Small Claims Court Assistance Manual for REALTORS® and Their Clients:

Helpful Hints for How to Make Your Case in Court

The information contained herein is believed accurate as of July 29, 2013. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney.

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Chapter 1: General Information about this Manual and Small Claims Court

I. Introduction

This "how-to" guide seeks to provide real estate brokers and agents, and their clients, with practical advice on how to bring or defend an action in small claims court. It explains to these parties how to prepare for their day in court and outlines what to do and say once there. The focus of this guide is on the most typical types of claims that arise out of a real estate transaction including: disputes between a broker and seller over a commission; disputes between a buyer and seller over the deposit; and a broker defending against claims made by a principal, among other things.

Preparation beforehand and practical presentation in court are the keys to making the best case possible. In each section of this guide, we first discuss the central arguments for each type of claim and suggest a way to structure your arguments by laying out the necessary allegations in an opening statement and bringing forth the critical facts of your claim. Additionally, each section contains a recommended document list and a summary of relevant contractual provisions and legal authorities. Complete copies of these documents are located in the appendix.

For disputes arising out of a C.A.R. purchase or listing agreement, the parties may, but are not required to mediate before commencing a small claims action. Further, even if the amount at issue is above the small claims court jurisdictional limit, a party to the dispute may still consider going to small claims court rather than Superior Court (or arbitration) to resolve the dispute. In such cases, that party can waive the excess amount over and above the small claims court limit as this may be a relatively small price to pay in comparison to the costs of hiring an attorney to represent you in Superior court (or the costs of an arbitration).

The crux of small claims court is that there are no pleadings, no legal rules of evidence, no formal findings and no attorneys (except on appeal). The judge's decision is typically going to be made on the basis of common sense and fairness.

II. Jurisdiction: Money Limits in Small Claims Court

As of January 1, 2012, the maximum dollar amount for which an individual can bring suit in small claims court is $10,000. However if you are a corporation, you can only sue for $5,000. Furthermore, a person or entity may not file more than two claims of more than $2,500 in a small claims court anywhere in the state during a calendar year. There are other limits depending on the specific types of claims but they don't usually affect issues involved in real estate related disputes.

If a plaintiff is owed more than the limit, he or she may still go to small claims court. That person must however waive the right to the excess. For example, if the good faith deposit is $15,000 and buyer has breached the contract, the seller can sue the buyer (or visa-versa) in small claims court for $10,000 and waive the balance of $5,000.

III. Venue: Where To File Your Claim

For real estate related issues, you will generally file your claim in one of three places: the county where the property is located, the county where the defendant resides or the county where the contract was entered into; with the first two being the safest bets. Otherwise, a judge who felt that the venue was chosen to place the defendant at a disadvantage might decide to postpone or dismiss the proceedings until an appropriate venue is chosen.

IV. Judges

The kind of judge you get will depend upon the court. Small claims court cases may be heard by a judge, a court commissioner, or a judge pro tem. A judge pro tem is a person who is appointed by the presiding judge of the local superior court to temporarily act as a judge. This procedure is prescribed by the California Constitution. Usually, judges pro tem are practicing attorneys who are members of the State Bar of California.

Parties to a lawsuit have a right in California to have their case heard by a judge. Therefore, if the court has placed the case on the calendar of a judge pro tem or court commissioner, before the small claims case is heard, the plaintiff and defendant will be asked whether they consent to having the case be heard by someone other than a judge. If either party objects, the clerk will transfer the case to a judge whose calendar has an opening that day or reschedule the case for another day. If a party is objecting to a particular judge pro tem, the court may reassign the case to a different judge pro tem, a commissioner, or reschedule the case to a later date for that purpose. If you feel that a pro tem or commissioner might be particularly unfavorable for you, then you can consider refusing to consent.

V. Attorneys

At the small claims hearing, attorneys are not permitted (with very limited exceptions). However, if there is an appeal, then the parties are permitted to be represented by an attorney in court. Even on appeal however there is an important limitation. No matter what the attorney charges a party, the court will only allow a claim for attorney fees for up to $150, unless the judge decides that the appeal was in bad faith and was intended only to harass or delay. In that case the judge has discretion to award attorney fees of up to $1,000 plus lost wages.

VI. Filing and Fees: Commencing a Small Claims Court Action

Before filing a small claims court action you must always make a demand for the amount of money you are owed. Only then can you proceed to file your claim if you have not been paid within the time period you specify. There is no specific amount of time you are required to give the opposing party to pay you back. But you should allow a reasonable amount of time. If however you are demanding a penalty of up to $1,000 for bad faith failure to return a deposit, then you must give 30-days written notice.

When filing your claim the clerk will also give you the option of having your petition mailed out to the defendant by certified mail. You should take this option. It's absolutely the simplest method of service. And if the defendant doesn't accept delivery and you are forced to have the defendant served personally, the judge will award you the costs of hiring a process server should you win.

The fee for filing in small claims court depends on the amount of the claim: $30 if the claim is for $1,500 or less; $50 if the claim is between $1,500 and $5,000; or $75 if the claim is for more than $5,000. However, if a plaintiff has filed more than 12 small claims in California within the previous 12 months, the filing fee for each subsequent case is $100. The filing fee is paid by the plaintiff to the clerk of the small claims court.

VII. Small Claims Forms

All California small claims courts use the same basic set of standardized forms, although some courts have adopted special local forms. To see if your local court requires such forms, contact the court clerk directly or check the local court website.

The basic set of standardized forms covers nearly all aspects of small claims court: commencing the case; responding to the plaintiff; changing trial dates; name changes; DBAs; subpoenas; pretrial orders; dismissals; appeals; post judgment collection efforts; and many other aspects of small claims courts.

An excellent site for accessing all of the standardized California small claims forms is the "California Courts" website at http://www.courts.ca.gov/1017.htm. The information is clearly displayed, and all the forms are printable and may be downloaded in PDF format. Some forms may be filled in on line.

VIII. Arbitration and Mediation

Both the Residential Purchase Agreement (RPA) and Residential Listing Agreement (RLA) contain arbitration and mediation provisions. There is a common misunderstanding, however, that these provisions prevent a buyer, seller or broker from pursuing a claim in small claims

court. In fact, all of the C.A.R. forms allow for exceptions to both arbitration and mediation including an exception for small claims court. Therefore, notwithstanding the arbitration and mediation provisions, either party to a dispute may pursue their claim in small claims court.

Chapter 2: General Advice Applicable to All Claims; Preparing and Presenting Your Case

I. What to Bring to Court

First and foremost you need to have all of your documents. Because there are usually so many documents involved in a real estate dispute, we recommend that you create a folder with tabs, so that if the judge wants to see, for example, the purchase agreement, he or she can quickly flip right to it. The easier it is for a judge to find and view a document the more likely that judge will actually examine it and take your arguments seriously. In addition to bringing a folder for yourself, be sure to bring two copies of this folder: one for the judge and one for the other party (you are required to share all evidence with the other side).

We also recommend that important provisions of the contract be highlighted in your list of documents. As part of this manual, we identify "Important contractual terms" for each type of dispute. In addition to mentioning these terms in your opening statement or other testimony, if you highlight these same terms in your file, the judge will have two opportunities to notice and review these provisions.

II. Trial Procedure

The procedure will be explained before the hearing by the judge or some other court officer. The plaintiff, the defendant, and any witnesses will be asked to take an oath (a person may also request an affirmation in lieu of an oath) swearing or promising to tell the truth.

It is a good idea for a party to watch several cases before going to court, ideally before the day of court or at least before the party's case is called. This will give the party an idea of what the judge expects and how the procedures work in practice. It may also help a party to feel more comfortable with the procedure.

Often before the judge actually begins hearing cases, he or she will order the parties to go out into the hall to exchange information and discuss their cases. Any last minute settlements can be agreed to at this time. Don't be afraid to make an offer of settlement. The judge will not consider an offer of settlement as proof or any kind of evidence against you.

In the court room, the judge usually gives both sides opportunities to speak and to ask questions of the other party and of any witnesses the other party calls. In this way, the plaintiff and the defendant can respond to the statements made by the other. Remember that the goal of the small claims court is to give each side a fair chance to be heard by an impartial judge.

III. DBA Declaration Attached to Claim

If the broker's listing agreement is in the name of the DBA, the broker must attach to the claim a declaration stating that they have complied with the fictitious business name laws by executing, filing, and publishing a fictitious business name statement. In fact, the small claims court provides form SC-103 "Fictitious Business Name Declaration" for this purpose.

IV. Corporations

Ordinarily a corporation must employ an attorney to appear in court. But this is not the case in small claims. If your brokerage is a corporation it may appear in small claims through a regular employee, or a duly appointed or elected officer or director. With limited exceptions, this person cannot be an attorney. In fact, the general counsel for a corporation is actually precluded from representing the corporation in a small claims court.

In any event, before the trial begins the clerk will require you to fill out SC-109 (or you could fill it out in advance to save time). On that form you will state 1) that you are authorized to appear for the corporation 2) the basis for the authorization and 3) that you are not employed solely for the purpose of representing the corporation in court.

Lastly, it's important for a corporation that is suing to get its name written down correctly. Before filing double check your articles of incorporation or the Secretary of State website to make sure that the name on the court documents is the corporation's exact legal name.

V. Presenting Your Case

A plaintiff or defendant should think through his or her case in detail beforehand. It is often a good idea for a party to practice presenting his or her case to a friend. Remember that the judge is not familiar with the facts of your situation, and may have no preconceived idea of the case. Usually a party will have only a few minutes to present his or her side of the case. What this means to you is that how you present your case is critical. And anything you can do to make the judge's job easier will work in your favor.

Your presentation should be guided by three principles: you need to be clear and concise; you need to appear as a reasonable person, and lastly, you need to be prepared.

Let's start with clear and concise. State the most important part of your case first and follow up with your key points, one by one, presenting facts in easy to understand language. And only after you've stated the main points of your case clearly, would you then consider talking about more detailed aspects of your case, if the small claims judge wants to hear them.

Your opening statement should explain what you're owed and why you're owed it. After that, you provide all of the relevant facts that support your case. Don't play "hide the ball." The judge should not have to struggle to figure out where your remarks are going. Other "Do Nots" to keep in mind: Do not begin with a lengthy introduction. Do not ramble. And do not get bogged down in details unless the detail is serving a purpose.

As for reasonableness, your goal is to come across as a reasonable and respectful person. Don't interrupt the other party. Don't engage in petty remarks. Avoid melodrama. When you present your case and your facts in an orderly and understandable way, the facts will speak for themselves.

And definitely do not interrupt the judge. When the judge begins talking, you stop talking. Don't attempt to talk over the judge. The judge can interrupt you, but you cannot interrupt the judge.

Lastly, you must be fully prepared. This means that you should have copies of all documents that you may be asked to present. As stated above, we recommend that you create a tabbed folder.

A party should also consider making brief notes of what he or she plans to say at the trial. This does not mean a party should just read a presentation but rather, notes can often help to keep the presentation flowing, and can help a party to remember not to skip any important points. In this guide we have written out sample opening statements and suggested outlines of how to present your case.

You should also try to anticipate what the other side is going to say. Think hard about the other side's best arguments. The judge after listening to the other side may very well ask you to answer those arguments. Don't be caught off guard or appear as though you hadn't considered those claims.

All of the above advice can be used for any person in small claims court. But perhaps it's doubly important for an agent or broker to have a strong presentation since they are viewed as the professional and sophisticated party, and therefore, a judge may expect more from them, especially if the other party is a consumer. The broker's presentation also suggests to the judge that the broker was equally efficient and professional in representing the client.

VI. Witnesses

If a witness is necessary to your case then it is best for the witness to appear in person. While the rules of small claims court allow a judge to take into evidence written statements from witnesses in lieu of their appearance, in terms of persuasiveness, there is no substitute for a real live witness. Judges will always prefer to hear testimony from the "horse's mouth" because a live witness can be questioned and his/her truthfulness and credibility can be assessed

If you call a witness, you must arrange to have the witness in court at the time of trial. You can do this either by arranging with the witness informally to appear or having the witness served with a court-issued subpoena.

Arranging with a witness informally to be present will only be effective if the witness actually shows up in the courtroom. Informal arrangements work best with a person who you know is trustworthy and will appear. If a witness who has agreed to come voluntarily does not appear, the court will probably not postpone the trial, and you must be prepared to proceed without this witness.

If you are not sure that you can trust a witness to appear voluntary, you can subpoena a witness. If you do this, you should (but are not required to) get the witness' consent in advance, so they won't be surprised or offended by service of the subpoena. Someone who is surprised or offended may be more hostile to your case than necessary. In order to subpoena a witness, you should contact the small claims court clerk to obtain the necessary forms. The court's small claims court advisor may be able to help with filling out the forms. The subpoena can be served by any person over 18 years old, even a party to the dispute. If a witness who is subpoenaed fails to show up in small claims court, the court will usually postpone the trial on request to be fair to the party who subpoenaed the witness.

Witnesses are entitled to receive a witness fee ($35 per day) and mileage traveled both ways (.20 cents per mile) from the requesting party (Cal. Gov't Code § 68093).

VII. Other Resources

This guide is focused on practical tools and advice on presenting specific types of cases in court. For specific information on small claims court procedure you may look at C.A.R.'s Q&A, "Small Claims Court" (http://www.car.org/legal/miscellaneous-folder/small-claims-court/).

The Department of Consumer Affairs publishes, "The Small Claims Court: A Guide to Its Practical Use" (http://www.dca.ca.gov/publications/small_claims/).

Lastly, all counties are required (with limited exemptions) to provide a small claims court advisor to all disputants at no charge. You can typically speak with the small claims court advisor Monday through Friday during normal court business hours.

Chapter 3.0: Listing Broker Suing Seller for Commission Under an Exclusive Authorization and Right to Sell Listing Agreement

I. Introduction

Any judge will want to decide the case in the fair way. And indeed this is the essence of small claims. In a commission dispute with a homeowner however, it is often the professional broker who will have to work harder to win over the sympathies of the judge. Therefore, an important part of a listing broker's presentation will be to impress upon the judge the time and effort that selling the property required and thereby turn the judge's sympathies in the broker's favor.

II. Presentation

The broker must begin with the fundamentals of the case, and only afterwards explain the marketing plan, the open house schedule, the list of showings, marketing materials, copies of offers received, and conversation logs with the seller, to name a few factors. Even when explaining your efforts and the seller's wrong doing, it's important to stay controlled and even keeled. It is okay to show emotion but do not let the emotion interfere with your presentation or result in disrespect to the judge or the opposing party. Stick to a clear factual presentation that shows that you are in the right.

You may continue talking to explain your side, until the judge interrupts. Then stop and do as the judge instructs whether that means presenting a document, answering a direct question or letting the other side speak. In this regard, you should be prepared to think on your feet. Try to address the judge's concerns without skirting the issue.

Depending on the ground upon which the broker makes a claim for a commission there may be no requirement to show that the broker produced a ready, willing and able buyer. For example, suppose the seller withdraws the property from the market. This action may violate paragraph 4A(3) of the Residential Listing Agreement and the commission will be due. Is the broker required nonetheless to continue to work to produce a ready, willing and able buyer? No, because the seller has already made the property unmarketable, and it would be a completely wasted effort. As one judge stated it, "The law does not demand such absurdities[.]"

Nonetheless, many judges may expect the broker to provide evidence that they procured a ready, willing and able buyer. So after presenting your case in chief, if you can, demonstrate to the judge that you procured such a buyer(s). If you can't demonstrate that, then emphasize all the work that you did, and all of the buyers that viewed the property, whether or not they were ready, willing or able. Again, the judge is often trying to decide the case fairly, and pointing out

the work you did is part of what's fair, even if it may be not technically necessary in a strictly legal sense.

III. Defining the Exclusive Right to Sell

This section assumes that your seller is bound to an exclusive right to sell listing. In all likelihood that is the case since the exclusive listing is far and away the most common type of listing agreement.

Both case law and statute define an 'exclusive right to sell listing' as a listing whereby the broker has an exclusive right to sell or to find a buyer for a specified period of time. If during that period of time the property is sold, the broker is entitled to the commission, no matter who effected the sale. The listing also may provide for compensation of the listing agent if the property is sold within a specified period after expiration or to anyone on a "safety list." Generally speaking there is no right for the seller to frustrate the sale by withdrawing the property from the market or cancelling the listing. If any of the above events occur, the broker is entitled to the full commission.

Further, any form agreement which initially established a broker's right to compensation for the sale of residential property with one to four units must have the following statement (in 10-point boldface type). **"Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker"** (**Business and Professions Code § 10147.5**).

IV. Proof of Licensing

A real estate broker is required to be licensed under the California Business & Professions Code. The broker must present evidence of being properly licensed at all relevant times in order to bring a claim for compensation. Without this proof, the broker's case will be dismissed. Commission claims must be brought in the name of a broker. While a salesperson may receive an assignment of the right to sue the principal after the unpaid compensation has been earned, assignees are not permitted to sue in small claims court **(Code of Civil Procedure § 116.410)**.

V. Authorities

The other important point of a broker's commission case will be legal authority. The small claims judge may not know much about the intricacies of the law concerning real estate commissions. But a judge who is sympathetic to your position will still likely need to be fully convinced that the law favors you. For this reason you should always include the legal

authorities as we have provided for each section. You need not discuss the authorities except to point out that as part of the presentation you are providing legal authority that supports your position.

VI. Damages: Commissions vs. Out of Pocket Expenses

A broker suing for a breach of a listing is suing for the full commission. California case law allows the broker to claim the full commission as the loss. Both case law authorities and the Residential Listing Agreement say exactly that. If a judge were to read through these documents and satisfy him or herself as to the requirements of California law, that judge would surely reach the same conclusion.

But small claims courts do not always adhere to the strict letter of the law. So you may find yourself in the position of having to provide evidence of your losses such as advertising costs, time spent in open houses, showing properties, etc…. If the judge is asking you for this information then that is an indication that you might "win" the case, but only receive these out of pocket losses. At that point you could, as politely as possible, indicate to the judge that all of the case law you have provided allows the broker to claim the full commission.

VII. Types of Specific Claims

- Specific listing broker claim: Selling the property during the listing term or extension (Chapter 3.1)
- Specific listing broker claim: Sale of the property during the safety period (Chapter 3.2)
- Specific listing broker claim: Seller withdraws the property from the market during the listing term or extension (Chapter 3.3)
- Specific listing broker claim: Seller fails to act in good faith to sell the property during the listing term or extension (Chapter 3.4)
- Specific listing broker claim: Seller leases the property during the listing term or extension (chapter 3.5)
- Specific listing broker claim: Seller breaches an agreement to sell the property entered into during the listing term or extension (Chapter 3.6)
- Specific listing broker claim: Seller fraudulently induces the broker to cancel the listing (Chapter 3.7)

Chapter 3.1: Specific Listing Broker Claim: Sale of the Property is Sold During the Listing Term or Extension

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____.
I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation.

The reason I am entitled to compensation is that:

A. The property was sold during the term of the listing or a validly executed extension.

B. (Insert here any other secondary reason that you are owed a commission)

Here is what happened: (Explain to the judge the circumstances of how the property was sold either through another broker or by the owner himself.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - The contract signed by buyer and seller
  - Escrow closing statement
  - Copy of deed or other evidence of transfer of title
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement, Paragraph 4A(1) requires payment of agreed upon commission, "If during the Listing Period or any extension, Broker, cooperating broker, Seller or any other person procures a ready, willing and able buyer(s) whose offer to purchase the Property on any price and terms is accepted by Seller, provided the Buyer completes the transaction or is prevented from doing so by Seller. (Broker is entitled to compensation whether any escrow resulting from such offer closes during or after the expiration of the Listing Period, or any extension.)

IV. Sample List of Authorities

A. California Appellate Court Authority:

- "An *exclusive right to sell* listing entitles the listing broker to the agreed commission if the property sells within the time frame of the agreement even though the sale is made by persons other than the listing broker. Thus, a full commission is received if the home owner sells the property, though the broker has made no effort, nor incurred any expense toward marketing the product." **People v. National Association of REALTORS®, 120 Cal. App. 3d 459, 477, 174 Cal. Rptr. 728, (4th Dist. 1981)**

- [A]n "exclusive right to sell" agreement (exclusive sales contract) prohibits the owner from selling both personally (*Kimmell v. Skelly,* 130 Cal. 555, 558 [62 P. 1067]; *Ertell v. Lloyds Food Products, Inc.,* 115 Cal.App.2d 615, 617 [252 P.2d 683]) and through another broker (*Wright v. Vernon,* 81 Cal.App.2d 346, 347 [183 P.2d 908]), without incurring liability for a commission to the original broker. (*Harcourt v. Stockton Food Products, Inc.,* 113 Cal.App.2d 901, 905 [249 P.2d 30]; *Fleming v. Dolfin,* 214 Cal. 269, 271 [4 P.2d 776, 78 A.L.R. 585].) In the event the owner breaches this type of agreement, he is liable for the commission which would have accrued if the broker had procured a purchaser during the period of the listing. (*Justy v. Erro,* 16 Cal.App. 519, 527-528 [117 P. 575].) The broker need not show that he could have performed by tendering a satisfactory buyer (*Kimmell v. Skelly, supra,* p. 560), or that he was the procuring cause of the sale. (*Leonard v. Fallas,* 51 Cal.2d 649, 652 [335 P.2d 665].) The owner may breach the agreement by negotiating a sale in violation of the agreement (*Lowe v. Loyd, supra*) or by action which renders the broker's performance impossible. (*Alderson v. Houston,* 154 Cal. 1, 10 [96 P. 884].) **Carlsen v. Zane, 261 Cal. App. 2d 399, 401-402, 67 Cal. Rptr. 747 (4th Dist. 1968)**

- "[The exclusive right to sell listing] even precludes the owner himself from selling the property during the stated term without paying the brokerage commission." **Tetrick v. Sloan, 170 Cal. App. 2d 540, 546, 339 P.2d 613 (2d Dist. 1959)**

B. California Real Estate Law Treatise:

- Under an exclusive right to sell listing, "[t]he listing broker is entitled to payment of the specified commission whenever the property is sold during the term of the listing *even though the broker is not the procuring cause of the sale [ft. note omitted]*, has not made any effort or incurred any expense in marketing the property [ft. note omitted] and the property is sold entirely through the efforts of only the owner [ft. note omitted]." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:29**

Chapter 3.2: Specific Listing Broker Claim: Sale of the Property During the "Safety" Period

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____. I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation.

The reason I am entitled to compensation is that:

A. **The property was sold after the listing had expired to a person who wrote an offer on the property or viewed it during the listing period and whose name I provided to the seller as required by the listing agreement.**

B. **(Insert here any other secondary reason that you are owed a commission)**

Here is what happened: (Explain to the judge how you obtained offers and showed the property during the listing. After its expiration you provided the seller with a list of prospects, as required by listing agreement. Then explain how you know the property has been sold to someone on the list you provided.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - The contract signed by buyer and seller
  - Escrow closing statement
  - Copy of deed or other evidence of transfer of title
  - The offer made by the prospective buyer
  - The reservation list
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement, paragraph 4A(2) requires payment of the agreed upon commission, "If within ____ calendar days (a) after the end of the Listing Period or any extension; or(b) after any cancellation of this Agreement, unless otherwise agreed, Seller enters into a contract to sell, convey, lease or otherwise transfer the Property to anyone ("Prospective Buyer") or that person's related entity: (i) who physically entered and was shown the Property during the Listing Period or any extension by Broker or a cooperating broker; or (ii) for whom Broker or any cooperating broker submitted to Seller a signed, written offer to acquire, lease, exchange or obtain an option on the Property. Seller, however, shall have no obligation to Broker under paragraph 4A(2) unless, not later than **3 calendar days** after the end of the Listing Period or any extension or cancellation, Broker has given Seller a written notice of the names of such Prospective Buyer."

IV. Sample List of Authorities

A. California Supreme Court Authority

"In the present case the language of the contract does not imply an obligation on the part of the broker to do anything more than list the name of the prospective purchaser with the owner." [The court held that the listing broker was entitled to the commission on the sale of the property made during the 90-day term of the listing's "safety clause".] **Leonard v. Fallas, 51 Cal. 2d 649, 652, 335 P.2d 665 (1959)**

B. California Statutory Authority

"The exclusive right to sell listing also may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination. " **Civil Code § 1086(f)(1)**

C. California Real Estate Law Treatise:

"A listing agreement provided only that the broker would be entitled to payment of a commission if the property is sold 'within 90 days after its termination to anyone whose name is *registered* with me in writing as of the termination date.' The court held that the listing broker was entitled to the commission on a sale of the property made during the term of this "safety clause" to a purchaser whom he had twice 'contacted" whose name was given to the seller." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:51**

D. Comparing C.A.R. Listing Agreement Language to Case law:

Leonard case only required names to be registered. C.A.R. clause requires buyer to have been shown the property or to have written an offer. C.A.R. clause requires reservation or registration list to be provided within three days after expiration of listing.

Chapter 3.3: Specific Listing Broker Claim: Seller Withdraws the Property from the Market, or Cancels the Agreement, During the Listing Term or Extension

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____. I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation.

The reason I am entitled to compensation is that:

A. The seller withdrew the property from sale, or cancelled the listing, before the expiration of the listing agreement.

B. (Insert here any other secondary reason that you are owed a commission)

Here is what happened: (Explain to the judge how the seller cancelled or withdrew the property and the efforts you had put into the listing before that happened.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - The letter (email) (fax) from the seller asking (demanding) that the property be withdrawn from sale
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement paragraph 4A(3) requires payment of agreed upon commission, "If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension." [Highlight added].

Residential Listing Agreement paragraph 8(b) requires the Seller to, "…act in good faith to accomplish the sale of the Property…"

IV. Sample List of Authorities

California Supreme Court and Appellate Court Authority

Where an owner lists a property but then decides not to sell by withdrawing it from the market, broker is entitled to recover the commission provided in the listing provided there is an express provision in the lease regarding compensation upon withdrawal. **Blank v. Borden, 11 Cal. 3d 963, 968, 115 Cal. Rptr. 31, 524 P.2d 127 (1974); Baumgartner v. Meek, 126 Cal. App. 2d 505, 511-512, 272 P.2d 552 (3d Dist. 1954)**.

No requirement to procure ready, willing and able buyer after cancellation or withdrawal.

> "The law does not demand such absurdities or sanction such questionable practices," [referring to the idea that a broker would be required to procure a buyer despite the fact that the seller had already withdrawn the property from the market]. **Baumgartner v. Meek, 126 Cal. App. 2d 505, 511-512, 272 P.2d 552 (3d Dist. 1954)**

> **California Real Estate Law Treatise**:
> "The broker becomes entitled to recover the full amount of the commission based on the listing price *under the express terms of the listing* on the termination and is not required to continue any efforts under the listing nor to show that he or she could have performed by procuring a purchaser for the property within the listing term had it not been cancelled [Ft note omitted]." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:54**

Chapter 3.4: Specific Listing Broker Claim: Seller Fails to Act in Good Faith to Sell the Property During the Listing Term or Extension

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____. I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation.

The reason I am entitled to compensation is that:

A. The seller failed to act in good faith to sell the property during the term of the listing or a validly executed extension.

B. (Insert here any other secondary reason that you are owed a commission)

Here is what happened: (Explain to the judge the efforts you put into marketing the property for sale and the seller's obstruction or failure to contribute to the effort or respond to you.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Seller instruction to remove property from the MLS
  - Seller instruction that for-sale signs be removed
  - Seller instruction cancelling open house or refusing property to be shown
  - Seller instruction that broker stop contacting seller
  - Letter from broker confirming seller's instructions
  - Seller rejecting of full price offer (if so, also a copy of the offer)
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement paragraph 8(b) requires the Seller to, "…act in good faith to accomplish the sale of the Property…"

Residential Listing Agreement paragraph 4A(3) requires payment of agreed upon commission, "If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension." [Highlight added].

IV. Sample List of Authorities

A. California Supreme Court and Appellate Court Authority

Owner liable for the full list price after he cancelled an exclusive right to sell listing (effectuated by a withdrawal of the property from the market) during the unexpired term of the listing. This was despite the fact that the property was not sold thereafter, as long as there was an express provision in the listing agreement entitling the broker to compensation after wrongful termination. **Blank v. Borden, 11 Cal. 3d 963, 969-971, 115 Cal. Rptr. 31, 524 P.2d 127 (1974)**

'The contract made plaintiffs agents of defendant to sell all the lots for the agreed commission, at the agreed price, upon the terms fixed thereby and within the time limited. The conduct of the defendant in repudiating his own obligation to perform, in refusing to perform a material part of the contract, and in disabling himself from performance by suffering the accrual of bond liens which could not be removed except with the consent of the bondholders, prevented the plaintiffs from performing their part of the contract as its terms provided. It amounted to a wrongful discharge of plaintiffs as agents. It was a breach of a material part of an entire contract; "the first breach by the defendant was a breach of the whole and discharged the plaintiffs from performance of any conditions on his part." (*Haskell v. McHenry,* 4 Cal. 411.) "Plaintiffs were entitled to sue upon the breach immediately, and recover the entire damage resulting from it, without waiting for the time for full performance to elapse." (*Hale v. Trout,* 35 Cal. 242.) They were not required to go on making sales and demanding certificates showing clear title.' **Alderson v. Houston (1908) 154 Cal. 1, 10, 96 P. 884**

B. California Real Estate Law Treatise:

"**Commission due when the owner prevents performance**. Even though the owner does not expressly revoke the listing, the broker is entitled to recover the commission that would have been earned when the owner performs some act that prevents the broker from performing [Ft. note omitted]. Thus, if the owner takes some act that puts the title or condition of the property beyond the owner's ability to convey or to give marketable title or possession to a buyer, the purpose of the agency is frustrated, and the broker is entitled to the commission that is provided in the listing.[Ft. note omitted]." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:54**

Chapter 3.5: Specific Listing Broker Claim: Seller Leases the Property during the Listing Term or Extension

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____.
I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation. .

The reason I am entitled to compensation is that:

A. The property was leased during the term of the listing or a validly executed extension.

B. (Insert here any other secondary reason that you are owed a commission)

Here is what happened: (Explain to the judge the circumstances of how the seller leased the property and that made it impossible for you to sell the property.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Copy of the lease agreement between seller and a tenant
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement paragraph 4A(3) requires payment of agreed upon commission, "If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension." [Highlight added].

IV. Sample List of Authorities

A. California Real Estate Law Treatise:

"….in the case of residential property, the lease of the property would practically eliminate the available market of buyers because most buyers of such property want to occupy the premises as their home." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:54**

"Commission due when the owner prevents performance. Even though the owner does not expressly revoke the listing, the broker is entitled to recover the commission that would have been earned when the owner performs some act that prevents the broker from performing [Ft. note omitted]. Thus, if the owner takes some act that puts the title or condition of the property beyond the owner's ability to convey or to give marketable title or possession to a buyer, the purpose of the agency is frustrated, and the broker is entitled to the commission that is provided in the listing.[Ft. note omitted]." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:54**

Chapter 3.6: Specific Listing Broker Claim: Seller Breaches an Agreement to Sell the Property entered into During the Listing Term or Extension

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____.
I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation. .

The reason I am entitled to compensation is that:

A. The property was sold during the term of the listing or a validly executed extension.

B. (Insert here any other secondary reason that you are owed a commission)

Here is what happened: (Explain to the judge the circumstances of how the seller entered into a contract to sell the property but breached that contract or interfered with sale or prevented the buyer from completing the purchase.)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - The contract signed by buyer and seller
  - Buyer cancellation (if because of seller breach)
  - Letter regarding seller in breach
  - Other documentation showing that seller breached listing
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement, **paragraph 4(a)(3),** "If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension."

Residential Listing Agreement, paragraph 8(b), "…act in good faith to accomplish the sale of the Property…"

IV. Sample List of Authorities

A. California Supreme Court and Appellate Court Authority

"…we must infer that plaintiffs and the buyer did everything which the agreement required of them and that consummation was prevented solely by the arbitrary refusal of defendant corporation and its officers to proceed with the transaction. In these circumstances, the defendants will not be allowed to take advantage of their own remissness to defeat plaintiff's recovery. (See *Coulter v. Howard* (1927), 203 Cal. 17, 23 [3] [262 P. 751]; *Richardson v. Walter Land Co.* (1953), 118 Cal.App.2d 459, 464 [4] [258 P.2d 42].)" **Collins v. Vickter Manor, Inc. (1957) 47 Cal.2d 875, 881, 306 P.2s 783**

[Where the seller carefully avoided the broker until after expiration of the listing and thereby prevented the closing,] "…the commission is payable whether the property be sold or not. Since the sale did not go through because of appellant's fault, there was a breach of the entire contract, and respondent then became entitled to recover the whole commission." **Herz v. Clarks Market, 179 Cal. App. 2d 471, 474 - 475, 3 Cal. Rptr. 844 (1st Dist. 1960)**

B. California Real Estate Law Treatise:

"… when payment of the broker's commission is conditioned on the consummation of the sale or the close of escrow, the broker can recover the commission even though the escrow does not close, where the owner has acted arbitrarily and in bad faith in preventing the conclusion of the transaction." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:49**

"Seller's breach of contract. The enforcement of a condition precedent to the payment of a commission assumes that the condition did not fail through the fault of the seller. When the transaction is not completed, the escrow does not close, or there is a non-performance of some other condition to the payment of the broker's commission, and the failure of the condition is a result of the seller's breach of contract, the condition is excused and the broker may recover the condition even though the condition did not occur [Ft. note omitted]" **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:49**

Chapter 3.7: Specific Listing Broker Claim: Seller Fraudulently Induces the Broker to Cancel the Listing

I. Sample Opening Statement

Your honor, my name is _____.

I am a real estate broker licensed by the California Department (now Bureau) of Real Estate.
OR
I am an employee of a corporation licensed by the California Department (now Bureau) of Real Estate. I am authorized to represent the corporation before this Court. I am not hired solely for the purpose of representing the corporation in Small Claims Court. I have completed form SC109 and have provided it to the court.

I have included a copy of the broker's license with my supporting documentation.

(If applicable)
I (or the corporation) do (does) business under the following name: _____.
I have completed form SC103 and have provided it to the court.

I am here today because _____ (the seller) signed a listing agreement hiring my company to find a buyer for the property located at _____. Unfortunately, _____ (the seller) breached the agreement and owes me a commission in the amount of $ _____. I am also asking for my costs in bringing this action.

This listing agreement is an Exclusive Authorization and Right to Sell. It started _____ (date) and ended _____(date). The agreement has negotiability of commission language required by law.

The listing agreement specified the compensation to be paid as ___% of the list price, or if a sale is entered into, ___% of the sale price. Accordingly, I am asking for $_____.

Before filing this claim, I made a demand upon _____ (the seller) to pay this amount but I have not been paid. I have included a copy of the demand with my documentation.

The reason I am entitled to compensation is that:

A. **The seller tricked me into signing a cancellation of the listing when the seller had a buyer all along for the property.**

B. **(Insert here any other secondary reason that you are owed a commission)**

Here is what happened: (Explain to the judge the circumstances of how xxx .)

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - The listing agreement
  - The demand letter
  - The calculation of the amount owed to me
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - The cancellation of listing signed by seller and broker
  - The contract signed by buyer and seller
  - Any document showing the opening of escrow
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C (If applicable and available)**
  - My marketing plan for the property
  - My open house schedule for the property
  - My list of showings of the property
  - My list of marketing materials for the property (ex. Newspaper ads, website pages, flyers, etc.)
  - Written offers received
  - _____
  - _____
- **Category D (Bring with you but do not automatically give to court unless asked.)**
  - My out-of-pocket costs

III. Sample Relevant Terms

Residential Listing Agreement, p**aragraph 4(a)(3),** "If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension."

Residential Listing Agreement, p**aragraph 8(b),** "…act in good faith to accomplish the sale of the Property…"

IV. Sample List of Authorities

A. California Supreme Court and Appellate Court authority

The owner is liable for the full list price after he cancelled an exclusive right to sell listing (effectuated by a withdrawal of the property from the market) during the unexpired term of the listing. This was despite the fact that the property was not sold thereafter, as long as there was an express provision in the listing agreement entitling the broker to compensation after wrongful termination. **Blank v. Borden, (1974) 11 Cal. 3d 963, 969-971, 115 Cal. Rptr. 31, 524 P.2d 127**

In Walter v. Libby, the seller signed an exclusive listing agreement but fraudulently induced the broker to cancel it. The court stated, "Appellant's misrepresentation as to his present intention, and his suppression of the vital fact that he was about to dispose of the ranch through his own efforts, were obviously calculated to and did induce respondent to give his consent to the revocation of the agency and to surrender the instruments evidencing it. Appellant could not take advantage of respondent's consent thus procured." Citing to (Washburn v. Speer, 206 Cal. 414, 420 [274 P. 516] and Civil Code §§ 1709-1710. **Walter v. Libby (1945) 72 Cal. App. 2d 138, 164, P. 2d 21 at p. 144**

B. California Real Estate Law Treatise:

"The broker becomes entitled to recover the full amount of the commission based on the listing price *under the express terms of the listing* on the termination and is not required to continue any efforts under the listing nor to show that he or she could have performed by procuring a purchaser for the property within the listing term had it not been cancelled [Ft note omitted]." **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), §5:54**

Chapter 4.0: Buyer Suing the Seller for Deposit or Damages

I. Introduction

Of all the disputes between buyer and seller, the buyer's claim for the return of the "earnest money" deposit is the most common. The key for most buyers in arguing their case is to understand how a contingency works. If a C.A.R. standard purchase agreement was used, the buyer's obligation to buy was likely subject to a variety of contingencies for: reports, inspections, title, CC&Rs and HOA issues, appraisal and loan.

II. Understanding Contingencies

A contingency makes the obligation to buy conditional upon the happening of a certain event. If the event doesn't happen, then the buyer is not obligated to buy. The buyer may then cancel. The cancellation is not a breach because the buyer has a contractual right to cancel. And because the buyer has a right to cancel, the seller cannot claim damages. Therefore the buyer is entitled to the return of the deposit.

For example, a basic contingency is an appraisal contingency. The standard C.A.R. purchase agreement states that the contract is, "contingent upon a written appraisal by a licensed or certified appraiser of the Property at no less than the specified purchase price." (Item 3I) of the RPA-CA). If the property doesn't appraise at the purchase price, then the buyer may cancel based upon this appraisal contingency, and the buyer would be entitled to the return of the deposit.

III. Removing Contingencies

The other critical point about the contingencies in C.A.R. contracts is that they are "active." This means that the contingencies remain in effect until they are removed in writing. So even after the contractual inspection period passes by, the buyer still retains the right to cancel based upon a contingency, as long as the buyer hasn't removed that contingency in writing. Some people, even brokers and judges, may have difficulty accepting this contractual provision, but this is what the RPA-CA clearly states. Under item 14B(4) even after the typical 17 day period elapses, the buyer retains the right to cancel the agreement based upon any remaining contingency.

What this means is that if a buyer is seeking to obtain the deposit and the contingency period has already lapsed, the buyer may very well have to call the judge's attention to the fact that the contract is active contingency removal.

We have provided some help in explaining to the judge where to locate the active contingency removal provision in the contract and the legal authority supporting it. In sections 4.1 and 4.2 that follow, we have created two additional authority sections based upon whether the buyer cancels "within the stated period" or "beyond the stated period." The stated period is typically 17 days. If the buyer has cancelled beyond the typical 17 day contingency period then the buyer will utilize the "Additional List of Authority" sections based upon that type of cancellation.

IV. Understanding the Contingency for Review of Inspections and Reports

The inspection contingency is the broadest contingency. The inspection contingency is stated under item 10 of the Residential Purchase Agreement (RPA) and includes many types of inspections, but it also incorporates the Buyers Inspection Advisory (BIA) which further expands its purview.

But what makes the inspection contingency especially broad is that the both the contract and the law give the buyer wide latitude to exercise the inspection contingency based upon a good faith assessment of the condition of the property. The RPA says under paragraph 10, "Buyer's acceptance of the condition of, and any other matter affecting the Property, is a contingency of this Agreement…."

Additionally, there are many cases where judges have discussed the good faith standard as the basis for a buyer exercising the right to cancel under an inspection contingency. Because not every judge in a small claims court will be aware of these cases, it's important for the buyer to cite them. The buyer may do this by copying the "authorities" section (that we have written out below) and presenting this to the judge along with other important documents in their tabbed file.

However, even the inspection contingency does not give a buyer an unlimited right to cancel for any reason at all. The reason for cancelling must be related to a matter affecting the condition of the property and must be in good faith. For example, if the buyer doesn't have the down payment as promised, and therefore cannot close, the buyer cannot simply cancel on the basis of the inspection contingency. What does that have to do with the condition of the property? Nothing. The buyer's cancellation in such a circumstance may be a breach.

V. Bad Faith Refusal to Release Deposit

Finally, there is the $1,000 penalty as stated in Civil Code 1057.3 and in item 14F of the RPA, which allows a judge to award up to $1,000 as a penalty when the buyer or seller had no good faith reason for refusing to release the deposit. There are two points about this penalty to keep in mind. First, the penalty can only be awarded if the seller has refused to release the deposit in

bad faith and 30 days after written demand has gone by. Secondly, although a buyer may request this penalty, it is essentially *discretionary* on the part of the judge since there must be a finding of bad faith. Typically, it will be awarded in only the most egregious and glaring examples of wrong doing on the part of the seller.

VI. Naming Escrow Holder as an Additional Defendant

If the buyer is successful, the small claims court will render a judgment against the seller in favor of the buyer. Once the escrow receives a copy of the judgment, the escrow should release the deposit in accordance with the RPA-CA which states in bold print: **"Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award."** (Paragraph 14F of the RPA-CA). This provision constitutes a joint escrow instruction which the escrow may rely on.

However, not every escrow will release funds based upon a judgment unless the judgment has specifically named the escrow itself as a defendant. For this reason it's best for the buyer to discuss his or her plans with the escrow first and to ascertain in advance of filing the small claims complaint the escrow's procedures. If the escrow has a policy of releasing the funds upon judgment without being named, then it is prudent not to name the escrow. Otherwise, a named escrow may file a formal "interpleader" action in which the funds are deposited with the court for distribution. Usually, an attorney gets involved, and the costs of filing the interpleader may be taken out of the proceeds held in escrow. Clearly the buyer should avoid naming the escrow as a defendant unless necessary.

On the other hand if the escrow states that it must be named as a defendant before it will release the funds, then the buyer can assure the escrow that the escrow holder is being named solely for the purpose of obtaining a release of funds. Further, in the complaint filed with the small claims court, the demand against the escrow will be limited to releasing the deposit, less the escrow's fee. The buyer may remind that escrow of the limited purpose in naming the escrow and that he or she will not be asking the escrow to testify or take sides in the dispute. The escrow may be reminded of a law (Civil Code § 1057.3(d)) which specifically authorizes that the escrow holder to deposit the amount in dispute with the court (less any cancellation fee and charges incurred). Once the escrow makes such deposit, it is discharged of any further responsibility for the funds.

VII. No Obligation to Mediate Before Proceeding in Small Claims

The RPA contains a clause obligating the parties to mediate (and if initialed, arbitrated) before filing a claim in court. There is an exception to this requirement if the legal claim is brought in small claims court. The purpose behind the exception is that a dispute can usually be resolved

in small claims court for a relatively modest amount of money and very quickly; two of the same goals served by mediating disputes.

VIII. Specific Claims

- Buyer cancels based on loan contingency: Seller fails to return deposit (Chapter 4.1)
- Buyer cancels based on inspection contingency: Seller fails to return deposit (Chapter 4.2)
- Buyer cancels based on seller failure to deliver reports or disclosures (Chapter 4.3)
- Buyer cancels based on seller breach of contract obligation (Chapter 4.4)
- Buyer wants deposit after seller cancels after a notice to perform (Chapter 4.5

Chapter 4.1: Buyer Cancels Based on Loan Contingency: Seller Fails to Return Deposit

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract to buy the property located at _____ from _____.

The agreement between me and the seller gives me the contractual right to cancel and have my deposit returned if certain contingencies have not been satisfied or contractual terms have not been fulfilled. I never, in writing, removed or waived this right. The purchase agreement explicitly requires this to be done in writing before my contingency rights can be waived.

As required by the contract, I gave the seller a written cancellation and have since tried to get my deposit back, but the seller has refused.

Before filing this claim, I made a demand upon the seller to sign instructions authorizing escrow to release the funds, but seller has not done so nor has seller paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. I was unable to obtain a loan to purchase the property. I tried to get the loan on the terms stated in the contract, but the lender to which I applied would not lend that amount to me.

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge the circumstances of how you made a diligent effort to obtain the loan as described in the contract, but were denied. The buyer should discuss his or her diligent efforts including completing and sending to the lender a loan application, obtaining a pre-approval letter, correspondence with lender, and documentation, if any, pertaining to the lender's denial of the loan. The buyer should discuss any bureaucratic snafus and roadblocks that the lender threw in their path, and provide correspondence, if any.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Cleared check or other proof of deposit
  - Written Cancellation
  - Demand letter or any correspondence showing that buyer requested seller to release the deposit
  - Legal authority supporting claim
- **Category B (If applicable and available)**
  - Loan application
  - Pre-approval letter
  - Documents requested by lender showing buyer's diligent and good faith efforts
  - Correspondence with lender
  - Denial letter or any correspondence from lender indicating delays or inaction
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 3H(2) "Obtaining the loan(s) specified above **is a contingency** of this Agreement unless otherwise agreed in writing."

Residential Purchase Agreement, Paragraph 14B(4) "**Continuation of Contingency:** Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Residential Purchase Agreement, Paragraph 14F "Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A Buyer or Seller may be subject to a civil penalty of up to $1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitle to the deposited funds (Civil Code §1057.3)."

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities (For Cancellation Within Stated Time Period, Normally 17 days)

A. California Statutory Authority

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.
(b) **Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30 days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:**

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.
(2) **Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).**
(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), **there shall be no cause of action under this section,** and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller**, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller.** A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.
(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds. **Civil Code § 1057.3 (a) – (d) [subsections (e), (f) and (g) omitted]**

B. California Real Estate Law Treatise:

The most common condition precedent in real estate contracts is a provision that the buyer is not obligated to complete the purchase until financing is obtained to provide the funds to pay the purchase price. [ft. note omitted] In such cases, the contract should set forth the amount and minimum terms of the new financing in order that the buyer's obligation will be certain enough for enforcement. [ft. note omitted] Depending on the terms of the contract, if the buyer is unable to obtain the required loan within the period specified, either the buyer or the seller may be able to terminate the contract.[ft. note omitted]" **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:158**

V. Additional List of Authorities (For Cancellation Beyond the Stated Time Period, Normally 17 days. Use both this list of authorities and the prior list)

Under paragraph 14B(4) contingencies explicitly remain in full effect even after the time frame for their removal (usually 17 days) has lapsed.

"Continuation of contingency: Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Additional List of Authorities

A. California Supreme Court and Appellate Authority

' "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*AIU, supra*, 51 Cal.3d at p. 822.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.).' **Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal.4th 857, 868, 959 P.2d 265, 77 Cal.Rptr.2d 107**

"Waiver requires the intentional relinquishment of a known right after knowledge of the facts." **Alden v. Mayfield (1912) 164 Cal. 6, 11, 127 P. 45**

" ' "[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' " (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31, 44 Cal.Rptr.2d 370, 900 P.2d 619.) "Whether a waiver has occurred depends solely on the intention of the waiving party." (*Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722, 5 Cal.Rptr.2d 1.)" **In re Marriage of Turkanis and Price (2013) 213 Cal.App.4th 323, 352, 152 Cal.Rptr.3d 498, 515**

B. California Statutory Authority

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." **Civil Code § 1638**

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible…" **Civil Code § 1639**

C. California Real Estate Law Treatise

"When the language of an instrument is clear and explicit and does not lead to an absurd result, the language of the contract is controlling, and the intent of the parties is ascertained from the written provisions of the instrument. [ft. note omitted] When a contract is in writing, the intention of the parties is to be ascertained from the writing alone, if possible.[ft. note omitted]" **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:59**

Chapter 4.2: Buyer Cancels Based on Inspection Contingency: Seller Fails to Return Deposit

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract to buy the property located at _____ from _____.

The agreement between me and the seller gives me the contractual right to cancel and have my deposit returned if certain contingencies have not been satisfied or contractual terms have not been fulfilled. I never, in writing, removed or waived this right. The purchase agreement explicitly requires this to be done in writing before my contingency rights can be waived.

As required by the contract, I gave the seller a written cancellation and have since tried to get my deposit back, but the seller has refused.

Before filing this claim, I made a demand upon the seller to sign instructions authorizing escrow to release the funds, but seller has not done so nor has seller paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. I was not satisfied with the property based upon my inspections and investigations.

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge the circumstances of how you or someone you hired conducted inspections or investigations or you reviewed reports or disclosures made by the seller. Explain what was revealed in the inspections, investigations, reports or disclosures that you disapproved of.] [The heart of the buyer's case is to impress upon the judge that they were genuinely dissatisfied with the condition of the property or any other matter affecting the condition. The buyer can point to any variety of inspections made, and any number of reports by their own investigators or any reports or disclosures received from the seller. The buyer is not limited to problems that pertain to the physical condition of the property. The kinds of schools, the amount of noise and traffic, crime and any other offsite factor can all be legitimate areas of concern for the buyer. If there were negotiations for repairs to be made on the property that failed, these attempts can be evidence of the buyer's sincere and legitimate dissatisfaction. There is nothing in the law that requires the buyer to be dissatisfied with more than one aspect of the property. But more is better than less. If there are several points of dissatisfaction with the property, then there is no reason why the buyer should not discuss all of them. Although many cases allow the buyer to cancel based upon the buyer's own subjective feelings about the property, it is really better to demonstrate that *any* person would have been dissatisfied.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Cleared check or other proof of deposit
  - Written Cancellation
  - Demand letter or any correspondence showing that buyer requested seller to release the deposit
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Inspection reports
  - Seller disclosures (such as TDS and SPQ) and reports
  - Documentation showing importance of certain features or property conditions to buyer (such as Buyer Material Issues form or even correspondence between buyer and buyer's broker)
  - Request for Repairs or other proof of negotiations between buyer and seller over property condition (including emails or other exchanges between the real estate brokers)
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 10A "Buyer's acceptance of the condition of, and any other matter affecting the Property, is a contingency of this Agreement as specified in this paragraph and paragraph 14B."

Residential Purchase Agreement, Paragraph 14B(1)(i) Buyer given right to, "approve all disclosures, reports and other applicable information, which Buyer receives from Seller; and approve all other matters affecting the Property;…"

Residential Purchase Agreement, Paragraph 14B(4) "**Continuation of Contingency:** Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Residential Purchase Agreement, Paragraph 10 In addition to establishing the contingency based upon the condition of the property, paragraph 10 of the RPA-CA grants the buyer "the right" to conduct inspections, investigations, tests, surveys and other studies across a broad range of issues, including the right to "satisfy Buyer as to any matter specified in the attached Buyer's Inspection Advisory **(C.A.R. Form BIA)**."

Residential Purchase Agreement, Paragraph 14F "Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A Buyer or Seller may be subject to a civil penalty of up to $1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitle to the deposited funds (Civil Code §1057.3)."

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities (Cancellation Within Stated Time Period, Normally 17 Days)

A "satisfaction" clause gives the buyer wide latitude to cancel based upon the buyer's own subjective satisfaction exercised in good faith.

A. California Supreme Court and Appellate Court Authority

"While contracts making the duty of performance of one of the parties conditional on his satisfaction would seem to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such 'satisfaction' clauses have been given effect."

This multiplicity of factors which must be considered in evaluating a lease shows that this case more appropriately falls within the second line of authorities dealing with "satisfaction" clauses, being those involving fancy, taste, or judgment. Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract. **Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625, 626-627 (1958)**

B. California Statutory Authority

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.
(b) Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30 days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.
(2) Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).
(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), there shall be no cause of action under this section, and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller. A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.
(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds. **Civil Code § 1057.3 (a) – (d) [subsections (e), (f) and (g) omitted]**

C. California Real Estate Law Treatise:

"Satisfaction' conditions common in real estate contracts. Real estate contracts commonly contain conditions precedent to the buyer's obligation to purchase the property based on satisfaction or approval of some fact by the buyer or third person. The contract may provide, for example, that the buyer's obligations are conditioned upon the inspection and approval of the physical condition of the property, the seller's title, existing financing, and termite or engineering reports. Also, the contract may be conditioned on the occurrence of future events to the satisfaction of the buyer, such as, obtaining a subdivision approval, market survey, or new leases." **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:160**

"Application of the subjective standard. In some cases, an objective standard is neither practical nor appropriate. When the right involved is one that is submitted to the taste, fancy, feeling, or judgment of the party in whose favor the condition is given, it can be exercised without any practical or utilitarian reasons. Because no objective standard of measurement is available, the court permits the party to be the judge of his or her own satisfaction, subject only to the limitation that discretion must be applied in good faith. If he or she does act in good faith—and is really dissatisfied—the transaction may be avoided by the buyer." **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:160**

V. Additional List of Authorities (For Cancellation Beyond the Stated Time Period, Normally 17 days. Use both this list of authorities and the prior list)

Under paragraph 14B(4) contingencies explicitly remain in full effect even after the time frame for their removal (usually 17 days) has lapsed.

Residential Purchase Agreement, Paragraph 14B(4) states: "Continuation of contingency: Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Sample List of Authorities

A. California Supreme Court and Appellate Authority

' "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*AIU, supra*, 51 Cal.3d at p. 822.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.).' **Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal.4th 857, 868, 959 P.2d 265, 77 Cal.Rptr.2d 107**

"Waiver requires the intentional relinquishment of a known right after knowledge of the facts." **Alden v. Mayfield (1912) 164 Cal. 6, 11, 127 P. 45**

" ' "[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' " (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31, 44 Cal.Rptr.2d 370, 900 P.2d 619.) "Whether a waiver has occurred depends solely on the intention of the waiving party." (*Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722, 5 Cal.Rptr.2d 1.)" **In re Marriage of Turkanis and Price (2013) 213 Cal.App.4th 323, 352, 152 Cal.Rptr.3d 498, 515**

B. California Statutory Authority

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." **Civil Code § 1638**

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible…" **Civil Code § 1639**

C. California Real Estate Law Treatise

"When the language of an instrument is clear and explicit and does not lead to an absurd result, the language of the contract is controlling, and the intent of the parties is ascertained from the written provisions of the instrument.[ft. note omitted] When a contract is in writing, the intention of the parties is to be ascertained from the writing alone, if possible.[ft. note omitted]" **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:59**

Chapter 4.3: Buyer Cancels Based on Seller Failure to Deliver Reports or Disclosures

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract to buy the property located at _____ from _____.

The agreement between me and the seller gives me the contractual right to cancel and have my deposit returned if certain contractual terms have not been fulfilled. I never, in writing, removed or waived these rights.

As required by the contract, I gave the seller a written cancellation and have since tried to get my deposit back, but the seller has refused.

Before filing this claim, I made a demand upon the seller to sign instructions authorizing escrow to release the funds, but seller has not done so nor has seller paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. The seller has not given me reports or disclosures that are a pre-condition to my obligation to buy. Without these reports or disclosures I was unable to fully evaluate the property and its condition.

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge the specific reports or disclosures that the seller has failed to provide and where in the contract or other documents the seller had an obligation to provide the report or disclosure. Identify the type of information that should be revealed in the report or disclosure and why it would be important to you or any other buyer.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Cleared check or other proof of deposit
  - Written Cancellation
  - Demand letter or any correspondence showing that buyer requested seller to release the deposit
  - Legal authority supporting claim
- **Category B (If applicable and available)**
  - Sample copy of disclosures (such as TDS, NHD and SPQ) that seller failed to deliver
  - Sample copy of report (such as termite) that seller was obligated to provide but did not
  - Documentation showing importance of certain features or property conditions to buyer (such as Buyer Material Issues form or even correspondence between buyer and buyer's broker)
  - Request for Repairs or other proof of negotiations between buyer and seller (including emails or other exchanges between the real estate brokers) that show importance of certain features or property conditions that cannot be evaluated fully without the seller required disclosure or report
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 4 "ALLOCATION OF COSTS (If checked): Unless otherwise specified here, in writing, this paragraph only determines who is to pay for the inspection, test or service ("Report") mentioned; it does not determine who is to pay for any work recommended or identified in the Report.

Residential Purchase Agreement, Paragraph 6A(4) "If any disclosure or notice specified in 6A(1), or subsequent or amended disclosure or notice is Delivered to Buyer after the offer is Signed, Buyer shall have the right to cancel this Agreement within 3 Days After Delivery in person, or 5 Days After Delivery by deposit in the mail, by giving written notice of cancellation to Seller or Seller's agent.

Residential Purchase Agreement, Paragraph 9 "CONDITION OF PROPERTY: Unless otherwise agreed: (i) the Property is sold (a) in its PRESENT physical ("as-is") condition as of the date of Acceptance and (b) subject to Buyer's Investigation rights; (ii) the Property, including pool, spa, landscaping and grounds, is to be maintained in substantially the same condition as on the date of Acceptance; and (iii) all debris and personal property not included in the sale shall be removed by Close Of Escrow…"

Residential Purchase Agreement, Paragraph 14A "SELLER HAS: 7 (or ☐ _____) Days After Acceptance to Deliver to Buyer all Reports, disclosures and information for which Seller is responsible under paragraphs 4, 6A, B and C, 7A, 9A, 11A and B and 12A. Buyer may give Seller a Notice to Seller to Perform (C.A.R. Form NSP) if Seller has not Delivered the items within the time specified.

Residential Purchase Agreement, Paragraph 14B(3) and (4) "Continuation of Contingency**:** Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of

attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities

Failure of a Condition Precedent Permits Termination of Contract

A. California Appellate Court Authority

"When a condition precedent is adopted by the parties to a contract, the court will exact a substantial if not strict observance of the provisions before finding liability." **Cochran v. Ellsworth (1954) 126 Cal.App.2d 429, 429, 272 P.2d 904**

"In contract law, a 'condition precedent' is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." **Borroso v. Ocwen Loan Servicing, LLC (2012) 208 Cal.App.4th 1001, 1009, 146 Cal.Rptr.3d 90**

B. California Statutory Authority

"A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."
Civil Code § 1436

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.
(b) **Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30 days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:**

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.

(2) **Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).**

(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), **there shall be no cause of action under this section,** and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller**, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller.** A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.

(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds. **Civil Code § 1057.3 (a) – (d) [subsections (e), (f) and (g) omitted]**

C. California Real Estate Law Treatise

"A failure of occurrence of a condition precedent permits the other person to terminate the contract. Absent a repudiation or waiver,[ft. note omitted] when an act or event is a condition precedent, the condition must be performed or satisfied before the duty of a party who has the conditional obligation to perform may recover in any action for specific performance or damages caused by the other party's nonperformance.[ft. note omitted]

Timely performance and not a tender of performance is required. When a condition precedent is not satisfied within the time provided in the contract, either party may terminate the contract without further performance or tender of performance.[ft. note omitted]" **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:158**

"Independent conditions. When performance is required at different times, the contract terms usually are treated as independent covenants and conditions precedent to subsequent performance." **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:161**

Chapter 4.4: Buyer Cancels Based on Seller Breach of Contract Obligation

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract to buy the property located at _____ from _____.

The agreement between me and the seller gives me the contractual right to cancel and have my deposit returned if certain contractual terms have not been fulfilled. I never, in writing, removed or waived these rights.

As required by the contract, I gave the seller a written cancellation and have since tried to get my deposit back, but the seller has refused.

Before filing this claim, I made a demand upon the seller to sign instructions authorizing escrow to release the funds, but seller has not done so nor has seller paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. **The seller has not met his/her contractual obligations, such obligations are material, I did not prevent or interfere with seller's obligations, and I was otherwise prepared to perform as agreed by the contract.**

B. **[Insert here any other secondary reason that you are owed a commission]**

Here is what happened: [Explain to the judge the specific thing or things the seller was required to do but did not (for example, failure to: remove a tenant (paragraph 5); maintain the condition of the property during the escrow (paragraph 9); and make agreed upon repairs in good and skillful manner that complies with applicable law, including governmental permit (paragraph 15). Explain why the obligation is important to you (or probably would be to any other buyer).]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Cleared check or other proof of deposit
  - Written Cancellation
  - Demand letter or any correspondence showing that buyer requested seller to release the deposit
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Request for Repairs or other proof of negotiations between buyer and seller (including emails or other exchanges between the real estate brokers) that show importance of certain features or property conditions
  - Verification of Property Condition form
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, paragraph 5C, "Tenant-occupied property: (i) Property shall be vacant at least 5 (or ☐ _____) Days Prior to Close Of Escrow, unless otherwise agreed in writing. Note to Seller: If you are unable to deliver Property vacant in accordance with rent control and other applicable Law, you may be in breach of this Agreement."

Residential Purchase Agreement, paragraph 9, "CONDITION OF PROPERTY: Unless otherwise agreed: (i) the Property is sold (a) in its PRESENT physical ("as-is") condition as of the date of Acceptance and (b) subject to Buyer's Investigation rights; (ii) the Property, including pool, spa, landscaping and grounds, is to be maintained in substantially the same condition as on the date of Acceptance; and (iii) all debris and personal property not included in the sale shall be removed by Close Of Escrow…"

Residential Purchase Agreement, paragraph 14A, "SELLER HAS: 7 (or ☐ _____) Days After Acceptance to Deliver to Buyer all Reports, disclosures and information for which Seller is responsible under paragraphs 4, 6A, B and C, 7A, 9A, 11A and B and 12A. Buyer may give Seller a Notice to Seller to Perform (C.A.R. Form NSP) if Seller has not Delivered the items within the time specified.

Residential Purchase Agreement, paragraph 14B(4), "Continuation of Contingency**:** Even after the end of the time specified in 14B(1) and before Seller cancels this Agreement, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based upon a remaining contingency or Seller's failure to Deliver the specified items."

Residential Purchase Agreement, paragraph 15, "REPAIRS: Repairs shall be completed prior to final verification of condition unless otherwise agreed in writing. Repairs to be performed at Seller's expense may be performed by Seller or through others, provided that the work complies with applicable Law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all Repairs may not be possible. Seller shall: (i) obtain receipts for Repairs performed by others; (ii) prepare a written statement indicating the Repairs performed by Seller and the date of such Repairs; and (iii) provide Copies of receipts and statements to Buyer prior to final verification of condition."

Residential Purchase Agreement, paragraph 16, "FINAL VERIFICATION OF CONDITION: Buyer shall have the right to make a final inspection of the Property within 5 (or _____) Days Prior to Close Of Escrow, NOT AS A CONTINGENCY OF THE SALE, but solely to confirm: (i) the Property is maintained pursuant to paragraph 9; (ii) Repairs have been completed as agreed; and (iii) Seller has complied with Seller's other obligations under this Agreement (C.A.R. Form VP).

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities

Failure of a Condition Precedent Permits Termination of Contract

A. California Appellate Court Authority

"When a condition precedent is adopted by the parties to a contract, the court will exact a substantial if not strict observance of the provisions before finding liability." **Cochran v. Ellsworth (1954) 126 Cal.App.2d 429, 429, 272 P.2d 904**

"In contract law, a 'condition precedent' is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." **Borroso v. Ocwen Loan Servicing, LLC (2012) 208 Cal.App.4th 1001, 1009, 146 Cal.Rptr.3d 90**

B. California Statutory Authority

"A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."
Civil Code § 1436

C. California Real Estate Law Treatise

"A failure of occurrence of a condition precedent permits the other person to terminate the contract. Absent a repudiation or waiver,[ft. note omitted] when an act or event is a condition precedent, the condition must be performed or satisfied before the duty of a party who has the conditional obligation to perform may recover in any action for specific performance or damages caused by the other party's nonperformance.[ft. note omitted]

Timely performance and not a tender of performance is required. When a condition precedent is not satisfied within the time provided in the contract, either party may terminate the contract without further performance or tender of performance.[ft. note omitted]" **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:158**

"Independent conditions. When performance is required at different times, the contract terms usually are treated as independent covenants and conditions precedent to subsequent performance." **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:161**

Chapter 4.5: Buyer Claims Deposit After Seller Cancels After a Notice to Perform

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract to buy the property located at _____ from _____.

The agreement between me and the seller requires the seller to return the deposit should he or she cancel after having delivered a notice to perform.

Before filing this claim, I made a demand upon _____the seller to sign instructions authorizing escrow to release the funds, but seller has not done so nor has seller paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. The seller gave me a notice [to remove the _____ contingency] [to remove all of my contingencies] [to _____(such as increase my deposit, provide a pre-qualification letter)]. When I did not do so, the seller cancelled. The contract does not obligate me to take the action but does require the seller to return my deposit in that circumstance.

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge why you did not take the action. For example, you did not remove the financing contingency because the lender had not given any assurance that the loan would be made. Inform the judge that paragraph 14C (1) and (2) requires the seller to return a deposit if the seller cancels after issuing a notice to buyer to perform.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement and sample relevant terms
  - Escrow instructions
  - Cleared check or other proof of deposit
  - Written Cancellation
  - Demand letter or any correspondence showing that buyer requested seller to release the deposit
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Communication from lender that no decision made on loan application
  - Communication from lender that appraisal has not yet been conducted on property.
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 14C, SELLER RIGHT TO CANCEL:
(1) Seller right to Cancel; Buyer Contingencies: If, by the time specified in this Agreement, Buyer does not Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement then Seller, after first Delivering to Buyer a Notice to Buyer to Perform (C.A.R. Form NBP) may cancel this Agreement. In such event, Seller shall authorize return of Buyer's deposit. [Highlight added].
(2) Seller right to Cancel; Buyer Contract Obligations: Seller, after first Delivering to Buyer a NBP may cancel this Agreement for any of the following reasons: (i) if Buyer fails to deposit funds as required by 3A or 3B; (ii) if the funds deposited pursuant to 3A or 3B are not good when deposited; (iii) If Buyer fails to Deliver a notice of FHA or VA costs or terms as required by 3C(3) (C.A.R. Form FVA); (iv) if Buyer fails to Deliver a letter as required by 3H; (v) if Buyer fails to Deliver verification as required by 3G or 3J; (vi) if Seller reasonably disapproves of the verification provided by 3G or 3J; (vii) if Buyer fails to return Statutory and Lead Disclosures as required by paragraph 6A(2); or (viii) if Buyer fails to sign or initial a separate liquidated damages form for an increased deposit as required by paragraphs 3B and 25. In such event, Seller shall authorize return of Buyer's deposit. [Highlight added].
(3) Notice To Buyer To Perform: The NBP shall: (i) be in writing; (ii) be signed by Seller; and (iii) give Buyer at least 2 (or ☐ _____) Days After Delivery (or until the time specified in the applicable paragraph, whichever occurs last) to take the applicable action. A NBP may not be Delivered any earlier than 2 Days Prior to the expiration of the applicable time for Buyer to remove a contingency or cancel this Agreement or meet an obligation specified in 14C (2).

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities

A. California Supreme Court Authority

' "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*AIU, supra*, 51 Cal.3d at p. 822.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264.).' **Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal.4th 857, 868, 959 P.2d 265, 77 Cal.Rptr.2d 107**

B. California Statutory Authority

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." **Civil Code § 1638**

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible…" **Civil Code § 1639**

C. California Real Estate Law Treatise

"When the language of an instrument is clear and explicit and does not lead to an absurd result, the language of the contract is controlling, and the intent of the parties is ascertained from the written provisions of the instrument.[ft. note omitted] When a contract is in writing, the intention of the parties is to be ascertained from the writing alone, if possible.[ft. note omitted]" **1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:59**

Chapter 5.0: Seller Suing the Buyer for Deposit or Damages

I. Introduction

The most common claim that a seller makes against a buyer is for the release of the "earnest money" deposit. The key for most sellers in arguing their case is to understand how a contingency works pursuant to the C.A.R. Residential Purchase Agreement (RPA). A buyer's obligation to buy is subject to a variety of contingencies: contingencies for reports, inspections, title, CC&Rs and HOA issues, appraisal and loan. However, once those contingencies are either removed, the buyer's obligation becomes unconditional. The small claims judge may need to be reminded on how the contract works and how the requirements of the contract affect the parties.

II. Understanding Contingencies

A contingency makes the obligation to buy conditional upon the happening of a certain event. If the event doesn't happen, then the buyer is not obligated to buy. The buyer may then cancel. The cancellation is not a breach because the buyer has a contractual right to cancel. And because the buyer has a right to cancel, the seller cannot claim damages. Therefore the buyer is entitled to the return of the deposit.

However, once the buyer removes a contingency, the buyer can no longer rely on that reason for cancelling the contract. If the buyer has no other legitimate contractual or legal reason to cancel, the buyer is in breach of contract and the seller is entitled to damages.

III. Removing Contingencies

The contingencies in RPA remain in place until they are specifically removed in writing. This is often called the "active" removal method. Thus, contingencies are not removed by the mere passage of time, nor are they automatically removed upon the happening of a specific event. There must be an affirmative act by the buyer in writing to remove the contingencies. This makes it difficult to remove contingencies. However, once the contingencies are removed, the buyer takes all responsibility for completing the transaction just as if the contract was written without the contingency at all. In other words, where there is a contingency the seller assumes the risk the buyer will have a right to cancel based on some learned information or other event (such as failure to get a loan) and get the deposit back. Without the contingency, the risk of not completing the contract shifts to the buyer.

IV. Cancellation Based Upon a Contingency

A buyer's right to cancel based upon a contingency may be unilateral but it does not give a buyer an unlimited right to cancel for any reason at all. Where for example, the buyer cancels on the basis of an inspection contingency, the reason for cancelling must be related to a matter affecting the condition of the property and must be in good faith. Indeed, whenever a buyer (or seller) cancels on the basis of any contingency, the reason for the cancellation must relate to that contingency, and must be in good faith.

Furthermore, a buyer cannot cause his or her own contingency to fail. For example, if the buyer makes no effort to provide the lender with the proper information as requested, the buyer will not be able to obtain the loan. If the buyer then cancels on the basis of the loan contingency, this would likely be a breach since the buyer's own actions caused the contingency to fail. This would be both bad faith, and failure to make a diligent effort to obtain the designated loan.

Lastly, a buyer cannot cancel on the basis of a contingency if the contingency has been satisfied. Let's take an example where the buyer has removed all contingencies with the exception of the loan contingency. Suppose the buyer is now approved for the loan by the lender. But the buyer chooses not to accept it. Can the buyer cancel on the basis of the loan contingency? No, the buyer actually got the loan and therefore the contingency has been satisfied. The buyer's cancellation would be a breach.

Another common situation where a buyer's contingency has been satisfied is where the appraisal comes in at or above the purchase price. Where this is the situation, the buyer's cancellation based upon the appraisal contingency will likely be a breach. The appraisal contingency protects the buyer against a property appraising at less than the purchase price. Once the appraisal comes in at or above purchase price, the appraisal contingency has been satisfied.

V. Bad Faith Refusal to Release Deposit

Finally, there is the $1,000 penalty as stated in Civil Code 1057.3 and in item 14F of the RPA, which allows a judge to award up to $1,000 as a penalty when the buyer or seller had no good faith reason for refusing to release the deposit. There are two points about this penalty to keep in mind. First, the penalty can only be awarded if the buyer has refused to release the deposit in bad faith and 30 days after written demand has gone by. Secondly, although a seller may request this penalty, it is essentially *discretionary* on the part of the judge since there must be a finding of bad faith. Typically, it will be awarded in only the most egregious and glaring examples of wrong doing on the part of the buyer.

VI. Liquidated Damages

Ordinarily, if a buyer breaches a contract the seller has to prove how much the buyer's breach actually injured the seller. However, California law allows parties to agree in advance as to how much the seller will be damaged if the buyer breaches a contract. This agreement is called liquidated damages. The amount of damages "liquidated" has to be a reasonable amount at the time the contract is entered into. For sales of residential property which the buyer intends to occupy, the amount is presumed reasonable if it is no more than 3% of the purchase price. For other types of properties, there is no maximum amount presumed to be reasonable. A liquidated damage clause in a contract for the sale of a residential property of one to four units one of which the buyer intends to occupy is valid if it is in 10 point bold type and separately initialed by buyer and seller. If more than one deposit is made, additional deposits beyond the initial deposit are only counted toward liquidated damages if the additional deposit is accompanied by a separately signed or initialed liquidated damage clause.

VII. Naming Escrow Holder as an Additional Defendant

If the seller is successful, the small claims court will render a judgment against the buyer in favor of the seller. Once the escrow receives a copy of the judgment, the escrow should release the deposit in accordance with the RPA which states in bold print: **"Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award."** (Paragraph 14F of the RPA). This provision constitutes a joint escrow instruction which the escrow may rely on.

However, not every escrow will release funds based upon a judgment unless the judgment has specifically named the escrow itself as a defendant. For this reason it's best for the seller to discuss his or her plans with the escrow first and to ascertain in advance of filing the small claims complaint the escrow's procedures. If the escrow has a policy of releasing the funds upon judgment without being named, then it is prudent not to name the escrow. Otherwise, a named escrow may file a formal "interpleader" action in which the funds are deposited with the court for distribution. Usually, an attorney gets involved, and the costs of filing the interpleader may be taken out of the proceeds held in escrow. Clearly the buyer should avoid naming the escrow as a defendant unless necessary.

On the other hand if the escrow states that it must be named as a defendant before it will release the funds, then the seller can assure the escrow that the escrow is being named solely for the purpose of obtaining a release of funds. Further, in the complaint filed with the small claims court, the demand against the escrow will be limited to releasing the deposit, less the escrow's fee. The seller may remind that escrow of the limited purpose in naming the escrow,

and that he or she will not be asking the escrow to testify or take sides in the dispute. The escrow may be reminded of a law which specifically authorizes the escrow holder to deposit the amount in dispute with the court (less any cancellation fee and charges incurred). Once the escrow makes such deposit, it is discharged of any further responsibility for the funds. (Civil Code § 1057.3(d)).

VIII. No Obligation to Mediate Before Proceeding in Small Claims

The C.A.R. purchase agreement contains a clause obligating the parties to mediate (and if initialed, arbitrate) before filing a claim in court. There is an exception to this requirement if the legal claim is brought in small claims court. The purpose behind the exception is that a dispute can usually be resolved in small claims court for a relatively modest amount of money and very quickly; two of the same goals served by mediating disputes.

IX. Specific Claims

- Buyer does not perform after removing all contingencies (Chapter 5.1)
- Buyer is in breach of contract (Chapter 5.2)

Chapter 5.1: Buyer Does Not Perform After Removing All Contingencies

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract sell the property located at _____ to _____.

The buyer cancelled the agreement without having a legal or contractual right to do so.

Before filing this claim, I made a demand upon the buyer to sign instructions authorizing escrow to release the funds, but the buyer has not done so nor has buyer paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. The buyer cancelled the contract based upon a contingency that has already been removed in writing or the buyer could not legitimately rely on that contingency even if it were not removed in writing.

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge how and when the buyer removed a contingency and then attempted to cancel based on that contingency. If the buyer removed all contingencies then simply demonstrating that the buyer failed to close should be sufficient to prove the seller's case. If the buyer did not remove the contingency but caused it to fail then the seller should provide as much documentation as possible demonstrating the bad faith of the buyer, or the seller knows that the buyer's contingency has already been satisfied (for example there is an appraisal at or above the purchase price) then the seller will focus on how the buyer is attempting to use but the buyer is using that contingency as an excuse to cancel anyway.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Written Cancellation
  - Demand letter or any correspondence showing that seller requested buyer to release the deposit
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Contingency removal form
  - Request for Repair form
  - Documents contesting buyer's reason for cancellation (for example, if buyer claims seller never gave reports or disclosures, include signed copy of TDS or reports. If buyer cancels based on appraisal or loan, any document available from buyer's lender contradicting the buyer's reason.)
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 14D "EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES: If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall with regard to that contingency or cancellation right conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections or for inability to obtain financing."

Residential Purchase Agreement, Paragraph 25 "LIQUIDATED DAMAGES: If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price."

Residential Purchase Agreement, Paragraph 3B, INCREASED DEPOSIT: Buyer shall deposit with Escrow Holder an increased deposit in the amount of . . . .$ _____
within ____ Days After Acceptance, or ☐ _____.
If a liquidated damages clause is incorporated into this Agreement, Buyer and Seller shall sign a separate liquidated damages clause (C.A.R. Form RID) for any increase deposit at the time it is Delivered.

Residential Purchase Agreement, Paragraph 14F "Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A Buyer or Seller may be subject to a civil penalty of up to $1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitle to the deposited funds (Civil Code §1057.3)."

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities

A. California Appellate Court Authority

After the buyer signed escrow instructions stating that the contingency was "deleted" the court determined that in doing so "they waived any condition precedent to their performance and defendants were contractually assured of obtaining the full purchase price in cash." **Doryon v. Salant, 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378 (2d Dist. 1977)**

B. California Statutory Authority

"(b) A provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and either subdivision (c) or (d) of this section.
(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages.
(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages." **Civil Code § 1675(b) – (d)**

"A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless:
(a) The provision is separately signed or initialed by each party to the contract; and
(b) If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type." **Civil Code § 1677**

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.
(b) Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30 days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.
(2) Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).
(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), there shall be no cause of action under this section, and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller. A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.

(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds. **Civil Code § 1057.3 (a) – (d) [subsections (e), (f) and (g) omitted]**

C. California Real Estate Law Treatise:

"Satisfaction of conditions. A condition is satisfied when it is performed or occurs, but a contract often will require that a party execute a document of satisfaction to assure that the contract has become unconditional [ft. note omitted]" **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:166**

"Waiver of condition. A condition generally can be waived voluntarily by the party for whose benefit it has been inserted into the contract [ft. note omitted]. That is, it may be waived by the person whose obligation is contingent on the satisfaction of the condition [ft. note omitted].

"Conditions that generally are solely for the buyer's protection and can be waived by the buyer include the contingency that he or she obtain planning commission approval of the intended use of the property [ft. note omitted] or that he or she have the right to make a physical inspection of the property or inspect the seller's books and records.[ft. note omitted]". **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:166**

Chapter 5.2: Buyer is in Breach of Contract

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I entered into a contract sell the property located at _____ to _____.

The buyer cancelled the agreement without having a legal or contractual right to do so.

Before filing this claim, I made a demand upon the buyer to sign instructions authorizing escrow to release the funds, but the buyer has not done so nor has buyer paid me the equivalent amount, $_____. I have included a copy of the demand with my documentation. I am also asking for my costs in bringing this action. In addition, I am asking that a $1,000 penalty be assessed against the seller for the seller's breach because there is no good faith dispute over the fact that I am entitled to the money.

The specific reason I am entitled to compensation or return of my deposit is that:

A. The buyer cancelled the contract but the buyer either did not fulfill its contractual requirements or the buyer acted in bad faith

B. [Insert here any other secondary reason that you are owed a commission]

Here is what happened: [Explain to the judge what the buyer did wrong, such as not even applying for a loan or not applying for the type of loan specified in the contract. For example only applying for an FHA loan with 3% down when contract says buyer will get a conventional loan with 20% down or making up an excuse to cancel that is not the buyer's real reason. This will often be difficult to prove but sometimes parties put something in writing that demonstrates the real reason.]

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Written Cancellation
  - Demand letter or any correspondence showing that seller requested buyer to release the deposit
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Documents showing buyer acted in bad faith or did not follow the contract (for example, letter or email from buyer's broker indicating buyer cannot get loan after buyer already removed loan contingency but then buyer cancels for inspection contingency but does not identify any problem with property)
  - **Insert documentation from Category B from any other secondary claim you are making**
- **Category C**
  - _____
  - _____

III. Sample Relevant Terms

Residential Purchase Agreement, Paragraph 14D "EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES: If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall with regard to that contingency or cancellation right conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections or for inability to obtain financing."

Residential Purchase Agreement, Paragraph 25 "LIQUIDATED DAMAGES: If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price."

Residential Purchase Agreement, Paragraph 3B, INCREASED DEPOSIT: Buyer shall deposit with Escrow Holder an increased deposit in the amount of . . . .$ _____
within ____ Days After Acceptance, or ☐ _____.
If a liquidated damages clause is incorporated into this Agreement, Buyer and Seller shall sign a separate liquidated damages clause (C.A.R. Form RID) for any increase deposit at the time it is Delivered.

Residential Purchase Agreement, Paragraph 14F "Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A Buyer or Seller may be subject to a civil penalty of up to $1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitle to the deposited funds (Civil Code §1057.3)."

Residential Purchase Agreement, Paragraph 26C "(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions."

IV. Sample List of Authorities

A. California Appellate Court Authority

When an agreement to sell real property is silent on the details of the terms of financing, the usual and standard terms of a note and deed and trust must be accepted by the buyer. Specifically the buyer has no right to reject a loan on the basis that note contained an acceleration clause (but may reject a note on the basis of compound interest since that custom or usage was not "well-known in the community.") **Robertson v. Dodson, 54 Cal. App. 2d 661, 664-665, 129 P.2d 726 (1st Dist. 1942)**

B. California Statutory Authority

"(b) A provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and either subdivision (c) or (d) of this section.
(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages.
(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages."**Civil Code § 1675(b) – (d)**

"A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless:
(a) The provision is separately signed or initialed by each party to the contract; and
(b) If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type." **Civil Code § 1677**

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.
(b) Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30

days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.

(2) Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).

(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), there shall be no cause of action under this section, and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller. A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.

(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds. **Civil Code § 1057.3 (a) – (d) [subsections (e), (f) and (g) omitted]**

C. California Real Estate Law Treatise:

"Contract conditioned on the buyer obtaining new financing. When the contract contains a condition of new financing to be acquired by the buyer, the buyer's approval or satisfaction can be measured by the objective standard. The buyer is bound to accept a loan that contains the usual terms of such financing in the marketplace and is bound to accept market terms unless the contract establishes appropriate limitations of interest rate, loan fees, etc." **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:160**

Chapter 6.0: Broker Defending Claims by Buyer

I. Presentation

A claim by a buyer may be against the listing broker or the buyer's broker. These are really two different types of claims. A listing broker will have duties of disclosure and good faith to a buyer, but will not have a fiduciary duty (assuming no dual agency). The buyer's agent on the other hand is a fiduciary to the buyer, and thus may have to defend against the buyer by showing that he or she used reasonable care, diligence and skill in the performance of the agency.

II. Buyer's Claim for Deposit

Sometimes a buyer will sue the real estate broker or agent for the return of the deposit, either individually or as an additional defendant when the seller is also sued. The suit against the listing broker is usually premised on the mistaken notion of the broker's role in the transaction. Many people confuse the responsibilities and obligations of the seller and real estate broker and imagine that the broker is liable for the contractual obligations of the seller. Nonetheless, it is vital that the broker show up in court and defend the claim.

III. Distinguish Between Broker and Seller's Role

In order to prevent a judge from deciding in favor of a buyer on such a claim, it may be necessary to explain to the judge the different roles and responsibilities or buyer, seller and broker. Whether the broker is the listing broker or cooperating broker, a key part of the defense is to clearly demonstrate that the broker is not a party to the contract between the buyer and the seller. Since the buyer's deposit is made pursuant to the purchase agreement, and since the broker is not a party to that agreement or escrow, the broker has no ability to enforce its terms.

The broker, whether representing seller or buyer, is a marketing agent whose purpose is to find a buyer for the seller's property or find a property for a buyer to acquire. While the broker often is involved in the negotiation process before and after a contract has been agreed to by buyer and seller, it is the buyer and seller who enter into a contract, and it is the buyer and seller who ultimately make their own decisions on whether the contract has been breached and whether to authorize return of any deposit. The broker has no authority to direct disbursement of those funds.

If the buyer is suing the listing broker who is not a dual agent, the broker should also point out that the broker is representing the seller only and has no fiduciary duty to the buyer. However, if the buyer is suing his or her own agent, then the buyer may argue that the broker has

breached his or her fiduciary duty by misadvising the buyer. One way to approach a defense of this claim is for the buyer's broker to point out that both the purchase agreement and the contingency removal form provides the buyer with ample warning of the risk that removing contingencies entails. Also, the broker will want to emphasize that contract decisions are made by the buyer and not the broker, and that at no point was the buyer ever assured that he or she would get the deposit back.

IV. Specific Claims

- Listing Broker Defending Claim by buyer for deposit (Chapter 6.1)
- Buyer Broker Defending Claim by buyer for deposit (Chapter 6.2)
- Listing Broker Defending Claim by buyer of failure to disclose is in breach of contract (Chapter 6.3)

Chapter 6.1: Listing Broker Defending Claim by Buyer for Deposit

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I represented the seller of the property located at _____ to _____ and the buyer has named me as a defendant in the buyer's attempt to have the deposit released.

Your honor, at no point did I represent the buyer. I represented the seller exclusively and the confirmation in the contract clearly indicates this. Since I do not represent the buyer, I have no fiduciary duty to the buyer.

Neither I nor my brokerage is a party to this contract or the escrow that is holding the deposit. The name of the principals and their signatures are clearly indicated on the contract and escrow instructions.

On the last page of the purchase agreement, there is a place for the brokerage company to sign but the broker box clearly states that the brokers are not parties to the contract between buyer and seller. The broker box is only for the purpose of clarifying the agreement to pay a commission between the brokers and stands outside the terms of the contract between the buyer and seller. Thus, at no point has the contract been agreed to or executed by a broker. Further, the contract specifies that the broker is a party to escrow for the sole purpose of compensation.

In addition, agency law provides that while a principal may be liable for act of an agent, an agent is not responsible for acts of the principal with the exception of unusual circumstances. No such circumstances exist here.

(If applicable) Finally, the Contingency Removal form gives the buyer ample warning just above the signature line that if the buyer removes all contingencies the risk for not closing will be borne by the buyer.

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. : I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Written Cancellation
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Contingency removal form

III. Sample Relevant Terms

Residential Purchase Agreement paragraph 2C, "CONFIRMATION: The following agency relationships are hereby confirmed for this transaction: Listing Agent _____ (Print Firm Name) is the agent of (check one): ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Selling Agent _____ (Print Firm Name) (if not the same as the Listing Agent) is the agent of (check one): ☐ the Buyer exclusively; or ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."

Residential Purchase Agreement page 8 entitled, "Real Estate Brokers," states in part: "**A. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."**

Residential Purchase Agreement paragraph 24C, "of the purchase agreement states in part: "Brokers are a party to the escrow for the sole purpose of compensation pursuant to paragraph 23 and paragraph D of the section title Real Estate Brokers on page 8."

Residential Purchase Agreement paragraph 14D states: **"EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES:** If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall with regard to that contingency or cancellation right conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections or for inability to obtain financing."

The Contingency Removal Form (CA) states at the bottom in bold print just above the signature line the following:

"**Once all contingencies are removed**, whether or not Buyer has satisfied him/herself regarding all contingencies or received any information relating to those contingencies, **Buyer many not be entitled to a return of Buyer's deposit if Buyer does not close escrow**. This could happen even if, for example, Buyer does not approve of some aspect of the Property or lender does not approve Buyer's loan."

IV. Sample List of Authorities

A. Supreme Court and Appellate Court Authority

"He relies on the rule that an agent who acts for a disclosed principal and is dealt with by the third party as an agent does not ordinarily incur personal liability. (See, 2 Cal.Jur.2d, Agency, § 132, and cases cited.)" [Referring to a defendant who signed contract "as an agent only"] **Coughlin v. Blair (1953) 41 Cal.2d 587, 595, 262 P.2d 305**

"Mr. Jans signed the escrow instructions as agent for a disclosed principal, Tenneco West, Inc. He cannot be held liable on the contract absent a showing that he acted without believing he had the authority to do so. (Rest.2d Agency, § 320; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency and Employment, § 182, p. 778.)" **Jacobs v. Freeman (1980) 104 Cal.App.3d 177, 191, 163 Cal.Rptr. 680**

"Case law explicating section 2343 shows that the "acts are wrongful in their nature" clause arises in juxtaposition to the normal rule that agents are not liable for the torts or breaches of contract of their principals." **Kurtin v. Elieff (2013) 215 Cal.App.4th 455, 480, 155 Cal.Rptr.3d 573**

B. California Statutory Authority

AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature.

Civil Code § 2343

C. California Real Estate Law Treatise

"Agent not liable for the acts of the principal. The agent is only liable to third persons for his or her own wrongful acts or omissions. While a principal may be vicariously liable for the wrongful acts of an agent, even though the principal has not personally committed any wrongful acts or omissions,[ft. note omitted] absent fault, an agent cannot be vicariously liable for the wrongful acts of the principal.[ft. note omitted]"

2 Miller & Starr, Cal Real Estate (3d ed. 2012), § 3:36

“Agents are not liable on the principal's contracts. Ordinarily, an agent is not personally liable on a contract executed in the name of the principal.[ft. note omitted]”

2 Miller & Starr, Cal Real Estate (3d ed. 2012), § 3:49

Chapter 6.2: Buyer Broker Defending Claim by Buyer for Deposit

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I represented the buyer of the property located at _____ to _____ and the buyer has named me as a defendant in the buyer's attempt to have the deposit released.

I am very careful not to make any type of promise or guarantee to a client that assures them he or she will or won't get the deposit back. Moreover, the Contingency Removal form fully informs the buyer that once he or she removes contingencies, the deposit is at risk if he or she cannot close. It states this clearly and in bold print just above the signature line.

I did nothing wrong and I fully performed my duties as a real estate agent in the transaction:

- I provided the buyer with all of the disclosures as provided by the seller
- I arranged for inspections
- I negotiated for repairs
- I conducted my own inspection and disclosed in writing to the buyer anything material that I found
- (list other duties that you performed)

Neither I nor my brokerage is a party to this contract or the escrow that is holding the deposit. The name of the principals and their signatures are clearly indicated on the contract and escrow instructions.

On the last page of the purchase agreement, there is a place for the brokerage company to sign but the broker box clearly states that the brokersemail are not parties to the contract between buyer and seller. The broker box is only for the purpose of clarifying the agreement to pay a commission between the brokers and stands outside the terms of the contract between the buyer and seller. Thus, at no point has the contract been agreed to or executed by a broker. Further, the contract specifies only that the broker is a party to escrow for the sole purpose of compensation.

In addition, agency law provides that while a principal may be liable for act of an agent, an agent is not responsible for acts of the principal with the exception of unusual circumstances. No such circumstances exist here.

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Written Cancellation
  - Receipt for Reports
  - Transfer Disclosure Statement, Agent Visual Inspection Disclosure
  - Legal authority supporting my claim
- **Category B (If applicable and available)**
  - Letters, email or other communication advising buyer of risk of losing deposit by removing contingencies or taking other action

III. Sample Relevant Terms

Residential Purchase Agreement paragraph 2C, "CONFIRMATION: The following agency relationships are hereby confirmed for this transaction: Listing Agent _____ (Print Firm Name) is the agent of (check one): ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Selling Agent _____ (Print Firm Name) (if not the same as the Listing Agent) is the agent of (check one): ☐ the Buyer exclusively; or ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."

Residential Purchase Agreement page 8 entitled, "Real Estate Brokers," states in part: "**A. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."**

Residential Purchase Agreement paragraph 24C, "of the purchase agreement states in part: "Brokers are a party to the escrow for the sole purpose of compensation pursuant to paragraph 23 and paragraph D of the section title Real Estate Brokers on page 8."

Residential Purchase Agreement paragraph 14D states: **"EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES:** If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall with regard to that contingency or cancellation right conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections or for inability to obtain financing."

The Contingency Removal form (CA) states at the bottom in bold print just above the signature line the following:

The Contingency Removal form (CR) states at the bottom in bold print just above the signature line the following:

"**Once all contingencies are removed,** whether or not Buyer has satisfied him/herself regarding all contingencies or received any information relating to those contingencies**, Buyer many not be entitled to a return of Buyer's deposit if Buyer does not close escrow.** This could happen even if, for example, Buyer does not approve of some aspect of the Property or lender does not approve Buyer's loan."

IV. Sample List of Authorities

A. Maxims of Jurisprudence: "He who consents to an act is not wronged by it." Civil Code § 3515

"He who takes the benefit must bear the burden" Civil Code § 3521

B. Appellate Court Authority

"Sections 1572, subdivision (2) and 1710, subdivision (2) govern the law of negligent misrepresentation where there is no allegation of actual suppression of fact [citation]. Those sections (§§ 1572, subd. (2), 1710, subd. (2)) require positive assertions or simply assertions for the statement of a cause of action for negligent misrepresentation, and we see no reason to depart from these statutory requirements that something more than an omission is required to give rise to recovery on that theory, *even as against a fiduciary*.**" Byrum v. Brand (1990) 219 Cal.App.3d 926, 941, 268 Cal.Rptr. 609** [Claim of land investor against his financial planner on whose recommendation plaintiff made real estate investment]

"Plaintiff's agreement with defendant is contained in the listing agreements, disclosure statements and purchase contracts described above. Plaintiff admitted each document was genuine, stated he read each document prior to signing, acknowledged he understood each document was legally significant, and admitted defendant did nothing to prevent him from reading each document in its entirety. Plaintiff claimed he only "glanced through" some of the documents because "[i]t is a bore to read through these kinds of real estate transactions." (ft. note omitted) However, his failure to read the documents does not permit him to avoid their legal effect, and plaintiff does not contend otherwise." **Carleton v. Tortosa, supra, 14 Cal.App.4th 745, 755, 17 Cal.Rptr.2d 734** [Claim of real estate investor against his broker for failure to advise on adverse tax consequences]

C. California Statutory Authority

Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

Civil Code § 1572

A deceit, within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it.

Civil Code § 1710

D. California Real Estate Law Treatise

"Fiduciary duty to exercise skill, care, and diligence. It is the duty of an agent to obey the instructions of the principal.[ft. note omitted] An agent is under a duty to use reasonable care, diligence, and skill in the performance of the agency.[ft. note omitted] The standard of care imposed on the real estate licensee imposes a higher degree of skill and diligence than is required from a nonprofessional.[ft. note omitted] The extent of the duties owed does not depend on the sophistication of the principal.[ft note omitted]" **2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 3:25**

"Agent not liable for the acts of the principal. The agent is only liable to third persons for his or her own wrongful acts or omissions. While a principal may be vicariously liable for the wrongful acts of an agent, even though the principal has not personally committed any wrongful acts or omissions,[ft. note omitted] absent fault, an agent cannot be vicariously liable for the wrongful acts of the principal.[ft. note omitted]"

2 Miller & Starr, Cal Real Estate (3d ed. 2012), § 3:36

Chapter 6.3: Listing Broker Defending Claim by Buyer of Failure to Disclose

I. Sample Opening Statement

Your honor, my name is _____.

I am here today because I represented the seller of the property located at _____ to _____ and the buyer has named me as a defendant in the buyer's attempt to have the deposit released or otherwise recover damages.

Neither I nor my brokerage is a party to this contract or the escrow that is holding the deposit. The name of the principals and their signatures are clearly indicated on the contract and escrow instructions.

On the last page of the purchase agreement, there is a place for the brokerage company to sign but the broker box clearly states that the brokers are not parties to the contract between buyer and seller. The broker box is only for the purpose of clarifying the agreement to pay a commission between the brokers and stands outside the terms of the contract between the buyer and seller. Thus, at no point has the contract been agreed to or executed by a broker. Further, the contract specifies only that the broker is a party to escrow for the sole purpose of compensation.

In addition, agency law provides that while a principal may be liable for act of an agent, an agent is not responsible for acts of the principal with the exception of unusual circumstances. No such circumstances exist here.

I am very careful not to make any type of promise or guarantee to a client that assures them he or she will or won't get the deposit back.

I did nothing wrong and I fully performed my duties as a real estate agent in the transaction:

- I provided the buyer with all of the disclosures as provided by the seller
- I arranged for inspections
- I conducted my own inspection and disclosed in writing to the buyer anything material that I found. I am only responsible for disclosing what I know or what could have been discovered during my inspection. I am not responsible for hidden defects.
- (list other duties that you performed)

(If applicable) The buyer was aware of the problem now complained of since it was revealed in

- In the seller's disclosure (such as TDS or Seller Property Questionnaire)

- In the inspection report obtained by the buyer
- In a report that the seller delivered to the buyer

(If applicable) Given that the problem was not discovered by anyone prior to close of escrow, it is likely that the problem developed after the buyer purchased the property. I am not responsible for events that occur after transfer of title.

(If applicable) The buyer has not been damaged because the buyer should have contacted the home warranty company to cure the problem of which the buyer now complains.

(If applicable) The buyer is overestimating the amount of damage. Even if I were responsible, the buyer is not entitled to the cost of a brand new item but only the replacement value of what has been lost. A reasonable cost to repair or replace the defective item would have been a better damage amount.

If you have questions your honor, I would be happy to answer them. If you would like, I am prepared to explain my case a little further. For your information, I have the following documents available for you. I also have a copy for the seller.

- (List Documents)

II. Sample Document List

- **Category A**
  - Purchase Agreement
  - Escrow instructions
  - Transfer Disclosure Statement
  - Seller Property Questionnaire
  - Agent Visual Inspection Disclosure
  - Inspection Report
  - Home Warranty Contract
  - Home Warranty Company report
  - Estimates of repair or replacement
  - Legal authority supporting my claim

Category B

- _____
- _____

III. Sample Relevant Terms

Residential Purchase Agreement paragraph 2C, "CONFIRMATION: The following agency relationships are hereby confirmed for this transaction: Listing Agent _____ (Print Firm Name) is the agent of (check one): ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Selling Agent _____ (Print Firm Name) (if not the same as the Listing Agent) is the agent of (check one): ☐ the Buyer exclusively; or ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."

Residential Purchase Agreement page 8 entitled, "Real Estate Brokers," states in part: "**A. Real Estate Brokers are not parties to the Agreement between Buyer and Seller."**

Residential Purchase Agreement paragraph 24C, "of the purchase agreement states in part: "Brokers are a party to the escrow for the sole purpose of compensation pursuant to paragraph 23 and paragraph D of the section title Real Estate Brokers on page 8."

Residential Purchase Agreement paragraph 14D states: **"EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES:** If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall with regard to that contingency or cancellation right conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections or for inability to obtain financing."

The Contingency Removal form (CA) states at the bottom in bold print just above the signature line the following:

"**Once all contingencies are removed**, whether or not Buyer has satisfied him/herself regarding all contingencies or received any information relating to those contingencies, **Buyer many not be entitled to a return of Buyer's deposit if Buyer does not close escrow**. This could happen even if, for example, Buyer does not approve of some aspect of the Property or lender does not approve Buyer's loan."

IV. Sample List of Authorities

A. California Supreme Court and Appellate Court authority

"Generally, an agent is not held liable for the fraud of a principal, unless the agent knows of or participates in the fraudulent act. (2 Witkin, Summary of Cal.Law (9th ed. 1987) Agency and Employment, § 151, pp. 145–146; Rest.2d Agency (1958) § 348, pp. 112–113.)" **Mars v. Wedbush Morgan Securities, Inc. (1991) 231 Cal.App.3d 1608, 1616, 283 Cal.Rptr. 238**

The agent's duty is to conduct a *visual* inspection. An agent is liable under Civil Code §2079 et seq. only if defects are discernible by *visual inspection,* and a reasonably competent and diligent visual inspection fails to reveal them. **Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 18 Cal.Rptr.2d 779; Civil Code § 2079**

Agent had no duty to disclose speculative facts. **Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 18 Cal.Rptr.2d 779**

A seller's or agent's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. **Pagano v. Krohn (1997) 60 Cal.App.4th 1, 8-9**

B. California Statutory Authority

"The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property comprises a unit in a planned development as defined in Section 11003 of the Business and Professions Code, a condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Section 1368." **Civil Code § 2079.3**

"Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer." **Civil Code § 2079.5**

C. California Real Estate Law Treatise:

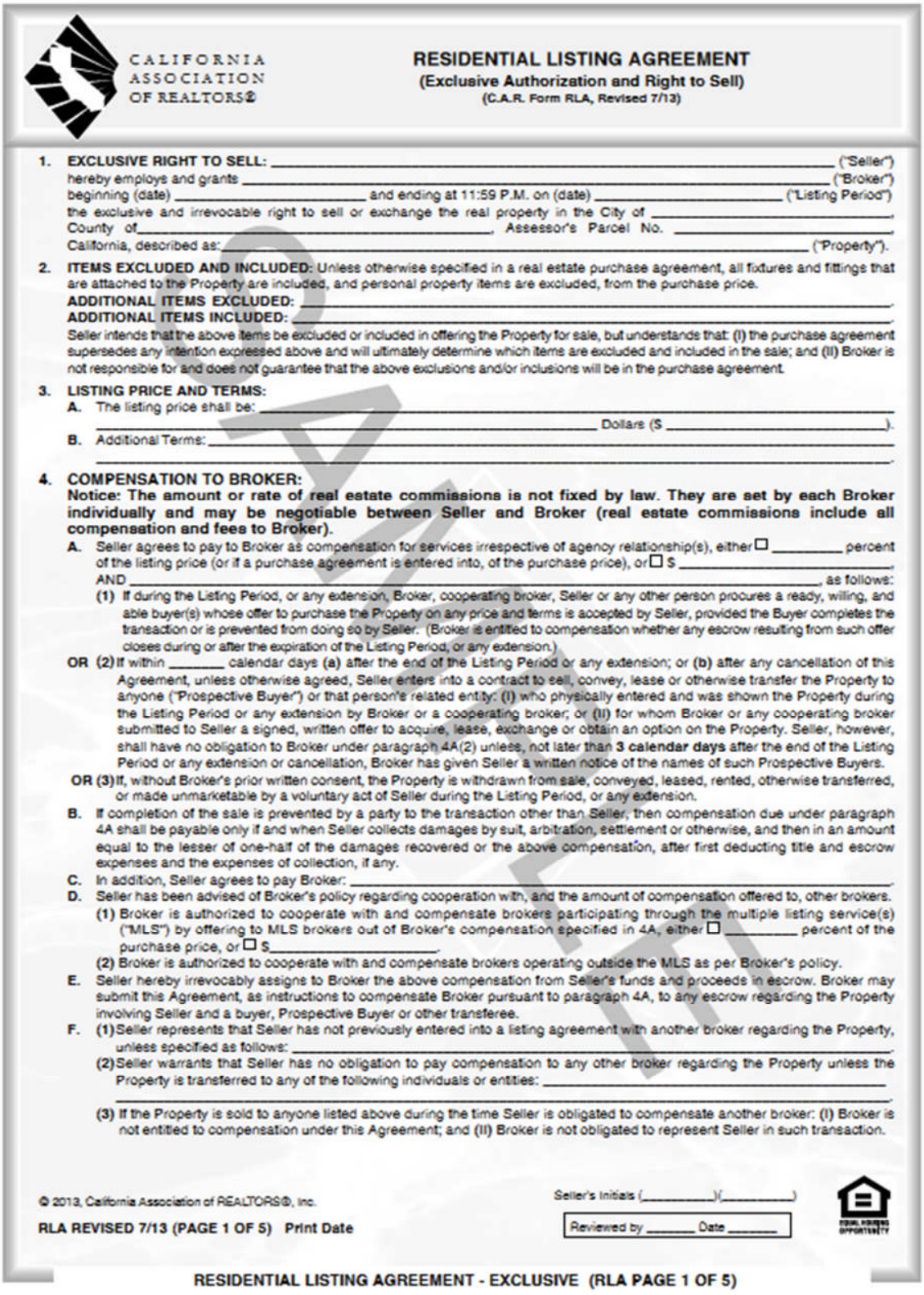
A buyer who does not inspect the property may be deemed to have knowledge of those conditions that are patent, obvious, and apparent by visual observation during an inspection conducted with ordinary diligence in the context of a buyer's knowledge, intelligence, and experience. [ft. note omitted] A buyer is required to exercise reasonable care to protect himself or herself and is deemed to have knowledge of those facts that are within his or her diligent attention and observation [ft. note omitted] and is held to be aware of obvious and patent conditions. [ft. note omitted]" **1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:149**

"The test of materiality referenced by the decisions that require disclosure describe a matter as material when it has a significant and measurable effect on the "value or desirability" of the property." **1 Miller & Starr, Cal. Real Estate (3rd ed. 2012), § 1:143**

Appendix

Forms

Residential Listing Agreement (Exclusive Authorization and Right to Sell) (C.A.R. Form RLA)



CALIFORNIA ASSOCIATION OF REALTORS®

RESIDENTIAL LISTING AGREEMENT
(Exclusive Authorization and Right to Sell)
(C.A.R. Form RLA, Revised 7/13)

1. **EXCLUSIVE RIGHT TO SELL:** _____ ("Seller")
hereby employs and grants _____ ("Broker")
beginning (date) _____ and ending at 11:59 P.M. on (date) _____ ("Listing Period")
the exclusive and irrevocable right to sell or exchange the real property in the City of _____,
County of _____, Assessor's Parcel No. _____,
California, described as: _____ ("Property").

