THE REAL PROPERTY SECTION

OF THE BAR ASSOCIATION OF SAN FRANCISCO

Presents

COMMERCIAL REAL ESTATE BROKERAGE STANDARD OF CARE

Speakers

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Vice-Chair BASF Real Property Section

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PRESENTER BIOGRAPHIES

THEODORE S. KOKERNAK, SR. VP

Mr. Kokernak joined Marcus & Millichap Real Estate Investment Brokerage Company at its headquarters office in Palo Alto, California in 1981. In recognition of his outstanding sales ability and performance he was promoted to Senior Sales Associate in 1984, Senior Investment Associate in 1988, Director for the National Retail Group 2005 and Senior Vice President Investments in 2007, a distinction conferred to less than 3% of the firm's 1200+ agents, and is ranked in the top 1.5% of firm-wide career earnings. Specializing in the sale of income properties priced in excess of $1 million, Mr. Kokernak has sold a broad range of property types, located in California and throughout the nation, including single tenant retail properties, apartment complexes, shopping centers, skilled nursing facilities, senior housing, office buildings, mixed use complexes, land and industrial buildings. He is also in an investor in numerous real estate ventures. Mr. Kokernak graduated Cum Laude with a BS in Business Administration, with an emphasis in Finance and Real Estate, from Hayward State University, Hayward, California, in 1981.

HAROLD A. JUSTMAN, ESQ.

Harold Justman has litigated real estate disputes for thirty-five years. He has also qualified as a trial expert witness regarding the standard of care of real estate brokers in Santa Clara, San Mateo, San Francisco, Marin, Sonoma, Alameda, Contra Costa, Fresno and San Joaquin Counties. Recently he has acted as an academic consultant to the Real Estate Program at Menlo College where he is an Adjunct Professor of real estate.

Mr. Justman graduated from Stanford University in 1972, and he graduated from Hastings Law School in 1975. After the passing of Bob Bruss in 2007, Harold (Bob's longtime friend and personal real estate attorney of more than 25 years) took over preparation/distribution of the California Real Estate Law Newsletter.

SEAN E. PONIST, ESQ.

Sean Ponist is the owner of the Law Offices of Sean Ponist, P.C., a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 25 cases to verdict. In 2011, 2012, and 2013, Mr. Ponist was selected as a Northern California Super Lawyer.

He has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?") and California Lawyer magazine ("The Nonrefundable Deposit – Not!"). He has further lectured for the San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," and "Private Investigation and the Legal Community"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

COMMERCIAL REAL ESTATE BROKERAGE STANDARD OF CARE

I. LICENSING REQUIREMENTS – OUT-OF-STATE BROKERS AND OUT-OF-STATE PROPERTIES

A. Out-of-State Brokers and California Properties

1. An Out-of State Broker Cannot Independently Conduct Business in California

A real estate broker licensed in another state must be licensed by the California Department of Real Estate in order to recover a commission in California in a transaction for which a license is required. (Bus & Prof. Code, §§ 10130, 10136.)

2. A California Broker Can Share Commissions with an Out-of-State Broker

By statute, a licensed California real estate broker lawfully may pay a commission to a broker of another state. (Bus & Prof. Code, § 10137.)

3. Location of Performance, Not Property, is determinative

Bus. & Prof. Code sections 10130 and 10136 only require a license for the recovery of compensation when a person acts as a real estate broker "within this state."

- Thus, a California license is only required when licensed activities are performed within California.
- If the out-of-state broker does not perform any act that requires a California license, he or she may recover a commission for licensed services performed outside of California, provided that the broker has the appropriate license where the services were performed. (*Consul Ltd. v. Solide Enterprises, Inc*. (9th Cir. 1986) 802 F.2d 1143, 1149; *Hayter v. Fulmor* (1944) 66 Cal.App.2d 554, 558; *Silverberg v. Baum* (1928) 95 Cal.App. 535, 536.
- However, if an out-of-state broker performs acts in California that require a license, he or she cannot recover compensation whether or not the real property is located in California. (*Consul Ltd. v. Solide Enterprises, Inc*. (9th Cir. 1986) 802 F.2d 1143, 1149; *Hayter v. Fulmor* (1944) 66 Cal.App.2d 554, 558 (brokerage license statutes apply even if land situated outside California).

4. Finder's Fees and/or Referral Fees

California law does not require a license for a person to be compensated as a "finder," "referrer" or "middleman." Thus, an out-of-state broker may recover a finder's fee or other compensation where the person's activities do not require a license under California law. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 8-9.)

B. California Broker and Out-of-State Properties

Compensation for services performed outside of California may require a foreign license. Brokers licensed under California law run the risk of being denied compensation when they engage in transactions involving out-of-state land if the broker is not also licensed by the state where the property is located.

1. Recovery of Commission Where Services Performed in California

If the forum state is California or it applies California law, and the action is for the recovery of compensation relating to brokerage services performed in California for the sale of land located outside of California, the broker may recover the compensation according to the brokerage agreement. However, if the brokerage services were performed outside of California, the broker who does not have a license in the state where the services were performed cannot recover compensation even if the contract was made, and the owner resides, in California. (*Consul Ltd. v. Solide Enterprises, Inc.* (9th Cir. 1986) 802 F.2d 1143, 1149-1151.)

2. The Law of the State Where the Contract was Made Applies

A California broker who files suit in California for compensation arising out of the sale of foreign land will be entitled to recover a commission based primarily on the application of the conflict of laws theory of lex loci contractus, i.e., the law of the place of the making of the contract governs. California courts protect California licensees by applying California law and conclude that a broker licensed in California may recover compensation in a transaction involving out-of-state land. (*Cochran v. Ellsworth* (1954) 126 Cal.App.2d 429, 435-438 (California broker was allowed to recover a commission for the sale of Arizona land even though the broker was not licensed under Arizona law).)

II. COMMERCIAL AGENT/BROKER COMPENSATION AND PROCURING CAUSE ISSUES

A. Conditions to Payment of Compensation

Three basic conditions must be satisfied for an agent/broker to be entitled to compensation:

1. Broker must have a valid real estate license;
2. There must be a written agreement between broker and principal sufficient to satisfy the statute of frauds;
3. The specific conditions of the broker's contract must have been satisfied.

(Greenwald et al., Cal. Practice Guide: Real Property Transactions (TRG 2014) ¶ 2:277.)

B. Satisfaction of Contract Terms: Procuring Cause

1. Payment may be conditioned upon any lawful conditions

The parties are free to make the duty to pay broker compensation dependent on the satisfaction of any lawful conditions. (*Blank v. Borden* (1974) 11 Cal.3d 963, 969; see also *RealPro, Inc. v. Smith Residual Co., LLC* (2012) 203 Cal.App.4th 1215, 1220 (offer to purchase property at full listing price did not trigger broker's right to commission where other conditions precedent to payment not met).)

2. Procuring Cause

While compensation can be conditioned on any lawful condition, most listing agreements, nonetheless, condition the payment of compensation on (1) the broker's procurement of a "ready, willing and able" buyer; and/or (2) actual consummation of the purchase and sale transaction. (*Won Shil Park v. First American Title Co*. (2011) 201 Cal.App.4th 1418, 1423–1424.)

Question of fact (*Colwell Co. v. Hubert* (1967) 248 Cal.App.2d 567, 577).

Procuring cause defined – an agent or broker is a "procuring cause" if he or she originates a series of events which, without any break in continuity, result in the intended transaction. (*Colwell Co. v. Hubert* (1967) 248 Cal.App.2d 567, 577; *Rose v. Hunter* (1957) 155 Cal.App.2d 319, 323.)

Sale of property need not be consummated – an agent or broker may even be the "procuring cause" when a sale is not completed. (*Estate of Lopez* (1992) 8 Cal.App.4th 317, 320–321.)

"Ready, willing and able buyer" presumption – as between a seller and an agent/broker, it is conclusively presumed that the buyer is in fact "ready, willing and able" upon execution of an "unconditional" contract to sell. (*Beazell v. Kane* (1954) 127 Cal.App.2d 593, 595; *Deeble v. Stearns* (1947) 82 Cal.App.2d 296, 299.)

