

Contract Essentials

Q: Would you please explain the California deficiency judgment rules?

A: A deficiency judgment is a court-ordered lien against a borrower when the foreclosure sale proceeds are insufficient to pay off the balance of the loan. First, if the lender forecloses by trustee's sale, in California the lender cannot legally go after the borrower for the deficiency amount. To obtain a deficiency judgment, the lender must sue the borrower in a judicial foreclosure. Second, the lender can go after a deficiency judgment only if the loan is a recourse loan. The law does have certain exceptions for bad faith waste (e.g., destruction of the property or failure to pay property taxes) and will allow the lender to sue the borrower of a non-recourse loan for "milking of the mortgaged property."

Non-recourse loans are: (1) lender loan to purchase a residential one- to four-unit property that the buyer intends to occupy, and (2) loan from the seller to purchase any real property. Recourse loans are all other types of loans, e.g., the refinance of any loan on any type of rental property, residential properties consisting of five or more units, commercial property, industrial property, or agricultural property.

When a borrower and a lender negotiate to stop a trustee's sale foreclosure, the lender's oral representations to stop (or postpone) a foreclosure are not binding on the lender. In *Secrest v. Security National Mortgage Loan Trust* (2008), the 4th District Court of Appeal held that the lender wasn't bound by an oral agreement to stop the foreclosure despite the borrowers' compliance with the lender's demands.

In January 2002, the borrowers, the Secrests, received a forbearance agreement that was mailed to them by the first lender. The agreement had an incorrect reinstatement amount on it so the lender's representative, Neamon, told Luther Secrest to modify the proposed forbearance agreement by crossing out the incorrect reinstatement amount, signing it, faxing it back, and wire-transferring the \$13,422.51 to the lender. Neamon agreed that if Secrest did those things, that "he would immediately stop any collection efforts, perform a complete audit of our residential loan agreement ..." and if the Secrests owed anything more on the loan, then he would have a corrected forbearance agreement prepared and sent to them. Secrest did as instructed. However, the loan audit was never conducted and a corrected forbearance agreement was never delivered to the Secrests. After the loan was sold, the new lender sent the Secrests a notice of default indicating a past due amount of \$75,577.69.

The January 2002 forbearance agreement modified the loan and deed of trust, and an agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. The Secrests' problem was that the lender never signed the forbearance agreement, so it did not comply with the statute of frauds.

However, "part performance allows

enforcement of a contract lacking a requisite writing in situations in which invoking the statute of frauds would cause unconscionable injury." In addition to part performance, the party seeking to enforce a contract must have changed position in reliance on the oral agreement to such an extent that application of the statute of frauds would be unjust. The Secrests argued that their payment of \$13,422.51 constituted part performance and a change of position sufficient to prevent the lender from asserting the statute of frauds.

The appellate court disagreed. The payment of money is not sufficient part performance to take an oral agreement out of the statute of frauds. To take an oral contract out of the statute of frauds, the required performance has been limited to "conveying property, rendering personal services, or doing something other than payment of money."

Enforceable Essentials

»» In *Patel v. Liebermensch* (2008), the California Supreme Court addresses the issue of essential terms needed for a real estate option agreement to be enforceable. Patel expressed interest in leasing Liebermensch's property with an option to buy. On July 25, 2003, Liebermensch faxed a proposal to Patel that included the following information: address, monthly rental rate, security deposit, and the following option to buy: "Through the end of year 2003, the selling price is

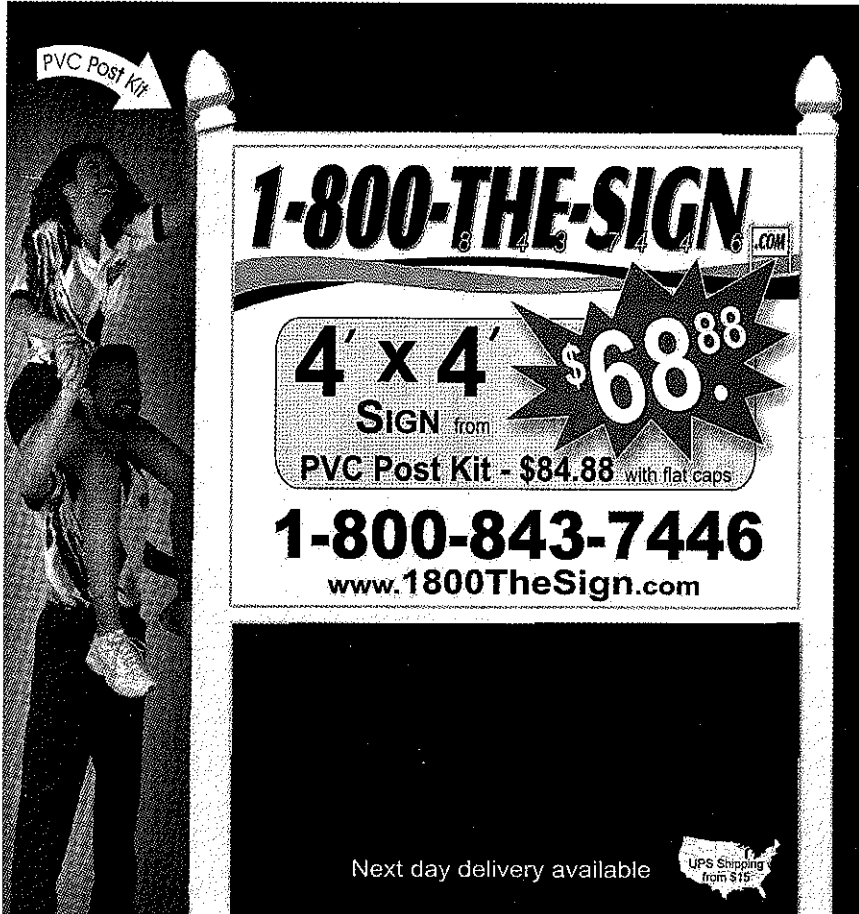
\$290,000. The selling price increases by 3 percent through the end of the year 2004 and cancels with expiration of your occupancy. Should this option to buy be exercised, \$1,200 shall be refunded to you. Please indicate your acceptance by signing below and returning to me at the above referenced fax." Patel signed the proposal and added a handwritten amendment providing an option to renew until August 2005. Liebermensch signed the option proposal and initialed Patel's amendment.

In July 2004, Patel sent Liebermensch a letter exercising the option to purchase. Liebermensch then sent Patel a purchase agreement. Patel responded with an alternative proposal that Liebermensch rejected. Patel then signed the original purchase agreement. Liebermensch did not respond and Patel sued for specific performance.

The trial court ordered specific performance, but the court of appeal reversed on the grounds that not all the essential terms were in the option contract—in particular, the contract did not specify the time or manner of payment. The appellate court focused on a dispute between the parties after Patel exercised the option concerning the length of the escrow period and concluded that there hadn't been an agreement on all the material terms of the transaction.

The California Supreme Court, in reversing the appellate court, noted that "few contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached." An "agreement for the sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding." The material factors in the written contract are the seller, the buyer, the price to be paid, and the property to be transferred described so it may be identified. In addition, a reasonable time of payment may be implied in a contract for the sale of real property. ♦

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