2. **ITEMS EXCLUDED AND INCLUDED:** Unless otherwise specified in a real estate purchase agreement, all fixtures and fittings that are attached to the Property are included, and personal property items are excluded, from the purchase price.
ADDITIONAL ITEMS EXCLUDED: _____.
ADDITIONAL ITEMS INCLUDED: _____.
Seller intends that the above items be excluded or included in offering the Property for sale, but understands that: (i) the purchase agreement supersedes any intention expressed above and will ultimately determine which items are excluded and included in the sale; and (ii) Broker is not responsible for and does not guarantee that the above exclusions and/or inclusions will be in the purchase agreement.

3. **LISTING PRICE AND TERMS:**
A. The listing price shall be: _____
_____ Dollars ($ _____).
B. Additional Terms: _____
_____.

4. **COMPENSATION TO BROKER:**
Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between Seller and Broker (real estate commissions include all compensation and fees to Broker).
A. Seller agrees to pay to Broker as compensation for services irrespective of agency relationship(s), either ☐ _____ percent of the listing price (or if a purchase agreement is entered into, of the purchase price), or ☐ $ _____,
AND _____, as follows:
(1) If during the Listing Period, or any extension, Broker, cooperating broker, Seller or any other person procures a ready, willing, and able buyer(s) whose offer to purchase the Property on any price and terms is accepted by Seller, provided the Buyer completes the transaction or is prevented from doing so by Seller. (Broker is entitled to compensation whether any escrow resulting from such offer closes during or after the expiration of the Listing Period, or any extension.)
OR (2) If within _____ calendar days (a) after the end of the Listing Period or any extension; or (b) after any cancellation of this Agreement, unless otherwise agreed, Seller enters into a contract to sell, convey, lease or otherwise transfer the Property to anyone ("Prospective Buyer") or that person's related entity: (i) who physically entered and was shown the Property during the Listing Period or any extension by Broker or a cooperating broker; or (ii) for whom Broker or any cooperating broker submitted to Seller a signed, written offer to acquire, lease, exchange or obtain an option on the Property. Seller, however, shall have no obligation to Broker under paragraph 4A(2) unless, not later than **3 calendar days** after the end of the Listing Period or any extension or cancellation, Broker has given Seller a written notice of the names of such Prospective Buyers.
OR (3) If, without Broker's prior written consent, the Property is withdrawn from sale, conveyed, leased, rented, otherwise transferred, or made unmarketable by a voluntary act of Seller during the Listing Period, or any extension.
B. If completion of the sale is prevented by a party to the transaction other than Seller, then compensation due under paragraph 4A shall be payable only if and when Seller collects damages by suit, arbitration, settlement or otherwise, and then in an amount equal to the lesser of one-half of the damages recovered or the above compensation, after first deducting title and escrow expenses and the expenses of collection, if any.
C. In addition, Seller agrees to pay Broker: _____.
D. Seller has been advised of Broker's policy regarding cooperation with, and the amount of compensation offered to, other brokers.
(1) Broker is authorized to cooperate with and compensate brokers participating through the multiple listing service(s) ("MLS") by offering to MLS brokers out of Broker's compensation specified in 4A, either ☐ _____ percent of the purchase price, or ☐ $_____.
(2) Broker is authorized to cooperate with and compensate brokers operating outside the MLS as per Broker's policy.
E. Seller hereby irrevocably assigns to Broker the above compensation from Seller's funds and proceeds in escrow. Broker may submit this Agreement, as instructions to compensate Broker pursuant to paragraph 4A, to any escrow regarding the Property involving Seller and a buyer, Prospective Buyer or other transferee.
F. (1) Seller represents that Seller has not previously entered into a listing agreement with another broker regarding the Property, unless specified as follows: _____.
(2) Seller warrants that Seller has no obligation to pay compensation to any other broker regarding the Property unless the Property is transferred to any of the following individuals or entities: _____
_____.
(3) If the Property is sold to anyone listed above during the time Seller is obligated to compensate another broker: (i) Broker is not entitled to compensation under this Agreement; and (ii) Broker is not obligated to represent Seller in such transaction.

Seller's Initials (_____)(_____)
Reviewed by _____ Date _____
EQUAL HOUSING OPPORTUNITY

Property Address:_____ Date:_____

5. MULTIPLE LISTING SERVICE:

A. Broker is a participant/subscriber to _____ Multiple Listing Service (MLS) and possibly others. Unless otherwise instructed in writing the Property will be listed with the MLS(s) specified above. That MLS is (or if checked ☐ is not) the primary MLS for the geographic area of the Property. All terms of the transaction, including sales price and financing, if applicable, **(I)** will be provided to the MLS in which the property is listed for publication, dissemination and use by persons and entities on terms approved by the MLS and **(II)** may be provided to the MLS even if the Property is not listed with the MLS.

BENEFITS OF USING THE MLS; IMPACT OF OPTING OUT OF THE MLS; PRESENTING ALL OFFERS

WHAT IS AN MLS? The MLS is a database of properties for sale that is available and disseminated to and accessible by all other real estate agents who are participants or subscribers to the MLS. Property information submitted to the MLS describes the price, terms and conditions under which the Seller's property is offered for sale (including but not limited to the listing broker's offer of compensation to other brokers). It is likely that a significant number of real estate practitioners in any given area are participants or subscribers to the MLS. The MLS may also be part of a reciprocal agreement to which other multiple listing services belong. Real estate agents belonging to other multiple listing services that have reciprocal agreements with the MLS also have access to the information submitted to the MLS. The MLS may further transmit the MLS database to Internet sites that post property listings online.

EXPOSURE TO BUYERS THROUGH MLS: Listing property with an MLS exposes a seller's property to all real estate agents and brokers (and their potential buyer clients) who are participants or subscribers to the MLS or a reciprocating MLS.

CLOSED/PRIVATE LISTING CLUBS OR GROUPS: Closed or private listing clubs or groups are not the same as the MLS. The MLS referred to above is accessible to all eligible real estate licensees and provides broad exposure for a listed property. Private or closed listing clubs or groups of licensees may have been formed outside the MLS. Private or closed listing clubs or groups are accessible to a more limited number of licensees and generally offer less exposure for listed property. Whether listing property through a closed, private network - and excluding it from the MLS - is advantageous or disadvantageous to a seller, and why, should be discussed with the agent taking the Seller's listing.

NOT LISTING PROPERTY IN A LOCAL MLS: If the Property is listed in an MLS which does not cover the geographic area where the Property is located then real estate agents and brokers working that territory, and Buyers they represent looking for property in the neighborhood, may not be aware the Property is for sale.

OPTING OUT OF MLS: If Seller elects to exclude the Property from the MLS, Seller understands and acknowledges that: **(a)** real estate agents and brokers from other real estate offices, and their buyer clients, who have access to that MLS may not be aware that Seller's Property is offered for sale; **(b)** information about Seller's Property will not be transmitted to various real estate Internet sites that are used by the public to search for property listings; **(c)** real estate agents, brokers and members of the public may be unaware of the terms and conditions under which Seller is marketing the Property.

REDUCTION IN EXPOSURE: Any reduction in exposure of the Property may lower the number of offers and negatively impact the sales price.

PRESENTING ALL OFFERS: Seller understands that Broker must present all offers received for Seller's Property unless Seller gives Broker written instructions to the contrary.

Seller's Initials (_____)(_____) Broker's Initials (_____)(_____)

B. MLS rules generally provide that residential real property and vacant lot listings be submitted to the MLS within 2 days or some other period of time after all necessary signatures have been obtained on the listing agreement. Broker will not have to submit this listing to the MLS if, within that time, Broker submits to the MLS a form signed by Seller (C.A.R. Form SELM or the local equivalent form).

C. MLS rules allow MLS data to be made available by the MLS to additional Internet sites unless Broker gives the MLS instructions to the contrary. Seller acknowledges that for any of the below opt-out instructions to be effective, Seller must make them on a separate instruction to Broker signed by Seller (C.A.R. Form **SELI** or the local equivalent form). Specific information that can be excluded from the Internet as permitted by (or in accordance with) the MLS is as follows:
(1) Property Availability: Seller can instruct Broker to have the MLS not display the Property on the Internet.
(2) Property Address: Seller can instruct Broker to have the MLS not display the Property address on the Internet.
Seller understands that the above opt-outs would mean consumers searching for listings on the Internet may not see the Property or Property's address in response to their search.
(3) Feature Opt-Outs: Seller can instruct Broker to advise the MLS that Seller does not want visitors to MLS Participant or Subscriber Websites or Electronic Displays that display the Property listing to have the features below. Seller understands **(I)** that these opt-outs apply only to Websites or Electronic Displays of MLS Participants and Subscribers who are real estate broker and agent members of the MLS; **(II)** that other Internet sites may or may not have the features set forth herein; and **(III)** that neither Broker nor the MLS may have the ability to control or block such features on other Internet sites.
(a) Comments And Reviews: The ability to write comments or reviews about the Property on those sites; or the ability to link to another site containing such comments or reviews if the link is in immediate conjunction with the Property.
(b) Automated Estimate Of Value: The ability to create an automated estimate of value or to link to another site containing such an estimate of value if the link is in immediate conjunction with the Property.

Seller's Initials (_____)(_____)

Reviewed by _____ Date _____

6. **SELLER REPRESENTATIONS:** Seller represents that, unless otherwise specified in writing, Seller is unaware of: **(I)** any Notice of Default recorded against the Property; **(II)** any delinquent amounts due under any loan secured by, or other obligation affecting, the Property; **(III)** any bankruptcy, insolvency or similar proceeding affecting the Property; **(IV)** any litigation, arbitration, administrative action, government investigation or other pending or threatened action that affects or may affect the Property or Seller's ability to transfer it; and **(V)** any current, pending or proposed special assessments affecting the Property. Seller shall promptly notify Broker in writing if Seller becomes aware of any of these items during the Listing Period or any extension thereof.

7. **BROKER'S AND SELLER'S DUTIES: (a)** Broker agrees to exercise reasonable effort and due diligence to achieve the purposes of this Agreement. Unless Seller gives Broker written instructions to the contrary, Broker is authorized to **(I)** order reports and disclosures as necessary, **(II)** advertise and market the Property by any method and in any medium selected by Broker, including MLS and the Internet, and, to the extent permitted by these media, control the dissemination of the information submitted to any medium; and **(III)** disclose to any real estate licensee making an inquiry the receipt of any offers on the Property and the offering price of such offers. **(b)** Seller agrees to consider offers presented by Broker, and to act in good faith to accomplish the sale of the Property by, among other things, making the Property available for showing at reasonable times and referring to Broker all inquiries of any party interested in the Property. Seller is responsible for determining at what price to list and sell the Property. **Seller further agrees to indemnify, defend and hold Broker harmless from all claims, disputes, litigation, judgments attorney fees and costs arising from any incorrect information supplied by Seller, or from any material facts that Seller knows but fails to disclose.**

8. **DEPOSIT:** Broker is authorized to accept and hold on Seller's behalf any deposits to be applied toward the purchase price.

9. **AGENCY RELATIONSHIPS:**
   A. **Disclosure:** If the Property includes residential property with one-to-four dwelling units, Seller shall receive a "Disclosure Regarding Agency Relationships" (C.A.R. Form AD) prior to entering into this Agreement.
   B. **Seller Representation:** Broker shall represent Seller in any resulting transaction, except as specified in paragraph 4F.
   C. **Possible Dual Agency With Buyer:** Depending upon the circumstances, it may be necessary or appropriate for Broker to act as an agent for both Seller and buyer, exchange party, or one or more additional parties ("Buyer"). Broker shall, as soon as practicable, disclose to Seller any election to act as a dual agent representing both Seller and Buyer. If a Buyer is procured directly by Broker or an associate-licensee in Broker's firm, Seller hereby consents to Broker acting as a dual agent for Seller and Buyer. In the event of an exchange, Seller hereby consents to Broker collecting compensation from additional parties for services rendered, provided there is disclosure to all parties of such agency and compensation. Seller understands and agrees that: **(I)** Broker, without the prior written consent of Seller, will not disclose to Buyer that Seller is willing to sell the Property at a price less than the listing price; **(II)** Broker, without the prior written consent of Buyer, will not disclose to Seller that Buyer is willing to pay a price greater than the offered price; and **(III)** except for (i) and (ii) above, a dual agent is obligated to disclose known facts materially affecting the value or desirability of the Property to both parties.
   D. **Other Sellers:** Seller understands that Broker may have or obtain listings on other properties, and that potential buyers may consider, make offers on, or purchase through Broker, property the same as or similar to Seller's Property. Seller consents to Broker's representation of sellers and buyers of other properties before, during and after the end of this Agreement.
   E. **Confirmation:** If the Property includes residential property with one-to-four dwelling units, Broker shall confirm the agency relationship described above, or as modified, in writing, prior to or concurrent with Seller's execution of a purchase agreement.

10. **SECURITY AND INSURANCE:** Broker is not responsible for loss of or damage to personal or real property, or person, whether attributable to use of a keysafe/lockbox, a showing of the Property, or otherwise. Third parties, including, but not limited to, appraisers, inspectors, brokers and prospective buyers, may have access to, and take videos and photographs of, the interior of the Property. Seller agrees: **(I)** to take reasonable precautions to safeguard and protect valuables that might be accessible during showings of the Property; and **(II)** to obtain insurance to protect against these risks. Broker does not maintain insurance to protect Seller.

11. **PHOTOGRAPHS AND INTERNET ADVERTISING:**
   A. In order to effectively market the Property for sale it is often necessary to provide photographs, virtual tours and other media to buyers. Seller agrees (or ☐ if checked, does not agree) that Broker may photograph or otherwise electronically capture images of the exterior and interior of the Property ("Images") for static and/or virtual tours of the Property by buyers and others on Broker's website, the MLS, and other marketing sites. Seller acknowledges that once Images are placed on the Internet neither Broker nor Seller has control over who can view such Images and what use viewers may make of the Images, or how long such Images may remain available on the Internet. Seller further agrees that such Images are the property of Broker and that Broker may use such Images for advertisement of Broker's business in the future.
   B. Seller acknowledges that prospective buyers and/or other persons coming onto the property may take photographs, videos or other images of the property. Seller understands that Broker does not have the ability to control or block the taking and use of Images by any such persons. (If checked) ☐ Seller instructs Broker to publish in the MLS that taking of Images is limited to those persons preparing Appraisal or Inspection reports. Seller acknowledges that unauthorized persons may take images who do not have access to or have not read any limiting instruction in the MLS or who take images regardless of any limiting instruction in the MLS. Once Images are taken and/or put into electronic display on the Internet or otherwise, neither Broker nor Seller has control over who views such Images nor what use viewers may make of the Images.

12. **KEYSAFE/LOCKBOX:** A keysafe/lockbox is designed to hold a key to the Property to permit access to the Property by Broker, cooperating brokers, MLS participants, their authorized licensees and representatives, authorized inspectors, and accompanied prospective buyers. Broker, cooperating brokers, MLS and Associations/Boards of REALTORS® are **not** insurers against injury, theft, loss, vandalism or damage attributed to the use of a keysafe/lockbox. Seller does (or if checked ☐ does not) authorize Broker to install a keysafe/lockbox. If Seller does not occupy the Property, Seller shall be responsible for obtaining occupant(s)' written permission for use of a keysafe/lockbox (C.A.R. Form KLA).

Property Address: _____ Date: _____

13. **SIGN:** Seller does (or if checked ☐ does not) authorize Broker to install a FOR SALE/SOLD sign on the Property.

14. **EQUAL HOUSING OPPORTUNITY:** The Property is offered in compliance with federal, state and local anti-discrimination laws.

15. **ATTORNEY FEES:** In any action, proceeding or arbitration between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs from the non-prevailing Seller or Broker, except as provided in paragraph 19A.

16. **ADDITIONAL TERMS:** ☐ REO Advisory Listing (C.A.R. Form REOL) ☐ Short Sale Information and Advisory (C.A.R. Form SSIA)

_____

_____

_____

_____

_____

_____

17. **MANAGEMENT APPROVAL:** If an associate-licensee in Broker's office (salesperson or broker-associate) enters into this Agreement on Broker's behalf, and Broker or Manager does not approve of its terms, Broker or Manager has the right to cancel this Agreement, in writing, within 5 Days After its execution.

18. **SUCCESSORS AND ASSIGNS:** This Agreement shall be binding upon Seller and Seller's successors and assigns.

19. **DISPUTE RESOLUTION:**

A. **MEDIATION:** Seller and Broker agree to mediate any dispute or claim arising between them regarding the obligation to pay compensation under this Agreement, before resorting to arbitration or court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED. Exclusions from this mediation agreement are specified in paragraph 19C.

B. **ARBITRATION OF DISPUTES:**
Seller and Broker agree that any dispute or claim in Law or equity arising between them regarding the obligation to pay compensation under this Agreement, which is not settled through mediation, shall be decided by neutral, binding arbitration. The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator. The parties shall have the right to discovery in accordance with Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part 3 of the Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act. Exclusions from this arbitration agreement are specified in paragraph 19C.

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."

Seller's Initials _____ / _____ **Broker's Initials** _____ /

C. **ADDITIONAL MEDIATION AND ARBITRATION TERMS: The following matters shall be excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver or violation of the mediation and arbitration provisions.**

20. **ENTIRE AGREEMENT:** All prior discussions, negotiations and agreements between the parties concerning the subject matter of this Agreement are superseded by this Agreement, which constitutes the entire contract and a complete and exclusive expression of their agreement, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. This Agreement and any supplement, addendum or modification, including any photocopy or facsimile, may be executed in counterparts.

21. **OWNERSHIP, TITLE AND AUTHORITY:** Seller warrants that: (i) Seller is the owner of the Property; (ii) no other persons or entities have title to the Property; and (iii) Seller has the authority to both execute this Agreement and sell the Property. Exceptions to ownership, title and authority are as follows: _____
_____.

By signing below, Seller acknowledges that Seller has read, understands, received a copy of and agrees to the terms of this Agreement.

Seller _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ Email _____

Seller _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ Email _____

Real Estate Broker (Firm) _____ BRE Lic. # _____
By (Agent) _____ BRE Lic. # _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ Email _____

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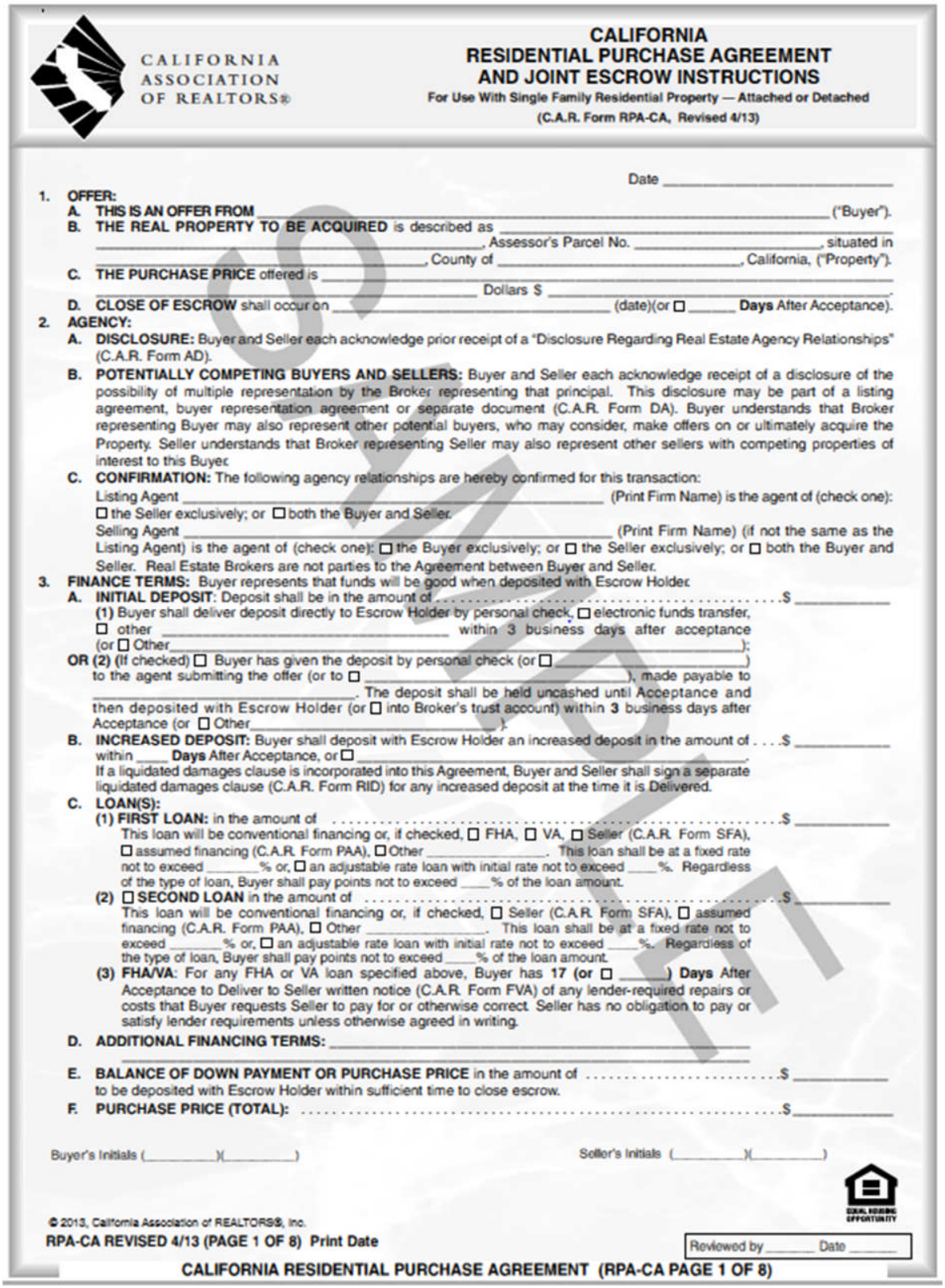
525 South Virgil Avenue, Los Angeles, California 90020

Reviewed by _____ Date _____

California Residential Purchase Agreement and Joint Escrow Instructions (RPA)



CALIFORNIA ASSOCIATION OF REALTORS®

CALIFORNIA RESIDENTIAL PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS

For Use With Single Family Residential Property — Attached or Detached

(C.A.R. Form RPA-CA, Revised 4/13)

Date _____

1. **OFFER:**
   A. **THIS IS AN OFFER FROM** _____ ("Buyer").
   B. **THE REAL PROPERTY TO BE ACQUIRED** is described as _____, Assessor's Parcel No. _____, situated in _____, County of _____, California, ("Property").
   C. **THE PURCHASE PRICE** offered is _____ Dollars $ _____.
   D. **CLOSE OF ESCROW** shall occur on _____ (date)(or ☐ _____ **Days** After Acceptance).
2. **AGENCY:**
   A. **DISCLOSURE:** Buyer and Seller each acknowledge prior receipt of a "Disclosure Regarding Real Estate Agency Relationships" (C.A.R. Form AD).
   B. **POTENTIALLY COMPETING BUYERS AND SELLERS:** Buyer and Seller each acknowledge receipt of a disclosure of the possibility of multiple representation by the Broker representing that principal. This disclosure may be part of a listing agreement, buyer representation agreement or separate document (C.A.R. Form DA). Buyer understands that Broker representing Buyer may also represent other potential buyers, who may consider, make offers on or ultimately acquire the Property. Seller understands that Broker representing Seller may also represent other sellers with competing properties of interest to this Buyer.
   C. **CONFIRMATION:** The following agency relationships are hereby confirmed for this transaction:
   Listing Agent _____ (Print Firm Name) is the agent of (check one): ☐ the Seller exclusively; or ☐ both the Buyer and Seller.
   Selling Agent _____ (Print Firm Name) (if not the same as the Listing Agent) is the agent of (check one): ☐ the Buyer exclusively; or ☐ the Seller exclusively; or ☐ both the Buyer and Seller. Real Estate Brokers are not parties to the Agreement between Buyer and Seller.
3. **FINANCE TERMS:** Buyer represents that funds will be good when deposited with Escrow Holder.
   A. **INITIAL DEPOSIT**: Deposit shall be in the amount of ..... $ _____
   (1) Buyer shall deliver deposit directly to Escrow Holder by personal check, ☐ electronic funds transfer, ☐ other _____ within 3 business days after acceptance (or ☐ Other_____);
   OR (2) (If checked) ☐ Buyer has given the deposit by personal check (or ☐ _____) to the agent submitting the offer (or to ☐ _____), made payable to _____. The deposit shall be held uncashed until Acceptance and then deposited with Escrow Holder (or ☐ into Broker's trust account) within **3** business days after Acceptance (or ☐ Other_____).
   B. **INCREASED DEPOSIT:** Buyer shall deposit with Escrow Holder an increased deposit in the amount of .... $ _____ within ____ **Days** After Acceptance, or ☐ _____.
   If a liquidated damages clause is incorporated into this Agreement, Buyer and Seller shall sign a separate liquidated damages clause (C.A.R. Form RID) for any increased deposit at the time it is Delivered.
   C. **LOAN(S):**
   (1) **FIRST LOAN:** in the amount of ..... $ _____
   This loan will be conventional financing or, if checked, ☐ FHA, ☐ VA, ☐ Seller (C.A.R. Form SFA), ☐ assumed financing (C.A.R. Form PAA), ☐ Other _____. This loan shall be at a fixed rate not to exceed _____% or, ☐ an adjustable rate loan with initial rate not to exceed ____%. Regardless of the type of loan, Buyer shall pay points not to exceed ____% of the loan amount.
   (2) ☐ **SECOND LOAN** in the amount of ..... $ _____
   This loan will be conventional financing or, if checked, ☐ Seller (C.A.R. Form SFA), ☐ assumed financing (C.A.R. Form PAA), ☐ Other _____. This loan shall be at a fixed rate not to exceed _____% or, ☐ an adjustable rate loan with initial rate not to exceed ____%. Regardless of the type of loan, Buyer shall pay points not to exceed ____% of the loan amount.
   (3) **FHA/VA:** For any FHA or VA loan specified above, Buyer has **17** (or ☐ _____) **Days** After Acceptance to Deliver to Seller written notice (C.A.R. Form FVA) of any lender-required repairs or costs that Buyer requests Seller to pay for or otherwise correct. Seller has no obligation to pay or satisfy lender requirements unless otherwise agreed in writing.
   D. **ADDITIONAL FINANCING TERMS:** _____
   E. **BALANCE OF DOWN PAYMENT OR PURCHASE PRICE** in the amount of ..... $ _____ to be deposited with Escrow Holder within sufficient time to close escrow.
   F. **PURCHASE PRICE (TOTAL):** ..... $ _____

Buyer's Initials (_____)(_____) Seller's Initials (_____)(_____)

EQUAL HOUSING OPPORTUNITY

G. **VERIFICATION OF DOWN PAYMENT AND CLOSING COSTS:** Buyer (or Buyer's lender or loan broker pursuant to 3H(1) shall, within **7 (or** ☐ _____**) Days** After Acceptance, Deliver to Seller written verification of Buyer's down payment and closing costs. (If checked, ☐ verification attached.)

H. **LOAN TERMS:**
(1) LOAN APPLICATIONS: Within **7 (or** ☐ _____**) Days** After Acceptance, Buyer shall Deliver to Seller a letter from lender or loan broker stating that, based on a review of Buyer's written application and credit report, Buyer is prequalified or preapproved for any NEW loan specified in 3C above. (If checked, ☐ letter attached.)
(2) LOAN CONTINGENCY: Buyer shall act diligently and in good faith to obtain the designated loan(s). Obtaining the loan(s) specified above **is a contingency** of this Agreement unless otherwise agreed in writing. Buyer's contractual obligations to obtain and provide deposit, balance of down payment and closing costs **are not contingencies** of this Agreement.
(3) LOAN CONTINGENCY REMOVAL:
(i) Within **17 (or** ☐ _____**) Days** After Acceptance, Buyer shall, as specified in paragraph **14**, in writing remove the loan contingency or cancel this Agreement;
OR (ii) (If checked) ☐ the loan contingency shall remain in effect until the designated loans are funded.
(4) ☐ **NO LOAN CONTINGENCY** (If checked): Obtaining any loan specified above is NOT a contingency of this Agreement. If Buyer does not obtain the loan and as a result Buyer does not purchase the Property, Seller may be entitled to Buyer's deposit or other legal remedies.

I. **APPRAISAL CONTINGENCY AND REMOVAL:** This Agreement is (**or**, if checked, ☐ is NOT) contingent upon a written appraisal of the Property by a licensed or certified appraiser at no less than the specified purchase price. If there is a loan contingency, Buyer's removal of the loan contingency shall be deemed removal of this appraisal contingency (**or**, ☐ if checked, Buyer shall, as specified in paragraph 14B(3), in writing remove the appraisal contingency or cancel this Agreement within **17 (or** ____**) Days** After Acceptance). If there is no loan contingency, Buyer shall, as specified in paragraph 14B(3), in writing remove the appraisal contingency or cancel this Agreement within **17 (or** ☐ ____**) Days** After Acceptance.

J. ☐ **ALL CASH OFFER** (If checked): Buyer shall, within **7 (or** ☐ _____**) Days** After Acceptance, Deliver to Seller written verification of sufficient funds to close this transaction. (If checked, ☐ verification attached.)

K. **BUYER STATED FINANCING:** Seller has relied on Buyer's representation of the type of financing specified (including but not limited to, as applicable, amount of down payment, contingent or non contingent loan, or all cash). If Buyer seeks alternate financing, (i) Seller has no obligation to cooperate with Buyer's efforts to obtain such financing, and (ii) Buyer shall also pursue the financing method specified in this Agreement. Buyer's failure to secure alternate financing does not excuse Buyer from the obligation to purchase the Property and close escrow as specified in this Agreement.

4. ALLOCATION OF COSTS (If checked): Unless otherwise specified here, in writing, **this paragraph** only determines who is to pay for the inspection, test or service ("Report") mentioned; it **does not determine who is to pay for any work recommended or identified in the Report.**

A. INSPECTIONS AND REPORTS:
(1) ☐ Buyer ☐ Seller shall pay for an inspection and report for wood destroying pests and organisms ("Wood Pest Report") prepared by _____ a registered structural pest control company.
(2) ☐ Buyer ☐ Seller shall pay to have septic or private sewage disposal systems inspected _____.
(3) ☐ Buyer ☐ Seller shall pay to have domestic wells tested for water potability and productivity _____.
(4) ☐ Buyer ☐ Seller shall pay for a natural hazard zone disclosure report prepared by _____.
(5) ☐ Buyer ☐ Seller shall pay for the following inspection or report _____.
(6) ☐ Buyer ☐ Seller shall pay for the following inspection or report _____.

B. GOVERNMENT REQUIREMENTS AND RETROFIT:
(1) ☐ Buyer ☐ Seller shall pay for smoke detector installation and/or water heater bracing, if required by Law. Prior to Close Of Escrow, Seller shall provide Buyer written statement(s) of compliance in accordance with state and local Law, unless exempt.
(2) ☐ Buyer ☐ Seller shall pay the cost of compliance with any other minimum mandatory government retrofit standards, inspections and reports if required as a condition of closing escrow under any Law. _____.

C. ESCROW AND TITLE:
(1) ☐ Buyer ☐ Seller shall pay escrow fee _____.
Escrow Holder shall be _____.
(2) ☐ Buyer ☐ Seller shall pay for **owner's** title insurance policy specified in paragraph 12E _____.
Owner's title policy to be issued by _____.
(Buyer shall pay for any title insurance policy insuring Buyer's **lender**, unless otherwise agreed in writing.)

D. OTHER COSTS:
(1) ☐ Buyer ☐ Seller shall pay County transfer tax or fee _____.
(2) ☐ Buyer ☐ Seller shall pay City transfer tax or fee _____.
(3) ☐ Buyer ☐ Seller shall pay Homeowner's Association ("HOA") transfer fee _____.
(4) ☐ Buyer ☐ Seller shall pay HOA document preparation fees _____.
(5) ☐ Buyer ☐ Seller shall pay for any private transfer fee _____.
(6) ☐ Buyer ☐ Seller shall pay for the cost, not to exceed $ _____, of a one-year home warranty plan, issued by _____, with the following optional coverages:
☐ Air Conditioner ☐ Pool/Spa ☐ Code and Permit upgrade ☐ Other: _____.
Buyer is informed that home warranty plans have many optional coverages in addition to those listed above. Buyer is advised to investigate these coverages to determine those that may be suitable for Buyer.
(7) ☐ Buyer ☐ Seller shall pay for _____.
(8) ☐ Buyer ☐ Seller shall pay for _____.

5. CLOSING AND POSSESSION:

A. Buyer intends (or ☐ does not intend) to occupy the Property as Buyer's primary residence.

B. Seller-occupied or vacant property: Possession shall be delivered to Buyer at 5 PM or (☐ _____ ☐ AM/☐ PM) on the date of Close Of Escrow; ☐ on _____; or ☐ no later than _____ **Days** After Close Of Escrow. If transfer of title and possession do not occur at the same time, Buyer and Seller are advised to: **(i)** enter into a written occupancy agreement (C.A.R. Form PAA, paragraph 2.); and **(ii)** consult with their insurance and legal advisors.

C. Tenant-occupied property: (i) Property shall be vacant at least **5 (or** ☐ _____) **Days** Prior to Close Of Escrow, unless otherwise agreed in writing. **Note to Seller: If you are unable to deliver Property vacant in accordance with rent control and other applicable Law, you may be in breach of this Agreement.**

OR (ii) (if checked) ☐ **Tenant to remain in possession.** (C.A.R. Form PAA, paragraph 3.)

D. At Close Of Escrow, **(i)** Seller assigns to Buyer any assignable warranty rights for items included in the sale, and **(ii)** Seller shall Deliver to Buyer available Copies of warranties. Brokers cannot and will not determine the assignability of any warranties.

E. At Close Of Escrow, unless otherwise agreed in writing, Seller shall provide keys and/or means to operate all locks, mailboxes, security systems, alarms and garage door openers. If Property is a condominium or located in a common interest subdivision, Buyer may be required to pay a deposit to the Homeowners' Association ("HOA") to obtain keys to accessible HOA facilities.

6. STATUTORY DISCLOSURES (INCLUDING LEAD-BASED PAINT HAZARD DISCLOSURES) AND CANCELLATION RIGHTS:

A. (1) Seller shall, within the time specified in paragraph 14A, Deliver to Buyer, if required by Law: **(i)** Federal Lead-Based Paint Disclosures (C.A.R. Form FLD) and pamphlet ("Lead Disclosures"); and **(ii)** disclosures or notices required by sections 1102 et. seq. and 1103 et. seq. of the Civil Code ("Statutory Disclosures"). Statutory Disclosures include, but are not limited to, a Real Estate Transfer Disclosure Statement ("TDS"), Natural Hazard Disclosure Statement ("NHD"), notice or actual knowledge of release of illegal controlled substance, notice of special tax and/or assessments (or, if allowed, substantially equivalent notice regarding the Mello-Roos Community Facilities Act and Improvement Bond Act of 1915) and, if Seller has actual knowledge, of industrial use and military ordnance location (C.A.R. Form SPQ or SSD).

(2) Buyer shall, within the time specified in paragraph 14B(1), return Signed Copies of the Statutory and Lead Disclosures to Seller.

(3) In the event Seller, prior to Close Of Escrow, becomes aware of adverse conditions materially affecting the Property, or any material inaccuracy in disclosures, information or representations previously provided to Buyer, Seller shall promptly provide a subsequent or amended disclosure or notice, in writing, covering those items. **However, a subsequent or amended disclosure shall not be required for conditions and material inaccuracies** of which Buyer is otherwise aware, or which are **disclosed in reports provided to or obtained by Buyer or ordered and paid for by Buyer.**

(4) If any disclosure or notice specified in 6A(1), or subsequent or amended disclosure or notice is Delivered to Buyer after the offer is Signed, Buyer shall have the right to cancel this Agreement within **3 Days** After Delivery in person, or **5 Days** After Delivery by deposit in the mail, by giving written notice of cancellation to Seller or Seller's agent.

(5) Note to Buyer and Seller: Waiver of Statutory and Lead Disclosures is prohibited by Law.

B. NATURAL AND ENVIRONMENTAL HAZARDS: Within the time specified in paragraph 14A, Seller shall, if required by Law: **(i)** Deliver to Buyer earthquake guides (and questionnaire) and environmental hazards booklet; **(ii)** even if exempt from the obligation to provide a NHD, disclose if the Property is located in a Special Flood Hazard Area; Potential Flooding (Inundation) Area; Very High Fire Hazard Zone; State Fire Responsibility Area; Earthquake Fault Zone; Seismic Hazard Zone; and **(iii)** disclose any other zone as required by Law and provide any other information required for those zones.

C. WITHHOLDING TAXES: Within the time specified in paragraph 14A, to avoid required withholding, Seller shall Deliver to Buyer or qualified substitute, an affidavit sufficient to comply with federal (FIRPTA) and California withholding Law (C.A.R. Form AS or QS).

D. MEGAN'S LAW DATABASE DISCLOSURE: Notice: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides. (Neither Seller nor Brokers are required to check this website. If Buyer wants further information, Broker recommends that Buyer obtain information from this website during Buyer's inspection contingency period. Brokers do not have expertise in this area.)

E. NOTICE REGARDING GAS AND HAZARDOUS LIQUID TRANSMISSION PIPELINES: This notice is being provided simply to inform you that information about the general location of gas and hazardous liquid transmission pipelines is available to the public via the National Pipeline Mapping System (NPMS) Internet Web site maintained by the United States Department of Transportation at http://www.npms.phmsa.dot.gov/. To seek further information about possible transmission pipelines near the Property, you may contact your local gas utility or other pipeline operators in the area. Contact information for pipeline operators is searchable by ZIP Code and county on the NPMS Internet Web site.

7. CONDOMINIUM/PLANNED DEVELOPMENT DISCLOSURES:

A. SELLER HAS: 7 (or ☐ _____) **Days** After Acceptance to disclose to Buyer whether the Property is a condominium, or is located in a planned development or other common interest subdivision (C.A.R. Form SPQ or SSD).

B. If the Property is a condominium or is located in a planned development or other common interest subdivision, Seller has **3 (or** ☐ _____) **Days** After Acceptance to request from the HOA (C.A.R. Form HOA): **(i)** Copies of any documents required by Law; **(ii)** disclosure of any pending or anticipated claim or litigation by or against the HOA; **(iii)** a statement containing the location and number of designated parking and storage spaces; **(iv)** Copies of the most recent 12 months of HOA minutes for regular and special meetings; and **(v)** the names and contact information of all HOAs governing the Property (collectively, "CI Disclosures"). Seller shall itemize and Deliver to Buyer all CI Disclosures received from the HOA and any CI Disclosures in Seller's possession. Buyer's approval of CI Disclosures is a contingency of this Agreement as specified in paragraph 14B(3).

8. ITEMS INCLUDED IN AND EXCLUDED FROM PURCHASE PRICE:

A. NOTE TO BUYER AND SELLER: Items listed as included or excluded in the MLS, flyers or marketing materials are **not** included in the purchase price or excluded from the sale unless specified in 8B or C.

B. ITEMS INCLUDED IN SALE:

(1) All EXISTING fixtures and fittings that are attached to the Property;

(2) EXISTING electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fans, fireplace inserts, gas logs and grates, solar systems, built-in appliances, window and door screens, awnings, shutters, window coverings, attached floor coverings, television antennas, satellite dishes, private integrated telephone systems, air coolers/conditioners, pool/spa equipment, garage door openers/remote controls, mailbox, in-ground landscaping, trees/shrubs, water softeners, water purifiers, security systems/alarms; (If checked) ☐ stove(s), ☐ refrigerator(s);

(3) The following additional items: _____.
(4) Seller represents that all items included in the purchase price, unless otherwise specified, are owned by Seller.
(5) All items included shall be transferred free of liens and without Seller warranty.

C. **ITEMS EXCLUDED FROM SALE:** Unless otherwise specified, audio and video components (such as flat screen TVs and speakers) are excluded if any such item is not itself attached to the Property, even if a bracket or other mechanism attached to the component is attached to the Property; and _____.

9. **CONDITION OF PROPERTY:** Unless otherwise agreed: **(i) the Property is sold (a) in its PRESENT physical ("as-is") condition as of the date of Acceptance and (b) subject to Buyer's investigation rights; (ii)** the Property, including pool, spa, landscaping and grounds, is to be maintained in substantially the same condition as on the date of Acceptance; and **(iii)** all debris and personal property not included in the sale shall be removed by Close Of Escrow.
   A. Seller shall, within the time specified in paragraph 14A, DISCLOSE KNOWN MATERIAL FACTS AND DEFECTS affecting the Property, including known insurance claims within the past five years, and make any and all other disclosures required by law.
   B. Buyer has the right to inspect the Property and, as specified in paragraph 14B, based upon information discovered in those inspections: (i) cancel this Agreement; or (ii) request that Seller make Repairs or take other action.
   C. **Buyer is strongly advised to conduct investigations of the entire Property in order to determine its present condition. Seller may not be aware of all defects affecting the Property or other factors that Buyer considers important. Property improvements may not be built according to code, in compliance with current Law, or have had permits issued.**

10. **BUYER'S INVESTIGATION OF PROPERTY AND MATTERS AFFECTING PROPERTY:**
   A. Buyer's acceptance of the condition of, and any other matter affecting the Property, is a contingency of this Agreement as specified in this paragraph and paragraph 14B. Within the time specified in paragraph 14B(1), Buyer shall have the right, at Buyer's expense unless otherwise agreed, to conduct inspections, investigations, tests, surveys and other studies ("Buyer Investigations"), including, but not limited to, the right to: **(i)** inspect for lead-based paint and other lead-based paint hazards; **(ii)** inspect for wood destroying pests and organisms; **(iii)** review the registered sex offender database; **(iv)** confirm the insurability of Buyer and the Property; and **(v)** satisfy Buyer as to any matter specified in the attached Buyer's Inspection Advisory (C.A.R. Form BIA). Without Seller's prior written consent, Buyer shall neither make nor cause to be made: **(i)** invasive or destructive Buyer Investigations; or **(ii)** inspections by any governmental building or zoning inspector or government employee, unless required by Law.
   B. Seller shall make the Property available for all Buyer Investigations. Buyer shall **(i)** as specified in paragraph 14B, complete Buyer Investigations and, either remove the contingency or cancel this Agreement, and **(ii)** give Seller, at no cost, complete Copies of all Investigation reports obtained by Buyer, which obligation shall survive the termination of this Agreement.
   C. Seller shall have water, gas, electricity and all operable pilot lights on for Buyer's Investigations and through the date possession is made available to Buyer.
   D. **Buyer indemnity and seller protection for entry upon property:** Buyer shall: **(i)** keep the Property free and clear of liens; **(ii)** repair all damage arising from Buyer Investigations; and **(iii)** indemnify and hold Seller harmless from all resulting liability, claims, demands, damages and costs. Buyer shall carry, or Buyer shall require anyone acting on Buyer's behalf to carry, policies of liability, workers' compensation and other applicable insurance, defending and protecting Seller from liability for any injuries to persons or property occurring during any Buyer Investigations or work done on the Property at Buyer's direction prior to Close Of Escrow. Seller is advised that certain protections may be afforded Seller by recording a "Notice of Non-responsibility" (C.A.R. Form NNR) for Buyer Investigations and work done on the Property at Buyer's direction. Buyer's obligations under this paragraph shall survive the termination of this Agreement.

11. **SELLER DISCLOSURES; ADDENDA; ADVISORIES; OTHER TERMS:**
   A. **Seller Disclosures (if checked):** Seller shall, within the time specified in paragraph 14A, complete and provide Buyer with a:
   ☐ Seller Property Questionnaire (C.A.R. Form SPQ) **OR** ☐ Supplemental Contractual and Statutory Disclosure (C.A.R. Form SSD)
   B. **Addenda (if checked):**
   ☐ Addendum # _____ (C.A.R. Form ADM)
   ☐ Wood Destroying Pest Inspection and Allocation of Cost Addendum (C.A.R. Form WPA)
   ☐ Purchase Agreement Addendum (C.A.R. Form PAA) ☐ Septic, Well and Property Monument Addendum (C.A.R. Form SWPI)
   ☐ Short Sale Addendum (C.A.R. Form SSA) ☐ Other _____
   C. **Advisories (If checked):** ☐ Buyer's Inspection advisory (C.A.R. Form BIA)
   ☐ Probate Advisory (C.A.R. Form PAK) ☐ Statewide Buyer and Seller Advisory (C.A.R Form SBSA)
   ☐ Trust Advisory (C.A.R. Form TA) ☐ REO Advisory (C.A.R. Form REO)
   D. **Other Terms:** _____

12. **TITLE AND VESTING:**
   A. Within the time specified in paragraph 14, Buyer shall be provided a current preliminary title report, which shall include a search of the General Index, Seller shall within 7 Days After Acceptance, give Escrow Holder a completed Statement of Information. The preliminary report is only an offer by the title insurer to issue a policy of title insurance and may not contain every item affecting title. Buyer's review of the preliminary report and any other matters which may affect title are a contingency of this Agreement as specified in paragraph 14B.
   B. Title is taken in its present condition subject to all encumbrances, easements, covenants, conditions, restrictions, rights and other matters, whether of record or not, as of the date of Acceptance except: **(i)** monetary liens of record unless Buyer is assuming those obligations or taking the Property subject to those obligations; and **(ii)** those matters which Seller has agreed to remove in writing.
   C. Within the time specified in paragraph 14A, Seller has a duty to disclose to Buyer all matters known to Seller affecting title, whether of record or not.
   D. At Close Of Escrow, Buyer shall receive a grant deed conveying title (or, for stock cooperative or long-term lease, an assignment of stock certificate or of Seller's leasehold interest), including oil, mineral and water rights if currently owned by Seller. Title shall vest as designated in Buyer's supplemental escrow instructions. THE MANNER OF TAKING TITLE MAY HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES. CONSULT AN APPROPRIATE PROFESSIONAL.
   E. Buyer shall receive a CLTA/ALTA Homeowner's Policy of Title Insurance. A title company, at Buyer's request, can provide information about the availability, desirability, coverage, and cost of various title insurance coverages and endorsements. If Buyer desires title coverage other than that required by this paragraph, Buyer shall instruct Escrow Holder in writing and pay any increase in cost.

13. SALE OF BUYER'S PROPERTY:

A. This Agreement is NOT contingent upon the sale of any property owned by Buyer.

OR B. ☐ (If checked): The attached addendum (C.A.R. Form COP) regarding the contingency for the sale of property owned by Buyer is incorporated into this Agreement.

14. TIME PERIODS; REMOVAL OF CONTINGENCIES; CANCELLATION RIGHTS: The following time periods may only be extended, altered, modified or changed by mutual written agreement. Any removal of contingencies or cancellation under this paragraph by either Buyer or Seller must be exercised in good faith and in writing (C.A.R. Form CR or CC).

A. SELLER HAS: 7 (or ☐ _____) Days After Acceptance to Deliver to Buyer all Reports, disclosures and information for which Seller is responsible under paragraphs 4, 6A, B and C, 7A, 9A, 11A and B and 12A. Buyer may give Seller a Notice to Seller to Perform (C.A.R. Form NSP) if Seller has not Delivered the items within the time specified.

B. (1) BUYER HAS: 17 (or ☐ _____) Days After Acceptance, unless otherwise agreed in writing, to:
(i) complete all Buyer Investigations; approve all disclosures, reports and other applicable information, which Buyer receives from Seller; and approve all matters affecting the Property; and
(ii) Deliver to Seller Signed Copies of Statutory and Lead Disclosures Delivered by Seller in accordance with paragraph 6A.

(2) Within the time specified in 14B(1), Buyer may request that Seller make repairs or take any other action regarding the Property (C.A.R. Form RR). Seller has no obligation to agree to or respond to Buyer's requests.

(3) By the end of the time specified in 14B(1) (or as otherwise specified in this Agreement), Buyer shall, Deliver to Seller a removal of the applicable contingency or cancellation (C.A.R. Form CR or CC) of this Agreement. However, if any report, disclosure or information for which Seller is responsible is not Delivered within the time specified in 14A, then Buyer has **5 (or ☐ _____) Days** After Delivery of any such items, or the time specified in 14B(1), whichever is later, to Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement.

(4) Continuation of Contingency: Even after the end of the time specified in 14B(1) and before Seller cancels, if at all, pursuant to 14C, Buyer retains the right to either (i) in writing remove remaining contingencies, or (ii) cancel this Agreement based on a remaining contingency. Once Buyer's written removal of all contingencies is Delivered to Seller, Seller may not cancel this Agreement pursuant to 14C(1).

C. SELLER RIGHT TO CANCEL:

(1) Seller right to Cancel; Buyer Contingencies: If, by the time specified in this Agreement, Buyer does not Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement then Seller, after first Delivering to Buyer a Notice to Buyer to Perform (C.A.R. Form NBP) may cancel this Agreement. In such event, Seller shall authorize return of Buyer's deposit.

(2) Seller right to Cancel; Buyer Contract Obligations: Seller, after first Delivering to Buyer a NBP may cancel this Agreement for any of the following reasons: **(i)** if Buyer fails to deposit funds as required by 3A or 3B; **(ii)** if the funds deposited pursuant to 3A or 3B are not good when deposited; **(iii)** if Buyer fails to Deliver a notice of FHA or VA costs or terms as required by 3C(3) (C.A.R. Form FVA); **(iv)** if Buyer fails to Deliver a letter as required by 3H; **(v)** if Buyer fails to Deliver verification as required by 3G or 3J; **(vi)** if Seller reasonably disapproves of the verification provided by 3G or 3J; **(vii)** if Buyer fails to return Statutory and Lead Disclosures as required by paragraph 6A(2); or **(viii)** if Buyer fails to sign or initial a separate liquidated damages form for an increased deposit as required by paragraphs 3B and 25. In such event, Seller shall authorize return of Buyer's deposit.

(3) Notice To Buyer To Perform: The NBP shall: **(i)** be in writing; **(ii)** be signed by Seller; and **(iii)** give Buyer at least **2 (or ☐ _____)** Days After Delivery (or until the time specified in the applicable paragraph, whichever occurs last) to take the applicable action. A NBP may not be Delivered any earlier than **2 Days** Prior to the expiration of the applicable time for Buyer to remove a contingency or cancel this Agreement or meet an obligation specified in 14C (2).

D. EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES: If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall conclusively be deemed to have: **(i)** completed all Buyer Investigations, and review of reports and other applicable information and disclosures pertaining to that contingency or cancellation right; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and expense for Repairs or corrections pertaining to that contingency or cancellation right, or for inability to obtain financing.

E. CLOSE OF ESCROW: Before Seller or Buyer may cancel this Agreement for failure of the other party to close escrow pursuant to this Agreement, Seller or Buyer must first Deliver to the other a demand to close escrow (C.A.R. Form DCE).

F. EFFECT OF CANCELLATION ON DEPOSITS: If Buyer or Seller gives written notice of cancellation pursuant to rights duly exercised under the terms of this Agreement, Buyer and Seller agree to Sign mutual instructions to cancel the sale and escrow and release deposits, if any, to the party entitled to the funds, less fees and costs incurred by that party. Fees and costs may be payable to service providers and vendors for services and products provided during escrow. **Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A Buyer or Seller may be subject to a civil penalty of up to $1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitled to the deposited funds (Civil Code §1057.3).**

15. REPAIRS: Repairs shall be completed prior to final verification of condition unless otherwise agreed in writing. Repairs to be performed at Seller's expense may be performed by Seller or through others, provided that the work complies with applicable Law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all Repairs may not be possible. Seller shall: **(i)** obtain receipts for Repairs performed by others; **(ii)** prepare a written statement indicating the Repairs performed by Seller and the date of such Repairs; and **(iii)** provide Copies of receipts and statements to Buyer prior to final verification of condition.

16. FINAL VERIFICATION OF CONDITION: Buyer shall have the right to make a final inspection of the Property within **5 (or _____) Days** Prior to Close Of Escrow, NOT AS A CONTINGENCY OF THE SALE, but solely to confirm: **(i)** the Property is maintained pursuant to paragraph 9; **(ii)** Repairs have been completed as agreed; and **(iii)** Seller has complied with Seller's other obligations under this Agreement (C.A.R. Form VP).

17. PRORATIONS OF PROPERTY TAXES AND OTHER ITEMS: Unless otherwise agreed in writing, the following items shall be PAID CURRENT and prorated between Buyer and Seller as of Close Of Escrow: real property taxes and assessments, interest, rents, HOA regular, special, and emergency dues and assessments imposed prior to Close Of Escrow, premiums on insurance assumed by Buyer, payments on bonds and assessments assumed by Buyer, and payments on Mello-Roos and other Special Assessment District bonds and assessments that are now a lien. The following items shall be assumed by Buyer WITHOUT CREDIT toward the purchase price: prorated payments on Mello-Roos and other Special Assessment District bonds and assessments and HOA special assessments that are now a lien but not yet due. Property will be reassessed upon change of ownership. Any supplemental tax bills shall be paid as follows: **(i)** for periods after Close Of Escrow, by Buyer; and **(ii)** for periods prior to Close Of Escrow, by Seller (see C.A.R. Form SPT or SBSA for further information). TAX BILLS ISSUED AFTER CLOSE OF ESCROW SHALL BE HANDLED DIRECTLY BETWEEN BUYER AND SELLER. Prorations shall be made based on a 30-day month.

18. **SELECTION OF SERVICE PROVIDERS:** Brokers do not guarantee the performance of any vendors, service or product providers ("Providers"), whether referred by Broker or selected by Buyer, Seller or other person. Buyer and Seller may select ANY Providers of their own choosing.
19. **MULTIPLE LISTING SERVICE ("MLS"):** Brokers are authorized to report to the MLS a pending sale and, upon Close Of Escrow, the sales price and other terms of this transaction shall be provided to the MLS to be published and disseminated to persons and entities authorized to use the information on terms approved by the MLS.
20. **EQUAL HOUSING OPPORTUNITY:** The Property is sold in compliance with federal, state and local anti-discrimination Laws.
21. **ATTORNEY FEES:** In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 26A.
22. **DEFINITIONS:** As used in this Agreement:
    - **A.** **"Acceptance"** means the time the offer or final counter offer is accepted in writing by a party and is delivered to and personally received by the other party or that party's authorized agent in accordance with the terms of this offer or a final counter offer.
    - **B.** **"C.A.R. Form"** means the specific form referenced or another comparable form agreed to by the parties.
    - **C.** **"Close Of Escrow"** means the date the grant deed, or other evidence of transfer of title, is recorded.
    - **D.** **"Copy"** means copy by any means including photocopy, NCR, facsimile and electronic.
    - **E.** **"Days"** means calendar days. However, after Acceptance, the last **Day** for performance of any act required by this Agreement (including Close Of Escrow) shall not include any Saturday, Sunday, or legal holiday and shall instead be the next Day.
    - **F.** **"Days After"** means the specified number of calendar days after the occurrence of the event specified, not counting the calendar date on which the specified event occurs, and ending at 11:59PM on the final day.
    - **G.** **"Days Prior"** means the specified number of calendar days before the occurrence of the event specified, not counting the calendar date on which the specified event is scheduled to occur.
    - **H.** "**Deliver**", "**Delivered**" or "**Delivery**" means and shall be effective upon (i) personal receipt by Buyer or Seller or the individual Real Estate Licensee for that principal as specified in paragraph D of the section titled Real Estate Brokers on page 8, regardless of the method used (i.e. messenger, mail, email, fax, other); OR (ii) if checked, ☐ per the attached addendum (C.A.R. Form RDN).
    - **I.** **"Electronic Copy" or "Electronic Signature"** means, as applicable, an electronic copy or signature complying with California Law. Buyer and Seller agree that electronic means will not be used by either party to modify or alter the content or integrity of this Agreement without the knowledge and consent of the other.
    - **J.** "**Law**" means any law, code, statute, ordinance, regulation, rule or order, which is adopted by a controlling city, county, state or federal legislative, judicial or executive body or agency.
    - **K.** **"Repairs"** means any repairs (including pest control), alterations, replacements, modifications or retrofitting of the Property provided for under this Agreement.
    - **L.** **"Signed"** means either a handwritten or electronic signature on an original document, Copy or any counterpart.
23. **BROKER COMPENSATION:** Seller or Buyer, or both, as applicable, agrees to pay compensation to Broker as specified in a separate written agreement between Broker and that Seller or Buyer. Compensation is payable upon Close Of Escrow, or if escrow does not close, as otherwise specified in the agreement between Broker and that Seller or Buyer.
24. **JOINT ESCROW INSTRUCTIONS TO ESCROW HOLDER:**
    - **A.** **The following paragraphs, or applicable portions thereof, of this Agreement constitute the joint escrow instructions of Buyer and Seller to Escrow Holder,** which Escrow Holder is to use along with any related counter offers and addenda, and any additional mutual instructions to close the escrow: 1, 3, 4, 6C, 11B and D, 12, 13B, 14F, 17, 22, 23, 24, 28, 30 and paragraph D of the section titled Real Estate Brokers on page 8. If a Copy of the separate compensation agreement(s) provided for in paragraph 23, or paragraph D of the section titled Real Estate Brokers on page 8 is deposited with Escrow Holder by Broker, Escrow Holder shall accept such agreement(s) and pay out from Buyer's or Seller's funds, or both, as applicable, the Broker's compensation provided for in such agreement(s). The terms and conditions of this Agreement not set forth in the specified paragraphs are additional matters for the information of Escrow Holder, but about which Escrow Holder need not be concerned. Buyer and Seller will receive Escrow Holder's general provisions directly from Escrow Holder and will execute such provisions upon Escrow Holder's request. To the extent the general provisions are inconsistent or conflict with this Agreement, the general provisions will control as to the duties and obligations of Escrow Holder only. Buyer and Seller will execute additional instructions, documents and forms provided by Escrow Holder that are reasonably necessary to close the escrow.
    - **B.** A Copy of this Agreement shall be delivered to Escrow Holder within **3** business days after Acceptance (or ☐ _____). Escrow Holder shall provide Seller's Statement of Information to Title company when received from Seller. Buyer and Seller authorize Escrow Holder to accept and rely on Copies and Signatures as defined in this Agreement as originals, to open escrow and for other purposes of escrow. The validity of this Agreement as between Buyer and Seller is not affected by whether or when Escrow Holder Signs this Agreement.
    - **C.** Brokers are a party to the escrow for the sole purpose of compensation pursuant to paragraph 23 and paragraph D of the section titled Real Estate Brokers on page 8. Buyer and Seller irrevocably assign to Brokers compensation specified in paragraph 23, respectively, and irrevocably instruct Escrow Holder to disburse those funds to Brokers at Close Of Escrow or pursuant to any other mutually executed cancellation agreement. Compensation instructions can be amended or revoked only with the written consent of Brokers. Buyer and Seller shall release and hold harmless Escrow Holder from any liability resulting from Escrow Holder's payment to Broker(s) of compensation pursuant to this Agreement. Escrow Holder shall immediately notify Brokers: **(i)** if Buyer's initial or any additional deposit is not made pursuant to this Agreement, or is not good at time of deposit with Escrow Holder; or **(ii)** if Buyer and Seller instruct Escrow Holder to cancel escrow.
    - **D.** A Copy of any amendment that affects any paragraph of this Agreement for which Escrow Holder is responsible shall be delivered to Escrow Holder within **2** business days after mutual execution of the amendment.

25. LIQUIDATED DAMAGES: If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer. Release of funds will require mutual, Signed release instructions from both Buyer and Seller, judicial decision or arbitration award. AT TIME OF THE INCREASED DEPOSIT BUYER AND SELLER SHALL SIGN A SEPARATE LIQUIDATED DAMAGES PROVISION FOR ANY INCREASED DEPOSIT (C.A.R. FORM RID)

Buyer's Initials _____/_____ Seller's Initials _____/_____

26. DISPUTE RESOLUTION:

A. MEDIATION: Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. **Buyer and Seller also agree to mediate any disputes or claims with Broker(s), who, in writing, agree to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to the Broker.** Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED. **Exclusions from this mediation agreement are specified in paragraph 26C.**

B. ARBITRATION OF DISPUTES:
Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. Buyer and Seller also agree to arbitrate any disputes or claims with Broker(s), who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Broker. The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator. The parties shall have the right to discovery in accordance with Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part 3 of the Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act. Exclusions from this arbitration agreement are specified in paragraph 26C.

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."

Buyer's Initials _____/_____ Seller's Initials _____/_____

C. ADDITIONAL MEDIATION AND ARBITRATION TERMS:

(1) EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver nor violation of the mediation and arbitration provisions.

(2) BROKERS: Brokers shall not be obligated nor compelled to mediate or arbitrate unless they agree to do so in writing. Any Broker(s) participating in mediation or arbitration shall not be deemed a party to the Agreement.

27. TERMS AND CONDITIONS OF OFFER:
This is an offer to purchase the Property on the above terms and conditions. The liquidated damages paragraph or the arbitration of disputes paragraph is incorporated in this Agreement if initialed by all parties or if incorporated by mutual agreement in a counter offer or addendum. If at least one but not all parties initial, a counter offer is required until agreement is reached. Seller has the right to continue to offer the Property for sale and to accept any other offer at any time prior to notification of Acceptance. Buyer has read and acknowledges receipt of a Copy of the offer and agrees to the above confirmation of agency relationships. If this offer is accepted and Buyer subsequently defaults, Buyer may be responsible for payment of Brokers' compensation. This Agreement and any supplement, addendum or modification, including any Copy, may be Signed in two or more counterparts, all of which shall constitute one and the same writing.

28. TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES: Time is of the essence. All understandings between the parties are incorporated in this Agreement. Its terms are intended by the parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Except as otherwise specified, this Agreement shall be interpreted and disputes shall be resolved in accordance with the laws of the State of California. **Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing Signed by Buyer and Seller.**

Property Address: _____ Date: _____

29. EXPIRATION OF OFFER: This offer shall be deemed revoked and the deposit shall be returned unless the offer is Signed by Seller and a Copy of the Signed offer is personally received by Buyer, or by _____, who is authorized to receive it, by 5:00 PM on the third Day after this offer is signed by Buyer (or, if checked, ☐ by _____ ☐AM/☐PM, on _____(date))

Date _____ Date _____

BUYER _____ BUYER _____

_____ _____

(Print name) **(Print name)**

(Address)

30. ACCEPTANCE OF OFFER: Seller warrants that Seller is the owner of the Property, or has the authority to execute this Agreement. Seller accepts the above offer, agrees to sell the Property on the above terms and conditions, and agrees to the above confirmation of agency relationships. Seller has read and acknowledges receipt of a Copy of this Agreement, and authorizes Broker to Deliver a Signed Copy to Buyer.

☐ (If checked) **SUBJECT TO ATTACHED COUNTER OFFER (C.A.R. Form CO) DATED:** _____.

Date _____ Date _____

SELLER _____ SELLER _____

_____ _____

(Print name) **(Print name)**

(Address)

(_____/_____) (Initials) **CONFIRMATION OF ACCEPTANCE:** A Copy of Signed Acceptance was personally received by Buyer or Buyer's authorized agent on (date) _____ at _____ ☐AM/☐PM. **A binding Agreement is created when a Copy of Signed Acceptance is personally received by Buyer or Buyer's authorized agent whether or not confirmed in this document. Completion of this confirmation is not legally required in order to create a binding Agreement; it is solely intended to evidence the date that Confirmation of Acceptance has occurred.**

REAL ESTATE BROKERS:

A. Real Estate Brokers are not parties to the Agreement between Buyer and Seller.

B. Agency relationships are confirmed as stated in paragraph 2.

C. If specified in paragraph 3A, Agent who submitted the offer for Buyer acknowledges receipt of deposit.

D. COOPERATING BROKER COMPENSATION: Listing Broker agrees to pay Cooperating Broker **(Selling Firm)** and Cooperating Broker agrees to accept, out of Listing Broker's proceeds in escrow: **(i)** the amount specified in the MLS, provided Cooperating Broker is a Participant of the MLS in which the Property is offered for sale or a reciprocal MLS; or **(ii)** ☐ (if checked) the amount specified in a separate written agreement (C.A.R. Form CBC) between Listing Broker and Cooperating Broker. Declaration of License and Tax (C.A.R. Form DLT) may be used to document that tax reporting will be required or that an exemption exists.

Real Estate Broker (Selling Firm) _____ DRE Lic. # _____

By _____ DRE Lic. # _____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

Real Estate Broker (Listing Firm) _____ DRE Lic. # _____

By _____ DRE Lic. # _____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone _____ Fax _____ E-mail _____

ESCROW HOLDER ACKNOWLEDGMENT:

Escrow Holder acknowledges receipt of a Copy of this Agreement, (if checked, ☐ a deposit in the amount of $ _____), counter offer numbers _____ ☐ Seller's Statement of Information and _____, and agrees to act as Escrow Holder subject to paragraph 24 of this Agreement, any supplemental escrow instructions and the terms of Escrow Holder's general provisions.

Escrow Holder is advised that the date of Confirmation of Acceptance of the Agreement as between Buyer and Seller is _____

Escrow Holder _____ Escrow # _____

By _____ Date _____

Address _____

Phone/Fax/E-mail _____

Escrow Holder is licensed by the California Department of ☐ Corporations, ☐ Insurance, ☐ Real Estate. License # _____

PRESENTATION OF OFFER: (_____) Listing Broker presented this offer to Seller on _____(date).
Broker or Designee Initials

REJECTION OF OFFER: (_____)(_____) No counter offer is being made. This offer was rejected by Seller on _____(date).
Seller's Initials

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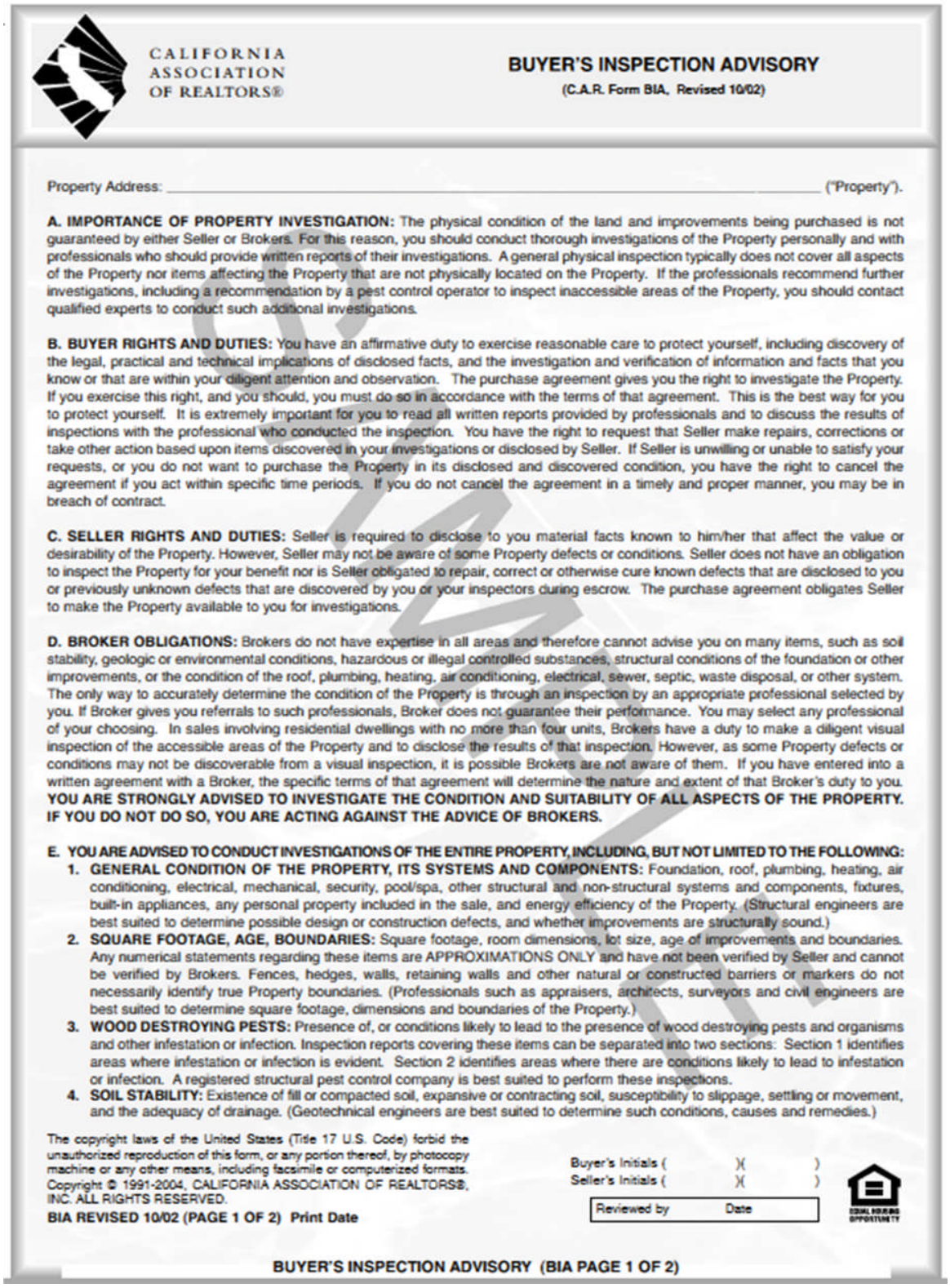
525 South Virgil Avenue, Los Angeles, California 90020

Reviewed by
Broker or Designee _____ Date _____

REVISION DATE 4/13 Print Date

Buyer's Inspection Advisory (C.A.R. Form BIA)



CALIFORNIA ASSOCIATION OF REALTORS®

BUYER'S INSPECTION ADVISORY

(C.A.R. Form BIA, Revised 10/02)

Property Address: _____ ("Property").

A. IMPORTANCE OF PROPERTY INVESTIGATION: The physical condition of the land and improvements being purchased is not guaranteed by either Seller or Brokers. For this reason, you should conduct thorough investigations of the Property personally and with professionals who should provide written reports of their investigations. A general physical inspection typically does not cover all aspects of the Property nor items affecting the Property that are not physically located on the Property. If the professionals recommend further investigations, including a recommendation by a pest control operator to inspect inaccessible areas of the Property, you should contact qualified experts to conduct such additional investigations.

B. BUYER RIGHTS AND DUTIES: You have an affirmative duty to exercise reasonable care to protect yourself, including discovery of the legal, practical and technical implications of disclosed facts, and the investigation and verification of information and facts that you know or that are within your diligent attention and observation. The purchase agreement gives you the right to investigate the Property. If you exercise this right, and you should, you must do so in accordance with the terms of that agreement. This is the best way for you to protect yourself. It is extremely important for you to read all written reports provided by professionals and to discuss the results of inspections with the professional who conducted the inspection. You have the right to request that Seller make repairs, corrections or take other action based upon items discovered in your investigations or disclosed by Seller. If Seller is unwilling or unable to satisfy your requests, or you do not want to purchase the Property in its disclosed and discovered condition, you have the right to cancel the agreement if you act within specific time periods. If you do not cancel the agreement in a timely and proper manner, you may be in breach of contract.

C. SELLER RIGHTS AND DUTIES: Seller is required to disclose to you material facts known to him/her that affect the value or desirability of the Property. However, Seller may not be aware of some Property defects or conditions. Seller does not have an obligation to inspect the Property for your benefit nor is Seller obligated to repair, correct or otherwise cure known defects that are disclosed to you or previously unknown defects that are discovered by you or your inspectors during escrow. The purchase agreement obligates Seller to make the Property available to you for investigations.

D. BROKER OBLIGATIONS: Brokers do not have expertise in all areas and therefore cannot advise you on many items, such as soil stability, geologic or environmental conditions, hazardous or illegal controlled substances, structural conditions of the foundation or other improvements, or the condition of the roof, plumbing, heating, air conditioning, electrical, sewer, septic, waste disposal, or other system. The only way to accurately determine the condition of the Property is through an inspection by an appropriate professional selected by you. If Broker gives you referrals to such professionals, Broker does not guarantee their performance. You may select any professional of your choosing. In sales involving residential dwellings with no more than four units, Brokers have a duty to make a diligent visual inspection of the accessible areas of the Property and to disclose the results of that inspection. However, as some Property defects or conditions may not be discoverable from a visual inspection, it is possible Brokers are not aware of them. If you have entered into a written agreement with a Broker, the specific terms of that agreement will determine the nature and extent of that Broker's duty to you. **YOU ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS.**

E. YOU ARE ADVISED TO CONDUCT INVESTIGATIONS OF THE ENTIRE PROPERTY, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING:

1. **GENERAL CONDITION OF THE PROPERTY, ITS SYSTEMS AND COMPONENTS:** Foundation, roof, plumbing, heating, air conditioning, electrical, mechanical, security, pool/spa, other structural and non-structural systems and components, fixtures, built-in appliances, any personal property included in the sale, and energy efficiency of the Property. (Structural engineers are best suited to determine possible design or construction defects, and whether improvements are structurally sound.)
2. **SQUARE FOOTAGE, AGE, BOUNDARIES:** Square footage, room dimensions, lot size, age of improvements and boundaries. Any numerical statements regarding these items are APPROXIMATIONS ONLY and have not been verified by Seller and cannot be verified by Brokers. Fences, hedges, walls, retaining walls and other natural or constructed barriers or markers do not necessarily identify true Property boundaries. (Professionals such as appraisers, architects, surveyors and civil engineers are best suited to determine square footage, dimensions and boundaries of the Property.)
3. **WOOD DESTROYING PESTS:** Presence of, or conditions likely to lead to the presence of wood destroying pests and organisms and other infestation or infection. Inspection reports covering these items can be separated into two sections: Section 1 identifies areas where infestation or infection is evident. Section 2 identifies areas where there are conditions likely to lead to infestation or infection. A registered structural pest control company is best suited to perform these inspections.
4. **SOIL STABILITY:** Existence of fill or compacted soil, expansive or contracting soil, susceptibility to slippage, settling or movement, and the adequacy of drainage. (Geotechnical engineers are best suited to determine such conditions, causes and remedies.)

Buyer's Initials ( )( )
Seller's Initials ( )( )

Reviewed by Date

EQUAL HOUSING OPPORTUNITY

Property Address: _____ Date: _____

5. **ROOF:** Present condition, age, leaks, and remaining useful life. (Roofing contractors are best suited to determine these conditions.)
6. **POOL/SPA:** Cracks, leaks or operational problems. (Pool contractors are best suited to determine these conditions.)
7. **WASTE DISPOSAL:** Type, size, adequacy, capacity and condition of sewer and septic systems and components, connection to sewer, and applicable fees.
8. **WATER AND UTILITIES; WELL SYSTEMS AND COMPONENTS:** Water and utility availability, use restrictions and costs. Water quality, adequacy, condition, and performance of well systems and components.
9. **ENVIRONMENTAL HAZARDS:** Potential environmental hazards, including, but not limited to, asbestos, lead-based paint and other lead contamination, radon, methane, other gases, fuel oil or chemical storage tanks, contaminated soil or water, hazardous waste, waste disposal sites, electromagnetic fields, nuclear sources, and other substances, materials, products, or conditions (including mold (airborne, toxic or otherwise), fungus or similar contaminants). (For more in formation on these items, you may consult an appropriate professional or read the booklets "Environmental Hazards: A Guide for Homeowners, Buyers, Landlords and Tenants," "Protect Your Family From Lead in Your Home" or both.)
10. **EARTHQUAKES AND FLOODING:** Susceptibility of the Property to earthquake/seismic hazards and propensity of the Property to flood. (A Geologist or Geotechnical Engineer is best suited to provide information on these conditions.)
11. **FIRE, HAZARD AND OTHER INSURANCE:** The availability and cost of necessary or desired insurance may vary. The location of the Property in a seismic, flood or fire hazard zone, and other conditions, such as the age of the Property and the claims history of the Property and Buyer, may affect the availability and need for certain types of insurance. Buyer should explore insurance options early as this information may affect other decisions, including the removal of loan and inspection contingencies. (An insurance agent is best suited to provide information on these conditions.)
12. **BUILDING PERMITS, ZONING AND GOVERNMENTAL REQUIREMENTS:** Permits, inspections, certificates, zoning, other governmental limitations, restrictions, and requirements affecting the current or future use of the Property, its development or size. (Such information is available from appropriate governmental agencies and private information providers. Brokers are not qualified to review or interpret any such information.)
13. **RENTAL PROPERTY RESTRICTIONS:** Some cities and counties impose restrictions that limit the amount of rent that can be charged, the maximum number of occupants, and the right of a landlord to terminate a tenancy. Deadbolt or other locks and security systems for doors and windows, including window bars, should be examined to determine whether they satisfy legal requirements. (Government agencies can provide information about these restrictions and other requirements.)
14. **SECURITY AND SAFETY:** State and local Law may require the installation of barriers, access alarms, self-latching mechanisms and/or other measures to decrease the risk to children and other persons of existing swimming pools and hot tubs, as well as various fire safety and other measures concerning other features of the Property. Compliance requirements differ from city to city and county to county. Unless specifically agreed, the Property may not be in compliance with these requirements. (Local government agencies can provide information about these restrictions and other requirements.)
15. **NEIGHBORHOOD, AREA, SUBDIVISION CONDITIONS; PERSONAL FACTORS:** Neighborhood or area conditions, including schools, proximity and adequacy of law enforcement, crime statistics, the proximity of registered felons or offenders, fire protection, other government services, availability, adequacy and cost of any speed-wired, wireless internet connections or other telecommunications or other technology services and installations, proximity to commercial, industrial or agricultural activities, existing and proposed transportation, construction and development that may affect noise, view, or traffic, airport noise, noise or odor from any source, wild and domestic animals, other nuisances, hazards, or circumstances, protected species, wetland properties, botanical diseases, historic or other governmentally protected sites or improvements, cemeteries, facilities and condition of common areas of common interest subdivisions, and possible lack of compliance with any governing documents or Homeowners' Association requirements, conditions and influences of significance to certain cultures and/or religions, and personal needs, requirements and preferences of Buyer.

Buyer and Seller acknowledge and agree that Broker: **(i)** Does not decide what price Buyer should pay or Seller should accept; **(ii)** Does not guarantee the condition of the Property; **(iii)** Does not guarantee the performance, adequacy or completeness of inspections, services, products or repairs provided or made by Seller or others; **(iv)** Does not have an obligation to conduct an inspection of common areas or areas off the site of the Property; **(v)** Shall not be responsible for identifying defects on the Property, in common areas, or offsite unless such defects are visually observable by an inspection of reasonably accessible areas of the Property or are known to Broker; **(vi)** Shall not be responsible for inspecting public records or permits concerning the title or use of Property; **(vii)** Shall not be responsible for identifying the location of boundary lines or other items affecting title; **(viii)** Shall not be responsible for verifying square footage, representations of others or information contained in Investigation reports, Multiple Listing Service, advertisements, flyers or other promotional material; **(ix)** Shall not be responsible for providing legal or tax advice regarding any aspect of a transaction entered into by Buyer or Seller; and **(x)** Shall not be responsible for providing other advice or information that exceeds the knowledge, education and experience required to perform real estate licensed activity. Buyer and Seller agree to seek legal, tax, insurance, title and other desired assistance from appropriate professionals.

By signing below, Buyer and Seller each acknowledge that they have read, understand, accept and have received a Copy of this Advisory. Buyer is encouraged to read it carefully.

Buyer Signature	Date	Buyer Signature	Date
Seller Signature	Date	Seller Signature	Date

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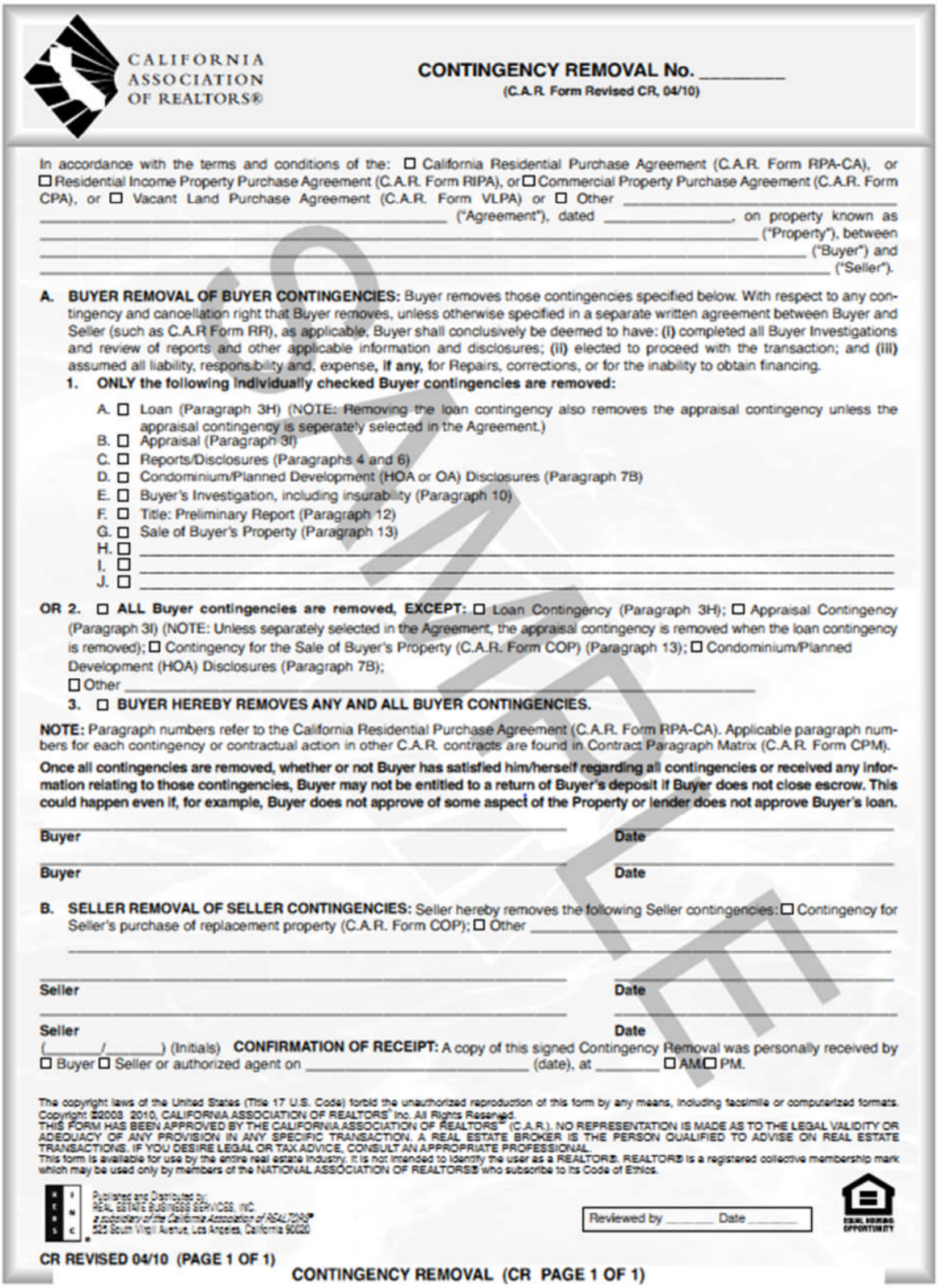
Reviewed by Date

Contingency Removal (C.A.R. Form CR)



CALIFORNIA ASSOCIATION OF REALTORS®

CONTINGENCY REMOVAL No. _____
(C.A.R. Form Revised CR, 04/10)

In accordance with the terms and conditions of the: ☐ California Residential Purchase Agreement (C.A.R. Form RPA-CA), or ☐ Residential Income Property Purchase Agreement (C.A.R. Form RIPA), or ☐ Commercial Property Purchase Agreement (C.A.R. Form CPA), or ☐ Vacant Land Purchase Agreement (C.A.R. Form VLPA) or ☐ Other _____ _____ ("Agreement"), dated _____, on property known as _____ ("Property"), between _____ ("Buyer") and _____ ("Seller").

A. BUYER REMOVAL OF BUYER CONTINGENCIES: Buyer removes those contingencies specified below. With respect to any contingency and cancellation right that Buyer removes, unless otherwise specified in a separate written agreement between Buyer and Seller (such as C.A.R Form RR), as applicable, Buyer shall conclusively be deemed to have: **(i)** completed all Buyer Investigations and review of reports and other applicable information and disclosures; **(ii)** elected to proceed with the transaction; and **(iii)** assumed all liability, responsibility and, expense, **if any,** for Repairs, corrections, or for the inability to obtain financing.

1. ONLY the following individually checked Buyer contingencies are removed:

A. ☐ Loan (Paragraph 3H) (NOTE: Removing the loan contingency also removes the appraisal contingency unless the appraisal contingency is seperately selected in the Agreement.)
B. ☐ Appraisal (Paragraph 3I)
C. ☐ Reports/Disclosures (Paragraphs 4 and 6)
D. ☐ Condominium/Planned Development (HOA or OA) Disclosures (Paragraph 7B)
E. ☐ Buyer's Investigation, including insurability (Paragraph 10)
F. ☐ Title: Preliminary Report (Paragraph 12)
G. ☐ Sale of Buyer's Property (Paragraph 13)
H. ☐ _____
I. ☐ _____
J. ☐ _____

OR 2. ☐ ALL Buyer contingencies are removed, EXCEPT: ☐ Loan Contingency (Paragraph 3H); ☐ Appraisal Contingency (Paragraph 3I) (NOTE: Unless separately selected in the Agreement, the appraisal contingency is removed when the loan contingency is removed); ☐ Contingency for the Sale of Buyer's Property (C.A.R. Form COP) (Paragraph 13); ☐ Condominium/Planned Development (HOA) Disclosures (Paragraph 7B);
☐ Other _____

3. ☐ BUYER HEREBY REMOVES ANY AND ALL BUYER CONTINGENCIES.

NOTE: Paragraph numbers refer to the California Residential Purchase Agreement (C.A.R. Form RPA-CA). Applicable paragraph numbers for each contingency or contractual action in other C.A.R. contracts are found in Contract Paragraph Matrix (C.A.R. Form CPM).

Once all contingencies are removed, whether or not Buyer has satisfied him/herself regarding all contingencies or received any information relating to those contingencies, Buyer may not be entitled to a return of Buyer's deposit if Buyer does not close escrow. This could happen even if, for example, Buyer does not approve of some aspect of the Property or lender does not approve Buyer's loan.

Buyer _____ **Date** _____

Buyer _____ **Date** _____

B. SELLER REMOVAL OF SELLER CONTINGENCIES: Seller hereby removes the following Seller contingencies: ☐ Contingency for Seller's purchase of replacement property (C.A.R. Form COP); ☐ Other _____ _____

Seller _____ **Date** _____

Seller _____ **Date** _____

(_____/_____) (Initials) **CONFIRMATION OF RECEIPT:** A copy of this signed Contingency Removal was personally received by ☐ Buyer ☐ Seller or authorized agent on _____ (date), at _____ ☐ AM ☐ PM.

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Reviewed by _____ Date _____

EQUAL HOUSING OPPORTUNITY

Cases

People v. National Association of REALTORS(R) (1981) 120 Cal.App.3d 459, 174 Cal.Rptr. 728

Appeals were taken from a judgment of the Superior Court of San Diego County, Charles W. Froehlich, Jr., J., in favor of People on some counts and in favor of city board of realtors on other counts in People's civil antitrust action. The Court of Appeal, Work, J., held that: (1) restricting access to the residential multiple listing service only to members of the city board constituted a group boycott; (2) the trial court did not err in "splitting off" the investment listings from residential listings of the multiple listing service; (3) refusing multiple listing service access to any listing agreement except one which granted listing broker an "exclusive right to sell" unlawfully restrained trade; and (4) city board engaged in illegal price fixing by adopting and adhering to policies which encouraged members to discriminate in commission splitting directed at undercutters.

Affirmed in part, reversed and remanded in part.

Attorneys and Law Firms

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Consumers Union of U.S., Inc., Harry M. Snyder, Luana L. Martilla, Clark K. Oshiro, San Francisco, amici curiae for plaintiff and appellant.

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Opinion

WORK, Associate Justice.

Reviewing a civil antitrust action against professional real estate organizations, we hold certain group conduct constituted both an unlawful restraint of trade permitting injunctive relief, and unlawful business activity allowing imposition of civil penalties. The additional issue of whether the associational policy of refusing to sell investment multiple listing service information to otherwise qualified persons unless they also purchase general memberships in the associations is an illegal tying arrangement was not decided below and should be remanded for further findings.

BACKGROUND

For 20 years San Diego Board of Realtors (SDBR) with the approval of the California Association of Realtors (CAR) and the National Association of Realtors (NAR) (collectively: the associations) openly encouraged its members to maintain uniform commission rates on residential sales (generally 6 percent) and a standard percentage at which to split sales commissions between listing and selling brokers (generally $^{50}/_{50}$) within the greater San Diego market. The rates were originally set by an express agreement among members of the SDBR, the La Mesa Board of Realtors and the El Cajon Board of Realtors (all presently combined in a Multiple Listing Service.) SDBR publicized the uniform rate to its membership, consisting of competing real estate brokers and salespersons.

After similar actions were held to violate federal antitrust laws (Sherman Act), the associations each adopted an official "hands off" policy ***466** regarding the fixing of commission rates by their members. NAR formally adopted such a policy in November, 1971 and SDBR soon followed suit.

Detecting no appreciable change in the uniformity of commissions charged among competitors holding SDBR memberships over the next four years, the Attorney General and San Diego County District Attorney suspected anti-competitive artificial forces were preventing erosion of the uniform rate. Believing multiple policies of ****731** the associations were potentially chilling to those desiring to deviate from the standard rates, and with evidence of

numerous harassing incidents by individual SDBR members directed at the only major commission price undercutter holding SDBR membership, they jointly filed this antitrust action asking for injunctive relief under the California equivalent to the Sherman Act (Cartwright Act, Bus. & Prof.Code, s 16700[1] et seq.) and for civil penalties under the unfair competition statutes (formerly Civ.Code, s 3369, now Bus. & Prof.Code, s 17200 et seq.).

The original three-count complaint alleged: (1) unlawful restrictions of trade under the Cartwright Act through certain restrictive regulations of the Multiple Listing Service (MLS) operated by SDBR, including the fact only Board members were entitled to access to that necessary service; (2) restraint of trade because of commission rate price fixing; and (3) a charge the Cartwright Act violations were also acts of unfair competition, prohibited by Civil Code section 3369, and subject to civil penalties. The court struck the third cause of action because it believed the Cartwright Act exclusively regulated activities constituting restraints of trade.

The case was tried on an amended complaint containing six causes of action: Count One, alleging unlawful exclusion of non-SDBR members from the residential and investment MLS was both a group boycott and an illegal tying arrangement; Count Two, alleging antitrust violations through activities maintaining the uniform commission rate. Counts Three, Four and Five charged the associations with individually committing unfair business practices in the setting of dues structure prohibited by section 3369, Civil Code, however, these are not pursued on appeal. The Sixth Count charges SDBR with individually committing the acts complained of in Count Two (price fixing), referring to these as unfair business practices and for violating the unfair competition sections. ***467** (Counts three through six were alternative pleadings in response to the court's earlier ruling on exclusivity.)

On the first cause of action the court found a group boycott and issued an injunction guaranteeing access, on conditions, to the residential, portion of the MLS to all licensed brokers and their salespersons without regard to SDBR membership. The court found no such boycott as to the MLS investment property portion. All other MLS operating rules were found to be reasonable, including a requirement excluding all listings except exclusive-right-to-sell agreements.

Because the court found a boycott violation relating to the restrictions on access to the residential portion of the MLS, it did not rule on the People's alternative illegal tying theory. Although the court found SDBR, CAR and NAR policies jointly created the residential MLS unlawful group boycott it enjoined only SDBR on the oral assurance CAR and NAR would comply with its holding.

SDBR obtained judgment on all other counts. Even though it found the restriction on access to the MLS investment portion did not constitute a group boycott, the court did not make findings or rule on the alternative illegal tie issue.

All parties appeal.

RESTRICTING ACCESS TO THE RESIDENTIAL MLS ONLY TO MEMBERS OF THE SDBR CONSTITUTES A GROUP BOYCOTT.

[1] The court's conclusion is foreordained by Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal.3d 920, 130 Cal.Rptr. 1, 549 P.2d 833.

In Palsson the court struck down two separate policies of the Marin County Board of Realtors as group boycotts. In restricting MLS access to the Board's own members Marin substantially stifled competition in the real estate market. Similar findings and conclusions of the trial court here are overwhelmingly supported by statistical exhibits and testimony.

However, the associations contend Palsson's holding was not based solely on the membership restriction of the MLS above, ****732** but on that ***468** factor plus the fact Marin limited Board membership to persons "primarily engaged" in the real estate business. Palsson, a part-time salesperson, could not subscribe to the MLS though he were willing to join the association in order to do so. By contrast SDBR points to its non-restrictive membership access.

The associations have lately provided us with a copy of the recent decision of the Iowa Supreme Court in State v. Cedar Rapids Bd. of Realtors, (Iowa) 300 N.W.2d 127, interpreting Palsson as holding "the combination of two Board bylaws unreasonably denied nonmembers access to the Board's MLS." (Id., at p. 130; italics added.) We find this

interpretation unpersuasive. The same argument was presented to the trial court which thoughtfully considered and correctly rejected it. (See also Glendale Bd. of Realtors v. Hounsell, 72 Cal.App.3d 210, 212, 139 Cal.Rptr. 830.) The court in Palsson first considered whether the appeal was moot because the "primarily engaged" bylaw was deleted before the hearing on appeal. The court noted even if this were so the appeal also separately attacked another Board policy limiting MLS access to members. This rule prevented MLS access to every non-member, even one primarily engaged in the real estate trade and eligible for membership. The court analyzed each restriction separately, found each to have anticompetitive effects far outweighing any possible business justification (the Rule of Reason test) and separately disapproved the MLS limitation for access to Board members only. (Marin County Bd. of Realtors v. Palsson, supra, 16 Cal.3d 920, 938, 130 Cal.Rptr. 1, 549 P.2d 833.)

THE COURT DID NOT ERR IN "SPLITTING OFF" THE INVESTMENT LISTINGS[2] FROM RESIDENTIAL LISTINGS EVEN THOUGH BOTH WERE PRODUCTS OF A SINGLE MLS OPERATION.

[2] The court's judgment effectively restructures the Board's MLS into two parts, one for residential and one for investment properties, with non-members now allowed access to only the residential portion. Practically speaking, the court's slicing off the investment portion is not so ***469** traumatic as to disrupt the MLS since it now publishes the investment property book separately from the residential. Although the case was tried and defended solely on the theory SDBR operated a single MLS and the evidence was presented with the People's expectation a finding of any group boycott would open the entire MLS as it existed at time of trial, we are cited to no authority limiting the power of the court to issue its injunction only against the residential MLS where, as here, that portion may be easily and completely bifurcated from the investment portion.

At the close of its case the People were put on notice the court was considering splitting its ruling on the group boycott theory between the investment and the residential portions of the MLS, and was concerned with the lack of evidence showing access to the investment portion is an economic necessity for brokers seeking to deal in investment properties in San Diego County. In spite of this warning the People made no request to reopen the evidence on this issue although previously advised the court would permit augmentation of proof in any area as to which the court felt it lacking.

The record substantially supports the court's finding the evidence fails to show lack of access to the investment portion "seriously hampers the competitive effectiveness of nonmember licensed brokers and salesmen." (See Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 936, 130 Cal.Rptr. 1, 549 P.2d 833.)

IS THE INVESTMENT MLS ILLEGALLY TIED TO SDBR MEMBERSHIP?

[3] The court made no findings and did not rule on the People's alternative argument ****733** that refusing to "sell" an investment MLS membership unless the buyer also purchased SDBR membership is a prohibited tie-in arrangement.[3]

***470** After finding a group boycott in the residential MLS the court found no necessity to determine if relief was also proper under the additional theory of illegal tying. However, by splitting off the investment MLS and finding no evidence of a group boycott to that service, the court was required to review the evidence and rule on the tying issue on which evidence had been presented.

Although the facts upon which resolution of this issue rests are not in conflict we recognize it is the function of the trial court to be the primary finder of fact, and this reviewing court is not to make findings "in the first instance." (Larson v. Thoresen, 36 Cal.2d 666, 670, 226 P.2d 571.) However, for the guidance of the trial court, we discuss some relevant points raised on this appeal.

[4] The purpose of the prohibition against the use of ties is to prevent a seller from using a dominant desired product to compel the purchase of a second distinct commodity. (Moore v. Jas. S. Matthews & Co. (9th Cir.) 550 F.2d 1207, 1214.)

Where by conditioning a sale of one item to the sale of another a seller has the economic power to coerce buyers to forego exercise of their independent judgment as to the merits of the tied product, thus shielding it from competitive market

forces, there is a restraint on competition. In fact, "(t) ying agreements serve hardly any purpose beyond the suppression of competition." (Standard Oil Co. v. United States, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371.) The greater the market control over the tying product, (here the investment MLS) the greater the economic power to restrain competition in sales of the tied product, (here real estate professional association memberships.)

Separability of Products

[5] At the outset SDBR contends coupling Board membership and MLS access is not illegal because there are not two separate products reasoning an organization is not severable from the services it renders, membership and the rights of membership being synonymous.

"Although we have not found, nor has our attention been directed to, any definitive test for the determination of this question, the following factors should be taken into account: (1) Whether competitors offer to sell the products or services separately or only as a unit. (2) Whether ***471** the combined product or service is composed of varying assortments of component parts. (3) Whether buyers are, or can be, charged separately for the alleged separate products or services. (And) (4) Whether the defendant ever sells or offers to sell the products or services separately." (Corwin v. Los Angeles Newspaper Services Bureau, Inc., supra, 4 Cal.3d 842, 858-859, 94 Cal.Rptr. 785, 484 P.2d 953;United States v. Jerrold Electronics Corporation, D.C., 187 F.Supp. 545, 559; affirmed per curiam sub nom. Jerrold Electronics Corp., et al. v. United States, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806;Associated Press v. Taft-Ingalls Corp., 6th Cir., 340 F.2d 753, 764.) Considering the foregoing, it is apparent SDBR membership and access to its investment MLS are independent product/services, (accord Bogus v. American Speech & Hearing Ass'n, 3 Cir., 582 F.2d 277) and not merely separable portions of a single unit as in the "right shoe, left shoe" hypothetical posed in Moore v. Jas. H. Matthews & Co., supra 550 F.2d 1207, 1214.

The Supreme Court in Marin County Board of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 130 Cal.Rptr. 1, 549 P.2d 833, has ****734** ruled when a multiple listing service corresponds directly with and touches upon the business activities of its members, and the association has the power to shape and influence the economic environment of its particular market the association's MLS must be made available to non-Board members, although such persons may be charged a reasonable fee for its use. (Id., at p. 937, 130 Cal.Rptr. 1, 549 P.2d 833.) While Marin County did not turn upon the question of unlawful tie-ins, its finding necessarily determines sale of Board memberships are separate from sale of MLS books. Similar factors are present here: Non-member real estate brokers can be charged separately for the SDBR investment MLS, SDBR offers the MLS separately to its own members, and the investment MLS is not a component part of Board membership. The trial court's actual severance of the residential MLS factually comfirms the severability of the SDBR investment MLS.

Sufficient Economic Power

This requires a showing SDBR possessed sufficient economic power over the investment MLS to restrain free competition in the market for the tied product (membership in other local, state or national realty associations.)