Seller cannot avoid payment of commission by frustrating sale – the seller cannot avoid compensation an agent or broker by purposefully frustrating a sale or making a sale impossible. (*Howard v. Gitlen & Assocs., Inc. v. Ameri* (1989) 208 Cal.App.3d 90, 96–97; *Sullivan v. Dorsa* (2005) 128 CA4th 947, 960.) Further thereto, many listing agreements expressly bar the seller from withdrawing the property from the market or rendering the property unmarketable during the term of the agreement. (*Blank v. Borden* (1974) 11 Cal.3d 963, 970–972 ("withdrawal-from-sale" provision gave broker right to 6% commission on stipulated sale price).)

Seller cannot avoid payment by refusing satisfactory offer – Refusal to accept satisfactory offer: Similarly, the broker is entitled to a commission where the seller refuses to accept an offer on terms consistent with those set forth in the listing agreement. (*Collins v. Vickter Manor, Inc.* (1957) 45 Cal.2d 875, 881.)

Note re exclusive listing agreements – "Procuring cause" issues only arise under listing agreements which actually require the broker to "procure" or "produce" a buyer. In contrast, under a true "exclusive right to sell" listing agreement, the broker is entitled to a commission regardless of who procures the buyer (Greenwald et al., Cal. Practice Guide: Real Property Transactions (TRG 2014) ¶ 2:308).

Note re Ethical Obligations of Agent's and Broker's – Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects. (National Assoc. of Realtors, Standard of Practice 16-13.)

III. AGENCY LAW AND DUAL AGENCY PROBLEMS IN COMMERCIAL REAL ESTATE TRANSACTIONS

A. Agency Law

1. Agency Defined

An "agent" is "one who represents another" (the "principal") in dealings with third persons. Representation by an agent on behalf of a principal is called an "agency." (Civ. Code § 2295; *Lombardo v. Santa Monica Young Men's Christian Ass'n* (1985) 169 Cal.App.3d 529, 541; *Horiike v. Coldwell Banker Residential Brokerage Co.* (2014) 225 Cal.App.4th 427.)

2. Fiduciary Relationship

Agents stand in a fiduciary relationship with their principals. Thus, real estate agents owe their principals the "same obligation of undivided service and loyalty" owed by trustees to their beneficiaries. (*Wyatt v. Union Mortgage Co*. (1979) 24 Cal.3d 773, 782; *Warren v. Merrill* (2006) 143 Cal.App.4th 96, 109–111.)

3. Breach of Fiduciary Duty Impact on right to compensation

Under agency law, a real estate agent's breach of fiduciary duty may forfeit the right to a commission for even properly performed services—at least where the breach involves intentional disloyalty, bad faith or fraud. (*Ziswasser v. Cole & Cowan, Inc.* (1985) 164 Cal.App.3d 417, 424–425.)

4. "Special agency"

Real estate brokers are "special agents" because they are authorized to represent the principal only in a particular transaction. (Civ. Code § 2297.)

B. Dual Agency Problems

1. Dual Agency Defined

A "dual agency" arises where the same agent or brokerage represents both buyer and seller. In such cases, the agent and/or broker is a fiduciary for both buyer and seller. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235.)

2. Principals' Informed Consent Required

A broker may properly act as "dual agent" for buyer and seller only with both parties' informed consent. (*McConnell v. Cowan* (1955) 44 Cal.2d 805, 809); Brown v. FSR Brokerage, Inc. (1998) 62 Cal.App.4th at 768–769.)

3. Remedies for Nondisclosure of Dual Representation

Brokers violate the real estate licensing law, and risk discipline, damages liability and a loss of compensation, if they act for more than one party in a transaction without the knowledge and consent of all parties thereto.

- Failure to make the requisite dual agency disclosures violates the licensing law and the Real Estate Commissioner may suspend or revoke the agent's real estate license (Bus. & Prof. Code § 10176(d); see also Bus. & Prof. Code § 10176(a) & § 10177(o); *McConnell v. Cowan* (1955) 44 Cal.2d 805, 812–813.)
- Avoidance of the transaction. (*Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 686, "The remedy for a real estate agent's breach of a duty to disclose a dual representation of both buyer and seller is that the principal is not liable to pay the agent's commission, and the principal may avoid the transaction ... It makes no difference that the principal was not in fact injured, or that the agent intended no wrong or that the other party acted in good faith ... ")

IV. DUTIES OF AGENTS AND BROKERS IN COMMERCIAL REAL ESTATE TRANSACTIONS

A. Duties to Client

1. CACI 4107

"As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

"The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

"[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.]"

2. Specific Common Law Duties

- Duty of loyalty and good faith (*Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131).
- Duty to be honest and truthful (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741).
- Duty to disclose all material facts that might affect the principal's decision (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1567).
- Duty to disclose relationship with other party (*Smith v. Zak* (1971) 20 CA3d 785, 794–795).
- Duty to disclose intent to purchase (*Batson v. Strehlow* (1968) 68 C2d 662, 675–676).
- Duty to disclose all offers (*Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 736).
- Duty of care and diligence (*Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 438).
- Duty to disclose profits (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1569–1570).
- Duty to account for monies (Bus. & Prof. Code § 10145; see also, 10 Cal.C.Regs. §§ 2830–2832, 2835).
- Duty not to discriminate (10 Cal.C.Regs. § 2780; see also 10 Cal.C.Regs. § 2725).
- Duty to investigate (*Field v. Century 21 Klowden–Forness Realty* (1998) 63 CA4th 18, 24)?
- Duty to review documents (10 Cal.C.Regs. § 2725(a))?

B. Duties to Others

Duty of honesty and fair dealing – Though not in an agency relationship with third parties, brokers/salespersons owe a broad obligation to act honestly and fairly in dealings with all parties to the transaction (e.g., no misrepresentations or false promises to influence, persuade or induce third party conduct; see generally, Bus. & Prof.C. §§ 10176(a),(b),(i), 10177(j), ¶ 2:114–115). (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741–742; *Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 735–736.)

C. *Easton v. Strassburger*

1. *Easton* Genesis

Brokers have an affirmative obligation to conduct a "reasonably competent and diligent inspection" of 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." (*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102.)

2. No Extension of *Easton* to Commercial Property

Easton limited its holding to residential property, expressing "no opinion" whether a broker's obligation to conduct an inspection for defects for the buyer's benefit applies to the sale of commercial real estate. (*Easton*, 152 Cal.App.3d at 102 n. 8.)

- Nonetheless, in dictum, *Easton* suggests a comparable duty of inspection and disclosure does not extend to commercial property and that any common law negligence or fraud

liability will be limited to the failure to disclose defects of which the broker had actual knowledge: "Unlike the residential home buyer who is often unrepresented by a broker, or is effectively unrepresented because of the problems of dual agency ... , a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interests ... " (*Ibid*.)

- Further, cases postdating *Easton*, construing the now-statutory duty of inspection and disclosure, have generally declined to extend the *Easton* obligation to the sale of commercial properties. (See e.g., *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1360.)

D. Statutory Duties

1. Civil Code sections 1102 and 2079 (1-4 units only)

The common law duty of inspection and disclosure under *Easton* has been codified in Civil Code section 2079 et seq., again, apply to residential properties only (i.e., 1-4 units). (*William L. Lyon & Assocs., Inc. v. Henley* (2012) 204 Cal.App.4th 1294, 1304.)

The inspection disclosures required by Civil Code section 2079 are required to be made on the agent's portion of the Civil Code section 1102.6 real estate transfer disclosure statement.

Scope of duty – only a visual inspection is required. (CC § 2079(a); *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 308 (absence of steel reinforcement and "J" bolts in foundation not discernible by visual inspection and thus outside scope of § 2079 inspection duty); *Salahutdin v. Valley of Calif., Inc*. (1994) 24 Cal.App.4th 555, 562 n. 3 (absent "red flags" visible from reasonably diligent visual inspection indicating property was not the size represented, § 2079 would not encompass duty to survey property or make sure it was the size represented). Thus, the following is outside the scope of inspection:

- Inaccessible areas (Civ. Code § 2079.3; *Assilzadeh v. California Fed'l Bank, FSB* (2000) 82 Cal.App.4th 399, 413);
- Offsite areas and public records (*Ibid*.);
- More than the unit offered for sale in a planned development (*Ibid*; see also, *Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1282).

Residential disclosures required in "mixed use" properties (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182).

