyers such as the transfer disclosure statement, the natural hazard disclosure statement, the seller's affidavit of non-foreign status, the water heater statement of compliance, and others.

During the escrow period, Gene Mix became ill and the Mixes changed their minds about selling the property and gave escrow a handwritten cancellation notice. Litigation ensued. The trial court held that the Behniwals were not entitled to specific performance because there was no written authorization from the Mixes to Seidenberg to sign on their behalf. Nor did the trial court find a sufficient basis for "ratification" of the deal in writing by the Mixes. Furthermore, the trial court held that the listing agents were liable for the Behniwals' attorney's fees on the "tort of another" theory. In other words, because of Seidenberg's forgery, the Behniwals believed they had a valid contract and incurred attorney's fees in their lawsuit.

The statute of frauds requires real estate purchase contracts to be in writing signed by the parties. Normally, an agent cannot sign ("forge") a client's signature unless he or she has written authorization to do so by the client. However, certain conduct by the client can subsequently "ratify" an agent's authority to sign the client's name to the contract. By law, ratification of an "invalid execution" must be in writing when the contract itself must be in writing.

Although the trial court found insufficient evidence of ratification by the Mixes, the Fourth District California Court of Appeal disagreed. In the past, documents of high levels of specificity, such as escrow instructions, have been held to easily ratify an agent's acts. In this case, the appellate court found the Mixes' signatures on the disclosure statements–although they don't restate a

contract's essential terms like former escrow instructions previously did–were sufficient to ratify the purchase agreement. Thus, the appellate court held that the trial court should have granted the Behniwals' request for specific performance.

Finally, since the Behniwals prevailed in the litigation, the court reversed the award of attorney's fees–against the listing agent–permitting the Behniwals, as the prevailing party, to request that their attorney's fees be paid but not under the "tort of another" theory.

Landlords Versus Security Deposit Law

An interesting commercial landlord-tenant case (*250 L.L.C.* v. *PhotoPoint Corp.* [2005]) deals with Civil Code Section 1950.7 (return of commercial security deposits) and Civil Code Sections 1951.2 and 1951.4 (a landlord's continuing right to rent after a tenant's abandonment). Section 1950.7 permits a commercial landlord to apply the security deposit against unpaid rent that has accrued as of the date of return of the security deposit–not future rents. A landlord with abandoned premises has two mutually exclusive remedies to collect future rents: terminate the lease and seek damages under Section 1951.2 for future rents, or, under Section 1951.4, continue to perform under the lease and seek rent as it becomes due. The First District California Court of Appeal held that the landlord, 250 L.L.C., wrongly retained future rents from the security deposit and, thus, it cannot go after future rent damages because the result would enable 250 L.L.C. to profit from its violation of Section 1950.7. Parties to a commercial lease may avoid this problem by waiving Section 1950.7. ◆

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