[6] The allegations in Count One encompass tying arrangements made illegal under both Business and Professions Code section 16727 (the state equivalent of the federal Clayton Act, s 3) as well as sections 16720 and 16726 (patterned after ***472** the Sherman Act.) Section 16727 violations may be established by a lesser evidentiary showing than required to establish an illegal tie under sections 16720 and 16726. (Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d 842, 852, 94 Cal.Rptr. 785, 484 P.2d 953.) Under section 16727, (and the Clayton Act), a tie-in is illegal if the seller (1) enjoys a monopolistic position in the market for the "tying" product or (2) if a substantial volume of commerce in the tied product is restrained. (See Times-Picayune v. United States, 345 U.S. 594, 608-609, 73 S.Ct. 872, 880-881, 97 L.Ed. 1277; and discussion in Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc., 101 Cal.App.3d 532, 549, 161 Cal.Rptr. 811), while sections 16720 and 16726 (and Sherman Act) tyings are not illegal unless both conditions exist.

A tying arrangement is unreasonable per se under the Clayton Act (s 16727) when either of the above two elements are present (Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc., D.C., 393 F.Supp. 453, 467), although under the Sherman Act both elements are required for a finding of illegality.

[7] Proof of requisite economic power is usually inferred from other, more easily proven, facts. Domination of the market in the tying product is sufficient to infer competition in the tied product has been or probably will be lessened by the agreement. (United Shoe Mach. Co., et al. v. United States, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708;International Machines Corp. v. U.S., 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085;Fashion Guild v. Trade Comm'n., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949;Standard Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653;Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc., supra, 393 F.Supp. 453.) Thus, evidence of market dominance is sufficient to support a finding of the requisite economic power.

[8] The "monopolistic" condition is satisfied when the seller has a "dominant" (as opposed to absolute) monopoly position in the tying product market. (International Salt Co. v. U.S., 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.) Uncontradicted evidence shows SDBR dominates the local investment MLS market with the participation of 10 other CAR/NAR members, it has the only investment MLS service in San Diego County and generates at least 1900 book sales per month.

***473** On remand the trial court must determine if the evidence shows SDBR enjoys sufficient economic power in the tying product (investment MLS) to appreciably restrain competition in the tied product (real estate association memberships). (****735**Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc., supra, 101 Cal.App.3d 532, 549, 161 Cal.Rptr. 811.)

THE UNFAIR COMPETITION STATUTES[4] AND THE CARTWRIGHT ACT PROVIDE CUMULATIVE REMEDIES FOR ACTS RESTRAINING TRADE.

[9] The court recognized restraints of trade under the Cartwright Act are also unlawful business practices and therefore unfair competition as defined by statute. In spite of this, the court felt Cartwright Act violations were not intended to be included within the unfair competition statutes because it "(made) little practical sense" where the Cartwright Act provides for civil damages of a punitive nature, as well penal sanctions, particularly when specific reference to Business and Professions Code sections 17500 to 17535 is contained in section 3369. The court reasoned, if the legislature intended to increase penalties for restraints of trade the logical method would be to amend the Cartwright Act itself. It held, the statutory reference to "unlawful, unfair or fraudulent business practice(s)" contained within former Civil Code section 3369 was intended to be limited by the later reference to "act(s) denounced by Business and Professions Code section 17500 to 17535, ***474** inclusive;" thereby foreclosing its application to other portions of the Business and Professions Code.

The Supreme Court has consistently held unlawful business practices included within section 17200 include " ' "anything that can properly be called a business practice and that at the same time is forbidden by law. " ' " (People v. McKale, 25 Cal.3d 626, 632, 159 Cal.Rptr. 811, 602 P.2d 731 (interpreting former Civ.Code s 3369 and including within its ambit violations of the Mobilehome Parks Act, formerly Civ.Code, ss 789.4 et seq.), quoting Barquis v. Merchants Collection Ass'n, 7 Cal.3d 94, 113, 101 Cal.Rptr. 745, 496 P.2d 817.) In People v. K. Sakai Co., 56 Cal.App.3d 531, 128 Cal.Rptr. 536 the court enjoined the selling of whale meat and assessed a civil penalty of $2,000 pursuant to former Civil Code section 3369 for business conduct violating The Endangered Species Act (Pen.Code, s 653***o***-653r). Further, in People v. Pacific Land Research Co., 20 Cal.3d 10, 141 Cal.Rptr. 20, 569 P.2d 125, the Supreme Court held violations of the Subdivided Lands Act (Bus. & Prof.Code, s 11000 et seq.) were properly governed by the Act.[5]

The court's implication the treble damage and criminal sanction provisions contained ****736** within the Cartwright Act[6] render an additional civil penalty unnecessary is also incorrect. If no victim of a Cartwright Act violation has an individual stake great enough to warrant suit, treble damages are impractical, and where monetary damages are prospective only, they are impossible.

Where a meaningful deterrent and incentive is necessary before positive antitrust policies will be implemented, civil penalties as found in section 17206, are not superfluous.[7] (See also Motors, Inc. v. Times-Mirror Co., 102 Cal.App.3d 735, 162 Cal.Rptr. 543.)

***475** When a statute is clear on its face it is both unnecessary and improper to engage in the murky

interpretation process. (See Estate of Todd, 17 Cal.2d 270, 109 P.2d 913.) It is the Legislature's responsibility to determine what is wise or practical and courts may not interpret where interpretation is not demanded. (People v. Sands, 102 Cal. 12, 16, 36 P. 404); and where there is no uncertainty or ambiguity on the face of a statute the court should apply it according to its plain meaning. (People v. Chambers, 7 Cal.3d 666, 674, 102 Cal.Rptr. 776, 498 P.2d 1024.)

Although the unfair competition statute uses the conjunctive term "and" to separate several classifications of prohibited conduct, there is no uncertainty (Santos v. Dondero, 11 Cal.App.2d 720, 54 P.2d 764), nor does the fact certain acts may be covered by more than one classification create an ambiguity justifying applying the clearly broad statutory reference "unlawful business practice," only to the narrower acts "denounced by Business and Professions Code Sections 17500 to 17535 ...."

In order for the Cartwright Act to be excluded from the section 17200 definition, therefore, the exclusion must come from the Act itself. The Act does just the opposite:

> "The provisions of this chapter are cumulative of each other and of any other provision of law relating to the same subject in effect May 22, 1907." (s 16700; added Stats. 1941, c. 526, s 1, p. 1834.)

NAR argues this language makes Cartwright Act penalties cumulative only of each other and of other provisions of the law relating to the same subject in effect before May 22, 1907. Such a restrictive interpretation undercuts the very purposes for which the Cartwright Act was enacted: "to maintain competition completely free, unlimited, and unfettered ... (making) unlawful partial restrictions and limitations on competition as well as those which result in its complete absence." (***476**Associated Plumbing Contractors of Marin, etc., Counties, Inc. v. F.W. Spencer & Son, Inc., 213 Cal.App.2d 1, 7, 28 Cal.Rptr. 425.) By enacting section 16700 the Legislature simply "disclosed an intent that the common law is not to be superseded ...." (Widdows v. Koch, 263 Cal.App.2d 228, 235, 69 Cal.Rptr. 464.) It did not evidence a desire to limit the state's ability to control unlawful and unfair business practices, nor has it adopted a policy preventing the People from remedying practices constituting "unfair competition."

A court must "construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (****737**Clean Air Constituency v. California State Air Resources Bd., 11 Cal.3d 801, 814, 114 Cal.Rptr. 577, 523 P.2d 617.) This issue was similarly resolved in the United States Supreme Court's analysis of the relationship of the Sherman Act to the federal equivalent of our unfair competition statutes, 15 U.S.C.A. s 45; FTCA s 5) which also allows civil penalties. In Trade Comm'n v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, the Government was admittedly proceeding under the unfair competition legislation and, at the same time, was proceeding against the same defendants in a separate Sherman Act criminal action. Assuming the same acts formed the basis for both legal actions the court, after finding no contrary congressional intent, held the two statutes provided the Government cumulative remedies. (Id., p. 694, 695, 69 S.Ct. pp. 800-801.)

Section 16700 does not exclude the civil penalty in section 17206. The demurrer was improperly sustained.

THE COURT DID NOT ERR IN FAILING TO ENJOIN CAR AND NAR IN A MANNER SIMILAR TO SDBR ALTHOUGH IT FOUND EACH "FOSTERED AND SANCTIONED" POLICIES ESTABLISHING AN ILLEGAL GROUP BOYCOTT.

[10] The court has the power to refuse to enjoin future conduct where it is satisfied there is no reasonable possibility past unlawful acts will be repeated. In fact, where the injunction is sought solely to prevent recurrence of proscribed conduct which has, in good faith been discontinued, there is no equitable reason for an injunction. (Rosicrucian Fellowship v. Rosicrucian etc. Ch., 39 Cal.2d 121, 144, 245 P.2d 481;Mallon v. City of Long Beach, 164 Cal.App.2d 178, 190, 330 P.2d 423.)

***477** In its judgment the trial court noted it received "assurances" NAR and CAR would take no action, direct or indirect, to undermine SDBR's compliance with the terms of the injunction imposed upon it. It then reserved jurisdiction for an indefinite time to impose an injunction on a showing of appropriate future circumstances.

We find no abuse of discretion in the court's action because it made a formal finding CAR and NAR at all times acted in conformance with their understanding of the law and with the intent to comply with that law. Further, each assured the court it had already announced to its members the similar rule established in Hounsell before entry of judgment herein.

While the People argue the importance of having an injunction of statewide applicability they ignore the fact the only conduct found to violate the Cartwright Act was that specifically related to the residential MLS of SDBR. As to this issue the relief prayed for was limited to the specific local MLS and Board; the prayers which would have statewide application were on issues as to which they did not prevail.

REFUSING MLS ACCESS TO ANY LISTING AGREEMENT EXCEPT ONE WHICH GRANTS THE LISTING BROKER AN "EXCLUSIVE" RIGHT TO SELL, UNLAWFULLY RESTRAINS TRADE.

[11] There are three types of listings common in the real estate industry:

(a) An exclusive right to sell listing entitles the listing broker to the agreed commission if the property sells within the time frame of the agreement even though the sale is made by persons other than the listing broker. Thus, a full commission is received if the home owner sells the property, though the broker has made no effort, nor incurred any expense toward marketing the product.

(b) An exclusive agency listing guarantees a commission to the listing broker in every sale except where the homeowner individually finds a buyer and makes the sale.

(c) Open listings are those which guarantee the listing broker a sales commission only if the property is sold through his efforts. The parties are free to negotiate what amount, if any, of the listing broker's actual ***478** costs in attempting to market the property should be paid by the homeowner where the property is sold by another, or not sold at all.

****738** While each listing type is potentially available to property owners in San Diego County, an owner who wishes the exposure offered by the SDBR MLS must agree to an exclusive-right-to-sell listing. This official SDBR policy is admittedly advocated and encouraged by CAR and NAR, satisfying the requirement of joint action. The People correctly argue the economic power on the market of (at least) the residential MLS combined with the listing limitation effectively throttles consumer efforts to negotiate for better deals on commissions because by so doing they will be foreclosed from essential MLS exposure. From the trial court's finding participation in the residential MLS essential to the economic success of most residential brokers operating within SDBR territory, we can deduce the unwillingness of most brokers to list residential properties (with generally smaller potential commissions than investment properties) on terms excluding them from that essential marketing tool.

The court upheld this restriction as reasonable in order to insure a listing broker advertising in the MLS will not be faced with the "higher risk of being deprived of any commission." Commendable as this personal economic concern may be in regard to brokers it overlooks the impact on the consumer (property owner).

The general public is the beneficiary of the antitrust laws and policies adopted for purposes benefitting cooperating market competitors may yet be unlawful where joint activity conflicts with the public interest in preserving competition. (Paramount Famous Corp. v. U.S., 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145.)

It is not necessary to show suppression of all competition, nor universal dissatisfaction with the policy. Neither good intentions of the parties nor some good results may offset the public right to be free from competitive restraint.

Here the proved fact of substantial MLS impact on the market place leads to the inescapable conclusion limiting access impermissibly restrains the public's ability to compete in negotiating for alternative type listings. It is this forcing of preference upon consumers which is unlawful. (Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 935, 130 Cal.Rptr. 1, 549 P.2d 833.)

***479** Permitting brokers to market properties listed other than by "exclusive right to sell" agreements if they desire imposes no great foreseeable burden on the MLS. A fee sufficient to allow MLS a fair return is

charged each participant in its service. Each additional property exposed through MLS potentially benefits all subscribers who may wish to pair it with a buyer. The decision to assume a "risk" of lost commission is properly a decision for the individual listing broker who may negotiate other terms which may mitigate this loss. Further, should an MLS subscriber see the listing and deal "behind the back" of the listing broker, the SDBR arbitration and grievance committees are well equipped to provide relief.

The "exclusive right to sell" policy violates the Cartwright Act.

On remand the trial court shall frame an appropriate injunction as to SDBR, and such injunctions as it deems required as to CAR and NAR, to insure those using the SDBR MLS are subjected to no direct or indirect policy inducing acceptance of only exclusive right to sell listings; to insure access to the residential MLS to any type listing agreement presented by its subscribers, and to insure the right of access is included in the written MLS policy.

BY ADOPTING AND ADHERING TO POLICIES WHICH ENCOURAGED MEMBERS TO DISCRIMINATE IN COMMISSION SPLITTING DIRECTED AT UNDERCUTTERS SDBR ENGAGED IN ILLEGAL PRICE FIXING.

[12] Undisputed evidence shows San Diego area realtor associations adopted and adhered to a standard five percent commission rate until 1955 when it was raised to six percent by agreement reached during joint meetings of the major local associations. ****739** Advisory schedules were published, disseminated, and members were urged to comply. In 1974 and 1975, 97 percent of SDBR MLS properties listed were still at a flat 6 percent. (The largest portion of rates other than six percent were actually higher; of those one to two percent which were lower, most were attributable to Twin Palms Realty (TP), the major price undercutter whose travails are discussed below.)

The evidence shows local real estate brokers deal with non-homogeneous products involving differentiated services and, in a truly competitive market, one would expect a wide variety of rates and prices. In the absence of either a perfectly competitive industry or governmental ***480** price control, the degree of uniformity in rates shown here gives rise to an inference the rates are artificially and collusively stabilized.

The People introduced expert testimony of Dr. Bruce Owen, Ph.D., relating to this issue. He considered several factors:

(1) The local real estate market is "monopolistically competitive" in that there is a large number of similar sellers competing to sell different products.

(2) The MLS requirement each listing published must show the listing broker's commission rate acts as an instant "price cheater" detection device.

(3) The SDBR grievance and arbitration mechanism provides a means of keeping undercutters in line.

(4) There is an excess capacity of sellers.

(5) Failure of the uniform rate to decrease as the real estate inflation outstripped the rise in the cost of doing business.

Based in part on Owen's testimony, the trial court found the standard rates prevailing over a long period of time to be evidence of collusive price setting or other artificial influence. It also found four activities attributable to SDBR policies which are useful to maintain such uniformity: publishing and distributing sample literature using 6 percent and $^{50}/_{50}$ split as examples; requiring the listing commission to be included in the published MLS, thus aiding those who would bring pressure to bear on price cutters; entertaining complaints against undercutters through its ethics or arbitration machinery brought by persons motivated by the undercutter's deviation from the usual 6 percent rate and $^{50}/_{50}$ commission split, and continuing the foregoing practices even after it ceased publically recommending adherence to the standard rate it had developed and maintained for many years. Each of the above findings is supported by substantial evidence.

Adoption of standard rates of real estate commissions through concerted efforts of a real estate board, similar to those actions engaged in by SDBR and other realtor boards in establishing uniform rates in San Diego County, was condemned as illegal per se price fixing violating the ***481** Sherman Act, section 3, as early as 1950 in United

States v. Real Estate Boards, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007.

No party here contends the uniform prices were originally set other than by collusive actions of the local realtor boards with the blessing of the state and national associations, or that their actions in promoting adherence to that policy were other than per se violations of applicable antitrust legislation. They do contend, however, these transgressions, and therefore their liability for them, abruptly ceased when, in 1971 and early 1972, each adopted a 14 point policy stating unequivocally that commissions and splits were henceforth to be set individually by their members and each disavowed the previous policies. Thus, after more than 20 years of SDBR and association propagandizing the industry, and their members in particular, to the effect it was not only economically disadvantageous to cut prices or offer less than a $^{50}/_{50}$ cooperative split, but a sanctionable breach of ethics as well, the stated policies changed.

Except for publicizing the new "hands off" policy, the associations took no affirmative action to promote individualization of pricing or splits among members, nor to encourage deviation from the artificially inculcated uniformity in San Diego County.

****740** The People argue, as they did at trial, a per se standard of illegality is the appropriate test. This would preclude the defense (a) the rate selected was reasonable; and/or (b) there may be legitimate business purposes other than the stabilization of rates, and/or (c) the parties did not intend to impact prices by their conduct. (Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S.Ct. 1925, 1927,164 L.Ed.2d 580;United States v. Trenton Potteries, 273 U.S. 392, 397-398, 47 S.Ct. 377, 379-380, 71 L.Ed. 700.)

The trial court analyzed the anticompetitive effects of this continuing conduct with little or no regard for the impact previous associational conduct had on the setting of commissions and splits. (After all, when a formation has been artificially stimulated to march to a 6-percent tune for more than 20 years its cadence is not likely to change merely because the band stops playing.)

An agreement to exchange price information even in the absence of an agreement to adhere to a price schedule, which tends to stabilize prices may violate antitrust laws. (***482**United States v. Container Corp., 393 U.S. 333, 334, 337, 89 S.Ct. 510, 511, 512, 21 L.Ed.2d 526.) However, Container stopped short of declaring a mere reciprocal exchange of price information, in and of itself, is a per se violation. (See concurring opinion by Fortas, pp. 338-340, 89 S.Ct. pp. 513-514.)

We conclude the court properly refused to apply a per se rule here. In not applying a per se rule to actions only ancillarily affecting price competition the Supreme Court has adopted a policy of upholding those actions which are designed to and actually do improve competition to a degree which significantly offsets any minimal subsidiary restraint. (Generally see Sullivan, Antitrust (1977) s 76, p. 205.)

Therefore, our analysis of the trial court's findings requires a review to see if there is evidence supporting a finding the exchange of price information here was designed to and actually does promote competition and, if so, whether the stimulus to competition outweighs the anticompetitive scope of the restraints which are created.

We agree with the trial court's conclusion evidence of the long term standing prevalence of the 6 percent uniform rate evidences the impact of artificial forces on the market. There is no evidence to support its conclusion the SDBR has not been shown to be responsible for this artificial stabilization. In fact, the evidence viewed in a light most favorable to SDBR shows the only artificial forces on the market were those applied by or as a result of SDBR policies.

A review of the uncontradicted evidence shows the following: In August 1974, SDBR adopted an MLS policy to dispel confusion generated by the then prevailing practice of designating commission split offers by symbols. Concurrently, SDBR was confronted, for the first time, by a major price cutting operation conducted by one of its own members (TP). TP extensively publicized its uniform policy of listing any property for a $1,200 commission, which it uniformly offered to split $800 to itself and $400 to any cooperating seller.

TP generally confined its early sales activities to the Mira Mesa area but soon spread to others and opened several branch offices.
November 10, 1974 NAR adopted a policy also

designed to deal with the confusion over the use of symbols, a problem of national concern:

> " 'If the listing broker desires to offer to any MLS participant a commission split other than the split indicated on his listing as published ***483** by the MLS, it shall be accomplished through advance notification by letter to the other broker.' "

Four days later, Art Leitch Realtors, a direct competitor of Twin Palms, owned by NAR's first vice president who was present when the November 10th policy was adopted, sent written notice to TP that future cooperation would result only in a $400 commission regardless of amount of total ****741** commission involved. A November 2 letter from Forest E. Olson, Inc., was less tactful.[8]

A courtesy copy of the Olson letter was sent to SDBR where Executive Director Kraus read it and discarded it. Kraus was more than somewhat familiar with the issue because, as a director of the NAR, he had been present and voted to adopt the NAR policy.

(2) In February, 1975, even though no brokers had used the reciprocal symbols in MLS listings since August, 1974, SDBR modified its previous policy statement to include the NAR language.

In February, 1975, John Kirchner was an SDBR director and its MLS committee chairman and a direct TP competitor. He contacted Henry Pena, TP's owner, and confirmed Pena's intention to uniformly continue undercutting the 6 percent "standard" rate and deviating from the $^{50}/_{50}$ commission split. He then advised Pena there would soon be some changes made. Indeed there were. A few days later Kirchner presented a motion to his fellow SDBR board members to adopt a policy advising its members it would be proper to split a listing commission with a cooperating seller differently than publicly stated in an MLS listing if the broker who was to be excluded from the blanket offer was first notified in writing.

With Kirchner voting as a director this policy was adopted and added to the NAR language.

(3) After adoption of the February, 1975 MLS commission split policy, more SDBR members sent letters to TP advising they would pay ***484** only $400 if TP cooperated in selling their properties. Many of these letters were "blanket," referring to any future sale; some were from brokers who did not even list properties within geographical areas where TP was active; some stated their policy would change when TP raised its commission rates and split $^{50}/_{50}$; most were from active SDBR committee members.

Several persons, in doubt about how to avoid paying the MLS listed commission split to TP, contacted Kraus and other SDBR staff members. Invariably they were referred to the MLS split policy.

(4) The language of the new policy implied individual letters had to be sent to TP before the specified property was sold, identifying that parcel. However, many letters were of the "blanket" nature. When, through arbitration, TP successfully forced a listing broker to split $^{50}/_{50}$ (as listed in the MLS) on a sale made by TP, prompt action was taken. SDBR "clarified" its existing policy stating "blanket" letters were really sufficient. More than that, the policy was made retroactive. (This time Kirchner seconded the motion which was made by another direct TP competitor). Similar letters kept coming to TP, along with others simply expressing general dissatisfaction, and harassing, mostly anonymous phone calls. In addition, some homeowners holding current listings with TP were informed by TP competitors that other brokers would not show their property so long as it was listed with TP.

This concerted activity of SDBR members eventually pressured TP into raising its minimum commission to $1,600 and offering a $^{50}/_{50}$ split, however, only one brokerage elevated its previous blanket offer of $400.

On overwhelming evidence the trial court found: several brokers active in SDBR activities were having difficulty competing with TP for sales in Mira Mesa, where TP's undercutting efforts to promote listings was proving singularly successful. (Notably Ideker, Kirchner, Mason, Meetze, Diechoff, Leitch and others.) It found certain of these brokers knew and had in mind ****742** their problems with TP when they participated in adopting the SDBR MLS policies and they understood the manner in which the rule contained in the statement would facilitate discriminatory treatment of TP. In addition, SDBR's

Executive Director, Kraus, was previously in receipt of the Olson letter.

***485** In spite of the above findings the trial court gave no weight to the adoption of the February, 1975 policy because there was no evidence a "majority of the various committees and boards in question" were motivated to adopt the policy for the purpose of affecting TP, and the later retroactive "clarification" was after the present lawsuit had been filed. There is no substantial evidentiary support for the first reason and the second is irrelevant. Undisputed evidence shows the 1976 "clarification" was adopted specifically to deal with letters which had been sent to TP. SDBR was well aware many letters had been sent to TP which were "blanket" in nature, it had no reason to believe letters had been sent to any other broker. Its retroactivity was directed solely at TP.

More importantly, the trial court's search for a specific motive on the part of SDBR to put financial pressure on TP is misplaced. None need be shown in the rule of reason analysis. If such an intent were found a per se violation would exist.

What business purpose justifies the discriminatory split policies? The trial court suggested it appeared to be a proper effort to offset confusion over the use of certain symbols on listing forms indicating the listing broker would split commissions with a cooperating selling broker on the same terms as the seller would split equivalent transactions where the rates were reversed. However, the proof shows the local practice of using such designations had already ceased in response to the August 1974 policy. A survey of SDBR MLS forms during the six months immediately preceding February, 1975 showed none, and the testimony showed the problem abating by the end of 1973.

SDBR members wrote these letters and unilaterally discriminated against TP actually having in mind SDBR would uphold this practice through its arbitration service, and it did. This knowledge undoubtedly encouraged the practice which was used to goad TP into raising its prices and, in effect, to punish TP for deviating from the desired standard commission rate. The extent to which a discriminating SDBR member broker could rely is evidenced by the Clairmont Realty (Nies)-Pena (TP) arbitration. In that matter TP sold one of Clairmont's listings which advertised a $^{50}/_{50}$ split to all comers. Previously, Clairmont had sent a "blanket" letter to TP unilaterally stating it would pay TP only $400 on any sale generated by TP. Clairmont's letter stated it was being sent in accordance with the "MLS suggestion ... in (SDBR's) Realtor Report Volume 3 No. 21 ...."

***486** A purchase contract was executed by both buyer and seller, and by agents for both Clairmont and TP on August 13, 1975. The contract included a handwritten provision the commission would be split on a $^{50}/_{50}$ split basis, and escrow instructions prepared August 14, 1975 reflected that agreement.

However, Clairmont's manager later learned of the contracted split and reneged, finally offering a two-third/one-third split. TP did not agree and filed a complaint with SDBR which was then arbitrated. In spite of the fact a $^{50}/_{50}$ split was included in the already executed written purchase contract, Clairmont's later unilateral oral refusal to split either in accord with the contract, or the advertised MLS, was upheld.

By upholding its split policy in this manner, SDBR refutes its contention the policy was designed only as a more definitive expression of its hands off policy. By referring members to its split policy when executive officer Kraus and staff members received specific inquiries on how to deal with the price cutter (TP), members were, in effect, told SDBR would uphold any unilateral action taken in accordance with this policy and, in fact, it did.

Further, at an SDBR conducted seminar in November or December 1976 (even after ****743** the present law suit was filed) one speaker (identified as from SDBR) commented during his presentation on how to fill out listings and, in discussing the present law suit, stated: " 'How can you deal with a $1600 broker who gives you $400 and keeps $1200 for himself?' " and further: "How would you like to deal with a guy like Henry Pena every day?' "

By refusing listing symbols which clearly state the listing broker insists in reciprocal splits in every case (e. g., "R") the new SDBR split commission policy tells brokers they must advertise specific commission splits tailored to the specific attributes of each listing, however, in practice if they unilaterally establish blanket discriminatory reciprocal splits in individual cases, SDBR will enforce them through its grievance and arbitration

procedures even though not based on any factors suggested by its policy.

Interpretation of SDBR policies by its executive director and committee members has fostered unilateral commission-splitting discrimination against the competing rate cutter and permitted the use of its arbitration ***487** and grievance procedures to force TP to accept reduced commission splits over its objections. By so doing SDBR gives encouragement to those brokers wishing to impose economic pressure to cause their competitor to alter its commission structure. The extent to which such brokers could rely on SDBR's support is shown in the decision rendered in the Clairmont Realty-TP arbitration where TP was also assessed the costs of the proceeding.

Although the court gave no weight to the letters and discriminatory acts of brokers who unilaterally determined to treat TP differently than others who cooperated in the sale of realty, the remaining uncontradicted evidence shows the letters did not surface until some two and one half years after SDBR's "hands off" policy was adopted. Even during this two-and-one-half-year period the uniformity of commissions continued unabated, contrary to normal competitive economic expectations, influenced only by the policies of the association and the acts of its members in conformance thereto. We view the effect of these policies in conjunction with the existing long-term history of association activity to prevent price competition in San Diego County, the consistent promotional efforts to publicize the advantages of not competing on pricing, and propagandizing the lack of ethics involved in price cutting. The evidence shows the MLS policies have, in fact, maintained pricing uniformity and substantially stabilized the commissions charged by SDBR members as revealed by the statistics produced in this case. There is no substantial evidence to the contrary. The degree of stabilization of the monopolistically competitive market here, with a surplus of competitors selling distinguishable services, is substantial. As such it is an unreasonable restraint of trade. (United States v. Container Corp., supra, 393 U.S. 333, 334, 337, 89 S.Ct. 510, 511, 512, 21 L.Ed.2d 526.)

By such action SDBR violates both the Cartwright Act and the unlawful competition statutes for which the People are entitled to injunctive relief, and, if appropriate, civil penalties.

The judgment is reversed in the following particulars:

(1) as to the First Cause of Action, paragraph 4, relating to restrictions on access to the investment portion of the SDBR MLS, the judgment is remanded for further proceedings to determine the issue of whether an illegal tying arrangement exists and to grant appropriate relief if required.

***488** (2) as to the Second and Sixth Causes of Action the judgments are reversed and the matter remanded with directions to issue injunctive relief on appropriate terms as generally contained in the prayer of the Second Amended Complaint, paragraphs 1(a), (d), (e) and (f); 2, and 5.

On remand the court is directed to determine and impose the appropriate civil penalty, if any, for each act found to violate the Cartwright Act.

In all other respects the judgment is affirmed.
GERALD BROWN, P. J., and STANIFORTH, J., concur.

Carlsen v. Zane (1968) 261 Cal.App.2d 399, 67 Cal.Rptr. 747

Action for recovery of broker's commission. The Superior Court, Riverside County, Alexander B. Yakutis, J. pro tem., entered judgment for brokers and owners appealed. The Court of Appeal, Kerrigan, J., held that where agreement with brokers provided that brokers had exclusive and irrevocable right to sell parcel of land until expiration date of agreement, and within term of listing agreement owners sold portion of parcel, brokers were improperly denied commission on sale by owners on theory that brokers failed to use due diligence in procuring purchaser.

Reversed.

Attorneys and Law Firms

****748 *400** Miller & Cardin and George H. Miller, Rubidoux, for plaintiffs and appellants.

Carter & Coudures and Charles H. Carter, Corona, for defendants and respondents.

Opinion

OPINION

KERRIGAN, Associate Justice.

The plaintiffs are copartners and licensed real estate brokers who entered into a 90-day written 'exclusive right to sell' agreement with the defendants on January 17, 1965. The agreement contained the following provisions: that the plaintiffs had the exclusive and irrevocable right to sell a 15-acre parcel of unimproved land owned by the defendants until the expiration date of April 17, 1965, for the sum of $3,600 per acre; that the brokers had the right to negotiate ***401** sales of the 15 acres in separate 5-acre parcels; that the owners agreed to pay the brokers 10% Of the selling price; and that the 'owner agrees to pay (the brokers) said per cent of the list price if owner withdraws said property from sale * * * or otherwise prevents performance hereunder by (the brokers) during the said period of (the) agreement regardless of whether a buyer was or was not obtained.'

Within the term of the listing agreement, in mind-March 1965, the defendant-owners sold 10 of the 15 acres to a personal friend for the sum of $2,600 per acre, comprising the total sum of $26,000. The remaining five acres were not sold.

Plaintiffs filed suit to recover $5,400 plus interest and attorney fees. The brokers contend that they are entitled to a 10% Commission of the list price of $54,000 for the entire 15 acres even though the 10-acre parcel was sold by defendants for less than the list price, and 5 acres remained unsold. Defendants countered by filing a cross-complaint for fraud on the ground that the brokers had falsely represented that they had an immediate buyer of 5 acres at the list price of $3,600 per acre prior to the execution of the exclusive listing agreement, which constituted the inducement for signing ****749** the listing, and sought recovery of $5,000 exemplary damages.

The trial court found, 'That the defendants (sic-plaintiffs) did not, in fact, exercise due diligence in procuring a purchaser * * * even though during the existence of the 'exclusive right to sell' agreement a portion of the land (10 acres) was sold by reason of defendants' own efforts,' and ruled that plaintiffs were not entitled to recover. The judgment also provided that the defendants take nothing whatsoever by reason of their cross-complaint. No appeal has been taken from the judgment on the cross-action.

Although the plaintiffs' attack on the findings and judgment is stated in varying forms, the sole issue on appeal is whether an owner of real property is liable for payment of a broker's commission under an 'exclusive right to sell' agreement where the owner sells the real property to a third party during the term of the agreement as a result of his own efforts and the broker is not the procuring cause of the sale. [1] [2] [3] [4] [5] Exclusive listing agreements are of two types. (Tetrick v. Sloan, 170 Cal.App.2d 540, 546—547, 339 P.2d 613.) An 'exclusive agency' agreement is interpreted as prohibiting the owner from selling the property through the agency of another broker during the listing period. (***402** Lowe v. Loyd, 93 Cal.App.2d 684, 686, 209 P.2d 851), but the owner may sell the property through his own efforts. (E. A. Strout Western Realty v. Gregoire, 101 Cal.App.2d 512, 518, 225 P.2d 585; Faith v. Meisetschlager, 45 Cal.App. 7, 9, 187 P. 61.) However, an 'exclusive right to sell' agreement (exclusive sales contract) prohibits the owner from selling both personally (Kimmell v.

Skelly, 130 Cal. 555, 558, 62 P. 1067; Ertell v. Lloyds Food Prod., Inc., 115 Cal.App.2d 615, 617, 252 P.2d 683), and through another broker (Wright v. Vernon, 81 Cal.App.2d 346, 347, 183 P.2d 908), without incurring liability for a commission to the original broker. (Harcourt v. Stockton Food Products, 113 Cal.App.2d 901, 905, 249 P.2d 30; Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585.) In the event the owner breaches this type of agreement, he is liable for the commission which would have accrued if the broker had procured a purchaser during the period of the listing. (Justy v. Erro, 16 Cal.App. 519, 527—528, 117 P. 575.) The broker need not show that he could have performed by tendering a satisfactory buyer (Kimmell v. Skelly, supra, p. 560, 62 P. 1067), or that he was the procuring cause of the sale. (Leonard v. Fallas, 51 Cal.2d 649, 652, 335 P.2d 665.) The owner may breach the agreement by negotiating a sale in violation of the agreement (Lowe v. Loyd, supra) or by action which renders the broker's performance impossible. (Alderson v. Houston, 154 Cal. 1, 10, 96 P. 884.)

[6] [7] In the case under review, the trial court expressly found that the contract here involved was an 'exclusive right to sell' agreement, but denied recovery because the plaintiffs failed to use 'due diligence in procuring a purchaser for the land.' The court erred in applying the 'due diligence' test inasmuch as such a finding is the equivalent of stating that the brokers failed to perform the contract by not procuring a buyer ready, willing and able to purchase on the terms specified in the listing agreement, which rule of performance by the broker is applicable only to general, nonexclusive agreements. (See McCoy v. Zahn Corporation, 183 Cal. 191, 195, 191 P. 20; Leonard v. Fallas, supra, 51 Cal.2d 649, 652, 335 P.2d 665.)

[8] Inasmuch as a reversal is required and the subject of damages will necessarily constitute a significant issue upon retrial, a discussion of such issue is deemed advisable for the guidance of the trial court. The damages awarded in cases where exclusive broker agreements have been breached may be the full commission provided in the listing agreement where the property is withdrawn from sale by the owner's action. ***403** (See Baumgartner v. Meek, 126 Cal.App.2d 505, 510, 272 P.2d 552.) The 10-acre parcel embraced within the listing agreement here was sold for a price less than that provided ****750** in the listing agreement, and it should be further noted that the remaining 5 acres were not withdrawn from sale by the owner, and theoretically, the plaintiffs were at liberty to sell the remaining 5-acre parcel at any time during the period of the listing agreement. Consequently, the measure of damages should be limited to a percentage of the sales price actually obtained inasmuch as the agreement herein explicitly provides that '(O)wner agrees to pay- * * * brokers 10% Of the Selling price in the event that during the period of this agreement * * * said property is sold or exchanged by (brokers) or any other person including owner.' (Emphasis supplied.) It necessarily follows that upon retrial the court must limit plaintiffs' recovery of a broker's commission to the selling price secured by the defendants in the sum of $2,600 per acre for the 10-acre parcel.

Judgment reversed.

McCABE, P.J., and TAMURA, J., concur.

Parallel Citations

261 Cal.App.2d 399

Tetrick v. Sloan (1959) 170 Cal.App.2d 540, 339 P.2d 613

Broker's action against landowner for commission assertedly due for negotiating petroleum lease. From an adverse judgment rendered by the Superior Court of Los Angeles County, Walter H. Odemar, J., plaintiff appealed. The District Court of Appeal, Fox, P. J., held that where landowner's authorization to negotiate petroleum lease gave broker no designated time in which to procure lessee and did not give broker exclusiver agency or exclusive right to lease, authorization was analogous to general listing and landowner could revoke authorization at any time before broker performed.

Affirmed.

Attorneys and Law Firms

****614 *542** Jerome J. Mayo, Harriet Pugh, Los Angeles, for appellant.

Hightower, Gregg & Garland, David M. Garland, Los Angeles, for respondent.

Opinion

FOX, Presiding Justice.

Judgment was entered for defendant at the conclusion of a nonjury trial in which plaintiff sought to recover for real estate brokerage services.

Defendant owns certain real property in Ventura County, known as the Bar 'S' Ranch. On March 17, 1955, the following writing was signed by the defendant:
'I Authorize P. D. Tetrick to negotiate a new lease with a Major Oil Company on my property, located in Ventura County, California, known as Bar 'S' Ranch, consisting of 2275 acres more or less. Oceanic Oil Company has now under lease the deep rights and if Oceanic *Oil* Company does not comply with its present agreement in full, then it is my desire that P. D. Tetrick is to proceed in negotiating a new deal. I am to retain 1/6 or 16 2/3 land owners royalty also I am to receive 1/2 of any bonus paid in the consummating of this deal.'

Pursuant to this authorization, plaintiff contacted various oil companies, including the Texas Company. The trial court specifically found 'That it is true that plaintiff discussed with major oil companies with regard to an oil lease on the defendant's 'Bar S Ranch's property, and it is true that plaintiff contacted The Texas Company with regard to an oil and gas lease * * * prior to March 19, 1956 * * *.' Defendant, by an instrument in writing, on March 19, 1956, canceled the authorization granted in March, 1955. Subsequently, on July 6, 1956, defendant signed an oil lease with the Texas Company, and received a bonus in excess of $39,000. Plaintiff thereafter commenced ****615** an action to recover one half of this bonus. Judgment was for defendant and plaintiff prosecutes this appeal therefrom.

Plaintiff's version of his activities as disclosed by his opening brief with respect to the granting of the lease to the Texas Company is as follows:

'Plaintiff * * * first contacted The Texas Company by contact ***543** with Mr. Shaefer, then Mr. Brandt, Mr. Baker, Mr. Hubble in Santa Paula, and finally, Mr. Shuey. The contact with Mr. Hubble was by telephone on or about October 7, 1955. Thereafter, he [plaintiff] went to Mr. Shuey's office around January 20, 1956. On this occason, defendant was present and Shuey told defendant that The Texas Company was interested in his property at $60.00 an acre. Defendant used the prior offer which plaintiff had arranged from the Superior Oil Company as a lever to get a deal from The Texas Company and he lied to Mr. Shuey and told him that he had an offer from Superior Oil Company of $100.00 an acre. At that time The Texas Company was willing to offer $60.00 an acre and defendant wanted $100.00 an acre. On that occasion, the only thing they talked about was the initial amount per acre. (It is to be noted that this was following the pattern theretofore set by defendant, in that on the Union Oil contract [sic] and the Superior Oil contract [sic] nothing was discussed other than the initial payment, and that when that was not proven satisfactory, defendant refused to do anything more in the premises.) During this conversation with Mr. Shuey, the 3% overriding royalty was discussed. Thereafter, at defendant's request, he [plaintiff] again contacted Mr. Hubble. Plaintiff stated that with regard to The Texas Company, as with regard to all other oil companies, he interviewed or talked with the Land Agent, and in each case told them that he was interested in leasing the Bar 'S' Ranch. * * *'

In his opening brief, plaintiff summarizes Shuey's testimony as follows:

'Mr. Shuey was called by the defendant and stated that he was Assistant Divisional Land Man for the Producing Department of the Pacific Coast Division of The Texas Company, located in Los Angeles. Mr. Shuey stated that the first time he talked with defendant, he did not talk about the entire Bar 'S' Ranch but a portion of it. He stated that The Texas Company has a system whereby prospective oil lands are processed through the company and then finally there is an authorization for The Texas Company to lease. He stated that, of course, the lands are first given to the Geological Department, and finally an authorization is made.

'Mr. Shuey stated that the Oceanic Oil Company lease mentioned in the agreement of March 17, 1955, was quitclaimed in October of 1955 and that he would not negotiate on any of the Bar 'S' Ranch property until it had been quitclaimed.

Mr. Shuey stated that the first authorization from management ***544** * * * to enter into a lease on 673 acres of the Bar 'S' Ranch was had in June of 1956. He said that he recalled a conversation with plaintiff, but could not place the time, except that it was in early 1956, between January and June.

'Mr. Shuey's then version of the meeting with plaintiff was that plaintiff told him he was representing defendant and asked him if he was interested in a lease, and that Shuey cut him off short, telling him he would have to have written authorization. He maintained he had not seen or talked to plaintiff in 1955. Mr. Shuey, however, was not so positive later.'

The defendant's version of plaintiff's activity with respect to the Texas Company lease is that plaintiff had nothing to do with this lease and, he, defendant, negotiated and entered into the lease on the sixth of July, 1956. There is no showing that defendant did not act in good faith.

As grounds for reversal, plaintiff argues that the writing signed by defendant on March 17, 1955, constituted an offer for a ****616** unilateral contract and, once partly performed by plaintiff, defendant had no legal right to cancel such offer; and, having done so, plaintiff may recover on the contract as if he had fully performed. Plaintiff also contends that he is entitled to recover under the doctrine of promissory estoppel.

Essentially, this appeal involves two questions. First, did plaintiff sufficiently perform prior to March 19, 1956, so that he was entitled to his commission before his authority was revoked? Second, was defendant free to revoke plaintiff's authority without liability after plaintiff had expended time and effort pursuant to the March 17, 1955, authorization?

[1] It is plaintiff's position that his duties did not include the actual give-and-take phases of working out the terms and conditions of a lease with a potential lessee but that he was merely to aid the defendant in this regard; also, plaintiff argues that 'the word 'negotiate' * * * does not mean consummate, but means to treat with a view to coming to terms on some matter * * * to conduct communications or conferences as a basis of agreement. * * *' The trial court was of the opinion that this phase of the authorization was uncertain and on that basis received parol evidence as to the meaning of 'negotiate.' The defendant testified that plaintiff was 'to do everything except' sign for him. The trial court found against plaintiff on this issue and such finding is supported by substantial evidence.

[2] [3] Before a broker or salesman is entitled to a commission for the sale or lease of real property, he must find a party who ***545** is ready, willing, and able to purchase or lease on the terms and conditions specified in the contract of employment, or, if the precise terms are not specified, upon terms satisfactory and acceptable to his principal. Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 880, 306 P.2d 783; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 305–306, 266 P.2d 856; Diamond v. Fay, 23 Cal.App.2d 566, 568, 138 P. 933. This may be accomplished, inter alia, by securing a written contract or offer signed by the potential purchaser or lessee. In Gunn v. Bank of California, 99 Cal. 349, at page 353, 33 P. 1105, at page 1107, the court pointed out that: '[t]he contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect, or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract * * *.' See also, 2 Mechem on Agency 2d ed., p. 2003, § 2431. However, merely introducing the principal to a party who comes to an agreement with him after the termination of the

agency but who was not ready, willing and able to consummate the transaction during the life of the agency is in itself insufficient to entitle the broker to a commission. See Brown v. Mason, 155 Cal. 155, 158–159, 99 P. 867, 21 L.R.A.,N.S., 328; Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d at pages 307–308, 266 P.2d at pages 860–861; Nelson v. Mayer, 122 Cal.App.2d 438, 445–446, 265 P.2d 52.

[4] In the instant case, plaintiff did not secure a written lease or offer to lease from the Texas Company, nor did he introduce the defendant to any one willing to enter into a lease on terms and conditions acceptable to the defendant. The evidence is clear that when the plaintiff and defendant met with Shuey, the defendant wanted $100 an acre bonus for his property but Shuey was willing to pay only $60 per acre. Furthermore, there was no agreement as to the amount of land to be leased. Under such circumstances, and based upon the authority to which reference has been made, it is clear that as of March 19, 1956, plaintiff had not performed and was not therefore entitled to any commission.

[5] [6] [7] [8] Where, as in the instant case, there is no contract between the principal and the real estate broker or salesman 'that the latter shall have some particular time within which to find a purchaser [or lessee], it is, as a general rule, entirely competent for the principal to revoke the authority ****617** without liability at any time before it is performed. * * * The only thing which would prevent revocation or withdrawal would be performance. ***546** It would make no difference that much time had been spent or that the performance was great; unless the act could be regarded as at least practically performed, the principal might revoke without liability.' 2 Mechem on Agency, 2d ed., p. 2046, § 2449. In Heffernan v. Merrill Estate Co., 77 Cal.App.2d 106, 112–113, 174 P.2d 710 the court states the applicable rule as follows: 'According to the great weight of authority, an owner of real property who has not contracted to employ a broker for any specified period of time may revoke the employment and terminate the agency at any time before it is consummated.' The court then stated (77 Cal.App.2d at page 113, 174 P.2d at page 713), that '[t]he correspondence in the present case amounted to no more than an unilateral offer to sell on the part of the owner, which did not grant a specified time for performance by the broker. The authorities hold, under such circumstances, that the owner may revoke in good faith his offer at any time before complete performance of his broker by procuring a binding sale to one who is willing and able to purchase the property on the terms specified, and by securing the purchaser's written agreement to that effect.' As previously discussed. Plaintiff had not performed prior to the time he received defendant's written withdrawal of authorization. Plaintiff contends, however, that once he has commenced performance, the defendant could no longer revoke without incurring liability, citing Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086. See generally also, Restatement, Contracts, § 45; 1 Williston, Contracts, § 60A (1936 ed.). Plaintiff also argues that the doctrine of promissory estoppel is applicable (see generally, Drennan v. Star Paving Co., 51 Cal.2d 409, 333 P.2d 757; Restatement, Contracts, § 90). The plaintiff's argument misconceives the nature of his relationship with the defendant. Generally, there are three types of brokerage listings. First, the general listing. Such is revocable at the will of the owner in good faith at any time before performance, regardless of the efforts expended by the broker. Such a listing leaves the owner free to list his property with other brokers, to sell it himself, or to withdraw it from the market. Second, the exclusive agency. Terms are inserted in the listing which provide that for a stated period the owner will not deal through other brokers, yet he may sell the property himself without liability. Third, the exclusive right to sell. This type of agency even precludes the owner himself from selling the property during the stated term without paying the brokerage commission. All three varieties are basically ***547** offers for a unilateral contract and, by generally accepted principles of contract law, are revocable until accepted by performance of the requested. However, where the listing contains language to the effect that the broker shall have, for a stated period, an exclusive right to deal with or sell the property, the offer becomes irrevocable for the prescribed period. It is in those situations where the listing contains these added stipulations that we find the courts speaking of the irrevocability of the offer as a consequence of the expenditure of time and money by the broker in attempting to sell the property. After noting the three different types of listings referred to above, the court in Baumgartner v. Meek, 126 Cal.App.2d 505, 509, 272 P.2d 552, 554, states: 'In view of the nature of the basic transaction between the owner and the broker, that is, a listing which is no more than an offer of a unilateral contract to be accepted

only by a performance of the requested act, the additional stipulations were challenged in many courts as not resulting in any contract in fact between the parties (citations). But in many states, and in this state, courts have accepted such written listings as resulting in contractual relations. Though the basic offer to pay a commission for the procuring of a purchaser ready, able and willing to ****618** buy can still be accepted only by performance, nevertheless it has been held that these restrictive stipulations bind the owner and subject him to liability if he refuses to abide by them. These holdings are sometimes based on the idea that the restrictive clauses constitute subsidiary promises resting upon the consideration that the broker agrees to and does expend time and effort to bring about a sale.' After quoting from the Restatement of Contracts, section 45, the court continues: 'It is unnecessary to attempt to follow the reasoning given in the many opinions of courts dealing with this subject. We think that in California the rule has been too long declared and too often enforced to leave the matter open.' See Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067.

[9] The authorization in the instant case was analogous to a general listing. It gave plaintiff no designated time in which to procure a lessee and manifestly did not give plaintiff an exclusive agency or exclusive right to lease. The authorization is completely silent in this respect. In Summers v. Freeman, 128 Cal.App.2d 828, 831, 276 P.2d 131, 133, the court said that '[t]he general rule on exclusive agency agreements is stated as follows: 'A real estate broker's authority to sell real property is not exclusive, unless it is made so, by ***548** the contract of employment, in unequivocal terms or by necessary implication.' (Citation.)' Had the parties contemplated such a relationship they surely would have so stated in the writing. A general listing, as noted, is revocable at any time prior to performance without liability. To apply the rule from the Wilshire case (see section 45, Restatement of Contracts), supra, or the promissory estoppel doctrine to the facts of the instant case, would be to transform that which is equivalent to a general listing into an exclusive listing. This we cannot do. Therefore, as plaintiff did not perform the requested act prior to the revocation of the offer, and as defendant was free to revoke without incurring liability, the plaintiff has no right to redress in this action.

The judgment is affirmed.
ASHBURN and HERNDON, JJ., concur.

Parallel Citations
339 P.2d 613

Leonard v. Fallas (1959) 51 Cal.2d 649, 335 P.2d 665

Real estate broker brought action against owner of realty to recover commission. The Superior Court Los Angeles County, Roger Alton Pfaff, J., entered judgment in favor of the broker, and the owner appealed. The Supreme Court, McComb, J., held that where licensed real estate broker and owner of realty entered into contract whereby owner agreed to pay broker certain commission if realty was sold on prescribed terms while contract was in force, or if sold within 90 days after its termination to anyone whose name was registered with owner in writing as of March 22, the termination date, and on March 7 broker wrote letter to owner giving owner a list of persons contacted by broker, including name of certain prospective purchaser, and on March 22 broker's exclusive right to sell the realty expired, and on June 6 an escrow was opened between the owner and prospective purchaser listed by broker, whereby that prospective purchaser agreed to purchase the realty and the owner agreed to sell it to him, broker was entitled to his broker's commission from owner, though sale was arranged by another broker, and though escrow was not closed and sale was not consummated until July 6.

Judgment affirmed.

Opinion, 329 P.2d 529, vacated.

Attorneys and Law Firms

****666 *650** Bailie, Turner, Lake & Sprague and Frederick W. Lake, Los Angeles, for appellant.

Allan L. Leonard, Los Angeles, for respondent.

Opinion

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $8,000 in an action to recover a commission alleged to be due for breach of a contract for the sale of real property.

****667 Chronology**

i. On February 29, 1956, plaintiff, a licensed real estate broker, and defendant entered into the following contract:
'February 29, 1956

'Mr. Wayland T Leonard

Wayland T Leonard Co

215 West Sixth St.

Los Angeles 14 California
'Dear Mr. Leonard:

'In consideration of services rendered and to be rendered you are hereby granted the exclusive right to sell my property ***651** located at the northeast corner of Wilshire Blvd and Union in Los Angeles and described as Lots 14, 16 and 18 in Block 2 of the Fairview Tract, for a period of three weeks from the date of my signature. I agree to sell my property for $243,000.00 with 29% down and the balance payable annually within three years plus interest at 5% on the unpaid balance. I agree to pay you through escrow the Realty Board Commission which is 5% upon the first $100,000.00 of the purchase price, and 2 1/2% upon the balance of the purchase price, if said property is sold on the above terms or any other terms acceptable to me while this contract is in force, or if sold within 90 days after its termination to anyone whose name is registered with me in writing as of the termination date.

'Receipt of a copy of this contract, which shall inure to the benefit of and bind the successors, assigns, executors and administrators of the parties respectively, is hereby acknowledged.

'Date: 2-29-56

'Termination Date: March 22 1956 at 5 p. m.

Owner: /s/ Roy E Fallas

Roy E Fallas

4618 West 6th Street

Los Angeles Calif.
'I accept the above described employment and agree to use diligence in procuring a purchaser.

'Date: 2-29-56

Realtor: /s/ Wayland T Leonard

Wayland T Leonard

215 W 6th Street

Los Angeles, Calif.'

ii. On March 7, 1956, plaintiff wrote a letter to defendant giving him a list of the parties contacted by him to that date, which list included the name ofMorgan Adams.

iii. On March 8, 1956, plaintiff obtained an offer of $200,000 from Gilbert and Rothschild for the property described in the contract, which offer defendant declined.

iv. On March 9, 1956, plaintiff, who had previously contacted Mr. Adams relative to the property, again contacted Mr. Adams, who stated that he was not interested in the property at the price asked.

***652** v. On March 22, 1956, plaintiff's exclusive right to sell defendant's property expired.

vi. On June 6, 1956, an escrow was opened between Mr. Adams and defendant, whereby Mr. Adams agreed to purchase defendant's property for the sum of $220,000, and defendant agreed to sell it to him. This sale was arranged through Mr. Jones, a real estate broker associated with Dunn & Co. While the negotiations conducted by Mr. Jones were in progress, plaintiff telephoned Mr. Adams and was informed that he was then engaged in negotiations relating to the property. He told plaintiff, 'don't upset my negotiations. Don't disturb ****668** this deal.' He also informed plaintiff, 'Every broker in town has submitted the property to me one time or another.'

vii. On July 6, 1956, the escrow was closed and the sale consummated.

Questions: First. Did plaintiff comply with the terms of his contract with defendant?

Yes. These rules are here applicable.
[1] 1. The parties to a broker's contract for the sale of real property are at liberty to make the compensation depend upon any lawful conditions they see fit to place therein. (Kimmell v. Skelly, 130 Cal. 555, 559, 62 P. 1067; cf. Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585.)

[2] 2. Where an agreement provides that a real estate broker's commission is to be paid if the property is sold within a specified period to a person whose name is furnished to the owner by the broker, and the property is sold by the owner to such a party during the prescribed period, it is immaterial that the agent was not the procuring cause of the sale. (Fleming v. Dolfin, supra; Gregory v. Bonney, 135 Cal. 589, 592, 67 P. 1038; Walter v. Libby, 72 Cal.App.2d 138, 141(3) et seq., 164 P.2d 21; Mills v. Hunter, 103 Cal.App.2d 352, 357(3) et seq., 229 P.2d 456; Delbon v. Brazil, 134 Cal.App.2d 461, 464(1), 285 P.2d 710.)[1]

[3] 3. Where a landowner has agreed to pay a real estate broker a commission in the event of a sale, 'a sale' means the making of an executory binding agreement by which the property is to be sold to a purchaser obtained by the broker. (Two-good v. Monnette, 191 Cal. 103, 107(2), 215 P. 542; Coulter v. Howard, 203 Cal. 17, 25(6), 262 P. 751; ***653** Woodbridge Realty v. Plymouth Development Corp., 130 Cal.App.2d 270, 279(6), 278 P.2d 713; Freeman v. Van Wagenen, 90 N.J.L. 358, 101 A. 55, 56(3, 4); Felleman v. Von Luckner, 234 App.Div. 787, 253 N.Y.S. 567; Klipper v. Schlossberg, 96 N.J.L. 397, 115 A. 345, 346.)

[4] Applying the foregoing rules to the facts of the present case, it is evident that the property was sold 'within 90 days after' the termination of the contract between plaintiff and defendant to a person 'whose name' was registered with defendant by plaintiff in writing before the termination of the contract. Therefore, pursuant to the terms of the contract, plaintiff was entitled to his broker's commission from defendant.

Wright & Kimbrough v. Dewees, 52 Cal.App. 42, 197 P. 957, and Hobson v. Hunt, 59 Cal.App. 679, 211 P. 242, relied on by defendant, are not applicable to the facts in the present case. In Wright & Kimbrough v. Dewees, it was held that the rule here relied on was not applicable, because the contract provided "if sold to a party to whose attention said property was brought through the agency of said agent' the broker shall receive five per cent 'as a commission for promoting said sale." (52 Cal.App. at page 46, 197 P. at page 958) It was pointed out that in Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067, in which

case the rule was held to be applicable, the contract provided for a fixed compensation in the event of a sale by anyone during a specified period. The situation in the present case is the same as in the Kimmell case.

In Hobson v. Hunt, supra, the contract provided for a commission 'if the agent during the life of this agreement, shall find a purchaser ready, willing and able to buy the said property at the above price' (59 Cal.App. at page 680, 211 P. at page 242), while in the present case, as pointed out supra, there was no requirement that the plaintiff find a purchaser ready, willing and able to buy defendant's property.

Second. Did the trial court err in not making a finding (a) that plaintiff had **669 abandoned the contract and (b) whether plaintiff had performed all the conditions of the contract?

[5] No. This rule is here applicable: If findings are made upon issues which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error. (Merrill v. Gordon & Harrison, 208 Cal. 1, 6(3), 279 P. 996; Chamberlain v. Abeles, 88 Cal.App.2d 291, 299(8, 9), 198 P.2d 927; Mortgage Guarantee Co. v. Smith, 9 Cal.App.2d 618, 621(4), 50 P.2d 835; see cases ***654** cited in West's Ann.Cal. Code Civ.Proc., vol. 16, s 632, p. 533, n. 133.)

In the present case the trial court found 'that plaintiff exercised diligence in performing his said contract; that plaintiff made contact with one Morgan Adams, also known as Morgan Adams Jr., in respect of the possible purchase by the said Adams of the said real property; that plaintiff under date of March 7th 1956, and on March 22nd 1956 by reference to the saie letter of March 7th 1956, registered with defendant in writing the name of Morgan Adams (among others) as a prospective purchaser.

'The Court finds that before the expiration of the ninety days after March 22nd 1956 referred to in paragraph I of these findings, and on June 7th 1956, defendant sold to Morgan Adams, also known as Morgan Adams Jr., and to James H. Adams as nominee of Morgan Adams, the said real property for $220,000.00 through the agency of Charles J. Dunn & Co., real estate brokers.

'The Court finds that it is unnecessary to make findings in respect of issues not expressly covered herein.'

[6] Clearly, the foregoing findings cover the material issues in the case, and there is an implied finding that plaintiff did not abandon the contract. Therefore, the above rule of law is applicable, and it was not prejudicial error for the trial court to fail to make additional findings.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Parallel Citations

335 P.2d 665

Blank v. Borden (1974) 11 Cal.3d 963, 524 P.2d 127, 115 Cal.Rptr.31

Real estate broker brought action against owner to recover under withdrawal-from-sale provision in exclusive-right-to-sell contract. The Superior Court, Riverside County, Richard M. Marsh, J., entered judgment for broker and owner appealed. The Supreme Court, Sullivan, J., held that inasmuch as withdrawal-from-sale clause presented owner with a true option or alternative to terminate agent's otherwise exclusive right through the payment of a sum certain set forth in the contract, the clause did not constitute a void penalty provision.

Affirmed.

Burke, J., filed dissenting opinion concurred in by Tobriner, J.

Attorneys and Law Firms

***965 ***31 **127** Minsky, Garber & Rudof and Albert C. Garber, Los Angeles, for defendant and appellant.

***966 ***32 **128** James Hollowell, Palm Springs, for plaintiff and respondent.

Moses Lasky, Howard N. Ellman and Brobeck, Phleger & Harrison, San Francisco, amici curiae for plaintiff and respondent.

Opinion

SULLIVAN, Justice.

In the instant case we confront the question whether the familiar withdrawl-from-sale provision in an exclusive-right-to-sell contract between an owner of real property and a real estate broker exacts an unlawful penalty within the meaning of sections 1670 and 1671 of the Civil Code. We conclude that it does not. In so holding, we decline defendant-owner's invitation to extend into this area the rule of Fracasse v. Brent (1972) 6 Cal.3d 784, 100 Cal.Rptr. 385, 494 P.2d 9, which limited to Quantum meruit the recovery of an attorney discharged without cause in spite of a valid contingent fee contract. Pointing out basic differences between the type of contract there involved and that before us, we affirm the judgment of the trial court granting full recovery under the withdrawal-from-sale provision according to its express terms.

On April 26, 1970, defendant Erica Borden and plaintiff Ben Blank, a real estate broker, entered into a written agreement for the purpose of securing a purchaser for defendant's weekend home in Palm Springs. The agreement, a printed form contract drafted by the California Real Estate Association, was entitled 'Exclusive Authorization and Right to Sell' and by its terms granted Blank the exclusive and irrevocable right to sell the property for the seven-month period extending from the date of the agreement to November 25, 1970. It further provided that if the property were sold during the said period the agent would receive 6 percent of the selling price, and that 'if said property is Withdrawn from sale, transferred, conveyed, leased without the consent of Agent, or made unmarketable by (the owner's) voluntary act during the term hereof or any extension thereof,' the agent would receive 6 percent of the 'price for the property' stated elsewhere in the agreement. (Italics added.) Relevant portions of the agreement are set forth in the margin.[1]

***967** The findings of the trial court describe subsequent events in the following terms: ****129 ***33** '5. Plaintiff at once began a diligent effort to 'obtain a purchaser for said property, including but not limited to the expenditures of monies for advertisements in the newspaper, but on or about June 26, 1970, while said exclusive sales contract was still in effect and while plaintiff was making a diligent effort to obtain a purchaser, defendant, without reason or justification, orally notified plaintiff that the property was no longer for sale and that he had no further right to make efforts to sell same or collect a commission, all in direct violation of said exclusive sales contract.'

Determining that the foregoing constituted a withdrawal from sale within the terms of the agreement,[2] the trial court concluded that plaintiff Blank was entitled to compensation according to the agreement's provisions. Accordingly it rendered judgment in favor of plaintiff Blank in the amount of $5,100 (6 percent of $85,000) plus interest. Defendant has appealed.

***968** At the outset we quickly dispose of two contentions relating to the substantiality of the evidence in support of the findings of the trial court which we have quoted above.

[1] [2] First, it is contended that there was no support for the finding that plaintiff was making a diligent effort to find a purchaser for the property when it was withdrawn from the market; this, it is urged, resulted in a failure of consideration. Suffice it to say that although the record contains evidence which might support a contrary finding, it also contains substantial evidence in support of the finding made by the trial court concerning plaintiff's

diligence. There is evidence in the record that plaintiff contacted several parties—members of the country club on whose golf course the property fronted as well as other persons—with respect to the property, and that he ran newspaper advertisements concerning the property during the two months which preceded defendant's withdrawal of the property. The fact that plaintiff had produced no Offers prior to the withdrawal of the property from the market of course does not in itself compel a finding that he was not making diligent efforts to find a purchaser.

Second, it is contended that the finding concerning defendant's withdrawal of the property from the market lacks substantial support. Again, however, our examination of the record discloses ample evidence to support the finding. The withdrawal occurred in the course of an argument which took place at the property between plaintiff and defendant's then fiance, Dr. Archer Michael.[3] Defendant was also present at the time. When Dr. Michael, after making statements which might reasonably be construed as threats of physical violence, told plaintiff to take his sign off the property and leave because his services were no longer wanted, plaintiff asked defendant whether she concurred. She replied that she did, and plaintiff departed. It was only after receiving a letter from plaintiff's attorney demanding payment pursuant to the contract that she attempted to soften her position and requested that plaintiff continue his efforts to sell the property. It was wholly within the province of the trial court, as finder of fact, to determine that the withdrawal was complete and unequivocal when made and that defendant's subsequent efforts through counsel to recant were ineffective and irrelevant.

We are thus brought to the single significant issue in this case, namely, the extent of recovery to which plaintiff is entitled under the contract.

***969** **[3]** It has long been the law of this state that any right to compensation asserted by a real estate broker must be found *****34 **130** within the four corners of his employment contract. (Crane v. McCormick (1891) 92 Cal. 176, 182, 28 P. 222; see also Kimmell v. Skelly (1900) 130 Cal. 555, 560, 62 P. 1067; see generally, 1 Miller & Starr, Current Law of Cal. Real Estate (1965) pp. 228—247.) By the same token, however, '(t)he parties to a broker's contract for the sale of real property are at liberty to make the compensation depend upon any lawful conditions they see fit to place therein. (Citations.)' (Leonard v. Fallas (1959) 51 Cal.2d 649, 652, 335 P.2d 665, 668.) In short it is the Contract which governs the agent's compensation, and that contract is strictly enforced according to its lawful terms.

[4] It is equally well settled in this state that a withdrawal-from-sale clause in an exclusive-right-to-sell contract is lawful and enforceable, a claim for compensation under such a clause being not a claim for damages for breach of that contract but a claim of indebtedness under its specific terms. (Maze v. Gordon (1892) 96 Cal. 61, 66—67, 30 P. 962; Baumgartner v. Meek (1954) 126 Cal.App.2d 505, 510—511, 272 P.2d 552; cf. Kimmell v. Skelly, Supra, 130 Cal. 555, 559—561, 62 P. 1067; Rankin v. Miller (1960) 179 Cal.App.2d 133, 135, 3 Cal.Rptr. 496; see generally, 1 Miller & Starr, Current Law of Cal. Real Estate, Supra, pp. 215, 245.)

Defendant contends, however, albeit somewhat obliquely, that such clauses should be denied enforcement as an unlawful penalty[4] under the terms of Civil Code sections 1670 and 1671. The same argument was urged upon the court in Baumgartner v. Meek, Supra, 126 Cal.App.2d 505, 272 P.2d 552, and was rejected in the following language: 'We think this contention cannot be sustained in view of the contrary holdings in the cases referred to (i.e., Kimmell v. Skelly, Supra, 130 Cal. 555, 62 P. 1067; Walter v. Libby (1945) 72 Cal.App.2d 138, 164 P.2d 21; Fleming v. Dolfin (1931) 214 Cal. 269, 4 P.2d 776; Mills v. Hunter (1951) 103 Cal.App.2d 352, 229 P.2d 456.) The distinction between an action for breach of the promise by the owner not to revoke or deal through others or sell himself during the stipulated term, wherein damages are sought for such breach, and a contractual provision whereby, in consideration of the services of the broker to be and being rendered, the owner directly promises that if he sells through others or by himself or revokes he will pay a sum certain, is made clear in the cited cases, particularly in the quotations ***970** we have taken from the opinion in Kimmell v. Skelly. The action is for money owed, an action in debt (Maze v. Gordon, Supra), and the only breach involved is the failure to pay the promised sum.' (126 Cal.App.2d at p. 512, 272 P.2d at p. 556.)

[5] We agree with the Baumgartner court that the withdrawal-from-sale clause in an exclusive-right-to-sell contract does not constitute a void penalty provision. In reaching this conclusion we are not unmindful of the teaching of our recent decision in Garrett v. Coast & Southern Fed. Sav. & Loan Assn., Supra, 9 Cal.3d 731, 108 Cal.Rptr. 845, 511 P.2d 1197, wherein we emphasized that we look to substance rather than form in determining the 'true function and character' of arrangements which are challenged on this ground. (Id. at pp. 735—737, 108 Cal.Rptr. at p. 847, 511 P.2d at p. 1199.) As we there stated, 'when it is manifest that a contract expressed to be performed in the alternative is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance, the provision cannot escape

examination in light of pertinent rules relative to the liquidation of damages.' (Id. at p. 738, 108 Cal.Rptr. at p. 849, 511 P.2d at p. 1201.) Here, however, we ***35 **131 do not find that the contract before us is of the indicated character. Its terms in no sense contemplate a 'default' or 'breach' of an obligation by the owner upon whose occurrence payment is to be made.[5] On the contrary, the clause in question presents the owner with a true option or alternative: if, during the term of an exclusive-right-to-sell contract, the owner changes his mind and decides that he does not wish to sell the subject property after all, he retains the power to terminate the agent's otherwise exclusive right through the payment of a sum certain set forth in the contract.

We do not see in this arrangement the invidious qualities characteristic of a penalty or forfeiture. As indicated above, what distinguishes the instant case from other situations in which a form of alternative performance is used to mask what is in reality a penalty or forfeiture is the element of rational choice. For an example by way of contrast we need look no further than the Garrett case itself. There the contract, a promissory note secured by a deed of trust on real property, provided for the assessment of certain 'late charges' for failure to make timely ***971** installment payments on the note—such charges to be a percentage of the unpaid principal balance for the period during which payment was in default. We held that these charges, which did not qualify as proper liquidate damages pursuant to Civil Code section 1671, constituted illegal penalties. In characterizing the subject provision we observed that its 'only reasonable interpretation . . . is that the parties agreed upon the rate which should govern the contract and then, realizing that the borrowers might fail to make timely payment, they further agreed that such borrowers were to pay an additional sum as damages for their breach (,) which sum was determined by applying the increased rate to the entire unpaid principal balance.' (9 Cal.3d at p. 738, 108 Cal.Rptr. at p. 849, 511 P.2d at p. 1201.) Clearly this arrangement, viewed from the time of making the contract, realistically contemplates no element of free rational choice on the part of the obligor insofar as his performance is concerned; rather the agreement is founded upon the assumption that the obligor will make the lower payment. In these circumstances, as an eminent commentator has observed, 'the only purpose and effect of the formal alternative is to hold over (the obligor) the larger liability as a threat to induce prompt payment of the lesser sum.' (McCormick, Damages (1935) s 154, p. 618.)

In the instant case, on the other hand, the contract clearly reserves to the owner the power to make a realistic and rational choice in the future with respect to the subject matter of the contract. Rather than allowing the broker to proceed with his efforts to sell the property, the owner, in the event that at any time during the term of the contract he changes his mind and decides not to sell after all, may withdraw the property from the market upon payment of a sum certain. In these circumstances the contract is truly one which contemplates alternative performance,[6] not one in which the formal alternative conceals ***36 **132 a penalty for failure to perform the main promise.[7]

***972** [6] Further considerations support our determination that the contractual provision here at issue should be enforced according to its terms. First, it is important to recognize that we are not here concerned with a situation wherein the party who seeks to enforce the clause enjoyed a vastly superior bargaining position at the time the contract was entered into. On the contrary, the contract before us was one which was freely negotiated by parties dealing at arm's length.[8] While contracts having characteristics of adhesion must be carefully scrutinized in order to insure that provisions therein which speak in terms of alternative performance but in fact exact a penalty are not enforced (see Garrett v. Coast & Southern Fed. Sav. & Loan, Supra, 9 Cal.3d 731, 108 Cal.Rptr. 845, 511 P.2d 1197; cf. Henningsen v. Bloomfield Motors, Inc. (1960) 32 N.J. 358, 403—404, 161 A.2d 69), we believe that in circumstances such as those before us interference with party autonomy is less justified. (See generally, Sweet, Liquidated Damages in California (1972) 60 Cal.L.Rev. 84.)

Moreover, it must be emphasized that the basic contract before us shares with other purely 'commission' contracts the quality of being essentially result-oriented.[9] Regardless of the amount of effort expended by the broker under such a contract, he is entitled to no compensation at all unless a sale occurs. By the same token, when a sale Is effected, the compensation received is a percentage of the sale price—and this is paid regardless of the amount of effort which has been expended by the broker. If in this context we view the owner's exercise of a withdrawal-from-sale clause as an anticipatory 'breach' of the main contract, the 'damage' sustained by the broker would not be measured in the amount of effort expended by him prior to the 'breach' but rather would be measured in terms of the value of the lost Opportunity to effect a sale and thereby ***973** receive compensation. (See Charles V. Webster Real Estate v. Rickard (1971) 21 Cal.App.3d 612, 615—616, 98 Cal.Rptr. 559; Coleman v. Mora (1968) 263 Cal.App.2d 137, 145—146, 69 Cal.Rptr. 166.) The determination of this value would clearly degenerate into an examination of fictional probabilities—e.g., whether the broker, if allowed to continue his efforts for the full term of the

contract, would have been successful in locating a buyer and effecting a sale. This consideration ***37 **133 further strengthens our conviction that in these circumstances the contract of the parties, entered into in a context of negotiation and at arm's length, should govern their rights and duties.

[7] Finally, we reject the contention advanced by defendant that the rule announced by us in Fracasse v. Brent (1972) 6 Cal.3d 784, 100 Cal.Rptr. 385, 494 P.2d 9, should be extended to the case at bench. In Fracasse we held that an attorney, retained under a valid contingent fee contract, upon discharge by his client with or without cause before the happening of the contingency, is not entitled to recover the full amount provided by the contract but only the reasonable value of his services rendered to the time of the discharge. From what we have said above it is apparent that the two types of contract are fundamentally different. Not only do contingent fee contracts lack provisions for alternative performance such as the one which here concerns us, but it must be recognized that the circumstances under which they are executed not infrequently find the attorney in a bargaining position vastly superior to that of the client. More importantly, however, the Fracasse decision was clearly grounded in the special relationship of attorney and client and the public policy growing from that relationship which implies a right on the part of the client to discharge his attorney at any time with or without cause. (Id. at pp. 789—791, 100 Cal.Rptr. 385, 494 P.2d 9.) Clearly considerations of this nature are not present in the instant case.

For the foregoing reasons we hold that the withdrawal-from-sale clause in an exclusive-right-to-sell real estate contract, long a part of real estate marketing practice in this state and long held to be valid and enforceable according to its terms, does not exact an unlawful penalty in violation of sections 1670—1671 of the Civil Code. The judgment below, which enforced the clause before us upon a showing that the explicitly stated conditions for its enforcement were present, was fully supported by the evidence and correct in all respects.

The judgment is affirmed.

WRIGHT, C.J., and McCOMB, MOSK and CLARK, JJ., concur.

***974** BURKE, Justice (dissenting).

I dissent. The majority never reach the question whether the 'commission-on-withdrawal' clause in the instant case was an invalid penalty clause or an enforceable liquidated damages clause. (See Civ.Code, ss 1670, 1671.) Instead, the majority neatly sidestep this issue by labelling the brokerage contract as one contemplating an 'alternative performance' by the owner in the event he exercises his 'true option' to withdraw the property from sale. To the contrary, the issue in this case cannot be avoided by the facile use of labels—otherwise any illegal penalty could be disguised as a 'true option' by the promisor to pay a substantial sum for the privilege of breaking his contract. When we examine the essential nature of the exclusive brokerage contract, it becomes patently obvious that defendant Promised to afford plaintiff broker the exclusive and irrevocable right to sell the property during a specified period, that defendant Breached that promise by withdrawing the property from sale, that the contract itself specifies the Damages for that breach, and that accordingly we must determine whether or not the damage provision was a penalty or liquidated damages provision.

By the express terms of the brokerage contract, defendant gave to plaintiff 'the exclusive And irrevocable right to sell or exchange' the subject property for the period from April 26, 1970 to November 25, 1970. (Italics added.) The proposed sales price was $85,000, and defendant agreed to pay plaintiff the following 'compensation'; 'Six % Of the selling price if the property is sold during the term hereof, or any extension thereof, by Agent, on the terms herein set forth or any other price and terms I may accept, or through any other person, or by me, Or six % Of the ***38 **134 price shown in 3(a) (the $85,000 sales price), If said property is withdrawn from sale, transferred, conveyed, lease Without consent of Agent, or made unmarketable by my voluntary act during the term hereof or any extension thereof.' (Italics added.)

Nowhere in the contract is any mention made of any 'option' given to defendant to withdrawn the property from sale. Instead, the language of the contract makes it apparent that a withdrawal of the property without the broker's consent would constitute a breach of the owner's promise to grant an irrevocable right to sell the property during the specified period.[1] ***975** Indeed, it seems wholly naive to assume, as the majority do, that a property owner would have bargained for the 'option' of withdrawing the property from sale, given the consequences of exercising that option, namely, the payment of the Full commission which would have been payable to the broker had he sold the property for the original $85,000 asking price.

The majority suggest that defendant was given a 'realistic

and rational choice' under the contract to withdraw the property from sale, and that the contract was 'freely negotiated' at 'arm's length.' Yet as the majority acknowledge in the first sentence of their opinion, the 'commission-on-withdrawal' provision is a 'familiar' one; in fact, the provision probably is contained in every exclusive brokerage contract in this state.[2] In other words, no 'true option' or 'rational choice' is involved in this case—owners seeking to sell their property under an exclusive contract have no practical alternative but to agree to the 'commission-on-withdrawal' provision.

It is true that in 1892 this court held, in a brief, one paragraph analysis of the issue, that the 'commission-on-withdrawal' provision is not a damages provision but instead merely specifies the amount to be paid the broker in the event the owner exercises his 'right' to withdraw the property from sale. (Maze v. Gordon, 96 Cal. 61, 66—67, 30 P. 962.) Moreover, subsequent Court of Appeal cases have followed the Maze rule, albeit reluctantly. Thus, in Baumgartner v. Meek, 126 Cal.App.2d 505, 512, 272 P.2d 552, 556, the court noted that 'It is not for this court at this stage to defend or attack the (Maze) rationale . . ..' And in Never v. King, 276 Cal.App.2d 461, 478, 81 Cal.Rptr. 161, the court openly criticized the Maze and Baumgartner rationale, concluding, however, that it was 'unnecessary to reexamine Baumgartner' since under the facts in Never the owner made no express promise to pay a commission on withdrawal. Certainly, this court should not hesitate to reexamine Maze in view of the hesitancy of the Court of Appeal to apply its holding.

Both the court in Baumgartner, and the majority herein fail to discuss another line of cases holding that an agreement to pay a broker a specified sum as 'liquidated damages' in the event of a withdrawal of the ***976** property from sale, or other prevention of the broker's performance, is void as constituting an unlawful penalty under section 1670, at least in the absence of pleading and proof that the transaction fell within the exception contained in *****39 **135** section 1671. (See Robert Marsh & Co., Inc. v. Tremper, 210 Cal. 572, 292 P. 950; McInerney v. Mack, 34 Cal.App. 153, 166 P. 867; Glazer v. Hanson, 98 Cal.App. 53, 276 P. 607; see also Sweet, Liquidated Damages in California, 60 Cal.L.Rev. 84, 110—111.) The foregoing cases have never been overruled or disapproved and, I submit, their rationale is irreconcilable with the holding in Baumgartner and the instant case.

Thus, in Tremper, supra, a broker was employed to complete an exchange transaction between two principals; he was to be paid $1,000 for his services or, if the parties failed to carry out the exchange, the same amount 'as liquidated damages for time, trouble and expense incurred' by the broker. The exchange fell through and the broker sought to recover $1,000 as 'liquidated damages' due under the contract. The court refused such recovery, stating its rationale as follows (pp. 575—576, 292 P. p. 952): 'The law is that the 'liquidated damage' clause is void unless it is made to appear that the case comes within the exception provided by section 1671, Supra. The burden rests upon the person who seeks to bring himself within the exception. Upon the face of the complaint and agreement itself the provision which provides for the payment of liquidated damages is void. ( ) The items which respondent (broker) specifically names as constituting the basis of its damages, to wit, 'time, trouble and expenses incurred' in bringing about the exchange, are commonplace items which enter into every contract for service and they have never been held to be impracticable or extremely difficult of determination, but, on the contrary, have been held by numerous decisions to be readily computable. (Citation.)'

The contract in Tremper called for the payment of 'liquidated damages,' whereas the contracts in Maze, Baumgartner and the instant case refer to payment of a 'commission' or 'compensation' upon the owner's withdrawal of the property from sale. Moreover, both Maze and Baumgartner assumed that since defendant-owner had a 'right' to withdraw the property on payment of the specified sum, the broker's claim to that sum was not based upon breach of contract. The cases uniformly hold, however, that in determining the application of section 1670 to a particular contractual arrangement we must look beyond the form of the transaction and the stipulations of the parties. As we recently stated in Garrett v. Coast & Southern Fed.Sav. & Loan Assn., 9 Cal.3d 731, 737, 108 Cal.Rptr. 845, 849, 511 P.2d 1197, 1201, 'We have consistently ignored form and sought ***977** out the substance of arrangements which purport to legitimate penalties and forfeitures. (Citations.)' (See also Robert Marsh & Co., Inc. v. Tremper, Supra, 210 Cal. 572, 576, 292 P. 950 (the 'mere stipulations' of the contract, such as use of the phrase 'liquidated damages,' are not controlling.)

In Garrett, case involving late charges under installment loan contracts, we analyzed and rejected a similar argument to the effect that the stipulated payment was merely part of a contract for alternative performance. We stated (9 Cal.3d pp. 737—738, 108 Cal.Rptr. pp. 848, 849, 511 P.2d pp. 1200, 1201) in Garrett that 'The mere fact that an agreement may be construed . . . to vest in one party an option to perform in a manner which, if it were not so construed, would result in a penalty does not validate the agreement. (Fn. omitted.) To so hold would be to condone a result which, although directly prohibited by the Legislature, may nevertheless be

indirectly accomplished through the imagination of inventive minds. . . . ( ) We recognize, of course, the validity of provisions varying the acceptable performance under a contract upon the happening of a contingency. We cannot, however, so subvert the substance of a contract to form that we lose sight of the bargained-for performance. Thus when it is manifest that a contract expressed to be performed in the alternative is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of ***40 **136 that performance, the provision cannot escape examination in light of pertinent rules relative to the liquidation of damages. (Citations.)' (Italics added.) In Garrett, we concluded that the only reasonable interpretation of the late charge clause was that it was intended to provide for damages for breach in failing to make timely loan payments. Accordingly, we held that the provisions of sections 1670 and 1671 applied.[3]

As in Garrett, I would conclude that the only reasonable interpretation of the instant 'commission upon withdrawal' clause is that it was intended to compensate the broker for damages arising from the owner's breach of the exclusive brokerage contract. Obviously, the primary purpose underlying such a contract is to afford the broker an exclusive and temporarily irrevocable right to sell the property for a specified period, unhampered by competition from other brokers and unhindered by interference from the owner. The owner's unauthorized act of withdrawing the property from sale totally defeats the foregoing purpose and, unquestionably, constitutes a breach of contract for which appropriate damages may *978 be recovered. Any attempt, however, to specify the amount of those damages in advance of that breach, whether termed a 'commission,' 'liquidated damages' or otherwise, must meet the requirements of sections 1670 and 1671.

I turn, therefore, to the question whether the instant provision is a 'penalty' or a 'liquidated damages' provision. As we indicated in Garrett, supra, a penalty provision usually operates to compel the performance of an act and becomes effective only in the event of a default in that performance, upon which a forfeiture is compelled without regard to the damages which may actually flow from the failure to perform. (9 Cal.3d at p. 739, 108 Cal.Rptr. 845, 511 P.2d 1197.) On the other hand, a liquidated damages provision must represent a reasonable endeavor by the parties to assess the fair average compensation for a loss resulting from breach; the fixing of actual damages for breach must have been 'impracticable' or 'extremely difficult.' (Id., at pp. 738—739, 108 Cal.Rptr. 845, 511 P.2d 1197.) In determining the issue, we must do so from the position of the parties at the time the contract was entered into; the party seeking to rely upon a liquidated damages provision bears the burden of pleading and proving the validity thereof under section 1671. (Id., at p. 738, 108 Cal.Rptr. 845, 511 P.2d 1197; accord, Better Food Mkts. v. Amer. Dist. Teleg. Co., 40 Cal.2d 179, 185, 253 P.2d 10.)

Judged on the basis of the foregoing rules, the 'commission-upon-withdrawal' clause bears close resemblance to an ordinary penalty provision. As we have seen, in practical effect that clause operates to enforce the owner's primary promise to afford the broker an exclusive and irrevocable right to sell the subject property during the specified period; the clause only becomes effective upon the owner's breach of that promise. Moreover, the specified damages (namely, a percentage of the original asking price for the property) may bear little or no relation to the actual damages suffered by the broker upon prevention of his performance by the owner.

The specified damages could, of course, approximate actual damages in a situation in which the broker had negotiated a sale of the property at the original asking price, for in that situation the broker's actual loss would be the commission he otherwise would have earned.[4] But the 'commission-upon-withdrawal' clause purports ***41 **137 to require payment of the full commission whether or not a sale had been arranged. In that regard, the clause *979 seemingly could not represent a reasonable effort to estimate the fair Average compensation as required in Garrett. Moreover, as indicated in prior cases, ordinarily valuation of a broker's services is not so impracticable or extremely difficult as to justify use of a specified damages provision. (Robert Marsh & Co., Inc. v. Tremper, Supra, 210 Cal. 572, 756, 292 P. 950; McInerney v. Mack, Supra, 34 Cal.App. 153, 157—158, 166 P. 867; Glazer v. Hanson, Supra, 98 Cal.App. 53, 60, 276 P. 607.)

However, I would leave open the question whether a 'commission-upon-with-drawal' clause can ever be sustained as a valid liquidated damages provision under section 1671. (We adopted a similar approach in Garrett, supra, 9 Cal.3d at p. 741, 108 Cal.Rptr. 845, 511 P.2d 1197.) It is possible that on a proper showing we might conclude that a particular clause represents a reasonable effort by the parties to fix a fair compensation to the broker in the event the owner withdraws the property from sale. In the instant case, however, plaintiff failed to plead or prove facts which would show the applicability of section 1671, despite defendant's reliance in her answer upon the defense of unlawful penalty. Since the burden of proof was upon plaintiff in this regard, the trial court erred in awarding to him the damages specified in the brokerage contract.

Although I would hold that the contractual provision is, therefore, unenforceable in this case, plaintiff had the opportunity to establish Actual damages arising from defendant's breach, namely, the reasonable value of plaintiff's services performed to the date the property was withdrawn from sale.[5] At trial, however, plaintiff described the nature of his services, but he made no attempt to prove by expert testimony or otherwise, the reasonable value thereof, and the trial court made no finding on that issue.

I would reverse the judgment

TOBRINER, J., concurs.

Parallel Citations

11 Cal.3d 963, 524 P.2d 127

Baumgartner v. Meek (1954) 126, Cal.App.2d 505, 272 P. 2d 552

Action to recover upon a real estate brokerage listing. The Superior Court, Napa County, Raymond J. Sherwin, J., entered judgment on verdict for plaintiff, and defendants appealed. The District Court of Appeal, Paulsen, J. pro tem., held that a brokerage listing, though basically an offer of a unilateral contract, attains a binding force upon the performance of services pursuant thereto by the broker, with the consideration being the performance of services by the broker in seeking a purchaser.

Judgment affirmed.

Attorneys and Law Firms

****552 *506** Francis H. Frisch and Laura O. Coffield, Napa, for appellants.

Riggins, Rossi, King & Kongsgaard, Napa, for respondent.

Opinion

PAULSEN, Justice pro tem.

This is an appeal from a judgment of $15,000 and interest upon the verdict of a jury in an action to recover upon a real estate brokerage listing. The document signed by the parties conformed to the California Real Estate Association standard form and so far as material to this appeal reads as follows:
'In consideration of the services of W. B. Griffiths Company, hereinafter called broker, I hereby list with said broker, exclusively and irrevocably, for the period of time beginning January 8, 1951 and ending March 1, 1951, the property situated in the Berryessa Valley, County of Napa, California, described as follows, to-wit: [Description] and I hereby grant said broker the exclusive and irrevocable right to sell said property within said time for Three Hundred Thousand $^{00}/_{100}$ ($300,000.00) Dollars * * *

'I hereby agree to pay said broker as commission five (5%) per centum of the selling price should, during the time set forth herein, said property be ****553** sold by said broker or by me or by another broker or through some other source or whether said property be withdrawn from sale, transferred, conveyed or leased without approval of said broker.

'Dated January 8, 1951

'(Signed) N. T. Meek

Flora E. Meek

'Contract extended to

Dec. 1/51

(Signed) N. T. Meek

Flora E. Meek'

***507** 'In consideration of the foregoing listing and authorization the undersigned broker agrees to use diligence in procuring a purchaser.

'W. B. Griffiths Company

'(Signed) By Edith R. Baumgartner

'Broker.'

It will be noted that the contract was originally made in January, 1951, and ran to March 1, 1951. There was evidence to the effect that after March 1st, at appellants' request, respondent continued her attempts to find a buyer, and that in September of that year she obtained an offer of $200,000 which was refused by appellants. They asked her to try to find a buyer who would pay more, and respondent then insisted upon again having an exclusive authorization. A new contract was executed, but this was later superseded by the extension of the original agreement as shown above.

On November 8, 1951, respondent called appellant N. T. Meek in San Jose and advised him she had a prospective purchaser for $250,000 and discussed the possibility of a sale at that price. The following morning N. T. Meek called respondent and told her he would have to take the ranch off the market. There is a dispute regarding the rest of the conversation at that time. Respondent testified that when N. T. Meek told her he was taking the property off the market, she said, 'But, Tom, how about my authorization; I still have until the 1st of December and you know I have done a great deal of work on this and I have spent a great deal of money and I have interested people; I am going to be in a most embarrassing position with my people.' Appellant N. T. Meek testified that 'Edith said that she thought she ought to be recompensed for what she was out for advertising. I asked her how much it was; she said 'About $480.00', and I told her I would pay her. It was okay with

her to take it off the market.'

Appellant N. T. Meek then wrote respondent, under date of November 9, 1951, advising her that he was taking his ranch off the market.

In December, 1951, respondent filed an action to recover from appellants the sum of $15,000. Her first cause of action alleged she was entitled to that sum because of the withdrawal of the property from sale and the second cause of action alleged that she was entitled to that sum because defendants, without her approval, had sold the property to other purchasers. This ***508** second cause of action was subsequently dismissed and the cause proceeded to trial upon the first count alone.

There can be no doubt but that respondent, in accordance with her written statement that she would in consideration of the listing use diligence in procuring a purchaser, did expend considerable sums of money advertising the property, taking photographs of it, gathering data for use in promoting the sale and listing it with other brokers. Supportive of this is the testimony of appellant N. T. Meek concerning the phone conversation in which he offered to pay her $480 to recompense her for her expenditures in efforts to sell the property. It cannot be doubted either that respondent actively continued her efforts to obtain a satisfactory sale up to the time when she was advised by appellants through the letter of N. T. Meek that they had taken the property off of the market. This happened within the term stipulated by the writings executed by the parties.

Appellants first contend that respondent could not recover a commission without pleading and proving that she had procured a purchaser ready, able and willing to pay the price at which appellants had authorized her to sell. In support of this they cite ****554** Merkeley v. Fisk, 179 Cal. 748, 178 P. 945. The case is not in point. In that case the plaintiff's claim was based upon allegations of performance by the broker who claimed that he had made a sale. A demurrer to his complaint was sustained and it was held on appeal that the pleading was insufficient because it did not contain allegations that the purchaser procured by the broker was one that was able, ready and willing to buy.

Appellants next argue that the contract was unilateral and without consideration. Basically, a brokerage listing is an offer of a unilateral contract, the act requested being the procuring by the broker of a purchaser ready, able and willing to buy upon the terms stated in the offer. Conformable to the settled rules governing offers of unilateral contracts such a listing, which we might term a general listing, is held to be revocable at the will of the owner in good faith at any time before performance, regardless of the effort sexpended by the broker. Furthermore, such a listing leaves the owner free to list with other brokers, to sell the property through his own efforts, to withdraw the property from the market, or otherwise to revoke his offer. Latterly, however, and particularly in California, there has developed a concept of irrevocability which brokers have generally sought to implement ***509** by written provisions placing restrictions upon the freedom of the owner under a general listing. These stipulations take the form of a stated term within which the broker might accept the offer of unilateral contract by performing the required act, or of a so-called exclusive agency, doing away with the right of the owner to deal through other brokers, or of an exclusive right to sell, precluding the owner himself from selling and the like. In view of the nature of the basic transaction between the owner and the broker, that is, a listing which is no more than an offer of a unilateral contract to be accepted only by a performance of the requested act, these additional stipulations were challenged in many courts as not resulting in any contract in fact between the parties, e. g. see Bartlett v. Keith, 325 Mass. 265, 90 N.E.2d 308; 37 Iowa L.Rev. 350, 354. But in many states, and in this state, courts have accepted such written listings as resulting in contractual relations. Though the basic offer to pay a commission for the procuring of a purchaser ready, able and willing to buy can still be accepted only by performance, nevertheless it has been held that these restrictive stipulations bind the owner and subject him to liability if he refuses to abide by them. These holdings are sometimes based on the idea that the restrictive clauses constitute subsidiary promises resting upon the consideration that the broker agrees to and does expend time and effort to bring about a sale. Thus we find in Restatement of Contracts, Section 45:

> 'If an offer for a unilateral contract is made and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, * * *.'

It is unnecessary to attempt to follow the reasoning given in the many opinions of courts dealing with this subject. We think that in California the rule has been too long declared and too often enforced to leave the matter open. This position of our courts is well set out in Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067. In that case the written listing was substantially the same as in the case before us. It read:

> "For and in consideration of the services to be performed by Messrs. Hooker & Lent, I hereby employ them as my sole and exclusive agents to sell for me that certain real property [indicated] * * *. This employment and authority shall continue for the full period of thirty days from the date hereof, ***510** and thereafter until withdrawn by me in writing; and I agree to pay to said Hooker & Lent, in the event of the sale of said real property by them or by anyone else, including myself, while this contract is in force, twenty-two hundred and fifty dollars as and for their compensation hereunder."

Within the time stipulated the owner sold the property and action was brought ****555** to recover the amount which the written listing stipulated would be paid in that event. It was conceded that the brokers had found no purchaser, but the evidence and findings were that they had spent time and money in attempting to do so. The court had no hesitancy in treating the written listing as a contract and said:
'* * * the contract was in full force and effect at that time [when the owner sold]. * * * If the brokers had found a purchaser at any time prior to the sale made by defendant, then clearly they would have been entitled to their commission; and this circumstance shows that the contract was in full force and effect when the sale was made.

'It is claimed that the brokers' contract was one to find a purchaser, and, no purchaser having been found, no commissions were earned, and that for this reason the complaint does not state a cause of action. The contract in this case is not the ordinary broker's contract. It is more. By its terms the brokers were entitled to $2,250 if during the life of the instrument, they found a purchaser; or if, during its life, defendant sold the property, they were likewise entitled to the same amount. Defendant having sold the property during the life of the contract, this last provision is relied upon to support a recovery, and justly so. The defendant made a contract, and had the power to make it; and there is no reason why she should be allowed to escape from its binding force unless equitable grounds exist which excuse her. The parties to a broker's contract are at liberty to make the compensation of the broker depend upon any lawful conditions they see fit to place therein. The single question is, what does the contract provide?'

[1] As to the contention there was no consideration to support the contract the court stated it was to be found in the consideration of the services to be performed by the broker. The court said that the owner had agreed that if these services produced a buyer the stipulated commission would be paid, but that: 'She also further agreed to pay them the same amount in consideration of their services if she herself sold ***511** the property. The consideration for her promise to pay the money if the sale was made by her, was the performance of services by the brokers in seeking a purchaser.' In declaring the contract enforceable the court relied on Crane v. McCormick, 92 Cal. 176, 28 P. 222; Maze v. Gordon, 96 Cal. 61, 30 P. 962, and Rucker v. Hall, 105 Cal. 425, 38 P. 962, and these cases squarely support the opinion. Although the matter is not mentioned in the opinion it is noteworthy that in the Kimmell case the appellants in their opening brief challenged the provision for payment in event the sale was made by the owner as providing for a penalty and as therefore void. This contention was countered by respondent who argued that the action was not one for damages, either liquidated or unliquidated, or for a breach, citing Maze v. Gordon, supra, but was one to recover a sum of money that was to be paid on the happening of contingencies which had occurred. Said respondent in his brief in that case: 'No breach is claimed and the idea of liquidated damages and penalty originated with counsel for the plaintiff. * * * By no construction of the complaint or contract can this action be converted into a claim for penalty or liquidated damages.' In Maze v. Gordon, where the agreement was to pay a commission if the owner withdrew the property from sale within the term the court said [96 Cal. 61, 30 P. 963]: 'By the terms of the employment, commissions became due 'in the event of withdrawing the sale of said property during the time.' The claim to compensation under this provision of the contract is not, as respondent suggests, as damages for a breach of the contract *in withdrawing the land from sale*. This Hamilton had a right to do, and in such event he became indebted to plaintiff for his commissions.' The contention of appellant that the contract here was unilateral and without consideration cannot be sustained in view of the authorities we have referred to.

****556** Appellants next insist that the 'attempted withdrawal of the land from sale was ineffectual since the authorization to sell was exclusive and irrevocable.' To this effect they cite Sill v. Ceschi, 167 Cal. 698, 140 P. 949, where it is held that where the brokerage contract is for a definite term it cannot be revoked within the term if the broker has expended money and effort in seeking a purchaser.

[2] It appears to be appellants' view that because they had no legal right to withdraw the property from sale, respondent therefore had the legal right to continue her efforts to find a purchaser and was required to do so before she could recover. ***512** As stated in Rucker v. Hall, supra [105 Cal. 425, 38 P. 963], the withdrawal 'placed it out of her power to complete' a sale. If appellants' contentions in this respect are correct the respondent would have been required to spend additional money and time trying to find a buyer who could not have viewed the property without permission of the owner. Respondent would also have been required, in order to interest such a buyer at all, to misrepresent her position in the matter, or, what is equally as bad, to persuade a prospective buyer to enter into an agreement which she knew would not be honored by the seller, and all this for the sole purpose of placing herself in a position to collect a commission and not with the hope of making a sale. The law does not demand such absurdities or sanction such questionable practices.

[3] Finally, it is contended that the promise to pay if the owner withdrew the property from sale during the term must be considered either as a penalty or as a liquidated damage provision and in either view void as a matter of law. As we have noted, provisions in brokerage contracts similar to those contained in this contract have been approved and enforced by our courts in such cases as Kimmell v. Skelly and cases therein cited. See also Walter v. Libby, 72 Cal.App.2d 138, 164 P.2d 21; Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585, and Mills v. Hunter, 103 Cal.App.2d 352, 229 P.2d 456. We think this contention cannot be sustained in view of the contrary holdings in the cases referred to. The distinction between an action for breach of the promise by the owner not to revoke or deal through others or sell himself during the stipulated term, wherein damages are sought for such breach, and a contractual provision whereby, in consideration of the services of the broker to be and being rendered, the owner directly promises that if he sells through others or by himself or revokes he will pay a sum certain, is made clear in the cited cases, particularly in the quotations we have taken from the opinion in Kimmell v. Skelly. The action is for money owed, an action in debt, Maze v. Gordon, supra, and the only breach involved is the failure to pay the promised sum. Plaintiff in such cases seeks to recover actual damages, not liquidated damages. The code provisions, therefore, concerning penalties and concerning stipulated damages are not applicable. It is not for this Court at this stage to defend or attack the rationale of these decisions upon this subject. Brokerage contracts have been formulated for many years in reliance upon them. These contracts in their ***513** language are so plain that the intent of the parties to bind themselves, just as these decisions have declared they are bound in such instances, cannot be disregarded. As we have indicated, the whole question of the relationships between owner and broker in respect of this type of transaction is one wherein there has been much conflict in decisions. Our courts have ruled in the way indicated by us and we think the rule of the cases in which they have done so ought not now to be disturbed. Although these decisions have not specifically discussed the challenge here made to the contractual provisions upon which respondent relies, it can hardly be said that they have been rendered without consideration of such attacks, for as we have seen, the contentions were advanced in the brief in at least one, and that the principal one, of the cases cited.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Parallel Citations

272 P.2d 552

Alderson v. Houston (1908) 154 Cal. 1, 96 P. 884

Department 1.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by G. E. Alderson and another against H. R. Houston. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiffs appeal. Reversed.

Attorneys and Law Firms

****885 *3** Chas. L. Batcheller and Thos. C. Ridgway, for appellants.

Russ Avery and Samuel H. French, for respondent:

Opinion

SHAW, J.

The plaintiffs appeal from a judgment, and from an order denying their motion for a new trial.

The complaint states a cause of action for the breach of a contract on the part of defendant, as owner of 43 lots in the city of Los Angeles, empowering the plaintiffs, as real estate brokers, to sell the said lots. The contract is dated May 17, 1904. It declares that the defendant is the owner of 43 lots, describing them, and gives to plaintiffs the right to the exclusive sale thereof for the period of 18 months from its date. It contained the following provision: 'All sales are to be made with delivery of certificates of title for each lot as sold or passes title under the terms of this agreement, drawn by the Title Insurance & Trust Co. of Los Angeles, and shall show clear of incumbrances, except building restriction, and such taxes that may be assessed but are not due and payable.' ***4** It further provided that an advance commission of 10 per cent. on the selling price should be paid to plaintiffs, and that 'a commission of $8,000, less such amounts as are paid in cash as advance commission, being the said 10 per cent., and such discounts as shall have been allowed from list prices to said Alderson shall be paid in cash when all the said lots are sold.' The discount mentioned referred to certain discounts, to be allowed on sales of certain lots upon which plaintiffs were to build houses. It was agreed that they should erect on the lots 6 houses within 12 months, and 4 within 15 months, from the date of the contract. Time was made of the essence of the agreement, and it was agreed that any failure of the parties thereto to comply with the terms thereof should forfeit the contract upon 30 days' written notice. The sales of the respective lots were to be made at prices stated in a schedule attached to the contract. It is alleged that the plaintiffs proceeded to place the lots on the market for sale, advertise them in the newspapers, place signboards advertising that the same were for sale by plaintiffs, and in all the usual ways, and in various ways, endeavored to procure purchasers, built houses on several of the lots in pursuance of the terms of the agreement, and made sales of a number of the lots at the prices agreed upon, for which they received advance commissions and discounts amounting to $2,320. It is further alleged that certain street assessments, for the improving and opening of streets abutting on the lots, became a lien upon a number of the lots; that the plaintiffs procured purchasers for some of these lots ready, able, and willing to buy the same, and demanded of defendant that he procure a certificate of title showing the same to be free from incumbrances; that thereupon the defendant refused to remove the liens of said assessments from said lots, and refused to furnish the certificates of title, as demanded, and denied his obligation, under the terms of the contract, to clear any lots of the lien of said assessments, whereupon said sales so made by the plaintiffs were prevented and defeated, and the plaintiffs were prevented from performing their part of the contract. It is claimed that, by reason of the conduct of the defendant in preventing the performance of the contract by plaintiffs, the plaintiffs are entitled to recover the ***5** damages arising from the breach of the contract, and that this consists of the $8,000 agreed to be paid as commissions upon the sale of all the lots, less the sums received in advance, as the contract provides, which balance amounts to $5,680.

The court found that the plaintiffs placed the lots on the market, and advertised them, and made the effort to sell the same as alleged in the complaint, and that they procured purchasers for 12 of the lots not incumbered by assessment liens, for which certificates of title were furnished, and deeds made, to the satisfaction of the purchasers, and upon which the $2,320 advance commissions and discounts were received by the plaintiffs. The dispute arises concerning lots 13, 16, 54, 55, and 56. As to lots 54 and 55, the court finds that the plaintiffs found purchasers therefor, and that defendant hindered and prevented the sales thereof, but that after February 23, 1905, he did not refuse to clear the title of said lots of the assessment lien, or refuse to furnish the certificate of title provided in the contract, nor insist that the purchasers should pay the assessment, or accept title to the lots subject thereto. As to lot 56, the finding is to

the same effect, except that it is found that the defendant did not hinder or prevent the sale thereof. As to lots 13 and 16, the court finds that the plaintiffs found purchasers therefor, but that the defendant did not refuse to furnish clear certificates, nor hinder or prevent the sales. The plaintiffs found purchasers for lots 54 and 55 at the agreed price of $1,100 each. Under the terms of the contract there was a discount of 25 per cent. upon the price of lot 55, to which the plaintiffs would have been entitled, as part of the commission, if they had made the sale. They would also have been entitled to $110, as 10 per cent. advance commission on the sale of lot 54, if such sale had been accomplished, making a total of $385 on the two lots.