2. Further Statutory Duties re Disclosure Concerning Condition of Property

- Structural Pest Control Report (Civ. Code § 1099);
- Hazardous Substance Notice (Health & Saf. Code § 25359.7(a));
- Asbestos Notice (Health & Saf. Code § 25915 et seq.);
- Hazardous Waste Property Designation (Health & Saf.C. § 25220 et seq.);
- Lead Based Paint in Residential Structures (42 USC §§ 3545, 4852d(b));
- Toxic Mold Disclosure (Health & Saf.C. § 26140(a));

- "Commercial Property Owner's Guide to Earthquake Safety" (Bus. & Prof. Code § 10147; Gov. Code § 8893.2).

3. Statutory Duty to Ensure Accuracy of Listing in Multiple Listing Service

Statutory Duty – An agent who places a listing or other information in a multiple listing service "shall be responsible for the truth of all representations and statements" made by the agent of which the agent "had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy." (Civ. Code § 1088.)

Saffie v. Schmeling (2014) 224 Cal.App.4th 563 – Statement by listing agent in MLS indicating, "This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers," not actionable, even though parcel not buildable.

E. Contractual Duties

1. Duties May be Defined by Contract

"Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." Where the plaintiff does not contend that a defendant failed to fulfill a duty imposed by law, the extent of the duties, if any, "are determined by the terms of the agreement between the parties." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755.)

2. Limitations of duties and exculpatory provisions not dispositive (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486).

3. Examples of Language in Commercial Contracts Limiting Duties and Protecting Agent/Broker

LIMITATION OF LIABILITY: Except for Agent's gross negligence or willful misconduct, Agent's liability for any breach or negligence in its performance of this Agreement shall be limited to the greater of $50,000 or the amount of compensation actually received by Agent in any transaction hereunder.

SCOPE OF AGENT'S AUTHORITY AND RESPONSIBILITY: Agent shall have no authority to bind either Buyer or Seller to any modification or amendment of this Agreement. Agent shall not be responsible for performing any due diligence or other investigation of the Property on behalf of either Buyer or Seller, or for providing either party with professional advice with respect to any legal, tax, engineering, construction or hazardous materials issues. Except for maintaining the confidentiality of any information regarding Buyer or Seller's financial condition and any future negotiations regarding the terms of this Purchase Agreement or as otherwise required by law, Buyer and Seller agree that their relationship with Agent is at arm's length and is neither confidential nor fiduciary in nature.

BROKER DISCLAIMER: Buyer and Seller acknowledge that, except as otherwise expressly stated herein, Agent has not made any investigation, determination, warranty or representation with respect to any of the following: (a) the financial condition or business prospects of any tenant, or such tenant's intent to continue or renew its tenancy in the Property; (b) the legality of the present or any possible future use of the Property under any federal, state or local law; (c) pending or possible future action by any governmental entity or agency which may affect the Property; (d) the physical condition of the Property, including but not limited to, soil conditions, the structural integrity of the improvements, and the presence or absence of fungi, mold or wood-destroying organisms; (e) the accuracy or completeness of income and expense information and projections, of square footage figures, and of the texts of leases, options, and other agreements affecting the Property; (f) the possibility that lease, options or other documents exist which affect or encumber the Property and which have not been provided or disclosed by Seller; or (g) the presence or location of any hazardous materials on or about the Property, including, but not limited to, asbestos, PCB's, or toxic, hazardous or contaminated substances, lead-based paint and underground storage tanks.

Buyer agrees that investigation and analysis of the foregoing matters is Buyer's sole responsibility and that Buyer shall not hold Agent responsible therefore. Buyer further agrees to reaffirm its acknowledgment of this disclaimer at close of escrow and to confirm that it has relied upon no representations of Agent in connection with its acquisition of the Property.

NON-CONFIDENTIALITY OF OFFERS: As a Buyer of real property, you are advised of the possibility that sellers or sellers' representatives may not treat the existence, terms or conditions of offers as confidential unless confidentiality is required by law, regulation, or a confidentiality agreement between the parties. In consultation with a real estate attorney, Buyer should carefully consider the relative need, value, advantage and disadvantage of requiring the execution of a confidentiality agreement as a precondition to submittal of Buyer's offer. Such consultation should take place early enough in time for Buyer's attorney to prepare a satisfactory confidentiality agreement (if any) and for it to be delivered to Agent prior to presentation of Buyer's offer.

NO REPRESENTATION IS MADE BY AGENT AS TO THE LEGAL OR TAX EFFECT OR VALIDITY OF ANY PROVISION OF THIS PURCHASE AGREEMENT. A REAL ESTATE BROKER IS QUALIFIED TO GIVE ADVICE ON REAL ESTATE MATTERS. IF YOU DESIRE LEGAL, FINANCIAL OR TAX ADVICE, CONSULT YOUR ATTORNEY, ACCOUNTANT OR TAX ADVISOR.

F. Conduct

1. Promotional Promises

2. Voluntarily Assumed Duties

G. Misrepresentations: Statements of Financial Condition

1. Typical items of financial condition include estoppel certificates, tax returns, profit and loss statements, balance statements.

2. Effect of Delivery of Financial Documents
3. Correcting Prior Statements

4. Code of Civil Procedure section 1974

"No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged. This section is a Statute of Frauds provision and is to be applied in a manner that is consistent with the manner in which subdivision 2 of Section 1624 of the Civil Code is applied."

5. Confidential Financial Information (*Blickman Turkus v. MF Downtown Sunnyvale* (2008) 162 Cal.App.4th 858)

V. THE IMPACT OF EXPERT TESTIMONY ON THE STANDARD OF CARE

A. The Basics Re Expert Testimony

1. The education, training, and experience of a real estate broker determines the standard of care. (Civil Code section 2079.2)
2. The broker's duty to investigate is limited to the subject matter about which the broker is educated, trained and experienced.
3. The broker's duty to advise is limited to the subject matter about which the broker is educated, trained and experienced. A real estate broker does not have the education, training or experience to investigate or advise on the law, taxes, or the like.
4. Note – sophistication of client can be a factor in evaluating standard of care.
5. Note – consideration of impact of involvement of other professionals, such as attorneys or accountants, on real estate brokers' standard of care.

B. Examples of Conflicting Expert Testimony re Standard of Care

Plaintiff's Expert	**Defendant's Expert**
In my opinion, the basic due diligence that any competent real estate agent must perform to evaluate any fast food sale/lease-back by a seller company that is not publicly traded company includes, among other things, obtaining the following information: (a) the number of restaurants owned and operated by the seller company; (b) a letter from the	Commercial real estate is not like residential real estate. In residential real estate, there is a lot of hand-holding. By contrast, in commercial real estate, the parties are assumed to be relatively sophisticated and knowledgeable. A commercial real estate broker simply assists his or her client in the commercial marketplace where ready, willing

franchisor confirming the seller company is in good standing with the brand; (c) the selling entity's financial statements, including two years profit and loss statement or "balance sheet," and the entity's tax returns to verify these and other financial statements; (d) financial records showing the individual performance of the fast food franchise, which must include sales, rent, taxes, and insurance; and (e) the comparable rental value of other fast food sites in the local area. Failure of the real estate agent to obtain this basic information falls below the standard of care.	and able buyers and sellers transact business. It is incumbent upon the buyer to ensure him or herself that s/he has all the financial information desired to make an informed decision about the investment. Unless specifically called for in writing or requested by his or her client, a commercial real estate broker does not an obligation to obtain documents on behalf of client.
A real estate agent must perform basic due diligence to determine the creditworthiness of the tenant/lessee to fulfill his/her obligations as a real estate agent. If, for example, the lessee is not creditworthy, the investment may be too risky and an unsafe investment.	See above – this is a determination for the purchaser to make. The amount of risk an investor is willing to assume, can only be assessed and decided by the investor. A commercial real estate broker is not trained to make this subjective determination nor is s/he in a position to do so.
In order to determine an accurate purchase price, which also assists in determining the longevity of the investment, commercial real estate brokers commonly look at the ratio between sales volume and rent. A general rule of thumb is that the ratio should be 8%. If higher, the tenant is paying too much rent to support the business. It is also my opinion that the purchase prices were in excess of the properties' respective values, because the rent was inflated relative to the respective locations' sales, making the properties unmarketable should the fast food franchises fail in these locations. The real estate agents' failure to advise regarding the foregoing falls below the standard of care.	See above – every investment and every business needs to be evaluated as a whole. While looking at one factor myopically – such as the sales/rent ratio – may suggest an unsustainable rent, looking at the business financials as a whole suggests otherwise. Additionally, the purchaser is and was a sophisticated investor with a team of advisors, including accountants, who were in a much better position to advise on the tenant's financials than the real estate agent who does not have any responsibility for doing so.
In light of the foregoing and other issues relating to Plaintiffs' sophistication, education, net worth, and locality, this investment was not suitable for Plaintiffs. Based upon Plaintiffs' circumstances, and after analyzing all of the factors, it falls below the standard of care of a broker to even	See above.

