Escrow: The 5-Year Plan

Q: I have a real estate salesperson's license and my broker just went out of business. Can I still continue to act as agent for all my existing transactions?

A: If your broker still has an active real estate broker's license in California and your license is still with your broker, you may continue to act as an agent. However, I would suggest that you check with the Department of Real Estate regarding the current licensed status of your broker and you. On the other hand, if your broker is no longer a real estate broker in California, you must "hang" your license with another broker or you will be considered "unlicensed." If you continue to act as a licensee without a broker, you risk being fined or jailed for up to six months. The maximum fine for an unlicensed individual acting as a real estate licensee is $20,000 ($60,000 for a corporation) (Cal. Bus. & Prof. Code §10139). Once you've hung your license with another broker, he/she will need to communicate with your former broker to take over agency of any existing transactions.

According to the California Court of Appeal in *Peak-Las Positas Partners* v. *Bollag* (2009), the seller was acting "unreasonably" by not permitting the buyer to extend escrow a second time. Typically under contract law, when a buyer cannot perform during the escrow period and is unable to close escrow in a timely manner, the seller can cancel escrow and hold the buyer in breach of contract. However, the facts in *Bollag* are quite compelling and both the trial court and the appellate court agreed that the buyer could not arbitrarily cancel escrow–that the buyer was bound by the implied covenant of good faith and fair dealing. • In 1999, Peak-Las Positas Partners (PLP) signed a contract with Bollag to purchase 4.5 acres of Bollag's property for development. The contract price was $475,000. The contract contained the provision that escrow would close upon approval of a lot line adjustment and no later "than two years after the opening of escrow, unless extended by mutual consent of buyer and seller." PLP paid a nonrefundable $150,000 deposit.

The lot line adjustment was delayed because the property was in an unincorporated area surrounded by the city of Santa Barbara. The property needed to be annexed into the city prior to approval of the lot line adjustment, delaying the close of escrow. In 2001, Bollag and PLP signed the first amendment extending the escrow five years. However, the city required more extensive project changes. PLP had to prepare a comprehensive plan that included landscaping, open space areas, traffic mitigation, restoration of a creek, and landslide mitigation. PLP had spent almost $5 million in project costs when the city required additional project changes in order to approve the lot line adjustment. PLP requested a two-year escrow extension. This time Bollag denied the request and PLP sued for specific performance. Five months later, the city approved the annexation, the project, and the lot line adjustment.

The question was whether Bollag acted "reasonably" in denying PLP's second request for the escrow extension. Bollag argued that he was concerned about landslide liability. The court rejected this argument since Bollag was already aware of landslide issues when he agreed to sell the property. Furthermore, expert testimony agreed that PLP's landslide mitigation measures were "substantial," "safe," and "effective." Bollag also argued that PLP did not act diligently; however, the court found the evidence to be contrary to Bollag's claim. In fact, Bollag had to pay $511,282.50 in attorneys' fees–more than the purchase price of the land that he sold.

Past Lawsuits Must Be Disclosed

>> In *Calemine* v. *Samuelson* (2009), the California Second District Court of Appeal held that disclosure of a water intrusion problem was insufficient and that the seller had to disclose the existence of two lawsuits against the developer and a flooring company. Samuelson, the seller of a three-story condominium, personally experienced water intrusion problems on the lower level of his condo between 1983–when he purchased the condo–and 1999. In 1986, the homeowners' association (HOA) and individual homeowners, including Samuelson, brought a lawsuit against the developer. In 1992, the

HOA hired Westar Flooring to repair and waterproof the affected areas. The work was ineffective and the HOA sued Westar in 1996. Construction Headquarters Inc. was then hired to perform the repairs and waterproofing. After the work was completed in 1998, Samuelson did not observe any further flooding or water intrusion into the lower level of his condo other than occasional damp spots during periods of heavy rain. The Calemines purchased the condo in 2002. In 2005, the condo lower level garage flooded.

On the Transfer Disclosure Statement, Samuelson noted he was aware of "flooding, drainage, or grading problems." However, Samuelson indicated "no" after the question of whether the seller is aware of "any lawsuits by or against the seller threatening to or affecting this real property, including any lawsuits alleging a defect or deficiency in this real property or 'common areas' (facilities such as pools, tennis courts, walkways, or other areas, co-owned in undivided interest with others)." Samuelson indicted that he responded "no" because he believed the form required disclosure of only then-pending lawsuits and the lawsuits had been resolved. The trial court found in favor of Samuelson; however, the appellate court reversed.

The appellate court concurred with the holding in an earlier case, *Pagano v. Krohn* (1997), in which the seller was found to have no duty to the buyers to elaborate on the water intrusion problems regarding the type and scope of repairs made. However, the seller does have a duty to disclose the existence of previous lawsuits, not just ongoing lawsuits. ◆

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Saturday Legal Hotline Hours

Starting April 4, C.A.R. Members have been able to access the Legal Hotline on Saturdays from 10 a.m. to 2 p.m. An attorney will be available to take calls on a first-come basis at (213) 739-8282.