The plaintiffs claim that the judgment in ****886** favor of the defendant is not supported by the findings, and that many of the findings are not supported by the evidence. The evidence shows that at the time the contract was made the assessment liens on lots 54, 55, and 56 had not accrued, and ***6** that they did not accrue until September 16, 1904. Sales of lots 54, 55, and 56 were made about October 7, 1904. Houston made deeds ready for delivery for lots 54 and 56, conveying title subject to the assessment liens. He was requested, on October 20, 1904, to discharge the liens and furnish clear certificates of title, whereupon he refused to furnish the same, or to make a deed, except upon the condition that the purchasers should pay or assume the liens, stating that the contract did not require him to give title to any of the lots free or clear of assessment liens. The court found that his contention in this respect was untenable, and in this we think the court was correct. The part of the contract above quoted required him to furnish a certificate of title showing the property clear of incumbrances, except building restrictions, and taxes assessed, but not due and payable. While in the broad sense of the term the word 'tax' may be construed to include special assessments made to pay for improvements upon streets, or for the opening thereof, yet such is not the ordinary and usual meaning of the word. In construing contracts the words thereof are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. Civ. Code, § 1644. In the ordinary course of business, particularly among real estate dealers, it is well known that the word 'taxes' is used to refer to ordinary taxes assessed upon property for state, county, or city purposes, and not to designate street assessments for public improvements. There is nothing to indicate that it was here used in other than its ordinary meaning. By the contract, therefore, the defendant was bound to furnish a certificate of title for each lot, showing that the same was free from all liens, except such state, county, and city taxes as were assessed, but not due or payable. He was, consequently, bound to clear the property from all street assessments, and to furnish certificates accordingly. In this connection, another contention of defendant may be considered. The proceeding for improving the street in question was made under the general street improvement law and the socalled 'Bond Act.' See Gen. Laws (Pony Ed.) 1906, pp. 1279, 1330; St. 1885, p. 147, c. 153, and amendment thereto; Bond Act, St. 1893, p. 33, c. 21; St. 1899, p. 40, c. 42. At the trial Houston claimed that 10-year bonds had been issued on these assessments, which were not due and payable except in annual ***7** installments, and hence that they came within the exception in the contract as taxes 'not due and payable.' The assessment became a lien on September 16, 1904, the date of issuing and recording the warrant. Section 10, Street Improvement Act, supra. Bonds could not, in any event, be issued therefor until the expiration of 30 days thereafter, and after the recording of the contractor's return to the warrant. Section 4, Bond Act, supra. In the intervening time the entire assessment on each lot was due and payable. Section 10, supra. It was therefore optional with Houston either to pay the assessments, or by nonpayment to suffer the issuance of 10-year bonds therefor. He had, by his contract with plaintiffs, agreed to sell these lots free from such liens, at any time within 18 months from the date of the contract. His conduct, in thus voluntarily permitting them to become incumbered by liens for these bonds which could not be discharged for 10 years, was an act by which he disabled himself from executing his contract according to its terms. The assessments having become due and payable after his contract was made, and he having then had an opportunity to discharge the liens, he would be estopped to set up his inability to discharge the liens for the bonds subsequently issued, as an excuse for nonperformance of the contract on his part.

After his refusal of October 20th to pay the liens, or furnish clear certificates therefor, a correspondence on the subject ensued between plaintiffs and defendant. The plaintiffs steadily insisted that Houston was bound to furnish clear certificates and remove the liens, declared that the sales made would fall through if their demands were not promptly met, and urged immediate action. They also stated that it was useless to try to sell the lots at the schedule prices with the assessment liens upon them, and that, in order to enable them to carry out their contract, they must have the question settled. The defendant steadily persisted in his refusal and in his denial of any obligation to pay the liens or furnish certificates clear of such liens. During this correspondence, and because of the delay in clearing the title, the buyer of lot 54 withdrew his offer, and claimed and obtained a return of his deposit. A certificate of title was ordered for lot 55, but further proceedings upon

that sale were delayed by the plaintiffs, because of the existing controversy concerning the assessment ***8** liens, they having informed the buyer that the sale was to be made free of incumbrance. The buyer, after some delay, refused to wait longer for the title to be cleared, and withdrew his deposit and offer. Houston was not informed of this sale, nor specifically requested to clear the title thereto. A formal demand for a clear deed and certificate for lot 56 was made on January 20, 1905, and was definitely refused by the defendant on January 24, 1905. On February 23, 1905, the defendant served on plaintiffs a written notice, stating that he had executed and deposited in escrow a deed of lot 56, clear of liens, and that he would thereafter, until he should give written notice to the contrary, execute deeds, and procure certificates of title clear of incumbrance, for all lots sold by the plaintiffs under the contract, ****887** but that he contended, and would continue to contend, until he gave written notice otherwise, that he was not bound by the contract to give deeds or procure certificates free from the lien of street assessments, and that he reserved all his rights under the contract; that he did this in order to remove any excuse claimed by plaintiffs for not performing the contract on their part, and to protect himself in case his construction of the contract was finally determined to be wrong, and not as a compromise, or with any concession that his construction of the contract was not correct. The deed referred to in this notice did not on its face purport to convey a clear title, but declared that it was made 'subject to all taxes and assessments levied or assessed against the property after the 17th day of May, 1904,' which made it subject to the street bond thereon, amounting to $483.40. He had, however, deposited with the deed his check to the city treasurer for the amount of the bond, with instructions to the escrow holder to deliver the check to the city treasurer when the deed was taken up. The holder of the bond had agreed to accept full payment in that way, and cancel the bond, but plaintiffs were not informed of that fact until the trial of the cause. The plaintiffs did not accept the propositions made in the notice of February 23d, but replied thereto on March 2, 1905, saying that it came too late, that they had been prevented from making sales by his delay and refusal to conform to the contract, and that unless he would give a reasonable extension of time for the performance of the contract by them, and would agree thereafter to pay or remove all street ***9** assessment liens as the lots were sold, they would insist on their rights and damages for his breach of the contract. To this Houston replied, on March 4th and 15th, in writing, reaffirming all that he said in his notice on February 23d, and stating that, while no legal or moral reason existed for so doing, yet he would and did extend the time limit of the contract 4 additional months, but that he would not agree to abide by the contract, except as stated in said notice. This offer to extend the time was not accepted on the terms proposed, and on May 8, 1905, it was withdrawn. The plaintiffs did not take up the deed for lot 56 in pursuance of the offer of February 23d, and about the 1st of June, 1905, they began the present action.

Although the contract in question provides for the sale of 43 lots, at a separate price for each lot, yet in view of its provisions with respect to the payment of the $8,000 commissions, it must be considered as an entire contract. The total price of all the lots, according to the schedule prices, was $47,275. The $8,000 commissions provided for was evidently not calculated upon any percentage of the prices fixed. By the terms of the contract, if plaintiffs failed to make a sale of all the lots, they would receive nothing, excepting these advance commissions and discounts, which would not amount to $8,000. It is similar, in this respect, to the contract considered in Cox v. McLaughlin, 44 Cal. 18. There a contractor agreed to grade and construct a section of a railroad at a fixed sum for the entire work, to be paid, from time to time, in installments as the work progressed, and it was held that the contract was entire, and that the provision for payments, from time to time as the work progressed, did not make it severable. In the present case the plaintiffs are not entitled to anything, except the advance commissions and discounts, until the entire contract is performed, and there is no scale furnished by the contract whereby the whole amount they are entitled to for each lot can be apportioned. See, also, the following authorities: Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305; Potter v. Potter, 43 Or. 154, 72 Pac. 704; Horseman v. Horseman, 43 Or. 94, 72 Pac. 698; 2 Parsons on Contracts, 519; 3 Page on Contracts, §§ 1484, 1487, 1493. ***10** The contract made plaintiffs agents of defendant to sell all the lots for the agreed commission, at the agreed price, upon the terms fixed thereby, and within the time limited. The conduct of the defendant in repudiating his own obligation to perform, in refusing to perform a material part of the contract, and in disabling himself from performance by suffering the accrual of bond liens, which could not be removed, except with the consent of the bondholder, prevented the plaintiffs from performing their part of the contract as its terms provided. It amounted to a wrongful discharge of plaintiffs as agents. It was a breach of a material part of an entire contract. 'The first breach by the defendant was a breach of the whole, and discharged the plaintiffs from performance of any conditions on his part.' Haskell v. McHenry, 4 Cal. 411. 'Plaintiffs were entitled to sue upon the breach immediately, and recover the entire damage resulting from it, without waiting for the time for full performance to elapse.' Hale v. Trout, 35 Cal. 242.

They were not required to go on making sales and demanding certificates showing clear title. Id. The law is well and succinctly stated in Clark & Skyles on Agency (section 365, p. 826) as follows: 'The agent has the election of two remedies by which he may obtain the redress for the wrongful discharge: (1) He may treat the contract as rescinded, and sue at once, on a quantum meruit, for the service actually rendered by him prior to the revocation and notice thereof; or (2) he may treat the contract of employment as continuing, though broken by the principal, and sue on the breach, for damages. In the latter case he may either sue for damages at once upon the breach of the contract, or wait until the expiration of the time of service fixed by the contract, and then sue for damages.' Page 828: 'If he elects to treat the contract as continuing, and sues at once for the breach, he is entitled to recover the amount of compensation, ****888** if any, earned by him prior to the breach, and remaining unpaid, and, in addition to this, the probable damages sustained by him by reason of the breach. Such damages are prima facie the whole amount of unearned compensation which he would have earned if allowed to carry out the contract; but the principal may reduce such amount of damage, by showing affirmatively, the burden of proof being on him, that the agent will probably find similar employment ***11** during the remainder of the term fixed by the contract.' Page 830: 'When an agent has notice of his wrongful discharge, it is not necessary that he should tender his service, or keep himself in readiness to perform. * * * All that is necessary is that he was ready and willing to continue in such employment at the time of the discharge.'

It is claimed, on behalf of the defendant, that the conduct of the defendant, although contrary to the terms of the contract, did not constitute a sufficient prevention of performance by plaintiffs to justify them in declaring the contract terminated, and suing to recover the entire compensation allowed therein. We think this claim cannot be sustained. The question was elaborately discussed in Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33. After quoting from the decision in Palm v. O. & M. R. Co., 18 Ill. 217, the following passage: 'I have examined all the authorities referred to by counsel, and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work, by the positive affirmative act of the other party, or where the other party has neglected to do some act, without which the plaintiff could not, in the nature of things, go on with his contract'—the court proceeds to discuss the question, and in the course of the discussion say: 'Stress is laid by counsel upon the words 'prevented from going on.' * * * The same language—i. e., that the party suing must be 'prevented' from performance—has been used in numerous cases; but, wherever the attention of the court has been directly called to the sense in which the word has been used, it has been held, not to mean that there must be physical prevention, but that any acts, conduct, or declarations of the party evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance.' After some further discussion the opinion proceeds: 'Without further quotation from cases it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference ***12** whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an *effectual* renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. (Italics ours.) As said by Bowen, L. J., in Johnston v. Milling Co., 16 Q. B. Div. 460: 'Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * * If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases.' The court cites and discusses the following cases supporting the proposition: Hochster v. De Latour, 20 L. & Eq. 157; Frost v. Knight (L. R.) 7 Exch. 111; Freeth v. Burr (L. R.) 9 C. P. 208; Mersey S. & I. Co. v. Naylor, 9 Q. B. Div. 648; Roper v. Johnston (L. R.) 8 C. P. 167; Ex parte Stapleton (L. R.) 10 Ch. Div. 586; Planche v. Colburn, 8 Bing. 14; Danube & B. S. R. Co. v. Xenos, 13 C.

B. (N. S.) 825; Masterton v. Mayor, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Hosmer v. Wilson, 7 Mich. 304, 74 Am. Dec. 716; Derby v. Johnson, 21 Vt. 21; Hinckley v. Pittsburgh S. Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Haines v. Tucker, 50 N. H. 307; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180. The same principle is stated in De Prosse v. Royal Eagle Co., 135 Cal. 411, 67 Pac. 502, where the court says, referring ***13** to a repudiation by the defendant of a part of an entire contract: 'A repudiation of a part of it was, as to plaintiffs, a repudiation of it all; that is plaintiffs had the right to consider the breach of this covenant a breach of the entire contract'—quoting with approval the passage from Haskell v. McHenry, supra.

The defendant claims that the case falls within the rule stated in Cox v. McLaughlin, 54 Cal. 608, and ****889** Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, where it was held that where a contract was entire, and the consideration for the work to be done by plaintiff was to be paid in installments as the work progressed, the mere failure or refusal of the defendant to pay an installment when it became due did not constitute such a prevention of performance as to authorize the plaintiff to sue for the entire contract price without performing all the work, but that it was a sufficient breach to warrant the plaintiff in treating the contract as rescinded, refusing to go on with the work and suing upon a quantum meruit for the value of the work already done. But, as is pointed out in Porter v. Arrowhead R. Co., 100 Cal. 500, 35 Pac. 146, those cases were so decided for the reason and upon the ground that the payment of an installment upon the contract price was not a condition precedent to the doing of the work, and that a breach cannot be a 'prevention' of performance by the other party, unless it is a breach of a condition precedent; that is, of something which the defendant must do before the plaintiff can perform. In the case at bar we find that the condition broken by Houston, the part of the contract which he repudiated, was a condition precedent to the performance by plaintiffs.

The defendant was to furnish certificates showing clear titles to the satisfaction of buyers. The plaintiffs could not complete the sale of any lot upon the contract terms until this was done. It is not for the defendant to say that purchasers might have been found who were willing to take the lots, and pay or assume the liens in addition to the contract prices, if the plaintiffs had continued to make efforts to that end. The plaintiffs owed him no duty to find such buyers. They had a right to stand upon the contract. The refusal of the defendant to clear the lots of the liens effectually prevented the plaintiffs from completing the making of the sales above mentioned, and also from the performance of their part of the contract.

***14** It is further claimed that, by the offer contained in the notice of February 23, 1905, and the extension of time offered on March 4th, Houston receded from his refusal and from his repudiation of the contract, and removed all excuse for a lack of full performance by plaintiffs. The claim is not tenable. In the first place, the time of performance was limited by the contract to 18 months from its date. During more than 4 months of that time, Houston had repudiated his obligation, and had refused to perform the same, and this delay had, as the evidence shows, prevented the sales of the four lots numbered 13, 16, 54, and 55. As to lots 54 and 55, the court so finds. As to the other two, the evidence shows that plaintiffs had found purchasers ready, able, and willing to buy at the fixed prices, if the title were cleared, but that, because of Houston's repudiation and refusal, they could give no assurance that the title would be cleared, and that, after waiting a long time, during which the hope was held out to them that Houston would ultimately yield his claim, and give a clear title, the buyers became weary, and refused to go on with the purchases. The subsequent offer of Houston did not restore to plaintiffs these buyers, nor destroy the effect of his previous refusal to be bound. In the second place, Houston's offer of February 23d was not a retraction of his previous refusal to be bound. On the contrary, he thereby repeated and reaffirmed his intention not to be bound, and declared that he would thereafter perform the contract or not as he should choose. If plaintiffs had accepted this as a settlement of the dispute, they could no longer give prospective buyers a positive promise of a clear title, or make a positive sale at the fixed prices, but would be compelled to say that both the title and prices were dependent upon the pleasure of Houston, and were not fixed by the contract. The proposition of Houston was a clear repudiation of his obligation. The offered extension of time did not remove the objection. It was accompanied by a condition that Houston had no right to impose, namely, that he was not to be bound to clear the title, but would do so or not at his pleasure. The plaintiffs were not required to accept the offer of extension with that condition annexed. The performance on their part involved the expenditure of money in advertising, and of time and effort to find buyers, and it would be unjust to require them to do this in reliance upon the mere volition of Houston, ***15** instead of upon his obligation, to which they had a right. In Lake Shore, etc., Co. v. Richards, supra, there was a similar dispute as to the construction of a contract, and a refusal to perform as to a part only. With respect to this the court there said (page 99 of 152 Ill., page 783 of 38 N. E. [30 L. R. A. 33]): 'Under the construction of the contract upon which it had acted, and was proposing to continue to act,

it was under no obligation to deliver any cars to be transferred by plaintiff's firm, thus absolutely repudiating its contract liability to do so. True, it had not altogether ceased to deliver some cars to the thus transferred, but they were not delivered because of any contract liability to do it, but at their convenience and option.' It was held that this did not remove the effect of the repudiation of the obligation.

As the case must be reversed for a new trial, it is proper to discuss the question of the measure of damages. The rule applicable to such breach of contract is stated generally in section 3300 of the Civil Code, whereby the damages allowed are said to be 'the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.' There are a few cases, involving the future performance of a broken contract, wherein it has been held that the possibility that the plaintiff ****890** would have been able to perform if he had not been prevented was, from the nature of the undertaking, so remote and speculative that the contract price for full performance could not be allowed as damages. Contracts of agency to sell goods in unlimited quantities on commission have been held to be in this class. Union R. Co. v. Barton, 77 Ala. 148; Brigham v. Carlisle, 78 Ala. 248, 56 Am. Rep. 28; Washburn v. Hubbard, 6 Lans. (N. Y.) 11. These, however, are exceptions. The general rule is thus stated in 1 Sutherland on Damages (section 121): 'The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur. The jury may proceed upon reasonable probabilities, and accept, as sufficiently proved, those results which, under like circumstances, generally come to pass. It is not, however, to be hence inferred that prospective damages may be recovered on every plausible anticipation, nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events. It is only intended ***16** that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration.' As was stated in Danforth v. Tenn., ect., Co., 93 Ala. 614, 11 South. 60: 'If profits formed a constituent element of the contract, their loss the natural and proximate result of the breach, and such as was reasonably in the contemplation of the contracting parties, and the amount can be estimated with reasonable certainty, they are recoverable.'

There was uncontradicted evidence in the case at bar showing that it was extremely probable that plaintiffs could and would have sold all the lots within the time limited in the contract if the defendant had been willing to clear the title. It was amply sufficient to support a finding to that effect. The court below made no finding on the point, being evidently of the opinion that no finding was required, inasmuch as it concluded that there had been no prevention of performance. The question whether or not the contract could have been performed was a question of fact, to be determined from the evidence, in case the court had concluded that the defendant was liable.

In mitigation of damages the defendant would have been entitled to deduct from the contract price the amount which the plaintiffs would have had to expend in the future performance of the contract, and which they were excused from expending by reason of the defendant's breach and their election to treat the contract as terminated. 1 Sutherland on Damages, § 120, p. 340; U. S. v. Speed, 75 U. S. 84, 19 L. Ed. 449; Masterton v. Brooklyn, 7 Hill (N. Y.) 62, 42 Am. Dec. 38; McMaster v. State, 108 N. Y. 556, 15 N. E. 417. The defendant did not introduce any evidence in mitigation of damages.

We are of the opinion that the court erred in its conclusions of law, first, that the defendant did not prevent the performance by plaintiffs of the contract; and, second, that plaintiffs were not entitled to the agreed commission less the amounts previously paid thereon, and that the motion for new trial should have been granted.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

Parallel Citations

96 P. 884

Collins v. Vickter Manor, Inc. (1957) 47 Cal.2d 875, 306 P. 2d 783

Action by licensed realty brokers against corporate vendor and vendor's officers for brokers' commission and for officers' alleged wrongful interference with contractual relations between brokers and vendor. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of dismissal after sustaining demurrer, and brokers appealed. The Supreme Court, Schauer, J., held that complaint was sufficient to state cause of action against the vendor and that question whether officers were privileged to cause corporation to discontinue its relation with brokers was matter of defense to be decided by resolution of factual issues involved, and therefore, sustaining of general demurrer was error.

Judgment reversed, and cause remanded with directions.

Opinion, 300 P.2d 90, vacated.

Attorneys and Law Firms

****784 *877** Frye & Yudelson, Collman E. Yudelson and Lawrence E. Silverton, North Hollywood, for appellants.

Peter T. Rice and Sam Lipson, Los Angeles, for respondents.

Opinion

****785** SCHAUER, Justice.

Plaintiffs appeal from a judgment of dismissal entered after defendants' demurrer to the second amended complaint was sustained without leave to amend. Plaintiffs, licensed real estate brokers, seek to recover a brokers' commission from defendant corporation and damages from the individual defendants for asserted wrongful interference with the contractual relations between plaintiffs and defendant corporation. We have concluded that under the established rules as to construction of pleadings the complaint states causes of action against both the corporation and the individual defendants, and that the 'ambiguities' listed in the special demurrer cannot support the above described order.[1]

Each of the first four counts of the complaint (which plaintiffs ***878** refer to as separate causes of action) attempts to state substantially the same cause of action against defendant corporation for a brokers' commission of $3,000. The material allegations of these four counts may be summarized as follows:
[1] On or about October 20, 1954, defendant corporation orally employed plaintiffs to procure a purchaser for described real property owned by the corporation and agreed to pay plaintiffs a commission of $3,000 for their services. Plaintiffs obtained a buyer, Grayson, who agreed to pay $65,000 for the property. Grayson and defendant corporation executed a so-called deposit receipt; a copy of the deposit receipt is attached to and made a part of the complaint. The document is signed by plaintiffs as well as the prospective buyer and seller; it recites that plaintiffs received from Grayson a deposit on account of purchase of the described property, on stated terms, 'Purchase price to be $61,750.00.' At the bottom of the document appears the following:
'We, the undersigned (seller), approve and agree to the foregoing, and agree to pay said broker a real estate commission of $3087.50.

'65000.00.....to seller 3000.00 comm.[2]

Vickter Manor, Inc.
Abe Vickter (secy.)

Seller'

We, the undersigned (buyer), agree to purchase the above described property for the price and terms outlined above.

Purchaser Leonard Grayson'

Significant 'terms outlined above' in the receipt are (1) 'Seller to furnish satisfactory soil compaction report on each bldg site from a reliable testing firm such as D. D. Warren Co.' and (2) 'Final contour map and filing map subject to buyers approval.' Plaintiffs aver that these 'conditions were subsequent to the formation of a valid contract for the sale of the above described real property, but were precedent ***879** to the Buyer's duty to pay the purchase price.' In connection with these terms it is to be noted that the transaction evidenced by the deposit receipt was the proposed sale of unimproved ****786** property for the apparently contemplated purpose of subdivision, improvement, and resale.

The complaint further alleges that Grayson, the purchaser procured by plaintiffs, 'was ready, willing and able to purchase the said real property on the terms and conditions imposed by the said Defendant corporation'; that Grayson, by entering into an escrow on October 26, 1954, as contemplated by the deposit receipt,[3] accepted in writing the oral offer to sell made by defendant corporation, and was at all times 'ready, willing and able to complete the purchase' of the property; that the

corporation, however, prevented the buyer's performance 'by failing to deposit the necessary papers in the said escrow; by failing to furnish any soil compaction report; by failing to furnish any contour map or filing map for the buyer's approval; and by giving written notice of withdrawal from said escrow on or about November 19, 1954'; that plaintiffs 'have duly performed all of the conditions of said contract on their part to be performed' but defendant corporation has refused to pay plaintiffs their earned commission of $3,000, and that the total sum remains unpaid.

Plaintiffs also attempt to state causes of action against defendant Engle (fifth 'cause of action') and against defendant Vickter (sixth 'cause of action') for $3,000 damages caused by interference of the respective individual defendants with the contractual relations between plaintiffs and the corporation. These 'causes of action' repeat the substance of the allegations of the counts against the corporation and add the following averments: Engle, Vickter, and one Lipson were the officers and directors of defendant corporation and 'beneficial owners' of its property; no stock of the corporation was ever issued. While the above mentioned escrow was still open, Engle and Vickter, with full knowledge of plaintiffs' contract with the corporation, 'wrongfully, intentionally, and without justification,' prevented ***880** the corporation from depositing in the escrow 'those documents necessary in order to close said escrow.' The individual defendants did this to prevent closing of the escrow and to permit the corporation and themselves to profit by a sale to others. Engle, president and managing officer of the corporation, had power, on behalf of the corporation, either to complete the sale or to prevent its completion, and he, joined by Vickter, caused the corporation to send written notice of withdrawal from escrow on or about November 19, 1954.

[2] [3] The allegations of the Complaint, with the incorporated deposit receipt, sufficiently state the following cause of action against defendant corporation: The corporation employed plaintiffs to procure a purchaser; plaintiffs procured a purchaser ready, able, and willing to buy on terms sufficiently expressed in the deposit receipt; the corporation 'approve(d) and agree(d) to' those terms; the deposit receipt appears to satisfy the statute of frauds as a written and signed memorandum of the corporation's agreement to pay plaintiffs $3,000 for their services (Civ. Code, s 1624, par. 5; Code Civ.Proc., s 1973, par. 5); the corporation breached its agreement to pay plaintiffs' commission. The right of the brokers to their commission is not, on the facts here alleged, defeated by the failure of the parties to consummate the transaction. (See Meyer v. Selggio (1947), 80 Cal.App.2d 161, 164(4), 181 P.2d 690.)

[4] Defendants rely on Lawrence Block Co. v. Palston (1954), 123 Cal.App.2d 300, 305-306, 266 P.2d 856. It is there correctly determined that 'To entitled a broker to a commission for a sale of real property it must be established that in pursuance of his contract and within the time specified therein, he found a purchaser ready, able, and willing to buy on the terms and conditions ****787** specified in the contract of employment, or, if the exact terms are not specified in his contract, upon terms satisfactory and acceptable to his employer.' However, defendants assert, the only right of plaintiffs to recover a commission grows out of the written deposit receipt between the buyer and seller, and therefore the following statement in the Block Company case is controlling: 'Where the only agreement to pay a broker a commission is contained in the contract between his principal and the customer, the broker's right to compensation is dependent upon performance of that contract.' But this statement does not indiscriminately control every three-party ***881** writing signed by the broker, his principal, and the customer. Such a three-party writing may unequivocally specify, or where uncertain may be construed or shown by extrinsic evidence to mean, that the broker has fully performed the duties of his employment and earned his commission by having obtained a buyer ready, able, and willing to proceed with a purchase in accord with those terms of the writing which define the seller's offer the offer for which the seller employed the broker to produce a qualified acceptor. Where the deposit receipt is subject to such interpretation, recovery of the commission is not prima facie precluded by those decisions which refuse to allow recovery because the broker did not fully perform the terms of his contract. Manifestly a different case is presented if by the terms of the employment contract the broker's right to commission is expressly, or by established implication, made dependent upon the consummation of a contract between his principal and the prospective customer. (See Lawrence Block Co. v. Palston (1954), supra, 123 Cal.App.2d 300, 266 P.2d 856; Frederick v. Curtright (1955), 137 Cal.App.2d 610, 614-615, 290 P.2d 875; Ridgway v. Chase (1954), 122 Cal.App.2d 840, 847, 850(8), 265 P.2d 603; Love v. Gulyas (1948), 87 Cal.App.2d 608, 613, 197 P.2d 405.)

[5] Even if we assume that the agreement between plaintiffs brokers and defendant corporation can properly be construed to mean that plaintiffs were not to receive their commission until consummation of a final agreement between the corporation and the buyer, the judgment appealed from cannot be affirmed. The order sustaining the general demurrer is untenable because the complaint alleges (and the demurrer admits) facts from which, under the established liberal rules of

construction (see Code Civ.Proc., s 452; Faulkner v. Cal. Toll Bridge Authority (1953), 40 Cal.2d 317, 328(5), 253 P.2d 659; Mix v. Yoakum (1927), 200 Cal. 681, 687(11), 254 P. 557), we must infer that plaintiffs and the buyer did everything which the agreement required of them and that consummation was prevented solely by the arbitrary refusal of defendant corporation and its officers to proceed with the transaction. In these circumstances, the defendants will not be allowed to take advantage of their own remissness to defeat plaintiff's recovery. (See Coulter v. Howard (1927), 203 Cal. 17, 23(3), 262 P. 751; Richardson v. Walter Land Co. (1953), 118 Cal.App.2d 459, 464(4), 258 P.2d 42.)

Defendants additionally argue that the complaint fails to ***882** state any cause of action because, they say, the deposit receipt is not an enforceable contract between buyer and seller but rather gives the buyer the unilateral right, in his uncontrolled discretion, to refuse to buy if he is not satisfied as to soil compaction report and maps (see provisions of deposit receipt quoted 306 P.2d 785). This argument is neither controlling nor correct. As already indicated, plaintiffs' right to a commission is no necessarily dependent upon even the execution of a binding contract of purchase and sale. With particular reference to defendants' argument, the right to a commission is not (on the record here) dependent upon Grayson's being satisfied with the soil compaction report which the corporation agrees to furnish or upon Grayson's approval of the 'contour map and filing map.'

[6] [7] [8] [9] Furthermore, if the provisions as to soil compaction report and maps were ****788** contained in an otherwise enforceable contract to buy and sell, those provisions would not make the buyer's obligation illusory; the buyer could not withdraw from the contract at his pleasure. (Cf. Shortell v. Evans-Ferguson Corp. (1929), 98 Cal.App. 650, 659, et seq. (5, 6), 277 P. 519; 12 Cal.Jur.2d 317, s 114.) A contractual provision for performance to the satisfaction of one of the parties ordinarily calls for such performance as would be satisfactory to a reasonable person. (Thomas Haverty Co. v. Jones (1921), 185 Cal. 285, 296(7), 197 P. 105. If acceptance or rejection of the soil compaction report and maps were dependent on the buyer's uncontrolled caprice, then he would be the sole judge of his own satisfaction and could withdraw from the contract without regard to the reasonableness of his decision. (Tiffany v. Pacific Sewer Pipe Co. (1919), 180 Cal. 700, 702-704, 182 P. 428, 6 A.L.R. 1493.) But where the question is whether an agreed performance will satisfy a requirement of commercial value or quality, operative fitness or mechanical utility, the party to whom such performance is tendered is not justified in claiming arbitrarily, unreasonably, or capriciously that he is not satisfied, in order to evade liability. (Thomas Haverty Co. v. Jones (1921), supra, 185 Cal. 285, 296(7), 197 P. 105; Tiffany v. Pacific Sewer Pipe Co. (1919), supra, 180 Cal. 700, 702-704(1), 182 P. 428; Melton v. Story (1931), 113 Cal.App. 609, 613, 298 P. 1032.) A standard for the soil compaction report is stated in the deposit receipt (a report 'from a reliable testing firm such as D. D. Warren Co.'), and from the receipt as a whole it could be determined that the report and maps should ***883** meet reasonable standards for the commercial purpose of subdivision. In these circumstances, the buyer could not evade liability by mere arbitrary rejection of the report and maps.

[10] As hereinabove stated, counts five and six undertake to plead causes of action against the individual defendants Engle and Vickter for the tort described (in Speegle v. Board of Fire Underwriters (1946), 29 Cal.2d 34, 39(2), 172 P.2d 867) as 'Intentional and unjustifiable interference with contractual relations.' It is established that one who, without legal justification, intentionally induces a third person not to perform a contract with another, is liable to the other for the ensuing damage. (Imperial Ice. Co. v. Rossier (1941), 18 Cal.2d 33, 35(1), 112 P.2d 631.)

[11] Plaintiffs have alleged the existence of a valid contract and an intentional unjustified interference with it by the individual defendants which caused defendant corporation to breach such contract to plaintiffs' damage. Whether or not Engle and Vickter were privileged to cause the corporation to discontinue its relations with plaintiffs, in the belief that such a course of action was in the best interests of the corporation, is a matter of defense, to be decided by a resolution of the factual issues presumptively involved. Their right, if any, to such privilege, does not affirmatively appear on the face of the complaint.

For the reasons above stated, the judgment is reversed and the cause remanded with directions to overrule the general demurrer and entertain further proceedings not inconsistent with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

Parallel Citations

306 P.2d 783

Herz v. Clarks Market (1960) 179 Cal.App.2d 471, 3 Cal. Rpte. 844

Action by realty broker to recover a commission allegedly earned under a written contract to find a purchaser for a lease held by defendant on a certain market. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered judgment for broker and defendant appealed. The District Court of Appeal, Duniway, J., held that evidence sustained findings that broker found a purchaser ready, willing and able to buy lease in question according to defendant's terms, that broker notified defendant that he found such a purchaser, and that defendant refused to sell.

Judgment affirmed.

Attorneys and Law Firms

****845 *472** Burnstein & Michaels, Robert C. Burnstein, Jess Abramovitz, Oakland, for appellant.

Haley, McInerney & Logan, William H. McInerney, Oakland, for respondent.

Opinion

DUNIWAY, Justice.

Appeal by defendant Clarks Market, a corporation, from an adverse judgment in an action to recover a broker's commission. Appellant made a written contract with respondent broker, dated December 10, 1956, whereby the broker was 'employ [ed]' for the period December 10, 1956, to February 10, 1957, 'to find a purchaser for the lease' held by appellant on a market at Moraga, Contra Costa County. The contract contained a brief description of the lease and referred to certain subleases to be assigned to the purchaser. It granted respondent 'the sole and irrevocable right to sell' and authorized him to accept a deposit. The price and terms of payment were stated. There was a further agreement to pay 'as commission the sum of $250.00 per month for two years (24 payments) beginning the first month of payment made by purchaser whether said property be sold by said agent or by me or by another agent or through any other source or whether said property be transferred or conveyed or withdrawn from sale during the period of time set forth herein.'

The respondent, in consideration of the employment, 'agrees to use diligence in procuring a purchaser.' The contract was thus a bilateral contract, mutual promises being exchanged. ***473** Davis v. Jacoby, 1 Cal.2d 370, 378–379, 34 P.2d 1026. In this respect, the case differs from many of the cases relied on by appellant, such as Mattingly v. Pennie, 105 Cal. 514, 520, 39 P. 200; Keeler v. Glendon, 124 Cal.App.2d 634, 268 P.2d 1089; and Silva v. Goldman, 117 Cal.App. 423, 4 P.2d 191.

The court found that respondent found a purchaser ready, willing and able to buy, according to the terms of the agreement, and notified appellant on January 25, 1957, that he had found such purchaser, but that appellant refused to sell. Judgment was thereupon entered in favor of respondent for $6,000 (24 x $250).

Appellant contends that the evidence does not support these findings, and that in any event the court should not have granted judgment for $6,000. We do not agree.

1. *The evidence supports the findings*.

Appellant contends that respondent did not either (1) procure a binding contract from the buyer, or (2) bring the parties together thus enabling them of contract, or (3) procure a buyer who 'verbally' (orally) accepted the seller's terms and offered to enter into a written contract. Twogood v. Monnette, 191 Cal. 103, 215 P. 542. No contract was ever signed. But the evidence, construed most favorably to respondent, would clearly support the following: respondent found a corporation engaged in operating supermarkets, called Louis Stores, Inc., which was able to buy. Appellant ****846** had furnished him with considerable data as to the lease and subleases, fixtures, etc. and this he communicated to Mr. Louis, president of Louis Stores. On January 25, he was orally told by Mr. Louis that Louis Stores would buy, according to the terms of respondent's contract with appellant, which Mr. Louis had seen, the only condition being that the terms of the leases be as represented. This offer respondent communicated to appellant both orally and by letter, with a copy to Mr. Louis. The deal was such, and appellant's officers knew it was such, that a final contract could only be worked out at a meeting. Respondent repeatedly tried to set up such a meeting, but appellant's officers, having changed their minds, repeatedly postponed possible meetings, and refused to let respondent have the leases for Mr. Louis' examination, until after February 10. One of them told respondent to 'get $20,000 more.' In the words of one of appellant's officers, they 'kissed Mr. Herz off.' As soon as

February 10 had gone by, they told respondent that they would not go ***474** through with the deal. They never questioned the financial ability of Louis Stores to buy, or raised any other objection as to terms. Lathrop v. Gauger, 127 Cal.App.2d 754, 767–768, 274 P.2d 730. The only explanation of their conduct that they could give the court was that they had no faith in respondent and did not believe that Louis Stores had made 'a concrete offer.' [1] [2] [3] The foregoing evidence clearly supports the findings. The law does not invariably require that an offer be directly communicated from the proposed buyer to the seller; such communication as there was here under the circumstances of this case, is sufficient. Woodbridge Realty v. Plymouth Dev. Corp., 130 Cal.App.2d 270, 280–281, 278 P.2d 713. And appellant's officers having carefully avoided a meeting, which was expressly requested, and having done so for the obvious purpose of evading appellant's contractual obligation to respondent, appellant is not now in a position to assert that, because no meeting occurred, respondent did not bring the parties together. He did all that appellant permitted him to do in this regard. Purcell v. Firth, 175 Cal. 746, 749–750, 167 P. 379; Woodbridge Realty v. Plymouth Dev. Corp., supra, 130 Cal.App.2d 270, 281–282, 278 P.2d 713; Johnson v. Goldberg, 130 Cal.App.2d 571, 578; Merriman v. Wickersham, 141 Cal. 567, 570, 75 P. 180; Twogood v. Monnette, supra, 191 Cal. 103, 107, 215 P. 542; Williams V. Freeman, 35 Cal.App.2d 104, 107–108, 94 P.2d 817; W. Ross Campbell Co. v. Peskin, 162 Cal.App.2d 225, 230, 328 P.2d 27. Nor is it required that a binding contract be executed by the buyer. Coulter v. Howard, 203 Cal. 17, 25, 262 P. 751; and see cases cited supra. Mr. Louis' testimony as to the ability of Louis Stores, Inc. is sufficient. Woodbridge Realty v. Plymouth Dev. Corp., supra, 130 Cal.App.2d 270, 275, 278 P.2d 713. The case of Clements v. Rankin, 83 Cal.App.2d 779, 189 P.2d 725, relied on by appellant, is not in point. In that case the buyer did not agree to the seller's terms and the fact that he did not was caused by the broker's misrepresentations.

2. *The judgment was proper*.

[4] Appellant claims that, because no deal was made and no money paid to it, respondent is not entitled to any commission. It asserts that respondent was to be paid only out of moneys paid by the buyer to appellant over the two year period. But it is not required by the contract between the parties that respondent's commission be paid only out of moneys received by appellant; the commission is payable ***475** whether the property be sold or not. Since the sale did not go through because of appellant's fault, there was a breach of the entire contract, and respondent then became entitled to recover the whole commission. Civ.Code, § 1512; Coulter v. Howard, supra, 203 Cal. 17, 23, 262 P. 751; House v. Cook, 91 Cal.App. 617, 619–620, 267 P. 354; Swanson v. Thurber, 132 Cal.App.2d 171, 177, 281 P.2d 642; Stanton v. Carnahan, 15 Cal.App. 527, 529–530, 155 P. 339; ****847** Realty Bonds & Finance Co. v. Point Richmond Canal & Land Co., 171 Cal. 238, 241, 152 P. 433; W. Ross Campbell Co. v. Peskin, supra, 162 Cal.App.2d 225, 231, 328 P.2d 27; Ratzlaff v. Trainor-Desmond Co., 41 Cal.App. 586, 590–594, 183 P. 269. As was said in the Coulter case, supra, 203 Cal. at page 23, 262 P. at page 753. 'The law will not lend an ear to such contention on her [the owner's] part; therefore the payments provided will be held due as of the date of repudiation. The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase.'

Affirmed.

BRAY, P. J., and TOBRINER, J., concur.

Parallel Citations

179 Cal.App.2d 471

Walter v. Libby (1945) 72 Cal.App.2d 138, 164 P.2d 21

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by E. L. Walter against Elmer Libby to recover commissions allegedly due by reason of sale of defendant's ranch property. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Attorneys and Law Firms

****22 *140** Wm. N. Graybiel, of Turlock, for appellant.

C. Ray Robinson and Samuel V. Cornell, both of Merced, for respondent.

Opinion

PEEK, Justice.

By his complaint plaintiff and respondent sought to recover from defendant and appellant certain commissions alleged to be due by reason of the sale of appellant's ranch property.

On November 2, 1944, the parties executed a written agreement relative to the sale of the property. Plaintiff promptly proceeded to advertise the property for sale and interviewed numerous prospective customers. On the afternoon of December 8, 1944, appellant called upon respondent at the latter's office, stating that he wanted to take the property off the market; that he had decided that it was not a good time to sell; that if he waited until the trees were in bloom and the vines were leafed out, he could sell it for more money, and when that time arrived undoubtedly he would again list the property with respondent. Thereupon respondent agreed to consider the contract at an end and surrendered to appellant the instruments evidencing it. On the following morning appellant deposited in escrow a conveyance of said property to one William Eck, receiving therefor the full amount of the purchase price. He refused to pay respondent any part of the commission as provided in the contract.

At the conclusion of the hearing the trial court found that on November 2, 1944, under the contract between the parties respondent was given the exclusive right to sell certain designated property belonging to appellant for a minimum term of thirty days but to be continuous thereafter until 'I [appellant] shall have given written notice to E. L. Walter, stating when, (not less than ten days thereafter), to cancel this authorization,' ***141** and the contract also provided: 'I further agree that should I sell or dispose of said property or any part thereof, while this agreement is in force, or sell at any time to a person or persons introduced or sent by said E. L. Walter, I agree to pay said E. L. Walter a commission of 5 per cent upon the purchase price received for said property.'

The court further found that the contract was in full force and effect at the time of the sale by appellant to Eck, and that respondent's consent to the surrender thereof and the termination of the agency was induced by the fraud of appellant, and gave judgment for respondent in the amount of $400, representing a commission of five per cent on the sale price of the property together with the costs of suit.

The appellant admitted that he had destroyed the original copies of the contract, executed in duplicate, as he considered the agreement no longer operative, and the contents thereof were established by secondary evidence.

Although appellant attacks the validity of the complaint and the order overruling his demurrer, the principal issues he has raised relate to the sufficiency of the evidence to sustain the findings and the alleged error of the trial court in overruling his general demurrer.

[1] [2] We find no merit in the first contention wherein it is charged that as the complaint neither alleged that the contract ****23** was in full force and effect at the time the property was sold or that plaintiff was the procurer of the purchaser, it therefore is fatally defective. While the complaint does not allege in so many words the existence of the contract at that time, it does set out the terms of the agreement from which it appears that the relation of principal and agent had been created between the parties for an indefinite time. It is well established that the rule is 'When a principal and agent relationship has been shown to have been created to exist for an indefinite length of time there is a presumption in favor of the continuance of the relationship.' Gudger v. Manton, 21 Cal.2d 537, 552, 134 P.2d 217, 226. See also Knox v. Modern Garage etc. Shop, 68 Cal.App. 583, 587, 229 P. 880.

[3] [4] It is evident that appellant misconceives the nature and effect of the contract. Where, as here, the agent or broker is given an exclusive right to sell, as distinguished merely from a sole or exclusive agency (such as that which engaged the attention of the court in ***142** Dreyfus

v. Richardson, 20 Cal.App. 800, 130 P. 161, strongly relied upon by appellant), he is entitled to be compensated when a sale is made by the principal, and it is immaterial that he was not the procuring cause thereof. Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.2d 776, 78 A.L.R. 585; Gregory v. Bonney, 135 Cal. 589, 67 P. 1038; Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067; Justy v. Error, 16 Cal.App. 519, 117 P. 575; 9 C.J., p. 622, § 101, 12 C.J.S., Brokers, pages 219–221, § 94. Also as shown by the cited cases it is immaterial whether the recovery be predicated on the theory of damages for wrongful prevention of performance or on the theory of enforcement of the provision for payment of a commission in any event. In either case the action is on the contract.

On the question of the sufficiency of the evidence to sustain the findings, appellant first complains that the finding, that the sale of the property was made on the morning of December 8, 1944, is not supported by the evidence and that it is in direct conflict with the uncontradicted testimony that no sale took place until appellant and the purchaser met at the bank on December 9th when final terms were agreed upon and reduced to writing.

From such contention it is evident that again appellant has misconceived the nature and effect of the contract in relation to this question. An examination of the record shows testimony by the purchaser that after learning the property was for sale he went to the ranch on several occasions; that he talked to appellant's wife telling her his purpose; that on the morning of December 8th, he talked with appellant as he was leaving the ranch; that they discussed his possible purchase of the ranch, and that it was agreed between appellant and himself that they would meet at the bank the following morning for the purpose of opening an escrow.

[5] [6] It was not necessary for plaintiff to show that a formal sale was actually consummated at the morning conference on December 8th. The word 'sale' must be construed in the light of its use in the contract which was merely a printed form agreement between a vendor and a broker listing with the broker a particular property for a specified term and providing that should the broker or the owner secure a purchaser within said term the owner would pay to the broker the usual commission of five per cent. The contract did not state that the broker's commission would be paid only upon ***143** actual consummation of the sale and transfer of title. It merely provided that the agent 'shall have for his services in obtaining a purchaser' a commission of 5% of the purchase price. Such a contract is but the usual contract between a broker and his client and must be construed as such. Purcell v. Firth, 175 Cal. 746, 749, 167 P. 379; Frank Meline Co. v. Kleinberger, 77 Cal.App. 193, 246 P. 136. Hence the evidence was amply sufficient to support the finding of the trial court that the 'defendant herein agreed to sell' the ranch to Eck on the forenoon of December 8, 1944.

[7] [8] But even if the finding in question was not warranted, this would not affect respondent's right to a recovery, for there is another finding to the effect that the sale had been consummated prior to the termination of the agency agreement; and under the theory that the so-called cancellation or annulment was nugatory as having been induced by fraud, the contract must be held to have been in full force and effect without regard to the precise time at which the sale was concluded, and respondent would still be entitled to the amount of the commission. See Frank Meline Co. v. Kleinberger, 77 Cal.App. 193, 199, 200, 246 P. 136; Justy v. Erro, 16 Cal.App. 519, 531, 117 P. 575. 'It is ****24** only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding becomes material; complaint may not be made of an unsupported finding which, had it been made the other way, would not have affected the judgment.' 24 Cal.Jur., pp. 993, 994, sec. 217.

[9] [10] Appellant's contention that the evidence was insufficient to establish the contents of the written contract, and particularly the provision imposing liability for a sale made by appellant himself, likewise is without merit. Respondent testified that he used printed forms, that they were the only ones he had in the office, and that they all contained the provision in question. Appellant did not deny that printed forms were used nor specifically assert that such a provision had been deleted therefrom, but contented himself with the bare statement that said provision was not a part of the contract. His testimony being contradictory to that of respondent merely presented a conflict in the testimony as to the contents of the instrument. Under such circumstances 'it is for the trier of the fact to determine what witnesses are most entitled to credit.' 16 Cal.Jur., p. 703, sec. 13.

[11] ***144** Appellant advances the further argument that respondent should not have been awarded a recovery, because he failed to perform the services contemplated by the contract. This, in another form, is the same contention previously made which, as we have pointed out, is based on a misconception of the character and extent of the rights created by the contract. Under the agreement, respondent was not required to do more than obtain a purchaser; and this, the evidence shows, he did with due diligence and in the full performance of his duties. As stated in Kimmell v. Skelly, 130 Cal. 555,

559, 560, 62 P. 1067, 1068: 'The consideration for her [the seller's] promise to pay the money if the sale was made by her was the performance of services by the brokers in seeking a purchaser.'

[12] [13] Likewise without merit is the contention that the trial court improperly found the existence of fraud because fraud was not pleaded. It is elementary under our system of code pleading that where the answer sets up new matter by way of avoidance (in this case the alleged cancellation and annulment of the contract), such an allegation is deemed to be controverted, and on the issue so made the plaintiff is at liberty to adduce evidence of fraud to negative the asserted defense. Bancroft's Code Pleading, Vol. 1, page 682, sec. 473.

[14] [15] Nor is there any foundation for the assertion that the evidence was insufficient to justify the finding of fraud. Appellant's misrepresentation as to his present intention, and his suppression of the vital fact that he was about to dispose of the ranch through his own efforts were obviously calculated to and did induce respondent to give his consent to the revocation of the agency and to surrender the instruments evidencing it. Appellant could not take advantage of respondent's consent thus procured. Washburn v. Speer, 206 Cal. 414, 420, 274 P. 519; Civil Code, §§ 1709, 1710.

[16] [17] While the duty to make full disclosure as between principal and agent is more often emphasized with respect to the conduct of the agent, the doctrine is by no means one-sided. The principal may revoke the agency in accordance with the terms of his agreement but he may not do so in bad faith and merely for the purpose of depriving the agent of rights he otherwise would have. The rule is that 'the revocation must be made in good faith and not for the purpose of defeating the agent's rights.' Elms v. Merryman Fruit etc. Co., 207 Cal. 747, 751, 279 P. 781, 783. See also ***145** Blumenthal v. Goodall, 89 Cal. 251, 255, 26 P. 906; 3 C.J.S., Agency, p. 64, § 174; Mechem upon the Law of Agency, section 209.

Likewise there is no force to appellant's argument that his motion for nonsuit should have been granted on the ground that the proof was insufficient to establish the contents of the lost or destroyed instruments, which alone could disclose the terms of the contract on which this suit is based. In Pryor v. McGuire, 59 Cal.App. 234, 237, 210 P. 532, as in the present case, it was contended that the trial court should have followed the seller's version as to the terms of the contract. However, there, as in the case at bar, the seller obtained the contract from the agent through fraudulent representations and the court held that as the contract was last known to have been in possession of the seller, if the contract contained the clause he claimed it did, 'there was no reason for the diligence excercised by the defendant in taking the contract out of the hands of the plaintiff.'

****25** In the case at bar if the contract did not contain the clause which respondent claims it did, there was no reason for the diligence exercised by appellant in taking the contract out of the hands of respondent.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Parallel Citations

164 P.2d 21

Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 959 P.2d 265, 77 Cal.Rptr 2d 107

Insured sued its comprehensive general liability (CGL) insurers, asserting that they had duty to defend it in proceedings commenced by state Environmental Protection Agency's (EPA) issuance of order under "Superfund" law directing insured to remediate pollution allegedly caused by its fertilizer and pesticide business. The Superior Court, Los Angeles County, No. BC110056, Edward M. Ross, J., granted summary judgment to insurers, and insured appealed. The Court of Appeal reversed. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and held in an opinion by Brown, J., on an issue of first impression, that state EPA's order notifying insured that it was a responsible party for pollution and requiring remediation was not a "suit" triggering insurers' duty to defend under comprehensive general liability (CGL) insurance policies.

Judgment of Court of Appeal reversed.

Kennard, J., filed a dissenting opinion.

Opinion, 65 Cal.Rptr.2d 127, vacated.

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Opinion

BROWN, Justice.

In this case we determine whether environmental agency activity prior to the filing of a complaint, in this case an order notifying the insured that it is a responsible party for pollution and requiring remediation, is a "suit" triggering the insurer's duty to defend under a comprehensive general liability insurance (CGL) policy. Two Courts of Appeal have ruled on the issue reaching opposite conclusions. We granted review in both cases, holding *Fireman's Fund Ins. Co.* v. *Superior Court*[**] (1997) 65 Cal.App.4th 1205, 78 CAL.RPTR.2D 418, ***861** REVIEW GRANTED DEC. 23, 1997 (s065447) for resolutiON of the COURT OF APPEAL HERE CONCLUDED THAT THE ORDER CONSTITUTED A "SUIt." we disagree, and therEfore reverse its judgment.

I. FACTS AND PROCEDURAL BACKGROUND

Since 1959, plaintiff Foster–Gardner, Inc. (Foster–Gardner) has operated a wholesale pesticide and fertilizer business in Coachella, California (Site). In August 1992, Foster–Gardner received an "Imminent and Substantial Endangerment Order and Remedial Action Order" (Order) from the Department of Toxic Substances Control (DTSC) of the California Environmental Protection Agency. DTSC issued the Order pursuant to the Carpenter–Presley–Tannerrrrrrrrrr *****110** r Hazardous Substance Account Act (HSAA), California's ****268** "Superfund" law. (Health & Safety Code[1] section 25300 et seq.)

The Order stated the following: As a finding of fact Foster–Gardner was "the owner and operator of the Site, [was] a responsible party, and has incurred liability for cleaning up the Site." As a conclusion of law, Foster–Gardner was a "responsible party" or "liable person" within the meaning of sections 25319, 25323.5, subdivision (a), and 25385.1(g).

In recounting the Site history, the Order stated that "[p]rior to the banning of ... DDT in 1972, Foster–Gardner handled DDT at the Site." In addition, Foster–Gardner stored anhydrous ammonia in tanks at the Site. The Coachella Fire Department had responded to leaks in the tanks. In 1990, the Riverside County Superior Court ordered Foster–Gardner to cease storing anhydrous ammonia. Foster–Gardner continues to handle other chemical products at the Site.

In June 1988, the Riverside County Health Department (RCHD) sampled surface soil at the Site. That investigation revealed extensive contamination with toxaphene, DDT (dichloro-diphenyl-trichloro-ethane) and its products of degradation, DDD (dichloro-diphenyl-dichloro-ethane) and DDE (dichlorodiphenyldichloroethylene). RCHD required Foster–Gardner to conduct a site assessment. Consultants for Foster–Gardner performed a "Preliminary Assessment of DDT in Soil" in January 1990, and "Additional Assessment of DDT in Soil" in March 1990. These studies concluded that the Site was contaminated within and beyond the property boundaries.

Sometime between February and May 1990, Foster–Gardner installed an asphalt cap over high traffic areas of the Site, and treated some Site areas ***862** with a dust suppressant. In March 1991, surface soil sampling conducted by consultants at the request of the City of Coachella revealed excessive concentrations of DDT, DDD, DDE, and toxaphene in the combined residential and industrial streets, and lots adjacent to the Site.

In an unrelated investigation of groundwater contamination at the Coachella City Yard from May to September 1989, consultants discovered excessive concentrations of 1, 2–dichloropropane, 1, 2–dichloroethane and ethylene dibromide in the shallow aquifer. A report prepared by consultants for the Colorado River Basin Regional Water Quality Control Board (RWQCB) stated that the source of these contaminants was in all likelihood the Site.

In May 1991, the RWQCB required Foster–Gardner to conduct a preliminary groundwater investigation by installing and sampling three monitoring wells at the Site. In September 1991, the RWQCB required Foster–Gardner to install four additional wells. On October 22, 1991, the RWQCB issued a Cleanup and Abatement Order requiring Foster–Gardner to clean up and abate the effect of the discharge of contaminants from the Site into the groundwater.

As a result of the Site investigations, groundwater, soil, and surface soil data indicated that the Site was a source of contamination for groundwater and surrounding surface soils, and a potential source of contamination for surface water and air. The DTSC determined that during the ownership and operation of the Site by Foster–Gardner, hazardous substances or wastes had been disposed of onto the Site ground, and "there has been a release or threatened release of hazardous substances or hazardous wastes from the Site." The DTSC further determined that actual and/or threatened release of hazardous substances or hazardous wastes at the Site presents an imminent and substantial endangerment to the public health or welfare, or to the environment.

Foster–Gardner was ordered to submit within 10 days of the effective date of the Order a written notice of its intent to comply with the Order's terms. It was ordered to report within 30 days on its compliance with the direction of the DTSC, the RWQCB and/or the RCHD with regard to interim *****111** measures, including but not limited to continued ****269** groundwater monitoring, complying with the RWQCB's Cleanup and Abatement Order and any subsequent requirements of the RWQCB made pursuant to that order, complying with the RCHD's orders to contain runoff from the Site, and conducting sampling and analysis of off-site surface soils. Within 180 days, Foster–Gardner was ordered to prepare and submit a Remedial Investigation and Feasibility Study (RI/FS) Workplan detailing all of the activities necessary to ***863** complete the remedial investigation and feasibility study of the Site and any off-site areas where there was a release or threatened release of hazardous substances from the Site. In accordance with the schedule set forth in the RI/FS Workplan, Foster–Gardner was ordered to at some future time prepare a "Remedial Investigation Report and Feasibility Study Report." Once the Feasibility Study Report was approved, Foster–Gardner was required to submit a draft Remedial Action Plan (RAP). Following approval of the final RAP, Foster–Gardner was ordered to submit a Remedial Design and Implementation Plan (RDIP). Once the RDIP was approved, Foster–Gardner "shall implement the final RAP."

The Order provided, "Nothing in this Order" precludes the DTSC or other agency "from taking any action authorized by law to protect the public health or safety or the environment and recovering the cost thereof." Foster–Gardner was liable for any oversight costs and "any costs incurred by the DTSC in responding to a release or threatened release of hazardous substances." These costs would be recovered by a civil action. Moreover, "[n]othing in this Order shall constitute or be construed as a satisfaction or release from liability for

any conditions or claims arising [as] a result of past, current or future operations" of Foster–Gardner. Finally, the Order stated, "You may be liable for penalties of up to $25,000 for each day you refuse to comply with this Order and for punitive damages up to three times the amount of any costs incurred by the Department as a result of your failure to comply, pursuant to" sections 25359 (as enacted by Stats.1983, ch. 1044, § 19, p. 3673) and 25361.

Foster–Gardner tendered defense of the DTSC Order to four of its insurers, National Union Fire Insurance Company of Pittsburgh, PA, and Pacific Indemnity Company (Pacific), Fremont Indemnity Company (Fremont), and Ranger Insurance Company (Ranger) (insurers).[2] Pacific's policies were in effect from May 1984 to May 1986, Fremont's policies from June 1983 to July 1984, and Ranger's policies from December 1970 to December 1980. All insurers had issued CGL polices containing the following language with minor nonmaterial differences: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... bodily injury or ... property damage to which [this] insurance applies, caused by an occurrence, ... and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, ... and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or ***864** judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements." The policies further provided, "Regardless of the number of ... claims made or suits brought on account of bodily injury or property damage, the company's liability is limited...." The Pacific and Fremont policies provided, "The company may pay any part or all of the deductible amount to effect settlement of any claim or suit...." While the policies consistently treated the terms "suit" and "claim" as separate and noninterchangeable, these terms were not defined in the policies.[3]

*****112 **270** The insurers either refused to defend, or agreed to defend subject to a reservation of rights and have not, in Foster–Gardner's view, adequately funded that defense. On August 2, 1994, Foster–Gardner filed this action seeking as relevant here a declaration of the insurers' defense obligations and recovery of defense costs. On June 1, 1995, Foster–Gardner filed a motion for summary judgment or in the alternative summary adjudication. The parties ultimately stipulated that the insurers' oppositions to Foster–Gardner's motions would be deemed cross-motions for summary judgment. The trial court entered summary judgment in favor of the insurers in part on the ground that the insurers had no duty to defend because the DTSC Order was not a "suit."

The Court of Appeal reversed. It noted that "A Determination and Order does not commence either a lawsuit in court or an adjudicative procedure before an administrative tribunal. Instead, it is simply an order from an administrative agency." The court held, however, that the DTSC Order constituted a "suit" within the meaning of the policy, and hence gave rise to the insurers' duty to defend. "This conclusion rest[ed] on four factors: the nature and irrevocable consequences of HSAA 'Superfund' procedures which take place before a traditional lawsuit is filed in court, the lack of definition of the operative terms 'suit' and 'claim' in the insurance policies, the general standards for interpretation of insurance policies in California and how those standards have been applied, and the nature of the analysis applied by the California Supreme Court in ***865** *AIU Ins. Co. v. Superior Court* 1990) 51 CAL.3D 807, 274 CAL.rptr. 820, 799 p.2d 1253 (*aiu*)." IT REASONED, "were this case presented on a clean slate, the proper resolution of the 'suit' issue would be debatable.... In California, however, the application of a nontechnical, 'functional' approach to determine the 'damages' issue in *AIU* lights the way to resolution of the 'suit' issue. There is no principled basis on which a nontechnical, functional analysis could properly control the 'damages' issue in *AIU,* while a strictly technical and literal analysis controlled the 'suit' issue. Neither the term 'suit' nor the term 'claim' is defined in the policies. The terms must therefore be construed in favor of the insured, to the extent consistent with objectively reasonable expectations. Although the proceedings commenced by the Determination and Order clearly do not constitute a traditional lawsuit in a court, neither do they constitute a mere claim which can simply be ignored—without adverse effect—until a traditional lawsuit is filed. The true nature of HSAA 'Superfund' proceedings lies somewhere between a traditional lawsuit in a court and a traditional claim or pre-suit demand which has no effect until enforced by a lawsuit in a court. *AIU* teaches that ambiguities of this sort, produced by the combination of new schemes for remediating pollution plus undefined terms used in standard CGL policies, are to be construed against the insurer."

Soon after, a different division of the same district Court of Appeal reached the opposite conclusion. (*Fireman's Fund Ins. Co.* v. *Superior Court, supra,* 65 Cal.App.4th 1205, 78 Cal.Rptr.2d 418, review granted Dec. 23, 1997 (S065447) (*Fireman's Fund*).) In *Fireman's Fund,* the court considered whether United States Environmental Protection Agency (EPA) notices that the insured, Vickers

Incorporated, was a potentially responsible party (PRP) in a Comprehensive Environmental Response, Compensation and Liability Act action (CERCLA) (42 U.S.C. § 9601 et seq.), as amended by the Superfund Amendments and Reauthorization Act, 42 United States Code section 9601 et seq., constituted a "suit."[4] The court held that the words at *****113 **271** issue were clear and unambiguous, and that the insurer had no duty to defend the EPA notices. The court stated, "Foster–Gardner's failure to consider the threshold issues—the plain meaning of 'suit' and 'claim' and whether those terms are ambiguous—is fatal to its analysis and to its decision to rewrite an insurance policy to afford coverage where none was purchased." (65 Cal.App.4th at p. 1212, 78 Cal.Rptr.2d 418.)

***866** We granted the insurers' petition for review in this case. We subsequently granted plaintiff Vickers Incorporated's petition for review in *Fireman's Fund,*[***] *supra,* 65 Cal.App.4th 1205, 78 Cal.Rptr.2d 418, and deferred further action pending consideration and disposition of the related issues here.

II. DISCUSSION

A. BACKGROUND

1. *Relevant HSAA Procedures*[5]

Whenever DTSC "determines that there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or threatened release of a hazardous substance," it has three options. (§ 25358.3, subd. (a).) Generally, in August 1992 and currently it could (1) "[o]rder any responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment," as was done in this case; (2) "[t]ake or contract for any necessary removal or remedial action"; or (3) "[r]equest the Attorney General to secure the relief as may be necessary to abate the danger or threat" in the superior court in the county in which "the threat or danger occurs." (§ 25358.3, subd. (a)(1)-(3), as amended by Stats.1989, ch. 1032, § 21, pp. 3576–3577; 3 Manaster & Selmi, Cal. Environmental Law & Land Use Practice, supra, § 55.02[4], pp. 55–13–55–14.) Here, DTSC chose the first option.

Currently, but not in August 1992, the HSAA expressly provides that "the responsible party [shall be given] an opportunity to assert all defenses to the order." (§ 25358.3, subd. (a)(1).) These defenses are limited, and include acts of God, war, or a third party, the innocent landowner defense, and the statute of limitations. (§§ 25323.5, subd. (b), 25360.4; 3 Manaster & Selmi, Cal. Environmental Law & Land Use Practice, *supra,* §§ 56.10[3][a]–56.10[4], pp. 56–31–56–39.)

As noted, the Order here required Foster–Gardner to prepare a Remedial Investigation and Feasibility Study. " 'Remedial investigation' means those actions deemed necessary by the [DTSC] to determine the full extent of a hazardous substance release at a site, identify the public health and environment threat posed by the release, collect data on possible remedies, and otherwise evaluate the site for purposes of developing a remedial action ***867** plan." (§ 25322.2.) " 'Feasibility study' means the identification and evaluation of technically feasible and effective remedial action alternatives to protect public health and the environment, at a hazardous substance release site, or other activities deemed necessary by the [DTSC] for the development of a remedial action plan." (§ 25314.)

The final RAP issued by the DTSC establishes the cleanup option selected for the site. (3 Manaster & Selmi, Cal. Environmental Law & Land Use Practice, *supra,* § 55.26[1], p. 55–76.) It also includes "a nonbinding preliminary allocation of responsibility among all identifiable potentially responsible parties at a particular site." (§ 25356.1, subd. (e).) "The PRPs identified in the final RAP have three options: (1) assume cleanup responsibility based on the RAP, (2) litigate, or (3) agree to binding arbitration. If a PRP does not choose any of these options, the DTSC ... will begin the cleanup and collect the costs through a subsequent action." (3 *****114** Manaster & Selmi, Cal. Environmental Law & Land Use Practice, *supra,* § 55.26[1], p. 55–76.)

****272** A PRP named in a final RAP may seek judicial review of the plan by filing a petition for writ of mandate pursuant to Code of Civil Procedure section 1085. (§ 25356.1, subd. (g)(1); 3 Manaster & Selmi, Cal. Environmental Law & Land Use Practice, *supra,* § 55.26[2], p. 55–76.) The court must uphold the RAP if it is based on substantial evidence available to the DTSC. (§ 25356.1, subd. (g)(2).) Currently, but not in August 1992, the HSAA specifies that judicial review of any issues concerning the adequacy of any response action taken or ordered by the DTSC is limited to the administrative record. (§ 25357.5, subd. (a).) "Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court." (*Ibid.*)

If DTSC has incurred costs and seeks to compel recovery of them, it must file a lawsuit in court. (§ 25360, subds. (a), (c); see *id.,* former subd. (d), as amended by Stats.1989, ch. 269, § 40, p. 1338; *AIU Ins. Co. v. Superior*

Court (1990) 51 Cal.3d 807, 815–816, 274 Cal.Rptr. 820, 799 P.2d 1253 (*AIU*).) If DTSC decides to file a cost recovery action, "[n]othing in this section deprives a party of any defense he or she may have." (§ 25360, subd. (c); see *id.,* former subd. (d), as amended by Stats.1989, ch. 269, § 40, p. 1338.) There is strict liability for any recoverable costs or expenses. (§ 25363, subd. (d).) However, generally, "any party found liable for any [recoverable] costs or expenditures ... who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that party's actions, shall be required to pay only for that portion." (§ 25363, subd. (a).)

Currently, but not in August 1992, a PRP that fails to comply with an Order without sufficient cause is subject to a civil penalty of up to $25,000 ***868** for each day of noncompliance. (§ 25359.2.) This liability may be imposed either in a civil action or administratively. (*Ibid.*) In addition, in August 1992, generally a party who failed to comply with an Order was liable for "punitive damages up to three times the amount of any costs" incurred by the DTSC "as a result of the failure to take proper action." (§ 25359, as enacted by Stats.1983, ch. 1044, § 19, p. 3673; cf. § 25359, as amended by Stats.1992, ch. 1237, § 1, p. 5819.)

2. *Relevant Insurance Law Principles*

[1] [2] [3] [4] "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545; see *AIU, supra,* 51 Cal.3d at pp. 821–822, 274 Cal.Rptr. 820, 799 P.2d 1253.) "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*AIU, supra,* 51 Cal.3d at p. 822, 274 Cal.Rptr. 820, 799 P.2d 1253.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.)

[5] [6] [7] [8] "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 619; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263.) The fact that a term is not defined in the policies does not make it ambiguous. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., supra,* 5 Cal.4th at p. 866, 21 Cal.Rptr.2d 691, 855 P.2d 1263; *Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545; *Castro v. Fireman's Fund American Life Ins. Co.* (1988) 206 Cal.App.3d 1114, 1120, 253 Cal.Rptr. 833.) Nor does "[d]isagreement concerning the meaning of a phrase," or " 'the fact that a word or phrase isolated from its context is susceptible of more than one meaning.' " *****115** (*Castro v. Fireman's Fund American Life Ins. Co., supra,* 206 Cal.App.3d at p. 1120, 253 Cal.Rptr. 833.) " '[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances ****273** of that case, and cannot be found to be ambiguous in the abstract.' " (*Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1265, 10 Cal.Rptr.2d 538, 833 P.2d 545, italics omitted.) "If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage." (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37, 36 Cal.Rptr.2d 100, 884 P.2d 1048.)

[9] [10] [11] ***869** An insurer has a duty to defend when the policy is ambiguous and the insured would reasonably expect the insurer to defend him or her against the suit based on the nature and kind of risk covered by the policy, or when the underlying suit potentially seeks damages within the coverage of the policy. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co., supra,* 9 Cal.4th at p. 38, 36 Cal.Rptr.2d 100, 884 P.2d 1048; *Montrose Chemical Corp. of Calif. v. Superior Court* (1993) 6 Cal.4th 287, 299, 24 Cal.Rptr.2d 467, 861 P.2d 1153; *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 271–275, 54 Cal.Rptr. 104, 419 P.2d 168.) The duty to defend is "a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage...." (*Montrose Chemical Corp. of Calif. v. Superior Court, supra,* 6 Cal.4th at p. 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153, original italics; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46, 65 Cal.Rptr.2d 366, 939 P.2d 766 [defense duty "arises as soon as tender is made"].) It extends to allegations that are actually and even only potentially covered. (*Buss v. Superior Court, supra,* 16 Cal.4th at p. 46, 65 Cal.Rptr.2d 366, 939 P.2d 766.) Indeed, the insurer must defend the entire action even when only one of several causes of action is potentially covered. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d

210, 846 P.2d 792; *Buss v. Superior Court, supra,* 16 Cal.4th at p. 49, 65 Cal.Rptr.2d 366, 939 P.2d 766 [insurer "cannot parse the claims, dividing those that are at least potentially covered from those that are not"].)

3. *Out–of–State Authority*

While the issue of whether environmental agency activity prior to the filing of a complaint is a "suit" within the meaning of a CGL policy is one of first impression in California, numerous other state and federal courts have considered this question. These cases have arisen as a consequence either of underlying CERCLA proceedings, underlying state proceedings pursuant to statutes modeled after CERCLA (similar to the HSAA), or both. Essentially three approaches have evolved, generally referred to as the literal, functional, and hybrid approaches.

a. *The "literal meaning" approach*

Under the "literal meaning" approach, the term "suit" is deemed unambiguous, referring to actual court proceedings initiated by the filing of a complaint. When no complaint has been filed, there is no "suit" the insurer has a duty to defend.[6] (*Lapham–Hickey* ***116 **274 *Steel Corp. v. Protection Mutual Ins. Co., supra,* 211 Ill.Dec. 459, 655 N.E.2d at p. 847 [word "suit" is unambiguous, and its plain meaning ***870** requires the filing of a complaint in a court of law before an insurer's duty to defend is triggered]; *Ray Industries, Inc. v. Liberty Mut. Ins. Co., supra,* 974 F.2d at p. 761, original italics [Term "suit" has a "plain and unambiguous meaning" that excludes PRP letters, because a "suit" is "an attempt to gain an object *in the courts.* The term refers to formal legal proceedings, as opposed to demands and other tactics that, however powerful, are not enforced by a court of law."].)

In addition to the plain meaning of the term "suit," some courts find support for their conclusion in the connection between the filing of a complaint and the duty to defend. Generally the issue of whether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint and comparing these allegations to the policy provisions. (*Lapham–Hickey Steel Corp. v. Protection Mutual Ins. Co., supra,* 211 Ill.Dec. 459, 655 N.E.2d at p. 847["[T]he duty to defend extends ... not to allegations, accusations or claims which have not been embodied within the context of a complaint."]; *City of Edgerton v. General Cas. Co. of Wisconsin, supra,* 517 N.W.2d at p. 477.) "These references to the 'complaint' clearly indicate that insurers generally contract to defend suits filed in a court, rather than mere allegations or threats." (*Ray Industries, Inc. v. Liberty Mut. Ins. Co., supra,* 974 F.2d at p. 763.) Where there is no complaint, there is no "suit" against which the insurer can defend. (*Lapham–Hickey Steel Corp. v. Protection Mutual Ins. Co., supra,* 211 Ill.Dec. 459, 655 N.E.2d at p. 847.)

Moreover, many courts note that the standard policy language differentiates between a "claim" and a "suit." "If all of the policy's language is to be ***871** given effect, then the words 'suit' and 'claim' as used within [the policy] must have different meanings.... While [the insurer] has the power to investigate any claim, it has the duty to defend only suits. If the word 'suit' was broadened to include claims, in the face of policy language which distinguishes between the two, any distinction between these two words would become superfluous." (*Lapham–Hickey Steel Corp. v. Protection Mutual Ins. Co., supra,* 211 Ill.Dec. 459, 655 N.E.2d at pp. 847–848; *Ray Industries, Inc. v. Liberty Mut. Ins. Co., supra,* 974 F.2d at p. 762 [court construed the term "suit" narrowly in order to maintain policy distinction between "suit" and "claim"].)

Other courts conclude that interpreting "suit" to mean an action initiated by the filing of a complaint recognizes the variety of options available to the EPA in enforcing CERCLA and state agencies enforcing such laws as the HSAA. (*Ray Industries, Inc. v. Liberty Mut. Ins. Co., supra,* 974 F.2d at p. 762.) Under CERCLA (and the HSAA), agencies have express authority to file a lawsuit to recover all costs of removal or remedial action. (*Ibid.*) Or they may chose not to file a lawsuit in a particular case. "Like other claimants, the EPA threatens litigation and makes other efforts to pressure potentially liable parties; but these threats, however seriously they may be taken, do not constitute a lawsuit." (*Ibid.*)

Because they conclude the term "suit" does not encompass administrative agency orders and other activity, courts have noted that the insurer would be put in the position of providing coverage for which it did not contract or receive payment. (*City of Edgerton* ***117 *v. General Cas. Co. of Wisconsin, supra,* 517 N.W.2d at p. 476, fn. 26 ["The original risk assessment becomes a nullity if the language of the policy is redefined in order to ****275** expand coverage beyond what was planned for by the insurer in the contract of insurance."].)

Finally, at least one court has held that because in that particular jurisdiction an insurer has no duty to indemnify

an insured for cleanup costs pursuant to a CERCLA order, there is no duty to defend environmental agency administrative proceedings. (*Becker Metals Corp.* v. *Transportation Ins. Co., supra,* 802 F.Supp. at p. 240; see also *Aetna Cas. & Sur. Co. v. General Dynamics Corp., supra,* 968 F.2d at p. 714.)

b. *The "functional" and "hybrid" approaches*

Under the "functional" approach, any receipt of a PRP letter or other pre-complaint environmental agency activity constitutes a "suit."[7] In a refinement of the "functional" approach, other courts have determined that a PRP ***872** letter or other pre-complaint environmental agency action is a "suit" only if it is sufficiently coercive and threatening. (*Ryan v. Royal Ins. Co. of America* (1st Cir.1990) 916 F.2d 731, 741–742 [applying N.Y. law: "origins and purpose of the duty to defend seem best accommodated ... by focusing ... [on the] coerciveness, adversariness, the seriousness of the effort with which the government hounds an insured, and the gravity of imminent consequences"; these do not include a state environmental agency's "implied invitation to voluntary action"].)[8] This is the "hybrid" approach. These courts essentially do not consider a mere preliminary notification to be a "suit," but conclude a proceeding becomes a "suit" if it progresses beyond the mere notification or request for voluntary action stage. Because the Order received by Foster–Gardner in this case is considerably past the mere notification stage, we need not differentiate between the two approaches here.

Under both the functional and hybrid approach, the term "suit" is deemed ambiguous, *****118** and interpreted to refer to proceedings other than those in a court ***873** of law initiated by the filing of a complaint. Some courts are persuaded ****276** that "the fact that another reasonable interpretation of the term 'suit' exists simply creates an ambiguity." (*Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co., supra,* 775 F.Supp. at p. 733.) Having found ambiguity, courts then determine that an insured would reasonably expect a defense of the administrative agency's order or other activity. (*Aetna Casualty & Surety Co., Inc. v. Pintlar Corp., supra,* 948 F.2d at p. 1517["[A]n 'ordinary person' would believe that the receipt of a PRP notice is the effective commencement of a 'suit' necessitating a legal defense. The PRP letter forced Gulf to hire technical experts and lawyers to protect its interests in connection with EPA's actions."].)

For many courts that conclude an administrative action is a "suit," "[o]f critical importance is the creation of the administrative record and the role it may play in future litigation. Documentation sought by the EPA, and which [the insured] must produce under the force of law, will determine the amount and type of waste generated by [the insured] and discharged onto the site. Given the strict liability stance of CERCLA, this information is all that is needed to establish both the fact and proportional share of [the insured's] liability at the site. [¶] Moreover, because the EPA may implement any investigatory and remedial action it deems necessary at the site, subject only to an abuse of discretion review, the total cost of the project will also be determined before litigation is brought. The significant authority given to the EPA in such matters allows it essentially to usurp the traditional role of a court of law in determining and apportioning liability. Such matters are concluded by the EPA before the action is ever brought to court." (*Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., supra,* 519 N.W.2d at pp. 871–872, italics omitted; *Aetna Casualty & Surety Co., Inc. v. Pintlar Corp., supra,* 948 F.2d at p. 1516 ["Unlike the garden variety demand letter, which only exposes one to a potential threat of future litigation, a PRP notice carries with it immediate and severe implications. Generally, a party asserting a claim can do nothing between the occurrence of the tort and the filing of the complaint that can adversely affect the insured's rights. However, in a CERCLA case, the PRP's substantive rights and ultimate liability are affected from the start of the administrative process."]; *Avondale Indus., Inc.* v. *Travelers Indem. Co., supra,* 887 F.2d at p. 1206; *Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co., supra,* 775 F.Supp. at p. 733; *Hazen Paper v. U.S. Fidelity and Guar., supra,* 555 N.E.2d at p. 581.)

Other courts have stated that "[c]overage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation." (*Aetna Casualty & Surety Co., Inc. v. Pintlar Corp., supra,* 948 F.2d at p. 1517.) "If the threat is clear then coverage should be provided." (*Id.* at p. 1518.)

***874** In response to the concern that "a decision in [the insurer's] favor might blur the distinction between 'claim' and 'suit' evidenced in [the] insurance policies," one court has stated, "we wish to emphasize that this opinion should in no way be viewed as intimating that every request for relief should be considered the initiation of a suit that the insurers are obliged to defend. Rather, our determination on this issue is made primarily based on the unique aspects of CERCLA actions and the authority given to EPA under the statute.... Accordingly, we do not disturb the basic claim/suit distinction contained within the subject insurance policies." (*Michigan Millers Mut.*

Ins. Co. v. Bronson Plating Co., supra, 519 N.W.2d at p. 871, fn. 13.)

Finally, courts have relied on certain policy considerations, such as the need to encourage prompt and efficient hazardous waste clean-

*****119** up. "[I]f the receipt of a PRP notice is held not to trigger the duty to defend under CGL policies, then insureds might be inhibited ****277** from cooperation with the EPA in order to invite the filing of a formal complaint.... A fundamental goal of CERCLA is to encourage and facilitate voluntary settlements.... It is in the nation's best interests to have hazardous waste cleaned up effectively and efficiently." (*Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp., supra,* 948 F.2d at p. 1517; *Avondale Indus., Inc. v. Travelers Indem. Co., supra,* 887 F.2d at p. 1206 ["common sense argues that for Travelers to proffer a defense now is better for it, Avondale, and the public interest in a prompt cleanup of the hazardous waste"]; *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., supra,* 519 N.W.2d at p. 872 [" [F]rom a policy perspective, ... the position urged by [the insurers] would only increase the litigiousness of this already extensively litigated area of the law. Limiting an insurer's duty to defend to an actual court proceeding preceded by a complaint would merely encourage PRPs to decline 'voluntary' involvement in site cleanups, waiting instead for an actual lawsuit to be brought in order to receive insurance coverage. This would have the effect of substantially protracting the cleanup of contaminated sites."].)

4. *AIU*

In *AIU, supra,* 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253, the United States and local administrative agencies filed suits against FMC Corporation (FMC), seeking relief for alleged violations of state and federal environmental laws, including CERCLA and the HSAA. (*Id.* at p. 815, 274 Cal.Rptr. 820, 799 P.2d 1253.) FMC in turn sought declaratory relief against its insurers determining that any costs it might become obligated to pay as a result of the injunctive relief and/or reimbursement ordered in the third party suits were covered under its CGL policies. (*Id.* at p. 816, 274 Cal.Rptr. 820, 799 P.2d 1253.)

The insurance policies at issue provided coverage to FMC for all sums FMC became legally obligated to pay as "damages" (under two policy ***875** forms) or "ultimate net loss" (under a third) because of property damage. (*AIU, supra,* 51 Cal.3d at p. 814, 274 Cal.Rptr. 820, 799 P.2d 1253.) We determined whether (i) any adverse orders issued in those suits would "legally obligate" FMC to pay such costs, (ii) the costs would constitute "damages" or "ultimate net loss," and (iii) such costs would be incurred because of "property damage." (*Id.* at p. 818, 274 Cal.Rptr. 820, 799 P.2d 1253.) We noted that "[o]nly if all three conditions [were] fulfilled [would] the insurers' duty to provide coverage arise under the policies." (*Ibid.*)

The first requirement for coverage was that FMC be legally obligated to pay the costs at issue. We stated, "Because it is clear that, if FMC is held liable in the third party suits, it will be 'obligated' to pay for whatever relief the courts order, the only remaining question is whether that obligation may be considered 'legal' under applicable rules of interpretation." (*AIU, supra,* 51 Cal.3d at p. 824, 274 Cal.Rptr. 820, 799 P.2d 1253.) We declined to interpret the phrase "legally obligated" as providing coverage for only those actions traditionally brought in law and not in equity. (*Id.* at pp. 824–825, 274 Cal.Rptr. 820, 799 P.2d 1253.) We observed that because the distinction between law and equity in California had generally been abolished, "even a legally sophisticated policyholder might not anticipate that the term 'legally obligated' precludes coverage of equitably compelled expenses." (*Id.* at p. 825, 274 Cal.Rptr. 820, 799 P.2d 1253.) "Thus, as a matter of plain meaning, the term 'legally obligated' covers injunctive relief and recovery of response costs." (*Ibid.*) Moreover, even if the phrase raised doubts about whether a law-equity distinction was intended, it would be unreasonable to conclude that it unambiguously incorporated this sophisticated distinction into the policies. Any such ambiguity was resolved in favor of coverage. (*Ibid.*) "Whether the term 'legally obligated' is ambiguous or not, therefore, we conclude that it encompasses the types of relief sought in the third party suits." (*Ibid.*)

We next determined whether FMC's prospective legal obligation in the third party suits was to pay "damages." *****120** (*AIU, supra,* 51 Cal.3d at p. 825, 274 Cal.Rptr. 820, 799 P.2d 1253.) In so doing, we rejected the construction of the term "damages" as " 'any sum expended under sanction of law' " or "sums ****278** paid to third persons as a result of 'legal claims.' " (*Id.* at p. 827, 274 Cal.Rptr. 820, 799 P.2d 1253.) "Although we agree that a layperson might reasonably define 'damages' in such broad terms, it is unlikely that he would do so in the context of the coverage provision at issue here, taken as a whole." (*Ibid.*) Instead, we noted that "the statutory and dictionary definitions of 'damages' share several basic concepts. Each requires there to be 'compensation,' in 'money,' 'recovered' by a party for 'loss' or 'detriment' it has suffered through the

acts of another." (*Id.* at p. 826, 274 Cal.Rptr. 820, 799 P.2d 1253.)

In determining whether reimbursement of government response costs constituted "damages," we concluded that the first element of the statutory and dictionary definitions of "damages" was fulfilled. (*AIU, supra,* 51 Cal.3d at p. 828, 274 Cal.Rptr. 820, 799 P.2d 1253.) ***876** The "agencies suffer 'loss' or 'detriment' in two separate ways when they incur response costs under CERCLA and similar statutes. First, release of hazardous waste into groundwater and surface water constitutes actual harm to property in which the state and federal governments have an ownership interest; this harm is 'detriment' in statutory terms. [Citations.] Second, the agencies' out-of-pocket expenses of investigating and removing the waste as required by statute is 'loss' incurred as a direct result of harm allegedly created through the unlawful act or omission of FMC." (*Id.* at pp. 828–829, 274 Cal.Rptr. 820, 799 P.2d 1253.)

We also concluded that the second element of statutory and dictionary definitions of "damages" was fulfilled. "FMC's reimbursement of government response costs is monetary 'compensation' for the loss suffered by the agencies when they proceed with environmental cleanups." (*AIU, supra,* 51 Cal.3d at p. 829, 274 Cal.Rptr. 820, 799 P.2d 1253.)

We rejected the insurers' argument that CERCLA intended that reimbursement of response costs be treated as conceptually distinct from recovery of "damages." (*AIU, supra,* 51 Cal.3d at pp. 830–831, 274 Cal.Rptr. 820, 799 P.2d 1253.) We stated, "our ultimate conclusion as to whether reimbursement of response costs is 'damages' for insurance purposes is, as noted above, predominantly a question of how, under *state law,* insurance policies should be interpreted. [Citations.] We are not bound by distinctions or definitions contained in CERCLA itself, if such distinctions do not reflect the intent of the parties to the CGL policies at the time of their formation. For this reason, even to the extent that CERCLA distinguishes between response costs and damages, this fact seems immaterial to the interpretation question at issue in this case. The parties' intent in entering the CGL policies could not possibly have been influenced by the niceties of statutory language adopted many years after the policies were drafted." (*Id.* at p. 831, 274 Cal.Rptr. 820, 799 P.2d 1253, original italics.)

We also noted that while reimbursement of response costs was essentially a form of restitution, both restitution and compensatory damages fell within the meaning of "damages" in the policies. (*AIU, supra,* 51 Cal.3d at p. 836, 274 Cal.Rptr. 820, 799 P.2d 1253.) We observed that "the relief sought in the underlying suits at issue here is not punitive," and distinguished it from those forms of restitution that as a matter of public policy cannot be covered by insurance. (*Id.* at pp. 836–837, 274 Cal.Rptr. 820, 799 P.2d 1253.)

We next considered whether "any or all of the costs of complying with injunctions issued under CERCLA and similar statutes are 'damages' under the CGL policies." (*AIU, supra,* 51 Cal.3d at p. 838, 274 Cal.Rptr. 820, 799 P.2d 1253.) We noted that "The statutes on which the third party suits are based provide that, in lieu of remedying contamination and seeking reimbursement, the agencies may ***877** obtain injunctions compelling responsible parties to both cease discharging hazardous waste and clean up damage already present. [Citation.] As courts and commentators have recognized, government cleanup efforts are generally considerably more expensive than cleanups performed by the responsible party. [Citations.] For this reason, federal and state governments generally seek voluntary and *****121** involuntary cleanup by the responsible party (pursuant to injunction if necessary) before performing it themselves and seeking reimbursement ****279** under CERCLA." (*Id.* at pp. 837–838, 274 Cal.Rptr. 820, 799 P.2d 1253.)

We noted, "The costs of injunctive relief ... do not readily satisfy the statutory or dictionary definitions of 'damages.' Because such costs are paid to employees or independent contractors rather than aggrieved parties, they do not directly 'compensate' aggrieved persons for 'loss' or 'detriment.' " (*AIU, supra,* 51 Cal.3d at p. 838, 274 Cal.Rptr. 820, 799 P.2d 1253.) We concluded, however, that it was unlikely "that the parties to CGL policies intended to cover reimbursement of response costs but not the costs of injunctive relief, at least where the latter costs are incurred—generally at a lower total cost—for exactly the same purposes addressed through governmental expenditure of response costs." (*Ibid.*) In this respect, we noted that unlike traditional injunctive relief, which is generally only available when legal remedies such as monetary compensation are inadequate, "injunctive relief may be available [under CERCLA], even though legal or restitutive remedies are adequate." (*Id.* at pp. 838, 840, 274 Cal.Rptr. 820, 799 P.2d 1253.) In addition, the mere fact that the agencies sought an injunction did not indicate an absence of cognizable property damage or personal injury. Moreover, "in its remedial aspects, the injunction results in exactly the type of expenditures involved in reimbursement of response costs, whether or not the agencies have an adequate remedy in the form of reimbursement." (*Id.* at p. 840, 274 Cal.Rptr. 820, 799

P.2d 1253.) "[I]njunctive relief is an equivalent substitute for the goal of government remedial action." (*Ibid.*) "For these reasons, it would exalt form over substance to interpret CGL policies to cover one remedy but not the other. Given the practical similarity of remedies available under the environmental statutes at issue here, we believe a reasonable insured would expect both remedies to fall within coverage as 'damages.' " (*Ibid.*)

We observed that CERCLA and the HSAA "authorize alternative remedies—injunction and reimbursement—that are relatively interchangeable in a way perhaps not foreseen by the parties at the time they entered the CGL policies.... [T]he policies necessarily present some ambiguity in light of statutory schemes that by their very operation tend to eliminate the formal distinction between compensation paid to an aggrieved party and sums expended by the insured under compulsion of injunction. [Citation.] For this reason, although we take the statutory and dictionary definitions ... to be the 'ordinary and popular' definition of 'damages' for interpretation purposes, we will not apply this definition inflexibly. To the extent that policy ***878** language is ambiguous in light of the way environmental statutes authorize relief, our goal remains to protect the objectively reasonable expectations of the insured." (*AIU, supra,* 51 Cal.3d at p. 828, 274 Cal.Rptr. 820, 799 P.2d 1253.)

Finally, we observed that "some costs required under environmental injunctions are prophylactic in nature," and stated "these costs are not incurred 'because of property damage,' and therefore are not covered by CGL policies." (*AIU, supra,* 51 Cal.3d at p. 841, 274 Cal.Rptr. 820, 799 P.2d 1253.) "Until such damage has occurred, whether on the waste site itself or elsewhere, there can be no coverage under CGL policies." (*Id.* at p. 843, 274 Cal.Rptr. 820, 799 P.2d 1253.)

B. Analysis

[12] [13] Under the policies, the insurers are required to defend a "suit," but have discretion to investigate and settle a "claim." The parties each assert that the word "suit" is clear and unambiguous, but differ on what that meaning is. The insurers assert that the word "suit" in the policies means a civil action commenced by filing a complaint. Anything short of this is a "claim." Foster–Gardner asserts that "suit" means " 'an attempt to gain an end by legal process' before a trial judge or some other dispute resolution authority, as opposed to a threat to do so." Here, it asserts, the Order "is the substantive equivalent to a formal action brought in court." It defines a "claim" as "a threat to initiate ... legal process or merely a demand as of right." We agree with the insurers.

*****122** The Order here essentially required Foster–Gardner to continue monitoring hazardous waste levels at the Site, prepare studies documenting the extent of Site contamination, ****280** and draft a proposal for remediating the Site. As the Court of Appeal acknowledged, "A Determination and Order does not commence either a lawsuit in court or an adjudicative procedure before an administrative tribunal. Instead, it is simply an order from an administrative agency. It is only in the event that a[PRP] does not comply with a Determination and Order that an enforcement action in court might follow." As Pacific asserts, "The very fact that the Court can easily determine that an HSAA proceeding is *not* a suit ... indicates that the Court knows what an actual suit is by the term's use in the policy."

As noted earlier, "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 18, 44 Cal.Rptr.2d 370, 900 P.2d 619; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., supra,* 5 Cal.4th at p. 867, 21 Cal.Rptr.2d 691, 855 P.2d 1263.) The primary attribute of a "suit," as that term is *commonly* understood, is that parties to an action are involved in actual court proceedings initiated by the filing of a complaint. (Black's Law Dict. (6th ed.1990) ***879** p. 1434 ["Suit" is "[a] generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him ... Term 'suit' has generally been replaced by term 'action'; which includes both actions at law and in equity."]; Webster's New Collegiate Dict. (9th ed.1987) p. 1180 ["suit" is "an action or process in a court for the recovery of a right or claim"].) As the Court of Appeal in *Fireman's Fund* stated, "A 'claim' can be any number of things, none of which rise to the formal level of a suit—it may be a demand for payment communicated in a letter, or a document filed to protect an injured party's right to sue a governmental entity, or the document used to initiate a wide variety of administrative proceedings.... While a claim may ultimately ripen into a suit, 'claim' and 'suit' are not synonymous." (*Fireman's Fund,*[***] *supra,* 65 Cal.App.4th at p. 1216, 78 Cal.Rptr.2d 418; see *Phoenix Ins. Co. v. Sukut Construction Co., Inc.* (1982) 136 Cal.App.3d 673, 677, 186 Cal.Rptr. 513 [Claim "is a demand for something as a right, or as due. A formal lawsuit is not required before a claim is made."]; cf. *Perzik v. St. Paul Fire & Marine Ins. Co.* (1991) 228 Cal.App.3d 1273, 1277, 279 Cal.Rptr. 498["[S]uit for damages unambiguously refers

to civil litigation ... that is, lawsuits alleging 'professional liability claims.' "]; *Safeco Surplus Lines Co. v. Employer's Reinsurance Corp.* (1992) 11 Cal.App.4th 1403, 1408, 15 Cal.Rptr.2d 58, italics omitted [" ' [T]here is an inherent difference between the 'making' of a claim and the 'bringing' of a lawsuit. The former, by its very nature, involves some kind of notice. The latter only requires the filing of a complaint.' "].) Thus, a reasonable construction of the word "suit" is a lawsuit.

In contrast, Foster–Gardner's construction of the term "suit" is not reasonable. There is nothing in the policy language to support the interpretation that some pre-complaint notices are "suits" and some are not. Rather, the unambiguous language of the policies obligated the insurers to defend a "suit" not, as Foster–Gardner asserts, the "substantive equivalent" of a "suit."

As the Wisconsin Supreme Court has stated, "We find no ambiguity in the term 'suit' as it has been used in the insurance policies. 'Suit' denotes court proceedings, not a 'functional equivalent.' The dissent believes that a reasonable policyholder would view letters from a federal or state agency advising an insured of liability as a 'suit.' To the contrary, the word 'suit' is easily understood and unambiguous to a reasonable policyholder. The proof is in the decisions that hold that a 'PRP letter' is the 'functional equivalent of a suit.' Either there is a suit or there is not. When there is no suit, there is no duty to defend." (*City of Edgerton v. General Cas. Co. of Wisconsin, supra,* 517 N.W.2d at p. 477.)

***880** Moreover, the policies do not treat the terms "suit" and "claim" as interchangeable, but consistently treat them separately. (See *ante,* p. 111 of *****123** 77 Cal.Rptr.2d, p. 269 of 959 P.2d.) This careful separation indicates that the insurers' differing rights and obligations with respect to "suit[s]" and "claim[s]" were deliberately and intentionally articulated in ****281** the policies. (See 2 Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,* ¶ 7:2048.1, p. 7H–21 [The effect of such policy language is that "an insurer owes a duty to defend 'suits' but no duty to defend 'claims' which have not yet become 'suits.' Instead, the insurer has the discretionary right to investigate and settle 'as it deems expedient.' " (Italics omitted.)].)

In addition, in determining whether they have a duty to defend, we have instructed insurers to "compar[e] the allegations of the complaint with the terms of the policy." (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 25, 44 Cal.Rptr.2d 370, 900 P.2d 619 [It is a "settled rule that the insurer must look to the facts of the complaint and extrinsic evidence, if available, to determine whether there is a potential for coverage under the policy and a corresponding duty to defend."]; *id.* at p. 26, 44 Cal.Rptr.2d 370, 900 P.2d 619["[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy."]; *Montrose Chemical Corp. of Calif. v. Superior Court, supra,* 6 Cal.4th at p. 300, 24 Cal.Rptr.2d 467, 861 P.2d 1153, italics omitted ["The duty to defend is determined by reference to the policy, the complaint, and all facts known to the insurer from any source."].) The parameters of a "suit"—and therefore the limits of a defense—are defined explicitly by the complaint, the policy, and any other information known to the insurer. It is because the insurer's duty to defend depends on the allegations in the *complaint* that the insurer may or may not owe a duty to defend those allegations. (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 26, 44 Cal.Rptr.2d 370, 900 P.2d 619; *Ray Industries, Inc. v. Liberty Mutual Ins. Co., supra,* 974 F.2d at p. 763 ["These references [in duty to defend cases] to the 'complaint' clearly indicate that insurers generally contract to defend suits filed in a court, rather than mere allegations or threats."].)

Furthermore, we have been solicitous of the fact that a declaratory relief action concerning coverage issues may need to be stayed to avoid prejudice to the insured in its defense of an underlying lawsuit. (*Montrose Chemical Corp. of Calif. v. Superior Court, supra,* 6 Cal.4th at pp. 301–302, 24 Cal.Rptr.2d 467, 861 P.2d 1153 ["To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action."] As Pacific asserts, the very notion that an insured may be prejudiced is predicated on the existence of an underlying lawsuit wherein the parties can assemble information through discovery and possess ***881** the power to subpoena information in the coverage action. Absent an underlying lawsuit, there is no such danger.

Indeed, relying, as Foster–Gardner suggests, on the "coerciveness" of a particular notice or Order would introduce a significant element of uncertainty into an insurer's ascertainment of its duty to defend. When and under what circumstances would an Order or other pre-complaint notice or proceeding be considered a "suit"? Would the dollar amount of the insured's potential liability determine "coerciveness?" Who determines what is coercive and what is not? To answer these questions, courts would have to rewrite unambiguous policy language on a case-by-case basis under the guise of interpretation.

Nor would there be any basis for limiting this expanded "suit" definition to environmental agency notices. (See 2 Croskey et al., Cal. Practice Guide: Insurance Litigation 2, *supra,* ¶¶ 7:1856–7:1859, pp. 7G–21–7G–22 [noting that Court of Appeal's opinion in this case arguably would mean an insurer has an obligation to defend employment discrimination administrative proceedings].) Businesses are frequently required to comply with the regulations of and respond to inquiries by the state or federal Occupational Safety and Health Administration (OSHA), the Immigration and Naturalization Service (INS), the health department, and the Internal ***124** Revenue Service (IRS) prior to the time any complaint is filed. One can imagine that the average business owner might find compliance with an IRS audit or other regulations **282** and inquiries coercive and expensive. That does not mean that these inquiries are transformed into "suit[s]" their insurers are obligated to defend. As amicus curiae Insurance Environmental Litigation Association asserts, Foster–Gardner's position would create "a broad legal-services arrangement under which insurers would step into any dispute that conceivably might ripen into litigation."

Although we reject the proposition that the Order triggered a duty to defend, we fully recognize the seriousness of such an Order. Currently, judicial review of any issues concerning the adequacy of any response action taken or ordered by the DTSC is limited to the administrative record, and Foster–Gardner's available defenses are few. By enacting the HSAA, the Legislature has given extraordinary power to the DTSC, and any company that received an Order would be justified in treating it seriously. Such Orders "may even represent a unique legal creation, with no true parallel in any other area of administrative law. But the fact that the [Legislature] chooses to create a new and more powerful type of claim does not justify our deviating from the plain language of the contracts." (*Ray Industries, Inc. v. Liberty Mutual Ins. Co., supra,* 974 F.2d at p. 764.)

[14] ***882** Rather, by specifying that only a "suit," and not a " claim" triggers the duty to defend, insurers have drawn an unambiguous line to define and limit their contractual obligation. This delineation encourages stability and efficiency in the insurance system. In exchange for a higher premium, the policies might have obligated the insurer to defend any "demand" against the insurer, or to provide a defense whenever the insured is subject to government compulsion or investigation. They did not. (*AIU, supra,* 51 Cal.3d at p. 837, 274 Cal.Rptr. 820, 799 P.2d 1253, fn. 15 [The HSAA " expressly *permits* responsible parties to enter into agreements to 'insure, hold harmless, or indemnify a party to the agreement for any costs or expenditures under this chapter.' " (Original italics.)]; § 25364; see *Jaffe v. Cranford Ins. Co.* (1985) 168 Cal.App.3d 930, 933, 214 Cal.Rptr. 567 [insurer agrees to pay damages " 'resulting from any claims or suits' "].) Although insureds certainly deserve no less than the benefit of their bargain, insurers should be held liable for no more. (*Ray Industries, Inc. v. Liberty Mutual Ins. Co., supra,* 974 F.2d at p. 764 ["By limiting its duty to defend to 'suits,' [the insurer] unambiguously demonstrated its intention to avoid responsibility for any action that fell outside the traditional and well-recognized meaning of that term. This court will not deprive [the insurer] of the benefit of its bargain by forcing it to insure against the creation of a new type of legal action, a risk for which it was not paid."].)

Foster–Gardner asserts that it is not urging this court to ignore the long-recognized distinction between a "claim" and a "suit." Rather, "[t]he plain meaning of the term 'suit' in a standard CGL policy embraces the [DTSC] coercive administrative proceeding—a proceeding that not only determines liability, but also establishes the amount thereof." The Order "is not a 'claim' because it is not a mere threat to initiate legal action, or merely a demand as of right.... The [DTSC] is not threatening to institute a legal action to establish Foster–Gardner's alleged liability for response costs, it has done so.... [P]ursuant to its order, the [DTSC] will make findings of fact and determinations of law which will determine Foster–Gardner's alleged liability, subject only to the appellate review of a trial court."

As noted earlier, Foster–Gardner's argument has proved of "critical importance" to other courts. (See *ante,* p. 118 of 77 Cal.Rptr.2d, p. 276 of 959 P.2d.) In our view, however, even if many of the factual predicates for any future lawsuit are determined either prior or in response to the Order, that does not ineluctably lead to the conclusion that the policies' language must be interpreted to require a duty to defend such an Order. Indeed, in even simpler, more routine insurance claims, information that may prove damaging to the insured is gathered prior to the filing of a lawsuit. For example, "[i]t is well established that an insurer is not required ***125** to provide a criminal defense to an insured under a liability policy obligating the insurer to pay 'damages' for which the insured **883** is found liable." (*Stein v. International Ins. Co.* (1990) 217 Cal.App.3d 609, 615, 266 Cal.Rptr. 72; *Perzik v. St. Paul Fire & Marine Ins. Co., supra,* 228 Cal.App.3d at pp. 1276–1278, 279 Cal.Rptr. 498; *Jaffe v. Cranford Ins. Co., supra,* 168 Cal.App.3d at p. 934, 214 Cal.Rptr. 567.) Nevertheless, a guilty verdict against the insured in the criminal proceeding may well affect the insured's ability to meaningfully defend any

subsequent civil action. The fact that damaging, perhaps even irrefutable, findings will be made does not mean that a duty to defend arises in the criminal proceeding. (See *Stein v. International* ****283** *Ins. Co., supra,* 217 Cal.App.3d at p. 614, 266 Cal.Rptr. 72.) Similarly, in an automobile accident, medical reports are written, collision experts consulted, and other information obtained often long before the institution of any lawsuit. The fact that the insured's liability will be affected by such information does not alter the language of the insurance contract which does not require a defense until the lawsuit is filed.