recommend an out of state investment to Plaintiffs. It is not a suitable investment for Plaintiffs.	
It appears to me that the brokers were more concerned about commissions than representing their clients.	See above – it appears that the purchasers were more interested than making a quick buck than doing the due diligence required to analyze the transaction (touche)

VI. THE POTENTIAL IMPACT OF SB 1171

A. Potential expansion of Civil Code section 2079.14 to 2079.24.

B. Potential expansion still further?

APPENDIX 1

225 Cal.App.4th 427
Court of Appeal,
Second District, Division 5, California.

Hiroshi HORIIKE, Plaintiff and Appellant,
v.
COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al., Defendants and Respondents.

B246606 | Filed April 9, 2014

Synopsis

Background: Real estate purchaser brought action against listing salesperson and broker which represented both purchaser and vendor, alleging several claim, including breach of fiduciary duty. The Superior Court, Los Angeles County, No. SC110477, John H. Reid, J., granted a nonsuit on the fiduciary duty claim against the listing salesperson, instructed jury that broker had no liability for breach of fiduciary duty based on the listing salesperson's acts, and entered judgment on jury verdict for broker and listing salesperson on remaining causes of action. Purchaser appealed.

Holdings: The Court of Appeal, Kriegler, J., held that:

[1] listing salesperson owed a fiduciary duty to purchaser, and

[2] findings that salesperson did not provide false information to purchaser, or provided false information that he reasonably believed to be true, and did not intentionally conceal information, did not satisfy his fiduciary duty.

Reversed and remanded.

West Headnotes (14)

[1] **Brokers** Nature of broker's obligation

A real estate broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. Cal. Civ. Code § 2079

Cases that cite this headnote

[2] **Brokers** Acting for parties adversely interested

A dual real estate agent has fiduciary duties to both the buyer and seller. Cal. Civ. Code § 2079(d).

Cases that cite this headnote

[3] **Brokers** Acting for parties adversely interested

Real estate listing salesperson owed a fiduciary duty to purchaser; broker acted as the dual agent of the purchaser and vendor, disclosure form explicitly stated that a dual agent has a fiduciary duty of utmost care, integrity, honesty, and

loyalty in dealings with either party, and salesperson executed the forms on behalf of broker as an associate licensee and owed an equivalent fiduciary duty to that owed by the broker. Cal. Civ. Code §§ 2079, 2079.13(b).

Cases that cite this headnote

[4] **Brokers** Acting for parties adversely interested

Trial Nature and grounds in general

Jury's findings that real estate salesperson, who listed property for sale and acted as an associate licensee for broker, which acted as dual agent for both purchaser and seller, did not provide false information to purchaser, or provided false information that he reasonably believed to be true, and did not intentionally conceal information, did not satisfy his duty to purchaser as a fiduciary, and thus court's error in granting nonsuit on purchaser's breach of fiduciary duty claims against salesperson was prejudicial; trier of fact could conclude that salesperson was aware of material information that he failed to provide to purchaser, including that the square footage of the property had been measured and reflected differently in different documents, even though he did not have a fraudulent intent, and could find that salesperson, who did not provide purchaser the handwritten advice given to other potential buyers to hire a specialist to verify the square footage, breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage. Cal. Civ. Code §§ 2079, 2079.13(b).

Cases that cite this headnote

[5] **Brokers** Nature of broker's obligation

A broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty.

Cases that cite this headnote

[6] **Brokers** Skill and care required

The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision.

Cases that cite this headnote

[7] **Brokers** Skill and care required

A broker is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision.

Cases that cite this headnote

[8] **Principal and Agent** Nature of agent's obligation

The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information.

Cases that cite this headnote

[9] **Principal and Agent** Nature of agent's obligation

A fiduciary must tell its principal of all information it possesses that is material to the principal's interests.

Cases that cite this headnote

[10] **Principal and Agent** Fraud

A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent.

Cases that cite this headnote

[11] **Fraud** Fiduciary or confidential relations

Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.

Cases that cite this headnote

[12] **Principal and Agent** Fraud

Most acts by an agent in breach of his fiduciary duties constitute constructive fraud.

Cases that cite this headnote

[13] **Principal and Agent** Fraud

The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known or should be known to the fiduciary, may constitute constructive fraud.

Cases that cite this headnote

[14] **Fraud** Fiduciary or confidential relations

A careless misstatement by a fiduciary may constitute constructive fraud even though there is no fraudulent intent.

See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 466.

Cases that cite this headnote

****893** APPEAL from a judgment of the Superior Court of Los Angeles County, John H. Reid, Judge. Reversed and remanded. (Los Angeles County Super. Ct. No. SC110477)

Attorneys and Law Firms

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Klinedinst PC and Neil Gunny for Defendants and Respondents.

Opinion

KRIEGLER, J.

***429** A broker represented both the buyer and the seller in a real property transaction through two different salespersons. The buyer brought several claims against the broker and the salesperson who listed the property for sale, including breach of

fiduciary duty. The trial court granted a nonsuit on the claim for breach of fiduciary duty against the salesperson on the ground that the salesperson who listed the property did not have a fiduciary ***430** duty to the buyer. The court also instructed the jury that the broker had no liability for breach of fiduciary duty based on the salesperson's acts. The jury returned a verdict in favor of the defense on the remaining causes of action.

The buyer contends that the salesperson had a fiduciary duty equivalent to the duty owed by the broker, and the trial court incorrectly granted the nonsuit and erroneously instructed the jury. We agree. When a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker. The buyer was prejudiced by the erroneous rulings, because the jury's findings of fact did not resolve the omitted issues concerning breach of fiduciary duty. Therefore, we reverse the judgment and remand for a new trial.

****894 FACTS**

Defendant Chris Cortazzo is a salesperson for defendant Coldwell Banker Residential Brokerage Company (CB). In 2006, the owners of a residential property in Malibu engaged Cortazzo to sell their property. The building permit lists the total square footage of the property as 11,050 square feet, including a single family residence of 9,224 square feet, a guest house of 746 square feet, a garage of 1,080 square feet, and a basement of unspecified area.

Cortazzo listed the property for sale on a multiple listing service (MLS) in September 2006. The listing service provided Cortazzo with public record information for reference, which stated that the living area of the property was 9,434 square feet. The listing that Cortazzo created, however, stated the home "offers approximately 15,000 square feet of living areas." Cortazzo prepared a flier for the property which stated it "offers approximately 15,000 square feet of living areas."

In March 2007, a couple made an offer to purchase the property. They asked Cortazzo for verification of the living area square footage. Cortazzo provided a letter from the architect stating the size of the house under a current Malibu building department ordinance was approximately 15,000 square feet. Cortazzo suggested the couple hire a qualified specialist to verify the square footage. The couple requested the certificate of occupancy and the architectural plans, but no architectural plans were available. In the real estate transfer disclosure statement, Cortazzo noted from his visual inspection that adjacent parcels were vacant and subject to development. He repeated his advice to hire a qualified specialist to verify the square footage of the home, stating that the broker did not guarantee or warrant the square footage.

***431** When the couple learned architectural plans were not available, they requested a six-day extension to inspect the property. The sellers refused to grant the extension and the couple cancelled the transaction at the end of March 2007. In July 2007, Cortazzo changed the MLS listing to state that the approximate square footage was "0/O.T.," by which he meant zero square feet and other comments.

Plaintiff Hiroshi Horiike was working with CB salesperson Chizuko Namba to locate a residential property to purchase. Namba saw Cortazzo's listing for the Malibu property and arranged for Cortazzo to show the property to Horiike on November 1, 2007. Cortazzo gave Horiike a copy of the flier stating the property had 15,000 square feet of living areas. Escrow opened on November 9, 2007. Cortazzo sent a copy of the building permit to Namba. Namba provided a copy of the permit to Horiike with other documents.