Along these lines, Foster–Gardner asserts that "should this Court decide to deprive insureds of their entitlement to defense costs for coercive administrative proceedings, this Court will also be providing the Carriers with an unintended windfall in the form of reduced indemnity obligations. Specifically, an insured in the administrative action may be able to limit or even eliminate a carrier's indemnity obligations by vigorously defending against claims of alleged damage."

Of course, because we conclude the insurers here did not contract and receive premiums to defend anything but a civil lawsuit, requiring them to defend the Order would result in an unintended windfall for *Foster–Gardner.* Moreover, it is indeed arguable that an insured's early intervention in a dispute outside the civil action context may reduce any indemnity for which the insurer is ultimately held liable. That does not alter the scope of the insurer's duty to defend. Thus, even if Foster–Gardner is correct that its insurers will ultimately be obligated to indemnify costs incurred as a result of the Order, this merely means that the insurers have an inherent incentive to participate in those proceedings where the costs are ascertained. Under the language of the policy, however, this is a judgment call left solely to the insurer ("the company ... may make such investigation and settlement of any claim ... as it deems expedient"). (See *Stein v. International Ins. Co., supra,* 217 Cal.App.3d at p. 615, 266 Cal.Rptr. 72; *Harleysville Mutual Ins. Co. v. Sussex Co., supra,* 831 F.Supp. at p. 1132 [The "insurer may well have an interest in providing a defense early in the administrative proceeding as it may ultimately be called upon to indemnify the insured for liability resulting from that proceeding."].) In any event, as the Court of Appeal in *Fireman's Fund* pointed out, "this anomaly is more imagined than real since insurance companies routinely pay 'claims' that have not ripened into 'suits' and which therefore have not triggered a defense obligation." (*Fireman's Fund,*[***] *supra,* 65 Cal.App.4th at p. 1212, fn. 6, 78 Cal.Rptr.2d 418.)

***884** Foster–Gardner further argues, "The conclusion that coercive administrative actions are 'suits' flows naturally from this Court's holding in *AIU,* that costs incurred to comply with an injunction mandating cleanup or to reimburse a government agency for cleanup expenses under CERCLA and the State Superfund Act constitute 'damages' under a CGL policy. [Citation.] No logical basis exists under California rules of policy interpretation to determine that the term 'damages' under a CGL policy is broad enough to include equitable remedies pursued by government entities, yet that the term 'suit' cannot be read in a similar manner to include the adversarial administrative proceedings in which such damages are sought."

In *AIU,* as set forth above, we acknowledged, "The costs of injunctive relief ... do not readily satisfy the statutory or dictionary definitions of 'damages.' Because such costs are paid to employees or independent contractors rather than aggrieved parties, they do not directly 'compensate' aggrieved persons for 'loss' or 'detriment.' " (*AIU, supra,* 51 Cal.3d at p. 838, 274 Cal.Rptr. 820, 799 P.2d 1253.) We concluded, however, that it was unlikely "that the parties to CGL policies intended to cover reimbursement of response *****126** costs but not the costs of injunctive relief, at least where the latter costs are incurred—generally at a lower total cost—for exactly the same purposes addressed ****284** through governmental expenditure of response costs." (*Ibid.*) In this respect, we noted that unlike traditional injunctive relief, which is only available when legal remedies such as monetary compensation are inadequate, "injunctive relief may be available [under CERCLA], even though legal or restitutive remedies are adequate." (*Id.* at pp. 838, 840, 274 Cal.Rptr. 820, 799 P.2d 1253.) In addition, the mere fact that the agencies sought an injunction did not indicate an absence of cognizable property damage or personal injury. Moreover, "in its remedial aspects, the injunction results in exactly the type of expenditures involved in reimbursement of response costs, whether or not the agencies have an adequate remedy in the form of reimbursement." (*Id.* at p. 840, 274 Cal.Rptr. 820, 799 P.2d 1253.) "[I]njunctive relief is an equivalent substitute for the goal of government remedial action." (*Ibid.*) "For these reasons, it would exalt form over substance to interpret CGL policies to cover one remedy but not the other. Given the practical similarity of remedies available under the environmental statutes at issue here, we believe a reasonable insured would expect both remedies to fall within coverage as 'damages.' " (*Ibid.*)

Here, however, we perceive no elimination in the HSAA of the formal distinction between a "suit" and "claim[s]" which do not rise to the level of a suit. Under section 25358.3, the DTSC is authorized to issue an Order *or* to

"[r]equest the Attorney General to secure the relief as may be necessary to abate the danger or threat" in the superior court in the county in which "the threat or danger occurs." (§ 25358.3, subd. (a)(1) & (3), as amended by Stats.1989, ch. 1032, § 21, pp. 3576–3577; see § 25358.3, subd. (a)(1) & 3); ***885** see *id.,* subds. (e), (g).) Moreover, to compel a party to repay its expended costs, the DTSC must file a lawsuit in court. (§ 25360, subds. (a), (c), see *id.,* former subds. (a) & (d), as amended by Stats.1989, ch. 269, § 40, p. 1338; see *AIU, supra,* 51 Cal.3d at pp. 815–816, 274 Cal.Rptr. 820, 799 P.2d 1253.) Thus, the HSAA itself clearly distinguishes between the issuance of an Order and the institution of a civil lawsuit. (See *Ray Industries Inc. v. Liberty Mutual Ins. Co., supra,* 974 F.2d at p. 762 ["CERCLA itself recognizes a distinction between lawsuits and PRP notice letters .... the EPA has express authority to file a lawsuit ...; it has simply chosen not to do so in this case."]; *Harleysville Mutual Ins. Co. v. Sussex County, supra,* 831 F.Supp. at p. 1132 ["Recognizing the difference in these approaches provides a clear line of demarcation between situations that do and do not trigger the insurer's duty to defend."].)

Foster–Gardner also argues that because under *AIU,* response costs are "damages" within the coverage of the policies, and the Order is the "proceeding" in which Foster–Gardner's liability for these damages will be determined subject only to review by a trial court, then the insurers have a duty to defend. However, as we have already stated, an insurer does not have a duty to defend each and every proceeding in which there is a potential covered damages or any other factual predicate will be ascertained. Rather, it has a duty to defend a *suit* whenever there is potential coverage. (*Gray v. Zurich Insurance Co., supra,* 65 Cal.2d at p. 268, 54 Cal.Rptr. 104, 419 P.2d 168, italics added ["the duty to defend arises only if the third party *suit* involves a liability for which the insurer would be required to indemnify the insured" (italics added)]; *Montrose Chemical Corp. of Calif. v. Superior Court, supra,* 6 Cal.4th at p. 299, 24 Cal.Rptr.2d 467, 861 P.2d 1153.)

Moreover, the proceedings in *AIU* in which "damages" were sought were civil actions, not administrative proceedings. (*AIU, supra,* 51 Cal.3d at p. 815, 274 Cal.Rptr. 820, 799 P.2d 1253 [the "United States and local administrative agencies ... filed suits against FMC, seeking relief for alleged violations of CERCLA" and the HSAA]; *id.* at p. 816, 274 Cal.Rptr. 820, 799 P.2d 1253 ["FMC seeks declaratory relief establishing that the CGL policies cover costs it may become obligated to pay as a result of injunctive relief and/or reimbursement ordered in the third party suits."].) We did not hold that an insurer *****127** has a duty to defend when no such suit has been filed. As *Fireman's Fund* observed, "*AIU's* holding—that there is *coverage* ****285** for certain *damages* sought in a third party suit prosecuted by the EPA under CERCLA—has nothing to do with whether the carrier has a *duty to defend* when no third-party suit has been filed." (*Fireman's Fund,*[***] *supra,* 65 Cal.App.4th at p. 1212, fn. 6, 78 Cal.Rptr.2d 418, original italics.) In addition, to the extent the Order seeks prophylactic rather than remedial or mitigative measures, Foster–Gardner's reliance on *AIU* is in any event inapt. (*AIU, supra,* 51 Cal.3d at pp. 841, 843, 274 Cal.Rptr. 820, 799 P.2d 1253.)

Foster–Gardner asserts that we have recently held in *Aerojet–General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 70 Cal.Rptr.2d 118, 948 P.2d 909 ***886** that "environmental investigation expenses may constitute defense costs that the insurer must pay in fulfilling its duty to defend.... Since the Court held that an insurer has a duty to pay investigative costs pursuant to an administrative order, logic dictates that such administrative orders constitute 'suits' triggering the Carriers' duty to defend."

Aerojet, however, did not involve the issue of an insurer's duty to defend its insured prior to a complaint being filed. Rather, the issue was "whether site investigation expenses ... may constitute defense costs that the insurer must incur in fulfilling its duty to defend" or whether such costs were solely indemnification. (*Aerojet–General Corp. v. Transport Indemnity Co., supra,* 17 Cal.4th at p. 45, 70 Cal.Rptr.2d 118, 948 P.2d 909.) The parties and all but one insurer stipulated that the insurers had or would pay Aerojet's defense costs, and "would litigate whether site investigation expenses were defense costs." (*Id.* at pp. 50–51, 70 Cal.Rptr.2d 118, 948 P.2d 909.) Moreover, Aerojet had been sued in state and federal court by the State of California and the United States in three actions in 1979 and 1986. (*Id.* at p. 47, 70 Cal.Rptr.2d 118, 948 P.2d 909.)

We concluded that "the insured's site investigation expenses constitute defense costs that the insurer must incur in fulfilling its duty to defend if, and only if, the following requirements are satisfied. First, the site investigation must be conducted within the temporal limits of the insurer's duty to defend, i.e., *between tender of the defense and conclusion of the action.* Second, the site investigation must amount to a reasonable and necessary effort to avoid or at least minimize liability. Third and final, the site investigation expenses must be reasonable and necessary for that purpose." (*Aerojet–General Corp. v. Transport Indemnity Co., supra,* 17 Cal.4th at pp. 60–61, 70 Cal.Rptr.2d 118, 948 P.2d 909, italics added.) "By contrast, if and to the

extent that the site investigation is not conducted within the temporal limits of the insurer's duty to defend ... the related site investigation expenses cannot even possibly be defense costs that the insurer must incur in fulfilling its duty to defend." (*Id.* at p. 61, 70 Cal.Rptr.2d 118, 948 P.2d 909.)

[15] "The duty to defend arises when the insured tenders defense of the third party lawsuit to the insurer." (2 Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,* ¶ 7:604, p. 7B–22.) Prior to the filing ****286** of a complaint, there is nothing for the insured *to tender defense of,* and hence no duty to defend arises. It follows therefore that site investigation expenses incurred prior to the instigation of a lawsuit against the insured are not defense costs the insurer must incur. That is because the insurer does not yet have a duty to defend the insured.

[16] Foster–Gardner also asserts that "The potential liability under the [Order] would be overwhelming to most sophisticated business institutions. To ***887** small, family owned businesses such as Foster–Gardner, such potential liability is nearly incomprehensible." We are cognizant of the significant economic consequences that may flow from the Order. "Still, that is not sufficient reason for a court to create new coverage and impose risks not assumed or paid for by the contracting parties." (*Michigan Millers Mut. Ins. v. Bronson Plat., supra,* 519 N.W.2d at p. 881 (dis. opn. of Griffin, J.).) Indeed, we are also cognizant that judicially *****128** created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." (*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 408, 257 Cal.Rptr. 292, 770 P.2d 704.)

Finally, Foster–Gardner relies on *Taranow v. Brokstein* (1982) 135 Cal.App.3d 662, 185 Cal.Rptr. 532, in which the court held that the word "suit" included arbitration proceedings. In *Taranow,* however, the partnership contract at issue required all controversies and claims arising out of the agreement to be arbitrated. (*Id.* at p. 664, 185 Cal.Rptr. 532.) It also provided for attorney fees " '[s]hould any partner be forced to bring suit to enforce the terms of this partnership agreement.' " (*Ibid.*) The court therefore reasonably concluded that for the attorney fee provision to have any effect, the term "suit" would have to be interpreted to include arbitration proceedings. (*Id.* at pp. 667–668, 185 Cal.Rptr. 532.) That is not the situation here. Interpreting "suit" to include only actions commenced by the filing of a complaint does not render the insurer's promise to defend meaningless. Moreover, post–1985 policies generally include arbitration proceedings in the definition of "suit." (See *ante,* fn. 3.)

As noted, cases in other jurisdictions have relied in part on certain policy considerations in determining that environmental agency activity is the "functional equivalent" of a "suit." (*Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp., supra,* 948 F.2d at p. 1517; *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., supra,* 519 N.W.2d at p. 872.) In particular, these cases have expressed the concern that a contrary conclusion would increase litigation by encouraging insureds (who want the insurer to cover defense costs) to fail to respond to an administrative order or other inquiries, and let the agency sue them for reimbursement of cleanup costs.

We disagree. Our conclusion that a "suit" is a court proceeding initiated by the filing of a complaint creates a "bright-line rule that, by clearly delineating the scope of risk, *reduces* the need for future litigation. Indeed, it is the position taken by [these other jurisdictions] that will open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the 'functional equivalent of a suit brought in a ***888** court of law.' " (*Michigan Millers Mut. Ins. v. Bronson Plat., supra,* 519 N.W.2d at p. 881 (dis. opn. of Griffin, J.), italics added.)

We also note that in response to the suggestion that "because it is in the nation's best interests to have hazardous waste cleaned up, our courts must construe insurance policies to provide coverage for such remedial work lest the insureds be discouraged from cooperating with the EPA," the Court of Appeal in *Fireman's Fund* aptly stated, "While we agree that it is in everyone's best interests to have hazardous wastes cleaned up, we do not agree that a California court may rewrite an insurance policy for that purpose or for any purpose. This is a contract issue, and imposition of a duty to defend CERCLA proceedings that have not ripened into suits would impose on the insurer an obligation for which it may not be prepared.... Whatever merit there may be to these conflicting social and economic considerations, they have nothing whatsoever to ****287** do with our determination whether the policy's disjunctive use of 'suit' and 'claim' creates an ambiguity." (*Fireman's Fund,*[***] *supra,* 65 Cal.App.4th at p. 1214, fn. 8, 78 Cal.Rptr.2d 418; see also *AIU, supra,* 51 Cal.3d at p. 818, 274 Cal.Rptr. 820, 799 P.2d 1253 ["The answer is to be found solely in the language of the policies, not in public policy considerations."].)

We conclude the Order did not initiate a "suit" within the meaning of the policies. Accordingly, it did not give rise to the insurers' duty to defend.

DISPOSITION

The judgment of the Court of Appeal is reversed.

GEORGE, C.J., and BAXTER and CHIN, JJ., concur.

*****129** KENNARD, Justice, dissenting.

I dissent.

The majority holds that an administrative agency notice identifying the recipient as a party potentially responsible for environmental pollution, and directing the recipient to assume responsibility for remediation of the pollution, does not trigger an insurer's duty to defend the recipient under a comprehensive general liability (CGL) policy. I would hold that it does.

The issue that this court decides here is one that may arise in the context of either state or federal environmental laws. The issue may arise in the context of proceedings under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. § 9601 et seq.) when the Environmental Protection Agency (EPA), having identified a site contaminated with hazardous material and the parties potentially responsible for that contamination, sends a letter to each potentially responsible party (PRP) notifying that party of the EPA's findings. And the issue may ***889** arise under various state legislative schemes enacted to supplement and complement CERCLA, including our state's Carpenter–Presley–Tanner Hazardous Substance Account Act (Health & Saf.Code, § 25300 et seq.), when the state agency (here the Department of Toxic Substances Control) sends a similar letter (here an "Imminent and Substantial Endangerment Order and Remedial Action Order") directing a PRP to take or pay for remedial action.

Although this court has not previously addressed the issue of whether a PRP notification letter, under either CERCLA or its state law counterpart, triggers an insurer's duty to defend under a CGL policy, this issue has been addressed many times by other courts. The Courts of Appeal of this state have reached conflicting decisions concerning it, as have state and federal courts in other jurisdictions. By now, the issue has been thoroughly dissected and analyzed, and the arguments on each side are well developed and well known.

The majority draws its arguments and reasoning from the decisions of other courts (and from one dissenting opinion) reaching the result it favors. Arguments and reasoning supporting the opposite conclusion are readily marshaled in the same manner. In particular, the Supreme Courts of Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, and North Carolina, and the Ninth Circuit Court of Appeals (applying Idaho law), have all handed down decisions concluding that a PRP notification letters triggers an insurer's duty to defend under a CGL policy. (*Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.* (9th Cir.1991) 948 F.2d 1507; *A.Y. McDonald Indus., Inc. v. Ins. Co. of North America* (Iowa 1991) 475 N.W.2d 607; *Hazen Paper Co. v. United States Fidelity and Guaranty Co.* (1990) 407 Mass. 689, 555 N.E.2d 576; *Michigan Millers Mutual Ins. Co. v. Bronson Plating Co.* (1994) 445 Mich. 558, 519 N.W.2d 864; *SCSC Corp.* v. *Allied Mutual Ins. Co.* (Minn.1995) 536 N.W.2d 305; *Coakley v. Maine Bonding and Cas. Co.* (1992) 136 N.H. 402, 618 A.2d 777; *C.D. Spangler Const. Co. v. Indus. Crankshaft & Eng. Co., Inc.* (1990) 326 N.C. 133, 388 S.E.2d 557.) Rather than retrace in detail the familiar path that these courts have laid out, I will summarize the main points that I have found persuasive in reaching a conclusion opposite to the majority's.

Under a CGL policy, the insurer promises to defend any "suit" against the insured seeking damages within the scope of the ****288** policy's indemnity provisions. The issue here is whether the term "suit" includes an administrative proceeding that a state agency charged with environmental protection commences by sending to the insured a statutory notification letter identifying the insured as a PRP and ordering the insured to commence the remediation process. The majority's decision that such a notice does not commence a "suit" rests mainly on the proposition that the term "suit" is unambiguous and refers only to a court action commenced by the filing of complaint. ***890** Maj. opn., *ante,* at p. 122 of 77 Cal.Rptr.2d, at p. 280 of 959 P.2d.) Two decisions, one by a Court of *****130** Appeal in this state and the other by the Michigan Supreme Court, persuade me that this is not so.

In a 1982 decision joined by Presiding Justice Racanelli and Justice Newsom, Justice Elkington had this to say about the meaning of "suit":

"While the term 'suit' will ordinarily refer to an action commenced in a court of law, it has often been given a much broader meaning. It is not 'essential that the proceeding should be originally instituted in a court.' [Citation.] The word signifies 'the prosecution of any claim, demand, or request, and is much broader than the

term "action," and may embrace it, but does not define it.' [Citation.] It is 'in the nature of an action in court.' [Citation.] ' "Actions" technically applies only to actions at law, since "action" is narrower than "suit," which denotes any legal proceeding of a civil kind brought by one person against another, and includes actions at law and suits in equity.' [Citation.] It may be 'given a broad meaning' [citation]; it 'is a more general term denoting any legal proceeding of a civil kind' [citation]; and it simply connotes an 'adversary proceeding' [citation], or 'a process in law instituted by one party to compel another to do him justice' [citation]. [¶] 'Lawsuit' is defined by Webster's Third New International Dictionary (p. 1280) as 'any of various technical legal proceedings.' [¶] And the term has expressly been held to embrace arbitration proceedings. ' "[S]uit" is a broad term including arbitration.' [Citations.]" (*Taranow v. Brokstein* (1982) 135 Cal.App.3d 662, 665–666, 185 Cal.Rptr. 532, italics omitted.)

The Michigan Supreme Court, addressing the same issue that the majority decides, concluded that "suit," as used in a CGL policy to trigger the insurer's duty to defend, does not unambiguously refer only to civil actions commenced in a court. The Michigan Supreme Court's decision includes these relevant observations:

"There is a division of opinion, both within Michigan and among other jurisdictions, regarding the definition of the term 'suit,' and its application to nontraditional legal proceedings. Some courts have found that 'suit' must refer unambiguously to a court proceeding initiated by a complaint, while others hold that the term may also encompass some nonjudicial proceedings.

"In determining what a typical layperson would understand a particular term to mean, it is customary to turn to dictionary definitions. Having canvassed a number of lay dictionaries, we note that most definitions of 'suit' do include a reference to some type of court proceeding, e.g., 'the act, the process, or an instance of suing in a court of law.' The Random House Dictionary of the English Language (1987). Nevertheless, 'suit' is not ***891** defined exclusively in those terms. For instance, Webster's New World Dictionary of the American Language (2nd college ed., 1982), provides the alternative definition, 'attempt to recover a right or claim through legal action,' while Webster's Third New International Dictionary of the English Language (1964), defines suit as 'the attempt to gain an end by legal process: prosecution of a right before any tribunal.'

"The existence of these alternative and more general definitions of a 'suit' persuasively suggests that a typical layperson might reasonably expect the term to apply to legal proceedings other than a court action initiated by a complaint. [Citation.] Where the insurers fail to provide otherwise, that commonly understood meaning must prevail." (*Michigan Millers Mut. Ins. v. Bronson Plating Co., supra,* 445 Mich. 558, 567–569 [519 N.W.2d 864, 869], fns. and italics omitted.)

****289** Another focal point of the majority's decision is the proposition that a PRP notification letter is properly characterized as a "claim" rather than a "suit." The terms "claim" and "suit" both appear in the standard CGL policy, and are used in a way that indicates they are intended to be mutually exclusive. The majority reasons that because "suit" unambiguously refers to a court proceeding initiated by complaint, a PRP notification letter does not commence a "suit," and therefore it must be, by default, a *****131** "claim." (Maj. opn., *ante,* at pp. 122, 123–124 of 77 Cal.Rptr.2d, at pp. 280, 281–282 of 959 P.2d.) I find this reasoning unpersuasive.

One could just as readily reach the opposite conclusion by beginning with the term "claim" rather than the term "suit." Focusing on the usual meaning of "claim" in the insurance context, one might conclude that "claim" is unambiguous and that it means a prelitigation demand letter that may be ignored without adverse legal consequences. A PRP notification letter does not satisfy this definition of "claim." As the majority acknowledges (maj. opn., *ante,* at p. 110 of 77 Cal.Rptr.2d, at p. 268 of 959 P.2d), the letter at issue here was sent by an administrative agency, recited the agency's factual findings and legal conclusions, and ordered the insured to take specific actions. As the majority also acknowledges (maj. opn., *ante,* at p. 123 of 77 Cal.Rptr.2d, at p. 281 of 959 P.2d), failure to respond to this sort of letter has substantial adverse legal consequences, including fines of up to $25,000 per day (Health & Saf.Code, § 25359.2) and lost opportunities to contest the scope and cost of the cleanup. It must follow, therefore, that a PRP notification letter is not a "claim" and that, by a process of elimination, it must be a "suit" (or, more precisely, the event that initiates a "suit").

Obviously, resolution of the duty-to-defend issue presented here should not turn on whether analysis begins with the term "suit" or with the term "claim." The correct inquiry, in my view, is which of the two terms — "suit" or "claim" — more aptly describes the PRP notification letter and the administrative process that the sending of the letter initiates. In my view (and that ***892** of the various courts reaching decisions contrary to the majority's decision here), a PRP notification letter, which includes an administrative order backed by heavy sanctions, and the administrative remediation process that the letter initiates, in substance resemble a typical

personal injury court proceeding initiated by complaint more closely than they do the typical personal injury claimant's prelitigation demand letter that an insured may ignore without legal consequences. In any event, the CGL policy language at issue here is ambiguous as to whether a PRP notification should be treated as a mere "claim" or as the initiation of a "suit," and under our rules of policy interpretation (see, e.g., *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253), this ambiguity should be resolved in favor of coverage.

Finally, the majority's decision is inconsistent with *AIU Ins. Co. v. Superior Court, supra,* 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253. There, this court held that when the government seeks to recover environmental pollution remediation costs in a civil suit, those costs are, in the words of the standard CGL policy, sums that the insured is "legally obligated" to pay as "damages." (*Id.* at p. 837, 274 Cal.Rptr. 820, 799 P.2d 1253.) It is inconsistent with generally accepted principles of insurance law to hold that even though the insurer must indemnify government remediation costs, it need not represent and defend the insured in the administrative process that largely determines the amount of these costs. In the same decision, this court also held that an insurer must indemnify the costs of complying with an injunction ordering remedial action. (*Id.* at p. 841, 274 Cal.Rptr. 820, 799 P.2d 1253.) It is illogical to hold that an insurer need not pay those costs when they result from compliance with an administrative order rather than from compliance with an injunction. As this court stated, "costs of compliance must be interpreted as 'damages' in the environmental context, because to hold otherwise would make insurance coverage hinge on the 'mere fortuity' of the way in which government agencies seek to enforce cleanup requirements, would unreasonably constrain the agencies' choice of cleanup mechanisms, ****290** and would introduce substantial inefficiency into the cleanup process." (*Id.* at pp. 840–841, 274 Cal.Rptr. 820, 799 P.2d 1253.) "Because an insured would reasonably expect equal coverage of the costs of equivalent or alternative remedies, the costs of injunctive relief under the statutes in question here are *****132** 'damages' for CGL purposes." (*Id.* at pp. 841–842, 274 Cal.Rptr. 820, 799 P.2d 1253.) So too here, a reasonable insured would expect the insurer to pay cleanup costs whether the insured's obligation for those costs is determined administratively or judicially, and a reasonable insured would also expect the insurer to represent and defend its interests in the forum — whether administrative or judicial — in which its cleanup costs were determined. An insured would not expect that the existence of coverage for defense costs would "hinge on the 'mere fortuity' of the way in which government agencies seek to enforce cleanup requirements." (*Id.* at pp. 840–841, 274 Cal.Rptr. 820, 799 P.2d 1253.)

***893** For these reasons, I would hold that a PRP notification triggers the insurer's duty to defend under the standard CGL policy language at issue here.

MOSK and WERDEGAR, JJ., concur.

Parallel Citations

18 Cal.4th 857, 959 P.2d 265, 47 ERC 1098, 29 Envtl. L. Rep. 20,357, 98 Daily Journal D.A.R. 8398

Alden v. Mayfield (1912) 164 Cal. 6, 127 P. 45

Department 2. Appeals from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Victoria Alden against C. E. Mayfield. From the judgment and from an order denying a new trial, plaintiff appeals, and defendant appeals from a judgment for plaintiff on a cross-complaint. Reversed and remanded.

Attorneys and Law Firms

****46 *7** T. T. C. Gregory, of Fairfield, for appellant.

W. U. Goodman, of Fairfield, for respondent.

Opinion

HENSHAW, J.

Plaintiff sued in ejectment to recover possession of certain property, which possession was withheld by defendant after service upon him of 30 days' notice to quit. In separate counts and causes of action plaintiff sought to recover, besides the possession of the property, damages for its detention and the value of the rents and profits. Sullivan v. Davis, 4 Cal. 291; Johnson v. Visher, 96 Cal. 310, 31 Pac. 106.

The admitted facts are that Victoria Alden, plaintiff, was the owner of a store in Suisun which the defendant had been occupying under a tenancy from month to month, paying therefor a rental value of $65 a month. In June, 1908, there was served upon the defendant a notice of an increase of rent from $65 a month to $100 a month. This increase in rent was never paid by defendant, but defendant continued in possession, paying $65 a month and contending that the notice of an increase of rent was waived by R. C. Haile, agent of the plaintiff, duly authorized to make such waiver. Haile resided in Suisun, Mrs. Alden, his mother, resided in Oakland, and Haile managed her property. By direction to Haile the rent was to be deposited each month in a local bank to the credit of plaintiff. In the latter part of March, 1910, Mrs. Alden was at her bank in Suisun, and discovered that the defendant had been paying, not $100 a month, but $65 a month. She sought and had an interview with him at the bank, in which interview she demanded the payment of the back rent. Defendant refused to acknowledge the indebtedness, saying that her son ***8** Richard had declared that the rent should remain without increase. Mrs. Alden then informed him that Mr. Haile, had no authority to reduce the rent, and, upon the defendant's offer to pay $100 a month if he could secure a lease for a term of years, Mrs. Alden answered that she declined to have anything further to do with him, and would not let him remain longer in possession of the property under any circumstances. Mrs. Alden then immediately consulted her attorney, and upon May 2, 1910, served upon defendant a formal notice to quit and surrender possession upon the last day of May, 1910. Civ. Code, § 827. The complaint alleged that the defendant 'refused on the 1st day of June, 1910, to deliver up said possession of the said premises to said plaintiff and continues in possession of same without the consent and against the will and wish of plaintiff; that said defendant now withholds the possession of said premises from the said plaintiff.' This allegation is not denied by the answer. But, notwithstanding his failure ****47** to deny, defendant undertakes to plead a waiver of the notice to quit, and does so by averring that, under the terms of the lease, he was to deposit the rental upon the first of each and every month in a local bank to the credit of plaintiff; that all sums paid as rental have been so deposited; that on or about June 1, 1910, and on or about the first of each succeeding month, defendant has deposited a like sum in like manner; that 'R. C. Haile, agent of plaintiff as aforesaid, is duly authorized to draw from the bank any money on deposit there to the credit of plaintiff; that said R. C. Haile knew that the notice to quit had been served as therein alleged ever since on or about April 12, 1910, and with full knowledge of the breach thereof and that defendant was in possession of the said premises contrary to the said notice, accepted the said sum deposited as the rent for June and with full knowledge thereof has accepted a like sum on or about the 1st of each and every succeeding month.'

[1] Appeal No. 1944. The foregoing outlines the important issues presented upon this appeal, which is taken by the plaintiff from the judgment and from the order denying her motion for a new trial. The court's findings were in favor of the defendant as to the agency of Haile and his waiver of the increase in rent to $100 a month, ***9** which was to go into effect upon the 31st day of July, 1908. The waiver it is found was an oral waiver. Upon the waiver of the notice to quit and surrender possession the findings follow the allegations of the answer.

Appellant attacks these findings as being unsupported. The first to invite consideration are those which find that Haile, the duly authorized agent of plaintiff, waived the increase of rent from $65 to $100 a month. Without reviewing the evidence, it is enough to say that there is sufficient to establish the agency and the power of Haile

to make this waiver. It is true that the notification was in writing, and that the waiver was by parol agreement. Civ. Code, § 1698. But it sufficiently appears from the unconditional acceptance by the agent of the lesser amount of rent that the oral agreement became executed and therefore binding. It is argued that Mrs. Alden knew nothing of this purported waiver, and this is doubtless true. Yet she had clothed her son as her agent, actual or ostensible, with sufficient power to make the waiver, and she is bound by his conduct in so doing. True it is, also, that Haile, who at the trial was dead, had denied by verified answer that he had ever agreed to such a waiver. True it is that in other respects the evidence upon the matter is sharply conflicting, but, as has been said, there is sufficient to support the finding of the court in this regard.

[2] The same, however, cannot be said of the finding of the waiver of the notice to quit. All the facts and all the circumstances demonstrate that there was no waiver, and that the defendant never honestly believed that there was a waiver. Those facts and circumstances are the following: He knew, and so testifies, that in March, 1910, Mrs. Alden insisted upon the payment of the back rent and refused to accept his explanation that her son had waived it, then telling him in terms that her son had no authority so to do. He knew, and so testifies, that, because of this difference and of other grievances which Mrs. Alden entertained against him, she refused and to him declared that she refused to allow him longer to occupy her premises upon any terms. He knew that the notice to quit was thereafter promptly served upon him. He knew who Mrs. Alden's attorney was and consulted that attorney, seeking a way out of his difficulties, ***10** and was by this attorney informed that he, the attorney, had sole charge of the matter, and that Haile had nothing further to do with the property. He was by this attorney informed that the notice to quit would be enforced, and that he would be expected to deliver possession upon the 1st of June following. In his answer he even admits that he was withholding possession without the consent and against the will of the plaintiff, but seeks to justify that holding because of an asserted waiver by the agent of plaintiff. And in what did that waiver consist? His tenancy terminated with the beginning of June 1st. Yet upon June 1st he deposits with the bank not even the $100 a month rental insisted upon by Mrs. Alden, but $65. He did this without notice to Mrs. Alden, her attorney or to Haile. This action in ejectment was begun the day after. Nothing could more clearly evince a refusal to waive the terms of the notice, or a refusal to accept rent, than the commencement of this action, and yet it is contended and found, because this amount was thus slipped into the bank and by the bank placed to the credit of the plaintiff, that she had waived her right to enforce the termination of the tenancy. To this point the contention is so preposterous as not to merit discussion. But it is said that the tenant continued month by month so to deposit the $65, and that Haile must have known of this, and that, therefore, Haile's acceptance and use of the money constitutes the waiver, though admittedly Haile's principal, the plaintiff herein, knew nothing about it. The difficulty with this argument is that the defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery.

****48** [3] In this connection it should be added that, doubtless on the theory that Haile's agency and his power to waive the terms of the notice to quit had been established, the court improperly refused to allow plaintiff to testify that only at the trial had she for the first time discovered that defendant had so deposited the money, that such deposits ***11** were without her authority, and that she instructed the bank to return them.

[4] [5] [6] Still further in this connection, it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff. This he admits and the admission under the circumstances is a pregnant one. It amounts to an admission that he knew there was no waiver and no continuation of the tenancy so far as plaintiff was concerned. The testimony as to the receipt of the rents amounts to no more than this. The plaintiff owned other pieces of property, and had other tenants thereon. One and all they were instructed to deposit their rents when due to her credit in the local bank. The local bank received these deposits and credited them to the account of plaintiff. Not having received positive instructions from the plaintiff to the contrary, they received the deposits made by defendant on and after June 1st, entered them in a bank book, and credited them to the account of plaintiff. It does not appear except inferentially, and because of the fact that Haile had possession of the bank book from time to time, that even Haile knew that defendant was depositing moneys for rent, and it certainly does not appear that Haile ever knew that defendant was claiming that he (Haile) had assented to a continuation of the tenancy and to a waiver of the notice to quit. The unconditional acceptance by a landlord of moneys as rent, which rent has accrued after the time the tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit. 18 Am. & Eng. Ency. of Law, 402. But waiver always rests upon

intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. Silva v. Campbell, 84 Cal. 422, 24 Pac. 316. Therefore the evidence, so far from establishing a waiver, with all that a waiver implies—a meeting of minds and the intentional forbearance to enforce a right—clearly establishes that there was no waiver, but only an effort by defendant surreptitiously to do something which might in some way advantage him and enable him the longer to hold possession. This is made manifest from the fact that defendant was not prepared to leave the building, had no other location or store in which to move his goods, and ***12** was desirous of remaining where he was until he could secure other accommodations. The finding in this respect being unsupported, it follows that the judgment and order appealed from should be reversed and the cause remanded for a new trial. And it is ordered accordingly.

Judgment in 1944.

Appeal No. 1940. Besides answering plaintiff's complaint, defendant cross-complained and presented as grounds of cross-complaint the disturbance of his quiet possession and the injury to his business occasioned by the acts of Haile, agent of plaintiff, while defendant was occupying the premises as the tenant of plaintiff. In particular the cross-complaint charged that: 'Within the last year, and both before and after June 1, 1910, the said R. C. Haile, agent as aforesaid, entered the said premises and threatened to immediately remove defendant and his said stock of merchandise from the premises. Said R. C. Haile on all of these occasions told the defendant that he owed many thousands of dollars back rent and requested its payment, and demanded possession of the premises on behalf of plaintiff and as her agent and said that the said plaintiff was entitled to the possession thereof. The said R. C. Haile, agent as aforesaid, on all of these many occasions talked in a loud and threatening manner. On one of the said occasions it was necessary for the defendant to eject the said Haile from the said premises on account of the great disturbance he was creating.'

[7] [8] The court found in accordance with the allegation last above quoted, and further found that 'the quiet enjoyment and possession of defendant was molested and disturbed to such an extent that he concluded to sell and did sell his said stock at a great sacrifice and at more than $3,127.59 below its real worth and cost and suffered a loss thereby including prospective benefits of more than $7,691.22.' Further findings of the court are identical with those just considered in the previous appeal, and are to the effect that the tenancy was continued after June 1st, through the waiver of the notice to quit. The court's unexplained conclusion of law from these findings is that the plaintiff take nothing by his cross-complaint, and judgment upon the cross-complaint was entered accordingly. From that judgment cross-complainant and defendant Mayfield appeals upon the ***13** judgment roll alone, and urges, with justice, that the tenant under a tenancy from month to month is as much entitled to damages for an illegal interference with his tenancy as is any other tenant. This is true. Heilbron v. Centerville & Kingsburg Irr. Ditch Co., 76 Cal. 8, 17 Pac. 932; Dwyer v. Carroll, 86 Cal. 298, 24 Pac. 1015; McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984. And in proper cases damages may be predicated upon a loss of prospective profit. Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327; Civ. Code, § 3300; Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

****49** [9] Appellant next contends upon the authority of such cases as Overacre v. Blake, 82 Cal. 77, 22 Pac. 979, that this appeal presents a case where the findings are unattacked and are sufficient to support a judgment in his favor, but that the conclusions of law are erroneously drawn from the findings; that, since the findings establish that the judgment should be in his favor, this court will reverse the judgment upon appeal, with directions to the court below to enter a correct judgment upon the findings. In many cases, indeed it may be said that ordinarily, such would be the ruling and direction of this court. But not so here, nor in any case where to do so would be to countenance a grave injustice. In this case, as in the preceding appeal, the whole superstructure rests upon the finding of the continuation of defendant's tenancy after June 1st. That finding, as we have said and discussed, is unsupported, and upon direct appeal the case in which that finding has been made has been reversed. To grant appellant's request in the present instance would be to countenance a judgment based upon this unsupported finding and cast the plaintiff in damages in the sum of over $7,000, for no dollar of which the record shows her justly liable. Under the plenary powers vested in this court by section 53 of the Code of Civil Procedure, it will order a judgment only in a proper case and order a new trial where the action seems to demand it. Certainly this is such an occasion; for, in addition to what has already been said, the allegation of the cross-complaint and the finding of the court thereon still further negative the idea that Haile could have waived or could have believed that he had waived the notice to quit, or could in any other way have recognized the ***14** continuance of the tenancy, since the finding is that before and after June 1st he was repeatedly threatening to remove defendant and his stock of merchandise from the premises and demanding possession of the premises—conduct absolutely foreign to any notion of a waiver and a renewal of tenancy.

Parallel Citations

Wherefore the judgment here appealed from is reversed, and the cause remanded for a new trial.

127 P. 45

We concur: MELVIN, J.; LORIGAN, J.

In re Marriage of Turkanis and Price (2013) 213 Cal.App.4th 323, 152 Cal.Rptr.3d 498

Synopsis

Background: Husband brought action for dissolution of marriage. After status only judgment of dissolution was entered, valuation phase of trial commenced. The Superior Court, Los Angeles County, No. BD 401600, Maren E. Nelson, J., entered order valuing closely-held corporation. Wife appealed, and the Court of Appeal, 2011 WL 1783096, affirmed. Allocation phase of trial commenced, and the Superior Court entered amended judgment dividing the parties' assets. Wife appealed, and the Court of Appeal, 2012 WL 2928530, affirmed. Husband thereafter filed motion to expunge family law attorney's real property liens (FLARPLs) filed by attorneys who represented wife during first phase of trial. The Superior Court granted the motion, and former attorneys appealed.

Holdings: The Court of Appeal, Flier, J., held that:

[1] award of real estate to husband as his separate property did not automatically extinguish FLARPLs;

[2] as a matter of first impression, court had jurisdiction to consider husband's application to expunge FLARPLs;

[3] court was not required to issue a statement of decision on husband's motion to expunge;

[4] court was not required to join attorneys to prior proceedings before entering judgment on husband's motion to expunge; and

[5] court could reduced requested fee award to $39,000.

Affirmed.

APPEAL from orders of the Superior Court of Los Angeles County, Maren E. Nelson, Judge. Affirmed. (Los Angeles County Super. Ct. No. BD 401600)

Attorneys and Law Firms

****502** Brian J. Kramer, in pro. per.; Brian J. Kramer, P.C. and Brian J. Kramer for Appellant Joan M. Price and Claimant and Appellant Brian J. Kramer.

Daniel B. Spitzer, Encino, in pro. per., for Claimant and Appellant Daniel B. Spitzer.

Buter, Buzard, Fishbein & Royce and Glenn S. Buzard, Los Angeles, for Respondent.

Opinion

FLIER, J.

***336** This is the third appeal we consider in this marital dissolution action between Richard Turkanis and Joan M. Price. In the first appeal, we considered the trial court's order after the first of two phases of trial. The purpose of this first phase of trial was to set the value at the date of marriage of a closely held corporation (Radman) formed by Turkanis prior to marriage (the valuation trial). We permitted Price an interlocutory appeal from the valuation order and affirmed it in a nonpublished opinion. (*In re Marriage of Price & Turkanis* (May 11, 2011, B218753) 2011 WL 1783096.) Price brought the second appeal ***337** after the second phase of trial in which the trial court allocated assets between Price and Turkanis (the allocation trial). We affirmed the trial court's judgment after the allocation trial in a nonpublished opinion. (*In re Marriage of Price & Turkanis* (July 19, 2012, B226221) 2012 WL 2928530.)

In this third proceeding, former attorneys for Price, Brian J. Kramer and Daniel B. Spitzer, appeal from the trial court's order granting Turkanis's motion to expunge the attorneys' "family law attorney's real property liens" (FLARPL's). (Fam.Code, § 2033, subd. (a).)[1] Kramer and Spitzer recorded these FLARPL's to secure their fees and costs when they represented Price during the first phase of trial. They contend that the court erred in granting Turkanis's motion to expunge their FLARPL's because (1) the relevant sections of the Family Code do not permit the court to expunge duly noticed and recorded FLARPL's, (2) the trial court should have joined them to the action before entering a judgment stripping their FLARPL's, and (3) the court should have granted Kramer's request for a statement of decision on the motion to expunge the FLARPL's.

Kramer and Price also appeal from the court's order on Kramer's *Borson*[2] motion for attorney fees, in which the court ordered Turkanis to pay $39,000 to Kramer for Price's fees. They contend that the court erred in offsetting the fee award for unreasonable litigation conduct under Family Code section 271. We affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

Turkanis and Price married on March 31, 1995. They have one child, a daughter, born in 1997. They separated on December 19, 2003. Turkanis filed this dissolution action on February 10, 2004. The court entered a status only judgment of dissolution on November 10, 2005.

The first phase of trial, the valuation trial, commenced on May 19, 2008. The valuation trial took place on various days in May and June of 2008 and January, February, March, June, and July of 2009. On August 3, 2009, the court issued its 25–page written ruling valuing Radman as of the date of marriage.

****503** The second phase of trial, the allocation trial, commenced on February 10, 2010, and continued on three more days that month. The court entered its amended judgment dividing the parties' assets on June 1, 2010. The parties' daughter was in Turkanis's custody at the time of the court's judgment but ***338** was under the jurisdiction of the dependency court, so the trial court did not make any orders regarding child custody or visitation. At the allocation trial, Turkanis demonstrated that Price had received postseparation distributions in excess of $1.1 million during the pendency of the litigation. Turkanis himself had received approximately the same amount in distributions.

1. Kramer's FLARPL

Spitzer and Kramer associated in as Price's counsel during the pendency of the valuation trial, Spitzer in July 2008 and Kramer in December 2008. They were the 10th and 11th attorneys to enter appearances for Price. Price did not have funds available to pay Kramer's retainer fee. Thus, as part of her retainer agreement with Kramer, she agreed that Kramer's firm could seek to record a FLARPL pursuant to section 2033 against one of the two single family residences the parties' owned. She agreed the FLARPL would cover the retainer fee plus any unpaid fees and costs due at the time Kramer recorded the FLARPL.

Pursuant to section 2033, subdivision (b), on February 13, 2009, Price served and filed a notice of intent to record Kramer's FLARPL in the amount of $140,000. Her supporting declaration stated that she and Turkanis owned two single family residences in Los Angeles, one at 1234 N. Bundy Drive (1234 Bundy) and one at 1250 N. Bundy Drive (1250 Bundy). The notice said she intended to permit Kramer to record a FLARPL against 1234 Bundy, which had a fair market value, she believed, of over $1 million. Approximately one month prior, Turkanis had filed an income and expense declaration opining that the 1234 Bundy property had $1.75 million in equity value.

On February 26, 2009, Turkanis filed an ex parte application and objection to Price's notice of intent. In it, he stated that he had no objection to Kramer recording a FLARPL against the 1234 Bundy property. Under the section for requested relief, he specifically stated: "That [Price's] counsel be allowed a FLARPL on 1234 Bundy Avenue [*sic*] in the sum of $140,000." But he objected to a FLARPL against the 1250 Bundy property. He believed the equity value of the 1250 Bundy property to be $2.6 to $2.9 million. He also believed the court should eventually award him all the proceeds from the sale of the 1250 Bundy residence as his separate property, given the value of Radman when he brought it to the marriage. Under these circumstances, he felt it would be prejudicial to his claims and unjust to permit Kramer to record a FLARPL against 1250 Bundy. As to 1234 Bundy, he stated: "[Price] has advised the Court of her desire to ultimately own the 1234 Bundy Avenue [*sic*] Property. If my valuation of Radman ultimately prevails, it is unlikely that [Price] could be awarded the 1234 Bundy Avenue [*sic*] property without owing me substantial funds. However, if she were able to secure these funds ***339** and she was awarded the 1234 Bundy Avenue [*sic*] Property as she has indicated is her desire, then I believe it is appropriate that the [FLARPL] to secure [Price's] payment of her attorneys' fees be recorded against the property awarded to her."

Price filed an amended notice of intent regarding Kramer's FLARPL on or around April 2, 2009. She indicated in the notice that the court held a hearing on ****504** February 26, 2009, at which it had authorized Kramer to file a FLARPL against 1234 Bundy but denied without prejudice her request for a FLARPL against 1250 Bundy. The court had suggested that if Price wanted a FLARPL against 1250 Bundy, she needed to file a new notice because the initial one had identified only 1234 Bundy as the property against which she wanted a $140,000 FLARPL. Thus, she was filing the amended notice because she preferred the $140,000 FLARPL to be against 1250 Bundy.

Turkanis filed an ex parte application and objection to the amended notice on or around April 17, 2009. He objected to the recording of a FLARPL against 1250 Bundy but again stated he had no objection to a FLARPL for $140,000 against Price's interest in 1234 Bundy. Under the section for requested relief, he specifically stated: "[Price] may record a FLARPL against [her] interest in 1234 Bundy Avenue [*sic*] in the sum of $140,000. Said lien shall not apply or be assigned to any rents, issues, or profits that may be generated at any time prior to the Court's determination of [her] interest in the property." He stated the same objections to a FLARPL against 1250 Bundy as he had previously stated, and also restated verbatim his view that 1234 Bundy

could not be awarded to Price in the ultimate division of property without her owing him substantial funds.

Price filed a response to the objection arguing that, given the undisputed equity in both Bundy properties, there was no basis for Turkanis to assert that a FLARPL against one property over the other would result in an unequal division of property or otherwise be unjust. She believed that she had sizeable separate property claims of her own. She further believed that, even under a worst case scenario, she should receive several hundred thousand dollars of equity in the two homes. She and Kramer were optimistic that the outcome of trial would enable her to continue living at 1234 Bundy and therefore they preferred the FLARPL to be against 1250 Bundy.

After the hearing on Turkanis's ex parte application and objection, Kramer was permitted to record a FLARPL against Price's community property interest in 1234 Bundy but not 1250 Bundy. Price executed the deed of trust that effectuated the FLARPL for $140,000 on May 26, 2009. The deed was recorded on June 2, 2009. The property at 1234 Bundy was otherwise unencumbered.

***340** Kramer filed a substitution of attorney substituting out as counsel for Price on or around December 9, 2009, after the valuation trial but before the allocation trial commenced. Price was thereafter representing herself, except that Kramer made a few more appearances to represent Price on a limited basis regarding a trial continuance. Between December 2008 and February 2010, Price incurred approximately $273,109 in fees and costs for Kramer's services.

2. Spitzer's FLARPL

On or about June 26, 2009, Price filed and served a notice of intent to permit Spitzer to record a FLARPL against 1234 Bundy. She stated that the FLARPL was to be for $125,000, and at that point she had already incurred approximately $94,000 in fees for Spitzer's services. She believed that the property had over $1 million in equity value, and there were no encumbrances on it other than Kramer's FLARPL. Turkanis intended to file an objection to the notice, but instead the parties agreed to work on a deed of trust effectuating the FLARPL that was agreeable to both of them. They eventually agreed on the form of the deed of trust, which would effectuate a FLARPL for ****505** $150,000 against Price's community property interest in 1234 Bundy. Spitzer recorded the deed of trust effectuating the FLARPL on September 28, 2009.

Spitzer filed a substitution of counsel substituting out as Price's counsel on or about November 20, 2009.

3. Judgment After Valuation and Allocation Trials

The court's judgment divided the assets between Price and Turkanis. It found Turkanis's corporation, Radman, to have a value of $6,252,000 at the date of marriage. Turkanis sold Radman in 1998, after the parties had married. The court determined that his separate property interest in the proceeds from the sale of Radman was $6,283,988. At the allocation trial, the separate property proceeds were traced, and the court awarded assets accordingly. From the community estate, the court awarded Turkanis both the 1234 Bundy property and the 1250 Bundy property, among other things. After the tracing of the Radman sale proceeds, the division of presumptive community assets, the confirmation of separate property, and the determination of reimbursements and credits owing, the court determined that Price owed Turkanis an equalization payment of $154,289.

The court found the 1250 Bundy property had equity of $2 million. The judgment stated that the 1234 Bundy property had equity of $1.5 million and was "encumbered only by a lien for delinquent real property taxes"—despite ***341** that Kramer and Spitzer had recorded FLARPL's for $140,000 and $150,000, respectively, against the property. Still, it is clear from the transcript of the court's rendering of its proposed statement of decision that the court and Turkanis were aware of the FLARPL's and did not consider them expunged by the judgment. Turkanis indicated that he did not address the FLARPL's in the proposed judgment, which he drafted, because he "did not think it was appropriate" to extinguish the FLARPL's without giving Kramer and Spitzer a chance to be heard. He suggested that he file a motion to extinguish the FLARPL's, and the court agreed. The court ordered Turkanis to give notice to "the FLARPL holders" and Price.

4. Turkanis's Motion to Expunge the FLARPL's

On or about March 18, 2010, Turkanis served notice on Price, Kramer, and Spitzer that the court would hear Turkanis's motion to expunge the FLARPL's on June 1. He also gave notice that the court would hear Kramer's earlier filed *Borson* motion for fees on the same date.

Turkanis filed his "motion to deny enforcement of, and to extinguish, expunge, and/or limit real property liens" on or about May 4, 2010. For the most part, he argued that the FLARPL's were unjust under the circumstances. These circumstances included the following: (1) as a result of Radman's value at the date of marriage, Turkanis had substantial separate property claims; (2) since the

attorneys had recorded the FLARPL's, the Bundy properties had diminished in value;[3] and (3) the court had made two fee awards to Price since the FLARPL's, one for $21,000 and one for $79,000. Turkanis asserted that rendering his separate property ****506** (1234 Bundy) liable for payment of Price's attorney fees was an inequitable division of property.

Kramer opposed the motion to expunge on the ground that Turkanis had consented to the FLARPL on 1234 Bundy, the FLARPL was an integral condition of Kramer's agreement with Price, Kramer had acted in reliance on the FLARPL in representing Price, and there was no basis in law or equity for now expunging it. Spitzer similarly argued that Turkanis had consented to his FLARPL against 1234 Bundy and had agreed to the form of the trust deed with Spitzer, and Spitzer had relied on the FLARPL in agreeing to represent Price. Kramer requested that the court issue a statement of decision when it ruled on the motion to expunge and his *Borson* motion.

***342** At the hearing on the motion to expunge, the trial court noted that the statutory requirements for recording the FLARPL's was followed. But the court stated that when attorneys take FLARPL's against the community interest, they take them subject to the risk that the market or the facts of the case "may eat up their client's interest in the property." The court granted the motion to expunge the FLARPL's.

Turkanis prepared a proposed order much later, and approximately nine months after the hearing, the court entered the order granting the motion to expunge. The court held that section 2034 expressly granted it the authority to deal with a FLARPL at any time, and subdivision (a) of that section permitted it to deny a FLARPL based on a finding that it would result in an unequal division of property. The court found that, during trial, 1234 Bundy had declined in value, and Price had received substantial distributions of cash during trial. It noted that it awarded the entirety of 1234 Bundy to Turkanis, and there was currently an unpaid equalization payment due from Price to Turkanis. The court stated that ordering Turkanis to pay Kramer's and Spitzer's FLARPL's, and then adding that amount to the equalization payment, was not a fair reading of the Family Code. It found that "the Family Code, including sections 2030, 2031, 2032, 2033, and 2034, must be read in its entirety with regard to attorneys fees, and that sections 2033 and 2034, regarding [FLARPL's], are not a fee-shifting mechanism." The court's order extinguished and expunged Kramer's and Spitzer's FLARPL's. The court denied Kramer's request for a statement of decision.

Kramer filed a motion to reconsider the order granting the motion to expunge the FLARPL's. He based his motion on "new facts and circumstances" set forth in the declaration of a real estate appraiser, who opined that there was no merit to Turkanis's position that the Bundy properties had lost $1 million in equity during the relevant time period. Kramer requested a statement of decision on the motion for reconsideration. The court denied the motion, in part because Kramer did not show that the "new" information could not have been presented at the time of the original motion. The court did not issue a statement of decision.

Spitzer and Kramer thereafter filed timely notices of appeal. Turkanis apparently desired to sell the Bundy properties after the court expunged the FLARPL's. The parties entered into a stipulation that, upon the sale of 1234 Bundy, Turkanis would transfer $290,000 of the sale proceeds into an interest bearing account, representing Kramer's FLARPL for $140,000 and Spitzer's FLARPL for $150,000. No withdrawals would be permitted from the account until either a court order so directed, the remittitur issued ****507** in this appeal, or the parties settled the appeal.

343** ***5. Kramer's* Borson *Motion

Kramer filed a *Borson* motion for fees on or about November 5, 2009. In *Borson,* the court held that attorneys who have been discharged while an action is pending may, with the former client's consent, file a motion for their attorney fees. (*Borson, supra,* 37 Cal.App.3d at p. 637, 112 Cal.Rptr. 432.) On behalf of Price, Kramer was seeking fees from Turkanis in the amount of $237,046. This amount included the $140,000 for which Kramer had the FLARPL. The court held a hearing on December 8, 2009, at which it continued Kramer's *Borson* motion to a later date, either at the allocation trial or subsequent to trial when all other *Borson* motions would be heard. Later, when the continued hearing had been noticed for a date certain, Kramer filed additional papers establishing that the updated amount of fees he was seeking was $273,109. Turkanis's response to the *Borson* motion argued in part that Price's fee requests were not limited to fees that were "reasonably necessary" or "just" in light of her conduct that had needlessly prolonged litigation and her failure to engage in good faith settlement negotiations. Turkanis asserted that this conduct was also justification for sanctions under section 271, and such sanctions should offset any fee award.

The court heard argument on the *Borson* motion in August 2010 and filed a 14–page written order on October 26, 2010. It ordered Turkanis to pay Kramer $39,000 in fees. The court's order thoroughly

summarized the previous awards of attorney fees to Price, the work performed by Kramer, and the respective financial situations of the parties. The court had previously awarded Price $21,000 in April 2009, and another $79,000 in December 2009, plus $25,000 for costs. Thus, she had received approximately $125,000 total for fees and costs. Price chose to use the December award for her appellate counsel to pursue the interlocutory appeal from the valuation order, rather than pay Kramer.

In terms of the parties' financial situations, the court found Turkanis had $5,704 net monthly income, his new spouse had no income in 2010, and he had monthly household expenses of $14,230 for the support of himself, his spouse, the parties' daughter, and his spouse's two children. He had debts in an amount over $1.1 million, excluding the debt on 1250 Bundy, but including $525,340 he owed his counsel. He had already paid $212,289 in fees so that his total fee obligation at that point amounted to $737,629. Price owed him an equalization payment as detailed in the judgment, but there was no obvious source of payment. He had $9,400 in cash, $24,750 in securities, $290,552 in a mutual fund, and retirement accounts valued at $232,000. He had been awarded the Bundy properties, which had $3.5 million net equity as estimated in the judgment. He had 100 percent custody of the parties' daughter and did not receive child support.

***344** Price was not working and had no income, although she was a member of the California bar and a licensed real estate broker. She had expenses of $5,508 per month. Her income and expense declaration in support of the *Borson* motion did not quantify her assets, but stated they are not sufficient to comply with a previous court ruling, which ordered her to repay $60,000 she had withdrawn without authorization from a line of credit and a Schwab account. She had $40,000 in credit card debt, and including the equalization payment and the $60,000 the court had ordered her to repay, she owed Turkanis approximately $212,000. She had paid her ****508** various prior counsel $415,000 in fees. She owed an additional $677,730 in attorney fees. (Besides Kramer, several other former attorneys had filed *Borson* motions. This $677,730 was the total due to Kramer and the others.) Her total fee obligation at that point was thus $1,092,730.

The court held that Turkanis could assert as a defense that Price's litigation conduct justified an offset against any fee awards under section 271. It further held that her conduct supported an offset under section 271. In particular, she failed to comply with court orders regarding the management of the Bundy properties, giving rise to considerable fees when Turkanis was forced to seek court orders to take over management of the properties, to arrange for payment of their expenses after Price allowed property taxes to go unpaid and the mortgage on 1250 Bundy to go into default, and to obtain funds to repair the properties after Price vacated them and left them in a condition that was not rental ready. After reviewing Kramer's bills, the court determined that approximately $33,000 of his fees dealt with issues surrounding the Bundy property's management. The court also considered Price's approach to settlement and found it so unreasonable that it rendered settlement negotiations futile.

The court held that, based on the parties' respective income and expense declarations, Turkanis had the ability to contribute to Price's fees as well as pay his own. It noted that it was considering the reasonableness of the fees incurred, the prior fee awards to Price, the procedural posture of the case (the fact that Price owed Turkanis an equalization payment and she had appealed the order giving rise to that payment), and Price's apparent inability to make the equalization payment. The court then stated as follows:

> "By subtracting from the total fees incurred by Dr. Turkanis only the amount of Ms. Price's fees for dealing with management of the real property and assuming nothing else changed, Dr. Turkanis' total fees would have been approximately $700,000. Ms. Price's total reasonable fees should have been approximately the same. Total fees by both sides would have been approximately $1,400,000. While settlement was not required, it bears noting that had the case settled after the first valuation hearing, when Dr. Turkanis' fees were approximately $530,000, and again subtracting only the fees incurred due to [the] hearing on management of the Bundy property, the combined total of both parties' ***345** reasonable fees and costs would have been $1 million or less. Instead, the total fees and costs now exceed $1.8 million, with Dr. Turkanis being responsible for $861,000 thereof, to date, and without considering his appellate fees, or his uncollected equalizing

payment."

The court ordered Turkanis to pay Kramer $39,000 as a contribution to Price's fees, "[c]onsidering all the circumstances, including the parties' respective financial positions, the fact that Ms. Price is obligated under the judgment to pay an equalizing payment to Dr. Turkanis that is not likely to be collected, Dr. Turkanis' need to pay his own counsel and experts both for trial and for the pending appeal, the fact that Dr. Turkanis is the sole support for [the parties' daughter], and given Ms. Price's litigation conduct." The court noted that, with this award, Turkanis's contributions to Price's fees came to $164,000, and he incurred total fees for himself and Price slightly in excess of $900,000. Kramer, identifying himself as former attorney for Price, timely filed a notice of appeal from the *Borson* order in ****509** which he identified Price as appellant. The opening brief identifies "Kramer and Price" as the appellants from the *Borson* order.

STANDARD OF REVIEW

We review the trial court's order granting the motion to expunge the FLARPL's for abuse of discretion. (*Biddle v. Superior Court* (1985) 170 Cal.App.3d 135, 136, 215 Cal.Rptr. 848 [reviewing order on motion to expunge lis pendens for abuse of discretion].) However, we review the trial court's factual findings supporting its order for substantial evidence (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461, 17 Cal.Rptr.3d 96), and we review the court's interpretation and construction of the relevant Family Code sections de novo (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432, 101 Cal.Rptr.2d 200, 11 P.3d 956).

We review an award of attorney fees under the Family Code for abuse of discretion, "and we therefore must affirm unless no judge reasonably could make the order." (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829, 130 Cal.Rptr.2d 1.) Likewise, we review for abuse of discretion a court's choice not to issue a statement of decision on a motion. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1497, 64 Cal.Rptr.3d 29.)

DISCUSSION

1. The Trial Court Did Not Err in Expunging the FLARPL's

Turkanis contends that the court did not err in expunging the FLARPL's because Price had no remaining interest in 1234 Bundy to which the ***346** FLARPL's could attach after the court awarded the property to him, and additionally, the relevant Family Code statute permitted the court to expunge the FLARPL's at any time upon application of either party. We disagree with the first contention, but agree with the latter.

a. Background of Sections 2033 and 2034

Family Code sections 2033 and 2034 provide for FLARPL's and permit the court to deny FLARPL's under certain circumstances. These sections were originally enacted as former sections 4372 and 4373 of the Civil Code. (*Lezine v. Security Pacific Fin. Services, Inc.* (1996) 14 Cal.4th 56, 68, fn. 7, 58 Cal.Rptr.2d 76, 925 P.2d 1002 (*Lezine*).) Effective January 1, 1994, Civil Code former sections 4372 and 4373 were repealed and replaced without substantive change by Family Code sections 2033 and 2034. (*Ibid.*)

The Legislature enacted Civil Code former sections 4372 and 4373 in response to the California Supreme Court's opinion in *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 283 Cal.Rptr. 584, 812 P.2d 931 (*Droeger*). (Sen. Com. on Judiciary, Analysis on Assem. Bill No. 3399 (1991–1992 Reg. Sess.) June 16, 1992, pp. 2–3; *Lezine, supra,* 14 Cal.4th at p. 68, fn. 7, 58 Cal.Rptr.2d 76, 925 P.2d 1002.) In *Droeger,* a marital dissolution action, wife executed a deed of trust on two parcels of community real property to secure a note in favor of her attorneys for their fees and costs. (*Droeger, supra,* at p. 30, 283 Cal.Rptr. 584, 812 P.2d 931.) Husband did not join in her execution of the note or deed of trust. (*Ibid.*) The court held that husband was entitled to void the encumbrance on the community real property in its entirety, and he was not limited to voiding the encumbrance only with respect to his one-half community interest. (*Id.* at p. 40, 283 Cal.Rptr. 584, 812 P.2d 931.) The holding was based on former ****510** section 5127 of the Civil Code.[4] (*Droeger,* at p. 31, 283 Cal.Rptr. 584, 812 P.2d 931.) That section stated in pertinent part: " '[E]ither spouse has the management and control of the community real property ..., but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered....' " (*Ibid.*) The court reasoned that nothing in Civil Code former section 5127 permitted an exception to the general rule against unilateral transfers by one spouse of community realty. (*Droeger,* at p. 41, 283 Cal.Rptr. 584, 812 P.2d 931.) It explained that any such exception would contravene the fundamental principles of equal management and shared responsibility over community property and the premise

that neither spouse alone may partition community property during marriage. (*Id.* at pp. 46–47, 283 Cal.Rptr. 584, 812 P.2d 931.) The court noted: "If [Civil Code ***347** former] section 5127 is to be amended to create an exception allowing a spouse to unilaterally transfer community realty to secure attorney fees in a dissolution proceeding, it is the task of the Legislature and not the courts to create that exception." (*Id.* at p. 41, 283 Cal.Rptr. 584, 812 P.2d 931.)

The Legislature took heed. Comment on the proposed FLARPL bill in the Senate Judiciary Committee noted that the author believed the bill was necessary to abrogate the *Droeger* holding, and the bill would do so by permitting a spouse to encumber his or her interest in community real property to pay attorney fees and costs in a dissolution action. (Sen. Com. on Judiciary, Analysis on Assem. Bill No. 3399 (1991–1992 Reg. Sess.) June 16, 1992, p. 2.) The comments further explained: "The author notes that the community real property may be the only asset a party has, particularly the weaker spouse. The author states that this bill would allow that spouse to retain legal counsel when he or she otherwise would be unable to afford it." (*Ibid.*)

Section 2033 thus provides for FLARPL's as follows: "Either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties. This encumbrance shall be known as a '[FLARPL]' and attaches only to the encumbering party's interest in the community real property."[5] (§ 2033, subd. (a).) The encumbering spouse must serve notice of the FLARPL on the nonencumbering spouse at least 15 days before recording the FLARPL. (§ 2033, subd. (b).) Such notice must include a declaration containing (1) a full description of the community real property, (2) the encumbering spouse's belief as to the fair market value of the property and supporting documentation, (3) any other encumbrances on the property, (4) a list of community assets and liabilities and their estimated values, and (5) the amount of the FLARPL. (§ 2033, subd. (b)(1)-(5).)

****511** The nonencumbering spouse may file an "ex parte objection" to the FLARPL. The objection must request to stay the recordation of the FLARPL until further notice of the court and should also include a declaration containing (1) specific objections to the FLARPL and to specific items in the notice, (2) the nonencumbering spouse's belief as to the appropriate items or value and any supporting documentation, and (3) specific reasons why recordation of the FLARPL "would likely result in an unequal division of property or would otherwise be unjust under the circumstances of the case." (§ 2033, subd. (c)(1)-(3).)

***348** Section 2034 deals with the circumstances under which the court may deny a FLARPL and provides in pertinent part: "On application of either party, the court may deny the [FLARPL] described in Section 2033 based on a finding that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances of the case. The court may also for good cause limit the amount of the [FLARPL]. A limitation by the court is not to be construed as a determination of reasonable attorney's fees." (§ 2034, subd. (a).) Section 2034 also provides that the court may, upon receiving an objection to the FLARPL, determine whether the case involves complex or substantial issues of fact or law, and if it does, the court may implement a case management plan to oversee an appropriate allocation of fees and costs in the matter. (§§ 2034, subd. (b), 2032, subd. (d).) Additionally, section 2034 establishes that the "court has jurisdiction to resolve any dispute arising from the existence of a [FLARPL]." (§ 2034, subd. (c).)

The reported case law interpreting or applying sections 2033 and 2034, or their predecessor sections, is scant. Only one reported California case exists interpreting or applying these sections in any measure, *In re Marriage of Ramirez* (2011) 198 Cal.App.4th 336, 132 Cal.Rptr.3d 41 (*Ramirez*), which we discuss more in a following part. But *Ramirez* does not directly address all the issues before us. We are, therefore, guided in large part by the plain language of the statute and analogous case law.

b. The Court's Division of Property Did Not Automatically Extinguish the FLARPL's

[1] [2]To begin with, insofar as Turkanis contends he should prevail because the judgment extinguished Price's community property interest in 1234 Bundy by awarding the property to Turkanis, and the FLARPL's therefore had nothing to which they could attach after that, this is incorrect. The court's division after trial of community or quasi-community property does not ordinarily affect the enforceability of valid, preexisting liens on the property. Section 916, regarding the division of property and subsequent liabilities, states in pertinent part: "The separate property owned by a married person at the time of the division and the property received by the person in the division is not liable for a debt incurred by the person's spouse before or during marriage, and the

person is not personally liable for the debt, unless the debt was assigned for payment by the person in the division of the property. *Nothing in this paragraph affects the liability of property for the satisfaction of a lien on the property*." (§ 916, subd. (a)(2), italics added.) Thus, as our Supreme Court has held, "[u]nder this provision, following the division of property, the community property awarded to one spouse no ***349** longer is liable for marital debts that are assigned to the other spouse, *with the exception that* the award of community ****512** real property to one spouse that is subject to a lien remains liable for satisfaction of the lien, i.e., the lien remains enforceable to satisfy the underlying debt." (*Lezine, supra,* 14 Cal.4th at p. 65, 58 Cal.Rptr.2d 76, 925 P.2d 1002, italics added; see also *Ramirez, supra,* 198 Cal.App.4th at pp. 343–344, 132 Cal.Rptr.3d 41 [citing *Lezine* for the proposition that a valid lien attached to community property follows the property even after the court awards it to the nonencumbering spouse in property division].) The nondebtor spouse is not without remedies, however. If a lien is enforced against property that has been awarded to the nondebtor spouse, the nondebtor spouse has a right of reimbursement from the debtor spouse. (*Lezine,* at p 65, 58 Cal.Rptr.2d 76, 925 P.2d 1002 .)

Our Supreme Court applied these rules in *Lezine.* There, husband incurred a debt, and the creditor perfected a judgment lien for the debt before the court divided the community property in husband and wife's dissolution action. (*Lezine, supra,* 14 Cal.4th at pp. 61–62, 58 Cal.Rptr.2d 76, 925 P.2d 1002.) Among the community property was the couple's residence. The trial court eventually awarded the couple's residence to wife as her sole and separate property and assigned husband's debt to him. (*Id.* at p. 62, 58 Cal.Rptr.2d 76, 925 P.2d 1002.) Still, the court held the transfer of the residence to wife in the property division, after the judgment lien had attached, "did not alter the liability of the property to satisfy the lien or otherwise affect the judgment lien. [T]he allocation of community real property to the nondebtor spouse in the property division does not affect the enforceability of any liens that previously attached to that real property, even if the underlying debt is assigned exclusively to the debtor spouse. [T]he nondebtor spouse may seek reimbursement against the debtor spouse to the extent the property is applied in satisfaction of the liens." (*Id.* at pp. 73–74, 58 Cal.Rptr.2d 76, 925 P.2d 1002.) Accordingly, the court held that the trial court lacked authority to expunge the creditor's judgment lien, after the court had awarded the residence to wife as her separate property. (*Id.* at p. 74, 58 Cal.Rptr.2d 76, 925 P.2d 1002; see also *Kinney v. Vallentyne* (1975) 15 Cal.3d 475, 477, 479, 124 Cal.Rptr. 897, 541 P.2d 537 [judgment lien against husband that attached after interlocutory decree of divorce but before community property division still attached to community realty even after court awarded realty to wife as her separate property].)

[3] [4] The lien, once validly attached to the property, follows the property pursuant to section 916 and does not automatically disappear because the court awards the property to the nonencumbering spouse. Here, there does not seem to be any dispute that, at the time the FLARPL's were created, 1234 Bundy was presumptive community property. (§ 760 ["Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."]; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 610–611, 122 Cal.Rptr. 79, 536 P.2d 479 [" '[Property] acquired by purchase during a marriage is presumed to be community property, and the burden is on the ***350** spouse asserting its separate character to overcome the presumption.' "].) There also does not seem to be any dispute that Price and her attorneys complied with the statutory requirements of section 2033 for attaching the FLARPL's. They gave notice to Turkanis, he consented to the FLARPL's against Price's one-half community interest in 1234 Bundy, and the attorneys duly recorded the deeds of trust. The court's award of 1234 Bundy to Turkanis as his ****513** separate property did not *automatically* extinguish the liens.

c. Section 2034 Permitted the Court to Expunge the FLARPL's

[5]Still, the question remains whether Turkanis had any mechanism for expunging the FLARPL's after the court had awarded the property to him. The true crux of this matter is whether section 2033 or 2034 permits the court to expunge FLARPL's when a dispute arises as to their propriety after the FLARPL's have been recorded. We determine that section 2034, subdivision (c) so permits the court.

"In interpreting a statute, our function is to ascertain the intent of the Legislature in enacting the statute and to effectuate the purpose of the statute. We begin with the statute's language, giving its words their usual and ordinary meaning, construing them in context. [Citation.] If the statutory language is unambiguous, we presume that the Legislature meant what it said," and the plain meaning of the statute governs. (*County of San Bernardino v. Calderon* (2007) 148 Cal.App.4th 1103, 1108, 56 Cal.Rptr.3d 333; see also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29, 34 Cal.Rptr.3d 520.) If the

statutory language is ambiguous, permitting more than one reasonable interpretation, only then may the court consider extrinsic aids to interpretation. (*County of San Bernardino v. Calderon, supra,* at p. 1108, 56 Cal.Rptr.3d 333.) Resort to legislative history is thus appropriate only when statutory language is ambiguous. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., supra,* at p. 29, 34 Cal.Rptr.3d 520.)

[6]The relevant statute is unambiguous on the issue before us. Subdivision (c) of section 2034 gives the court "jurisdiction to resolve *any dispute* arising from the existence of a [FLARPL]." (§ 2034, subd. (c), italics added.) This broad catchall provision gives the court jurisdiction to resolve disputes over the propriety of existing FLARPL's, whenever they may arise. The plain language of the subdivision does not impose any timing requirement or otherwise limit the court's ability to revisit the propriety of a FLARPL. Moreover, as this subdivision is separate from the other parts of the statutory scheme relating to the ex parte objection process (§ 2033, subd. (c)), it contemplates disputes apart from the ex parte objection process. The parties engage in the ex parte objection process before the FLARPL exists, and section 2034, subdivision (c), contemplates disputes when the FLARPL is ***351** already in "existence." To read this part of the statute as merely referring to the ex parte objection process and no other disputes would render it superfluous, and we are to avoid interpretations that render any part of a statute superfluous. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207, 48 Cal.Rptr.3d 108, 141 P.3d 225.)

Kramer and Spitzer acknowledge in their briefing that the encumbering spouse may bring an application under section 2034 to expunge a lien if that party concludes he or she improvidently executed the FLARPL. Leading commentators agree, although they point out that either party, whether the encumbering spouse or the nonencumbering spouse, may seek a determination on the enforceability of a FLARPL:

> "Section 2034 clearly states a court determination on enforceability of the lien may be made on 'application' of *either party* (Fam.C. § 2034(a))—including, therefore, the encumbering party. This provision seems to give a party who improvidently executed the attorney lien encumbrance a 'way out' (e.g., as where ****514** he or she subsequently determines the lien would impede a practical equal community property division or otherwise wishes to avoid liquidation of the encumbered property)." (Hogoboom & King, Cal. Practice Guide Family Law (Rutter Group 2011) § 1:296.)

If the encumbering party can seek to avoid a FLARPL's enforcement after "improvidently" executing it, we see no reason why the nonencumbering party cannot attempt to do the same.

At oral argument before this court, Kramer and Spitzer appeared to concede that section 2034, subdivision (c) permits a court to revisit the propriety of a FLARPL after it has been recorded, but both cited very limited circumstances in which this would be permitted. Kramer argued the court could do this only when the encumbering spouse had not complied with the procedural requirements for duly recording the FLARPL, and the nonencumbering spouse wanted to expunge the procedurally deficient FLARPL. Spitzer argued the court could do this when the amount of the lien needs to be revisited based on the unreasonableness of the attorney fees incurred. There is no basis in the statute to restrict the disputes that the court may address under the broad catchall provision to these two very limited circumstances. We do not have the power to rewrite the statute in this manner. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, 59 Cal.Rptr.2d 671, 927 P.2d 1175.) Only the Legislature may do this.

Kramer and Spitzer additionally argue that the purpose of the statutory scheme—to permit parties "to retain or maintain legal counsel" (§ 2033, subd. (a)), especially economically weaker parties—will be frustrated by our holding that the nonencumbering spouse may challenge the propriety of a ***352** FLARPL after recordation. They assert that capable family law attorneys will have no incentive to accept clients who have only FLARPL's to offer if the attorneys know that the court can expunge duly recorded FLARPL's at any time. While our holding engenders some risk for attorneys who accept FLARPL's, trial courts routinely adjudicate the propriety and reasonableness of fee awards under the Family Code and have broad discretion to do so, and attorneys are thus routinely taking the risk that the court will not reimburse all of their fees. (§ 2030, subd. (a) [court may order one party to contribute to another party an amount "reasonably necessary for attorney's fees" based on assessment of parties' incomes and needs]; § 2032, subd. (a) [court may award attorney fees and costs when the making and amount of the award are "just and reasonable" under the parties' relative circumstances].) Even under Spitzer's view of section 2034, subdivision (c), a court would be permitted to revisit the amount of a duly recorded FLARPL and reduce it, perhaps substantially, if the court determined that it did not represent reasonable fees. Such a scheme is nearly as risky for attorneys as a scheme that permits the court to

extinguish a FLARPL.

[7]Kramer and Spitzer also argue that the doctrine of waiver or equitable estoppel prohibits Turkanis from moving to expunge the FLARPL's after he initially consented to them encumbering 1234 Bundy. We agree with Kramer and Spitzer that, as an abstract matter, the doctrines of waiver and equitable estoppel could possibly bar a party from seeking to expunge a FLARPL. They do not have that effect here, however, for reasons discussed below.

[8] [9] "[T]he doctrine of equitable estoppel is a rule of fundamental fairness ****515** whereby a party is precluded from benefiting from his inconsistent conduct which has induced reliance to the detriment of another. [Citations.] Under well settled California law four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury...." (*In re Marriage of Valle* (1975) 53 Cal.App.3d 837, 840–841, 126 Cal.Rptr. 38, fn. omitted.)

[10] [11] [12]" ' "[W]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' " (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31, 44 Cal.Rptr.2d 370, 900 P.2d 619.) "Whether a waiver has occurred depends solely on the intention of the waiving party." (*Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722, 5 Cal.Rptr.2d 1.)

[13] ***353** Generally, the existence of either estoppel or waiver is a question of fact for the trial court, whose determination is conclusive on appeal unless the opposite conclusion is the only one that we can reasonably draw from the evidence. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319, 24 Cal.Rptr.2d 597, 862 P.2d 158; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 431 P.2d 245.)

Turkanis contends that Kramer and Spitzer have forfeited their arguments for waiver and equitable estoppel because they did not assert them in the trial court. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486, 61 Cal.Rptr.2d 341 ["Points not raised in the trial court will not be considered on appeal."].) We agree. While they generally argued that expunging the FLARPL's would be unfair or inequitable after Turkanis had consented to them and they had acted in reliance on them, they did not outline even the basic contours of the doctrines as we have done in the foregoing paragraphs. Their generalized arguments regarding unfairness did not suffice to put the court on notice that it should make essential factual findings regarding key issues, such as (1) whether Turkanis intended to relinquish a known right; (2) whether, when he consented to the FLARPL's, he actually knew the facts on which he later based his argument that the FLARPL's would result in an inequitable division of property; or (3) whether Kramer and Spitzer were truly ignorant of these same facts at the time they obtained the FLARPL's. The trial court, as the finder of fact, was positioned to make these determinations from any argument and evidence bearing on these issues. The parties did not have a chance to present such argument and evidence because Kramer and Spitzer never articulated the specific elements of equitable estoppel or waiver. The issues were thus not preserved for appeal.

In sum, section 2034, subdivision (c) gives the trial court jurisdiction to revisit the propriety of a FLARPL at any time, as the trial court did in this case. Our holding rests on the plain language of the statute. If the prerecordation, ex parte objection process is the only time when parties may contest the propriety of a FLARPL, it is the task of the Legislature and not the courts to make such an amendment to section 2034.

****516** ***2. The Trial Court Did Not Err in Denying Price's Request for a Statement of Decision***

[14] [15] [16] Kramer and Spitzer contend that the trial court erred in failing to issue a statement of decision on the motion to expunge, even though it issued a written order granting the motion. This argument is unavailing. Code of Civil Procedure section 632 requires the trial court to issue a statement of decision only after a bench trial, when any party requests it. The general rule, however, is that a trial court need not issue a statement of decision after a ***354** ruling on a motion. (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 678, 78 Cal.Rptr.2d 225.) A court may exercise its discretion to issue a statement of decision in instances other than trial, but nothing requires it to do so. (*In re Marriage of Feldman, supra,* 153 Cal.App.4th 1470, 1497, 64 Cal.Rptr.3d 29.) The trial court thus did not abuse its discretion.

3. The Trial Court Did Not Err in Failing to Join Kramer and Spitzer as Parties to the Trial

[17]Relying on *Ramirez,* Kramer and Spitzer maintain that

the trial court erred in failing to join them to the action prior to entering a judgment that extinguished their FLARPL's. This argument also lacks merit.

Ramirez held that an attorney who had a FLARPL was an indispensable party to the nonencumbering spouse's motion for an order vacating the FLARPL. (*Ramirez, supra,* 198 Cal.App.4th at p. 344, 132 Cal.Rptr.3d 41.) Because that attorney FLARPL-holder did not have notice of the motion to vacate the FLARPL and did not participate in the proceedings, the *Ramirez* court reversed the trial court's order requiring the attorney to vacate her FLARPL. (*Id.* at p. 345, 132 Cal.Rptr.3d 41.)[6]

Ramirez is inapposite here. There can be no dispute that Kramer and Spitzer were parties to the motion to expunge proceedings. The trial court did not expunge the FLARPL's in their absence and thereby run afoul of principles of due process. Kramer and Spitzer contend that the court did just this when the judgment stated Turkanis was taking 1234 Bundy free of any encumbrances (except the lien for delinquent taxes). Thus, they say, Kramer and Spitzer were indispensable parties to the allocation trial leading up to the judgment. But, regardless of the statement in the judgment, the transcript is clear that neither the court nor Turkanis thought the FLARPL's were expunged by the judgment. That was why the court ordered Turkanis to bring a separate motion to expunge and to notice Kramer and Spitzer with the motion. *Ramirez* did not require the trial court to join them to the proceedings before the motion to expunge.

4. The Trial Court Did Not Err in Limiting Kramer's Fee Award on His* Borson *Motion

[18]Preliminarily, Turkanis contends that Kramer did not timely appeal from the *Borson* order because the notice of appeal identified Price as the sole appellant. While this is true, the appellants' briefs are filed on behalf of Price, ***355** who no one disputes timely appealed, as well as ****517** Kramer. We thus will consider the merits of the *Borson* appeal.

[19]The sole contention of error in the opening brief with respect to the *Borson* motion is that the trial court abused its discretion when it substantially reduced the fees to Kramer based on the finding that Turkanis deserved an offset for section 271 sanctions. In the reply brief, Kramer and Price assert for the first time that the trial court also abused its discretion by not scrutinizing Kramer's billing statements or analyzing the work that Kramer performed for Price that was the subject of the *Borson* motion. We decline to consider this belated argument. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583, 112 Cal.Rptr.3d 27 ["points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier"].) Even were we to rule on the argument, it would not assist Price and Kramer. The record is clear that the court did, in fact, review and analyze Kramer's bills. As just one example, the court's order summarized the work he did and analyzed how much of his work was attributable to litigation over the Bundy properties' management.[7]

[20] As to the argument regarding section 271, Price and Kramer argue that the court erred because it could not award section 271 sanctions as an offset; instead, Turkanis had to comply with due process requirements by properly noticing a section 271 motion. Section 271 states in pertinent part: "[T]he court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction." (§ 271, subd. (a).)

We disagree with Price and Kramer that the trial court erred here. Although the court's order discussed section 271 and determined that Price's conduct warranted such sanctions, it is clear from the court's thorough discussion that it based the award on the totality of the circumstances, and did not arbitrarily reduce the award to $39,000 as a sanction.

The factors the court considered to arrive at the award amount were proper. Section 2030 permits the trial court to order payment of attorney fees and ***356** costs as between the parties based upon their "abilities to pay" and their "respective incomes and needs" in order to "ensure that each party has access to legal representation to preserve each party's rights." (§ 2030, former subd. (a)(1)-(2).)[8] The court may award attorney fees under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) "In determining what is just and reasonable under the relative circumstances, ****518** the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (§ 2032, subd. (b).) The parties' circumstances described in section 4320 include, among

other things, the earning capacity of each party, the parties' marketable job skills, their obligations and assets, the duration of the marriage, and any "other factors the court determines are just and equitable."

[21] [22] [23]"Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).) The court should limit an award to fees that were reasonably necessary, including by taking into account over-litigation. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 255, 91 Cal.Rptr.3d 241.) " 'The exercise of sound discretion by the trial court in the matter of attorney's fees includes also judicial evaluation of whether counsel's skill and effort were wisely devoted to the expeditious disposition of the case.' " (*In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 576, 187 Cal.Rptr. 200.) "[S]ervices which have no apparent effect other than to prolong and to complicate domestic litigation cannot be deemed 'reasonably necessary' [citation] 'to properly litigate the controversy.' " (*Ibid.*)

Thus, consideration of Price's litigation conduct and a reduction for fees attributable to the unreasonable conduct was proper, even without reference to section 271. The court noted that Kramer represented Price in at least some of that unreasonable conduct to the tune of approximately $33,000. But more importantly, Kramer's and Price's suggestion that the $39,000 award was based entirely on her bad litigation conduct is not well taken. The court's award clearly considered the parties' respective incomes and expenses, their assets and liabilities, their earning capacities, the substantial amount that Turkanis still owed his own attorneys and would owe based on the pending ***357** appeals, the fact that Turkanis was supporting the parties' daughter, and the fact that, after this award, he would have paid approximately $164,000 of Price's fees and costs.

In sum, we do not agree with Price and Kramer that the trial court erred in taking into account Price's litigation conduct. Nor do we agree that the court arbitrarily fixed the award at $39,000 as a section 271 sanction. We will not reverse the award.

DISPOSITION

The orders are affirmed. Respondent to recover costs on appeal.

WE CONCUR:

RUBIN, Acting P.J.

GRIMES, J.

Parallel Citations

213 Cal.App.4th 332, 13 Cal. Daily Op. Serv. 1189, 2013 Daily Journal D.A.R. 1340

Mattei v. Hopper (1958) 51 Cal.2d 119, 330 P.2d 625

Purchaser's action for breach of contract by vendor who failed to convey real property in accordance with terms of deposit receipt executed by parties. The Superior Court, Contra Costa County, Wakefield Taylor, J., rendered judgment in favor of vendor, and purchaser appealed. The Supreme Court, Spence, J., held that contract for sale of real estate providing that agreement was subject to purchaser's obtaining leases satisfactory to purchaser was neither illusory nor lacking in mutuality of obligation and was enforceable by purchaser.

Reversed.

McComb, J., dissented.

Opinion, 326 P.2d 191, vacated.

Attorneys and Law Firms

****625 *121** Jay R. Martin and William F. Sharon, Oakland, for appellant.

Carlson, Collins, Gordon & Bold George R. Gordon, Martinez, John L. Garaventa, Concord, and Dean Ormsby, Martinez, for respondent.

Opinion

SPENCE, Justice.

Plaintiff brought this action for damages after defendant allegedly breached a contract by failing to convey her real property in accordance with the terms of a deposit receipt which the parties had executed. After a trial without a jury, the court concluded that the agreement was 'illusory' and lacking in 'mutuality.' From the judgment accordingly entered in favor of defendant, plaintiff appeals.

Plaintiff was a real estate developer. He was planning to construct a shopping center on a tract adjacent to defendant's land. For several months, a real estate agent attempted to negotiate a sale of defendant's property under terms agreeable to both parties. After several of plaintiff's proposals had been rejected by defendant because of the inadequacy of the price offered, defendant submitted an offer. Plaintiff accepted on the same day.

****626** The parties' written agreement was evidenced on a form supplied by the real estate agent, commonly known as a deposit receipt. Under its terms, plaintiff was required to deposit $1,000 of the total purchase price of $57,500 with the real estate agent, and was given 120 days to 'examine the title and consummate the purchase.' At the expiration of that period, the balance of the price was 'due and payable upon tender of a good and sufficient deed of the property sold.' The concluding paragraph of the deposit receipt provided: 'Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser.' This clause and the 120-day period were desired by plaintiff as a means for arranging satisfactory leases of the shopping center buildings prior to the time he was finally committed to pay the balance of the purchase price and to take title to defendant's property.

Plaintiff took the first step in complying with the agreement by turning over the $1,000 deposit to the real estate agent. While he was in the process of securing the leases and before the 120 days had elapsed, defendant's attorney notified plaintiff that defendant would not sell her land under the terms ***122** contained in the deposit receipt. Thereafter, defendant was informed that satisfactory leases had been obtained and that plaintiff had offered to pay the balance of the purchase price. Defendant failed to tender the deed as provided in the deposit receipt.

[1] Initially, defendant's thesis that the deposit receipt constituted no more than an offer by her, which could only be accepted by plaintiff notifying her that all of the desired leases had been obtained and were satisfactory to him, must be rejected. Nowhere does the agreement mention the necessity of any such notice. Nor does the provision making he agreement 'subject to' plaintiff's securing 'satisfactory' leases necessarily constitute a condition to the existence of a contract. Rather, the whole purchase receipt and this particular clause must be read as merely making plaintiff's performance dependent on the obtaining of 'satisfactory' leases. Thus a contract arose, and plaintiff was given the power and privilege to terminate it in the event he did not obtain such leases. (See 3 Corbin, Contracts (1951), s 647, pp. 581-585.) This accords with the general view that deposit receipts are binding and enforceable contracts. (Cal.Practice Hand Book, Legal Aspects of Real Estate Transactions (1956), p. 63.)

[2] [3] However, the inclusion of this clause, specifying that leases 'satisfactory' to plaintiff must be secured before he would be bound to perform, raises the basic question whether the consideration supporting the contract was thereby vitiated. When the parties attempt, as here, to make a contract where promises are exchanged as the consideration, the promises must be mutual in obligation. In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 660-662, 277 P. 519; 1 Corbin, Contracts (1950), s 152, pp. 496-502.) Or,

if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration. See J. C. Millett Co. v. Park & Tilford Distillers Corp., D.C.N.D.Cal., 123 F.Supp. 484, 493. Whether these problems are couched in terms of mutuality of obligation or the illusory nature of a promise, the underlying issue is the same consideration. Ibid.

While contracts making the duty of performance of one of the parties conditional upon his satisfaction would seem ***123** to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such 'satisfaction' clauses have been given effect. They have been divided into two primary categories and have been accorded different treatment on that basis. First, in those contracts where the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical ****627** utility, dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously (Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 882-883, 306 P.2d 783), and the standard of a reasonable person is used in determining whether satisfaction has been received. Thomas Haverty Co. v. Jones, 185 Cal. 285, 296, 197 P. 105; Fielding & Shepley, Inc., v. Dow, 72 Cal.App.2d 18, 21, 163 P.2d 908; Fruit Growers' Supply Co. v. Goss, 4 Cal.App.2d 651, 654, 41 P.2d 357; Scott Co., Inc., v. Rolkin, 133 Cal.App. 209, 212, 23 P.2d 1065; Melton v. Story, 113 Cal.App. 609, 612-614, 298 P. 1032; Jones-McLaughlin, Inc., v. Kelly, 100 Cal.App. 315, 321-325, 279 P. 1076; Bruner v. Hegyi, 42 Cal.App. 97, 99, 183 P. 369. Of the Cited cases, two have expressly rejected the arguments that such clauses either rendered the contracts illusory (Collins v. Vickter Manor, Inc., supra) or deprived the promises of their mutuality of obligation. Melton v. Story, supra. The remaining cases tacitly assumed the creation of a valid contract. However, it would seem that the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard as envisioned by this line of cases. Illustrative of some of the factors which would have to be considered in this case are the duration of the leases, their provisions for renewal options, if any, their covenants and restrictions, the amounts of the rentals, the financial responsibility of the lessees, and the character of the lessees' businesses.

This multiplicity of factors which must be considered in evaluating a lease shows that this case more appropriately falls within the second line of authorities dealing with 'satisfaction' clauses, being those involving fancy, taste, or judgment. Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract. Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 702-705, 182 P. 428, 6 A.L.R.1493; Brenner v. Redlick Furniture Co., 113 Cal.App. 343, 346-347, 298 P. 62; Kendis v. Cohn, 90 Cal.App. 41, 66-68, 265 P. 844; ***124** Schuyler v. Pantages, 54 Cal.App. 83, 85-87, 201 P. 137; see also Van Demark v. California Home Extension Ass'n, 43 Cal.App. 685, 687-689, 185 P. 866. Although these decisions do not expressly discuss the issues of mutuality of obligation or illusory promises, they necessarily imply that the promisor's duty to exercise his judgment in good faith is an adequate consideration to support the contract. None of these cases voided the contracts on the ground that they were illusory or lacking in mutuality of obligation. Defendant's attempts to distinguish these cases are unavailing, since they are predicated upon the assumption that the deposit receipt was not a contract making plaintiff's performance conditional on his satisfaction. As seen above, this was the precise nature of the agreement. Even though the 'satisfaction' clauses discussed in the above-cited cases dealt with performances to be received as parts of the agreed exchanges, the fact that the leases here which determined plaintiff's satisfaction were not part of the performance to be rendered is not material. The standard of evaluating plaintiff's satisfaction good faith applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged.

Moreover, the secondary authorities are in accord with the California cases on the general principles governing 'satisfaction' contracts. 'It has been questioned whether an agreement in which the promise of one party is conditioned on his own or the other party's satisfaction contains the elements of a contract whether the agreement is not illusory in character because conditioned upon the whim or caprice of the party to be satisfied. Since, however, such a promise is generally considered as requiring a performance which shall be satisfactory to him in the exercise of an honest judgment, such contracts have been almost universally upheld.' (3 Williston, Contracts (rev. ed. 1936), s 675A, p. 1943; ****628** see also 3 Corbin, Contracts (1951), ss 644, 645, pp. 560-572.) 'A promise conditional upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine.' (Restatement, Contracts (1932), s 265, comment a.)

If the foregoing cases and other authorities were the ***125** only ones relevant, there would be little doubt that the deposit receipt here should not be deemed illusory or lacking in mutuality of obligation because it contained the 'satisfaction' clause. However, language is two recent cases led the trial court to the contrary conclusion. The first case, Lawrence Block Co. v. Palston, 123 Cal.App.2d

300, 266 P.2d 856, 858, stated that the following two conditions placed in an offer to buy an apartment building would have made the resulting contract illusory: 'O.P.A. Rent statements to be approved by Buyer' and 'Subject to buyer's inspection and approval of all apartments.' These provisions were said to give the purchaser 'unrestricted discretion' in deciding whether he would be bound to the contract and to provide no 'standard' which could be used in compelling him to perform. 123 Cal.App.2d at pages 308-309, 266 P.2d at pages 861-862. However, this language was not necessary to the decision. The plaintiff in Lawrence Block Co. was a real estate broker seeking a commission, his right to which depended upon the existence of a binding agreement between the buyer and seller. The seller had not accepted the buyer's offer as originally written, but had added other conditions. This change constituted a counter-offer. Since the latter was not accepted by the buyer, no binding contract was created and the broker was not entitled to his commission.

The other case, Pruitt v. Fontana, 143 Cal.App.2d 675, 300 P.2d 371, 377, presented a similar situation. The court concluded that the written instrument with a provision making the sale of land subject to the covenants and easements being 'approved by the buyers' was illusory. It employed both the reasoning and language of Lawrence Block Co. in deciding that this clause provided no 'objective criterion' preventing the buyers from exercising an 'unrestricted subjective discretion' in deciding whether they would be bound. 143 CalApp.2d at pages 684-685, 300 P.2d at page 377. But again, this language was not necessary to the result reached. The buyers in Pruitt refused to approve all of the easements of record, and the parties entered into a new and different oral agreement. The defendant seller was held to be estopped to assert the statute of frauds against this subsequent contract, and the judgment of dismissal entered after the sustaining of demurrers was reversed.

While the language in these two cases might be dismissed as mere dicta, the fact that the trial court relied thereon requires ***126** us to examine the reasoning employed. Both courts were concerned with finding an objective standard by which they could compel performance. This view apparently stems from the statement in Lawrence Block Co. that 'The standard 'as to the satisfaction of a reasonable person' does not apply where the performance involves a matter dependent on judgment.' 123 Cal.App.2d at page 309, 266 P.2d at page 862. By making this assertion without any qualification, the court necessarily implied that there is no other standard available. Of course, this entirely disregards those cases which have upheld 'satisfaction' clauses dependent on the exercise of judgment. In such cases, the criterion becomes one of good faith. Insofar as the language in Lawrence Block, Co. and Pruitt represented a departure from the established rules governing 'satisfaction' clauses, they are hereby disapproved.

[4] We conclude that the contract here was neither illusory nor lacking in mutuality of obligation because the parties inserted a provision in their contract making ****629** plaintiff's performance dependent on his satisfaction with the leases to be obtained by him.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

McCOMB, J., dissents.

Parallel Citations

330 P.2d 625

Cochran v. Ellsworth (1954) 126 Cal.App.2d 429, 272 P.2d 904

Action by real estate broker against owner for commission. The Superior Court, Los Angeles County, James H. Pope, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Mosk, J. pro tem., held that where agreement whereunder broker claimed commission provided that commission would be paid in installments at the close of escrow and in event of consummation of the sale, and escrow was never closed, and purchase price and deeds were never delivered, broker was entitled to no compensation, even though failure of negotiations resulted from owner's voluntary yielding to purchaser's unjustified demand.

Judgment affirmed.

Attorneys and Law Firms

****905 *431** Demler & Eckert and Elizabeth Cochran, Long Beach, for appellant.

Best, Best & Krieger, Riverside, and Joseph A. Ball, Long Beach, for respondent.

Opinion

MOSK, Justice pro tem.

Desiring to sell his real property, consisting of 480 acres, the entire town of Stanfield, Arizona, respondent Earle Ellsworth in January, 1950, listed the property with Hapeman-McDonald, real estate brokers, in Riverside, California. Shortly thereafter appellant, a real estate broker licensed in California, but not in Arizona, learned of the listing, advertised the property and made efforts to obtain a purchaser.

On March 5, 1950, respondent informed appellant that the agency of Hapeman-McDonald was being revoked but that appellant could continue his efforts to sell the ****906** property. About this time appellant interested one Charles Fitzgerald, a Long Beach medical doctor, in the property and on March 4, 1950, ***432** Dr. Fitzgerald and his wife inspected the property unaccompanied by appellant.

Within a few days thereafter, on or about March 8, 1950, respondent Dr. Fitzgerald and appellant met in the Fitzgerald home in Long Beach, California, and negotiated for the sale of the Arizona property. Pursuant to these negotiations escrow instructions were drafted by the Farmers and Merchants Bank of Long Beach. On March 14, 1950, appellant went to Arizona where he further conferred with respondent, who advised him that he desired to have his own attorney in Arizona prepare the escrow instructions. The attorney, Eugene K. Mangum, drafted new instructions and at the same time, pursuant to a request from appellant, prepared a separate memorandum by the terms of which appellant was to receive a broker's commission in the total sum of $8,200.

The latter agreement, executed by both respondent and appellant, provided in part as follows:

'Whereas, party of the second part has acted as broker in arranging for the sale of certain Arizona property owned by party of the first part and others, and

'Whereas, it is desired by this Agreement to establish the terms of payment of the commission for such services performed by party of the second part,

'Now, Therefore, it is mutually agreed:

'I.

'In the event of consummation of the sale of the property hereinabove referred to, party of second part is to be entitled to a commission in the amount of Eighty-two Hundred ($8200.00) Dollars, payable as follows: The sum of $1200.00 at the close of escrow, and the sum of $7,000.00 on or before November 15, 1950.'

The parties concede that the escrow instructions constituted a binding contract of purchase and sale of the property. The escrow was thereafter opened in the Farmers and Merchants Bank in Long Beach. The buyer, Dr. Fitzgerald, deposited in the escrow a deed to his Long Beach home, $10,000 in cash and his promissory note secured by a deed of trust on the Arizona property. He also paid the sum of $4,000 cash outside of escrow for the stock of goods in the store located in Stanfield. For this he received a bill of sale from the respondent. On or about April 15, 1950, Dr. Fitzgerald took possession of the Arizona property. Subsequent thereto, at some time undisclosed by the record, respondent met all conditions required of him by the escrow.

***433** The escrow was never closed for on June 1, 1950, Dr. Fitzgerald served a notice of rescission upon respondent, claiming fraudulent misrepresentations concerning the property had been made to him. Respondent promptly instituted an action for specific performance against Dr. Fitzgerald in the court of Pinal County, Arizona.

This action was never brought to trial, for Fitzgerald and respondent, after negotiations through their attorneys, mutually rescinded the transaction and instructed the escrow holder to return the monies, deeds and other papers to the parties who had deposited same.

Not having received his commission, appellant brought this action for the purpose of collection. The trial court found that respondent made no false representations to Dr. Fitzgerald but that the latter desired 'to get out of the bargain from his own choice'. The trial court also found that the brokerage contract was executed in Arizona, that appellant was not a licensed real estate broker under the laws of the state of Arizona and that under those laws a broker cannot recover a commission upon a broker's contract unless so licensed. The court further found that it was the intention of the parties that the commission would be payable only if Dr. Fitzgerald completed the transaction of purchase, and that since he did not, no commission was due. From that determination, the broker has appealed.

In their settled statement, the parties have agreed there are two questions to be resolved on appeal: (1) when the owner of real property located in Arizona comes into California and lists such property with a California broker, does the fact that the ****907** written memorandum of his promise to pay broker's commission was signed in Arizona preclude the broker from collecting his fee; and (2) under the evidence was the sale of the real property involved 'consummated', so as to entitle the broker to his commission under a contract which called for payment of commission upon 'consummation' of sale?

1. *Does lack of an Arizona license prevent recovery by appellant?*

The first query of the parties on this appeal poses a perplexing problem involving the validity of the broker's contract, he having been licensed in California but not in Arizona. Both California and Arizona have a statute of frauds requirement that real estate brokers' contracts, to be enforceable, ***434** must be in writing. But beyond that, whether we here apply Arizona or California law is a unique dilemma in the conflicts of laws field. The following factual capsule will demonstrate the difficulty: there was one transaction; the property was in Arizona; the broker was in California; the seller was in Arizona; the buyer in California; the seller gave oral authorization to the broker in California; the written brokerage contract was executed in Arizona; the broker's services were rendered in California; the purchaser was obtained in California; the sale was negotiated in California; the escrow instructions were prepared in California but revised in Arizona; the escrow instructions were signed by the seller in Arizona but by the purchaser in California; the escrow was opened in California.

In many jurisdictions it has been held that an isolated transaction does not preclude recovery of a commission by a non-resident unlicensed real estate broker where he is not shown to be otherwise carrying on the business of a real estate broker in the state. Ressler v. Marks, 308 Pa. 205, 162 A. 666, 86 A.L.R. 638; Boggan v. Clark, 141 Miss. 849, 105 So. 760; Land Co. of Florida v. Fetty, 5 Cir., 15 F.2d 942; Vossler v. Earle, 273 Ill. 367, 112 N.E. 687. However the laws of Arizona specifically provide that 'the performance of one act * * * shall constitute the performer thereof a real estate broker.' Arizona Laws 1937, ch. 53, p. 177. If appellant is otherwise subject to the laws of Arizona by virtue of his contract, he is not exempt because only a single transaction was involved.

Three possible rules have been suggested for ascertaining the law governing the validity of a contract: (1) the intention of the parties; (2) the place of performance; (3) the place of making the contract. These are discussed at length by Beale in 23 Harv.L.R. 260 ff., and he concludes (p. 272) that 'the principle which is both sound theoretically and most practical in operation is the principle that contracts are in every case governed as to their nature and validity by the law of the place where they are made.'

[1] The place of making the contract, and its equivalent, the place of contracting, properly mean the place in which the final act was done which made the promise or promises binding. Just what event is the final one necessary to make a contract is primarily a question to be determined by the law of contracts. 2 Beale, The Conflict of Laws, p. 1045. In contract law, the universal principle disposing of this, says Williston (Vol. I, p. 309), is 'that the place of the contract ***435** is the place where the last act necessary to the completion of the contract was done,—that is, where the contract first creates a legal obligation'. To the same effect is Fitzhugh v. University Realty Co., 46 Cal.App. 198, 199, 188 P. 1023. An example is this situation described in Michelin Tire Co. v. Coleman & Bentel Co., 179 Cal. 598, at page 604, 178 P. 507, 510: 'The contract in question was prepared in Los Angeles, signed by the defendant company there and forwarded to the Michelin Tire Company of the New Jersey at Milltown for acceptance. It contained a provision that it should not be binding until accepted by the Michelin Tire Company. Upon receipt of the contract at Milltown, the Michelin Tire Company, after making a *substantial* change in one of the provisions of the contract, signed the same and returned it to the defendant company with advices as to the change. Until this change had been approved, it was not the contract between the parties. The defendant company upon receipt of the contract as modified, by letter ****908** dated

November 5, 1908, and mailed from Los Angeles, advised the Michelin Tire Company that it accepted the contract as modified. Under the authorities the contract was clearly executed in California, where the last act in its execution was performed. Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90.'

[2] [3] [4] Ordinarily the 'last act essential to the validity' of a brokerage contract is not the signing of authorization to act. The mere engagement of a broker to dispose of specified property does not create an enforceable contract, for the broker is not obligated to find a purchaser. An enforceable contract does not result until the broker finds oen able and willing to buy the property at the authorized price. The validity of such a contract is to be determined by the law of the state where the contract was consummated, that is, the place where the purchaser was found. 11 Cal.Jur.2d p. 153. This is not inconsistent with the rule that the *lex loci contractus* determines the validity and legal effect of a contract; it is merely a method of ascertaining the *loci contractus*.

An exception to the rule, however, is discussed in 159 A.L.R. 267:

'It is well settled, expressly or by necessary implication, by practically all the cases in which the courts have had the occasion to consider the question, that real-estate brokerage ***436** contracts authorizing or employing the broker to sell or buy real estate do not involve any transfer of an interest in land within the contemplation of the rule that contracts relating to a transfer of an interest in land are governed by the law of the jurisdiction where the land is located; and that such brokerage contracts are in the category of contracts of employment for personal services, which, under the general rule relating to the governing law of contracts, are governed by the law of the place where they are made and are to be performed, and that, if they are to be performed at a place other than where they are made, then by the law of the place where they are to be performed—and not by the law of the situs of the property as such.' To the same general effect is Manhattan Life Ins. Co. v. Johnson, 188 N.Y. 108, 113, 80 N.E. 658, 660, 9 L.R.A.,N.S., 1142.

There are some cogent reasons for not paying blind obeisance to the authority of the place of contracting in this day when ease of transportation and communication virtually erase state boundaries as commercial limitations. The *lex loci contractus* rule is not universally recognized and has been criticized in that it frequently elevates fortuitous and insignificant circumstances to crucial importance in establishing the controlling law. As stated in 31 Cal. L.Rev. 95, 96, 'In a society in which business is characteristically transacted while traveling, over the telephone, through the mails and telegraph, the place of acceptance may be in a state unrelated to previous negotiations or subsequent performance—a place involved solely because one party is passing through it. It seems strange to give the law of that place great weight.'

In Johnson v. Allen, 108 Utah 148, 158 P.2d 134, 159 A.L.R. 256, the court held a contract was not invalid where it did not have to be performed in a state in which the broker was not licensed. The fact that some of the negotiations were conducted in the state in which the broker was unlicensed is not controlling, held the court in Foley v. Hassey, 55 Wyo. 24, 95 P.2d 85. Also see Tillman v. Gibson, 44 Ga.App. 440, 161 S.E. 630.

Failure to rigidly adhere to the *lex loci contractus* creates problems, it is true. Yet by considering the facts in each case individually, courts have found a way to render substantial justice. In O'Dea v. Throm, 250 Ill.App. 577, conversations between seller and broker took place in Illinois, but a confirming written communication, posted in Illinois, was received by the broker while in Florida, situs of the real ***437** property. The court held Illinois law to prevail. In Howell v. North, 93 Neb. 505, 140 N.W. 779, the seller and broker dealt with each other in Nebraska, the property and ultimate sale were both in Colorado. The court held, 140 N.W. at page 780, the law of Colorado, ****909** 'the place where the act was to be performed', was controlling. In Aronson v. Carobine, 129 Misc. 800, 222 N.Y.S. 721, with an agreement made in New York to sell property located in New Jersey by a broker unlicensed in New Jersey, the court held the contract valid on the ground it was for personal services and these were rendered in New York. Restatement Conflict of Laws, Sec. 347, puts it this way: '* * * a promise may be legal although the acts called for would be illegal if to be performed in the state where the contract was made. * * * Illustrations:

'1. The purchase of grain futures is forbidden by the law of X but is legal by the law of Y. A agrees with B in X to purchase grain futures in Y. The bargain is legal.'

[5] Back of many of these cases is the desire of the courts to see that a broker is compensated for services actually rendered pursuant to agreement. As stated in Howell v. North, 93 Neb. 505, 140 N.W. 779, 780: 'The purpose of the statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants; but it was never the intention of the Legislature to protect the real

estate owner against legitimate claims for services which he authorized in writing, and which were honestly rendered.'

Therefore courts will frown upon efforts to avoid payment of a just claim nerely because an agreement was signed in a place requiring a license. The court curtly disposed of such contention in Peters v. Andrews, 74 Ind.App. 578, 129 N.E. 328, 329: 'We do not need to cite authority to support us in deciding that a resident of Mattoon, Ill., who engages the services of a resident of Knox county, Ind., to sell his farm in such county, cannot avoid paying for such services by going into a city where it is unlawful to engage in the real estate brokerage business without a license, to execute his contract of sale with the purchaser by his agent, and his agreement to pay such agent for his services.'

[6] In the instant case we have a contract for personal services, most of which the parties well know had already been performed in California, and the balance of which they contemplated to be performed in California. In this situation ***438** the bare physical act of signing the written instrument was a fortuitous, fleeting and relatively insignificant circumstance in the total contractual relationship between the parties. It should not be elevated to paramount importance, particularly when to do so will serve only the purpose of rendering invalid an otherwise legal agreement. Nor do we overlook the fact that the party here challenging the contract is the one who, through his own attorney, prepared the instrument and supervised its execution. Where a doubt exists, a contract is to be interpreted most strongly against the party responsible for the uncertainty. Civ.Code, § 1654. A contract is to receive such interpretation as will make it lawful and operative if reasonably possible. Civ.Code, § 1643.

Therefore we are governed in this case by California, not Arizona law. Since plaintiff was duly licensed as a broker in California, where his services were performed, the agreement was not void.

2. *Was the sale 'consummated' as contemplated by the agreement?*

[7] [8] [9] Generally speaking, a real estate broker has earned his commission when he has brought to the vendor a purchaser who is ready, willing and able to buy the property upon the terms on which the agent is authorized to sell, or when a written contract upon any terms acceptable to the seller has been entered into with a purchaser originally brought to the vendor by the agent. Alison v. Chapman, 36 Cal.App. 759, 173 P. 389. It is not necessary for the sale to be completed, under the foregoing rule, for the broker to be entitled to his commission. Carlin v. Lifur, 2 Cal.App. 590, 84 P. 292. Or if the owner makes concessions to the purchaser, it may not result in loss to the broker without his consent. Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 352, 248 P. 296. A broker who has rendered all required services is not to be denied compensation therefor by the whims of a defaulting ****910** vendor or purchaser who arbittrarily refuses to perform under a sales contract.

[10] [11] In the instant case, if the parties had entered into the usual type of real estate brokerage contract, the respondent would have been liable despite the subsequent termination of the sales agreement. Although the trial court found the vendor had made no false representations justifying the purchaser's attempted rescission, nevertheless the vendor and purchaser agreed between themselves on the terms of a rescission. Thus it appears that the vendor, upon no compulsion ***439** of court order, voluntarily yielded to what the trier of fact here has determined to be an unjustified demand. By so doing he could not, under a standard broker's contract, deprive the broker of the fruits of his labor. Lesser v. W. B. McGerry & Co., 121 Cal.App. 193, 197, 8 P.2d 1058; California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511. Some cases have excused a seller from liability to the broker after a rescission if the seller acted in good faith. Leventritt v. Cowell, 21 Cal.App. 597, 601, 132 P. 627; Dunne v. Colomb, 192 Cal. 740, 221 P. 912; Prince v. Selby Smelting & Lead Co., 35 Cal.App. 684, 170 P. 1075. It is not an act of good faith, however, to collusively agree with a buyer to terminate the purchase contract, or to acquiesce in wrongful insistence upon rescission. The binding written promises of a contract, upon which a third person relies for compensation earned, may not be so casually reduced to mere illusory texture.

But here we have no form brokerage contract. The instant agreement, specially prepared after negotiation, provided 'in the event of consummation of the sale' a commission was to be paid, the first payment to be 'at the close of escrow'. Therefore two events, unless they should occur simultaneously, had to come to pass before liability was to arise.

[12] [13] An owner and broker may, if they wish, enter into a binding agreement that no commission shall be considered earned until the happening of a certain specified event, Edgecomb v. Callahan, 132 Cal.App. 248, 22 P.2d 521, or upon certain defined terms and conditions, Backman v. Guadalupe Realty Co., supra, or upon any named contingency, Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650.

When a condition precedent is adopted by the parties to a contract, the court will exact a substantial if not strict observance of the provisions before finding liability. Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 894, 202 P.2d 365.

The event upon which the first payment was conditioned never occurred as the escrow was not closed, a situation parallel to that in Wilson v. Security-First Nat. Bank, 84 Cal.App.2d 427, 190 P.2d 975. Appellant does not clear that hardle by maintaining that the 'close of escrow' provision relates not to a condition precedent, but merely to the time of payment. For that time has not come to pass, and thus the whole sum sued for is not due.

More important here, however, is the proper construction ***440** to be accorded the phrase 'in the event of consummation of the sale'. Upon insistence of appellant that the phrase was ambiguous, and over opposition of respondent whose position in this regard we believe was sound, the trial court permitted parol evidence of the negotiations of the parties leading to the execution of the written instrument. The court's finding was 'that there had been discussion between the parties about the prospective purchaser and whether he would go through with the transaction, and the court finds that it was the intention of the parties that the commission would be payable if Dr. Fitzgerald completed the transaction of purchase. * * *'

[14] [15] When parol evidence is admitted as an aid to construction, upon appeal the trial court's construction of the instrument is ordinarily conclusive if the extrinsic evidence is conflicting, and the determination is supported by the evidence, as it is in this case. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17.

[16] Without regard to the extrinsic evidence, however, the words 'consummation of the sale' have a reasonably well defined meaning under the law. First of all, they refer to a future event, not to an obligation ****911** immediately arising upon execution of the instrument here in question. Alison v. Chapman, supra. Secondly, the cases clearly hold that 'consummation of the sale' means completion of the transaction, and where real property is involved, payment of the purchase price and conveyance of title. Peak v. Jurgens, 5 Cal.App.2d 573, 43 P.2d 569. The word 'consummate' means 'to bring to completion'. McGill v. Fleming, 32 Cal.App.2d 601, 90 P.2d 341, 343; Connor v. Riggins, 21 Cal.App. 756, 132 P. 849.

[17] Where a broker has seen fit to allow payment of his compensation to be contingent upon performance of a contract between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost. If the broker suffers any hardship from that result, it is unfortunately inherent in the form of his contract, which was the only written means he chose for his protection. Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856.

The sale could have been completed only upon payment of the purchase price and delivery of deeds conveying title and close of escrow. Those events did not transpire and therefore the sale was not consummated within the provisions of the agreement. We do not mean to hold, however, that after consummation ***441** of the sale a rescission with the consent of an innocent vendor who voluntarily chooses not to hold a defaulting purchaser would relieve an obligation to pay for a broker's services. Clearly that would be unjust to the broker. But here we have the rescission taking place prior to consummation of the transaction, and with the broker's compensation contingent upon consummation, liability did not arise.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

On Petition for Rehearing

PER CURIAM.

[18] On petition for rehearing, appellant urges that the transaction was consummated because title passed in escrow, even though a deed was not delivered to the purchaser. It is true that title may pass in escrow when all of the conditions of the escrow have been performed and the grantee is entitled to possession of the deed. Holman v. Toten, 54 Cal.App.2d 309, 128 P.2d 808; Hagge v. Drew, 27 Cal.2d 368, 375, 165 P.2d 461; Blumenthal v. Liebman, 109 Cal.App.2d 374, 379, 240 P.2d 699. But in this instance two circumstances indicate close of escrow was essential to consummation of the transaction: first, the finding of the trial court that the commission was to be payable if the purchaser 'completed the transaction of purchase' and the escrow was a significant phase of the 'transaction of purchase'; and second, the first portion of the commission was not payable until 'close of escrow'.

We therefore add to the first sentence of the final paragraph of our typewritten opinion the words 'and close of escrow', so that lines 7 and 8, page 17 [272 P.2d 911] will now read: 'The sale could have been completed only upon payment of the purchase price, delivery of

deeds conveying title and close of escrow'. With the opinion so amended, the petition for rehearing is denied.

Parallel Citations

272 P.2d 904

Borroso v. Ocwen Loan Servicing, LLC (2012) 208 Cal.App.4th 1001, 146 Cal.Rptr.3d 90

Synopsis

Background: Borrower brought action against loan servicer and trustee under deed of trust for breach of contract, wrongful foreclosure, and cancellation of deed on trustee's sale, and sought specific performance and injunction. The Superior Court, Los Angeles County, No. VC056571, Yvonne T. Sanchez, J., sustained demurrer without leave to amend. Borrower appealed.

Holdings: The Court of Appeal, Epstein, P.J., held that:

[1] loan modification agreement was not required to be notarized;

[2] servicer's failure to sign and return modification agreement did not preclude contract formation; but

[3] borrower did not validly accept revised mortgage loan modification agreement; but

[4] servicer's alleged acts would establish breach of implied covenant of good faith and fair dealing; and

[5] borrower stated a cause of action against servicer for wrongful foreclosure.

Reversed and remanded with directions.

Attorneys and Law Firms

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Opinion

EPSTEIN, P.J.

***1004** Divinia Barroso challenges the trial court order sustaining a demurrer, without leave to amend, to her complaint arising from the failed loan modification and eventual foreclosure sale of her home. We conclude that Barroso alleged formation of a valid contract to modify her loan documents. She did not allege compliance with ****93** the conditions for a revised loan modification offered to her later. We reverse the trial court's order as to the breach of contract cause of action because it sufficiently alleged breach of the modification agreement. For the same reason, Barroso should be permitted to allege a cause of action for breach of the covenant of good faith and fair dealing based on breach of the modification agreement. In addition, we conclude that Barroso should be allowed to amend the complaint to allege a cause of action for common law wrongful foreclosure based on the valid modification agreement.

FACTUAL AND PROCEDURAL SUMMARY

In reviewing an order sustaining a demurrer, we assume the factual allegations pleaded to be true and examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42, 105 Cal.Rptr.3d 181, 224 P.3d 920.) The following facts are alleged or are cognizable by judicial notice.

Barroso purchased a single family dwelling on Mallison Avenue in South Gate in 2005. As part of the purchase, she executed a promissory note secured by a deed of trust in the amount of $372,000 (the loan documents). On information and belief, Barroso alleges that Ocwen Loan Servicing, LLC (Ocwen) acquired the servicing rights to the original loan. In 2008, Barroso ***1005** encountered financial difficulties and was unable to make timely monthly mortgage payments. Ocwen began foreclosure proceedings on the property by recording a notice of default in January 2009 and a notice of trustee sale on April 16, 2009.

In response, Barroso began to negotiate for a loan modification. In June 2009, she was notified by Ocwen that she was eligible for benefits under the federal government Home Affordable Modification Program (HAMP)[1]. She alleges the notice informed her: "If you comply with the terms of the Home Affordable Trial Period Plan and the Modification Agreement, we will

modify your mortgage loan and waive all prior late charges that remain unpaid." Barroso claims a copy of this letter was incorporated by reference to the complaint as exhibit A, but that letter is dated October 20, 2009, as we discuss below. She alleges that enclosed with this letter from Ocwen were a "Home Affordable Modification Trial Period Plan (Step One of Two–Step Documentation Process)" which she refers to as the "Trial Period Plan," and a "Home Affordable Modification Agreement (Step Two of Two–Step Documentation Process)," which she refers to as the "Modification Agreement." The complaint incorporated these documents by reference. According to the complaint, Barroso was to make payments of $1,301.60 on the first of the month in July, August, and September 2009 under the Trial Period Plan. Under the Modification Agreement, she would make monthly payments of $1,301.60 beginning on October 1, 2009 and ****94** thereafter, with increases in the payment scheduled for October 2014.

Barroso alleges that she signed the Trial Period Plan and the Modification Agreement on July 3, 2009, and submitted both to Ocwen, with the July 1, 2009 payment of $1,301.60. She further alleges that Ocwen acknowledged receipt of that payment. Barroso alleges: "The original signed agreements are in the possession of Defendant Ocwen." She made the monthly payments when due under the Modification Agreement from August through November 2009.

After November 2009, Barroso believed she was making payments under a revised modification agreement. She states that Ocwen sent her a revised Home ***1006** Affordable Modification Agreement (Step Two of Two–Step Documentation Process) (Revised Modification Agreement) in December 2009, reducing the monthly mortgage payments to $1,294.85 effective October 1, 2009. It stated that if all of Barroso's representations remained true and all preconditions to the modification were met, the loan documents would automatically be modified on October 1, 2009 and all unpaid late charges would be waived. The complaint does not explain why this modification was sent to Barroso two months after its effective date. She alleges that the October 2009 payment already had been made and receipt acknowledged by Ocwen. Barroso alleges that she signed the Revised Modification Agreement on December 11, 2009, and submitted it to Ocwen with a payment of $1,300. She alleged that the original signed Revised Modification Agreement was in the possession of Ocwen.

Barroso made monthly payments of $1,300 from January through April 2010, as acknowledged by Ocwen. Barroso alleges she first learned something was wrong on May 7, 2010, when she received a notice to quit from an attorney acting on behalf of defendant U.S. Bank, described in the complaint as trustee for the registered holders of asset-backed certificates, series 2006. She contacted Ocwen and learned that the property had been auctioned at a foreclosure sale in April 2010. There were no bidders and the property reverted to the beneficiary, whom she alleges to be defendant U.S. Bank. In June 2010, Ocwen returned the April 2010 payment made by Barroso for the stated reason that the payment was not sufficient to satisfy the defaulted amount and no alternative payment arrangements had been made. She was directed to contact her home retention specialist immediately to avoid a foreclosure sale (which in fact already had taken place). Barroso alleges that this letter was false because she had accepted three alternative payment agreements, the Trial Period Plan, the Modification Agreement, and the Revised Modification Agreement. The complaint alleges that the Trial Period Plan was fully performed and that the other two agreements were "partially performed".

The complaint alleges a cause of action for breach of the Trial Period Plan, the Modification Agreement, and the Revised Modification Agreement, alleging that Barroso had performed each act required under these agreements, including making all payments when due. Despite Barroso's full performance, she alleges Ocwen breached the agreements by failing to honor their terms, wrongly proceeding to foreclosure sale, and wrongfully selling the property to the trustee without offering her an alternative to avoid foreclosure.

The second cause of action against Ocwen is for specific performance of the Revised Modification Agreement. The third cause of action against Ocwen is for wrongful foreclosure, alleging that Barroso was not in default ***1007** under the terms of the ****95** Revised Modification Agreement. The fourth cause of action is against defendant U.S. Bank for cancellation of the deed on the trustee's sale. The fifth cause of action, also against U.S. Bank, is to enjoin the eviction of Barroso and her family from the property. Barroso unsuccessfully sought a temporary restraining order and preliminary injunction to halt the unlawful detainer action.

Ocwen and U.S. Bank (collectively defendants) demurred to the complaint on the ground that each of the causes of action failed to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) They contended that the loan modification process was not completed due to Barroso's ineligibility and that they never agreed to modify the terms of her existing mortgage or to cancel the pending foreclosure sale. The demurrer includes a factual summary based on documents which the trial court judicially noticed. We

granted defendants' request to take judicial notice of these documents on appeal.

Defendants argued that Barroso failed to allege receipt of a fully executed loan modification agreement signifying the satisfaction of all conditions precedent, and therefore there was no loan modification agreement. They also contended that specific performance is not an independent cause of action, but instead is an equitable remedy for breach of contract.[2] They also argued that Barroso failed to allege sufficient facts to demonstrate that the foreclosure was unlawful or any other basis for cancellation of the trustee's deed, including a failure to allege tender of the amounts due under the mortgage. Finally, defendants contended that Barroso had failed to allege a basis for injunctive relief. In her opposition, Barroso argued that she had alleged that she signed and returned the agreement, that Ocwen had the fully executed original contracts in its possession, and that the language requiring Ocwen's signature was a condition subsequent and did not defeat the validity of the contract.

The trial court sustained the demurrer without leave to amend. It found Barroso's allegations were contradicted by the exhibits attached to the complaint which stated that the loan documents would not be modified unless and until the borrower received a copy of the agreement signed by Ocwen. The trial court concluded that Barroso's breach of contract cause of action failed on this ground and that the specific performance cause of action, which is derivative of the cause of action for breach of contract, failed for the same ***1008** reason. The court found that Barroso had not alleged a violation of the foreclosure statutes or any other basis for setting aside the sale or canceling the deed. The court concluded that leave to amend should be denied because it was not probable from the nature of the complaint, and the previous unsuccessful attempt to plead, that plaintiff could state a cause of action. The court denied leave to amend on that basis.

Barroso filed her notice of appeal from this order on November 19, 2010. We issued an order to show cause why the appeal should not be dismissed as being taken from the order sustaining the demurrer, which is a nonappealable order. After Barroso responded, we gave her 30 days to file and serve a judgment of dismissal. ****96** In February 2011, the trial court modified a judgment of dismissal submitted pursuant to the stipulation of the parties to entitle it "Order of Dismissal" and signed it. We granted an application to file an amicus brief by the National Housing Law Project, Housing and Economic Rights Advocates, Law Foundation of Silicon Valley, California Reinvestment Coalition, and Eric Mercer. We took the matter off calendar, granted judicial notice of documents presented by defendants to the trial court in opposition to the demurrer, and granted the parties leave to file supplemental briefs regarding amendment to add a cause of action for breach of the covenant of good faith and fair dealing. Supplemental briefs were filed by Barroso and Ocwen.

DISCUSSION

We apply the de novo standard to review an order sustaining a demurrer. (*Sprinkles v. Associated Indemnity Corp.* (2010) 188 Cal.App.4th 69, 75, 114 Cal.Rptr.3d 887.) Since the trial court sustained the demurrer without leave to amend, we must determine "whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, [we] will conclude that the trial court abused its discretion by denying the plaintiff leave to amend." (*Id.* at p. 76, 114 Cal.Rptr.3d 887.) It is plaintiff's burden to establish that the complaint could be amended to cure any pleading defect. (*Ibid.*)

[1] Barroso attached the three relevant loan modification documents (the Trial Period Plan, the Modification Agreement, and the Revised Modification Agreement) to her complaint and incorporated them by reference. " 'Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach.' [Citation.] Moreover, '[t]he rule on demurrer is simply a variation on the well-recognized theme that "[i]t is ... solely a judicial function to interpret a ***1009** written instrument unless the interpretation turns upon the credibility of extrinsic evidence." [Citations.]' [Citation.]" (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1091, 86 Cal.Rptr.3d 136.) " 'The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.] "The words of a contract are to be understood in their ordinary and popular sense." [Citations.]' [Citation.]" (*Avalon Pacific—Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1198, 122 Cal.Rptr.3d 417.)

On enforceability of the Modification Agreements,

Barroso's position is that she formed a binding contract with Ocwen to modify the terms of her mortgage and that Ocwen waived any right to claim conditions precedent had not been satisfied by accepting modified mortgage payments for nine months. She also argues that leave to amend should have been granted to allow her to plead causes of action for promissory estoppel, wrongful foreclosure, and breach of the covenant of good faith and fair dealing. Defendants argue that no agreement to modify the terms of the mortgage was reached because express conditions precedent were not satisfied. These include Barroso's untimely execution of one of the agreements and failure ****97** to have her signature notarized, as well as Ocwen's failure to return a signed copy to Barroso. Defendants contend that the express terms of the modification agreements allowed for acceptance of payments without waiver of any right to foreclose or other remedies. They assert that there was no breach of contract and that Barroso cannot amend her complaint to state causes of action for promissory estoppel, wrongful foreclosure, or breach of the covenant of good faith and fair dealing. We begin with the breach of contract cause of action.

I

[2] [3] The breach of contract cause of action turns on whether Barroso failed to allege performance of a condition precedent to formation of a valid agreement to modify the terms of her loan. "In contract law, a 'condition precedent' is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' [Citation.]" (*Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 885, fn. 1, 64 Cal.Rptr.2d 578, 938 P.2d 372.)[3] "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract. (13 Williston on Contracts (4th ed.2000) § 38:16, at p. 441.)" ***1010** (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199, 1 Cal.Rptr.3d 569.) " 'The rule is that provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. [Citations.]' (*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53 [81 Cal.Rptr. 373, 459 P.2d 925].) [Footnote omitted.]" (*Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415, 421, 86 Cal.Rptr.3d 715.) Barroso invokes the rule that conditions precedent are not favored in the law and that we should not "construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect. [Citation.]" (*Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 550, 54 Cal.Rptr.2d 128.)

Three conditions are at issue here: 1) whether Barroso was required to have her signature notarized; 2) whether execution of an agreement depended upon Ocwen returning a copy of the agreement it had signed to Barroso; and 3) whether she met the October 30, 2009 deadline for her signature on the Revised Modification Agreement.

A. Contract Terms

1. Signature Requirements

a. Barroso's Notarized Signature

As we shall explain, we conclude that Barroso has alleged a viable cause of action for breach of the Modification Agreement, but not the Revised Modification Agreement. This is because the exhibits incorporated into the complaint establish that Barroso was required to have her signature on the Revised Modification Agreement notarized. No similar requirement for the Modification Agreement is established on this record, and Barroso alleged full compliance with the other requirements of that agreement.

[4] Ocwen does not directly address whether Barroso was required to notarize her signature on the Modification Agreement when she signed it in July 2009. Instead, it cites provisions in both the ****98** Modification Agreement and Revised Modification Agreement stating that the loan documents would not be modified until Barroso received a copy of the agreement signed by Ocwen, an issue we discuss next. Ocwen then states: "In addition to failing to sign the document before a notary as expressly required in the offer, Barroso does not allege or attach a fully executed agreement by [Ocwen] as was also expressly required by the terms to demonstrate finalization (accepting her December of 2009 attempt to retroactively create a loan modification in October 2009)." This sentence appears to refer to the Revised Modification Agreement rather than the Modification Agreement. Ocwen concludes that Barroso failed to plead facts to support satisfaction of the critical express conditions to contract formation.

***1011** Barroso executed the Trial Period Plan on July 3, 2009, but her signature was not notarized. On the form for her signature, the word "(Seal)" appears at the end of the line for her signature. Barroso also executed the

Modification Agreement on July 3, 2009, without notarization. The signature form is the same as on the Trial Period Plan form, with the word "(Seal)" typed at the end of the line for the borrower's signature:

"In witness Whereof, the Servicer and I have executed this Agreement.

[Barroso signature] (Seal)

Servicer

Borrower

7–3–09

Date

By: (Seal)

Borrower

……

Date

Date"

No other space or form for notarizing Barroso's signature is provided on the Modification Agreement. The document does not include a jurat form.

Ocwen argues that Barroso was required to sign "the document" before a notary "as expressly required in the offer." It does not distinguish between the Modification Agreement and the Revised Modification Agreement in making this argument, and provides no citation to the record which would provide clarification. We have examined the entire Modification Agreement and have found no requirement that Barroso execute the document before a notary. As we have noted, no form for a notary to fill out is provided on the signature page of the Modification Agreement. Significantly, unlike the Modification Agreement, the signature page of the Revised Modification Agreement has a detailed form for the Notary to fill out acknowledging that the borrower signed the document before him or her.

The only express requirement that Barroso's signature be notarized appears in the letter attached to the complaint as Exhibit A, and incorporated by reference, from Ocwen to Barroso dated "10/20/2009".[4] The letter congratulates Barroso on her eligibility for a HAMP modification. Barroso describes this document in her complaint as the letter she received in June 2009 notifying her of her eligibility for a loan modification. But at oral argument the parties agreed that Exhibit ****99** A was *not* the cover letter for the Modification Agreement sent to Barroso in June 2009 in light of its date. Instead it accompanied the Revised Modification Agreement sent to Barroso later.

***1012** Three steps for accepting the offer are set out in Exhibit A. Step one stated that Barroso had to sign and return both copies of the modification agreement before October 30, 2009. It also said: "If the Modification Agreement has notary provisions at the end, you must sign both copies before a notary public and return the notarized copies to us." Step two required complete and timely payments and step three required return of both copies of the modification agreement to Ocwen. Exhibit D to the complaint provided for a first payment on October 1, 2009.

[5] We are satisfied that the word "Seal" at the end of the

line for the borrower's signature on the Modification Agreement was not sufficient to establish that Barroso was required to have her signature on that document notarized as a precondition to forming a valid contract to modify the terms of her loan. Barroso's allegation that she performed as required by the Modification Agreement leads to the conclusion that she has adequately alleged compliance with the signature requirement for that agreement. Our conclusion regarding the Revised Modification Agreement is different. Both Exhibit A and the signature block of the Revised Modification Agreement required Barroso to have her signature notarized as a condition of her performance. The Revised Modification Agreement incorporated into the complaint demonstrates that she failed to do so since the form for the notary to use is blank. Barroso cannot allege satisfaction of the signature requirement for the Revised Modification Agreement.

b. Return of Copy Signed by Ocwen

[6] In its brief, Ocwen argues there was no agreement to modify Barroso's loan because she did not allege that she received a copy of any modification agreement signed by both her and Ocwen. Each modification plan offered to Barroso included language that it would not take effect unless both Barroso and Ocwen signed the agreement and a fully executed copy was returned to Barroso. While Barroso alleges that the signed documents are in Ocwen's possession, she does not allege Ocwen's signature and return to her of any of the loan modification documents. Significantly, at oral argument, counsel for Ocwen stated that Ocwen does not argue that its failure to sign and send executed copies of the modification agreements to Barroso precluded formation of the contract for modification. This concession is appropriate since the failure to return an executed copy of the agreement in the circumstances of this case could not act as a condition precedent precluding formation of a binding modification agreement.

[7] " 'A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.' (***1013** Civ.Code, § 1643; *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist.* (1968) 264 Cal.App.2d 603, 609 [70 Cal.Rptr. 640].) 'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.' (*Strong v. Theis* (1986) 187 Cal.App.3d 913, 920 [232 Cal.Rptr. 272].)" (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1111–1112, 63 Cal.Rptr.2d 261.)

The interpretation Ocwen had asserted below and in the briefing here would violate these fundamental principles of contract interpretation. Were we to adopt ****100** that interpretation, Ocwen would have sole control over the formation of the contract despite Barroso's full performance, simply by refusing to return a signed copy to her. Moreover, such an interpretation would conflict with language in the first paragraph of the Modification Agreement: "If my representations in Section 1 continue to be true in all material respects, then this Home Affordable Modification Agreement ('Agreement') will, as set forth in Section 3, amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage."

2. Time of the Essence

Each plan declared that time was of the essence. Defendants contend that no agreement to modify the loan documents was formed because Barroso failed to sign the Revised Modification Agreement by the October 30, 2009 deadline. But no issue is raised regarding the timeliness of Barroso's signature on the Trial Period Plan and the Modified Agreement in July 2009.

B. Summary

We conclude that Barroso adequately alleged the existence of a valid Modification Agreement signed by her in July 2009. The record on this demurrer does not establish a requirement that Barroso's signature on that agreement be notarized. The failure of Ocwen to send Barroso a signed copy of the agreement is not a condition precedent barring formation of the binding modification agreement. No argument is made that Barroso's signature on July 3, 2009 was untimely.

Barroso alleges that she made payments under the Modification Agreement in August, September, October, and November 2009 when due. She made additional payments, which are alleged to have been under the Revised Modification Agreement, in December 2009 and January, February, March, and April 2010. Paragraph 21 alleges that Ocwen had auctioned the property at a foreclosure sale "notwithstanding Plaintiff having made all the payments required under the Trial Period Plan, the Modification Agreement and the Revised Modification Agreement...."

***1014** Paragraph 23 of the complaint alleges that Ocwen offered three agreements (the Trial Period Plan, the

Modification Agreement, and the Revised Modification Agreement) and that Barroso accepted each. Barroso alleges that the Trial Period Plan was completely performed, and that the Modification Agreement and Revised Modification Agreement were partially performed. We construe the allegation of partial performance of the Modification Agreement in the context of Barroso's allegation that she made all the payments due under that plan up to the foreclosure sale. The Modification Agreement created a new maturity date for the loan of September 1, 2049 with monthly payments scheduled until that date. We conclude that she alleged only partial performance of the Modification Agreement since her obligation to make monthly mortgage payments extended beyond the foreclosure date.

Barroso alleges that Ocwen breached the agreements by "failing to honor the terms of the agreements, wrongly proceeding to foreclosure sale, and wrongfully selling the Property at a trustee [sale] without offering Plaintiff any 'alternatives that may be available to avoid foreclosure' as represented in the May 26, 2010 letter (Exhibit 'F') and allowing title to the Property [to] revert to the beneficiary." She sought damages based on her loss of title to the property, for fees and costs, and other incidental expenses.

[8] The trial court erred in sustaining the demurrer to the cause of action for ****101** breach of contract to the extent it is based on the Modification Agreement. But Barroso did fail to have her signature on the Revised Modification Agreement notarized, as required. In addition, both the allegations of the complaint and the Revised Modification Agreement itself establish that Barroso signed it on December 11, 2009, well beyond the October 30, 2009 deadline for accepting that offer. We therefore conclude that the demurrer was properly sustained to the extent the cause of action for breach of contract is based on the Revised Modification Agreement.

[9] [10] [11] These conclusions guide our determination as to whether Barroso should have been granted leave to amend to allege a cause of action for breach of the implied covenant of good faith and fair dealing based on Ocwen's failure to modify her loan documents. "It has long been recognized, of course, that every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. [Citation.] The Supreme Court has clarified, however, that an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 [6 Cal.Rptr.2d 467, 826 P.2d 710] (*Carma*).) [Footnote omitted.]" ***1015** (*Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55, 122 Cal.Rptr.2d 267.) "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684 [254 Cal.Rptr. 211, 765 P.2d 373].)" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031, 14 Cal.Rptr.2d 335.) Under the terms of the Modification Agreement, Ocwen was obligated to modify Barroso's loan documents. Instead, it foreclosed on the property despite Barroso's payments and sold it. On remand, Barroso is to have leave to amend to allege a cause of action for breach of the implied covenant with respect to the Modification Agreement, but not the Revised Modification Agreement.

II

Our conclusion that Barroso has alleged an enforceable Modification Agreement renders discussion of some of her alternative arguments unnecessary.

A. Waiver by Acceptance of Payments

Barroso, joined by amici, argues that Ocwen waived enforcement of the conditions precedent by accepting nine payments she made under the modifications, through March 2010. Ocwen relies on language in the Modification Agreement and Revised Modification Agreement providing that unless modified, the terms of the original loan documents remain in full force and effect. The original deed of trust states that the lender may accept any payment or partial payment without waiver of any rights. Similar language appears in the original deed of trust. In light of our conclusion that Barroso has alleged an enforceable Modification Agreement, we need not reach this argument.

B. Statute of Frauds

[12] Barroso makes the alternative argument that the statute of frauds does not apply because she fully performed under the agreements. Ocwen does not appear to rely on the statute of frauds on appeal and it was not raised as an affirmative defense in the demurrer, as required. (*Ladd v. Warner Bros. Entertainment,* ****102** *Inc.* (2010) 184 Cal.App.4th 1298, 1309, fn. 8, 110

Cal.Rptr.3d 74.) We therefore need not discuss that issue.

III

Barroso also argues she should have been given leave to amend to allege causes of action for promissory estoppel and wrongful foreclosure.

1016** ***A. Promissory Estoppel

[13] [14] [15] " ' "Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation.]" [Citation.] Because promissory estoppel is an equitable doctrine to allow enforcement of a promise that would otherwise be unenforceable, courts are given wide discretion in its application. [Citations.]' (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901–902 [28 Cal.Rptr.3d 894].) 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.]' (*Id.* at p. 901 [28 Cal.Rptr.3d 894].)" (*Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, 513, 134 Cal.Rptr.3d 868; see also *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225, 120 Cal.Rptr.3d 507.)

Since the doctrine of promissory estoppel is applied where there is no enforceable promise, it does not apply here in light of our conclusion that Ocwen's promise to modify the loan documents under the Modification Agreement was enforceable. It follows that no amendment to add such a cause of action is necessary.

B. Wrongful Foreclosure

[16] [17] In her reply brief, Barroso concedes that she did not allege a cause of action for statutory wrongful foreclosure. Instead, she correctly contends that California recognizes a cause of action for wrongful foreclosure under equitable principles.[5] (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526, 134 Cal.Rptr.3d 604.) "A full tender must be *made* to set aside a foreclosure sale, based on equitable principles. [Citations.]" (*Ibid.*) The court in *Stebley* explained: "Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt." (*Ibid.*)

Barroso does not allege tender, nor does she suggest she could amend the complaint to cure this defect. Instead, she contends: "Respondents' contention that tender is required for Barroso to properly plead wrongful foreclosure is also without merit. In her complaint, Barroso pled that pursuant to the ***1017** Permanent Modification [Revised Modification Agreement], all arrearages were capitalized and the default was cured. (CT 10–11). 'If, after a default, the trustor and beneficiary enter into an agreement to cure the default and reinstate the loan, no contractual basis remains for exercising the power of sale.' *Bank of America v. La Jolla Group II* (2009) [(2005)] 129 Cal.App.4th 706, 712 [28 Cal.Rptr.3d 825]. Here the facts pled establish that the trustee's sale of the ****103** House is invalid, effectively obviating the need to allege tender."

Paragraph 3 of the Modification Agreement states that all unpaid late charges that remain unpaid will be waived. Paragraph 3.B. of the Modification Agreement states that the modified principal balance of Barroso's loan will include all amounts and arrearages that will be past due.[6]

In *Bank of America v. La Jolla Group II, supra,* 129 Cal.App.4th 706, 28 Cal.Rptr.3d 825, a homeowner's loan went into default because payments were missed. A notice of default and election to sell under the deed of trust and a notice of trustee's sale were recorded and the sale was scheduled for November 12, 2002. Four days before that date, someone acting on behalf of the homeowners went to a branch of the beneficiary bank and tendered a payment on the loan. A branch employee accepted the payment and reinstated the loan. But the trustee was not notified that the loan had been reinstated and the foreclosure sale went forward. (*Id.* at p. 709, 28 Cal.Rptr.3d 825.) The beneficiary bank sued the party who successfully bid on the property at the nonjudicial foreclosure sale, seeking cancellation of the trustee's deed upon sale. Various cross actions were filed. The trial court found the sale and deed upon sale void and restored record title to the condition immediately prior to recordation of the deed upon sale. The Court of Appeal concluded that it was undisputed that the homeowners and the beneficiary bank had entered into an agreement to cure the default. It followed that the beneficiary bank had no right to sell after that agreement and the foreclosure sale was invalid. (*Id.* at p. 712, 28 Cal.Rptr.3d 825.)

[18] Barroso and Ocwen reached an enforceable agreement to modify the terms of her loan, and to bring the loan current, in July 2009. Barroso alleges that she made all payments subsequent to that date when due.

Based on these allegations, she has alleged a basis for wrongful foreclosure under the principles applied in *Bank of America v. La Jolla Group II, supra,* 129 Cal.App.4th at p. 712, 28 Cal.Rptr.3d 825. It was not necessary for Barroso to tender any amount to Ocwen to forestall the foreclosure sale because there was no default under the terms of the Modification Agreement.

***1018 IV**

Barroso asks us to reverse the trial court's ruling because it allows respondents to violate the policies supporting the HAMP program and leads to a harsh and unjust result. She cites language in the HAMP Supplemental Directive 09–01, dated April 6, 2009, and titled "Introduction of the Home Affordable Modification Program". That language provides that the program was aimed at helping 3 to 4 million at-risk homeowners, those in default and those at risk of default, by reducing monthly payments to sustainable levels. She has attached excerpts of this document as exhibit 1 to her opening brief. Her public policy argument is based, in part, on the assertion that she had "in good faith complied in every way with the required terms and thus fully performed under the Contracts." Our conclusion that Barroso has viable causes of action under the Modification Agreement makes it unnecessary to rely on this general policy argument.

****104 DISPOSITION**

The order of dismissal based upon the sustaining of Ocwen's demurrer without leave to amend is reversed to the extent it is based on allegations regarding the Modification Agreement. Barroso is to be given leave to amend on remand consistent with the views expressed in this opinion. Barroso is to have her costs on appeal.

We concur: MANELLA and SUZUKAWA, JJ.

Parallel Citations

208 Cal.App.4th 1001, 12 Cal. Daily Op. Serv. 9562, 2012 Daily Journal D.A.R. 11,631

Doryon v. Salant (1977) 75 Cal.App.3d 706, 142 Cal.Rptr. 378

Purchasers brought action against vendors seeking specific performance of contract for the sale of real property. The Los Angeles Superior Court, Ernest J. Zack, J., entered judgment for vendors, and purchasers appealed. The Court of Appeal, Kaus, P. J., held that: (1) where offer and accepted counteroffer comprising the contract for the sale of real property provided that purchase price, payable by the close of escrow, was $68,500, that sale was, as to vendors, a cash sale, and that purchasers, within 21 days after opening of escrow, were to use due diligence to obtain proposed financing so that $68,500 in cash would be available at close of escrow, when purchasers signed, within 21-day period, supplemental instructions to the effect that they were satisfied with loan commitment they had obtained, vendors were contractually assured of obtaining full purchase price in cash, and such contract for sale of real property did not lack essential terms relative to manner of payment of contract price, and (2) where purchase offer provided that purchasers would deposit $2,000 "at opening of escrow," and that purchasers and vendors agreed to sign all necessary instructions "within five days of the date hereof," agreement itself did not spell out who was to open the escrow, but vendors' agent undertook to open escrow and there would have been no difficulty in doing so within five days if vendors had been willing to use escrow specified in agreement, if one-day delay in opening escrow was a breach, it was caused by vendors, and could not be attributed to purchasers.

Reversed.

Attorneys and Law Firms

***708 **378** Harold Rostow, Los Angeles, for plaintiffs and appellants.

****379** Sydney Halem, Los Angeles, for defendant and respondent Marvin Salant.

Milton R. Gunter, Beverly Hills, for defendant and respondent Cecile Salant.

Opinion

KAUS, Presiding Justice.

Plaintiffs Dan and Vicky Doryon brought an action for specific performance against Marvin and Cecile Salant. After a court trial, judgment was entered in favor of defendants.[1]

FACTS

This dispute involves residential property located at 6211 West Fifth Street in Los Angeles. Defendants retained Ginza Realty to sell the house. On August 20, 1974, plaintiffs signed a form "Offer to Purchase & Deposit Receipt" which provided:

***709** Plaintiffs agreed to buy the property for $65,000. They paid Ginza Realty a deposit of $1,000 and agreed to deposit an additional $2,000 "at opening of escrow . . . within 5 days from date hereof," and an additional $10,000 before the close of escrow a total down payment of $13,000. The offer was "subject to buyer obtaining a 1st trust deed and note for $52,000 payable at $490.97 per month . . . for a period of 25 years at 101/2 percent interest or less." The parties agreed "to enter into a 60 day escrow and to sign all necessary escrow instructions within 5 days from the date hereof." The offer also provided: "Time is of the essence of this contract but time for any act required to be done may be extended not longer than thirty days by the undersigned broker."

On August 27, defendants made a counteroffer which raised the purchase price to $68,500, and provided that the buyers would have "21 working days from opening of escrow to obtain a 1st trust deed and note, . . ." The preprinted counteroffer also provided: "OTHER TERMS: All other terms to remain the same."

Plaintiffs signed and accepted the counteroffer on August 28, 1974.

The deposit receipt also provided in the preprinted portion that Crestview Escrow would handle the escrow. However, on August 29 or 30 when the Ginza agent went to defendants' house to tell them that the counteroffer had been accepted, defendant Marvin Salant said that he did not want Crestview to handle the escrow, but that he wanted a bank of his choice, which bank he had not decided upon. On September 3, the agent opened an escrow at a branch of the Security Pacific bank nearest defendants' house. The Security Bank typed up escrow instructions. The agent brought the instructions to plaintiffs who promptly signed them. These instructions included the provision that $1,000 would be deposited in escrow by Ginza Realty and $2,000 would be deposited "upon signing of these instructions."

On September 4, 1974, plaintiffs gave the Ginza agent a check for $2,000 payable to Ginza. However, it was not

until September 17 that Ginza deposited even $1,000 in escrow. No other amounts were deposited in escrow. Ginza apparently deposited plaintiffs' $2,000 check in its trust account. The sellers never signed the escrow instructions. On September 17, 1974, plaintiffs obtained a commitment from a savings and loan institution for a $51,000 loan.

On September 19, plaintiffs signed supplemental escrow instructions which recited the terms of the loan commitment and added: "This ***710** complies with all requirements of this escrow for Buyer to obtain a new loan and the contingency regarding same as set out (in the) original escrow instructions dated September 3, 1974 is hereby deleted."

Between September 17 and October 1, the Ginza salesman repeatedly called defendants to ask them to sign the escrow instructions. Defendants stalled. First they wanted to know the exact cost of the termite report. Then there was a further delay because their attorney allegedly had "the papers" and was out of town for several days. Defendants never stated that they ****380** would not sign the escrow instructions, but on October 1, their attorney wrote Ginza that they would refuse to do so, because the fair market price of the property was $71,500 and Ginza had negligently undervalued it.

At trial, defendant Marvin Salant was asked the reason that he did not sign the escrow instructions. His response was: "We thought the price was too low."

At the end of plaintiffs' case, defendants moved for judgment under section 631.8 of the Code of Civil Procedure. The sole basis for their motion was that, since Ginza was not a licensed escrow agent, plaintiffs had breached the contract by paying the $2,000 deposit to Ginza, rather than into the escrow. Although the court thought that "if morality were involved here, or good faith or things of that sort, I might be tempted to consider the urgings of the plaintiffs, who I feel are in good faith and desired very much to have this property, and maybe deserve to get it," it felt compelled to grant the motion, though not on the ground urged by defendants. The court's reason as stated from the bench and elaborated in a later written memorandum, was that the plaintiffs' offer and the defendants' counteroffer, though accepted by plaintiffs, did not constitute a contract. The court fastened onto the fact that the counteroffer had raised the purchase price from $65,000 to $68,500 leaving, in the court's view, a gap of $3,500, with no provision on how it would be paid or financed. "It cannot be presumed, in the absence of evidence, that the sellers wanted the added $3,500 to be paid them in cash. It might not, for example, have been in their interest tax-wise to do so. The terms of sale were vital to the sellers as well as to the purchasers, and the form of such payment to them is not spelled out in the documents, . . ."

Defendants then submitted proposed findings of fact which included a finding that plaintiffs were "neither ready, willing or able purchasers of the real property." Plaintiffs filed written objections to the proposed ***711** findings, pointing out specifically that this finding was not supported by the evidence. No such finding appears in the findings which the court eventually did sign. Those are to the effect that (1) the contract between the parties "lacks essential terms relative to manner of payment of the contract price and does not constitute an enforceable contract in that it cannot be determined from the contract, or from any other evidence, how much of the price was to be in cash, and how much from the first trust deed," and (2) that plaintiffs had breached the contract because the escrow was opened one day late September 3 instead of September 2 and no cash was deposited in escrow until September 17.

DISCUSSION

The court's findings are not supported by the evidence and are contrary to law.

Enforceable Contract

The trial court erred in finding that the purported contract lacked "essential terms relative to the manner of payment of the contract price, . . ."

[1] In a real property transaction, the "material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified. (Citations.)" (King v. Stanley (1948)32 Cal.2d 584, 589, 197 P.2d 321, 324.)

[2] Those factors were satisfied here. The purchase price, payable by the close of escrow, was $68,500. The sale, was as to the sellers, a cash sale. The provision in plaintiffs' offer that made the sale subject to their being able to obtain a $52,000 loan, was solely for plaintiffs' benefit; if unable to obtain the loan, their performance was excused.[2] Defendants' sole right was that ****381** within the 21-day period from ***712** opening an escrow, the buyers use due diligence to obtain the proposed financing, (Abrams v. Motter (1970) 3 Cal.App.3d 828, 837-838, 83 Cal.Rptr. 855) so that $68,500 in cash would be available at the close of escrow. Defendants would

have had no complaint if plaintiffs had elected to forego financing altogether and to pay the purchase price with their own cash.

In short, when plaintiffs signed the supplemental escrow instructions on September 19 well within the 21-day period to the effect that they were satisfied with the $51,000 loan commitment they had obtained, they waived any condition precedent to their performance and defendants were contractually assured of obtaining the full purchase price in cash. That was the full extent of their rights in the matter.

"(A) contracting party may waive provisions placed in a contract solely for his benefit. (Citations.)" (Spellman v. Dixon (1967) 256 Cal.App.2d 1, 4, 63 Cal.Rptr. 668, 671; see also Wesley N. Taylor Co. v. Russell (1961) 194 Cal.App.2d 816, 828, 15 Cal.Rptr. 357, and cases collected; Pease v. Brown (1960) 186 Cal.App.2d 425, 429, 8 Cal.Rptr. 917; Groobman v. Kirk (1958) 159 Cal.App.2d 117, 126, 323 P.2d 867; Johnson v. Lehtonen (1957) 151 Cal.App.2d 579, 581, 312 P.2d 35, and cases discussed.)[3]

***713** Wesley N. Taylor Co. v. Russell, supra, 194 Cal.App.2d 816, 15 Cal.Rptr. 357, is very similar to this case. There, the defendant seller entered into an agreement with the prospective buyers, which agreement was contingent on the buyers being able to obtain a 15-year, 6-percent $50,000 mortgage. The buyers were able to obtain only a 12-year mortgage; this was, however, agreeable to them. (194 Cal.App.2d at pp. 825-826, 15 Cal.Rptr. 357.) Still, the seller refused to perform. In holding that the real estate brokers retained by the defendant seller were entitled to their commission, the court ruled: "It is generally held that a provision of the type here involved, one which by its terms is contingent upon the ability of the buyer to obtain a loan, is ****382** inserted for the buyer's benefit 'so that he would not be liable for breach of contract unless he could borrow the money with which to pay for the land. He was at liberty to waive the benefit of this clause and to assume an unconditional obligation to fulfill the contract. This he did by filing his bill, so that there is now complete mutuality between the parties.' " (Id., at p. 828, 15 Cal.Rptr. at p. 365.)

The court then listed a series of cases which held that "such a provision is for the sole benefit of the vendee; that the vendor's interest is in securing the purchase price; that the paramount obligation of the respective parties is the payment of the cash and the delivery of title to the property, and that the method of financing is incidental and not of the essence of the contract to convey." (Id., at pp. 828-829, 15 Cal.Rptr. at p. 365.)[4]

Breach by Plaintiffs

[3] The trial court found that because the escrow was opened one day late and the contract "makes time of the essence," plaintiffs' failure to deposit $2,000 into escrow within five days of the date of the agreement "constituted a failure to perform two conditions of the contract by Plaintiffs or was a breach thereof."

***714** We leave aside the issue whether a day's delay in opening an escrow, even in a contract in which time is of the essence, would justify the seller's total failure to perform. The fact is that the court saddled plaintiffs with defendants' own breach.

Although the purchase offer provides that the purchaser will deposit $2,000 "at opening of escrow," and that the purchaser and seller agreed to sign all necessary instructions "within 5 days of the date hereof," the agreement itself does not spell out who was to "open the escrow." The evidence, however, makes clear that the agent retained by defendant sellers undertook to open the escrow and that had defendants been willing to use the escrow specified in the agreement, there would have been no difficulty in doing so within five days; rather, according to the agent, "it would have been a 10-minute telephone call." Further, the evidence shows that plaintiffs had no objection to using Crestview Escrow or any other escrow but that the delay in opening the escrow was caused solely by defendant's insistence that he wanted the escrow to be handled by "a bank of his choice, . . ." Moreover, the provision that time was of the essence was qualified: "(A)ny act required to be done may be extended not longer than thirty days by the undersigned broker" the very agent who undertook to handle the escrow.

Thus, if the one-day delay was a breach, it was caused by defendants. More reasonably, it was no breach at all.

Similarly, there is also no evidence whatsoever that plaintiffs were delinquent with respect to depositing $2,000 into escrow. It is not disputed that on September 4, they gave the Ginza agent a $2,000 check, payable to Ginza, which he deposited in a Ginza trust account, intending to deposit the amount in the escrow. Ginza was defendants' agent and had undertaken to handle the escrow. There is no legal basis for visiting Ginza's sins on plaintiffs.

Disposition

The trial court's findings do not support the judgment

and there must be a retrial. For the benefit of the parties we address an issue only obliquely mentioned in the briefs.

****383** [4] The basic rule is, of course, that in an action for specific performance the plaintiff must allege and prove that he was ready, willing, and able to perform. (Am-Cal Investment Co. v. Sharlyn Estates, Inc. (1967) 255 Cal.App.2d 526, 539, 63 Cal.Rptr. 518; ***715** Pike v. Von Fleckenstein (1962) 203 Cal.App.2d 134, 136-137, 21 Cal.Rptr. 390.) Plaintiffs' first amended complaint on which the case was tried contains no such allegation.[5]

Nevertheless, abundant evidence on these issues was received. (Estate of Pieper (1964) 224 Cal.App.2d 670, 680, 37 Cal.Rptr. 46.) There could, of course, be no question concerning plaintiffs' readiness and willingness the problem, if any, was their ability to pay the cash differential between the loan commitment and the purchase price. On that issue there was evidence that plaintiffs had about.$19,000 in cash or in bank accounts, an equity of between $11,000 and $16,000 in their home, a life insurance policy with a cash surrender value of about $3,000 and that they were the owners of a going business which they valued at $50,000. They estimated their total net worth at $98,700.

These figures did not necessarily have to be believed by the trial court.[6] We cannot, however, save the judgment by inferring a finding that was never made; not only would such a finding be at odds with the trial court's remarks concerning plaintiffs' "good faith" but more specifically that was the precise finding which defendants submitted to the trial court and which, after objection by plaintiffs, the trial court did not make.[7]

The judgment is reversed.

STEPHENS and HASTINGS, JJ., concur.

Parallel Citations

75 Cal.App.3d 706

Robertson v. Dodson (1942) 54 Cal. App. 2d 661, 129 P.2d 726

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by R. R. Robertson against L. Polk Dodson, Jr., to recover the sum of $500 paid as a deposit under a written contract to purchase real property owned by defendant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Attorneys and Law Firms

****727 *662** Lorenz Costello, of Palo Alto, for appellant.

Theodore M. Monell, of San Francisco, for respondent.

Opinion

WAGLER, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff in an action to recover the sum of $500, paid as a deposit under a written contract to purchase certain real property owned by defendant.

The contract in question was executed on October 5, 1936; it acknowledged the receipt of the sum of $500 on account of an agreed purchase price of $8,000. Other provisions of the purchase agreement pertinent to this appeal read as follows:

"The balance of the purchase price is to be paid within ten (10) days from date hereof, as follows, to–wit: On completion of financing and recording of deed Fifteen Hundred ($1500.00) Dollars in cash, and, subject to obtaining a first encumbrance from the Palo Alto Mutual Building and Loan Association, the sum of Six Thousand ($6000.00) Dollars, payable to twelve (12) years from date of recordation, to–wit: October 15, 1948; said note to be written calling for monthly payments of Fifty–eight and 60/100 ($58.60) Dollars, including interest at the rate of six (6%) per cent per annum. * * *

"And It Is Hereby Agreed: First—That in the event ***663** said purchaser shall fail to pay the balance of said purchase price or complete said purchase, as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages."

A note and deed of trust in the form customarily used by the Palo Alto Building and Loan Association, bearing date of October 10, 1936, were subsequently delivered to the plaintiff. These documents the plaintiff refused to sign on the ground that certain of the provisions were not in accordance with the terms of the purchase contract. Plaintiff so notified the defendant on October 14, 1936. Three days later plaintiff, through his attorney, notified defendant that if loan papers, in accordance with the terms of the purchase agreement, were not presented by October 23, 1936, the contract would be considered breached. The defendant refused to submit any other note and deed of trust; he also refused to refund plaintiff's deposit. It is defendant's contention that the note and deed of trust presented complied with the conditions of the purchase agreement in all respects.

The trial court found that the terms of said note and deed of trust contained provisions not covered by the terms of the agreement of the plaintiff and defendant, in that said note and deed of trust securing same contained provisions for accelerating the maturity of said note, in the event of any default therein and for compounding of interest in such event, contrary to the provisions of said agreement, and that it was the understanding of the parties that the defendant should secure the loan in question; that defendant was unable to secure such loan in accordance with the terms of the contract between plaintiff and defendant, and that plaintiff's refusal to execute the note and deed of trust was justified.

[1] Defendant concedes that the note contained the provisions for acceleration of maturity and for compounding of interest. With reference to whose duty it was to procure the loan, the evidence was conflicting. On this appeal we must assume, therefore, that this was the duty of the defendant.

In support of his position that the note and deed of trust complied with the conditions of plaintiff's offer, defendant contends that, even though the purchase agreement was silent as to the rights of the parties in the event of plaintiff's default, the provisions of the note and deed of trust to which plaintiff objected were by implication as much a part thereof as if fully expressed therein.

***664** **[2]** With reference to the acceleration clause, we believe there is merit to defendant's ****728** contention. "Everyone is presumed to know the law. And all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal.Jur. 310, § 186; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Long v. Newman, 10 Cal.App. 430, 102 P. 534.

[3] It was agreed in this case that a loan was to be obtained from a specified building and loan association. The contracting parties were, therefore, presumed to know all existing laws governing transactions between such associations and their borrowers. Long v. Newman, supra.

Section 9.13 of the Building and Loan Association Act, Deering's Gen.Laws 1937, Act 986, § 9.13, added by Stats. 1933, p. 1114, reads as follows: "Whenever a borrower shall be in arrears in the payment * * * of his interest or loan installments, or shall be in default under the terms of any pledge, deed of trust or mortgage securing his loan, the whole loan shall become due at the option of the association."

[4] [5] This section is not only for the benefit and protection of the "association," but for the investing public as well. The acceleration clause to which plaintiff objected was both authorized and required by the statute. The inclusion of this clause alone, would not justify plaintiff's refusal to execute the documents.

[6] [7] Defendant seeks to justify the provisions dealing with the compounding of interest, on the grounds of usage and custom. This contention cannot be sustained. The record is void of any evidence of such usage or custom, or that the parties contracted with reference thereto. A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well–known in the community as to give rise to the presumption of such knowledge. 25 Cal.Jur. p. 419; Latta v. Da Roza, 100 Cal.App. 606, 280 P. 711, 281 P. 655; Hanley v. Marsh & McLennan, etc., Ltd., 46 Cal.App.2d 787, 117 P.2d 69.

[8] [9] [10] The evidence shows that defendant was employed by a bank. The custom of building and loan associations, if any, to require provision in their contracts compounding interest, may, or may not have been known to him. However, the ***665** plaintiff, according to the evidence, was entirely unfamiliar with real estate transactions and the financing thereof. A custom or usage which is confined to a particular trade or business, is binding upon those not engaged in the calling only in case they have either express or implied knowledge of its existence. Latta v. Da Roza, supra. Moreover, the compounding of interest has never been looked upon with favor in this state. Doe v. Vallejo, 29 Cal. 385; Yndart v. Den, 116 Cal. 533, 48 P. 618, 58 Am.St.Rep. 200; Schneider v. Turner, 10 Cal.2d 771, 76 P.2d 668.

It should also be noted that the Legislature has expressly provided that "in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest *unless an agreement to that effect is clearly expressed in writing* and signed by the party to be charged therewith." (Emphasis ours.) Deering's Gen.Laws 1937, Act 3757, § 2.

[11] How the defendant expects the court to imply an agreement to pay compound interest in view of this statute, he does not explain. Custom and usage may be used as an instrument of interpretation, but may not be used to create a contract. Rottman v. Hevener, 54 Cal.App. 485, 202 P. 334; Great Lakes Coal & Dock Co. v. Seither Transit Co., 8 Cir., 220 F. 28, 136 C.C.A. 110; Thompson v. Riggs, 5 Wall. 663, 72 U.S. 663, 18 L.Ed. 704. This rule is expressed by section 1870 of the Code of Civil Procedure as follows: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation."

[12] There is no merit to defendant's suggestion that plaintiff may have waived the discrepancies between the note and deed of trust and the purchase agreement. The record shows that the plaintiff acted with despatch in connection with all phases of the controversy, and that his refusal to accept the note and deed of trust in the form submitted was justified.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concurred.

Parallel Citations

129 P.2d 726

Coughlin v. Blair (1953) 41 Cal.2d 587, 262 P.2d 305

Action by purchasers for breach of realty purchase contract providing that utilities and pavement were to be brought to realty within 1 year without cost to purchasers. The Superior Court, Los Angeles County, J. T. B. Warne, Judge Assigned, entered judgment for purchasers, and defendants appealed. The Supreme Court, Traynor, J., held that where realty was reached by dirt road about 3,725 feet from public streets and utilities were an equal distance away, vendor and her agent agreed to install pavement and utilities to realty without cost to purchasers but vendor and her agent had not performed one year after expiration of time for performance, although repeatedly requested to do so, purchasers were entitled to damages for loss of use of realty and for increased building costs between date of performance and date of filing of complaint, but would not be entitled to damages for loss of use and increase in building costs between time of filing of complaint and date of trial.

Judgment affirmed in part and reversed in part and cause remanded.

Prior opinion, 252 P.2d 1009.

Attorneys and Law Firms

****307 *592** Charles Reagh, San Francisco, for appellants.

Krystal & Paradise and Robert E. Paradise, Los Angeles, for respondents

Opinion

****308** TRAYNOR, Justice.

Louise Blair, wife of defendant John Blair, owned a tract of land on the hills overlooking Hollywood. Part of the tract had been subdivided. Lot 7, the parcel involved in the present litigation, is in an unsubdivided part of the tract. It is at the apex of a triangular hill and has an exceptional view and privacy. In May, 1948, when the contract involved in this action was executed, lot 7 was graded and had access to the public streets by means of a dirt road to Nichols Canyon Road, about 3,725 feet away. Gas and electricity had not been installed nearer than the intersection of Nichols Canyon Road and the dirt road leading to lot 7.

Plaintiffs Clarence Coughlin and Cathleen Coughlin, husband ***593** and wife, viewed the lot several times with defendant John Blair. They informed him that they wished to purchase the lot and to build a residence thereon within the following year. They told him that, 'We were ready to sign for the property at his price provided he would agree that paving would be installed, electricity and gas would be installed, all within one year from the date of the agreement; that he would have the lot surveyed and staked, all of which was to be at his cost and at no cost to us.' John Blair was willing to sell the property on those terms. Accordingly, on May 30, 1948, the parties executed on a deposit receipt form the contract set forth in the footnote.[1] Plaintiff Clarence Coughlin testified that he first became aware of Mrs. Blair's name after he had looked at the deposit receipt. An escrow was opened in the name of Louise Blair. Plaintiffs paid the full purchase price of $14,000 and received a deed from Louise Blair. The deed granted plaintiffs lot 7, with a 'nonexclusive Easement for Ingress and Egress and for driveway purposes' to Nichols Canyon Road.

On May 30, 1949, the date that performance was due under the contract, the paving had not been done and neither gas nor electricity had been brought to the lot. During the following year plaintiffs wrote four letters to defendant John Blair demanding performance. Defendants did not repudiate the contract; nor did they perform their obligations thereunder. ***594** They did put temporary paving on part of the road to lot 7 in the fall or winter of 1949. Plaintiffs' last letter, on April 1, 1950, stated that they would institute an action, if the contract was not performed within thirty days. On May 24, 1950, plaintiffs brought this action. They did not seek rescission or specific performance. Instead, they sought damages for the difference in value of the property with and without the performance promised in the contract, and special damages for the loss of the use of the property and for the increase in building costs since the date performance was due.

At some time in 1950 permanent paving was installed on the road to lot 7 for a distance of 1200 feet commencing from the Nichols Canyon Road. In May of 1950 a gas line was installed over the same 1200 ****309** feet. It cannot be ascertained from the record whether or not these installations preceded the filing of the complaint; in any event, at that time about half only of the remaining 2525 feet of the road had even temporary paving and gas and electricity had not been brought to the lot. At the time of the trial, April 20, 1951, the road was in the same condition. No further work on the gas line was done until the week before trial, when workmen began laying a line in the direction of lot 7. Electricity was installed to a

point adjoining lot 7 in August, 1950. There is nothing to show that plaintiffs requested or accepted performance after the complaint was filed.

Louise Blair was named as a defendant in the complaint, but died a few days before trial. Before her death she had conveyed to defendant Marion Conger real property of which lot 7 was a part, and Mrs. Conger agreed to assume Louise Blair's obligations to plaintiffs arising from the agreement of sale. The parties stipulated that the case should proceed with Marion Conger substituted as successor to Louise Blair. The trial court concluded that both defendants, John Blair and Marion Conger, were personally liable for the breach of the contract. Plaintiffs recovered judgment for $9,500 general damages, the difference between the market value of the property on May 30, 1949, and the market value it would have had at that time had the contract been performed, $2,300.37 special damages for the loss of use of the lot, measured by loss of use of the $14,000 paid by plaintiffs and computed at 7 per cent from May 30, 1949, to the date of trial, and $3,700 special damages for the increase of construction costs between June, 1949, and the date of trial.

Defendants appeal, contending: (1) John Blair is not personally ***595** liable for nonperformance of the contract; (2) if the judgment against John Blair is affirmed, the judgment against Marion Conger must be reversed; (3) the award of damages is not sustained by the evidence and allows plaintiffs a double recovery; and (4) several material findings of the trial court are not supported by the evidence.

1. Liability of John Blair

[1] [2] Defendant John Blair contends that he signed the contract as an agent only and is not personally liable thereunder. He relies on the rule that an agent who acts for a disclosed principal and is dealt with by the third party as an agent does not ordinarily incur personal liability. See, 2 Cal.Jur.2d, Agency, s 132, and cases cited. That rule is inapplicable here. If the fact of agency appears in an integrated contract, and there is no unambiguous expression of an intention either to make or not to make the agent a party thereto, extrinsic evidence is admissible to show the intention of the parties. Restatement, Agency, s 323(2); Carlesimo v. Schwebel, 87 Cal.App.2d 482, 488, 197 P.2d 167; Otis Elevator Co. v. Berry, 28 Cal.App.2d 430, 433, 82 P.2d 704; cf. Patterson v. John P. Mills, etc., Inc., 203 Cal. 419, 421, 264 P. 759. In the present case the word 'agent' appears before John Blair's signature to the contract and there is a blank following the word 'owner.' The reference to Louise Blair as the person who would receive the down payment as liquidated damages suggests that she is the principal. The words 'gas & Pavement & Elec. to be put at no cost to buyer within 1 yr from above date also to be surveyed by Jno H. Blair at once' indicate that the parties intended that John Blair should be personally liable for the surveying and also for installing the improvements. Thus, the contract gave plaintiffs notice that John Blair was an agent and indirectly disclosed the identity of the principal, but it also contains language indicating that he was to be liable as a party to the contract. Since it cannot be definitely ascertained from the instrument whether John Blair signed solely as an agent or personally assumed the obligation to perform the contract, extrinsic evidence was admissible to determine the intention of the parties. Carlesimo v. Schwebel, supra, 87 Cal.App.2d 482, 487-489, 197 P.2d 167.

[3] Plaintiffs conducted all negotiations with John Blair at the tract office, marked ****310** with a sigh 'Blair Hills Estates.' John Blair stated that 'he would pave' the road to lot 7 ***596** and, in response to Mr. Coughlin's question regarding the time the utilities and pavement would be installed, stated 'probably by September everything would be in shape because he had invested $185,000 in bulldozing and he wanted to get started getting his money out of the tract so he was not going to lose any time in proceeding with the improvements in the tract.' In the light of this evidence the trial court properly denied defendant John Blair's motion for a nonsuit. Evidence later adduced[2] also supports the trial court's determination that it was the intention of the parties that John Blair be personally liable for performance of the contract. Eugene Blair, who was the brother of John Blair and who acted as the latters' agent and received a commission on the sale of the lot, testified, 'At the time of my deal with Mr. Coughlin it was no argument or discussion about the paving. Mr. Blair give them an agreement that he would pave it within a year. * * * Mr. Blair promised to put the gas and electricity in at a certain time, a certain time if he could do it. * * * Mr. Blair set it down in the form that I drew up and said in one year's time he thought he would have it all in.'

2. Liability of Marion Conger

[4] Defendant Marion Conger contends that affirmance of the judgment against John Blair necessitates reversal of the judgment against her. She relies on several cases holding that a party suing on a contract may be forced to elect between a judgment against an undisclosed principal and a judgment against his agent. Klinger v. Modesto Fruit Co., Inc., 107 Cal.App. 97, 100, 290 P. 127; McDevitt v. Chas. Corriea & Bros., 70 Cal.App. 245, 254,

233 P. 381; Ewing v. Hayward, 50 Cal.App. 708, 717, 195 P. 970; Contra: Montgomery v. Dorn, 25 Cal.App. 666, 670, 145 P. 148; Jewell v. Colonial Theater Co., 12 Cal.App. 681, 685, 108 P. 527; McKee v. Cunningham, 2 Cal.App. 684, 688, 84 P. 260; see, Craig v. Buckley, 218 Cal. 78, 81, 21 P.2d 430; ***597** Restatement, Agency, s 210(1); 39 Cal.L.Rev. 409. That rule is inapplicable here. The evidence discloses that John Blair was not only a party to the contract but that he also acted as an agent, and the deposit receipt at least indirectly identified Louise Blair as his principal. Restatement, Agency, ss 144, 146, 184; see, Geary St., P. & O. R. Co. v. Rolph, 189 Cal. 59, 65-66, 207 P. 539. Even if we assume that Louise Blair was an undisclosed principal the trial court properly refused to require plaintiffs to make an election.

[5] At the outset of the trial it was stipulated that John Blair, in signing the agreement, 'acted as agent for Louise Blair, that he has full authority to act as such agent, and that his act bound her.' It was further stipulated that Marion Conger, as successor in interest to Louise Blair, deceased, 'expressly assumes and agrees to pay and discharge any and all liabilities or obligations claimed or asserted by plaintiffs against defendants in the above entitled action, if and as adjudicated in this action.' Counsel for defendants stated, 'I stipulated (that this document) bound Mrs. Blair but I do not stipulate it bound Mr. Blair. He signed as agent and he is not bound except as agent.' Counsel for plaintiffs replied, 'I accept counsel's stipulation as far as it goes. We, of course, contend Mr. Blair was bound, that he acted not only as agent for his wife but also acted individually.' Marion Conger's liability was conceded by the stipulation. She cannot now successfully contend that ****311** Louise Blair was an undisclosed principal and that by obtaining judgment against John Blair plaintiffs elected to release her from liability. Williams v. General Ins. Co., 8 Cal.2d 1, 5, 63 P.2d 289; Stanton v. Santa Ana Sugar Co., 84 Cal.App. 206, 210, 257 P. 907. Plaintiffs were entitled to rely on the stipulation and to try the case on the assumption that it remained for them only to prove that John Blair was also liable.

3. Damages

Defendants contend that the trial court allowed plaintiffs excessive damages by awarding them $9,500 general damages for the difference between the market value of the property with and without the performance due under the contract. Their first ground of attack is that plaintiffs failed to show that the injury was permanent. Defendants assert that they performed part of their obligations under the contract before the action came to trial and that they will perform the remainder of their obligations in the future. They conclude ***598** that since plaintiffs will thus have the improvements, they would be allowed a double recovery if they also recovered damages for failure to get the improvements.

[6] The distinction defendants would draw between a permanent and a temporary injury has no relevance in a case involving a total breach of contract. In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. Abbott v. 76 Land & Water Co., 161 Cal. 42, 47-48, 118 P. 425; Van Horne v. Treadwell, 164 Cal. 620, 622, 130 P. 5; see, Corbin on Contracts, s 946. A judgment for the plaintiff in such an action absolves the defendant from any duth, continuing or otherwise, to perform the contract. Noble v. Tweedy, 90 Cal.App.2d 738, 744, 203 P.2d 778. The judgment for damages is substituted for the wrongdoer's duty to perform the contract. Restatement, contracts, s 313, Comment c; South Memphis Land Co. v. McLean Hardwood Lumber Co., 6 Cir., 179 F. 417, 426.

If there was a total breach of contract, plaintiffs properly brought their action for all their damages, general and special; since any subsequent action for additional damages would be successfully opposed by the plea of res judicata, plaintiffs' injury is necessarily permanent. It would be anomalous for a court in the very judgment that substitutes a money award for defendant's performance, and divests the court of the power in the future to require performance or to award additional damages for breach, also to determine whether or not the defendant will nevertheless render the performance from which he is absolved. Defendants rely on Spaulding v. Cameron, 38 Cal.2d 265, 239 P.2d 625, where we held that in an action to abate a nuisance a plaintiff could not recover both an injunction abating the nuisance and damages on the theory that the nuisance was permanent. That case would be in point here, if plaintiffs had obtained both damages for a total breach and a decree of specific performance requiring defendants to perform, or if defendants were still obliged to perform the contract. See, Wichita Falls Electric Co. v. Huey, Tex.Civ.App., 246 S.W. 692, 694-695.

[7] [8] [9] [10] If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. See, Rischard v. Miller, 182 Cal. 351, 353, 188 P. 50; Restatement, Contracts, s 313. Furthermore, even if a breach is total, the injured party may treat it as partial, ***599** unless the wrongdoer has repudiated the contract. Fresno Canal & Irrigation Co. v. Perrin, 170 Cal. 411, 415, 149 P. 805; Restatement, Contracts, s 317(2). The circumstances of

each case determine whether an injured party may treat a breach of contract as total. See, Smerican Type, etc., Co. v. Packer, 130 Cal. 459, 463, 62 P. 744; Clarke Contracting Co. v. City of New York, 229 N.Y. 413, 419-420, 128 N.E. 241; Helgar Corp. v. Warner's Features, 222 N.Y. 449, 453-454, 119 N.E. 113; Corbin on Contracts, s 946. If, as in the present case, the injured party has fully performed his obligations under a bilateral contract, courts usually treat a breach as partial unless it appears that performance of the agreement is unlikely and that the injured party may be ****312** protected only by recovery of damages for the value of the promise. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 29-30, 142 P.2d 22; Restatement, Contracts, s 316.

Plaintiffs contend that there was a total breach on May 30, 1949, the date that performance was due under the contract. Even if plaintiffs could have treated the breach as total at that time, it is clear that they elected not to do so, for during the following year they kept urging defendants to perform.

[11] [12] A different situation was presented on May 24, 1950, when plaintiffs brought the present action. At that time performance was one year overdue. By seeking damages for the difference in the value of their property with and without performance, plaintiffs gave notice that they would no longer treat defendants' continued failure to perform as a partial breach. Defendants could not reasonably expect plaintiffs to continue indefinitely to treat the breach as partial. Even if a breach might be considered partial at the time performance is due, there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here. It was not shown that depite defendants' delay, plaintiffs would be assured of getting the improvements. Cf. South Memphis Land Co. v. McLean Hardwood Lumber Co., 6 Cir., 179 F. 417, 426. Despite repeated requests by plaintiffs, defendants had not installed the improvements called for by the contract. It was uncertain when if ever they would do so. Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenicnce. Plaintiffs were not required to endure that uncertainty or to await that convenience and ***600** were therefore justified in treating defendants' non-performance as a total breach of the contract. See Gold Mining & Water Co. v. Swinerton, supra; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 780-781, 186 P. 356; Losei Realty Corp. v. City of New York, 254 N.Y. 41, 47, 171 N.E. 899.

[13] [14] The question remains whether the court applied a proper measure of damages. Unless a statute otherwise specifically provides, the proper measure of damages for the breach of a contract 'is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' Civ.Code, s 3300. damages must, however, 'be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.' Civ.Code, s 3359. In the present case the contract called for installation of improvements that would greatly increase the value of plaintiffs' property. The consideration was paid in advance. If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. Taylor v. North Pac. Coast R. Co., 56 Cal. 317, 320; Adams v. Hiner, 46 Cal.App.2d 681, 683, 116 P.2d 630; cf. Avery v. Fredericksen & Westbrook, 67 Cal.App.2d 334, 336, 154 P.2d 41; see, Corbin on Contracts, ss 1089-1091. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party. In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages os the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived. Knoch v. Haizlip, 163 Cal. 146, 154, 124 P. 998; South Memphis Land Co. v. McClean Hardwood Lumber Co., 6 Cir., 179 F. 417, 423-424; Hyatt v. Wiggins, 178 Ark. 1085, 13 S.W.2d 310, 303.

[15] In the present case the contract was to be performed entirely on property that is not owned by plaintiffs. Plaintiffs did have a nonexclusive easement thereover. ****313** Defendants, however, had reserved an easement and right of way over the road, with the right of 'constructing, maintaining, repairing, and operating the same.' Plaintiffs proved their damages on the theory that the proper measure was the difference in ***601** value of lot 7 with and without the promised performance. Defendants did not contend at the trial or on appeal that plaintiffs had the right to pave the road and install the gas line and electricity thereon, or that they would be able independently of defendants to get the improvements. In this state of the record, we are of the opinion that the trial court invoked the proper rule for measuring the general damages. Cf. Herzog v. Grosso, 41 Cal.2d 219, 259 P.2d 429.

[16] The question arises whether the measure of damages applied by the court includes a double recovery on the

ground that it allows damages on the assumption that there had been no performance by defendants whereas plaintiffs got the benefit of defendants' part performance during the period plaintiffs treated the breach as partial. If there were no performance by defendants between May 30, 1949, and May 24, 1950, there can be no doubt that the award of $9,500 damages was proper. If, on the other hand, defendants performed part of their contractual obligations to plaintiffs' benefit during the period that plaintiffs treated the breach as partial, defendants should be allowed credit therefor, since it would be manifestly unjust to allow plaintiffs to induce defendants to render such performance, and then to award plaintiffs damages as if it had not occurred.

The performance claimed by defendants breaks down into three activities: (1) at some time in the fall or winter of 1949, temporary paving was placed on 1225 feet of the road to the edge of lot 7; (2) at some unspecified date in 1950 permanent paving was installed on 1200 feet of the road to lot 7, commencing at the Nichols Canyon Road, leaving 1300 feet of the road with a dirt surface and the remaining 1225 feet of the road with temporary paving only; and (3) at an unspectified date in May of 1950 a gas line was installed over the same 1200 feet of road, leaving a 2525 foot gap between the end of the line and plaintiffs' lot.

Insofar as installation of the temporary paving is concerned, the record discloses that the benefit thereof to plaintiffs was included in the valuations made of the property. Witnesses Holabird and Vollmer testified that they had viewed the property shortly before the trial and that their appraisals were predicated on the condition of the road as it then existed.

Plaintiffs contend that the amount of permanent paving and the amount of gas line installed did not enhance the value of the lot, on the ground that a gap of 2525 feet left the lot as useless and its value as unchanged as a gap of ***602** 3725 feet. The testimony of the valuation experts that without the improvements contracted for the lot was useless, lends some support to this contention. In any event, since it cannot be ascertained from the record whether or not defendants installed the permanent paving and the gas line over the 1200 feet of road before or after plaintiffs filed their complaint, we must conclude that defendants failed to establish that they were entitled to credit therefor on the ground that this work was performed during the time plaintiffs treated the breach as partial.

The next question presented is whether defendants should receive credit for performance after the complaint was filed and before the action came to trial. In addition to the installation of the 1200 feet of gas line and permanent paving, discussed above, defendants installed electricity to the edge of lot 7 in August of 1950, more than two months after the complaint was filed, and began laying gas lines at a point 2500 feet from the lot and in its general direction about a week before trial. It was not shown that it was certain that the gas line would be brought to the edge of the lot. Neither party introduced evidence to show by what amount the installation of electricity without performance of the other obligations of the contract increased the value of the lot. Did the trial court err in applying its measure of damages in the absence of such evidence?

****314** [17] [18] Ordinarily this question does not arise. If the injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made. If the wrongdoer cannot induce the injured party to accept performance, he will ordinarily not perform. The record does not show why defendants chose to continue performance after the action was brought.[3] Plaintiffs did not urge performance after the complaint was filed, and they could not prevent it. By commencing the action they fully and fairly informed defendants that instead of performance they sought money damages for the value of defendants' promise. Unless plaintiffs indicated that they were again willing to treat the breach as partial, the remedial rights provided by law were substituted for the rights under the contract. Restatement, Contracts, s 313, Comment c. Thereafter defendants were absolved from all ***603** duties under the contract to furnish improvements. Subsequent work to that end would not be performance of a contract then existent but would be entirely voluntary. If prompted by defendants' self interest in the sale of other lots, such gratuitous benefit, wholly speculative on the record, would not constitute unjust enrichment to plaintiffs. Parties who have totally breached a contract cannot force performance on the injured parties.

Defendants next contend that if the award of $9,500 is upheld, the award for loss of use of the property $2,300.37, and the award for the increase in building costs, $3,700, must be reversed.

[19] [20] Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Coburn v. California Portland Cement Co., 144 Cal. 81, 84, 77 P. 771; Noble v. Tweedy, 90 Cal.App.2d 738, 745, 203 P.2d 778. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach

when he made the contract. Civ. Code, s 3300; California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 483, 221 P. 345, 32 A.L.R. 114; see, Corbin on Contracts, s 1007.

[21] Plaintiffs informed defendants at the time the contract was made that they were buying the lot as a site for a residence and that they needed the gas, electricity, and permanent paving installed within a year. Defendants were in the business of selling lots as residence sites and were fully aware of the consequences of delay in their performance. They knew that the lot was less valuable without than with the improvements, and that plaintiffs would be deprived of the use of the lot for building purposes so long as the contract was not performed. They also knew that an increase in building costs would add to the cost of the residence plaintiffs contemplated building on the lot. Had the contract been performed, plaintiffs would have had not only a more valuable lot than they now have but the use of that lot from the date performance was due for the erection of their residence. By defendants' breach of the contract, plaintiffs are not only left with a lot that is less valuable than it would have been had the contract been performed but they have been deprived of the use of the inproved lot they bargained for and are faced ***604** with increased building costs that would have been avoided had the contract been performed. The award of damages for the difference in the value of the lot with and without the improvements compensates for the loss in the value of the lot. It does not compensate for the loss of use of the lot or the increased building costs. Accordingly, plaintiffs are entitled to damages for the loss of use[4] and the increased building costs preceding the date they treated the breach as total, in addition ****315** to the $9,500. Tally v. Ganahl, 151 Cal. 418, 424, 90 P. 1049; Henderson v. Oakes-Waterman Builders, 44 Cal.App.2d 615, 617-618, 112 P.2d 662.

The trial court erred, however, by including in the award amages for loss of use and increase in building costs during the period between the date that the complaint was filed and the date of trial. Damages for delay during that period could be awarded only if defendants still had duties to perform. When plaintiffs filed their complaint, however, they elected to treat the breach as total and to substitute their remedies under the law for their rights under the contract. As we have seen, defendants were no longer obliged to perform and could not force performance on plaintiffs. Any delay in utilization of the property thereafter was chargeable to plaintiffs, not to defendants. See, Bomberger v. McKelvey, 35 Cal.2d 607, 614, 220 P.2d 729; Atkinson v. District Bond Co., 5 Cal.App.2d 738, 745, 43 P.2d 867; Richardson v. Davis, 116 Cal.App. 388, 390, 2 P.2d 860. Defendants cannot be required to pay damages designed to give plaintiffs the benefit of their bargain as to the time of total breach, and also to pay damages because they did not thereafter do things they were no longer under any duty to do and for which they would get no credit.

[22] By its award of damages, the trial court in effect attempted to compensate plaintiffs for the delay between the time they were entitled to damages and the time they were actually awarded damages in the form of the judgment. Such compensation is ordinarily given in the form of interest. Under section 3287 of the Civil Code, interest could not be awarded here, since the amount of damages could not be ascertained except on conflicting evidence. Lineman v. Schmid, 32 Cal.2d 204, 212, 195 P.2d 408, 4 A.L.R.2d 1380.

***605** The award for loss of use between the date of the complaint and the date of trial cannot, therefore, be sustained. Although, as we have seen, plaintiffs may recover damages for the amount that building costs increased between the date specified for performance in the contract and the date that the complaint was filed, the only finding on the subject is that costs increased $3,700 between the date that performance was due and the date of trial. A retrial on that issue is therefore necessary. Royer v. Carter, 37 Cal.2d 544, 551, 233 P.2d 539.

4. Findigs of the trial court

[23] [24] Defendants contend that the evidence does not support the finding that the term 'paving' in the contract was intended by the parties to be 'permanent paving conforming to the specifications of the City of Los Angeles for that area' and that such paving was a 'plant mix' of three inches of rock, sand, and asphalt.' Extrinsic evidence was admissible to determine what the parties meant by 'paving.' Code Civ.Proc. s 1860; Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Wachs v. Wachs, 11 Cal.2d 322, 325, 79 P.2d 1085; Snyder v. Holt Manufacturing Co., 134 Cal. 324, 328, 66 P. 311. Plaintiff Clarence Coughlin testified that defendant John Blair stated at the time that the contract was executed that the pavement would be 'State specifications, asphalt with asphalt shoulders.' An expert witness subsequently testified that 'city specifications' in the area called for three inches of rock and gravel. During the expert's testimony, the trial judge stated to defendants' counsel, 'The testimony, if I understand it, is it was to be paved according to the City's specifications.' Counsel replied, 'That is the testimony so far.' It thus appears that the case was tried on the understanding that 'state specifications' and 'city specifications' were the same

thing, and defendants cannot successfully contend on appeal that the finding is not supported by the evidence.

[25] Defendants next contend that the evidence does not support the finding that the difference between the market value of the property with and without performance of the contract was $9,500. Expert witnesses called by plaintiffs so testified, but defendants attack their valuations on the ****316** ground that the witnesses said they would not change their estimates 'if they knew that some respectable person was under obligation to install electricity, gas, and paving.' The contention is without merit. The witnesses have their valuations ***606** of the lot with and without the improvements. Their valuations of the lot with improvements necessarily contemplated the improvements called for by the contract installed by a responsible person. Defendants' objection goes, not to the soundness of the appraisal, but to the question discussed above, whether defendants can avoid liability for the difference in the value of the lot with and without improvements if they should complete the improvements some time in the future.

[26] Defendants contend that the evidence does not support the finding that, 'The breach of said agreement by defendants was deliberate.' That finding is material insofar as it bears on the question whether the breach was total or partial. Defendant John Blair admitted in his deposition, which was admitted in evidence and considered by the trial court in reaching its decision, that he did not make the deposit required by the gas company before it would extend its gas line to plaintiffs' lot, although he had the financial ability to make the deposit. He stated that the electricity was not installed because of a dispute between defendants and the city department of light and power over the interpretation of a contract between defendants and the city. At one point the city offered to install electricity to plaintiffs' lot without cost to defendants, if defendants would waive a claim to certain other rights under their contract with the city. Defendants would not agree. Defendants did not install permanent paving because they took the position that only temporary paving was required by the contract. It thus appears that defendants had the ability to perform the contract but for reasons they thought to their advantage refused to do so. The finding that the breach was 'deliberate' is supported by substantial evidence.

[27] Defendants finally attack the finding that the 'construction cost of a 'minimum house' (i. e., a house built at minimum cost and having an area not exceeding 1500 square feet, the minimum building restrictions applicable to the lot purchased by plaintiffs) increased during the period from June, 1949, to the date of trial in the sum of $3,750. Plaintiffs have suffered special damage resulting from the increase of construction costs on a 'minimum house' as above defined in the amount of $3,750.00.' Although, as previously pointed out, a new trial is required on this issue, the question may recur at the retrial and it is therefore necessary that we pass on defendants' contention.

There is testimony that the building costs of a 'minimum house' had increased by $3,750. Defendants contend, ***607** however, that there is no proof that the damages were foreseeable or that they were caused by their breach. Plaintiffs told defendant John Blair on the day that the contract was signed that they intended to build a 'three bedroom, rambling house with a playhouse and swimming pool.' It was testified that such a house would exceed 1,500 square feet. Defendants were thus informed of the use to which plaintiffs intended to put the property and the award of damages may not be attacked for lack of notice to defendants. Reliance Acceptance Corp. v. Hooper-Holmes Bureau, 139 Cal.App. 607, 613, 34 P.2d 762. Defendants contend that plaintiffs 'never seriously contemplated building at all' and that, accordingly, plaintiffs failed to show that but for the breach, they would have taken advantage of lower costs. At the time the contract was signed, however, plaintiffs stated that they intended to build 'the following spring,' the time when performance was specified in the contract. Plaintiffs actually employed an architect in June, 1949, and received plans from him in the fall of 1950. The record sustains the conclusion that but for the breach plaintiffs would have been able to take advantage of lower building costs in June, 1950.

To the extent that it awards $9,500 general damages with interest thereon and costs, the judgment is affirmed. To the extent that it awards special damages for loss of use of the property and special damages ****317** resulting from the increase in building costs, the judgment is reversed, and the cause is remanded to the trial court to determine the damages resulting from loss of use of the property and from the increase in building costs between June 1, 1949 and May 24, 1950. Defendants are to bear the costs of this appeal.GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

Parallel Citations

262 P.2d 305

Jacobs v. Freeman (1980) 104 Cal.App.3d 177, 163 Cal.Rptr. 680

Action was instituted on complaint by purchasers against vendor and others for alleged breach of contract and fraud with respect to sale of real property. The Superior Court, Kern County, Gerald K. Davis, J., granted motion for nonsuit in favor of defendants, and plaintiffs appealed. The Court of Appeal, Franson, Acting P. J., held that: (1) where an executory contract to sell land arose by virtue of escrow instructions, and an implied covenant of good faith and fair dealing required vendor's officers to submit contract to vendor's board of directors for approval, vendor breached its obligations to purchaser by failing to submit proposal to board and, though this did not mean that vendor breached its obligation to convey title to land, an obligation which was dependent upon board approval, it did present an issue of fact as to whether board approval would have been forthcoming if proposal had been submitted to it, and (2) when agents of vendor represented to purchasers that proposed sale would be submitted to vendor's board of directors for approval, those agents should have disclosed that such submission was subject to prior approval by one individual, failure of which constituted sufficient evidence of actionable misrepresentation to go to jury and to preclude a nonsuit; however, individual defendants could not be held liable on an agency theory absent evidence that they made any express or implied representation of fact to plaintiffs.

Affirmed in part and reversed in part and remanded.

Opinion, 100 Cal.App.3d 989, 161 Cal.Rptr. 368, vacated.

Attorneys and Law Firms

***181 **682** King, Eyherabide, Anspach, Friedman & Robinson, Stephen Eyherabide, Bakersfield, Arthur E. Schwimmer, Los Angeles, for plaintiffs and appellants.

William C. Kuhs, Bakersfield, for defendants and respondents.

Opinion

OPINION ON REHEARING

FRANSON, Acting Presiding Justice.

STATEMENT OF THE CASE

This appeal arises out of an action for specific performance and for damages initiated by appellants, who allege that they entered into contracts with respondent Tenneco West, Inc., for the purchase of two parcels of real property. A complaint sounding in both contract and tort ***182** was filed by appellants Vincent, Eugene, David and Ugo Antongiovanni, individually and doing business as Antongiovanni Brothers, a farming partnership.[1] The complaint alleged four causes of action against the following respondents: Tenneco West, Inc., and individuals N. W. Freeman, Simon Askin, Melvin Jans and Leon McDonough who was dismissed from the action prior to trial. The individual respondents were all employees and/or officers of the respondent Tenneco West, Inc. Howard Marguleas, not named in the original complaint, was served as a Doe defendant.

The following theories of liability were asserted. The first cause of action alleged that appellants contracted in writing to purchase certain real property owned by Tenneco West, Inc. Appellants alleged that the land sale contract consists of certain escrow instructions dated May 16, 1973. These instructions were signed by appellants as "buyer." Melvin Jans and Leon McDonough, senior vice president and assistant secretary respectively of Tenneco West, Inc., signed the instructions for Tenneco as "seller."

Appellants' complaint characterized the escrow instructions as a contract subject to "an implied covenant or alternatively, an implied condition." The instructions contained the following provision:

"IN ADDITION, this escrow is subject to :

"A. Approval hereof by Seller's Board of Directors."

The crucial allegation to establish breach of contract in appellants' first cause of action is:

> "Defendants and each of them have also failed to live up to the terms of the contract and are in breach (thereof) inasmuch as the named individual defendants in this action acting for and on behalf of TENNECO WEST, INC., breached the expressed terms of the

> contract and escrow and further breached the implied term of the contract in escrow to act in good faith and with fairness inasmuch as the individual defendants, acting on behalf of the corporation, did not submit the escrow to that particular entity known as the 'Board of Directors' of the seller, TENNECO WEST, INC. This failure to act and failure to abide by the implied term of the escrow and contract, amounts to a breach of the escrow and contract . . . ."

It was further alleged by appellants ***183** that the defendants, after entering the subject contract, attempted to sell the same property to other parties and that in so doing defendants were guilty of bad faith and malice.

Appellants' first cause of action also alleged that appellants had complied with or had tendered compliance with all conditions required of them under the escrow instructions; that they had paid money outside of escrow to Tenneco, and that Tenneco's deposit ****683** of this money in its general account had ratified the contract in question.

The relief sought in the first cause of action included: a decree for specific performance, compensatory damages for lost rents and profits, alternatively damages to compensate for the difference between the contract price and the value of the property as of the date of the breach, and exemplary damages in the amount of $500,000.

The second cause of action sounds in tort. Appellants alleged that Tenneco agents made representations concerning the sale which were known to be false at the time made; that appellants relied on these representations that the subject land would be sold to them on the terms set forth in the escrow instructions, "including the implied obligation to submit said escrow instructions and terms of sale to said Board of Directors." Appellants alleged the false representations were wanton, willful, malicious and amounted to a fraud. They prayed for exemplary damages in the sum of $1,000,000. Appellants also sought compensatory damages in the sum of $100,000 for the difference between the contract price and the actual value of the property at date of breach.

The allegations of the third and fourth causes of action are basically reiterations of the first and second causes of action.[2]

The matter proceeded to jury trial before Judge Davis. After appellants presented their case in chief, respondents moved for nonsuit pursuant to Code of Civil Procedure section 581c. Respondents argued in essence that the case should not go to the jury because no contract had arisen between the parties due to the lack of board approval of the sale. The trial court granted the motion in favor of all respondents. Judge Davis gave no statement on the record of his reasons for granting ***184** the nonsuit; however, he told the jury when explaining the ruling to them that he "ruled in favor of the defendant on the ground . . . (he) felt there was no way (they) could render a verdict in favor of the plaintiffs in this case in view of the way the escrow instructions were worded."

Appellants filed a timely notice of appeal.

THE FACTS

The parties are essentially in agreement as to the facts; they differ mainly on the legal significance of the two sets of escrow instructions dated May 16, 1973. The instructions pertained to two parcels of land, referred to by the parties as the Northeast Quarter and the South Half of section 19, township 30 south, range 27 east, Mount Diablo Base and Meridian (hereinafter the Northeast Quarter and South Half). According to the escrow instructions, the total consideration for the Northeast Quarter was to be $200,460 $3,000 to be paid outside of escrow, $47,115 to be paid through escrow, and the remainder to be evidenced by a promissory note and secured by a deed of trust. The total consideration for the South Half was to be $419,081; $20,000 to be paid outside escrow, $84,771 to be paid through escrow, and the remainder to be evidenced by a promissory note and secured by a deed of trust. Both parcels were subject to agricultural leases. The escrows were scheduled to close after these leases terminated; the escrow on the Northeast Quarter was to terminate in late December 1973, and the escrow on the South Half was to close in late December 1975.

Finally, the escrow instructions provided that the escrow would be subject to certain conditions, including approval by the seller's board of directors. Eugene Antongiovanni testified that he and his brothers were aware of this condition at the time they signed the instructions. Eugene acknowledged that at the time the instructions were signed he had no information leading

him to believe that board approval had already been procured. Eugene testified that Mr. Gilbert Castle, who had represented Tenneco in the negotiations with the Antongiovanni ****684** brothers for this land sale, had told Vincent Antongiovanni (who died before the action came to trial) that the escrow instructions had to be approved by Tenneco's board of directors.[3] The evidence clearly established that the ***185** board of directors never approved the subject escrow instructions; in fact, neither these instructions nor any information concerning the sale were ever submitted to the board.

At the time relevant to this action, N. W. Freeman, Simon Askin and Howard Marguleas constituted a majority and quorum of the board of directors of Tenneco West, Inc.

Mr. Jans, vice president of Tenneco West, Inc., was in charge of generating the sales of land. He was assisted by Mr. Gilbert Castle who solicited buyers and negotiated sales prices. When a land sale was contemplated, it was Mr. Jans' function to originate form No. 4283 regarding the proposed sale.

On May 17, 1973, the day after the escrow instructions were prepared, Mr. Jans filled out and signed a copy of form 4283 relative to the sale of the subject parcels. This form set forth information regarding the purchase price and terms of the sale to Antongiovanni Brothers and recommended approval of the sale. The form contained a blank space for Howard P. Marguleas' signature; his signature would indicate that he also recommended the sale on the basis that the land was surplus and the negotiated price was favorable. Jans testified that Marguleas' approval on the form was necessary before the matter would reach the board of directors.

Form 4283, as completed by Jans, was sent to Marguleas for his approval. Apparently the sale died at this point. Marguleas' deposition testimony revealed that he had disapproved the sale by not signing the form. Marguleas stated that his understanding of company policy was that if he did not approve a proposed sale, he was not required to take further action regarding the sale.

***186** Regarding the possibility that the board would have approved the sale despite Marguleas' recommendation against it, Marguleas stated: "(My disapproval) could well be (the final act, so to speak). If it was something of great magnitude I might add that I am sure that there are instances that I disapproved which they overruled me, and I can't think of any offhand but (it) wouldn't have been unusual, or I wouldn't have taken offense . . . ." However, there was also evidence suggesting that a majority of the board would not have approved this sale without Marguleas' recommendation. Mr. N. W. Freeman, a member of the board, explained his reliance on Marguleas' opinion:

> "Marguleas was an experienced agricultural man in all phases of agriculture . . . (P) . . . I am probably the guy that gave the instruction that no agricultural property was to be acquired or sold without Howard Marguleas' approval because I thought he had more he was more knowledgeable in what property we should retain and what property we should sell. . . . (Without Marguleas' approval), I would not as the chief executive officer of Tenneco, I ****685** wouldn't have referred it to the Board of Directors of Tenneco, Inc."

Mr. Simon Askin, another member of the board, also said that without Marguleas' approval, a transaction would not even be referred to the board.

It is unclear from the evidence exactly when Marguleas decided not to approve the sale of the surplus lands. Marguleas was unable to pinpoint when he decided to disapprove the sale.[4] He testified only that it was "at some point between May 17, 1973 (the date after that shown on the escrow instructions), and September 26, 1973." On the latter date Gilbert Castle sent a letter to appellants informing them that the board of directors of Tenneco, Inc., had not issued approval of the sale. Castle advised that Tenneco would therefore have to withdraw from the transaction. Enclosed with the letter was a check reimbursing appellants for $23,000 paid to Tenneco outside of escrow. Appellants had given Mr. Castle two checks, in the amounts of $20,000 and $3,000 respectively. These checks were dated June 27 and 28, and were paid outside of escrow as provided in the escrow instructions. The checks ***187** from appellants were deposited in Tenneco's general account; the funds were retained by Tenneco from late June 1973 until September 26 of that year when Tenneco reimbursed the funds.

Counsel for appellants thereafter sent a letter to Mr. Castle indicating that appellants were ready, willing and able to proceed with the deal. When Tenneco refused to proceed with the transaction, this lawsuit for specific performance and damages was instituted.

THE CONTRACT ACTION

Although the trial judge did not explain in any detail his reason for granting the nonsuit on either the contract or fraud causes of action, he did state that his ruling was compelled by the wording of the escrow instructions. The judge was apparently convinced by the argument of respondents' counsel that no binding contract arose between the parties because of the express provision that the escrow was subject to approval by the seller's board of directors. As we shall explain, respondents' argument misconceives the law. Upon the signing of the escrow instructions, an executory bilateral contract to sell the land was created obligating the seller to convey the land upon board approval. Furthermore, the seller's agents were required to act in good faith by seeking board approval for the transaction, and the board was required to consider the proposal honestly. Hence, the trial court erred in granting the nonsuit on the ground of the absence of proof of a contract to sell the land.