The parties to the transaction signed a confirmation of the real estate agency relationships as required by Civil Code section 2079.17. The document explained that CB, as the listing agent and the selling agent, was the agent of both the buyer and seller. Cortazzo signed the document as an associate licensee of the listing agent CB. Namba signed the document as an associate licensee of the selling agent CB.

Horiike also executed a form required under Civil Code section 2079.16 for the disclosure of three possible real estate agency relationships. First, the form explained the relationship of a seller's agent acting under a listing agreement with the seller. The seller's agent acts as an agent for the seller only and has a fiduciary duty in dealings with the seller. The seller's agent has obligations to both the buyer and the seller to exercise reasonable skill and care, as well as a duty of fair dealing ****895** and good faith, and a "duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties."

The second type of relationship, which is not at issue in this case, involves the obligations of an agent acting for the buyer only. An agent acting only for a buyer has a fiduciary duty in dealings with the buyer. A buyer's agent also has obligations to the buyer and seller to exercise reasonable care, deal fairly and in good faith, and disclose material facts.

The third relationship described was an agent representing both the seller and the buyer. "A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the ***432** Seller and the Buyer." An agent in a dual agency situation has a fiduciary duty to both the seller and the buyer, as well as the duties to buyer and seller listed in the previous sections.

Horiike signed the disclosure form as the buyer and Cortazzo signed as an associate licensee for the agent CB. In the visual inspection disclosure that Cortazzo provided to Horiike, he noted adjacent vacant lots were subject to building development. He did not add a handwritten note of advice to hire a qualified specialist to verify the square footage of the home, as he had in the previous transaction. Horiike completed the property transaction.

In preparation for work on the property in 2009, Horiike reviewed the building permit. He asked Cortazzo to verify that the property had 15,000 square feet of living areas. Horiike's expert testified at trial that the living areas of the home totaled 11,964 square feet. The defense expert testified the home's living areas totaled 14,186 square feet.

PROCEDURAL BACKGROUND

On November 23, 2010, Horiike filed a complaint against Cortazzo and CB for intentional and negligent misrepresentation, breach of fiduciary duty, unfair business practices in violation of Business and Professions Code section 17200, and false advertising in violation of Business and Professions Code section 17500. The parties agreed that the claims based on violations of the Business and Professions Code would be determined by the court following the jury trial.

After the presentation of Horiike's case to the jury, Cortazzo moved for nonsuit on the cause of action for breach of fiduciary duty against him. The trial court granted the motion on the ground that Cortazzo had no fiduciary duty to Horiike. Horiike stipulated that he was not seeking recovery for breach of fiduciary duty based on any action by Namba. Therefore, the court instructed the jury that in order to find CB liable for breach of fiduciary duty, the jury had to find some agent of CB other than Namba or Cortazzo had breached a fiduciary duty to Horiike. The court granted Horiike's request to submit an additional cause of action to the jury for intentional concealment against both defendants.

The jury returned a special verdict in favor of Cortazzo and CB. The jury found Cortazzo did not make a false representation of a material fact to Horiike, so there was no intentional misrepresentation. However, the jury ***433** made a contrary finding in considering the claim for negligent misrepresentation, finding that Cortazzo had made a false representation of material fact to Horiike. There was no liability for negligent misrepresentation, because the jury found Cortazzo honestly believed, and ****896** had reasonable grounds for believing, the representation was true when he made it. The jury found no concealment, because Cortazzo did not intentionally fail to disclose an important or material fact that Horiike did not know and could not reasonably have discovered. Lastly, the jury found that CB did not breach its fiduciary duty to Horiike.

The trial court determined the jury's findings resolved the remaining claims in favor of Cortazzo and CB. Therefore, on October 30, 2012, the court entered judgment in favor of Cortazzo and CB. Horiike filed a motion for a new trial on the ground the verdict was internally inconsistent, which the court denied. Horiike filed a timely notice of appeal.

DISCUSSION

Standard of Review

" 'A nonsuit in a jury case or a directed verdict may be granted only when disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in their favor. [Citations.]' [Citation.]" (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669, 156 Cal.Rptr.3d 90.)

"In reviewing a grant of nonsuit, the appellate court evaluates the evidence in the light most favorable to the plaintiff. [Citation.] The judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving all presumptions, inferences and doubts in favor of the plaintiff. [Citation.] The review of a grant of nonsuit is de novo. [Citation.]" (*Hernandez v. Amcord, Inc., supra,* 215 Cal.App.4th at p. 669, 156 Cal.Rptr.3d 90.) " 'The existence and scope of duty are legal questions for the court.' [Citations.]" (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163, 11 Cal.Rptr.3d 564.)

However, "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury ... or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

434** ***Duty of a Salesperson Acting for a Dual Agent

Horiike contends that Cortazzo, as an associate licensee of CB, owed a fiduciary duty to him equivalent to the fiduciary duty owed by CB. We agree.

The duties of brokers and salespersons in real property transactions are regulated by a comprehensive statutory scheme. (Civ.Code, § 2079 et seq.) Under this scheme, an "agent" is a licensed real estate broker "under whose license a listing is executed or an offer to purchase is obtained." (*Id.*, § 2079.13, subd. (a).) An "associate licensee" is a licensed real estate broker or salesperson "who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee." (*Id.* subd. (b).) " 'Dual agent' means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." (*Id.* subd.(d).)

"The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents ****897** of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions." (Civ.Code, § 2079.13, subd. (b).)

[1] **[2]** "[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.]" (*Field v. Century 21 Klowden–Forness Realty* (1998) 63 Cal.App.4th 18, 25, 73 Cal.Rptr.2d 784.) "[A] dual agent has fiduciary duties to both the buyer and seller." (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414, 98 Cal.Rptr.2d 176.)

[3] CB acted as the dual agent of the buyer and the seller in this case, as was confirmed on the disclosure forms provided to Horiike. The disclosure form explicitly stated that a dual agent has a fiduciary duty of utmost care, integrity, honesty, and loyalty

in dealings with either the seller or the buyer. (See *Assilzadeh v. California Federal Bank, supra,* 82 Cal.App.4th at p. 414, 98 Cal.Rptr.2d 176.) Cortazzo executed the forms on behalf of CB as an associate licensee. Under Civil Code section 2079.13, subdivision (b), the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB. CB owed a fiduciary duty to Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike.

Miller & Starr explains: "When there is one broker, and there are different salespersons licensed under the same broker, each salesperson is an ***435** employee of the broker and their actions are the actions of the employing broker.... [¶] When one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker. That broker thereby becomes a dual agent representing both parties." (2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, p. 68, fns. omitted.) Miller & Starr notes: "Salespersons commonly believe that there is no dual representation if one salesperson 'represents' one party to the transaction and another salesperson employed by the same broker 'represents' another party to the transaction. The real estate industry has sought to establish salespersons as 'independent contractors' for tax purposes (see § 3:18), and this concept has enhanced the misunderstanding of salespersons that they can deal independently in the transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction." (*Id.* at pp. 68–69.)

Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB. The motion for nonsuit should have been denied and the cause of action against Cortazzo for breach of fiduciary duty submitted to the jury. The jury was also incorrectly instructed that CB could not be held liable for breach of fiduciary duty based on Cortazzo's actions.

[4] Cortazzo and CB contend that Horiike cannot show prejudice as a result of the erroneous rulings, because the jury's findings on other claims resolve the claim for breach of fiduciary duty in favor of the defense. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 107, 87 Cal.Rptr.2d 754 [a plaintiff cannot show prejudice based on the elimination of a proper legal theory if the jury's verdict on a different theory negates an element of the omitted theory].) This is incorrect. The jury's findings that Cortazzo did not provide ****898** false information to Horiike, or provided false information that he reasonably believed to be true, and did not intentionally conceal information, does not satisfy his duty to Horiike as a fiduciary.

[5] [6] [7] [8] " '[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.] "The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the ***436** principal includes the duty to disclose reasonably obtainable material information." ' " (*Assilzadeh v. California Federal Bank, supra,* 82 Cal.App.4th at pp. 414–415, 98 Cal.Rptr.2d 176, quoting *Field v. Century 21 Klowden–Forness Realty, supra,* 63 Cal.App.4th at pp. 25–26, 73 Cal.Rptr.2d 784.)