Preliminarily we note the general principles governing a motion for nonsuit:

> "A nonsuit . . . may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given.' (Citations.) Unless it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, . . . the trial court is not justified in taking the case from the jury. . . ." (Estate of Lances (1932) 216 Cal. 397, 400, 14 P.2d 768, 768-69; see ****686** also 4 Witkin, Cal. Procedure (2d ed. 1971) s 353, pp. 3152-3153.)

[1] ***188** On appeal from the granting of a nonsuit, the reviewing court should consider only the grounds which were before the trial court. The reason for this rule is that the plaintiff should be given the opportunity to correct the deficiencies in his proof before a nonsuit is granted. As observed by Witkin: "If the court grants the motion, the appealing plaintiff should be able to insist that the reviewing court confine its consideration to the grounds specified below notwithstanding the existence of other good grounds; otherwise he is deprived of the opportunity to correct defects." (4 Witkin, Cal. Procedure, supra, Trial, s 362, p. 3159.) Thus, in reviewing nonsuits, the appellate courts do not follow the general rule that a judgment should be upheld if it is correct even though the reasons relied upon may be incorrect. (Lawless v. Calaway (1944) 24 Cal.2d 81, 92-94, 147 P.2d 604.)

[2] [3] Three fundamental interpretive principles compel our conclusion that an executory contract to sell the real property was formed when the parties affixed their signatures to the escrow instructions:[5] First, a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if this can be done without violating the intention of the parties (Civ.Code, s 1643; see also Rodriguez v. Barnett (1959) 52 Cal.2d 154, 160, 338 P.2d 907). This rule accords with the primary goal in contract interpretation which is to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful (Civ.Code, s 1636).

[4] The second principle is that "(i)n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." (Brown v. Superior Court (1949) 34 Cal.2d 559, 564, 212 P.2d 878, 881, quoted with approval in Murphy v. Allstate Ins. Co. (1976) 17 Cal.3d 937, 940, 132 Cal.Rptr. 424, 553 P.2d 584; see also Schoolcraft v. Ross (1978) 81 Cal.App.3d 75, 80, 146 Cal.Rptr. 57; 1 Witkin, Summary of Cal.Law (8th ed. 1973) Contracts, s 576, p. 493; 3 Corbin on Contracts (1960) s 571, p. 349 et seq.; Comment (1975) 22 UCLA L.Rev. 847, 951.) The implied covenant imposes upon the ***189** parties an obligation to do everything that the contract presupposes they will do to accomplish its purpose.

[5] Third, in the case of an uncertainty as to the meaning of a contract, when the uncertainty is not remedied by other rules of interpretation, the language should be construed most strongly against the party who caused the uncertainty to exist. (Civ.Code, s 1654; 3 Corbin on Contracts, supra, s 559, p. 262 et seq.; 4 Williston on Contracts (3d ed. 1961) s 621, p. 760 et seq.). Since the seller's agents prepared the escrow instructions, any uncertainty not remedied by other rules of construction must be construed against the seller.

[6] Applying these principles, it is clear that the parties who negotiated the sale of the property and signed the escrow instructions intended the contract would be submitted to the seller's board of directors for approval and that the board would consider the proposed sale in good faith. It is also clear that the parties intended the seller's agents would recommend approval of the sale to

the board. That this was contemplated by the seller is evidenced by form 4283, prepared and signed by Mr. Jans, which states, "Sale is recommended on the basis that the land is surplus to (company) needs and the negotiated price is most favorable." From the foregoing, we conclude that the condition of board approval of the proposed sale was intended to be a condition ****687** precedent to the seller's duty to convey title to the land rather than a condition precedent to the formation of a contract.

[7] Respondents' argument that a contract does not arise when an agreement is executed with the understanding it will not become operative until approved by another person or body, begs the issue. It is only where it can be said that reasonable persons would have understood that the agreement would not be effective when originally signed that the rule applies. For example, in Helperin v. Guzzardi (1951) 108 Cal.App.2d 125, 238 P.2d 141 and Los Angeles Rams Football Club v. Cannon (S.D.Cal.1960) 185 F.Supp. 717, the evidence was clear that the parties intended the contract to take effect only when the necessary approval was obtained. The court in Helperin stated ". . . (I)t was understood between Guzzardi and Prindle that the agreement would not constitute a binding contract or be made use of unless and until it was signed by Mrs. Guzzardi" (108 Cal.App.2d at p. 127, 238 P.2d at p. 142). In Los Angeles Rams Football Club v. Cannon, the agreement expressly provided that it "shall become valid and binding upon each party hereto ***190** only when, as and if it shall be approved by the Commissioner." (185 F.Supp. at p. 721.)

[8] Respondents' reliance on cases holding that when one of the parties to an agreement reserves an unqualified right to escape its obligations under the agreement, the promise is illusory and thus cannot constitute a binding contract, is also misplaced. As we have explained, the condition of board approval does not give respondent corporation the absolute right to escape its obligations under the agreement since there is an implied obligation on the part of the seller's officers to carry out the objectives of the contract in good faith by submitting the proposal to the board. Moreover, a part of the implied obligation would be that the board would actually confer and decide whether to approve the proposed sale.[6]

[9] Where a contract makes a duty of performance of one of the parties conditional upon his satisfaction, the modern trend is to avoid holding these contracts illusory by implying a requirement that the promisor's determination that he is not satisfied be exercised in good faith. (See, for example, Rodriguez v. Barnett, supra, 52 Cal.2d 154, 160-161, 338 P.2d 907; Mattei v. Hopper, supra, 51 Cal.2d 119, 122-123, 330 P.2d 625; Larwin-Southern California, Inc. v. JGB Investment Co. (1979) 101 Cal.App.3d 626, 638-640, 162 Cal.Rptr. 52; see also 1 Corbin on Contracts, s 149, at p. 657.) As Corbin has observed:

> "It has been thought, also, that promissory words are illusory if they are in form a promise that is conditional on some fact or event that is wholly under the promisor's control and his bringing it about is left wholly to his own will and discretion. This is not true, however, if the words used do not leave an unlimited option to the one using them. It is true only if the words used do not in fact purport to limit future action in any way." (Ibid., fn. omitted.)

[10] Since there was an implied obligation on the seller's part to submit the sale to the board for approval, the seller's promise made through its ***191** executive officers to convey the land once board approval was obtained was not illusory.

[11] Having determined that an executory contract to sell land arose by virtue of the escrow instructions and that the implied covenant of good faith and fair dealing required the seller's officers to submit the contract to the board for its approval, it follows that the seller breached its obligation by failing to submit the proposal to the board. Although this does not mean that the seller breached the obligation to convey ****688** title to the land, which obligation is dependent upon board approval, it does present an issue of fact as to whether board approval would have been forthcoming if the proposal had been submitted to it.[7] Thus, the trial court erred in granting the nonsuit.

Because we reverse the nonsuit as to the respondent corporate seller on the contract causes of action on the only ground argued and decided below, we do not pass upon other possible grounds for a nonsuit in favor of the corporation. (See 4 Witkin, Cal. Procedure, supra, s 362, p. 3159.)

[12] We do, however, affirm the nonsuit on the contract cause of action against the individual respondents. Mr. Jans signed the escrow instructions as agent for a disclosed principal Tenneco West, Inc. He cannot be held liable on the contract absent a showing that he acted without believing he had the authority to do so. (Rest.2d, Agency, s 320; 1 Witkin, Summary of Cal.Law, Agency and Employment, s 182, p. 778.) Mr. McDonough was dismissed as a defendant during trial. Since neither Freeman, Askin, nor Marguleas signed the contract, none of them are liable thereon.

THE FRAUD ACTION

Appellants contend the seller's agents who negotiated with them concerning the sale of the real property made false representations on which appellants relied to their detriment. Specifically, they assert ***192** that respondents represented they would submit the sale to the board for its approval; that respondents knew the representation to be false in that they did not intend to submit the sale to the board without Marguleas' prior approval; that the representation was willful and malicious and that appellants relied on it by entering into the escrow agreement and complying with its terms including the payment of monies to the seller.

[13] [14] Actionable fraud requires a negligent or intentional misrepresentation of a material fact. A promise material to the contract which is made without any intent of performing it is deemed a misrepresentation of fact (Civ.Code, ss 1572, subd. (4), 1710, subd. (4)). In the present case, as explained in footnote 3, ante, there is substantial evidence, albeit questionable, that Mr. Castle expressly represented to Vincent Antongiovanni that the contract would be submitted to the board. Since the credibility of witnesses is for the jury (Evid.Code, s 312, subd. (b)), this evidence raises an issue of fact as to whether respondents expressly misrepresented a material fact to appellants.

[15] [16] In the final analysis, what respondents were guilty of was a failure to disclose to appellants that the contract had to be approved by Mr. Marguleas before it was submitted to the board. This fact was concealed by the seller's executive officers when they signed the contract. Although a duty to disclose a material fact normally arises only where there exists a confidential relation between the parties or other special circumstances require a disclosure, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. (Rest.2d, Torts, s 529; 4 Witkin, Summary of Cal.Law, supra, Torts, s 464, pp. 2727-2728; 34 Cal.Jur.3d, Fraud and Deceit, s 24, pp. 592-594.) When the seller's agents represented that the proposed sale would be submitted to the board for approval, they should have disclosed that such submission was subject to prior approval by Marguleas. The failure to disclose this qualifying fact constitutes sufficient evidence of actionable misrepresentation to go to the jury.

Again, because the trial court's only articulated basis for granting the nonsuit on the fraud cause of action was that it felt there ****689** was no way that the jury could render a verdict for the plaintiff under the terms of the escrow instructions, we do not pass upon other possible grounds for the nonsuit. (See 4 Witkin, Cal. Procedure, supra, s 362, p. 3159.)

[17] [18] ***193** Since an agent who knowingly participates in a fraudulent transaction is equally responsible with his principal (3 Cal.Jur.3d, Agency, s 119, pp. 166-167), a factual question is presented as to whether respondent Jans participated in the misrepresentation by reason of his signing the escrow instructions. However, as to respondents Freeman, Askin, and Marguleas, the record is devoid of any evidence that they made any express or implied representations of fact to appellants. Accordingly, the judgment of nonsuit should be affirmed on the fraud cause of action as to respondents Freeman, Askin, and Marguleas.

The judgment of nonsuit on the contract causes of action is reversed as to respondent Tenneco West, Inc., a corporation. The judgment of nonsuit on the fraud causes of action is reversed as to respondent Tenneco West, Inc., a corporation, and as to respondent Jans, an individual. The judgment is affirmed on all causes of action as to the other individual respondents.

HOPPER and FRETZ,* JJ., concur.

Parallel Citations

104 Cal.App.3d 177

Kurtin v. Elieff (2013) 215 Cal.App.4th 455, 155 Cal.Rptr.3d 573

Synopsis

Background: Seller of partnership interest brought action against buyer and business entities partially owned by buyer for accounting, breach of warranty, fraud or intentional misrepresentation, negligent misrepresentation, and breach of settlement agreement. The Superior Court, Orange County, No. 30-2007-00100307, Nancy Wieben Stock, J., made findings after bench trial regarding distributions allegedly diverted to buyer, and then entered judgment on special jury verdict against buyer for breaches of his warranties of authority as an agent, but exonerated buyer on intentional and negligent misrepresentation causes of action, and granted new trial as to damages only. Buyer and seller appealed.

Holdings: The Court of Appeal, Rylaarsdam, Acting P.J., held that:

[1] arbitration award did not preclude further litigation of buyer's liability;

[2] seller's invocation of mediation privilege did not deny buyer a fair trial;

[3] accounting did not preclude breach of contract cause of action;

[4] seller was not required to establish collectibility to show breach of contract;

[5] jury verdict was inconsistent on issue of seller's breach of warranty of authority; and

[6] on issue of first impression, measure of damages for breach of warranty of authority was what "could have been recovered and collected from" principals.

Judgment affirmed, one order affirmed, and one order affirmed as modified.

Appeals from a judgment and two orders of the Superior Court of Orange County, Nancy Wieben Stock, Judge. Judgment affirmed; one order affirmed; one order affirmed as modified. (Super. Ct. No. 30–2007–00100307)

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Opinion

OPINION

RYLAARSDAM, ACTING P.J.

***458** We affirm the trial court's judgment holding defendant Bruce Elieff liable for misstating his authority to bind a group of real estate businesses known as the "Joint Entities" in the course of agreeing to buy out his former partner, plaintiff Todd Kurtin. We affirm the trial court's posttrial order denying Elieff's motion for judgment notwithstanding the verdict. And we affirm the trial court's grant of a new trial as to the issue of the precise amount of damages which Kurtin may recover.

However, as to one of Kurtin's causes of action—for liability under Civil Code section 2343 for lack-of-good-faith breach of an agent's warranty of authority—the new trial order must extend to liability as well. (All further statutory references to sections 2343, 2342, or 3318 will be to the Civil Code.) The jury returned inconsistent verdicts. Liability under section 2343 requires either (1) the *lack* of a good faith belief on an agent's part that "he has authority" to bind "his principal," or (2) an act by the agent that is "wrongful" in its nature. Case law has equated "wrongful" with tortious. Here, the jury found that Elieff *did* have a good faith belief in his authority to bind what the parties refer to as the Joint Entities when he signed the agreement. Furthermore, the jury specifically *exonerated* Elieff of all tort claims presented against him to the jury, including even the claim for negligent misrepresentation.

The proper remedy for inconsistent verdicts is a new trial. (See *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344, 100 Cal.Rptr.2d 446 (*Shaw*) ["Inconsistent verdicts are ' " 'against the law,' " ' and the proper remedy is a new trial."].) Accordingly, we will modify the new trial order on appeal to provide for the trial of liability under section 2343, as well as damages. (Code Civ. Proc., § 906.) As modified, we affirm that new trial order.

BACKGROUND

1. The 2005 Settlement Agreement

Kurtin and Elieff had been equal partners in a series of real estate ventures in the 1990's, doing business under the rubric of SunCal Companies. In 2003, growing disagreements between the two led Kurtin to sue Elieff to "separate" themselves. By that time SunCal Companies had already been "transformed" into "basically" Elieff's company.

The litigation led to a mediation, which in turn led to a settlement agreement. The agreement, signed in August 2005, provided that Elieff was to buy out Kurtin for $48.8 million in four installment payments.

***459** As Kurtin and Elieff structured their partnership, each real estate project was its "own little company." The settlement ****577** agreement provided that of the $48.8 million, both Elieff and the Joint Entities were jointly and severally responsible for the first installment of $21 million. However, only the Joint Entities were responsible for making the last three installments.

2. Default on the Payments

Elieff made the $21 million first and only installment payment for which he could be held personally responsible. The Joint Entities made the $1.8 million second installment payment for which they alone were responsible. But the Joint Entities paid only about $3.5 million of the $13.1 million third installment payment, and nothing on the final installment of $12.9 million.

Elieff had signed the settlement agreement both "individually and on behalf of the Elieff Separate Entities and the Joint Entities." The agreement had provided that if there was a default in any of the last three payments, Kurtin would be "entitled to have judgment entered pursuant to C.C.P. Section 664.6 against the Joint Entities" in an amount equal to the unpaid balance.

But when Kurtin sought to enforce the agreement against the Joint Entities under section 664.6 of the Code of Civil Procedure in the context of the 2003 litigation, the trial judge denied his request. The judge determined that the Joint Entities were not "parties" to Kurtin's 2003 litigation.

Elieff opposed the attempt to enforce the agreement. He argued that the trial judge had correctly determined the Joint Entities had to be added as parties to the lawsuit before any judgment could be entered against them.

The trial judge did not address the question of whether Elieff had the authority to bind the Joint Entities. However, in opposition to a writ petition filed in this court by Kurtin contesting the trial court's order, Elieff pointed out that "some of the Joint Entities are majority owned by independent third-parties," and further asserted "that only *his* interest in the Joint Entities, if anything, is subject to legal action." (Italics in original.) Pursuant to Evidence Code section 452, subdivision (d), on our own motion we have taken judicial notice of the records in writ proceeding in this court's docket number G037647.

Two of the Joint Entities, Moorpark 150 LLC (Moorpark), and SJD Partners (SJD), appeared through their own counsel, and argued that Elieff did not have any authority to bind their assets "to resolve his personal dispute with Kurtin." As they asserted in opposing the writ relief sought by Kurtin, Elieff "might as well have pledged the Brooklyn Bridge to Kurtin."

***460** Elieff further argued that Kurtin had an adequate remedy at law. Besides Kurtin's bringing the Joint Entities into the case, Elieff took the position that Kurtin could either (1) demand arbitration under the arbitration clause of the settlement agreement, or (2) sue for breach of the settlement agreement.

3. Arbitration

Kurtin never tried to bring the Joint Entities into the case. Instead he sought arbitration. We will recount the relevant facts involving the arbitration when we discuss whether the arbitration decision precludes *any* judgment against Elieff in more detail. For the moment, we need only note two things about the result of the arbitration. First, the arbitrator determined that the amount owing to Kurtin was $24,411,433.86. Second, the arbitrator announced a decision that only gave Kurtin the right, along the lines previously ****578** advocated by Elieff's attorneys in the writ proceeding, to foreclose on Elieff's *own* interests in the Joint Entities to the extent of that amount.

4. The Litigation

a. Phase 1 accounting

After the arbitration, Kurtin filed this action against Elieff and the Joint Entities. A "distribution" clause in the

settlement agreement prompted the trial judge to propose a bifurcated trial. The clause provided that "Elieff shall not take any distribution from any of the Joint Entities if such distribution prevents satisfaction of payment of the Settlement Payments." With reference to that clause, trial judge noted that Kurtin was "alleging certain causes of action concerning how the defendant handled certain funds or assets of" the Joint Entities. There was thus a "sub-issue" as to whether "distributions are measured in every entity at the very moment they emerge or whether the alleged pre-existing practice treating the joint entities as a single unified economic force allows somebody to exercise the business judgment to consider it more as a whole and utilize what might be considered net profit from one entity to help preserve the viability of another entity for the purpose allegedly of making more money for everybody as to all the entities." That is, the judge was concerned whether, if Elieff moved money around from one entity to another for the purpose of maximizing total aggregate profit, such movement might constitute a violation of the agreement.

Phase 1 of the bifurcated proceedings consisted of a five-day trial "concerning the accounting issues arising out" of Kurtin's claim that Elieff had breached the settlement agreement by, among other things, taking distributions from entities that prevented repayment of remaining payments. Kurtin ***461** had charged that some $22.4 million of "distributions" had been diverted to Elieff himself or Elieff-controlled entities.

After hearing evidence, the court made certain, limited, findings. The "evidence received by the Court," said the judge, "has, in fact, accounted for every penny of the funds that could be classified in any way as a distribution from a joint entity in the period following the August 2005 settlement agreement."

But the "every penny" comment did not mean the trial judge was ruling that Elieff had taken no "distributions" in contravention of the agreement. In fact, the trial judge did not actually define the word with the exception of ruling, as a matter of law, that the word "distribution" could not "be interpreted as precluding any and all distributions from being utilized for the good of the whole"

b. Phase 2 jury trial

The result of phase 1 was an elaborate jury instruction (Jury Instruction No. 10 in the record). The jury instruction encapsulates what happened at phase 1. In summary, the court ruled—and only ruled—that the $22.4 million in "distributions" fell into one of five categories, and left to the jury the task of deciding whether money falling into any given one of those categories was a "distribution" in contravention of the settlement agreement. We quote the relevant parts:

"At an earlier trial, the Court found that after the Settlement Agreement between Mr. Elieff and Mr. Kurtin was signed, Mr. Elieff used distributions of money from various of the Joint Entities in the total amount of $22,384,632.22.... The Court found that all of this money was used by Mr. Elieff in the following five categories: (1) management services; (2) management ****579** expenses; (3) management costs; (4) loan repayment or return of capital; and (5) payments to Mr. Kurtin.... [¶] The Court did not decide whether the taking of these distributions of money did or did not violate Paragraph 14 of the Settlement Agreement. The Court found that Paragraph 14 does not preclude Mr. Elieff from taking distributions from the Joint Entities, so long as the distributions were used to enhance, and not prevent or jeopardize, the possibility of Mr. Kurtin being paid the Settlement Payments required under the Settlement Agreement."

Attached to the instruction was a chart giving the jury a list of 19 specific money outflows totaling $22,384,632.22 from various of the Joint Entities, and a recapitulation of the five categories (management services, management expenses, and so on) which the judge had identified. Fourteen of the 19 ***462** outflows listed told the jury only that the court had made "no specific findings other than to conclude that the amount distributed was used for one or more" of those categories. For example: Item number 4 showed that on November 6, 2006, $1.5 million from one entity, Serrano Heights East, went into "one or more" of those five categories.

The remaining five outflows were more specific. About $4 million was used (by Rancho Etiwanda 685 and Serrano Heights East) to reimburse "Elieff/SunCal" for "costs incurred on joint projects." Another outflow from Moorpark Equity Partners consisted of $1 million to repay a deposit from a third party, another $250,000 going to pay a third-party owner, with the balance (roughly half a million dollars) going either to Moorpark Equity Partners itself ($263,000) or to reimburse "Elieff/SunCal for advances made by Elieff" ($241,500). Only one item, a $1.8 million outflow from Rancho Etiwanda, was unambiguously shown to have been used to repay Kurtin. (Presumably this was the same $1.8 million referenced above as the second installment payment.)

Even though the settlement agreement had not

personally obligated Elieff to pay more than $21 million of the $48.8 buyout price, Kurtin sought recovery from Elieff on the theory that Elieff had misrepresented his authority to obligate the Joint Entities to pay the balance. Concomitantly, Kurtin also claimed that Elieff had breached a provision in the settlement agreement to execute the customary documents "necessary to perfect this security interest" in Elieff's interests in the Joint Entities. And, as just discussed, Kurtin asserted that Elieff had taken distributions from the Joint Entities that should have gone to pay off the buyout price.

From these basic claims the following six causes of action against Elieff were submitted to the jury: number 2, for breach of warranty of an agent's authority under section 2342; number 3, for breach of warranty of an agent's authority under section 2343; number 4, for fraud or intentional misrepresentation in representing to Kurtin that he had the authority to sign for the Joint Entities; number 5, for negligently misrepresenting that he had the authority to sign for the Joint Entities; number 6, for breaching the provision of the settlement agreement that he would execute the documents necessary to perfect Kurtin's security interests in Elieff's share of the Joint Entities; and number 7, for breaching the provision of the settlement agreement not to take distributions which prevented the Joint Entities from paying the balance of the buyout amount.

The jury, however, came back with an anomalous result. On the one hand, it found Elieff liable for breaching the warranty of authority under both sections 2342 and 2343, and in each case determined the amount of damage ***463** to be ****580** $24,411,433.86, which was the exact amount the arbitrator had determined was owing on the unpaid balance. The jury further determined that Elieff had breached the provision requiring him to provide Kurtin with perfected security interests in Elieff's interests in the Joint Entities. And it likewise determined that Elieff had breached the provision precluding him from taking distributions that prevented the Joint Entities from paying off the balance of the $48.8 million. And, again, in each case the jury assessed Kurtin's damages at exactly $24,411,433.86.

But on the other hand the jury exonerated Elieff on both the intentional and negligent misrepresentation causes of action. It specifically found, in answering the special verdict form, that Elieff did not know his representation that he had authority to obligate the Joint Entities was false when he made it. And it specifically found that Elieff did not make the representation recklessly and without regard for its truth. Further, the jury concluded that Elieff did not lack reasonable grounds to believe his representation was true when he made it. Likewise, the jury found, in answering the special verdict form in regard to liability under section 2343, that Elieff did *not* "lack a good faith belief" in his authority to sign on behalf of the Joint Entities.

But then again, the jury found liability under section 2343 because Elieff had committed an act "wrongful in its nature" when he signed on behalf of the Joint Entities. As we discuss in more detail below, Kurtin's counsel had argued to the jury that the precise acts committed by Elieff that were "wrongful in their nature" were the alleged intentional and negligent misrepresentations, and yet the jury absolved Elieff of both intentional and negligent misrepresentation.

c. Judgment, posttrial motions and appeal

Judgment was filed May 17, 2010, decreeing that Kurtin recover $24,411,433.86 from Elieff. Within 12 days Elieff gave notice of his intent to move for new trial. The notice was supported by four juror declarations all stating that the jury "solely" looked at the $24,411,433.86 from the arbitration decision, and (as stated in each of the four declarations) did not discuss or "look at any other evidence to determine damages." The new trial motion focused on the anomaly of liability under section 2343 in light of the jury's exoneration of Elieff on the intentional and negligent misrepresentation claims. The motion further pointed out that even Kurtin's own counsel had not asked the jury for damages in excess of $8 million on the violation of the no-distribution clause. Elieff also filed a motion for judgment notwithstanding the verdict (JNOV).

The trial judge denied the motion for JNOV, but granted the new trial motion as to damages only. The judge reasoned that the evidence would not ***464** support a $24,411,433.86 verdict on any of the four causes of action on which Kurtin had prevailed. The court noted that the $24,411,433.86 figure "exceeded the total amount of all" distributions from the Joint Entities, and even exceeded "Kurtin's argued-for damages of $7,852,222.22." The judge in particular rejected Kurtin's argument that the $24,411,433.86 might be justified under section 2343 on the theory that Elieff's " 'wrongful acts' " subjected him to the "full liability of his principal." She ruled that damages under section 2343 were governed by section 3318, and under section 3318, Elieff could only be liable for what Kurtin could have "recovered and collected" from the Joint Entities.

Elieff filed a timely notice of appeal, challenging the judgment, the order denying ****581** the JNOV motion, and the order granting in part and denying in part his

motion for new trial. Kurtin countered with a notice of cross-appeal, also challenging the order granting in part and denying in part the new trial motion.

DISCUSSION

1. The Effect of the Arbitration

Elieff contends that the arbitration decision precludes the subsequent civil court judgment (either by way of res judicata or collateral estoppel, or both). Because the arbitration issue most clearly brings the various textual provisions of the settlement agreement into sharp relief, we now set them forth:

a. Relevant terms of the settlement agreement

A number of particular features of the settlement agreement are relevant. First, the recitations at the beginning purport to treat Elieff and the Joint Entities as one collective entity. ("This Settlement Agreement is entered into ... between Todd Kurtin ... and Bruce Elieff, the Elieff Separate Entities identified in Exhibit 'A' and the Joint Projects identified in Exhibit 'B' on the other hand (collectively 'Elieff').")

Second, the text of the agreement is clear that Elieff personally was only responsible for the initial $21 million installment payment, and not for the balance contemplated to come from the Joint Entities. The point is made in three separate instances. Paragraph 2 directly says it: "Elieff and each of the Joint Entities are jointly and severally liable for making the first Settlement Payment in the amount of $21,000,000. The Joint Entities are liable for making the remainder of the Settlement Payments." Paragraph 3 strongly implies it, both by (a) defining default in terms of the particular "Elieff Party obligated to pay" (thus excluding Elieff parties, like Elieff himself, *not* ***465** obligated to pay) and also by (b) specifically separating Kurtin's remedy for failure to pay the first installment from failure to pay the other installments.

Third, the text of the settlement agreement contemplates that the assets of the Joint Entities would secure the obligations of the Joint Entities under the agreement. It does so in paragraph 14 by both requiring Elieff personally to "execute customary documents necessary to perfect" a security interest to be held by Kurtin and by preventing Elieff from taking distributions which impair that security. Rather than attempting to paraphrase the remainder of that paragraph, we now quote it in full: "Payment to Kurtin of the Settlement Payments shall be secured by the interest of Elieff and the Joint Entities in the projects owned by the Joint Entities. Elieff and the Joint Entities shall execute customary documents necessary to perfect this security interest, including UCC–1 filings, provided however that Kurtin shall, within ten (10) business days of written notice execute those consents and/or subordination agreements necessary for Elieff to refinance the Pacific Point project. Elieff shall not take any distribution from any of the Joint Entities if such distribution prevents satisfaction of payment of the Settlement Payments."

Fourth, paragraph 15 of the settlement agreement contains an arbitration clause. The arbitration clause reads: "The Parties believe that all of the material terms of their agreement are set forth herein. It is the intent of the parties that this Settlement Agreement shall be final and binding and that this Settlement Agreement shall be enforceable under C.C.P. Section 664.6. In the event that any Party claims that one or more material terms have been ****582** omitted from this Settlement Agreement, or that the Parties failed to reach an agreement as to one or more material terms, or that any other defect exists with respect to this Settlement Agreement that would make it unenforceable, the Parties agree to final and binding arbitration before Tony Piazza or, if Mr. Piazza is unable, before a mutually agreeable arbitrator. At such arbitration, the arbitrator shall imply a reasonable term that the arbitrator finds consistent with the purpose and intent of this Settlement Agreement or otherwise cure any defect in the Settlement Agreement by amending its terms. The sole act of the arbitrator shall be to issue an amendment to this Settlement Agreement implying such additional terms, curing any ambiguity or otherwise curing any defect in this Settlement Agreement that would make this Settlement Agreement unenforceable. The Settlement Agreement, together with any amendment issued by the arbitrator, shall be enforceable under C.C.P. Section 664.6."

Finally, in paragraph 17, the agreement contains an integration clause: "This agreement contains the entire and only understanding between the Parties pertaining to the subject matter contained in it and supersedes any and ***466** all prior and/or contemporaneous oral or written negotiations, agreements, representations and understandings. This agreement shall be governed by California law."

b. The arbitration award

Despite the "sole act" language in the settlement agreement, at the arbitration Kurtin sought a direct award for the balance due. His arbitration brief asserted:

"Therefore, the arbitration award here should include an award against Elieff personally for the principal balance owing under the Settlement Agreement which, as explained below, is now $22,934,809.16 plus interest, attorney's fees and costs in an amount according to proof at the hearing."

What Kurtin received, however, was in substance simply an amendment to the terms of the settlement agreement. The arbitrator decreed that any recovery against Elieff would be restricted to *Elieff's own* interests in the Joint Entities, as distinct from the total assets of the Joint Entities themselves: "If payment of $24,411,433.86 is not made to Todd Kurtin by June 30, 2007, then Kurtin shall have the right to require Bruce Elieff to transfer to Kurtin or his designee by July 10, 2007, any and all of Elieff's right, title and interest—held directly or indirectly—in and to any or all of the Joint Entities listed on 'Exhibit B' to the Settlement Agreement of August 5, 2005 and Elieff shall promptly execute all documents necessary to effectuate such transfer."

The narrowness of the arbitrator's decision (it would be a misnomer to call it an "award," though the arbitrator himself referred to it as that) was emphasized by a statement which soon followed the sentence quoted above, the essence of which was that Kurtin could still assert further rights under the settlement agreement: "Exercise of this right [to require Elieff to give security in his own interests in the Joint Entities] shall not, of itself, extinguish Kurtin's rights to payment under the Settlement Agreement, but shall only reduce the amount due under the Settlement Agreement by the fair market value of any Elief [*sic*] right, title or interest transferred to Kurtin."

The second paragraph of the award then bolstered the right of Kurtin to recover from *Elieff's own interests in* the Joint Entities by prohibiting Elieff from encumbering those interests until Kurtin was "paid in full." It also provided that Elieff would hold "in constructive trust for Kurtin ****583** anything he received from said Joint Entities from this date [June 11, 2007] forward."

The next two, one-sentence paragraphs, suggested that there was no winner in the arbitration: Paragraph one read: "No attorney fees or costs are awarded." Paragraph two read: "This award is not intended to preclude any other remedy that Kurtin may have at law, or in equity."

***467** The final paragraph of the award referred back to the arbitration paragraph of the original agreement. It self-consciously recognized that arbitration decision was, in fact, amending the terms of the original settlement agreement: "This award shall also constitute an amendment to the Settlement Agreement of August 15, 2005, pursuant to Paragraph 15 of that Agreement, and shall be enforceable under C.C.P. Section 664.6, as well as enforceable as an arbitration award."

c. Discussion

[1]Elieff argues the arbitration decision, as the result of a prior proceeding, necessarily precluded further litigation of his liability on the unpaid balance under the settlement agreement in this civil action as a matter of res judicata. As summarized by our Supreme Court in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797, 108 Cal.Rptr.3d 806, 230 P.3d 342, the doctrine of res judicata requires that the cause of action in the prior proceeding be the same as in the present cause of action, the prior proceeding result in a final judgment on the merits, and the parties be the same as in the prior proceeding. (Or in privity with parties in the prior proceeding). If applicable, the doctrine "not only precludes the relitigation of issues that were actually litigated, but also precludes the litigation of issues that could have been litigated in the prior proceeding." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557, 131 Cal.Rptr.3d 382.)

Elieff emphasizes the "could have been" aspect of the res judicata doctrine. He argues that Kurtin asserted his "primary right" to be made whole in the arbitration proceeding, which is the same primary right he subsequently asserted in this civil case, and therefore must be satisfied with the decision the arbitrator handed down.

[2] [3]The flaw in Elieff's logic is that he confuses what Kurtin *asked for* in the arbitration with the arbitrator's power to *give it* in light of the scope of the arbitrator's powers to which the parties had agreed. It is well established that the scope of an arbitrator's powers are fixed by the agreement to arbitrate. (E.g., *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8, 10 Cal.Rptr.2d 183, 832 P.2d 899 [the " ' " 'powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission' " ' "]; *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 528, 125 Cal.Rptr.3d 83 ["An arbitrator's powers 'derive from, and are limited by, the agreement to arbitrate.' "].)

Here, the settlement agreement conferred only limited powers on the arbitrator. There is no provision giving the arbitrator power to make an award ***468** against any party for money. The arbitrator's powers are limited to interpreting the settlement agreement and, at the most,

amending it to insert intended but inadvertently omitted material terms.

And the arbitrator did just that. He interpreted and amended the agreement to insert terms which had been understood by the parties, but did not find their way into the final text. Thus, to the degree that the agreement was initially ambiguous as to Kurtin's right to security involving *all* the assets of each Joint Entity, the ****584** arbitrator cleared up that ambiguity by limiting Kurtin's right to security to just *Elieff's interests in* each Joint Entity.

The "primary right," then, that was adjudicated in the arbitration was not Kurtin's "right to be made whole," but Kurtin's right, under the agreement, to have the mediator who midwifed the settlement agreement interpret, and if necessary amend, the agreement. This case thus presents the opposite of the usual could-have-been-decided situation in res judicata analysis, where a litigant seeks to litigate in a second proceeding what could have been litigated in the first place. Here, a litigant sought to litigate more in the first proceeding than he could have possibly obtained from it.

Elieff's argument that *O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 308 P.2d 9 (*O'Malley*), *University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 954, 191 Cal.Rptr. 346 (*University of San Francisco*), *Felner v. Meritplan Ins. Co.* (1970) 6 Cal.App.3d 540, 544, 86 Cal.Rptr. 178 (*Felner*), and *Crofoot v. Blair Holdings Corp.* (1953) 119 Cal.App.2d 156, 186–187, 260 P.2d 156 (*Crofoot*) compel a contrary result is unpersuasive. All these cases are distinguishable.

O'Malley and *University of San Francisco* both involved *second agreements* to specifically submit disputes to arbitrators which clearly encompassed the scope of what was later challenged in court. (See *O'Malley, supra,* 48 Cal.2d at p. 108, 308 P.2d 9 [submission agreement made after initial collective bargaining agreement specifically included question of arbitrability by arbitrators] & p. 110, 308 P.2d 9 [holding employer bound by terms of its submission agreement]; *University of San Francisco, supra,* 142 Cal.App.3d at pp. 945, 953–954, 191 Cal.Rptr. 346 [noting that "additional agreement" plus "discussion at the hearing" showed that supplemental pension provisions "were properly a subject of arbitration," plus "the parties stipulated" that the arbitrator had the power to decide issue of his own "jurisdiction' "].)

Crofoot involved an agreement to arbitrate after a "plethora" of litigation which, by its terms, included issues of law as well as fact. The court rejected, as a matter of textual interpretation of the agreement to arbitrate, one party's ***469** argument that the terms of the agreement "necessarily" excluded issues of law. (*Crofoot, supra,* 119 Cal.App.2d at pp. 164, 186, 260 P.2d 156.) Likewise, in *Felner,* the *text* of the agreement to arbitrate –there an uninsured motorist provision in an insurance policy—was held "broad enough" and "sufficiently comprehensive" to include a dispute over whether an uninsured motorist actually came into "physical contact" with the insured. (*Felner, supra,* 6 Cal.App.3d at pp. 543–544, 86 Cal.Rptr. 178.)

In the case before us, unlike *O'Malley* and *University of San Francisco,* there was no second agreement specifically to arbitrate which encompassed the arbitrability of some issue which might have been outside some initial agreement. And unlike *Crofoot* and *Felner,* the actual text of this arbitration agreement—here, the settlement agreement *itself*—will not support the resolution by the arbitrator of the question of damages. We need only note additionally that while Kurtin may have sought more from the arbitrator than the arbitrator had the power to give, Elieff vigorously opposed Kurtin's attempt, and Elieff was successful in that opposition.

2. The Mediation Privilege

[4]What we have just said about the nature of the settlement agreement bears on Elieff's main argument against the judgment, namely that Kurtin's invocation ****585** of the mediation privilege denied Elieff a fair trial. Elieff's argument goes like this: Various terms of the settlement agreement were ambiguous, particularly the clauses requiring Elieff to execute "customary" security documents. Typically, in contract litigation, extrinsic evidence is allowed so that the trier of fact may resolve the issue of what the parties intended when they used ambiguous terms in a contract. (E.g., *Duncan v. The McCaffrey Group, Inc.* (2011) 200 Cal.App.4th 346, 381, 133 Cal.Rptr.3d 280, overruled on another point in *Riverisland Cold Storage v. Fresno–Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1176, 1182, 151 Cal.Rptr.3d 93, 291 P.3d 316 ["extrinsic evidence can be admitted to explain the ambiguity in the contract"].) But here, by asserting the "mediation privilege" (see Evid.Code, § 1119), Kurtin effectively prevented the trier of fact from hearing evidence from the mediation bearing on any ambiguities in the settlement agreement. Therefore, just as an attorney sued by a former client for malpractice must be allowed to use otherwise confidential information received from that client (cf. *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385, 99 Cal.Rptr.2d 622), Kurtin's

decision to hold firm to the mediation privilege means Elieff did not get a fair trial. Elieff should either have been allowed to present evidence otherwise precluded by the mediation privilege to defend himself or Kurtin should have been required to drop his claims. (See *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 107 Cal.Rptr.2d 456 [client's invocation of attorney-client ***470** privilege vis-à -vis attorneys sued for malpractice required dismissal of malpractice action against them].)

There are two flaws in the argument: One, Elieff already had a chance to clear up ambiguities in the settlement agreement before trial *in arbitration.* In fact, he actually used the arbitration process to clear up, in his favor, at least one ambiguity. (Here the parties acknowledge that the initial out-of-court proceeding was a mediation. The later proceeding which resulted in clarification of the settlement agreement is referred to by the parties as an arbitration. Mediation and arbitration are two different things, as Evidence Code section 1119, subdivision (a) makes clear. What went on at the mediation was the subject of the mediation privilege. Further proceedings in arbitration would not be so privileged.)

Two, even if, arguendo, Elieff did not have a chance to clear up ambiguities by way of arbitration prior to going to civil trial, Kurtin still did not forfeit his right to sue Elieff by asserting the mediation privilege. The California Supreme Court has clearly signaled the policy behind the mediation privilege is so strong that California law is willing to countenance the "high price" of the loss of relevant evidence to protect the privilege. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 138, 119 Cal.Rptr.3d 437, 244 P.3d 1080 (conc. opn. of Chin, J.).)

a. Elieff's chance to clear up ambiguities before trial

The first flaw in Elieff's mediation privilege argument is that he ignores the opportunity he had to resolve ambiguities in the settlement agreement by returning to the original mediator in arbitration. Accordingly, Elieff cannot now be heard to complain that he was denied the chance to resolve ambiguities at trial. The arbitration paragraph gave each party the right to go to arbitration in front of the one person most familiar with what the parties achieved at their mediation—the mediator himself—where any ambiguity in its terms might be resolved.

****586** As against such an opportunity, Elieff counters with the argument that the arbitration paragraph (giving the parties the right to return to the arbitrator) really is restricted to situations absolutely necessary to make the settlement agreement enforceable. Outside of those situations, he now argues, the arbitrator did not have the power to interpret ambiguous terms in the settlement agreement.

We cannot agree. The text of the arbitration clause is, on balance, most naturally read to set forth three sets of arbitral powers, with only the last of those three tethered to the idea of some need to avoid making the agreement unenforceable.

***471** We begin by observing the arbitration clause (quoted in full on pages 581–82, infra) consists of six sentences: The first two make the points that the settlement agreement consists of all material terms, and the parties want the agreement to be enforceable, while the sixth sentence specifies the intent that the agreement indeed be enforceable as the settlement of pending litigation under Code of Civil Procedure section 664.6.

It is sentences three and five on which Elieff relies to confine the arbitrator's power to interpret or cure ambiguities only to situations where the cure was absolutely needed to preserve enforceability. For reader convenience, we quote those two sentences again here, and include the intervening sentence four:

[5]"[Sentence 3:] In the event that any Party claims that one or more material terms have been omitted from this Settlement Agreement, or that the Parties failed to reach an agreement as to one or more material terms, or that any other defect exists with respect to this Settlement Agreement that would make it unenforceable, the Parties agree to final and binding arbitration before Tony Piazza or, if Mr. Piazza is unable, before a mutually agreeable arbitrator. [Sentence 4:] At such arbitration, the arbitrator shall imply a reasonable term that the arbitrator finds consistent with the purpose and intent of this Settlement Agreement or otherwise cure any defect in the Settlement Agreement by amending its terms. [Sentence 5:] The sole act of the arbitrator shall be to issue an amendment to this Settlement Agreement implying such additional terms, curing any ambiguity or otherwise curing any defect in this Settlement Agreement that would make this Settlement Agreement unenforceable."

Readers will see that sentences three and five are constructed in two parallel series of three clauses, each clause dealing with, in order: (1) omission of material terms; (2) curing ambiguity or disagreement as to those material terms; and (3) unspecified defects. In each sentence, only the last clause, concerning unspecified defects, is *unambiguously* connected to the idea of remedying unenforceability. Thus, to make the

unenforceability language apply to either of the first two clauses, one must relate back to the first and second clauses the unenforceability language one finds in the third clause. And that of course is how Elieff reads sentences three and five in this appeal.

To be sure, Elieff's argument is consistent with the references to "other defect" in sentence three, and the reference to "otherwise" in sentence five. Those two references can indeed be stretched to suggest a connection between what happens in the third clause and what has gone before in clauses one and two.

[6]All else being equal, however, courts prefer a more natural reading of text to a less natural one, whether that text be found in a statute (e.g., ***472 **587** *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 768, 108 Cal.Rptr.3d 557, 229 P.3d 985; *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 672, 94 Cal.Rptr.3d 685, 208 P.3d 623) or a contract (*Lapp–Gifford Co. v. Muscoy Water Co.* (1913) 166 Cal. 25, 27–28, 134 P. 989 [more natural interpretation of letter to creditor containing check for "final payment" was that it did not refer to payment in full of the disputed debt]; *Dover Village Assn. v. Jennison* (2010) 191 Cal.App.4th 123, 128–129, 119 Cal.Rptr.3d 175 [more natural reading of CC & R's was that sewer pipes were not " 'exclusive use' " items for purposes of repair responsibility].) And of course courts are directed by statute to read contracts as a whole, so, if reasonably practical, no part is deprived of effect. (Civ.Code, § 1641.)

In this case, we conclude Elieff's interpretation of the arbitration provision is not the more natural reading and does not give effect to the whole of the arbitration provision.

First, Elieff's reading is by no means *compelled.* Sentence three's phrase "other defect," and sentence five's use of the word "otherwise" do not *necessarily* require a connection to the first two clauses. Logically, each of the three clauses can be seen as independent of the others, i.e., the arbitrator has three sets of powers: (1) omission of material terms; (2) curing ambiguity or disagreement as to material terms; and (3) curing any unspecified defects which might make the agreement not enforceable. The independence of the three clauses is confirmed when one realizes that, grammatically, in sentence three the third clause is not even necessary to make an intelligible English sentence. Sentence three is written so the first two clauses easily survive even if the third were completely omitted. (Thus: "In the event that any Party claims that one or more material terms have been omitted from this Settlement Agreement, or that the Parties failed to reach an agreement as to one or more material terms, the Parties agree to final and binding arbitration....")

By the same token, sentence five, like sentence three, also can be read logically to set forth three independent clauses, though the gerund-based parallel construction ("implying ... curing ... or otherwise curing") makes it impossible to simply omit the third clause. Even so, the "or" separating the third clause from the other two emphasizes the independence of each clause: Either (1), (2) "or otherwise" (3). In that sequence, whatever is attached to (3) is not necessarily attached to (1) or (2).

Second, Elieff's reading of the arbitration clause tends to reduce sentence four to a meaningless afterthought. Sentence four begins by pegging off sentence three ("[a]t such arbitration") but articulates two powers of the arbitrator without any qualification as to enforceability. To be sure (as shown by sentences one, two ***473** and six), the parties clearly wanted their mediated agreement to be enforceable. But if they wanted to confine the arbitrator's powers *solely* to what was necessary to "save" that enforceability, there was no need to write sentence four. By stating powers in sentence four without any reference to enforceability, an intention is evidenced to give the arbitrator powers to construe the contract without a need to justify their use on a "saving" theory—an intention particularly demonstrated by the structure of the preceding sentence three, where the reference to enforceability (as shown above) is not even grammatically necessary.

Third, and most importantly, the last antecedent rule strongly indicates the arbitrator's powers are not necessarily pinned down by a requirement to only be exercised to "save" the agreement. (See ****588** *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137, 150, 53 Cal.Rptr.3d 786 [applying last antecedent rule, which usually applies to statutes, to contracts as well].)

The last antecedent rule is the common sense presumption that the tail should not wag the dog in sentence construction, i.e., qualifiers apply to words and phrases *immediately* preceding them, as distinct from words and phrases more remote. (See *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) In this regard, we note that if the parties really meant to confine the arbitrator's power to interpret terms or cure ambiguities to *only* situations where it was absolutely necessary to make the agreement enforceable, they could easily been much clearer than appending that limitation to the last of three successive clauses. (Here's one possibility: "In order to make sure this agreement is absolutely enforceable, the

arbitrator shall have the power to (1) insert omitted terms, (2) cure ambiguities, or (3) remedy defects, but the arbitrator's power to so shall be limited only to those situations where it is necessary to make sure the agreement is enforceable; otherwise the arbitrator shall have no power at all.")

Four, a reading of the arbitrator's powers not dependent on a need to "save" the agreement was one Elieff himself used with ease at both the trial and appellate level in other contexts when describing the arbitration clause. At the trial level, in the context of opposing Kurtin's attempt to obtain judgment under section 664.6 of the Code of Civil Procedure, Elieff's trial counsel observed: "The Settlement Agreement provided for final and binding arbitration in front of the person who mediated the settlement, Tony Piazza, if a party claimed that a material term had been omitted or that another defect with the agreement existed." The sentence lacks any qualifier about "only if necessary to save the agreement."

***474** Likewise, at the appellate level, after Kurtin sought writ relief in this court because the trial court refused to grant the Code of Civil Procedure section 664.6 motion, Elieff's counsel quoted with approval Kurtin's counsel's characterization of the arbitration provision that " 'if there's anything in this agreement that prevents the express intent of the parties from being carried out, the arbitrator can fix it basically.' " The context of that quotation, ironically, was *Elieff's* point that *Kurtin* already had a remedy to enforce the agreement in arbitration. And again, nothing was said about enforceability qua enforceability being a prerequisite for resort to the arbitrator.

And finally, in this regard, we also further note that at the arbitration that was actually held, Elieff won an important interpretational victory independent of any need to save the contract—a victory he certainly has not repudiated as beyond the arbitrator's powers. Namely, he established that Kurtin's claims under the agreement only extended to Elieff's own interests in the Joint Entities, as distinct from being directly against the Joint Entities themselves.

In sum, on balance, we conclude the better reading of the text of the arbitration clause is that Elieff could have cleared up any ambiguities he thought necessary to his defense by going back to the mediator prior to trial. Doing so, we note, would also have been consonant with the zealous regard the law affords the mediation privilege, which we now address.

b. California's Zealously Guarded Mediation Privilege

But even if the arbitration clause *is* limited to just clearing up what is minimally necessary to have an enforceable agreement, ****589** Elieff's more basic argument – that Kurtin *forfeited* his claims against Elieff by invoking the mediation privilege (see Evid.Code, §§ 1115–1128 and particularly § 1119)—cannot prevail. The mediation privilege carries with it different dynamics than simple attorney malpractice cases where a party can indeed be required to give up an evidentiary privilege as the price of asserting its claim. (E.g., *Solin, supra,* 89 Cal.App.4th at p. 467, 107 Cal.Rptr.2d 456; *McDermott, Will & Emery v. Superior Court, supra,* 83 Cal.App.4th at p. 385, 99 Cal.Rptr.2d 622 [corporate outside counsel entitled to judgment in shareholder derivative action where counsel could not make use of attorney-client communications].) Elieff's theory concerning mediation simply cannot be squared with what our Supreme Court unanimously both did and said in *Cassel v. Superior Court, supra,* 51 Cal.4th 113, 119 Cal.Rptr.3d 437, 244 P.3d 1080.

In *Cassel,* a plaintiff in a legal malpractice action claimed his attorneys had, in a pretrial mediation, pressured, harassed and otherwise coerced him into accepting a lower price than he wanted for certain licensing rights. The ***475** Supreme Court upheld a trial court order precluding the admission of evidence related *to the mediation,* including the discussions the plaintiff had with his attorneys. (*Cassel, supra,* 51 Cal.4th at pp. 121, 138, 119 Cal.Rptr.3d 437, 244 P.3d 1080.) The high court acknowledged that the exclusions "may indeed hinder the client's ability to prove a legal malpractice claim against the lawyers." (*Id.* at p. 122, 119 Cal.Rptr.3d 437, 244 P.3d 1080) But, as Justice Chin separately wrote to explain why he was "reluctantly" concurring in the judgment, the high court was willing to pay such "a high price ... to preserve total confidentiality in the mediation process." (*Id.* at p. 138, 119 Cal.Rptr.3d 437, 244 P.3d 1080 (conc. opn. of Chin, J.).)

The application of the mediation privilege in *Cassel* meant, under the particular circumstances of that case, the *plaintiff's* ability to present a claim was hindered. Here, Elieff argues that application of the mediation privilege supposedly hindered his ability *as defendant* to defend against a claim. And on that difference—the difference between one's status as a plaintiff or as a defendant—Elieff hangs all attempt to distinguish *Cassel.*

But we cannot see any meaningful difference between plaintiffs and defendants in the mediation privilege situation. In fact, differentiating between them makes no sense. One need only think of the consequence of Elieff's position to understand it was never intended by the

Legislature. Under Elieff's theory, parties to a mediation would know that if they were successful in achieving a mediated settlement in which they were the obligee, they could not enforce the settlement without running the risk of their adversaries claiming terms of the settlement were ambiguous, and forcing either (1) the disclosure of communications made in the course of the mediation or (2) the loss of the very benefit of that mediation, which was the mediated agreement itself. By contrast, obligors would have a natural advantage over obligees. They could put obligees to the Hobson's choice of giving up the benefit of the settlement or allowing the airing of privileged communications. The Legislature obviously never intended such asymmetry.

Due process is an underlying theme of Elieff's argument. Somehow, he says, it was fundamentally unfair that he was sued under a mediated agreement but was not allowed to bring evidence bearing on what the parties discussed concerning the actual terms of that agreement. But the *Cassel* decision itself confronted and rejected the ****590** idea that enforcing the mediation privilege statutes "in strict accordance with their plain terms" deprives a civil litigant of due process. (*Id.* at p. 124, 119 Cal.Rptr.3d 437, 244 P.3d 1080.) Said the court: "We further emphasize that application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. Implicit in our decisions ... is the premise *that the mere loss of* ***476** *evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest.*" (*Cassel, supra,* 51 Cal.4th at p. 135, 119 Cal.Rptr.3d 437, 244 P.3d 1080, italics added.)

Moreover, and significantly, a page after the "mere loss of evidence" statement, the *Cassel* opinion again rejected the notion that somehow due process was implicated by protection of the privilege, but phrased its idea in such a way as to apply to *both* sides of a dispute: "The Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, *even where this protection may sometimes result in the unavailability of valuable civil evidence.*" (*Cassel, supra,* 51 Cal.4th at p. 136, 119 Cal.Rptr.3d 437, 244 P.3d 1080, italics added.)

This court followed *Cassel* in its recent decision in *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 135 Cal.Rptr.3d 591 (*Provost*), where we rejected the claim of a party seeking to disavow a stipulated settlement arrived at through mediation, even though the party claimed coercion from threats of criminal prosecution by the other party if he did not enter into the agreement. (See *id.* at pp. 1302–1304, 135 Cal.Rptr.3d 591.) If evidence of *coercion* in the achievement of a mediated agreement itself was properly excluded by the mediation privilege in *Provost,* how much less compelling is Elieff's contention that Kurtin should forfeit his claim to repayment where the assertion of the privilege entails only an *incidental* loss of evidence from a mediation bearing on allegedly ambiguous contract terms.

Elieff places great reliance on *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 41 Cal.Rptr.3d 119 (*Kieturakis*) for his forfeiture theory, but the case doesn't help him.

Kieturakis is a somewhat complicated case that arose from a mediated divorce settlement which lopsidedly favored the husband, so we must explore it in some detail to show why does not stand for what Elieff claims. In fact, *Kieturakis* is a case which strongly upholds the mediation privilege.

After the mediated divorce settlement in *Kieturakis* the wife attempted to set it aside. Under substantive family law, the question then arose as to whether the husband had exerted undue influence in obtaining the settlement agreement, and, again as a matter of substantive family law, on that issue the husband bore the burden of showing he *did not* exert undue influence. To ascertain whether the husband had indeed exerted undue influence, the trial court *allowed* in evidence from the mediation in the interests of " 'justice' " (*Kieturakis, supra,* 138 Cal.App.4th at p. 75, 41 Cal.Rptr.3d 119)—something which, we now note, would clearly not be correct under *Cassel* or *Provost.* But, having made ***477** that mistake, the trial court concluded the husband had carried his burden of showing an absence of undue influence, so the trial court did not set aside the agreement. In effect, the trial court's finding the husband had indeed carried his burden rendered harmless the earlier error of admitting evidence from the mediation.

****591** Accordingly, the appellate court affirmed the order refusing to set aside the agreement. However, in affirming, it took the opportunity to explain that because the settlement was the product of mediation, the trial court had still erred in determining the husband bore the burden of proof. (*Kieturakis, supra,* 138 Cal.App.4th at p. 85, 41 Cal.Rptr.3d 119.) To apply a presumption of undue influence from a lopsided agreement arising out of mediation would undermine the Legislature's preference for mediation. (*Id.* at pp. 85–87, 41 Cal.Rptr.3d 119.)

It was in the process of recognizing that there was indeed a cost to be paid for the *Legislature's* value judgment

placing a higher value on mediation than on the substantive family statutes involving possible undue influence, that the *Kieturakis* court made a comment which Elieff now asserts requires dismissal of Kurtin's claims. "However, if there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in the mediation." (*Kieturakis, supra,* 138 Cal.App.4th at p. 87, 41 Cal.Rptr.3d 119.)

We are not persuaded by Elieff's argument connecting (a) the observation made by the *Kieturakis* court and (b) the idea Kurtin was put to a forced choice of giving up the mediation privilege or dropping his claims. Elieff's argument is a non sequitur. It does not follow from (a) *Kieturakis'* proposition that a party to a mediated agreement who later wants to *get out from under the terms of that agreement* cannot use evidence from the mediation to achieve her purpose if the other party asserts the mediation privilege to Elieff's proposition that (b) a *party seeking to enforce a mediated agreement* cannot do so without simultaneously losing the right to assert the mediation privilege.

Kieturakis' observation was, *in context,* a simple recognition that a party, such as the wife in the case before it, who seeks to *set aside* an agreement resulting from a mediation, will have a "price" to pay in being unable to use what happened at the mediation to challenge the agreement. And under *Cassel,* that recognition is fairly unremarkable. Indeed, as applied to the case before us, the observation only strengthens our conclusion that the mediation privilege statutes mean that it was *Elieff,* not Kurtin, who was required to pay the "price" of the Legislature's policy in favor of mediation confidentiality. The whole point of the passage in *Kieturakis* was that the mediation statutes reflect such a strong legislative policy that it even allows "unfair agreements ***478** to stand." (*Kieturakis, supra,* 138 Cal.App.4th at p. 87, 41 Cal.Rptr.3d 119.) As with *Provost,* if the Legislature is willing to allow even unfair mediated agreements to stand as a result of mediation confidentiality, it certainly is willing to stomach whatever incidental unfairness might result from a party's inability to use mediation evidence to explain allegedly ambiguous terms within a mediated agreement.

In sum, Kurtin did not lose this case by asserting a mediation privilege which the Legislature has chosen to zealously protect.

3. The "Accounting" and Damages

[7]Elieff argues that cause of action number 7 (for violation of the "distribution" clause in paragraph 14) is precluded from any retrial because the "accounting" which Kurtin received established that Elieff took no "profits" and spent funds only for authorized purposes. As Elieff's trial attorney said after the trial judge delivered her decision in the phase 1 trial from the bench, "I want to address the issue of ****592** whether there's anything left to submit to a jury on the seventh cause of action."

The argument overstates what happened in the trial court. There was indeed much left after the phase 1 trial. The trial judge did not rule that Elieff took no "distributions." She ruled, rather, that money which was used by Elieff to maximize the "good of the whole" would not be covered by the distribution clause.

Only one of the five destinations of the outflows identified by the trial court, payments to Kurtin, is unequivocally not a "distribution" taken by Elieff to "prevent" repayment of the unpaid balance. (That distribution was the $1.8 million that was itself a payment to Kurtin.) A reasonable jury might readily conclude that outflows within the other four categories (management services, management expenses, management costs, return of capital) both (a) did not benefit the Joint Entities as a whole and (b) prevented repayment of the unpaid balance. And the ultimate categorization of the various outflows was left to the jury. The trial judge granted a new trial on damages because the numbers of available outflows did not add up to the $24.4 million which the jury awarded on the seventh cause of action.

Put another way, the "gist" or "essence" of Kurtin's seventh cause of action was *not* one in equity. (Cf. *De Guere v. Universal City Studios* (1997) 56 Cal.App.4th 482, 507–508, 65 Cal.Rptr.2d 438 [explaining when parties are, or are not, entitled to jury trial in context of contract actions involving accountings].) Tracing the various outflows from discrete Joint Entities was only ancillary to the true gravamen of that cause of action, focused as it was ***479** on whether various outflows came within the category of distributions that prevented repayment. A reasonable jury might very well find that much mischief might be done under the cover of management services, expenses, and costs. Even capital that was "returned" to Elieff might, if not otherwise linked to the "good of the whole," and if that return had the effect of preventing repayment, constitute an improper "distribution" under the distribution clause. With the exception of the "good of the whole" qualifier appended to the definition of distribution by the trial judge, the whole tenor of the settlement agreement was that Kurtin would be paid off

the top from any money available for outflows from any of the Joint Entities, even if it meant that Elieff might go out of pocket.

[8]By the same token, we must reject Elieff's argument that Kurtin did not prove any damages. While a requirement of actual collectability from the Joint Entities puts a limit on Elieff's liability under section 2342 and under section 2343 per section 3318 (see discussion below in part 5 of this opinion), Kurtin had no need to establish collectability under his cause of action for violation of either the "distribution," or security-document clauses of paragraph 14. And phase 1 showed that of $22.4 million in outflows from Joint Entities identified in the phase 1 trial, only $1.8 million was shown to have been paid to Kurtin. That leaves about $20 million in distributions for which Elieff might (at least in theory) be personally liable under the distribution and security clauses of the settlement agreement alone.

4. Inconsistent Verdicts Regarding Section 2343

Kurtin's cause of action number 3 for violation of section 2343 presents the problem of inconsistent jury verdicts. The text of section 2343 plainly requires either the absence of a good faith belief on the part of the agent that he or she "has authority" to enter into the contract on behalf of a principal, or acts "wrongful in their nature." Here is the text of section 2343: " ****593** One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: [¶] 1. When, with his consent, credit is given to him personally in a transaction; [¶] 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, [¶] 3. When his acts are wrongful in their nature."

The problem is the jury found that that Elieff *did* have a good faith belief he could obligate the Joint Entities, and the only "wrongful" acts which the jury were asked to impute to Elieff were negligent or intentional misrepresentation, and the jury refused to find he engaged in either of those wrongful acts. ***480** Compounding the problem was Kurtin's own argument to the jury at the end of trial. That argument specifically linked Kurtin's claim of wrongful acts to the intentional misrepresentation claim. Kurtin's counsel rhetorically asked the jury, "Did Bruce Elieff commit an act that was wrongful in its nature when he signed the settlement agreement on behalf of any of" the Joint Entities, then answered his own question by referring to his intentional misrepresentation cause of action, emphasizing that Elieff had committed fraud: "Now, I'm going to defer on this question because in a minute we're going to come to a verdict form on what's called intentional misrepresentation."

[9]Kurtin posits that any "wrongful" act that might be derived from the facts generally before the jury will satisfy section 2343, regardless of whether the jury specifically found that Elieff actually committed it. In particular, Kurtin suggests that a "wrongful" act can be extracted from facts showing breach of a partnership duty. The argument, however, rests on an incorrect interpretation of section 2343.

[10]Case law explicating section 2343 shows that the "acts are wrongful in their nature" clause arises in juxtaposition to the normal rule that agents are not liable for the torts or breaches of contract of their principals. (See *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 255, 84 Cal.Rptr.2d 799 [independent insurance adjuster retained by insurer to adjust loss not directly liable in tort for negligent claims handling].) The "wrongful in their nature" clause codifies a corollary rule that agents *are* responsible for their *own* independent torts and breaches of contract in connection with "acts in the course of their agency." (See *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68–85, 131 Cal.Rptr.2d 777 (*Shafer*) [attorney of insurance company providing coverage for defendant liable for own fraud in misrepresenting defendant's coverage to third party claimants]; *Bayuk v. Edson* (1965) 236 Cal.App.2d 309, 319–320, 46 Cal.Rptr. 49 (*Bayuk*) [rejecting agent's argument he could not be liable on theory "he was acting for a disclosed principal," because he "personally agreed" to supervise construction of house and was negligent in doing so].)

Here, however, the jury never determined that Elieff committed any wrongful act in the *course* of signing on behalf of the Joint Entities. To be sure, he breached his own personal obligations not to take distributions which prevented repayment and to provide documents to secure his own interests in the Joint Entities, but those were not "acts in the course" of an assumed agency. The jury specifically found, in regard to his signing, that he had a good faith belief in his authority, and made no misrepresentation, intentional or negligent. Because of these inconsistent verdicts, we cannot say that the ***481** jury impliedly found a tort or a breach of contract ****594** "in the course" of an agency where they had not been asked to find one.

The trial court itself rejected Elieff's motion for a new trial as to liability under section 2343 by concluding that the evidence showed wrongful conduct in the lack of an intention to ever "expose" the Joint Entities to liability

and by "act[ing] to impair" their ability to perform. The problem with the former rationale is that the jury rejected all findings of fraud or misrepresentation on Elieff's part. The problem with the latter rationale is that Elieff's obligation under the distribution clause not to impair the Joint Entities' ability to perform was a personal obligation (liability for which remains undisturbed by our decision today), not an act "in the course" of his assumed agency.

[11]The law is clear that the proper remedy for inconsistent verdicts is "not to grant judgment as a matter of law in favor of one of the parties, but rather, to order a new trial." (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 376, 84 Cal.Rptr.3d 111; *Shaw, supra,* 83 Cal.App.4th at p. 1344, 100 Cal.Rptr.2d 446; e.g., *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 704, 99 Cal.Rptr.3d 418 ["Because the jury rendered inconsistent verdicts, we will reverse and remand for a new trial."].) We have power to modify the new trial order on appeal to have it include a new trial on the issue of liability under section 2343 as well as damages (Code Civ. Proc., § 906), and do so now.

5. Kurtin's Cross–Appeal

a. The Relationship Between Section 2343 and Section 3318

i. no effect on new trial order

The trial court's formal order on motion for new trial agreed with Elieff's contention that the measure of damages for the violation of section 2343 is found in section 3318. In particular, the trial judge cited the language from section 3318 that the measure of damages is what "could have been recovered and collected from [the agent's] principal if the warranty had been complied with" as governing in the new trial to come. Accordingly, the judge ruled that "even as" to the cause of action for violation of section 2343, "Kurtin [would be] required to prove actual damages." The judge "left for another day" the question of how " 'recovered and collected' " should be interpreted and "what degree of certainty" would meet "that standard."

In his cross-appeal, Kurtin now argues that the trial judge's ruling that section 3318 governs his section 2343 claim was incorrect. His main concern ***482** is the "recovered and collected" clause of the statute. Given that the total value of the Joint Entities is apparently not enough to pay off the unpaid balance of the $48.4 million buyout price (much less Elieff's personal *interests in* those entities), Kurtin argues that section 3318 does not establish the relevant measure of damages. Kurtin argues for an interpretation of section 2343 that would make Elieff personally liable for the unpaid balance exceeding more than $20 million without regard to section 3318 's "recovered and collected" language.

[12]Preliminarily, we reject Kurtin's argument that any error by the trial court on the issue of the applicability of section 3318 to section 2343 requires reversal of the order granting a new trial. As we have just shown in the preceding part of this opinion, given the inconsistent jury verdicts in this case, even the question of Elieff's liability under section 2343 must be considered anew by the trier of fact. Moreover, the trial judge identified several other reasons to order a new trial besides the inconsistent verdicts. These included: the failure of the amount of damages assessed ****595** to add up to the distributions at issue, the fact that the jury's award "exceeded even Kurtin's argued for" damages of about $7.8 million, and the lack of more detailed evidence in phase 2 of the trial by which the jury might be able to evaluate the "two dozen cash transactions" which the trial court itself had considered in phase 1. Even if, for sake of argument, the trial judge's announced opinion on the applicability of section 3318 to section 2343 were incorrect, under an abuse of discretion standard we can hardly say that the trial judge was unreasonable in determining to re-try the whole issue of damages.

[13]However, because the question of the proper measure of damages under section 2343 has been fully briefed on appeal and the new trial order is being affirmed, we address the question of the applicability of section 3318 to section 2343 for the benefit of the trial court on remand. (Code Civ. Proc., § 43.) The question is a matter of first impression in California.

As we now show, the trial judge was correct. Section 3318 does indeed limit the damages recoverable under section 2343.

ii. text of sections 2342, 2343 and 3318

For reader convenience we now set out the complete verbatim text of the three statutes at issue, including repeating the text of section 3318 recited in the previous part of this opinion.

***483** Section 2342 provides: "One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes."

Section 2343 provides: "One who assumes to act as an agent is responsible to third persons as a principal for his

acts in the course of his agency, in any of the following cases, and in no others: [¶] 1. When, with his consent, credit is given to him personally in a transaction; [¶] 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, [¶] 3. When his acts are wrongful in their nature."

Section 3318 provides: "The detriment caused by the breach of a warranty of an agent's authority, is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against his principal."

iii. analysis of text

The opening line of section 3318 sets forth a clear measure of damages for breach of an agent's warranty of authority, and makes no differentiation as to whether that breach is in good faith (section 2342) or lacks good faith (section 2343, subdivision (2)). Damages against the agent are limited by what could be "recovered and collected" from the agent's purported principal.

Any argument that section 3318 does not apply to section 2343 necessarily rests on two premises: (1) section 2343 contains its own, competing, measure of damages in the form of section 2343 's "responsible ... as a principal clause" and (2) the competing measure of damages clause set forth in section 2343 must prevail over the alternative in section 3318. That is, for section 3318 to *not* apply to section 2343, the "responsible ... as a principal" clause of section 2343 must necessarily trump the "detriment ... is deemed to be" clause of section 3318.

[14]Courts, of course, must prefer statutory interpretations which harmonize and reconcile potentially conflicting statutory ****596** meanings. (E.g., *Voices of the Wetlands v. State Water Resources* (2011) 52 Cal.4th 499, 519, 128 Cal.Rptr.3d 658, 257 P.3d 81; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778–779, 38 Cal.Rptr.2d 699, 889 P.2d 1019.) In the present case, the two potentially competing clauses ("responsible ... as a principal" and "detriment ... is deemed to be") may be harmonized by reading section 2343 's "responsible ... as a principal" language to set forth the *fact* of liability (i.e., if a purported agent does X, Y, or Z, he or she shall be liable as ***484** a principal) while section 3318 sets forth the precise *amount* of liability (i.e., if there is liability for doing Y, then here is the way the detriment is calculated). Three reasons impel our conclusion.

[15]First, the very structure of the Civil Code suggests that very harmonization. Chapter and section headings may be considered in ascertaining legislative intent and are entitled to "considerable weight." (*People v. Hull* (1991) 1 Cal.4th 266, 272, 2 Cal.Rptr.2d 526, 820 P.2d 1036; *Howard Jarvis Taxpayers Association v. County of Orange* (2003) 110 Cal.App.4th 1375, 1385, 2 Cal.Rptr.3d 514.) Sections 2342 and 2343 are contained within article 4 (obligations between principals and third persons) which is a subdivision of title 9 (dealing generally with agency) which is within part 4 (obligations arising from particular transactions) of division 3 (generally dealing with obligations) of the Civil Code. On the other hand, the general subject of relief, including damages, is within part 1 of division 4 (general provisions). Section 3318 is found in article 1 (damages for breach of contract), which is within chapter 2 (measure of damages) which is within title 2 (compensatory relief), which is within division 4 (dealing with general provisions). One can, from this pattern, divine the general structure of the Civil Code on the subject of breaches of an agent's warranty of authority: Spell out the obligation in division 3. Set forth the remedy in division 4.

Second, textually, we are required to give effect to section 2343 's "in the course of his agency" clause" as well as its "responsible ... as a principal" clause. When the statutory clauses are read together ("responsible ... as a principal in the course of his agency") it is evident that the statute was intended to refer to the *particular* transaction in which the agent "assumed" to act for another. The statute was not intended to assign a liability to the purported agent beyond what was inherent in that particular transaction, i.e., beyond the course of his agency. We note that Kurtin's proposed interpretation of section 2343 not only ignores the plain language of section 3318, but confers on Kurtin a windfall beyond the course of Elieff's purported agency, i.e., beyond the original expectations of the parties.

The point may be illustrated by examining the original intentions of the parties as the transaction was supposed to occur. Assume, for sake of argument, that Elieff really *did* have authority to bind the Joint Entities, that Elieff delivered all the security documents he was required to deliver, and that he took no distributions of any kind (e.g., forewent management fees otherwise legitimately owed to his companies) from any of the Joint Entities. But further assume (as appears indeed to have occurred in this case) that *despite* Elieff's foregoing any distributions from the Joint Entities, the real ***485** estate recession put them all into insolvency. In such a case,

there would be no question that Kurtin would be limited to what he could "recover and collect" from any of the Joint Entities, even if he had to go to bankruptcy court for that recovery. Section 3318 sets forth a measure of damages that indeed reflects the ****597** benefit of the bargain, *together with the commercial risks inherent in that bargain,* which Kurtin actually made.

[16]The third reason is that to the degree that section 2343 's "responsible ... as a principal" clause does indeed conflict with section 3318 's "detriment is deemed to be" clause, section 3318 must prevail as the more specific. (See Code Civ. Proc. § 1859 ["a particular intent will control over a general one that is inconsistent with it"]; e.g., *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577, 7 Cal.Rptr.2d 245, 828 P.2d 147 [" 'It is well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former.' "].) The precise "responsibility" or liability of a principal in any given context may vary, depending on the circumstances. For example, in criminal law, aiders and abettors are "liable as a principal" for the crime, but the exact extent of their liability is fixed by more specific penalty statutes. Here, section 3318 fixes a clear measure of damages for breaches of an agent's warranty of authority. By contrast one can puzzle all day over the degree to which "responsible ... as a principal" implies a measure of damages, if it does at all.

To the degree that case law has addressed the question of whether section 3318 applies to section 2343, the answer is yes. (See *Borton v. Barnes* (1920) 48 Cal.App. 589, 192 P. 307 (*Borton*).) *Borton,* in fact, contains a plain statement that section 3318 provides the measure of damages in a section 2343 situation where the agent lacks a good faith belief in his authority. (*Borton, supra,* 48 Cal.App. at pp. 591–592, 192 P. 307; cf. *Nichols Grain & Milling Co. v. Jersey Farm Dairy Co.* (1933) 134 Cal.App. 126, 130, 24 P.2d 925 [following *Borton* but not mentioning section 3318].) The brief reference to section 2343 in *Jeppi v. Brockman Holding Co.* (1949) 34 Cal.2d 11, 18–19, 206 P.2d 847 [observing that difference between section 2342 and section 2343 is that under section 2342 the agent is simply "held to account on a theory of breach of the implied warranty of authority" while under section 2343 the agent is held liable "as a principal"] merely notes the general difference between section 2342 and section 2343.

The question of section 2342 remains. There is a clear overlap between section 2342 [all breaches of an agent's warranty of authority] and section 2343, subdivision (2) [lack-of-good-faith breaches of an agent's warranty of authority]. We may observe that *all* liability for lack-of-good-faith breach of a ***486** purported agent's warranty of authority under section 2343 necessarily includes a breach of the purported agent's warranty of authority under section 2342 as well. (See *Borton, supra,* 48 Cal.App. at p. 591, 192 P. 307 [treating section 2342 and section 2343 together].)

From this overlap, the question arises as to what the practical difference between section 2342 and section 2343, subdivision (2) might be. One might postulate, simply to avoid a construction that avoids surplusage, that section 2342 and section 2343, subdivision (2) must have two different measures of damages, not just one as the language of section 3318 would lead one to believe, and, further, that the "as a principal" clause in section 2343 provides that different measure.

It does not, however, follow that section 2342 and section 2343 must have different measures of damages. Much of the time, in fact, the result under either statute will be exactly the same, as shown in the two cases that remain the leading case authorities on the interaction between the two statutes and section 3318, namely, *Borton, supra,* 48 Cal.App. 589, 192 P. 307, and ****598** *Kohlberg v. Havens* (1919) 41 Cal.App. 222, 182 P. 467 (*Kohlberg*). *Kohlberg* was the first case to find liability under section 2342. *Borton* was the first case to find liability under section 2343. In each case, the plaintiff received from the purported agent the commission he would have received from the purported principal if the purported principal had been liable on the contract. (In *Kohlberg,* the amount owing under the contract was not called a commission, but that's what it plainly was—the price of obtaining a third party's signature to a real estate agreement, see *Kohlberg, supra,* 41 Cal.App. at pp. 223–224, 182 P. 467.)

At the very least, the "as a principal" clause in section 2343 makes a potential difference as to when the applicable statute of limitations may begin to run. (E.g., *Kennedy v. Stonehouse* (1904) 13 N.D. 232, 100 N.W. 258 [where purported agent sued for lack-of-good faith breach of warranty of authority, statute of limitations began running when principal repudiated contract made in her name and not when agent initially misrepresented authority, which was ten years earlier].) Moreover, we may observe that the two statutes will yield different measures of damages in cases where the purported agent's breach of his or her implied warranty of authority comes under one of the two other subdivisions of section 2343, namely receiving credit personally, or is combined with his or her own independent tort.

B. The Accounting

Kurtin presents another point in his cross-appeal that centers on the phase 1 trial. Like Elieff in the main appeal, Kurtin claims that phase 1 decided ***487** more than it did. Specifically, he identifies three issues he now says "should have been tried to the jury": (1) the meaning of "distribution" in paragraph 14; (2) the standard by which Elieff's decisions to move any funds from one Joint Entity to another should be judged; and (3) the question of whether there were payments from Joint Entities to Elieff distributions preventing repayment.

We perceive that Kurtin's cross-appeal as it relates to these questions is essentially protective, because he has not been aggrieved by the new trial order on any of these issues. Those issues *were* tried to the jury by way of Kurtin's seventh cause of action for breaching the provision of the settlement agreement not to take distributions which prevented the Joint Entities from paying the balance of the buyout amount. And he prevailed on them. We need only mention here that we do not disturb the new trial order as to Elieff's liability on Kurtin's seventh cause of action on the distribution issue.

DISPOSITION

The new trial order is modified to include a new trial on Elieff's liability under section 2343, as well as a new trial on the topic of damages. As modified, the new trial order is affirmed. In all respects the judgment and order denying JNOV are affirmed, but let us now spell out what exactly that means:

(1) We affirm the trial court's determination that Elieff is liable to Kurtin in an as-yet-to-be-determined amount, if any, on Kurtin's causes of action for (a) breach of warranty of an agent's authority under section 2342; (b) breach of the provision of the settlement agreement that Elieff would execute the documents necessary to perfect Kurtin's security interests in Elieff's share of the Joint Entities; and (c) for breach of the provision of the settlement agreement not to take distributions which prevented the Joint Entities from paying the balance of the buyout amount.

(2) As we modify the trial court's new trial order, the issue of both Kurtin's liability ****599** under section 2343 and, *if* he is found to be liable, the amount of damages for which he will be liable, will be the subject of the new trial.

(3) Moreover, in the new trial on section 2343, if Elieff is found liable, the amount of damages for which he will be liable will be governed by section 3318 's "collected and recovered" language.

***488** Because each side has prevailed on at least one point, each side will bear its own costs in this appeal.

WE CONCUR:

ARONSON, J.

FYBEL, J.

Parallel Citations

215 Cal.App.4th 455, 13 Cal. Daily Op. Serv. 3813, 2013 Daily Journal D.A.R. 4901

Byrum v. Brand (1990) 219 Cal.App.3d 926, 268 Cal.Rptr. 609

Investors brought suit against financial consultant for breach of fiduciary duty, fraud, and negligent misrepresentation. The Superior Court, San Diego County, Artie G. Henderson, J., entered judgment on jury verdict in favor of consultant, and investors appealed. The Court of Appeal, Huffman, J., held that: (1) instruction requiring finding that consultant acted intentionally in failing to disclose some material facts that should have been disclosed by virtue of confidential relationship, with regard to investors' constructive fraud claims, likely served to prejudice investors, requiring reversal; (2) refusal to give investors requested instruction indicating that negligent misrepresentation may be shown where fiduciary fails or omits to disclose certain material facts, as well as where fiduciary negligently makes positive assertions of fact with no reasonable basis of belief, was not prejudicial error; and (3) jury determination that, although financial consultant concealed, suppressed, or misrepresented material fact to investor, consultant did not do so with fraudulent intent to induce such investment, as required for fraud, was supported by evidence.

Affirmed in part and reversed in part.

Attorneys and Law Firms

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Opinion

HUFFMAN, Associate Justice.

Plaintiffs George L. Byrum and J. Virginia Byrum (Byrum) appeal a judgment entered on a defense verdict in favor of Richard Garth Brand after jury trial was held in Byrum's action for fraud, negligent misrepresentation, and breach of fiduciary duty. Byrum raises claims of instructional error concerning (1) the nature of the representations or omissions which are properly actionable under a theory of negligent misrepresentation, (2) the duties and burden of proof applicable to an "investment adviser" within the meaning of certain provisions of the Corporations Code and the Civil Code,[1] and (3) the effect of a judicial admission contained in Brand's answer. Further, Byrum contends he was prejudiced by the use of a special verdict form for the breach of fiduciary duty cause of action which he claims was contrary to that approved by stipulation of the parties and was in any case contrary to law, and moreover that certain special verdicts reached by the jury were inconsistent, improper, and contrary to the evidence.

We do not find the claims of instructional and other error to be well taken, with the exception that we conclude the special verdict form used for the cause of action for breach of fiduciary duty contained an incorrect ****612** statement of law and its use significantly prejudiced Byrum. Accordingly, we reverse the judgment entered on the special verdict on the breach of fiduciary duty claim alone, and affirm the judgment with respect to the causes of action for fraud and negligent misrepresentation.

FACTUAL AND PROCEDURAL BACKGROUND

Byrum retired from his prosperous electrical contracting business in 1982. He had met Brand through a mutual friend in late 1979 or early 1980 ***930** when he asked the friend to suggest someone he could talk to in a business capacity about a tax problem at Byrum's business, Atlas Electric.[2] Byrum testified at trial he wanted to see Brand, whom he understood to be a financial adviser, to get unbiased advice regarding his selection of investments for his business and for his retirement; Byrum was preparing for retirement by making plans to turn his business over to an employee. He offered to pay Brand an hourly fee for services but Brand told him that would not be necessary, as everything he did would be taken care of by commissions.

Byrum told Brand he wanted to arrange a tax shelter investment. At the time, Byrum had no other investment consultant. Brand arranged for Atlas Electric's stock portfolio to be managed by an investment management company (Intervest) and set up tax shelter investments in two businesses, Atlantis Leasing and a limited partnership named North Oaks. Each of these ventures was successful and by late 1980 and early 1981, Byrum had developed trust in Brand's financial expertise. However, Byrum was never asked by Brand for personal financial data such as financial statements or estate

planning documents such as his will, nor was their arrangement for financial advising for either Byrum or his business ever formalized in a contract or letter.

Brand testified he has been a certified financial planner since the mid–1970's and also holds a real estate license and is a registered representative and stockbroker. In explaining his professional qualifications and experience to the jury, Brand stated he as a broker was compensated for his services by a commission paid by both buyer and seller of stock in such transactions as the Intervest portfolio management which he set up. Similarly, where limited partnership investments were concerned, Brand was compensated by the syndicator of the investment for bringing investors into the deal. However, with respect to the investment which gave rise to this action, the "Hilo investment," Brand testified he received no commissions for obtaining investors' participation and was an investor himself. Although he was questioned at trial about the federal requirements for acting as an "investment adviser," he did not characterize himself as such at the time he dealt with Byrum.[3]

Brand testified Byrum originally consulted him to have individual investments brought to Byrum's attention, and to obtain information about tax incentive-type investments. He considered Byrum to be a sophisticated ***931** investor based on Byrum's experience of 15 years' investing on behalf of his business, Atlas Electric, using corporations formed for that purpose. At their initial meeting, they discussed tax shelters. Brand testified at trial that in a loose sense, he had acted as Byrum's financial planner, but, in his mind, that term was equivalent to other names for that occupation such as stock broker, registered representative, or financial consultant. He testified his relationship with Byrum was "to act as a stock broker or a registered representative in which I would recommend various investments as options to Mr. Byrum to see if they agreed with his investment goals and his level of risk." He did not consider himself to be a personal financial consultant to Byrum; if he had, he would have needed to obtain information on Byrum's ****613** will, trusts, insurance, assets, and liabilities, which he never did.

After Byrum had invested in several concerns on Brand's advice, Brand presented him with a proposal for the Hilo investment for his personal consideration. This investment was a Hawaiian land trust in which Byrum bought a 20 percent interest for $70,000, payable with a $14,000 down payment and the balance due by November 1, 1989, in quarterly payments at 10 percent interest. Both Brand and his son, Richard Stephen Brand (referred to at trial as Rick Brand), testified extensively about the Hilo investment. Rick Brand bought the 39–acre parcel of rural Hilo property in 1979 for $225,000 ($5,800 per acre), with a $20,000 down payment, for the purpose of subdividing it into 6 parcels of vacant but improved land.[4] His only prior experience in the real estate business had been fixing up a house in Leucadia, California, for resale at a profit.

In 1980, having unsuccessfully attempted to sell the property and having cash flow problems, Rick Brand asked his father to find investors in the project, as Brand had offered to do after visiting the site. Brand testified he asked a few people he thought were his friends if they wanted to participate in the project, which he felt was a "medium risk investment." He prepared a packet of information on the land which included maps listing recent prices of subdivided parcels in the area, a list of neighboring property owners, a summary of information and a list of "interesting facts" on land in Hilo, and a table entitled, "Ten Percent Inflation Appreciation Factor," which covered a period up until 1984. Brand testified this packet did not contain, nor did he tell the investors, any estimate of the risk involved in the investment, the cost of improvements necessary to subdivide the land, a list of the required improvements such as drainage or road upgrading, the price his son had paid for the land or how title was held, nor an account of his son's employment history. However, he did tell the investors they would be ***932** buying a beneficial interest in the land as tenants in the entirety, and they would be assessed for the costs of improvements to the land, such as the road upgrading. The price to the investors was approximately $9,000 per acre, and the investors trusted him that this was a fair market value.

With regard to his dealings with Byrum, Brand denied ever telling Byrum a time frame for the investment, such as five years, or intentionally misrepresenting or concealing any facts. He also said he could not recall telling Byrum he would not have invested in the project if his son Rick had not been involved (although at an earlier deposition he had said this), but denied that this occurred. Brand said the first time he learned Byrum's investments were made with his retirement in mind was at trial. He did tell Byrum his son Rick would oversee the progress of the project, although these duties were voluntary on Rick's part.

Brand testified he informed Byrum of all the risks of which he was aware and all the factors which he felt were pertinent to the making of an informed decision. In his view, he did not have the duty to tell the investors what he did not know, and neither he nor Rick knew the costs of improving the road or bringing in electrical power, nor the length of time it would take to complete

the proposed subdivision; they merely believed the project was economically feasible. However, he had a general estimate at the time that the worst case for bearing the carrying costs would be until 1989, when the original note on the property expired.

Not surprisingly, Byrum's testimony differed from Brand's account of things. Byrum told the jury Brand had told him Rick Brand worked in real estate in Hawaii and would be there to manage the property. Brand told Byrum at their original meeting about the Hilo investment that the road was suitable for an agricultural subdivision and would not need to be improved and that neither water nor sewer service would have to be provided, although electrical ****614** power would have to be brought in. He made no independent investigation of the property, instead relying on Brand's representations about the project.

Although Byrum did not inquire of Brand about the completion date of the project, and although Brand did not expressly state the project would be completed by 1984, Byrum understood that since the "Ten Percent Inflation Appreciation Factor" document provided in the information packet did not go beyond 1984, the project would be completed by that year. Byrum testified he was never told the following pertinent factors about the project: Rick Brand had no experience in land development, a two-mile stretch of road would have to be improved with the cooperation of neighboring landowners, drainage was required to be installed, the property had ***933** been on the market for six months in 1980 without any offers having been made, and Rick had bought the property for $5,800 per acre. At his first meeting with Brand, he was not told about the carrying costs for the property or that Rick Brand did not have free title to the property. Byrum testified he would not have invested in the project if he had known then what he knew now.

In addition to Byrum and Brand, Rick Brand and several other investors testified at trial about what information regarding the project was known to them and when. Rick Brand testified he never told his father any estimated completion date for the project or that the participation of the neighbors in the road improvement was essential, although it would have made the road construction cheaper.

After the investors received a bill in the summer of 1985 for $69,000 road engineering fees, Byrum decided the delay in the project had lasted too long and the costs were too high. He offered to sell his interest in the property to the other investors but did not get any immediate takers. Having made some inquiries of Rick Brand, starting in March 1983 about projected development costs and not being satisfied with the answers, Byrum "lost faith" in Rick in July 1985 and stopped making payments on the promissory note he had signed in connection with the investment. Rick Brand then sued Byrum in Hawaii to foreclose his interest in the property and for damages. That action was settled in return for Byrum's release of all interest in the land, after Byrum incurred $12,176.63 attorney's fees defending the action; the other investors assumed his share of the obligation. The improved road was laid in 1986–1987, and the property was on the market at the time of trial.

Byrum's complaint (later amended)[5] was filed against Brand on July 20, 1987, for fraud, negligent misrepresentation, and breach of fiduciary duty. He sought damages of $83,226.72, exemplary damages of $500,000 and related relief. Brand answered, denying the major allegations, but in paragraph 4 of his answer admitted he "[held] himself out to the public as providing sound investment advice to his clients."

The matter proceeded to jury trial in July 1988. The trial court refused to give several jury instructions requested by Byrum. The first instruction ***934** denied was a specially tailored instruction on the issues of the elements of negligent misrepresentation; however, the court did give the jury a pattern instruction on negligent misrepresentation, BAJI No. 12.45 (7th ed. 1986).[6] Second, Byrum requested and the court refused to give several proposed instructions on the definition, duty, and burden of proof applicable to an "investment adviser," drawn from Corporations Code sections 25002 and 25009 as well as Civil Code section 3372. The court refused to instruct the jury that judicial notice had been taken ****615** that the investment involved was a "security," and explained that an exception in Corporations Code section 25009 (in the securities law) applied, in that Brand qualified as a broker-dealer who received no special compensation for his services.

With regard to the instruction requested under section 3372, the court denied plaintiff's request that it be given "because I think that it is clear from the evidence that Mr. Byrum did not use Mr. Brand for his retirement plan. He wanted tax shelters and he wanted investments and the investments that were suggested to Mr. Byrum by Mr. Brand were not of the securities-type, or of the type that would fall within the Corporations or Securities Codes." The court also refused Byrum's proposed instruction about the effect of admitted allegations in the pleadings. However, pursuant to stipulation of the parties that Brand owed Byrum a fiduciary duty by virtue of his advisory capacity, the court accordingly instructed the jury Brand had a duty of full and complete disclosure

of all material facts with respect to the Hilo investment. The "material facts" were defined as those that were significant to Byrum's decision to invest, regarding the scope, cost, timing, and/or necessity of third-party contributions to the project.

The jury returned a defense verdict including special verdicts on each cause of action. As to the claim of negligent misrepresentation, the jury answered "no" to the question:

> "In the course of his representation to plaintiffs about the Hilo investment, did the defendant make a representation of a past or existing material fact that was untrue?"

As to the fraud cause of action, the jury was asked and answered as follows:

> "Question No. 1: Did the defendant conceal, suppress or misrepresent a material fact in the course of his representation to plaintiffs about the Hilo investment? Answer: Yes.
>
> "Question No. 2: Did the defendant conceal, suppress or misrepresent a material fact with the intention to induce plaintiffs to invest in the Hilo investment? Answer: No."

***935** As to the cause of action for breach of fiduciary duty, a stipulation was reached as to the form of a special verdict to be used. Brand's attorney volunteered to prepare the entire special verdict form for the jury's use during deliberations and brought it to court the next day. Counsel for plaintiff received it and made some limited review of all the papers without raising any objections at trial. The jury then answered "no" to the verdict's question regarding breach of fiduciary duty:

> "Did the defendant intentionally fail to disclose to plaintiffs any material fact known by him which should have been disclosed because of their confidential relationship?"

After judgment was entered on the defense verdict, Byrum brought a new trial motion on a number of grounds, alleging in part that the special verdict form used for the breach of fiduciary duty cause of action was contrary to the parties' agreement and contrary to law. The motion for new trial was supported and opposed by the respective declarations of counsel. The court denied the motion, stating that while there might have been a misunderstanding, it did not find any ethical violation by counsel or any change in the verdict form as agreed. Byrum timely appealed.

DISCUSSION

Byrum raises a number of claims of error in the proceedings below. He chiefly focuses on instructional error that he contends occurred on the cause of action for negligent misrepresentation regarding the nature of the representation or omission required. He also claims instructional error occurred with respect to all the causes of action (negligent misrepresentation, fraud and breach of fiduciary duty) based on evidence that Brand had acted as Byrum's "financial planner" or "financial consultant," and had admitted in his answer that he "[held] himself out to the public as providing sound investment advice to his clients." Byrum thus contends the court erred in refusing his requested instructions ****616** about the definition and special duties of an "investment adviser," about shifting the burden of proof to Brand in accordance with section 3372, and about the effect of a judicial admission such as Brand made in his answer.

In addition to claiming instructional error, Byrum contends prejudicial error occurred when the trial court allowed a special verdict form on the cause of action for breach of fiduciary duty to be submitted to the jury in a form other than that agreed upon by counsel, and in a form which contained an incorrect statement of law regarding the intent required on the part of Brand. He also argues the defense verdict rendered on breach of fiduciary duty was inconsistent with the jury's findings on a related issue (i.e., fraud, that Brand had concealed, suppressed, or misrepresented a material fact about the Hilo investment, although this was not found to ***936** have been done with the intention to induce Byrum to make the investment), and was inconsistent with the stipulation of the parties and instruction by the court that Brand had a fiduciary relationship with Byrum. Finally, Byrum challenges the sufficiency of the evidence to support the defense verdict on fraud and its finding that Brand had not intended to induce Byrum to invest when making the representations that he did about the Hilo investment.

We requested supplemental briefing from the parties about the claimed instructional error regarding the special duties of an "investment adviser," and whether the Corporate Securities Law of 1968 (Corp.Code, §

25000 et seq.) and Civil Code section 3372 are properly applicable to these facts. We have considered all the materials submitted and do not find any of the claims of instructional error justify reversal of the judgment, for the reasons to be explained. However, since the version of the special verdict form submitted to the jury incorrectly required it to make an express finding of intent that Brand "*intentionally* fail[ed] to disclose to [Byrum] any material fact known by him which should have been disclosed because of their confidential relationship" (italics added), and accordingly required Byrum to make a greater showing of breach of fiduciary duty than is required by existing law, this was prejudicial error requiring reversal of the judgment on the breach of fiduciary duty theory alone. We shall discuss this dispositive issue first and then turn to the claims of instructional error and remaining contentions.

I

Breach of Fiduciary Duty: Special Verdict Form

We first address Byrum's contention he is entitled to relief from the judgment on breach of fiduciary duty because the form of verdict used was allegedly contrary to the form agreed upon by counsel, as claimed in the motion for new trial. In denying that motion, the trial court made no explicit findings that any waiver of the defect had occurred when Byrum's attorney received and reviewed the forms before the court sent them to the jury. Instead, the court admitted there might have been a misunderstanding, but it did not believe any change from the stipulated format was reflected in the final version used.

[1] [2] The Supreme Court addressed this problem in *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456–457, footnote 2, 72 Cal.Rptr. 217, 445 P.2d 881. First noting that failure to object to the form of a verdict before the jury has been discharged has frequently been held to be a waiver of any defect, the court stated there are many exceptions to this ***937** rule. (*Ibid.*) For example, "[w]aiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.' [Citations.]" (*Ibid.*) Waiver should not be found where a defect is latent and there is no hint of a strategic motive (as where a mistake has been made). The record before us gives rise only to inferences that a mistake was made, for whatever reason, and we shall not decide this issue on the basis of waiver. Instead, we shall examine the special verdict form for its legal sufficiency.

****617** Byrum's claim for breach of fiduciary duty alleged that duty was breached by reason of Brand's alleged fraud. Pursuant to stipulation of the parties, the jury was instructed a fiduciary, such as Brand, had a duty of full and complete disclosure of all the material facts he knew about the investment before obtaining Byrum's consent to the transaction. The jury was told, in pertinent part, "If you find by a preponderance of the evidence of the evidence [sic] that the defendant failed to disclose a material fact which he knew, then, you may award damages for breach of that duty." Related instructions were then given regarding the negligent misrepresentation cause of action about the requirement for a finding of liability that Brand have made an untrue representation as to a past or existing material fact, regardless of his actual belief about the truth of the fact, if there were no reasonable ground for believing it to be true.

The statute which governs claims of breach of fiduciary duty is section 1573, which provides:

> "CONSTRUCTIVE FRAUD. Constructive fraud consists: [¶] 1. In any breach of duty which, *without an actually fraudulent intent,* gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent, *without respect to actual fraud.*" (Italics added.)

The Supreme Court interpreted section 1573 in *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal.2d 501, 525, 86 P.2d 102, as stating the rule applicable in confidential relations. The court explained it is essential to the operation of the principle of constructive fraud that there exist a fiduciary relation, and stated:

> " 'To constitute positive or actual fraud there must be such fraud as affects the conscience, that is, there must be an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place.... Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation....' [Citation.]"

[3] The breach of duty referred to in section 1573 must be

one created by the confidential relationship, which is one of the facts constituting the fraud. ***938** (*Guthrie v. Times–Mirror Co.* (1975) 51 Cal.App.3d 879, 889, 124 Cal.Rptr. 577; also see *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 32–33, 136 Cal.Rptr. 378.) This distinguishes constructive fraud from other forms of actual fraud, including negligent misrepresentation, which may occur in any type of relationship. (§§ 1572(2), 1709, 1710(2); cf. *Hayter v. Fulmor* (1949) 92 Cal.App.2d 392, 398, 206 P.2d 1101, disapproved on another point in *Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, fn. 5, 275 P.2d 15.) It is clear that " '[c]onstructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud. [Citations.]' " (*Efron v. Kalmanovitz* (1964) 226 Cal.App.2d 546, 560, 38 Cal.Rptr. 148.)[7]

****618** With respect to this theory, breach of fiduciary duty or constructive fraud, Witkin has helpfully observed that where nondisclosure is alleged, the elements of representation and falsity—always part of a cause of action for actual fraud—are absent, as "[t]he fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship, and this must be alleged. [Citation.]" (5 Witkin, Cal.Procedure, Pleading, *op. cit. supra,* at p. 117.)

[4] [5] From the above authorities, it is readily seen that since fraud may be *presumed* from the parties' confidential relationship or the circumstances of their dealings, the special verdict here, requiring a finding of Brand's *intentional* failure to disclose material facts that should have been disclosed by virtue of the confidential relationship, was an incorrect statement of the law and could more probably than not have served to confuse and mislead the jury. This verdict form was impermissibly contrary to the instructions given with respect to the breach of fiduciary duty theory which did not require an intent to fail to disclose material facts. (*Koebig v. Southern Pacific Co.* (1895) 108 Cal. 235, 239–240, 41 P. 469; see 9 Witkin, Cal.Procedure, ***939** Appeal, *op. cit. supra,* § 356, p. 360.) It was thus improper and likely served to prejudice Byrum's claim on this issue.

Our examination of the verdict forms in their entirety convinces us the only proper disposition of this matter is an open reversal on the breach of fiduciary duty theory. The relationship of the fraud-based theories and verdicts with the fiduciary duty verdict does not give any clear indication of what the jury would have decided had a correct verdict form been supplied to them on this issue. The reversal we order puts the case "at large," as if no trial had ever taken place. (See 9 Witkin, Cal.Procedure, Appeal, *op. cit. supra,* § 625, at pp. 606–607.) Accordingly, the parties may seek leave of court to amend their pleadings for retrial (*op. cit. supra,* § 627, at pp. 608–609); the evidence presented and stipulations reached at retrial may differ from the original. We turn to the remaining issues raised on appeal with these considerations in mind.

II

Instructional Error and Remaining Claim

We set forth established rules for evaluating claims of instructional error.

> "Refusal to give a requested instruction is reversible error where the omission misleads and confuses the jury and it is reasonably probable a result more favorable to the requesting party would have been reached in the absence of the error. [Citations.]" (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 523–524, 196 Cal.Rptr. 82.)

[6] It is also well settled a party has the right to have the jury instructed on his or her theory of the case, but has no right to require the court use any particular phraseology; as long as the court correctly instructs on the issue, it is free to modify an instruction or give one of its own in lieu of the one offered. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 805, 174 Cal.Rptr. 348; also see 9 Witkin, Cal.Procedure, Appeal, *op. cit. supra,* § 355, pp. 358–359.) The appellate court must examine all the circumstances of the case, including the evidence and the other instructions given, in order to determine whether the probable effect of specific instructions has been to mislead the jury and thus to prejudice a party. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670–671, 117 Cal.Rptr. 1, 527 P.2d 353.)

In light of the reversal ordered on the breach of fiduciary duty cause of action, our observations on instructional error as to that theory are necessarily limited, since we have no way of knowing what the state of the evidence and pleadings will be at retrial. However, to fully consider the ***940** validity of the judgment entered on the defense verdicts on negligent misrepresentation and fraud, we discuss each of Byrum's claims of instructional error, and in conclusion consider his attack on the evidence supporting the judgment on the fraud cause of action.

****619 A**

Negligent Misrepresentation

[7] Byrum sought to have the trial court instruct the jury on the elements of negligent misrepresentation in the language of California Forms of Jury Instruction (Matthew Bender 1985, rev. ed. 1989), section 43.05. In pertinent part (the element of representation) that proposed instruction read:

> "Defendant is liable to Plaintiff for damages for negligent misrepresentation if Plaintiff proves the following: [¶] 1. That Defendant represented to Plaintiff that the investment was in his interest by failing to disclose material facts which if known would have resulted in plaintiff's not investing."

The trial court declined to give this instruction, instead giving BAJI No. 12.45, which stated simply as to the representation element:

> "The defendant must have made a representation as to a past or existing material fact."

Byrum contends this refusal to instruct as requested was prejudicial error. His theory is that negligent misrepresentation may be shown where a fiduciary fails or omits to disclose certain material facts, as well as where the fiduciary negligently makes "positive assertions" (§ 1572(2)) or "assertions" (§ 1710(2)) of facts with no reasonable basis for belief that the facts are true.[8] While he admits to finding no California authority which describes negligent misrepresentation by omission where a special (fiduciary) duty exists, he contends existing authority does not rule out such a theory. For example, although the court in *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 303–304, 136 Cal.Rptr. 603, discussed the issue and concluded a positive assertion was required under section 1572(2) and no authority had been cited or found which held the doctrine of negligent misrepresentation applied to *implied* representations, Byrum argues that authority is inapplicable as dicta and as not dealing with facts showing a fiduciary relationship was involved. He points to authority in *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735–737, 29 Cal.Rptr. 201, that nondisclosure of relevant facts in a buyer-seller context ***941** may be equated with an implied representation of the nonexistence of the nondisclosed facts, and argues Brand had a duty to investigate and uncover all material facts about the investment, and that a subsequent failure to disclose such undiscovered facts constituted a negligent implied misrepresentation. He thus requests we examine this question as one of first impression in light of the policies underlying the tort of negligent misrepresentation.[9]

[8] Accepting Byrum's invitation, we first note the nature of the several theories alleged in his action. As stated above (pt. I, *ante*), negligent misrepresentation is a claim which may be made in any type of relationship, while recovery for constructive fraud or breach of fiduciary duty is confined to the special kind of relationship ****620** which gives rise to special duties of full and complete disclosure of " ' "all material facts *within [the fiduciary's] knowledge* relating to the transaction in question...." ' " (*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 67 Cal.App.3d 19, 32, 136 Cal.Rptr. 378, italics added.) While Byrum has alleged the special fact that he is charging Brand *as a fiduciary* with negligent misrepresentation, we must still distinguish between the two types of causes of action, which are alleged as alternative theories.