[9] [10] "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. [Citations.] A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. [Citation.]" (*Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762, 67 Cal.Rptr.3d 797.)

[11] [12] [13] [14] " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] ... 'Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent.' [Citation.]" (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562, 29 Cal.Rptr.2d 463.)

In this case, the jury's findings do not resolve whether Cortazzo breached his fiduciary duty to Horiike. A trier of fact could conclude that Cortazzo was aware of material information that he failed to provide Horiike, even though he did not have a fraudulent intent. Cortazzo knew the square footage of the property had been measured and reflected differently in different documents. When a potential purchaser sought to confirm the square footage, Cortazzo gave handwritten advice to have the square footage verified by a specialist. He subsequently changed the listing for the property to reflect that the square footage required explanation. He did not explain to Horiike that contradictory square footage measurements existed. A trier of fact could conclude that although Cortazzo did not intentionally conceal the information, Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage. He did not even provide the handwritten advice given to other potential purchasers to hire a specialist to verify the square footage.

The jury's verdict did not necessarily decide the cause of action for breach of fiduciary duty based on Cortazzo's actions. The jury's findings are inconsistent on the threshold issue of whether Cortazzo made a false representation about the square footage of the living areas. Therefore, we must reverse the judgment and remand for a new trial.

**899 *437 DISPOSITION

The judgment is reversed. Appellant Hiroshi Horiike is awarded his costs on appeal.

We concur:

TURNER, P.J.

MOSK, J.

Parallel Citations

225 Cal.App.4th 427, 2014 Daily Journal D.A.R. 3878, 2014 Daily Journal D.A.R. 4481

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APPENDIX 2

224 Cal.App.4th 1182
Court of Appeal,
Second District, Division 6, California.

Randall S. RICHMAN, Plaintiff and Appellant,
v.
Mark HARTLEY, as Trustee, etc., Defendant and Respondent.

2d Civil No. B245052 | Filed March 20, 2014

Synopsis

Background: Vendor brought action against purchaser for breach of a real estate purchase agreement. The Superior Court, Ventura County, No. 56–2011–00401599–CU–BC–VTA, Henry J. Walsh, J., granted summary judgment for purchaser. Vendor appealed.

Holdings: The Court of Appeal, O'Donnell, J., held that:

[1] a Transfer Disclosure Statement (TDS) is required in a transfer of mixed-use property improved with up to four dwelling units, and

[2] vendor's failure to provide a TDS excused purchaser's performance.

Affirmed.

West Headnotes (9)

[1] **Appeal and Error** Review Dependent on Whether Questions Are of Law or of Fact
Appeal and Error Reasons for Decision

Where interpretation of a statute forms the basis of a ruling, the reviewing court will independently review the statute to determine the validity of the ruling and reviews the trial court's ruling rather than its rationale.

Cases that cite this headnote

[2] **Contracts** Grounds of action

To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff.

Cases that cite this headnote

[3] **Evidence** Legislative proceedings and journals

In appeal from trial court's summary judgment for purchaser based on vendor's noncompliance with Transfer Disclosure Law, in vendor's action for breach of real estate purchase agreement, Court of Appeal would take judicial notice of legislative history of Senate bills. Cal. Evid. Code §§ 452(c), 459; Cal. Civ. Code § 1102.

Cases that cite this headnote

[4] **Antitrust and Trade Regulation** Real property in general

Under Transfer Disclosure Law, a Transfer Disclosure Statement (TDS) is required in any transfer of real property "improved with or consisting of not less than one nor more than four dwelling units," even if the property also has commercial uses, and regardless of how it is otherwise improved. Cal. Civ. Code §§ 1102, 1102.3.

Cases that cite this headnote

[5] **Constitutional Law** Judicial rewriting or revision

Appellate courts may not rewrite unambiguous statutes.

Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Waiver of rights or remedies

Public policy prohibited a provision of a real estate purchase contract providing that the sale was "non contingent" from operating as a waiver of the Transfer Disclosure Law's requirement of a Transfer Disclosure Statement (TDS). Cal. Civ. Code § 1102(c).

Cases that cite this headnote

[7] **Contracts** Rights and Liabilities on Breach

Generally, a party's failure to perform a condition precedent will preclude an action for breach of contract.

Cases that cite this headnote

[8] **Antitrust and Trade Regulation** Enforceability of contracts; rescission

Vendor and Purchaser Conditions and provisos

Vendor's failure to perform the statutory condition precedent to provide a Transfer Disclosure Statement (TDS) established as a matter of law that purchaser was not required to perform under a contract to purchase property improved with a residential duplex, thus precluding vendor's action for breach of contract. Cal. Civ. Code §§ 1102, 1102.3.

Cases that cite this headnote

[9] **Action** Moot, hypothetical or abstract questions

To be ripe for resolution, a controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.

See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 480.

Cases that cite this headnote

Henry J. Walsh, Judge, Superior Court County of Ventura, (Super. Ct. No. 56– ****477** 2011–00401599–CU–BC–VTA) (Ventura County)

Attorneys and Law Firms

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Law Office of Richard L. Francis & Associates, Richard L. Francis, Charles W. Oaks, Oxnard, for Plaintiff and Appellant.

Opinion

O'DONNELL, J. [*]

***1184** In a sale of real property improved with one to four dwelling units, the seller is required to deliver to the buyer a real estate Transfer Disclosure Statement (TDS) pursuant to the Transfer Disclosure Law. (Civ.Code, § 1102, subd. (a) et seq.) [1] In this case the seller did not provide a TDS because the property is "mixed-use," i.e., improved with both residential and commercial buildings. We conclude that a TDS is required in any transfer of real property "improved with or consisting of not less than one nor more than four dwelling units," even if the property also has commercial uses. (§§ 1102, subd. (a); 1102.6.)

This appeal is from a summary judgment in favor of the buyer, respondent Mark Hartley, as trustee of the Mark Hartley Family Trust (Hartley), and against the seller, appellant Randall S. Richman (Richman), who sued Hartley for breach of a real estate purchase agreement. The trial court found that Richman was required as a matter of law to deliver a TDS. Because he did not do so, he failed to demonstrate his own performance under the purchase agreement and Hartley was entitled to summary judgment. On appeal, ***1185** Richman contends that the disclosure requirement applies only to transfers of properties that are solely residential in nature, and not to transfers of mixed-use properties. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, Hartley entered into a written agreement with Richman to purchase Richman's real property on Oak Street in Ventura (the Oak Street property). The property is a single parcel improved with two structures: one commercial building and a residential duplex. The terms of the parties' agreement were set forth in a form entitled "Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate (Non–Residential)" (the Agreement).

Paragraph 9.1 (a) of the Agreement provides that: "Seller shall make to Buyer, through escrow, all the applicable disclosures required by law (See AIR Commercial Real Estate Association ('AIR') standard form entitled 'Seller's Mandatory Disclosure Statement') and provide Buyer with a completed Property Information Sheet ('Property Information Sheet') concerning the property...." Paragraph 26 of the Agreement provides that "Sale will be non contingent and property shall be sold in an 'AS IS CONDITION' with all [its] faults." Under a simultaneously executed lease agreement, Hartley leased the property from Richman for two years.

Escrow was scheduled to close on or before April 14, 2009. Hartley managed the property under the lease agreement from 2007 to 2009, but failed to close escrow, citing Richman's failure to deliver the disclosure documents required by Paragraph 9.1(a) of the Agreement, including the TDS required by the Transfer Disclosure Law for transfers "of real property ****478** ... improved with or consisting of not less than one nor more than four dwelling units." (§§ 1102, subd. (a) et seq.; 1102.6.) It is undisputed that Richman did not provide any disclosures, including a TDS.

Richman sued Hartley for breach of the Agreement. Hartley moved for summary judgment, asserting that Richman's failure to deliver the TDS and the other disclosures required by Paragraph 9.1 (a) of the Agreement negated his breach of contract action against Hartley.

The trial court granted Hartley's summary judgment motion. The trial court found that the Transfer Disclosure Law applied to the transfer because of the presence of the two dwelling units on the property and, therefore, that a TDS was one of the "applicable disclosures required by law" within the meaning of Paragraph 9.1(a) of the Agreement.

***1186** The trial court also found that the statutory disclosure requirement was nonwaivable. Because Richman failed to provide Hartley with a TDS (as well as the two other disclosure forms required by Paragraph 9.1(a)), Hartley demonstrated that Richman could not establish one element of his breach of contract cause of action—his own performance—and that Hartley was therefore entitled to summary judgment. Judgment was entered on September 7, 2012. This timely appeal followed.

II. DISCUSSION

A. Standard of Review

[1] Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) "On appeal, the reviewing court exercises its independent judgment, deciding whether the moving party established undisputed facts that negate the opposing party's claim or state a complete defense. [Citations.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486–487, 59 Cal.Rptr.2d 20, 926 P.2d 1114.) Where interpretation of a statute forms the basis of a ruling, the reviewing court will independently review the statute to determine the validity of the ruling and reviews the trial court's ruling rather than its rationale. (*County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 572, 66 Cal.Rptr.3d 201.)

B. Richman's Breach of Contract Cause of Action

[2] Richman's complaint alleged a single cause of action against Hartley for breach of contract. To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach; and (4) the resulting damage to the plaintiff. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388, 272 Cal.Rptr. 387.) Hartley's summary judgment motion asserted that Richman could not, as a matter of law, prove that he had performed under the contract because he had not made "all the applicable disclosures required by law" as required by Paragraph 9.1(a) of the Agreement. Hartley contended that a TDS was "required by law" in the transaction because the improvements on the property included two dwelling units. Richman insisted that he was not required to comply with the Transfer Disclosure Law, which, he contends, was intended to apply only to transfers of residential real property, not to a mixed-use property such as the Oak Street property. The trial court agreed ***1187** with Hartley. The parties' dispute requires us ****479** to construe section 1102, which defines the scope of the Transfer Disclosure Law. [2]

C. The Transfer Disclosure Law

[3] The Transfer Disclosure Law applies, with enumerated exceptions, to sales or other transfers of "real property ... improved with or consisting of not less than one nor more than four dwelling units." (§ 1102, subd. (a).) Section 1102.3 provides that "[t]he transferor of any real property subject to this article shall deliver to the prospective transferee the written statement required

by this article....” The form of the required TDS is set forth in detail in section 1102.6. It was the Legislature's purpose that the Transfer Disclosure Law “ ‘reduce litigation and disputes pertaining to certain real property sales transactions.’ ” (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 203, 1 Cal.Rptr.3d 569, quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1406 (1985–1986 Reg. Sess.) as amended May 6, 1985, p. 2.) [3]

[4] It is undisputed that Richman did not deliver a TDS to Hartley. Our task, then, is to determine whether the Richman/Hartley transfer was “subject to this article,” i.e., whether the Legislature intended that a seller of mixed-use property provide the buyer with a TDS. (§ 1102.3.) In deciding this issue, we are guided by settled principles of statutory interpretation. “ ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.’ [Citation.]” (*Realmuto v. Gagnard, supra,* 110 Cal.App.4th at p. 199, 1 Cal.Rptr.3d 569.) “ ‘We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’ [Citation.]” (*Ibid.*)

We begin with the words of the statute. (*Wilcox v. Birthwhistle* (1999) 21 Cal.4th 973, 977, 90 Cal.Rptr.2d 260, 987 P.2d 727.) “ ‘... If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature....’ [Citation.]” (*Ibid.*) Only if the language permits more than one reasonable interpretation do we look to ***1188** extrinsic aids, such as the “ ‘... ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ [Citation]” (*Id.*, at pp. 977–978, 90 Cal.Rptr.2d 260, 987 P.2d 727.)

In 1985, the Legislature enacted Senate Bill No. 1406, which requires a seller to deliver to a buyer a real estate TDS in “any transfer ... of real property ... improved with or consisting of not less than one nor more than four dwelling units.” [4] (§ 1102, subd. (a).) These words ****480** are clear and unambiguous. Even Richman does not contend that the language of the statute is ambiguous. Neither the original enactment of the Transfer Disclosure Law nor any subsequent amendments has limited its application to transfers of real property that contain *only* residential units, and no published decision of an appellate court has so limited it. By its language, then, section 1102 applies to any transfer of real property on which are located one to four residential units, regardless of whether the property also has a commercial use.

Although we need look no further than the unambiguous words of section 1102, the statutory scheme of which it is a part also supports our conclusion. Section 1102.2 lists 10 types of real property transfers to which the Transfer Disclosure Law does not apply. These include transfers pursuant to court order (§ 1102.2, subd. (b)), transfers by a fiduciary in the course of administering a decedent's estate (*id.* at subd. (d)), transfers from one coowner to another coowner (*id.* at subd. (e)) and transfers between spouses resulting from a marital dissolution (*id.* at subd. (g)). Section 1102.2 does not exclude transfers of mixed-use property from the Transfer Disclosure Law's coverage.

Application of the Transfer Disclosure Law to mixed-use property where the residential portion is four or fewer units is also supported by other enactments of the Legislature which expressly defined “residential real property” to *exclude* mixed-use properties. For instance, Business and Professions Code section 11423, adopted in 1992, defines “residential real property” to mean “real property located in the State of California containing *only* a one- to four-family residence.” (*Id.* at subd. (a)(3).) The same language was used in section 2954.8, adopted in 1979, governing the handling of impound accounts by financial institutions. That section limits its application to loans made upon the security of real property “containing *only* a one- to four-family residence.” (*Id.* at subd. (a).)

If the Legislature had intended the Transfer Disclosure Law not to apply to a transfer of mixed-use property, it could have done so by adding the ***1189** word “residential” before “real property” in section 1102. It did not. Notwithstanding its use of more specific words in other statutes, and despite the 1995 amendments to the Transfer Disclosure Law discussed above, the Legislature has made no change that limits the disclosure obligation to solely residential property or excludes its application to

mixed-use parcels. We therefore hold that section 1102 applies to any transfer of real property "improved with or consisting of not less than one nor more than four dwelling units," even if the property also has commercial uses. (*Id.* at subd. (a).)

Richman, nevertheless, contends that applying the Transfer Disclosure Law to mixed-use properties is inconsistent with the Legislature's intent. He argues that the parties' transaction was essentially a commercial property transaction and that the Legislature did not intend to protect buyers engaged in commercial transactions when it enacted the Transfer Disclosure Law. It is true that the Legislature did not intend the Transfer Disclosure Law to apply to commercial real estate transactions. (*Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1361, 254 Cal.Rptr. 633; 2 Miller & Starr, Cal. Real Estate § 3:44 (3d ed.), pp. 261–262.) But this does not help us resolve the question raised by this case, which is whether the Transfer Disclosure Law applies to transfers of *mixed-use* property.

Richman urges us to consider the "essence of the transaction" to determine whether it was residential in nature (disclosure ****481** required) or commercial in nature (disclosure not required). [5] Richman would have us infer the essentially commercial nature of the transaction from the parties' experience with commercial property transactions and their use of preprinted forms used in commercial transactions. The statute's unequivocal definition of the transfers that fall within its ambit eliminates the need for such inferences, however. If a property is "improved with or consist[s] of" one to four dwelling units, it is subject to the Transfer Disclosure Law, regardless of whether it may also have a commercial use. (§ 1102, subd. (a).) Moreover, requiring trial courts to determine the "essence" of a transfer from the parties' evidentiary showings would lead to extensive litigation, as the parties to a failed transfer would inevitably have conflicting views of its "essence." This would defect the ***1190** Legislature's stated intent "to reduce litigation and disputes pertaining to certain real property sales transactions." (*Realmuto v. Gagnard, supra,* 110 Cal.App.4th at p. 203, 1 Cal.Rptr.3d 569.)