[9] Viewed in this light, we think the traditional parameters of negligent misrepresentation theory, as defined by statute, would not have allowed the trial court to instruct the jury as requested. Instead, Byrum's claim for breach of fiduciary duty is adequate to protect his right not to be misled by any omissions by a fiduciary such as Brand. Sections 1572(2) and 1710(2) govern the law of negligent misrepresentation where there is no allegation of actual *suppression* of fact (see sections 1572(3) and 1710(3)). Those sections (§§ 1572(2), 1710(2)) require positive assertions or simply assertions for the statement of a cause of action for negligent misrepresentation, and we see no reason to depart from these statutory requirements that something more than an omission is required to give rise to recovery on that theory, even as against a fiduciary.

***942** As already noted (pp. 617–618, *ante*), Witkin has explained that an actual representation is not a required element of a cause of action for breach of fiduciary duty or constructive fraud. However, for a cause of action for negligent misrepresentation, clearly a representation is an essential element. The alleged representation by omission claimed by Byrum seems to us to be too remote to fit this requirement. While Brand may not have uncovered or investigated certain material facts about the investment—i.e., its timing, cost, scope, or necessity for third-party contribution, as the material facts were defined for the jury—the record does not show he

positively asserted any facts about these factors that were not true, nor actively concealed or suppressed any such facts. Evidently, the jury believed his testimony that he disclosed all the risks of which he was aware, and all the factors which he felt were pertinent to the making of an informed decision. There were apparently no *known* facts which he failed to disclose, from which nondisclosure could be inferred an implied representation that the facts were otherwise. (See *Lingsch v. Savage, supra,* 213 Cal.App.2d at p. 736, 29 Cal.Rptr. 201.)[10]

Therefore, the instruction proposed by Byrum, that Brand somehow affirmatively represented the investment was in Byrum's interest by way of his failure to disclose certain material (but unknown) facts, would have required the jury to find that the omissions were implied affirmative representations. We do not think the law of negligent misrepresentation can be stretched so thin, and conclude the cause of action for breach of fiduciary duty affords Byrum an adequate forum for his allegations that Brand's failure to disclose material facts constituted a form of fraud, even if there were no actual intent to deceive. We find no error in the trial court's refusal of Byrum's requested instruction on the element of representation nor in the court's giving of the pattern instruction in its place. (*Grimshaw v. Ford Motor Co., supra,* 119 Cal.App.3d at p. 805, 174 Cal.Rptr. 348.)

B

Duties of an "Investment Adviser"

[10] Byrum requested, and the trial court refused, three special instructions on the definition, duty, and burden of proof applicable to an "investment adviser," as well as an instruction about the effect of ****621** judicially-admitted allegations. Each of these was apparently intended to apply to all three ***943** of Byrum's causes of action. The first was drawn from Corporations Code section 25009:[11]

> "A person is an investment advisor if for compensation he engages in the business of advising others, either directly or through writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities."

The second of these was drawn from a treatise in the field, Marsh & Volk, Practice Under the California Securities Laws (1969) section 13.10[3], page 13–53:

> "The duty of an investment advisor to a client is that of a fiduciary. An investment advisor is under a duty to disclose fully the nature and extent of any interest that that advisor has and any advice or recommendation the advisor has given to the client, such as compensation that the advisor would receive if the client should act on the recommendation. This means that if an investment advisor, that advisor's employer, or an affiliate will receive fees or other compensation from the sale of securities or other products or services recommended to a client, or if the advisor otherwise has a conflict of interest, the investment advisor must disclose in writing those fees, compensations, and conflicts at the time of entering into a contract or otherwise arranging for the delivery of a financial plan."

The third requested instruction was drawn from section 3372 and set forth the burden of proof applicable to investment advisers:

> "If a party is engaged in the business of advising others for compensation as to the advisability of purchasing property for investment and represents himself to be an expert with respect to investment decisions in such property, that party shall be liable to the other party who received and relied on such advisory services, and was damaged thereby; unless the party providing the advisory services proves that such services were performed with the due care and skill reasonably to be expected of a person who is such an expert."

Finally, Byrum sought to have the jury instructed as follows about Brand's admission in his answer about his investment advisory activities:

> "You are required to take as true, that is as an established fact, matters admitted by parties in their pleadings. In this case, defendant has admitted in his pleadings that he 'holds himself out to the public as

providing sound investment advice to his clients.' "

Byrum contends the trial court erred in refusing all these instructions because the "overwhelming evidence" showed Brand was an "investment adviser" who acted for compensation, to whom the burden should be ***944** shifted pursuant to section 3372 to show the services provided met an expert's standard of care regarding the performance of the duty owed. A fair reading of the record discloses that while Brand did not consider himself to be a personal financial consultant to Byrum, he did (grudgingly) admit that in a loose sense, he had acted as Byrum's financial planner. However, we do not find, and the parties have not cited, any specific reference in the record to Brand as an "investment adviser."

The basis of the court's decision to deny all these instructions was its determination that Brand's activities with regard to the Hilo investment fell under an exception to Corporations Code section 25009, in that he was a broker-dealer who received no special compensation for his services. Because the record is equivocal as to whether the Hilo investment was ever conclusively determined to be a security (although instructions on that basis were requested), we asked the parties to address in supplemental briefing the applicability of securities law (Corp.Code, § 25000 et seq.), and hence these instructions.

****622** A close examination of the text of the disputed instructions, however, reveals that regardless of the state of the record on the securities issue, the requested instructions were properly denied because their omission could not have misled or confused the jury such that it is reasonably probable Byrum would have obtained a more favorable result at trial if they had been given. (See *Canavin v. Pacific Southwest Airlines, supra,* 148 Cal.App.3d at pp. 523–524, 196 Cal.Rptr. 82.) The current record does not support arguments that Brand had to be characterized as an "investment adviser." We will explain.

In the first place, the instruction drawn from Corporations Code section 25009, defining an investment adviser, merely states such a person advises others as to the value of or advisability of investing in securities. It was not disputed Brand advised Byrum in a professional capacity regarding the value and advisability of the Hilo investment, although the exact nature of that investment was not an issue actively litigated by the parties at trial. As set forth in the first amended complaint, the theories alleged against Brand were framed in common law terms of fraud, negligent misrepresentation, and breach of fiduciary duty, rather than in statutory securities fraud causes of action, even though some references to securities issues were made in Byrum's trial brief and in the unsuccessful motion to amend the first amended complaint (taken off calendar by the de novo settlement judge). (See fn. 5, *ante.*) The jury was given numerous instructions about the fiduciary duty Brand owed to Byrum because of their stipulated confidential relationship, and we do not believe the proposed instruction added anything which would have assisted the jury in determining the duty owed by Brand ***945** and whether he met it. Thus, the evidence did not require this instruction be given regarding any cause of action.

Similarly, with respect to the requested instruction about the duty of an investment adviser, at the outset it merely reiterates what was already stipulated, that Brand had a fiduciary duty to Byrum. The remainder of the proposed instruction had to do with conflicts of interest. Here, the evidence showed Brand received no commissions on the Hilo investment, was an investor himself, and fully disclosed to Byrum and others it was his son Rick Brand who was the instigator of the investment scheme. We fail to see how this instruction on the duty to disclose conflicts of interest is supported or required by the record.

With regard to the proposed instruction on the burden of proof imposed upon investment advisers under section 3372,[12] we first note the evidence showed Brand received no compensation for this particular investment advice, which is one of the threshold requirements for applicability of the section. The trial court made such a finding when it ruled Brand qualified under the exception to Corporations Code section 25009 for broker-dealers who received no special compensation for their services.[13] Thus, with respect to the fraud and negligent misrepresentation claims, the evidence simply did not support the proposed instruction, which accordingly was properly ****623** refused. On retrial of the breach of fiduciary duty claim, we cannot speculate whether any additional evidence will be offered to provide more support for this instruction at any further proceedings.

Finally, we examine the appropriateness of the rejected instruction about the effect of Brand's judicial admission that he provided sound investment advice to his clients. As to the fraud-based causes of action, our evaluation of the circumstances of the entire case convinces us the jury received adequate instructions about the duty owed to refrain from fraudulent or ***946** negligent misrepresentations and any breach thereof, so that the proposed instruction would not have made any difference. (See *Henderson v. Harnischfeger Corp., supra,* 12 Cal.3d 663, 117 Cal.Rptr. 1, 527 P.2d 353.) There was no prejudicial error here.

On the breach of fiduciary duty retrial, subject to the right of the parties after reversal to seek leave to amend their pleadings (see 4 Witkin, Cal.Procedure, Pleading, *supra,* § 408, pp. 456–457), it would appear that since all issues on this theory remain unresolved at this time, the proposed instruction regarding judicial admissions may have a sound basis in law to the extent duty is placed in issue by the parties (for example, if relief is sought and obtained from the stipulation that Brand owed Byrum a fiduciary duty). (See *Razzano v. Kent* (1947) 78 Cal.App.2d 254, 259, 177 P.2d 612.) Our opinion on this point, however, is necessarily advisory only, for the reasons explained above.

C

Sufficiency of Evidence: Fraud

[11] We briefly touch upon Byrum's remaining argument on appeal, that the defense verdict on the fraud cause of action was "contrary to all evidence" and thus improper.[14] He contends that because the general purpose of Brand's contacts with Byrum was to sell investments, the jury could not have found on this record that Brand concealed, suppressed, or misrepresented a material fact, but did not do so with the fraudulent intent to induce such an investment. It thus appears Byrum claims no sufficient evidence supports this portion of the judgment. Our standard of review of such a claim is well established:

> "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874, 197 Cal.Rptr. 925, original italics.)

***947** Byrum asks us to hold it would have been impossible from all the evidence for the jury to find that although Brand did conceal, suppress, or misrepresent a material fact about the Hilo investment, he had no fraudulent intent to induce this investment. This we cannot do. Brand repeatedly testified he informed Byrum of all the risks of which he was aware, and of all the factors he felt were pertinent to the making of an informed decision. From this evidence, the jury was entitled to reach a defense verdict on the fraud cause of action, and we will not second-guess its evaluation of the evidence in this regard.

DISPOSITION

The judgment is reversed as to the breach of fiduciary duty cause of action. ****624** The balance of the judgment is affirmed. Each party is to bear his own costs.

BENKE, Acting P.J., and FROEHLICH, J., concur.

Parallel Citations

219 Cal.App.3d 926

Carleton v. Tortosa (1993) 14 Cal.App.4th 745, 17 Cal.Rptr.2d 734

Real estate investor sued broker alleging negligence in failing to advise investor that his transactions could have adverse tax consequences and by failing to structure transactions as tax-deferred exchanges. The Superior Court, Yolo County, No. 68078, Stephen Mock, J., granted summary judgment for broker on ground that broker had no duty with respect to tax advice. Investor appealed. The Court of Appeal, Scotland, J., held that: (1) real estate listing agreement, disclosure documents, and purchase contracts which stated that real estate broker makes no representation or recommendation as to tax consequences of transactions negated any duty of broker to prepare deposit receipts and structure escrows in manner that would minimize investor's tax liability, to inform investor of broker's lack of expertise with tax-deferred exchanges, or to "issue-spot" or warn investor regarding tax consequences on transactions, and (2) contractual provision relieving real estate broker of duty to recognize and alert client to potential tax consequences of transaction does not violate public policy.

Affirmed.

Attorneys and Law Firms

****736 *749** DeRonde & DeRonde, and John A. DeRonde, Jr., Fairfield, for plaintiff and appellant.

Murphy, Pearson, Bradley & Feeney, and Mark E. Ellis, Sacramento, for defendant and respondent.

Opinion

SCOTLAND, Associate Justice.

This case presents the question whether a real estate broker had a duty to advise her client that the client's real estate transactions could have adverse tax consequences.

Plaintiff Ernest Carleton, an experienced real estate investor, employed defendant Mary Tortosa, a real estate broker, in the sale of two residential rental properties and the purchase of two residential rental properties. Plaintiff executed listing agreements, real estate disclosure statements, and real estate purchase contracts which advised him that defendant's responsibilities as a broker did not include giving advice on tax consequences of the transactions. After the transactions were completed, ****737** plaintiff was informed ***750** by his accountant that plaintiff incurred a tax liability of approximately $34,000 because the transactions were not structured to qualify as tax-deferred exchanges under Internal Revenue Code section 1031. (26 U.S.C. § 1031; hereafter section 1031.)

Plaintiff then brought this professional negligence action, alleging in substance that defendant "failed to exercise reasonable care and skill in undertaking her duties as a broker" by neglecting to warn plaintiff his transactions could have adverse tax consequences and by failing to structure the transactions as tax-deferred exchanges.

Defendant filed a motion for summary judgment on the ground "plaintiff cannot establish duty or breach of duty as a matter of law." The trial court granted the motion, ruling: "Defendant Tortosa was in a fiduciary relationship with plaintiff. This relationship was defined by the documents [executed by plaintiff].... [¶] These documents evidence the nature of the fiduciary relationship between defendant and plaintiff [which] did not include a separate responsibility on the part of defendant to advise plaintiff Earnest [sic] Carleton on tax matters, but rather, specifically excluded the provision of tax advice from the scope of defendant Tortosa's duty to plaintiff. Plaintiff Carleton was specifically instructed to look to other professionals for tax advice. Thus, defendant Tortosa had no affirmative duty to provide tax advice to plaintiff Carleton or to structure the escrows of the subject transactions in such a way as to reap the greatest tax benefits to him. Such advice is strictly outside the scope of a real estate agent's fiduciary duty to her client."

Plaintiff appeals from the order and judgment. He claims a real estate broker's duty to exercise reasonable skill and care for the benefit of the client extends to advising the client that a transaction could have adverse tax consequences and recognizing the need for a tax-deferred exchange. According to plaintiff, the use of " 'boilerplate' disclaimers" in the listing agreements, disclosure forms and purchase contracts stating a real estate broker is not responsible for giving tax advice did not relieve defendant of the duty to warn plaintiff that his proposed transactions were in the nature of "an IRC 1031 Delayed Exchange and [to advise plaintiff] to secure the assistance of outside professionals in the event that [defendant] could not competently handle the transaction." (Emphasis omitted.) This is so, he argues, because any contractual provision relieving a real estate broker of the duty to recognize and alert a client to potential tax consequences of a transaction violates public policy.

As we shall explain in the published portion of this

opinion, aside from obligations imposed by statute and implementing regulations, a real estate ***751** broker's duty is derived from the agreement between the broker and client. In this case, the parties' agreement in effect specified that defendant had no duty to recognize and advise plaintiff regarding the potential tax consequences of his transactions. Contrary to plaintiff's claim, this contractual provision did not violate public policy because the Legislature has determined that sellers and buyers of real estate should obtain tax advice from professionals other than real estate brokers. (Civ.Code, § 2375.) In the unpublished part of this opinion, we reject plaintiff's contention that the trial court erred in ordering plaintiff to pay defendant's attorney fees. Accordingly, we shall affirm the judgment.

FACTS

Plaintiff is a teacher of high school English and foreign languages with 25 years experience in real estate investing. With the professional assistance of defendant, plaintiff had invested in Winters, California, for five or six years prior to the present transactions.

On April 17, 1990, plaintiff executed an "Exclusive Authorization and Right to Sell" (listing agreement) to sell his property at 1028 Adams in Winters. The property was sold and escrow closed on May 29, 1990.

****738** On April 25, 1990, plaintiff contracted to purchase property at 467 Edwards in Winters. Escrow closed on June 18, 1990.

On June 14, 1990, plaintiff executed a listing agreement to sell his property at 1001 Adams in Winters. The property was sold and escrow closed on August 15, 1990.

On July 5, 1990, plaintiff contracted to purchase property at 1103 Hoover in Winters. Escrow closed on August 28, 1990.

The listing agreements for the sales of the properties at 1028 Adams and 1001 Adams advised plaintiff: "A real estate broker is the person qualified to advise on real estate. If you desire legal or tax advice, consult an appropriate professional." For each of the four transactions defendant furnished plaintiff a written "Disclosure Regarding Real Estate Agency Relationships" which advised plaintiff: "The above duties of the agent in a real estate transaction do not relieve a Seller or a Buyer from the responsibility to protect their [*sic*] own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." In addition, for each of the four ***752** transactions plaintiff executed a "Real Estate Purchase Contract and Receipt for Deposit" which advised him: "Legal and Tax Advice: A real estate broker or agent is qualified to advise on real estate. If you require legal or tax advice, consult your attorney or accountant. No representation or recommendations are made by the broker, agents, or employees as to the legal sufficiency, effect, or tax consequences of this document or the transaction relating thereto. These questions are for your attorney and or your accountant."

During the course of the transactions, plaintiff asked defendant how many days he had to reinvest the proceeds of the two sales in order to avoid paying capital gains tax. Defendant answered: "I don't know.... Ask your tax person." Plaintiff called his accountant. "[T]he tax lady that does [his] taxes wasn't in, so [he] talked to her assistant, and she said [he had] forty-five days [to reinvest]."

After the transactions were completed, plaintiff's accountant prepared plaintiff's income tax returns and informed him he incurred a capital gains tax liability of approximately $34,000. The transactions failed to qualify as tax-deferred exchanges because they were not conducted through a third party intermediary.

DISCUSSION

I

"Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently review them on appeal, applying the same three-step analysis required of the trial court. ... First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. ... [¶] Second [ ], we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. ... The motion must stand self-sufficient and cannot succeed because the opposition is weak. ... A party cannot succeed without disproving even those claims on which the opponent would have the burden of proof at trial. ... [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the

existence of a triable, material factual issue. ... Counteraffidavits and declarations need not prove the opposition's case; they suffice if they disclose the ***753** existence of a triable issue." (*AARTS Productions, Inc. v. Crocker National Bank,* (1986) 179 Cal.App.3d 1061, 1064–1065, 225 Cal.Rptr. 203, citations omitted; see *FPI Development, Inc. v. Nakashima,* (1991) 231 Cal.App.3d 367, 381–382, 282 Cal.Rptr. 508.)

Plaintiff's complaint alleges defendant was negligent in two respects: in preparing ****739** the deposit receipts and structuring the escrows; and in failing to tell plaintiff of defendant's lack of expertise in structuring tax-deferred real estate exchanges and by further failing to advise plaintiff to seek other professional assistance in structuring the transactions.

[1] [2] [3] The issue framed by each theory of liability relates to defendant's failure to inform plaintiff of the tax consequences of his transactions. Plaintiff contends defendant had a duty to "recogniz[e] a tax-free exchange setting" and to "direct[ ] the client to an exchange company if [defendant] did not possess the requisite expertise." (Emphasis omitted.) According to plaintiff, defendant "at least had an obligation to 'issue-spot' or warn Plaintiff about the capital gains consequences of proceeding without adequate advice...." (Emphasis omitted.)[1]

***754** In her motion for summary judgment, defendant asserted she negated plaintiff's claims of negligence by showing she had no duty to prepare the escrows and structure the deposit receipts so as to minimize adverse tax consequences, she had no duty to advise plaintiff of her lack of experience with tax-deferred exchanges, and she fulfilled any duty to advise him to seek other professional assistance regarding the tax consequences of the transactions. In support of her motion for summary judgment, defendant submitted excerpts from plaintiff's deposition, his responses to interrogatories and requests for admissions, and documentation from numerous real estate transactions in which plaintiff participated as buyer or seller, including those here in issue.

We agree with the trial court that defendant's showing established facts which negated plaintiff's claims and justified a judgment in defendant's favor. (*AARTS Productions,* supra, 179 Cal.App.3d at pp. 1064–1065, 225 Cal.Rptr. 203.)

"The elements of a cause of action for negligence are commonly stated as (1) a legal duty to use due care; (2) a breach of that duty; (3) a reasonably close causal connection between that breach and the resulting injury; and (4) actual loss or damage." ****740** (*Ahern v. Dillenback,* (1991) 1 Cal.App.4th 36, 42, 1 Cal.Rptr.2d 339; 6 Witkin, Summary of Cal.Law (9th ed. 1988) Torts, § 732, p. 60.) Failure to prove any one of these elements is fatal to plaintiff's recovery. (*Banerian v. O'Malley,* (1974) 42 Cal.App.3d 604, 612, 116 Cal.Rptr. 919.)

[4] [5] Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury. (*Ballard v. Uribe,* (1986) 41 Cal.3d 564, 572, fn. 6, 224 Cal.Rptr. 664, 715 P.2d 624; *Ahern,* supra, 1 Cal.App.4th at p. 42, 1 Cal.Rptr.2d 339; *Clarke v. Hoek,* (1985) 174 Cal.App.3d 208, 213, 219 Cal.Rptr. 845.) Where a duty is found to exist, a real estate agent must fulfill it by exhibiting the degree of care and skill ordinarily exhibited by professionals in the industry. (2 Miller & Starr, op. cit. supra, § 3:17, pp. 94–95; *Montoya v. McLeod,* (1985) 176 Cal.App.3d 57, 65, 221 Cal.Rptr. 353; *Timmsen v. Forest E. Olson, Inc.,* (1970) 6 Cal.App.3d 860, 871, 86 Cal.Rptr. 359; *Brady v. Carman,* (1960) 179 Cal.App.2d 63, 68, 3 Cal.Rptr. 612.)

[6] The degree of care and skill required to fulfill a professional duty ordinarily is a question of fact and may require testimony by professionals in ***755** the field if the matter is within the knowledge of experts only. (*Miller v. Los Angeles County Flood Control Dist.,* (1973) 8 Cal.3d 689, 702, 106 Cal.Rptr. 1, 505 P.2d 193; see *Carson v. Facilities Development Co.,* (1984) 36 Cal.3d 830, 844–845, 206 Cal.Rptr. 136, 686 P.2d 656.) However, expert testimony is incompetent on the predicate question whether the duty exists because this is a question of law for the court alone. (*Clarke,* supra, 174 Cal.App.3d at p. 214, 219 Cal.Rptr. 845.) Plaintiff's contention that the trial court erroneously disregarded "custom and practice testimony, i.e. the testimony of other professionals in the same field," fails because, for reasons which follow, the trial court properly concluded defendant had no duty to structure the transaction to minimize plaintiff's tax liability or to advise him of her lack of expertise with section 1031 exchanges.

[7] Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency. (2 Witkin, Summary of Cal.Law (9th ed. 1987) Agency and Employment, § 253, pp. 245–246.) Plaintiff does not contend defendant failed to fulfill a duty imposed by statute or implementing regulation (e.g., Civ.Code, § 1102 et seq. [agent's duty to inspect property; disclosure requirements]). Thus, he must derive defendant's duty from the general law of agency, i.e., from the agreement between the principal and agent. "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of

the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect." (Rest.2d Agency, § 376; *Anderson v. Badger,* (1948) 84 Cal.App.2d 736, 741, 191 P.2d 768; 3 Cal.Jur.3d, Agency, § 87; cf. *Ahern,* supra, 1 Cal.App.4th at p. 43, 1 Cal.Rptr.2d 339 [insurance agent owes duties normally found in agency relationship].)

[8] Plaintiff's agreement with defendant is contained in the listing agreements, disclosure statements and purchase contracts described above. Plaintiff admitted each document was genuine, stated he read each document prior to signing, acknowledged he understood each document was legally significant, and admitted defendant did nothing to prevent him from reading each document in its entirety. Plaintiff claimed he only "glanced through" some of the documents because "[i]t is a bore to read through these kinds of real estate transactions." However, his failure to read the documents does not permit him to avoid their legal effect, and plaintiff does not contend otherwise. (E.g., *Bolanos v. Khalatian,* (1991) 231 Cal.App.3d 1586, 1590, 283 Cal.Rptr. 209.)

[9] [10] The listing agreements for sales of the properties at 1028 Adams and 1001 Adams told plaintiff that defendant, a real estate broker, was ***756** "qualified to advise on real estate," but informed plaintiff he ****741** should "consult an appropriate professional" if he desired legal or tax advice. The real estate agency disclosure forms advised plaintiff to "carefully read all agreements to assure that they adequately express your understanding of the transaction," and reiterated that "[a] real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional."[2] The real estate purchase contracts informed plaintiff that "[a] real estate broker or agent is qualified to advise on real estate. If you require legal or tax advice, consult your attorney or accountant." Moreover, the contracts specifically advised plaintiff that "[n]o representation or recommendations are made by the broker, agents, or employees as to the legal sufficiency, effect, or tax consequences of this document or the transaction relating thereto. These questions are for your attorney and or your accountant."

These documents negate plaintiff's claim of duty. His allegation that defendant had a duty to prepare the deposit receipts and structure the escrows in a manner which would minimize plaintiff's tax liability is negated by the purchase contracts' provision stating the broker makes no representation or recommendation as to the tax consequences of the transaction. Were defendant subject to the alleged duty, she necessarily would "represent" she has structured the transaction to minimize any adverse tax consequences. This is precisely what the document states the broker does not do.

[11] Plaintiff's claim that defendant had a duty to inform him of her lack of expertise with section 1031 exchanges and to advise him to seek other professional help in that regard is negated by the documents' provisions stating a broker is qualified to advise on real estate but legal or tax advice should be obtained from a "competent professional," an "attorney and or ... accountant." These documents also provide the very advisement which plaintiff claims defendant should have given: that plaintiff should "seek other professional assistance" regarding tax consequences of the transactions here at issue.

[12] Likewise, plaintiff's allegation that defendant had a duty to "issue-spot" or warn him regarding tax consequences of the transactions is at odds with the documents' admonition that plaintiff should get his tax advice elsewhere. (Cf. *Ahern,* supra, 1 Cal.App.4th 36, 1 Cal.Rptr.2d 339 [absent some conduct on the part of the ***757** agent consistent with assuming broader duties, the agent's duties are limited to those arising out of the contract].)[3]

This case is similar to *Santos v. Wing,* (1961) 197 Cal.App.2d 678, 17 Cal.Rptr. 457, where sellers of property were dissatisfied because, as structured, the sale had unfortunate tax consequences. In rejecting sellers' effort to hold the real estate agents responsible, the court explained: "We do not find in the evidence any suggestion that the [agents] had any knowledge of the appellants' tax situation, or what if any tax might result to the appellants from this sale. The [agents] did not attempt to give ****742** the appellants any tax advice. On the contrary, they urged appellants to seek counsel; the appellants did have an accountant and they had an attorney, and the appellant Santos held the seller's instructions in his possession for several days for the announced purpose of seeking legal advice." (*Id.,* at p. 684, 17 Cal.Rptr. 457.) Here, as in *Santos,* defendant real estate broker did not attempt to give tax advice. Rather, she repeatedly advised plaintiff in writing to seek tax advice from an attorney or accountant.[4]

Citing *Tunkl v. Regents of University of California,* (1963) 60 Cal.2d 92, 98–101, 32 Cal.Rptr. 33, 383 P.2d 441 and *Akin v. Business Title Corp.,* (1968) 264 Cal.App.2d 153, 158–159, 70 Cal.Rptr. 287, plaintiff contends the disclaimer language in the listing agreements, disclosure statements and purchase contracts should be disregarded. *Tunkl* and *Akin* hold that contractual language exculpating a party from responsibility for its

future negligence is invalid under ***758** Civil Code section 1668 where the contract affects a public interest. (*Tunkl,* supra, 60 Cal.2d at pp. 96, 101–104, 32 Cal.Rptr. 33, 383 P.2d 441 [a release from liability for future negligence imposed as a condition for admission to a charitable research hospital is invalid as contrary to the public interest]; *Akin,* supra, 264 Cal.App.2d at p. 159, 70 Cal.Rptr. 287.)

[13] Plaintiff's reliance on *Tunkl* and *Akin* is misplaced. In this case, the contractual language does not exculpate defendant from her negligence, i.e., from her breach of an extant duty of care. Rather, the contractual language in effect specifies that a real estate broker *has no duty* to provide legal or tax advice. Thus, the failure to provide such information is not negligence, and the rules governing exculpation from negligence do not apply.

[14] Nevertheless, plaintiff suggests that any contractual provision relieving real estate brokers of a duty to recognize and alert a client to the potential tax consequences of a transaction violates public policy. (Cf. *Easton v. Strassburger,* (1984) 152 Cal.App.3d 90, 199 Cal.Rptr. 383 [holding broker has duty to inspect premises; later codified in Civ.Code § 1102 et seq.]; see also *Schoenberg v. Romike Properties,* (1967) 251 Cal.App.2d 154, 162, 59 Cal.Rptr. 359 [duty to investigate property to determine its value].) According to plaintiff, "current real estate practice" dictates that a real estate professional has a duty to recognize tax consequences of a transaction and to structure tax-deferred exchanges when appropriate. He points to evidence that defendant was familiar with tax-deferred exchanges, had taken a class entitled "Unmasking and Masking and Creatively Protecting Clients in Exchanges," and had attended a seminar on "Tax Aspects of Real Estate." Plaintiff claims that, because brokers hold themselves out to the public as possessing special knowledge in real estate transactions and "given the evolution of the real estate profession into new and emerging fields (including [tax-deferred exchanges])," public policy requires brokers to have a duty to recognize and advise clients of the tax consequences of their transactions and of the need for tax-deferred exchanges.

This contention fails because the Legislature has determined that public policy expects sellers and buyers to obtain tax advice from professionals other than real estate brokers. By enacting Civil Code section 2375, the Legislature has mandated that buyers and sellers be told: "A real ****743** estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." We decline to conclude that public policy requires real estate brokers to provide tax advice when the Legislature has determined that such advice should be sought from other competent professionals.

[15] Plaintiff also claims the "boilerplate" language in his contracts stating defendant was not responsible for giving tax advice is adhesive and, thus, ***759** should be disregarded. "A contract of adhesion has been defined as 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citations.]" (*Izzi v. Mesquite Country Club,* (1986) 186 Cal.App.3d 1309, 1317, 231 Cal.Rptr. 315.) The contention fails because, even if it is adhesive in nature, "the contract would remain fully enforceable unless (1) all or part of the contract fell outside the reasonable expectations of the weaker party or (2) it was unduly oppressive or unconscionable under applicable principles of equity." (*Ibid.*) Because the Legislature has determined that buyers and sellers of real estate should rely on professionals other than real estate brokers for tax advice, any expectation on the part of plaintiff that defendant would provide such information or "issue-spot" tax problems was not reasonable. Moreover, none of the contractual terms is either "unduly oppressive" or "unconscionable." (*Ibid.*)

[16] Since defendant's showing in support of her motion for summary judgment established facts which negated plaintiff's claims of duty, the final step of our analysis is to determine whether plaintiff's opposition to defendant's motion for summary judgment demonstrated the existence of a triable, material issue of fact. (*AARTS Productions,* supra, 179 Cal.App.3d at pp. 1064–1065, 225 Cal.Rptr. 203.) It does not. Plaintiff's opposition relied on excerpts from defendant's deposition which suggest defendant was knowledgeable about the requirements for section 1031 exchanges. While such knowledge may establish an ability to structure the transaction to minimize tax consequences or to warn plaintiff, it does not establish a duty to do so. Defendant cannot be negligent for failing to do what she had no duty to do. (*Banerian,* supra, 42 Cal.App.3d at p. 613, 116 Cal.Rptr. 919.)[5]

The trial court properly granted summary judgment because defendant demonstrated her entitlement to judgment as a matter of law, and plaintiff failed to raise a material factual issue necessitating a trial. (*AARTS Productions,* supra, 179 Cal.App.3d at pp. 1064–1065, 225 Cal.Rptr. 203.)

II[**]

***760 DISPOSITION**

The judgment is affirmed.

PUGLIA, P.J., and SIMS, J., concur.

Parallel Citations
14 Cal.App.4th 745

Mars v. Wedbush Morgan Securities, Inc. (1991) 231 Cal.App.3d 1608, 283 Cal.Rptr. 238

Investor sued clearing broker, investment broker and investment broker's owner to recover investment losses. The Superior Court, Los Angeles County, Eric E. Younger, J., granted clearing broker's motion for summary judgment and investor appealed. The Court of Appeal, Goertzen, J., held that clearing broker owed no duty to investor other than those clearing broker undertook to perform as clearing broker; as investment broker's agent, clearing broker was not liable for investment agent's conduct in absence of evidence of wrongdoing on part of clearing broker.

Affirmed.

Attorneys and Law Firms

****239 *1610** William R. Hess, Los Angeles, for plaintiff and appellant.

Keesal, Young & Logan, Terry Ross and Michele Fron, Long Beach, for defendant and respondent.

Opinion

GOERTZEN, Associate Justice.

Plaintiff/appellant Marshall Mars (appellant) appeals from the judgment entered upon the granting of the motion for summary judgment of defendant/respondent Wedbush Morgan Securities, Inc. (respondent).[1] Appellant had sued First United Securities Group (First United); respondent; and Dennis Kantor, First United's owner, in an attempt to recover investment losses appellant suffered allegedly because of the defendants' actions.[2]

For the reasons discussed below, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 9, 1988, appellant filed his complaint against First United, respondent, and Kantor for breach of fiduciary duty, fraud, negligence, unauthorized trading of stock, and excessive trading of stock. Therein, appellant alleged the following. In November 1986, First United, represented by Kantor, became appellant's securities broker. At that time, First United ***1611** and Kantor promised they would fully inform him of all material facts affecting each trading activity executed for him, would not trade on his account with borrowed funds or increase his financial risks without first discussing the matter with him and obtaining his consent, would trade in accordance with all rules and regulations published by First United in its manuals and contracts, would abide by all applicable local, state and federal laws and regulations, and would accurately report his securities transactions. Beginning in November 1986, through August 1987, appellant invested about $50,000 with First United. In November 1987, appellant ordered First United to sell all his stock and close his account. From November 1986, through November 1987, defendants "falsely reported [appellant's] trading activity; bought and sold securities for [appellant] without his consent and knowledge; caused [appellant] to borrow against equity without his knowledge and consent and without taking into consideration or explaining to [appellant] the financial risks involved; failed to present [appellant] with all material facts affecting each transaction contemplated and entered into by [appellant] at the Defendants' solicitation and/or information; failed to execute sale orders upon demand by [appellant]; and caused [appellant] to trade excessively and without regard for the suitability of the investments made or the profitability of the trades."

On October 27, 1989, respondent filed its motion for summary judgment or, alternatively, for summary adjudication of issues. Respondent admitted that it was a member of the New York, American and Pacific Stock Exchanges and that it had entered into a Clearing Agreement with First United on July 6, 1983. Respondent asserted, however, that it could not be sued for the ****240** losses suffered by appellant because according to the terms of the Clearing Agreement between it and First United and the Letter of Understanding between appellant and First United, appellant was a client of First United, not of respondent; consequently, no fiduciary duty existed between it and appellant. Respondent argued that it had fully complied with its duties pursuant to the Clearing Agreement. Respondent further pointed out that appellant had executed a Letter of Understanding with First United, which indicated his acceptance of the arrangement made between respondent and First United and of the fact that he was the client/customer of First United, not respondent.

Included with respondent's motion were copies of the Clearing Agreement between First United and respondent, the Letter of Understanding between appellant and First United, an excerpt of appellant's deposition testimony, and the declaration of Marie Eaton, assistant vice-president of respondent.

***1612** By the terms of the Clearing Agreement, respondent was to act as the agent for First United, performing certain administrative duties[3] such as

executing transactions in First United's clients' accounts and releasing or depositing monies or securities to or for First United's customers upon authorization from First United; for all purposes the clients were First United's and not respondent's; First United agreed it would notify its clients of the nature of respondent's relationship and secure the clients' agreement of same; and First United would be responsible for complying with all pertinent professional, local, state and federal laws and regulations. The Clearing Agreement further provided that respondent was not to "be responsible to any of [First United's] clients for losses suffered by them except losses suffered as a result of [respondent's] failure to perform the specific duties undertaken ... pursuant to [the] agreement."

The Letter of Understanding informed appellant that an account in his name had been opened with respondent, on a "correspondent broker" basis, respondent would provide "order execution and certificate clearance on [First United's] instructions," respondent would not be involved with or have responsibility for decisions regarding transactions in appellant's account, appellant would continue as First United's customer, First United would be responsible for all activities in connection with appellant's account, and any inquiries or complaints should be directed to it. The bottom half of the letter, entitled "Account Agreement, Taxpayer Certification, and Beneficial Ownership Election," among other things, stated: "I understand and agree that my account is to be handled in the manner described above." Appellant executed this letter on October 22, 1986.

In his deposition testimony, appellant stated that he did not believe he had ever contacted respondent with respect to anything involving his account.

***1613** The declaration of Ms. Eaton, respondent's assistant vice-president, reiterated the terms of the Clearing Agreement and ****241** the Letter of Understanding. Ms. Eaton also declared that the "entry of orders, any instructions regarding the deposit or withdrawal of securities or money, and all transactions regarding [appellant's] account were done pursuant to instructions received ... from First United and its agents;" during the period October 1986, through January 1988, respondent did not sell securities to appellant; and that prior to filing the lawsuit, respondent had received no complaints from appellant in connection with the services respondent had agreed to provide.

Appellant filed a motion for leave to file an amended complaint, which was denied.

In opposition to the motion for summary judgment, appellant argued that respondent had violated various federal securities laws which had not been pleaded in the complaint, and, in sum, countered that as a clearing broker, respondent could be held liable for the unlawful acts of the broker; and that as triable issues of fact existed as to the exact relationship between First United and respondent, the motion for summary judgment should be denied. Appellant filed no counter declarations or affidavits of any kind.

On December 1, 1989, the hearing on the motion was held. The court granted the motion for summary judgment, finding that any case which appellant might have was against First United, not respondent. Judgment in favor of respondent was entered on December 1, 1989.

This timely appeal followed.

STANDARD OF REVIEW

[1] [2] [3] [4] "Summary judgment is properly granted only when the evidence in support of the moving party establishes that there is no issue of fact to be tried. [Citations.] [¶] The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory. [Citation.] The affidavits of the moving party are strictly construed and those of his [or her] opponent liberally construed, and doubts as to the propriety of summary judgment should be resolved against granting the motion. [Citation.] Issue finding rather than issue determination is the pivot upon which the summary judgment law turns. [Citation.]" (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35–36, 210 Cal.Rptr. 762, 694 P.2d 1134, internal quotation marks and ellipses omitted.)

[5] "This task is limited to addressing those issues or theories of liability raised in plaintiff's complaint. The papers filed by the party opposing ***1614** summary judgment must also be directed to the issues raised in the complaint; therefore, the opposing papers may not create issues outside of the pleadings. [Citations.]" (*Fireman's Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994, 216 Cal.Rptr. 796.)

With these rules in mind, we turn to the case before us.

DISCUSSION

[6] In granting the motion, the court found, as a matter of law, that as a clearing broker, respondent owed no duty to appellant other than those respondent undertook to

perform as a clearing broker; as First United's agent, respondent was not liable for First United's conduct; no evidence of wrongdoing was alleged or established on the part of respondent in connection with its duties as a clearing broker; and that respondent did not act negligently towards appellant. We are in accord.

The Clearing Agreement between respondent and First United and the Letter of Understanding between appellant and First United establish that appellant was a client of First United, not respondent. When appellant executed the Letter of Understanding, he agreed that First United would continue to be responsible for all activities in connection with his account. As noted by the court in *Van Luven v. Rooney Pace, Inc.* (1987) 195 Cal.App.3d 1201, 1203, 241 Cal.Rptr. 248, "an introducing broker [here, First United] is the firm whose account executives deal with customers, i.e., solicit orders and offer recommendations. A clearing broker, on the other hand, has no client contact, but places and executes orders with the exchange at ****242** the direction of the introducing broker." In the Clearing Agreement, First United accepted the responsibility for all activities in appellant's account. The Letter of Understanding put appellant on notice of the relationship between the parties and protected respondent from liability for any misconduct by First United.

[7] Moreover, respondent owes no fiduciary duty to appellant. The Clearing Agreement indicates that respondent agreed to act as an agent of First United; consequently, respondent had a fiduciary relationship with First United, the principal. (See 2 Witkin, Summary of Cal.Law (9th ed. 1987) Agency and Employment, § 41, pp. 53–54.) Respondent, however, generally owes no fiduciary duty to *appellant.* (*Edwards & Hanly v. Wells Fargo Securities, etc.* (2d Cir.1979) 602 F.2d 478, 484, cert. denied (1980) 444 U.S. 1045, 100 S.Ct. 734, 62 L.Ed.2d 731.) By the terms of the Clearing Agreement and Letter of Understanding, respondent did not control appellant's account. Respondent acted only upon instruction of First United, an arrangement to ***1615** which appellant freely agreed. Respondent, as the clearing broker, had no direct contact with appellant; it did not recommend transactions, give advice or determine suitability of the trading. Respondent was not appellant's investment broker. (See *Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1453–1456, 277 Cal.Rptr. 468; Cf. *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 709, 69 Cal.Rptr. 222.)

The factual allegations supporting a claim of negligence, appearing in paragraphs 9 through 18 of the complaint, speak to the actions of First United and Kantor, not respondent. As enumerated in footnote 3, *supra,* pursuant to the Clearing Agreement, respondent's duties with respect to appellant's account consisted of actions which were operational or ministerial in nature. (See *Carlson v. Bear, Stearns & Co. Inc.* (7th Cir.1990) 906 F.2d 315, 318.) The only language in the complaint related to respondent's enumerated duties is the allegation that respondent "falsely reported [appellant's] trading activity" after promising that it "would accurately and honestly report" securities transactions effected and executed for his account. Yet, in opposing the motion for summary judgment, appellant presented no evidence to create a genuine issue on the question of whether the alleged misreporting was a "but-for" cause of his losses. (See *Neiman v. Clayton Brokerage Co. of St. Louis, Inc.* (N.D.Ill.1988) 683 F.Supp. 196, 200.)

[8] Appellant contends, however, that an issue remains regarding the relationship between First United and respondent and whether respondent had a duty to supervise First United. We cannot agree. The Clearing Agreement between First United and respondent defines their relationship and sets forth the rights, duties and liabilities of each party. The Clearing Agreement conformed to the requirements of Rule 382 of New York Stock Exchange and Rule 400 of the American Stock Exchange.[4] Pursuant to this contract, respondent had no responsibility to supervise First United or Kantor. Respondent had no power over First United; it acted as an order taker for First United's accounts and cannot be liable for any trading decision made by First United. (See *Neiman v. Clayton Brokerage Co. of St. Louis, Inc., supra,* 683 F.Supp. at p. 201.) In fact, by deposition, appellant testified that he did not believe that he had ever contacted respondent about anything to do with his account.

[9] [10] Finally, we discuss whether a triable issue of fact exists as to whether respondent committed fraud. Respondent was First United's agent. ***1616** Generally, an agent is not held liable for the fraud of ****243** a principal, unless the agent knows of or participates in the fraudulent act. (2 Witkin, Summary of Cal.Law (9th ed. 1987) Agency and Employment, § 151, pp. 145–146; Rest.2d Agency (1958) § 348, pp. 112–113.) Here, the fraud alleged purportedly occurred through the investment machinations practiced by First United and Kantor. In order for respondent to be held liable for this alleged fraud, appellant would have to prove that respondent " 'exercised control over ... the people directly liable.' [Citations.]" (*Neiman v. Clayton Brokerage Co. of St. Louis, Inc., supra,* 683 F.Supp. at p. 201.) "Control almost always means the practical ability to *direct* the actions of those directly liable." (*Ibid.,* internal quotation marks, ellipses and brackets omitted, emphasis

in original.) As noted above, the Clearing Agreement clearly provides that respondent exercised no such control over First United or Kantor. Appellant presented no competent evidence which negated the provisions of the Clearing Agreement or which created a triable issue of fact in this regard.

In presenting his arguments, appellant relies solely on *Faturik v. Woodmere Securities, Inc.* (1977) 442 F.Supp. 943. The *Faturik* case arose after the federal equivalent of a demurrer was sustained without leave to amend. The court reversed, finding that the pleadings *could* be amended to state a cause of action for violation of Rule 10b–5 of the Securities and Exchange Commission. The present case arrives here after the granting of a motion for summary judgment; therefore, the pertinent appellate rules and analysis differ completely from those applied in *Faturik.*

DISPOSITION

The judgment is affirmed.

ARLEIGH M. WOODS, P.J., and EPSTEIN, J., concur.

Parallel Citations

231 Cal.App.3d 1608

Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 18 Cal.Rptr.2d 779

Purchasers of house brought action against seller's real estate brokerage firm and agent for fraud, negligent misrepresentation, and negligence upon discovering foundation problems. The Superior Court, County of Contra Costa, No. C8900278, David A. Dolgin, J., granted nonsuit at close of evidence on negligent misrepresentation and negligence claims, and entered judgement against purchasers on fraud claim, and purchasers appealed. The Court of Appeal, Smith, J., held that: (1) defendants satisfied standard of care for inspection and disclosure, precluding finding of fraudulent nondisclosure regarding foundation defects; (2) evidence did not establish that defendants made assertion regarding foundation, as required for claim of negligent misrepresentation; and (3) defendants were not negligent in failing to discover and disclose structural defects that were apparent from diligent visual inspection.

Affirmed.

Attorneys and Law Firms

****780 *300** Gene Cain, Stephen Austin Cain, Law Offices of Cain & Cain, Walnut Creek, for plaintiffs and appellants.

Sher, Marshall, Akawie & Blumenfeld, Sher, Blumenfeld & O'Leary, P.C., Timothy F. O'Leary, Paul S. Lecky, Oakland, for defendants and respondents.

Opinion

***301** SMITH, Associate Justice.

Plaintiffs John and Carolyne Wilson bought a home in Walnut Creek and later brought this action against the seller's real estate brokerage and agent, Century 21 Great Western Realty (Century 21) and Harry Kraft, after realizing that the home had foundation problems. The case was tried to a jury on theories of fraud, negligent misrepresentation and negligence, but the court granted a nonsuit at the close of evidence which left only the fraud cause of action. In a special verdict, the jury found that defendants had concealed or suppressed a material fact, but not with an intent to defraud. This appeal by plaintiffs from judgment on the verdict comes after the court denied their motions for new trial and judgment notwithstanding the verdict.

At issue here are the duties of a seller's broker to discover and disclose material defects to a home buyer, duties imposed by Civil Code sections 1102–1102.15, 2079 and 2079.2.[1] We affirm the judgment.

BACKGROUND

[1] A nonsuit is properly granted only if, as a matter of law, the evidence presented by the plaintiff is insufficient to permit a jury to find in his favor. Both the trial court and this court view the evidence most favorably to the plaintiff, with all legitimate inferences drawn in his favor and all supporting evidence accepted as true. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291, 253 Cal.Rptr. 97, 763 P.2d 948; *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117–118, 184 Cal.Rptr. 891, 649 P.2d 224; *Marvin v. Adams* (1990) 224 Cal.App.3d 956, 960, 274 Cal.Rptr. 308.) From that perspective, we summarize the trial evidence.[2]

Ann Hays was the owner and sole occupant of the property, a small two-bedroom, cottage-style house on a large lot at 1096 Mountain View Blvd. The house was built about 1947 and had been ill maintained for years when the elderly Hays decided in early 1987 to sell. She and Century 21 agent Kraft first settled on a listing price of $159,500 but, after getting roof ***302** and termite inspection reports calling for a new roof and other repairs, listed it as a " 'fixer upper' " at an advertised reduced price of $149,950.[3]

Plaintiffs were looking for a house to fix up. John Wilson had a general contractor's license and about 12 years of experience in home construction, having done some remodeling and termite jobs but mostly new construction. Working with his own agent, a Robert Fitzstephens of MG Realty, John Wilson read the existing reports and personally inspected the property before making an offer. The termite report called for repairing water-related damage, mainly in the bathroom, and noted foundation and stucco cracks around the house. In a walk-through with Hays, Wilson saw obvious sloping of the floors, meaning they were out of level. Then in a later inspection conducted with his father (a contractor since 1952), Wilson checked ****781** under the house, where he saw a sump pump and examined the center piers to assure that the floors could be releveled. He felt that there was settling caused by water collecting under the house in the area of the pump. He decided that he could put in a perimeter drain, move the pump and relevel the floor. He then secured his own roof report, and it showed, contrary to the seller's, that the roof would not need replacing right away.

Also existing before the offer was the statutorily required form, "Real Estate Transfer Disclosure Statement" (§

1102.6). In the seller's portion, Hays indicated that she was aware of defects in exterior walls and windows, explaining: "MINOR CRACKS IN STUCCO ON OUTSIDE WALLS. CRACK IN WINDOW IN MASTER BR." She also checked the "Yes" box opposite "Flooding, drainage or grading problems," explaining: "MINOR FLOODING IN LATE 1960's. DRAINAGE CORRECTED BY FLOOD CONTROL, SUMP PUMP INSTALLED UNDER HOUSE. NO FURTHER INCIDENTS OR PROBLEMS." In the listing agent's portion, Kraft confirmed Hays' information as complete and correct, by his own inspection, adding, "SEE ROOF AND TERMITE REPORTS." Neither portion indicated defects in the foundation.

Having that information, plaintiffs in late July 1987 made an offer of $140,000. The offer was made subject to their "physical inspection and acceptance" and "inspection and acceptance of existing termite and roof reports" within 10 days of contracting.

Hays counteroffered for $148,450, specifying: "THIS HOUSE IS BEING SOLD 'AS IS'. BUYER TO PAY FOR THE COST OF ALL REPAIRS." Buyers would also accept the existing reports and reimburse her for them.

***303** Plaintiffs accepted, and John Wilson did the needed termite work himself pending escrow. That work was a condition of his lender, although the lender was satisfied with the independent report showing no immediate need to repair the roof. In the process of removing and replacing the bathroom subfloor, John got a view of the foundation in that area. A supplemental termite report at some point identified grading problems near the garage, and John's brother did the needed grading to correct them.

John testified that he did not see anything before the close of escrow which signaled structural problems. Plaintiffs removed and waived their "physical inspection" contingency on August 5, on the same day signing an acknowledgment that they knew they had the right to secure a property inspection report at their own expense. They never sought one. They testified that no one recommended having one done (there was contrary testimony that a specific structural engineer was recommended), although John knew they had the right to have a professional come in and inspect. Their own agent, Fitzstephens, executed the selling agent's portion of the disclosure form in September, writing: "Flooring and grading problems, refer to tradesman roof and termite reports."

Escrow closed in October, after plaintiffs on the first of that month conducted a final walk-through inspection and signed an inspection sheet stating that they accepted the property in its then-existing condition. They planned to fix the water and floor problems themselves and, eventually, add onto the house to accommodate their growing family.

This lawsuit concerns defendants' failure to act upon a brief conversation which Kraft had with Ann Hays' next door neighbor, Jack Goldner, when the property was first listed for sale. Hays told Kraft that Goldner might be interested in buying, and Kraft approached him about it. Goldner said he might be interested and asked how much. When Kraft said $159,500, Goldner said it was too high and, having an ulterior motive of getting the price down, suggested that the property might have foundation problems.

Kraft and Goldner testified to somewhat differing accounts. We recite mostly Goldner's, which better supports plaintiffs' case: "... I told him that I thought that the house probably had some problems, that the price that he quoted me was higher ****782** than I expected the value of the house would be, if these problems were discovered. [¶] I told him, basically, that I was a contractor, that I was a home inspector, that I had had similar problems in my own house, had to replace my own foundation, having been a resident of the area for a number of years, had seen other people in the area that had to replace their foundations, and so I told him that if it [were] disclosed that ***304** there were those problems in that house, I expected the value would come down. And at that time I'd be interested in taking a look at the possibility of purchasing the property...." Goldner believed he also said that the problem homes had been built by the same builder as Hays' home. Goldner had extensively remodeled his own home, adding a second story, but Kraft recalled him saying that his home had been exactly the same as Hays' before the remodeling.

Goldner related his conversation with Kraft to John Wilson in early 1988, some three months after escrow had closed. Realizing that Wilson was a contractor too, Goldner gave him "a bit more elaborate" account than he had with Kraft. In December of that year, plaintiffs had a company X-ray their foundation, and the report revealed no steel reinforcement. John Wilson inspected for "J" bolts holding the house to the foundation and likewise found none.

Plaintiffs brought this action in January 1989. Their appeal is from the "judgment," suggesting the entire judgment. However, their arguments attack only the partial nonsuit ruling, which became reviewable only on appeal from the judgment entered on the subsequent no-fraud verdict. (Code Civ.Proc., § 581c, subd. (b).) The verdict itself is not challenged.

DISCUSSION

The trial court ruled, based on *Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 233 Cal.Rptr. 470, that the "as is" feature of the sale in this case relieved defendants of liability except for the fraudulent nondisclosure cause of action—the intentional concealment of material defects not visible to or observable by plaintiffs.[4] We will uphold the ruling as correct in result.

[2] "As is" language in a realty sales contract does not shield a seller or his agent from liability for affirmative or, as in this case, negative fraud. "[G]enerally speaking, such a provision means that the buyer takes the property in the condition visible to or observable by him. [Citation.] Where the seller actively misrepresents the then condition of the property [citations] or fails to disclose the true facts of its condition not within the buyer's reach and affecting the value or desirability of the property, an 'as is' provision is ineffective to relieve the seller of either his 'affirmative' or 'negative' ***305** fraud.... To enlarge the meaning of such a provision so as to make it operative against all charges of fraud would be to permit the seller to contract against his own fraud contrary to ... law. (Civ.Code, § 1668.)"[5] (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 742, 29 Cal.Rptr. 201; see 1 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 1:127, p. 446.)

Fraudulent nondisclosure

[3] Consistent with the foregoing, the court here allowed the jury to determine plaintiffs' cause of action for "negative" fraud—defendants' alleged nondisclosure of a fact materially affecting the value or desirability of the property. The basis was statutory. While Kraft did not *know* from his conversation with Goldner that Hays' foundation had defects, he assertedly ****783** should have investigated further and then discovered defects and disclosed them. Section 2079 requires a broker "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal...." The standard of care is what a reasonably prudent real estate licensee would exercise (§ 2079.2), and disclosure is required on the form used in this case (§§ 1102, 1102.6).

Negligent misrepresentation

Plaintiffs observe that negligent misrepresentation, one of their nonsuited causes of action, is construed in this state as a species of fraud or deceit, responsibility for which therefore cannot be validly contracted away without violating public policy as expressed in section 1668 (see fn. 4, *ante*). (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471–1473, 266 Cal.Rptr. 593; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 402–404, 264 Cal.Rptr. 779.) They urge that the court accordingly should have let that cause of action go to the jury despite the "as is" provision.

However, assuming merit in that argument, defendants offer a different basis for upholding the nonsuit. "[G]rounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion...." ***306** (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 94, 147 P.2d 604.) Here the motion was brought not at the close of plaintiffs' case-in-chief, but at the close of *all* evidence. We may assume, therefore, that plaintiffs had presented all the evidence they had to offer. Plaintiffs do not argue otherwise.

[4] Negligent misrepresentation is a species of fraud or deceit specifically requiring a "positive assertion" (§ 1572, subd. 2) or "assertion" (§ 1710, subd. 2) of fact. (*Blankenheim v. E.F. Hutton & Co., supra,* 217 Cal.App.3d 1463, 1472–1473 & fn. 6, 266 Cal.Rptr. 593.) An "implied" assertion or representation is not enough. (*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 942, 268 Cal.Rptr. 609; see *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 304, 136 Cal.Rptr. 603.)

[5] Defendants urge that the evidence does not show an adequate "assertion." We agree. In remarks to the court on the nonsuit motion, plaintiffs' counsel cited three asserted misrepresentations: (1) the fixer-upper language in the "GOOD NEWS!" announcement prepared by Kraft, (2) the "no" box being checked where the disclosure form asks whether the seller is aware of "Any settling from any cause, or slippage, sliding, or other soil problems," and (3) no check being made in the box indicating the seller's awareness of "any significant defects/malfunctions" in the "Foundation."

The first is easily dispatched. Asserting that property is good for " 'fixer upper' buyers" (fn. 3, *ante*) does not even impliedly represent the condition of the foundation. The foundation may be part of what needs fixing up. The second—the "no" box about awareness of settling, or slippage, sliding or other soil problems—relates to "settling" or "soil" problems, not the foundation itself.

Reference to the foundation is implied at best, not a positive assertion. It follows that Kraft did not positively assert anything about the foundation when he attested that the seller's information was complete and correct to the best of his knowledge. Finally, asserting that one is not "aware" of significant "defects/malfunctions" in a foundation, while a direct reference to a foundation, is still only *implied* as to its true condition. Indeed, one who claims to be "aware" of no defects necessarily leaves open the chance that unknown defects do exist. While plaintiffs argue that failure to discover and disclose unknown defects renders a disclosure of known defects an adequate implied "assertion," one court has held, in the analogous context of an investment advisor's failure to investigate and disclose investment facts, that the positive-assertion requirement bars relief. ****784** (*Byrum v. Brand, supra,* 219 Cal.App.3d 926, 942, 268 Cal.Rptr. 609.) Here, as there, "[t]he alleged representation by omission ... seems to us to be too remote to fit this requirement...." (*Ibid.*)

Because lack of a positive "assertion" defeats the claim, we do not consider whether jurors, having found no intent to defraud would, as defendants suggest, have found no intent to induce reliance, another essential ***307** element of negligent misrepresentation. (*Continental Airlines, Inc. v. McDonnell Douglas Corp., supra,* 216 Cal.App.3d 388, 402, 264 Cal.Rptr. 779.)

Negligence

That leaves the claim for ordinary negligence, and it appears to be an open question whether an "as is" provision in a realty sales contract validly relieves a broker of negligence liability for failure to discharge inspect-and-disclose duties owed to a buyer under section 2079 (see also § 1102 et seq.). We need not decide that question as the evidence here does not show a breach of statutory obligations.

A broker's duty to both *inspect* and disclose was first articulated in *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 199 Cal.Rptr. 383, a decision from this court, and was a common law development: "[T]he duty of a real estate broker, representing the seller, to disclose facts ... includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." (*Id.,* at p. 102, 199 Cal.Rptr. 383, fn. omitted.) The Legislature, as part of a scheme also including seller-disclosure duties (§ 1102 et seq.), has now codified that duty, with modifications. Section 2079 requires a broker to "conduct a reasonably competent and diligent visual inspection" of the property and "disclose to [a] prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal...."[6]

[6] It is not clear whether the broker's statutory duties supplant case law duties (cf. § 1102.8 [duties required by that article, §§ 1102–1102.15, do not limit or abridge those created by any other provision of law]), but plaintiffs base their case here exclusively on the statute. Their main argument that the "as is" provision had no effect, in fact, is that the law does not allow parties to contract away ordinary negligence liability for breach of duties created *by statute* for the public interest. (§§ 3513, 1668; see 1 Witkin, Summary of Cal.Law (9th ed. 1987) Contracts, §§ 631, 645, pp. 568–569, 586.)

***308** Plaintiffs fail to read the statute carefully enough. They base their case on a claimed duty by Kraft to investigate the foundation, based on the neighbor's comments, to discover defects (the absence of steel reinforcement and "J" bolts) and then to disclose those defects to plaintiffs. The statute does not require that kind of investigation and disclosure. Section 2079 requires a reasonably competent and diligent "visual" inspection and disclosure of any material defects which "such an investigation" would reveal (fn. 6, *ante*). The "inspection to be performed" under that provision, moreover, "does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection...." (§ 2079.3.)

Uncontradicted evidence shows that the only *visually* apparent problems with the foundation were some cracks and that those were disclosed both in the termite ****785** repair report and by plaintiffs' own repeated inspections of the property. Uneven flooring, which might also suggest foundation deficiencies, was obvious, was noted by plaintiffs' own agent on the disclosure form and was personally observed by plaintiffs. Nothing in the statutes required Kraft to order an X-ray (radiograph) examination for steel. Lack of steel was undisputedly hidden to the eye; only radiograph tests revealed it. Similarly, John Wilson testified that he discovered a lack of "J" bolts only by fishing around under the house between the foundation concrete and some concealing wood with a flat steel bar. He stated: "the way it was constructed, they were hidden"; "you couldn't tell whether there [were any]"; "[i]t was just covered up." Thus the record conclusively establishes that the structural defects were not discernible by "visual inspection" (§ 2079) and involved areas which were "reasonably and normally inaccessible to such an inspection" (§ 2079.3).

Nor did Goldner's conversation with Kraft reveal such problems. Goldner spoke generally about *probable* problems, not knowing whether Hays's house in fact had them, and he did not, according to both his and Kraft's testimony, speak of steel reinforcement or "J" bolts. If he mentioned them at all, it was to John Wilson, after the sale, where Goldner was "a bit more elaborate" because he was speaking with a fellow contractor.

No statutory duty was breached.

Our decision in *Easton v. Strassburger, supra,* 152 Cal.App.3d 90, 199 Cal.Rptr. 383, likewise offers no common-law support for the intrusive, speculation-based duty of inspection and disclosure urged upon us here. At issue in *Easton* was failure to discover soils problems, but not problems discernible only by a soils engineer or other expert. The seller's agents had been aware of certain " 'red flags' " which indicated erosion or settlement problems, and a reasonable inquiry would have revealed *actual* problems of that kind *on the sold* ***309** *property* in the recent past, including massive earth movement. (*Id.,* at pp. 96, 104, 199 Cal.Rptr. 383.)

Nonsuit was proper.

DISPOSITION

The judgment is affirmed.

KLINE, P.J., and BENSON, J., concur.

Parallel Citations

15 Cal.App.4th 298

Pagano v. Krohn (1997) 60 Cal.App.4th 1, 70 Cal.Rptr.2d 1

Purchasers of condominium unit sued vendor, vendor's real estate broker, brokerage, and purchasers' agent on various theories arising out of alleged failure to disclose that property was afflicted with water intrusion problems affecting entire development. The Superior Court, San Diego County, No. 670342, Judith McConnell, J., granted summary judgment for defendants. Purchasers appealed. The Court of Appeal, Prager, J., held that: (1) vendor's broker, who disclosed general water intrusion problem in complex, did not have duty to elaborate on that disclosure by providing specific details regarding such intrusion or precise allegation in condominium association's lawsuit against developer; (2) vendor's did not have duty to disclose past occurrence of algae or efflorescence on concrete of garage; (3) purchaser's agent did not have duty to verify information concerning lawsuit which agent passed from vendor to purchaser; and (4) purchaser's agent did not have duty to tell purchasers that lawsuit might adversely affect value of unit.

Affirmed.

Attorneys and Law Firms

****2 *4** Jon P. Chester, San Diego, for Plaintiffs and Appellants.

Shifflet, Walters, Kane & Knoske, Stephen F. Lopez, John F. Guenther, Higgs, Fletcher & Mack, John Morris, James M. Peterson, San Diego, Kimberly K. Mays, Orange, and Richard Gould, Costa Mesa, for Defendants and Respondents.

Opinion

***5** PRAGER, Judge.*

Plaintiffs Raymond Pagano and Lillian Pagano (the Paganos), purchasers of the subject condominium, sued the seller and the real estate brokers and agents involved in the sale transaction on various theories arising out of the defendants' alleged nondisclosure that the property was afflicted with a severe water intrusion problem affecting the entire condominium complex. The Paganos appeal a summary judgment entered in favor of all defendants. The various issues on appeal articulated by the Paganos boil down to whether there are triable issues of fact as to whether the defendants breached their respective duties of disclosure owed to the Paganos. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Helga Krohn (Krohn) listed her condominium in Black Horse Ranch (Blackhorse) for sale with defendant Peggy Chodorow (Chodorow), a real estate broker affiliated with defendant Coldwell Banker Residential Real Estate Corporation (Coldwell). On April 24, 1993, Krohn accepted an offer from Ray Pagano (Pagano) to purchase the condominium for $320,000.[1]

On April 26, Krohn prepared a real estate disclosure statement representing she was unaware of any flooding, drainage or grading problems. Chodorow noted on that statement: "I know nothing to contradict the owner's statement above. This development is on leased land. Some units have experienced moisture intrusion but not this unit according to owner." Around that time, either Chodorow or Krohn told defendant Jim Lawson (Lawson), the Paganos' agent, that a couple of units in the development had water intrusion problems but Krohn's unit did not. Before April 26, Lawson inspected Krohn's condominium looking for cracks, stress marks and water spots. On the April 26 real estate disclosure statement Lawson noted: "This home seems to be in good shape. I recommend Buyer have the property inspected prior to the close of escrow." On April 27 the Paganos canceled the sale transaction due to family problems.

****3 *6** On May 7, 1993, the board of directors of the Blackhorse Homeowners Association (Association) wrote a letter to the homeowners to give them an "update on the water intrusion problem at Blackhorse." The letter informed the homeowners that the Association had filed a lawsuit against the developer. The letter stated that as a result of negotiations between the developer and the two previous boards, the developer's "spokespeople talked about putting in gutters and downspouts that would be tied into the drainage system, around each unit as a way of directing rainwater away from the houses and foundations." The letter went on to report, however, that due to a dispute between the developer and its insurance carrier, the developer was unable to sign an agreement to toll the running of the statute of limitations on the Association's claims against it and therefore it was necessary to file the lawsuit.

On May 29, 1993, Pagano made, and Krohn accepted, a second offer to purchase the condominium for $315,000, which was $5,000 less than his first accepted offer. Before Pagano made that offer, Lawson forwarded him a

copy of the Association's May 7 letter regarding the lawsuit against the developer. Lawson also read the letter to Pagano over the telephone. Pagano's second offer contained the statement: "Buyer is aware of the ongoing lawsuit and the offer reflects that knowledge."

Before escrow closed the Paganos hired California Home Inspection, Inc., to inspect the condominium. The Paganos were present during the inspection, which lasted about four hours. Neither Pagano nor the professional inspector saw any sign of water intrusion in the condominium. The inspector recommended the installation of gutters and downspouts to help with site drainage.

Escrow closed and the Paganos moved into the condominium in June 1993. The Paganos first discovered evidence of water intrusion when an engineer supervising the installation of a sound system in the condominium pointed out dry rot and dampness in an area from which carpet and baseboard had been removed.

In November 1993 the Paganos filed the instant action, naming as defendants the Krohns, Chodorow and Coldwell. The Paganos later amended their complaint to substitute Lawson and Century 21 Village Realty (Century 21) in place of Doe defendants 1 and 2, respectively. The complaint includes causes of action for rescission, fraud, money had and received, breach of contract, negligent misrepresentation, violation of real estate brokers' statutory duty, concealment and negligent infliction of mental distress.

***7** All of the named defendants answered the complaint and moved for summary judgment against the Paganos.[2] The court granted summary judgment as to each defendant, ruling: "The declaration of HELGA KROHN ... states that she had no personal knowledge nor was she aware of any conditions of significance concerning her property other than those that were actually disclosed. The [real estate purchase contract] indicates that the plaintiff had knowledge of the ongoing lawsuit and lowered his purchase price accordingly. Furthermore, the inspection report ... indicates that the inspector hired by plaintiff recommended the installation of gutters and downspouts to help alleviate the problems of the property.

"Plaintiff admits that JIM LAWSON discussed [the Association's letter informing the homeowners that a lawsuit against the developer had been filed] prior to the close of escrow. The ruling is also based on the real estate purchase contract and receipt for deposit, the inspection report and the disclosure statement.... [¶] As a matter of law, the court finds that the real estate brokers are only required to disclose problems with a unit that could have been discovered through a visual inspection."

DISCUSSION

" 'Since a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and ****4** opposing papers, we independently review them on appeal, applying the same three-step analysis required of the trial court.... First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading.... [¶] Second[ ], we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor.... [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.... Counteraffidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue.' [Citations.]" (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 752–753, 17 Cal.Rptr.2d 734.)

I. *Seller's Agent*

As to Chodorow and Coldwell, agents for the seller in the subject transaction, the issues framed by the Paganos' complaint are (1) whether ***8** Chodorow falsely represented that the subject property was free of a water intrusion problem and/or concealed the existence of a water intrusion problem; (2) whether Chodorow breached her duty under Civil Code[3] section 2079 to conduct a reasonably competent and diligent inspection and disclose all material facts such an investigation would reveal;[4] and (3) whether Chodorow breached her duty to disclose all material facts within her knowledge.

[1] It is undisputed that before Pagano made his second offer to purchase the subject property, Chodorow disclosed to him that some units in the development had suffered moisture intrusion. There is no evidence that Krohn's unit was showing any sign of moisture intrusion at the time Chodorow made that disclosure or that

Chodorow had any knowledge of a moisture intrusion problem at Krohn's unit. Thus, the issue as to Chodorow is whether she owed a duty to disclose additional facts about the water intrusion problem in the development generally and the resulting litigation against the developer. We conclude the disclosures Chodorow made to Pagano were sufficient.

In addition to Chodorow's disclosure that there was moisture intrusion in some of the units at Blackhorse, Pagano was made aware, before he made his second offer, of the contents of the letter from the board of directors of the Association giving notice of the Association's lawsuit against the developer. The opening sentence of that letter stated its purpose was to give the homeowners an "update on *the water intrusion problem at Blackhorse.*" (Italics added.) Although the letter may have been overly optimistic in suggesting the lawsuit could be resolved by the installation of gutters and downspouts around the units to direct rainwater away from the houses and foundations, it clearly informed the reader that the developer was being sued because of a water intrusion problem at Blackhorse. Thus, before Pagano made his second offer on the property, he was apprised of the essential facts concerning water intrusion at Blackhorse—i.e., that there was a water intrusion problem in the development which affected some of the units and resulted in litigation against the developer.

The Paganos argue that Chodorow should have disclosed the following specific facts within her knowledge prior to the purchase of Krohn's unit: (1) as a homeowner in Blackhorse she received 31 documents such as newsletters and minutes of Association's meetings chronicling the progression of ***9** the water intrusion problems at Blackhorse; (2) ****5** she was aware of severe water intrusion problems experienced by the owners of three particular units; and (3) she had read the Association's complaint against the developer.[5]

Disclosure of these additional facts would have served only as elaboration on the basic disclosed fact that there was a water intrusion problem in the development affecting some of the units and resulting in a lawsuit against the developer. There is no evidence in the record that at the time the Paganos purchased their unit Chodorow had reason to believe the problem would affect every unit in the development. None of the Association's newsletters or minutes in the record indicates that all or even most of the 121 units at Blackhorse were directly affected by the water intrusion problem.[6] Chodorow was not obligated to disclose the details of water intrusion affecting other specific units in the development absent some reason to believe the Paganos' unit would likely suffer the same fate.[7]

The Association's complaint against the developer does not add significant information to the basic facts disclosed to Pagano. The complaint alleges generally that various construction errors resulted "in water and moisture intrusion into the condominiums...." At the time the complaint was filed Pagano already knew there was moisture intrusion into some of the condominiums. The complaint's reference to "the condominiums" could not reasonably be construed as meaning *all* of the condominiums because most of the condominiums were unaffected by water intrusion at the time the complaint was filed.

***10** In short, the essential facts about the water intrusion problem were disclosed to Pagano before he made his second offer to buy the subject property. Chodorow was not duty bound to elaborate on those facts by providing further details regarding the various manifestations of water intrusion throughout the development or the precise allegations in the Association's complaint against the developer.

Section 2079.5 provides in relevant part: "Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer." The Paganos knew there was water intrusion at Blackhorse which had resulted in litigation against the developer. The additional details they fault Chodorow for not disclosing, including the content of the Association's complaint, were within their own diligent attention.

The court did not err in granting summary judgment in favor of Chodorow and Coldwell.

II. *The Seller*

The Paganos contend there is a triable issue of fact as to whether Krohn failed to ****6** disclose material facts within her knowledge. Specifically, the Paganos contend Krohn had knowledge of the general water intrusion problem through communications from the Association and she knew her particular unit had exhibited evidence of moisture intrusion problems in the past in the form of efflorescence on the concrete in her garage and algae or moss on the exterior wall of the garage.[8] The Paganos also contend the knowledge of Krohn's agent Chodorow is imputed to her.

[2] Our analysis regarding Chodorow's knowledge and duty to disclose the general water intrusion problem at Blackhorse applies equally to Krohn. The Paganos were sufficiently informed of the existence of the general problem and resulting litigation. Since there is no evidence that Krohn's unit showed signs of water intrusion at the time the Paganos purchased it, the only issue as to Krohn is whether she was duty bound to disclose her observations of efflorescence and algae well over a year before the sale.

[3] ***11** We conclude the past occurrence of algae or efflorescence at Krohn's unit was not a material fact Krohn was required to disclose because there is no evidence the algae or efflorescence was related to the general water intrusion problem at Blackhorse. In a declaration in support of her summary judgment motion, Krohn stated the algae and efflorescence disappeared after certain sprinklers were adjusted so as not to spray on the affected areas, and the problem had been remedied long before she sold the property to the Paganos. Pagano testified in his deposition that he inspected the garage and noticed no sign of efflorescence at the time he purchased the property.

Because Pagano was apprised of the general water intrusion problem at Blackhorse and there is no evidence Krohn failed to disclose any material fact within her knowledge concerning her particular unit, the court properly granted summary judgment in favor of the Krohns.

III. *Buyers' Agent*

The Paganos contend Lawson breached his fiduciary duty to them by failing to obtain a copy of the Association's complaint against the developer or otherwise verify the information he received from Chodorow and Krohn and passed along to the Paganos about the lawsuit. It is undisputed Lawson advised Pagano of the existence of the Association's lawsuit. However, the Paganos contend Lawson misrepresented the nature of the lawsuit by telling them it was filed only to prevent the statute of limitations from running and only involved the need for gutters and downspouts, which the developer had agreed to provide.

[4] When the buyer's agent transmits material information from the seller or others to the buyer, the agent must either verify the information or disclose to the buyer that it has not been verified. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562–563, 29 Cal.Rptr.2d 463.) Accordingly, a buyer's agent is not required to verify information received from the seller and passed on to the buyer if the buyer understands the agent is merely passing on unverified information. (*Id.* at p. 563, 29 Cal.Rptr.2d 463.)

[5] In his deposition, Pagano testified he knew Lawson was passing along information he had received from Chodorow and Krohn when he told Pagano the lawsuit was about gutters and downspouts. Pagano also testified he had no knowledge that Lawson did any further investigation into the lawsuit or knew in May 1993 that the lawsuit concerned a greater problem than gutters and rainspouts. Since Pagano knew Lawson was merely passing on unverified information from the seller and her agent, Lawson was not required to verify that information.

****7** [6] ***12** In any event, the actual content of the Association's complaint against the developer was a matter of public record within the Paganos' diligent attention. Therefore, the Paganos had their own duty to ascertain the precise nature and scope of the Association's claims against the developer if these were material to their decision to purchase Krohn's unit. (§ 2079.5.)

[7] [8] The Paganos also contend Lawson breached his duty by failing to disclose his general knowledge that a lawsuit by a homeowners' association against a developer has a detrimental effect on unit sales prices. Conclusions as to how the legal or practical ramifications of disclosed facts adversely impact value are not "facts" subject to an agent's duty of disclosure. (*Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 608–609, 43 Cal.Rptr.2d 399.) Lawson fulfilled his disclosure duty to the Paganos by informing them of the existence of the lawsuit and the fact it arose from water intrusion problems at Blackhorse. "The legal and practical effects of this state of affairs do not rise to the status of a fact—they are the conclusions as to value resulting from the [disclosed facts]." (*Id.* at p. 608, 43 Cal.Rptr.2d 399.) Lawson had no duty to tell the Paganos the Association's lawsuit might adversely affect the value of their unit.

The court did not err in granting summary judgment in favor of Lawson and Century 21.

DISPOSITION

The judgment is affirmed.

KREMER, P.J. and HUFFMAN, J., concur.

Parallel Citations Journal D.A.R. 15,195

60 Cal.App.4th 1, 97 Cal. Daily Op. Serv. 9463, 97 Daily

Statutes

Civil Code § 1086

As used in this article, the following terms have the meanings stated in this section:

(a) "Property" means real property or a mobilehome, as defined in Section 18008 of the Health and Safety Code.

(b) "Sell" and "sale" include lease and exchange.

(c) "Buyer" includes a lessee in case of a lease and the party with whom property is exchanged in case of an exchange.

(d) An "agent" is one authorized by law to act in that capacity for that type of property, and is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code or is a licensee, as defined in Section 18006 of the Health and Safety Code.

(e) An "appraiser" is one licensed or certified under Part 3 (commencing with Section 11300) of Division 4 of the Business and Professions Code.

(f) A "listing" is a written contract between an owner of property and an agent by which the agent has been authorized to sell the property or to find or obtain a buyer.

A listing may be any of the following:
(1) An "exclusive right to sell listing" is a listing whereby the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property, and the agent is entitled to the agreed compensation if during that period of time the property is sold, no matter who effected the sale, or the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner. The exclusive right to sell listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination.

(2) An "exclusive agency listing" is the same as an "exclusive right to sell listing," except that the owner reserves the right to sell directly but not through any other agent and, in that event, without obligation to pay compensation to the agent.

(3) An "open listing" is a listing which grants no exclusive rights or priorities to the listing agent, and a commission is payable to the agent only if the agent procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, before the property is otherwise sold either through another agent or by the owner directly and before the listing expires by its terms or is revoked.
(g) A "listing agent" is one who has obtained a listing of property of the kind in respect of which he or she is authorized by law to act as an agent for compensation.
(h) A "selling agent" is an agent participant in a multiple listing service who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property.
(i) "Sold" includes leased and exchanged. A property is sold when a legally binding commitment to sell the property comes into existence.

Credits
(Added by Stats.1982, c. 547, p. 2486, § 1. Amended by Stats.1988, c. 113, § 3, eff. May 25, 1988, operative July 1, 1988; Stats.1993, c. 331 (S.B.914), § 3.)

West's Ann. Cal. Civ. Code § 1086, CA CIVIL § 1086
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Code of Civil Procedure § 116.410

(a) Any person who is at least 18 years of age, or legally emancipated, and mentally competent may be a party to a small claims action.

(b) A minor or incompetent person may appear by a guardian ad litem appointed by a judge of the court in which the action is filed.

West's Ann. Cal. C.C.P. § 116.410, CA CIV PRO § 116.410
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1638

The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 1638, CA CIVIL § 1638
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1639

When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 1639, CA CIVIL § 1639
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1436

CONDITIONS PRECEDENT. A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 1436, CA CIVIL § 1436
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1057.3

(a) It shall be the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited the funds or who is otherwise entitled to the funds under the contract, if the purchase of the property is not completed by the date set forth in the contract for the close of escrow or any duly executed extension thereof.

(b) Any buyer or seller who fails to execute any document required by the escrow holder to release funds on deposit in an escrow account as provided in subdivision (a) within 30 days following a written demand for the return of funds deposited in escrow by the other party shall be liable to the person making the deposit for all of the following:

(1) The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute.

(2) Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but liability under this paragraph shall not be less than one hundred dollars ($100) or more than one thousand dollars ($1,000).

(3) Reasonable attorney's fees incurred in any action to enforce this section.

(c) Notwithstanding subdivision (b), there shall be no cause of action under this section, and no party to a contract to purchase and sell real property shall be liable, for failure to return funds deposited in an escrow account by a buyer or seller, if the funds are withheld in order to resolve a good faith dispute between a buyer and seller. A party who is denied the return of the funds deposited in escrow is entitled to damages under this section only upon proving that there was no good faith dispute as to the right to the funds on deposit.

(d) Upon the filing of a cause of action pursuant to this section, the escrow holder shall deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds.

(e) Neither any document required by the escrow holder to release funds deposited in an escrow account nor the acceptance of funds released from escrow, by any principal to the escrow transaction, shall be deemed a cancellation or termination of the underlying contract to purchase and sell real property, unless the cancellation is specifically stated therein. If the escrow instructions constitute the only contract between the buyer and seller, no document required by the escrow holder to release funds deposited in an escrow account shall abrogate a cause of action for breach of a contractual obligation to purchase or sell real property, unless the cancellation is specifically stated therein.

(f) For purposes of this section:

(1) "Close of escrow" means the date, specified event, or performance of prescribed condition upon which the escrow agent is to deliver the subject of the escrow to the person specified in the buyer's instructions to the escrow agent.

(2) "Good faith dispute" means a dispute in which the trier of fact finds that the party refusing to return the deposited funds had a reasonable belief of his or her legal entitlement to withhold the deposited funds. The existence of a "good faith dispute" shall be determined by the trier of fact.

(3) "Property" means real property containing one to four residential units at least one of which at the time the escrow is created is to be occupied by the buyer. The buyer's statement as to his or her intention to occupy one of the units is conclusive for the purposes of this section.

(g) Nothing in this section restricts the ability of an escrow holder to file an interpleader action in the event of a

dispute as to the proper distribution of funds deposited in an escrow account.

Credits
(Added by Stats.1990, c. 13 (A.B.546), § 1.)

West's Ann. Cal. Civ. Code § 1057.3, CA CIVIL § 1057.3
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1675

(a) As used in this section, "residential property" means real property primarily consisting of a dwelling that meets both of the following requirements:

(1) The dwelling contains not more than four residential units.

(2) At the time the contract to purchase and sell the property is made, the buyer intends to occupy the dwelling or one of its units as his or her residence.

(b) A provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and either subdivision (c) or (d) of this section.

(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages.

(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

(e) For the purposes of subdivisions (c) and (d), the reasonableness of an amount actually paid as liquidated damages shall be determined by taking into account both of the following:

(1) The circumstances existing at the time the contract was made.

(2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer's default.

(f)(1) Notwithstanding either subdivision (c) or (d), for the initial sale of newly constructed attached condominium units, as defined pursuant to Section 783, that involves the sale of an attached residential condominium unit located within a structure of 10 or more residential condominium units and the amount actually paid to the seller pursuant to the liquidated damages provision exceeds 3 percent of the purchase price of the residential unit in the transaction, both of the following shall occur in the event of a buyer's default:

(A) The seller shall perform an accounting of its costs and revenues related to and fairly allocable to the construction and sale of the residential unit within 60 calendar days after the final close of escrow of the sale of the unit within the structure.

(B) The accounting shall include any and all costs and revenues related to the construction and sale of the residential property and any delay caused by the buyer's default. The seller shall make reasonable efforts to mitigate any damages arising from the default. The seller shall refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either 3 percent of the originally agreed-upon purchase price of the residential property or the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting.

(2) The refund shall be sent to the buyer's last known address within 90 days after the final close of escrow of the sale or lease of all the residential condominium units within the structure.

(3) If the amount retained by the seller after the accounting does not exceed 3 percent of the purchase price, the amount is valid unless the buyer establishes that the amount is unreasonable as liquidated damages pursuant to

subdivision (e).

(4) Subdivision (d) shall not apply to any dispute regarding the reasonableness of any amount retained as liquidated damages pursuant to this subdivision.

(5) Notwithstanding the time periods regarding the performance of the accounting set forth in paragraph (1), if a new qualified buyer has entered into a contract to purchase the residential property in question, the seller shall perform the accounting within 60 calendar days after a new qualified buyer has entered into a contract to purchase.

(6) As used in this subdivision, "structure" means either of the following:

(A) Improvements constructed on a common foundation.

(B) Improvements constructed by the same owner that must be constructed concurrently due to the design characteristics of the improvements or physical characteristics of the property on which the improvements are located.

(7) As used in this subdivision, "new qualified buyer" means a buyer who either:

(A) Has been issued a loan commitment, which satisfies the purchase agreement loan contingency requirement, by an institutional lender to obtain a loan for an amount equal to the purchase price less any downpayment possessed by the buyer.

(B) Has contracted to pay a purchase price that is greater than or equal to the purchase price to be paid by the original buyer.

(g)(1)(A) Notwithstanding subdivision (c), (d), or (f), for the initial sale of newly constructed attached condominium units, as defined pursuant to Section 783, that involves the sale of an attached residential condominium unit described in subparagraph (B), and the amount actually paid to the seller pursuant to the liquidated damages provision exceeds 6 percent of the purchase price of the residential unit in the transaction, both of the following shall occur in the event of a buyer's default:

(i) The seller shall perform an accounting of its costs and revenues related to and fairly allocable to the construction and sale of the residential unit within 60 calendar days after the final close of escrow of the sale of the unit within the structure.

(ii) The accounting shall include any and all costs and revenues related to the construction and sale of the residential property and any delay caused by the buyer's default. The seller shall make reasonable efforts to mitigate any damages arising from the default. The seller shall refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either 6 percent of the originally agreed-upon purchase price of the residential property or the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting.

(B) This subdivision applies to an attached residential condominium unit for which both of the following are true:

(i) The unit is located within a structure of 20 or more residential condominium units, standing over eight stories high, that is high-density infill development, as defined in paragraph (10) of subdivision (a) of Section 21159.24 of the Public Resources Code, and that is located in a city, county, or city and county with a population density of 1,900 residents per square mile or greater, as evidenced by the 2000 United States census.

(ii) The purchase price of the unit was more than one million dollars ($1,000,000).

(2) The refund shall be sent to the buyer's last known address within 90 days after the final close of escrow of the sale or lease of all the residential condominium units within the structure.

(3) If the amount retained by the seller after the accounting does not exceed 6 percent of the purchase price, the amount is valid unless the buyer establishes that the amount is unreasonable as liquidated damages pursuant to subdivision (e).

(4) Subdivision (d) shall not apply to any dispute regarding the reasonableness of any amount retained as liquidated damages pursuant to this subdivision.

(5) Notwithstanding the time periods regarding the performance of the accounting set forth in paragraph (1), if a new qualified buyer has entered into a contract to purchase the residential property in question, the seller shall perform the accounting within 60 calendar days after a new qualified buyer has entered into a contract to purchase.

(6) As used in this subdivision, "structure" means either of the following:

(A) Improvements constructed on a common foundation.

(B) Improvements constructed by the same owner that must be constructed concurrently due to the design characteristics of the improvements or physical characteristics of the property on which the improvements are located.

(7) As used in this subdivision, "new qualified buyer" means a buyer who either:

(A) Has been issued a loan commitment, which satisfies the purchase agreement loan contingency requirement, by an institutional lender to obtain a loan for an amount equal to the purchase price less any downpayment possessed by the buyer.

(B) Has contracted to pay a purchase price that is greater than or equal to the purchase price to be paid by the original buyer.

(8) Commencing on July 1, 2010, and annually on each July 1 thereafter, the dollar amount of the minimum purchase price specified in paragraph (1) shall be adjusted. The Real Estate Commissioner shall determine the amount of the adjustment based on the change in the median price of a single family home in California, as determined by the most recent data available from the Federal Housing Finance Board. Upon determining the amount of the adjustment, the Real Estate Commissioner shall publish the current dollar amount of the minimum purchase price on the Internet Web site of the Department of Real Estate.

(9) Prior to the execution of a contract for sale of a residential condominium unit subject to this subdivision, the seller shall provide to the buyer the following notice, in at least 12-point type:

"Important Notice Regarding Your Deposit: Under California law, in a contract for the initial sale of a newly constructed attached condominium unit in a building over eight stories tall, containing 20 or more residential units, and located in a high-density infill development in a city, county, or city and county with 1,900 residents or more per square mile, where the price is more than one million dollars ($1,000,000), as adjusted by the Department of Real Estate, liquidated damages of 6 percent of the purchase price are presumed valid if the buyer defaults, unless the buyer establishes that the amount is unreasonable."

If the seller fails to provide this notice to the buyer prior to the execution of the contract, the amount of any liquidated damages shall be subject to subdivisions (c) and (d).

(h) This section shall become inoperative on July 1, 2014, and, as of January 1, 2015, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2015, deletes or extends the dates on which it becomes inoperative and is repealed

Credits
(Added by Stats.1977, c. 198, p. 719, § 7, operative July 1, 1978. Amended by Stats.2003, c. 434 (A.B.728), § 3;

Stats.2008, c. 665 (A.B.2020), § 1; Stats.2009, c. 140 (A.B.1164), § 25.)

West's Ann. Cal. Civ. Code § 1675, CA CIVIL § 1675
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1677

A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless:

(a) The provision is separately signed or initialed by each party to the contract; and

(b) If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type.

Credits
(Added by Stats.1977, c. 198, p. 719, § 7, operative July 1, 1978.)

West's Ann. Cal. Civ. Code § 1677, CA CIVIL § 1677
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 2343

AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

1. When, with his consent, credit is given to him personally in a transaction;

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 2343, CA CIVIL § 2343
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1572

ACTUAL FRAUD, WHAT. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 1572, CA CIVIL § 1572
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 2079.3

DECEIT, WHAT. A deceit, within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

Credits
(Enacted in 1872.)

West's Ann. Cal. Civ. Code § 1710, CA CIVIL § 1710
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 2079.5

Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.

Credits
(Added by Stats.1985, c. 223, § 2.)

West's Ann. Cal. Civ. Code § 2079.5, CA CIVIL § 2079.5
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Civil Code § 1710

The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property comprises a unit in a planned development as defined in Section 11003 of the Business and Professions Code, a condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Section 1368.

Credits
(Added by Stats.1985, c. 223, § 2. Amended by Stats.1994, c. 339 (S.B.1509), § 2.)

West's Ann. Cal. Civ. Code § 2079.3, CA CIVIL § 2079.3
Current with urgency legislation through Ch. 10 of 2013 Reg.Sess.

Business and Professional Code § 10147.5

(a) Any printed or form agreement which initially establishes, or is intended to establish, or alters the terms of any agreement which previously established a right to compensation to be paid to a real estate licensee for the sale of residential real property containing not more than four residential units, or for the sale of a mobilehome, shall contain the following statement in not less than 10-point boldface type immediately preceding any provision of such agreement relating to compensation of the licensee:

Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each broker individually and may be negotiable between the seller and broker.

(b) The amount or rate of compensation shall not be printed in any such agreement.

(c) Nothing in this section shall affect the validity of a transfer of title to real property.
(d) As used in this section, "alters the terms of any agreement which previously established a right to compensation" means an increase in the rate of compensation, or the amount of compensation if initially established as a flat fee, from the agreement which previously established a right to compensation.

Civil Code § 2079

(a) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.

(b) It is the duty of a real estate broker or salesperson licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code to comply with this section and any regulations imposing standards of professional conduct adopted pursuant to Section 10080 of the Business and Professions Code with reference to Sections 10176 and 10177 of the Business and Professions Code.

Credits
(Added by Stats.1985, c. 223, § 2. Amended by Stats.1994, c. 339 (S.B.1509), § 1; Stats.1996, c. 812 (A.B.2221), § 2.)

West's Ann. Cal. Civ. Code § 2079, CA CIVIL § 2079
Current with urgency legislation through Ch. 20 of 2013 Reg.Sess.

Treatise

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:29

"Exclusive right-to-sell" listing defined. "An 'exclusive right to sell listing' is a listing whereby the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property. The agent is entitled to the agreed compensation if during that period of time the property is sold, no matter who effected the sale, or if the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner. The exclusive right to sell listing also may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination."[1]

Broker's right to recover a commission. Except in the case of probate sales,[4] the "exclusive right-to-sell" listing, or "general brokerage agreement,"[5] is usually construed as a bilateral contract. The listing broker is entitled to payment of the specified commission whenever the property is sold during the term of the listing *even though the broker is not the procuring cause of the sale,*[6] has not made any effort or incurred any expenses in marketing the property,[7] and the property is sold entirely through the efforts of only the owner.[8]

Terms of contract govern. The broker's right to compensation under an exclusive right to sell listing, as with any other contract, depends on the terms of the particular listing.[9]

Effect of the owner's withdrawal of the property. Where the listing agreement *expressly* provides that the broker will be entitled to the payment of a full commission in the event that the owner withdraws the property from the market at any time during the term of the listing, the broker's right to a commission immediately accrues on the act of removal by the owner regardless of whether the broker has procured a purchaser before that time.[10]

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:54

Termination prior to performance. A revocation of a listing terminates the agency relationship and the agent's duties of performance,[1] but the principal may be liable for damages for breach of contract. Where the listing agreement has been revoked or terminated by the owner *before* the broker has actually commenced performance, the owner's liability to the broker for a commission or other damages depends on whether the owner was contractually bound by the listing at the time of its revocation. If the listing agreement constitutes a bilateral contract between the parties, it becomes binding on the owner on its execution, without reference to whether the broker has or has not performed any services.[2] Therefore, where the listing is a bilateral contract, or an irrevocable unilateral contract, the principal may be liable to the broker for damages for a breach of the listing contract.[3]

Sale of the property during the term of the revoked listing. An exclusive agency listing provides for the payment of a commission if the property is sold during the term of the listing by the listing broker or by another agent.[4] An exclusive right-to-sell listing provides for the payment of a commission on any sale of the property during the term of the listing regardless of who sells the property.[5] When the owner sells or exchanges the property during the term of an exclusive right-to-sell listing directly or through another broker, the broker is entitled to recover the full commission by the terms of the listing without having to prove that he or she has procured a buyer.[6] Similarly, a sale of the property to a buyer procured by another agent during the term of an exclusive agency listing entitles the listing agent to recover the commission provided in the listing.[7] If the owner prematurely revokes an exclusive listing and the property is sold after the revocation, but during the term of the listing, the broker is entitled to recover the full amount of the commission by the terms of the listing.[8]

When the property is not sold after the revocation. When the owner wrongfully revokes a listing or withdraws the property from the market, and the property is not sold during the term of the listing, the broker's right to recover damages depends on whether the terms of the listing contain an express provision regarding compensation to the broker on a revocation or withdrawal.

Broker's recovery when there is an express provision in the listing. When the owner prematurely terminates an irrevocable listing agreement without adequate cause, and the listing agreement expressly provides that the broker will earn a commission on the withdrawal of the property from sale before the expiration of its term, the broker's right to a commission immediately accrues on the act of removal by the owner regardless of whether the broker has procured a purchaser before that time.[9] The broker becomes entitled to recover the full amount of the commission based on the listing price *under the express terms of the listing* on the termination and is not required to continue any efforts under the listing nor to show that he or she could have performed by procuring a purchaser for the property within the listing term had it not been cancelled.[10]

A provision in a listing that entitles the broker to the commission on withdrawal or premature termination is valid and does not constitute an unenforceable penalty or liquidated damages clause.[11] The commission is earned pursuant to the contract on the theory that the owner has the election of alternative performance. The broker is not seeking to recover damages for a breach by the owner but merely enforcing payment of the sums due by the express terms of the contract.[12]

Recovery when no express provision in the listing. When the listing agreement does not contain a provision for payment of the commission on termination or withdrawal of the property from the market, it is not clear whether the same rule applies on a wrongful revocation or withdrawal, or whether the broker is limited to a claim for the *actual* damages suffered as a result of the owner's breach.

When the listing does not contain an express provision for payment of the commission, there is dictum in one case that the wrongful termination or revocation of the listing by the owner is a breach of the contract. Because there is no express promise to pay a commission in such circumstances, the broker must be able to prove the damages proximately caused by the breach. If the damages are measured by the value of the lost opportunity to effect a

sale and receive compensation, the broker would have to prove that he or she would have been successful in locating a buyer and concluding a sale if permitted to continue performance.[13]

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:49

Seller's breach of the implied covenant of good faith may excuse the condition. In every listing contract or other employment agreement with the broker, there is an implied covenant of good faith and fair dealing that the principal will not act in bad faith to deprive the broker of the benefits of the agreement.[1]

Where the seller's performance is subject to his or her approval or satisfaction, the commission agreement is not illusory, but the seller must exercise discretion reasonably and in good faith.[2]

A breach of the implied covenant excuses or waives the condition to the payment of the broker's commission and entitles the broker to recover the commission based on an unqualified covenant of payment.[3] Where the broker's commission agreement with the owner is conditioned on the occurrence of a certain event or the satisfaction of a certain condition, the owner cannot arbitrarily and unjustifiably prevent the happening of the event or the condition on which his or her own liability is predicated. The owner who is at fault in preventing the condition or event from occurring will be liable to the broker for the commission.[4] "The law requires that the owner exercise good faith and refrain from any intentional act to discourage, embarrass, or prevent the completion of the purchase."[5]

Therefore, when payment of the broker's commission is conditioned on the consummation of the sale or the close of escrow, the broker can recover the commission even though the escrow does not close, where the owner has acted arbitrarily and in bad faith in preventing the conclusion of the transaction.[6]

This principle follows from the general rule that a party to a contract cannot take advantage of his or her own act or omission that prevents the performance of a condition to escape liability under the contract.[7] It is not essential that the party specifically intend to defeat the condition if the act is performed intentionally, or if the party intentionally fails to perform an act, and the natural and foreseeable result is that the condition will not be satisfied.[8]

1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:158

Condition that buyer obtain financing. The most common condition precedent in real estate contracts is a provision that the buyer is not obligated to complete the purchase until financing is obtained to provide the funds to pay the purchase price.[33] In such cases, the contract should set forth the amount and minimum terms of the new financing in order that the buyer's obligation will be certain enough for enforcement.[34] Depending on the terms of the contract, if the buyer is unable to obtain the required loan within the period specified, either the buyer or the seller may be able to terminate the contract.[35]

A failure of occurrence of a condition precedent permits the other person to terminate the contract. Absent a repudiation or waiver,[11] when an act or event is a condition precedent, the condition must be performed or satisfied before the duty of a party who has the conditional obligation to perform may recover in any action for specific performance or damages caused by the other party's nonperformance.[12]

1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:160

"Satisfaction" conditions common in real estate contracts. Real estate contracts commonly contain conditions precedent to the buyer's obligation to purchase the property based on satisfaction or approval of some fact by the buyer or third person. The contract may provide, for example, that the buyer's obligations are conditioned upon the inspection and approval of the physical condition of the property, the seller's title, existing financing, and termite or engineering reports. Also, the contract may be conditioned on the occurrence of future events to the satisfaction of the buyer, such as, obtaining a subdivision approval, market survey, or new leases.

Application of the subjective standard. In some cases, an objective standard is neither practical nor appropriate. When the right involved is one that is submitted to the taste, fancy, feeling, or judgment of the party in whose favor the condition is given, it can be exercised without any practical or utilitarian reasons. Because no objective standard of measurement is available, the court permits the party to be the judge of his or her own satisfaction, subject only to the limitation that discretion must be applied in good faith. If he or she does act in good faith—and is really dissatisfied—the transaction may be avoided by the buyer.

Contract conditioned on the buyer obtaining new financing. When the contract contains a condition of new financing to be acquired by the buyer, the buyer's approval or satisfaction can be measured by the objective standard. The buyer is bound to accept a loan that contains the usual terms of such financing in the marketplace and is bound to accept market terms unless the contract establishes appropriate limitations of interest rate, loan fees, etc.

1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:59

Written agreement interpreted by giving words their common meaning. When the language of an instrument is clear and explicit and does not lead to an absurd result, the language of the contract is controlling, and the intent of the parties is ascertained from the written provisions of the instrument.[3] When a contract is in writing, the intention of the parties is to be ascertained from the writing alone, if possible.[4] Words in a written contract are given their ordinary and popular meaning unless there is evidence that the parties intended otherwise.[5] Technical words are interpreted as usually understood by persons in the related profession or business unless clearly used in a different sense.[6] When the terms of a promise are uncertain or ambiguous, they are interpreted in the sense in which the promisor believed that the promisee understood them at the time of contracting.[7]

1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:161

Independent conditions. When performance is required at different times, the contract terms usually are treated as independent covenants and conditions precedent to subsequent performance. Because a policy of title insurance cannot be issued until after title has transferred, the condition of providing clear title in the escrow may be a condition concurrent, but the delivery of the policy of title insurance is a condition subsequent.[14]

1 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 1:166

Satisfaction of conditions. A condition is satisfied when it is performed or occurs, but a contract often will require that a party execute a document of satisfaction to assure that the contract has become unconditional.[1] Without proof of a satisfaction, a party may allege that a condition has been excused or waived.

Waiver of condition. A condition generally can be waived voluntarily by the party for whose benefit it has been inserted into the contract.[16] That is, it may be waived by the person whose obligation is contingent on the satisfaction of the condition.[17]

Conditions that generally are solely for the buyer's protection and can be waived by the buyer include the contingency that he or she obtain planning commission approval of the intended use of the property[18] or that he or she have the right to make a physical inspection of the property or inspect the seller's books and records.[19]

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 3:36

Agent not liable for the acts of the principal. The agent is only liable to third persons for his or her own wrongful acts or omissions. While a principal may be vicariously liable for the wrongful acts of an agent, even though the principal has not personally committed any wrongful acts or omissions,[22] absent fault, an agent cannot be vicariously liable for the wrongful acts of the principal.[23]

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 3:25

Fiduciary duty to exercise skill, care, and diligence. It is the duty of an agent to obey the instructions of the principal.[13] An agent is under a duty to use reasonable care, diligence, and skill in the performance of the agency.[14] The standard of care imposed on the real estate licensee imposes a higher degree of skill and diligence than is required from a nonprofessional.[15] The extent of the duties owed does not depend on the sophistication of the principal.[16]

2 Miller & Starr, Cal Real Estate (3d ed. 2012), § 3:49

Agents are not liable on the principal's contracts. Ordinarily, an agent is not personally liable on a contract executed in the name of the principal.[1] There are, however, a number of important exceptions to this general rule.

1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:149

Effect when a buyer does not inspect the property. A buyer who does not inspect the property may be deemed to have knowledge of those conditions that are patent, obvious, and apparent by visual observation during an inspection conducted with ordinary diligence in the context of a buyer's knowledge, intelligence, and experience.[17] A buyer is required to exercise reasonable care to protect himself or herself and is deemed to have knowledge of those facts that are within his or her diligent attention and observation[18] and is held to be aware of obvious and patent conditions.[19]

1 Miller & Starr, Cal Real Estate (3d ed. 2012), § 1:143

"Material" defined for purposes of the duty to disclose. The test of materiality referenced by the decisions that require disclosure describe a matter as material when it has a significant and measurable effect on the "value or desirability" of the property.[9]

2 Miller & Starr, Cal. Real Estate (3d ed. 2012), § 5:51

A listing agreement provided only that the broker would be entitled to payment of a commission if the property is sold "within 90 days after its termination to anyone whose name is *registered* with me in writing as of the termination date." The court held that the listing broker was entitled to the commission on a sale of the property made during the term of this "safety clause" to a purchaser whom he had twice "contacted" whose name was given to the seller. The broker had not entered into any negotiations with the purchaser for the sale of the property during the term of the listing and he had not even "shown" the property to him. The court concluded that "In the present case the language of the contract does not imply an obligation on the part of the broker to do anything more than list the name of the prospective purchaser with the owner."[18]