In a similar vein, Richman contends that Hartley is not the "kind of buyer" the Legislature intended to protect by enacting the Transfer Disclosure Law. He argues that the law was intended to protect "unsophisticated" residential purchasers, not buyers, like Hartley, who are well-versed in commercial real estate transactions. The courts have recognized the Legislature's interest in protecting unsophisticated residential home purchasers. (See, e.g., *Smith v. Rickard, supra,* 205 Cal.App.3d at p. 1361, 254 Cal.Rptr. 633 ["section 2079 et seq. is one of those statutory schemes where the Legislature distinguishes between residential and commercial properties in order to protect unsophisticated buyers and owners of residential property from those with greater knowledge and bargaining power"]; *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102, fn. 8, 199 Cal.Rptr. 383 [distinguishing between the "residential home buyer who is often unrepresented by a broker, or is effectively unrepresented because of the problems of dual agency [and] a purchaser of commercial real estate [who] is likely to be more experienced and sophisticated in his dealings in real estate"].) The Legislature's purpose to protect residential, not commercial, buyers does not, however, require the conclusion that it did not intend the Transfer Disclosure Law to apply to transfers of mixed-use properties, which by definition include residential units. Nothing in the statute or its legislative history supports an exception to section 1102 based on the sophistication of the buyer.

There is no need to consider Richman's theories for determining whether a transaction is "in essence" commercial or residential because the Legislature has provided a numeric means of determining whether the Transfer Disclosure Law applies: it applies if the property is improved ****482** with one to four residential units, regardless of how it is otherwise improved. Had the Legislature wished the real estate industry to determine, through successive litigations, whether a transaction is primarily commercial or residential, it would not have provided a bright line for determining the applicability of the Transfer Disclosure Law. Richman's construction would blur that bright line.

[5] Section 1102, subdivision (a) applies to property "improved with *or* consisting of" one to four dwelling units. Richman urges us to focus on the term "consisting of" and to interpret that term narrowly to mean "that the statute applies exclusively to *residential* property transactions as defined by a property containing one to four dwelling units." This contention is meritless. First, it ignores the alternate qualifier "improved with." It is undisputed that the subject property is "improved with" two residential units. Therefore, section 1102 applies to the transaction regardless of how we ***1191** interpret the term "consisting of." Second, Richman would have us read a new word—"residential"—into the statute. Appellate courts may not rewrite

unambiguous statutes. (*Melissa R. v. Superior Court* (2012) 207 Cal.App.4th 816, 822, 144 Cal.Rptr.3d 48.) As explained above, if the Legislature had intended to limit the application of section 1102 to solely residential properties, it would have done so. For the sake of thoroughness, however, we address Richman's argument, which is based on a misreading of our decision in *Smith v. Rickard, supra,* 205 Cal.App.3d 1354, 254 Cal.Rptr. 633.

In *Smith,* we analyzed section 2079, which requires a licensed real estate broker who has a written contract with the seller of "*residential* real property comprising one to four dwelling units" and who has listed that property for sale "to disclose to [a] prospective purchaser[ ] all facts materially affecting the value or desirability of the property that an investigation would reveal...." (****483** *Smith v. Rickard, supra,* 205 Cal.App.3d at p. 1360, 254 Cal.Rptr. 633.) In *Smith,* we did not have to read the word "residential" into the statute because it was already there. Our task was to determine whether the property was in fact "residential" for purposes of section 2079. The property at issue in *Smith* was a 50–acre commercial avocado and lemon orchard improved with a residence. After the sale was completed the buyer discovered that the avocado trees were infected with a fungus that was killing the trees and sued the broker for negligence in failing to inspect and disclose material defects in the avocado orchard. We held that the Legislature intended section 2079 to apply only to "brokers selling residential properties of four or fewer dwellings, and not to commercial real estate transactions." (*Smith v. Rickard, supra,* at p. 1360, 254 Cal.Rptr. 633.) We determined that the property was not residential: "The presence of a residence on the commercial property does not transform the property into residential property." (*Id.,* at p. 1363, 254 Cal.Rptr. 633.) Because section 2079 applies only to "residential" property, we concluded that the "broker has no duty to inspect" the commercial parts of the property. (*Id.,* at pp. 1356–1357, 254 Cal.Rptr. 633.)

In the absence of any case law defining the scope of section 1102, Richman urges that *Smith's* construction of section 2079 is controlling here, particularly our statement that "[t]he presence of a residence on the commercial property does not transform the property into residential property." [6] (*Smith v. Rickard, supra,* 205 Cal.App.3d at p. 1360, 254 Cal.Rptr. 633.) As explained above, however, that comment was made in the context of determining whether the property was "residential," as opposed to commercial, which is a critical distinction in the application of section 2079, but not in the application of section 1102, which does not specify that the property be "residential." ***1192** Accordingly, Richman's argument that we should read the word "residential" into section 1102 finds no support in *Smith*. On the contrary, *Smith* supports our holding here. In *Smith,* we compared section 2079 to several other statutes, including section 1102, and observed that section 1102, unlike section 2079, does not "require that the property be used only for residential purposes." (*Smith v. Rickard, supra,* at p. 1362, 254 Cal.Rptr. 633.) Although we did not construe section 1102 in *Smith,* our observation is consistent with our holding here that section 1102 does not require that the property be used only for residential purposes, but applies to all transfers of real property improved with or consisting of one to four residential units, regardless of whether it also has a commercial use.

D. Waiver of the Transfer Disclosure Law

[6] Richman contends that Paragraph 26 of the Agreement constituted a waiver of the disclosure requirements contained in Paragraph 9.1(a). Paragraph 26 states: "Sale will be non contingent and property shall be sold in an 'AS IS CONDITION' with all its faults." Although this provision may have created a triable issue as to whether the parties intended to waive the non-statutory disclosures of Paragraph 9.1(a), it could not, as a matter of law, operate as a waiver of the Transfer Disclosure Law.

In 1994 the Legislature amended section 1102 to add the provision that: "Any waiver of the requirements of this article is void as against public policy." (§ 1102, subd. (c).) The Legislature's stated purpose in enacting this change was to clarify "that the delivery of a real estate transfer disclosure statement may not be waived in an 'as is' sale, as held in *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188, 19 Cal.Rptr.2d 161." (§ 1102.1, subd. (a).) Section 1102 required Richman to provide Hartley with a TDS, and public policy prohibited waiver of that requirement.

[7] **[8]** Richman's delivery of a TDS was a statutory condition precedent to Hartley's duty to perform under the Agreement. (*Realmuto v. Gagnard, supra,* 110 Cal.App.4th at pp. 201–202, 1 Cal.Rptr.3d 569.) Generally, a party's failure to perform a

condition precedent will preclude an action for breach of contract. (*Id.*, at p. 205, 1 Cal.Rptr.3d 569.) Because Richman did not perform that condition precedent, Hartley was not required to perform as a matter of law and summary judgment was properly granted.

E. Extent of Disclosure Obligation

[9] The parties appear to agree that the disclosure obligation, if it exists, applies to the dwelling units only and not to the entire property. That issue is not properly before us, however. Richman did not deliver a TDS for any part ***1193** of the property and his contention on appeal is that he was not required to deliver a TDS at all. The scope of any TDS he was required to deliver was not the subject of an actual controversy between the parties. To be ripe for resolution, " '[t]he controversy must be definite and concrete, touching the legal relations of parties having ****484** adverse legal interests....' " (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169–171, 188 Cal.Rptr. 104, 655 P.2d 306.) Because there is no actual controversy concerning the extent of the disclosure obligation, we do not decide it.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

We concur:

GILBERT, P.J.

PERREN, J.

Parallel Citations

224 Cal.App.4th 1182, 14 Cal. Daily Op. Serv. 3073, 2014 Daily Journal D.A.R. 3547

Footnotes

* (Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to art. 6, § 6 of the Cal. Const.)

1 All statutory references are to the Civil Code unless stated otherwise.

2 Although the trial court's grant of summary judgment was based on Richman's failure to deliver any of the disclosures required by Paragraph 9.1(a), we consider only the failure to deliver the TDS required by section 1102 because Richman's failure to comply with section 1102 moots his other claims.

3 On our own motion, we take judicial notice of the legislative history of Senate Bill No. 1406 and the 1994 amendments enacted as Senate Bill No. 1377, which became law in 1995. (Evid.Code §§ 452, subd. (c), 459; *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 400, fn. 8, 276 Cal.Rptr. 524 [appellate court may take judicial notice of legislative history materials on its own motion].)

4 Senate Bill No. 1406 became law on January 1, 1987. It is codified at section 1102 et seq., "Disclosures Upon Transfer of Residential Property."

5 The parties litigated this issue in the summary judgment motion. Both parties offered evidence in support of their respective theories, including evidence of custom and practice in the Ventura County real estate industry. Richman relied primarily on his own declaration, which recounted his extensive experience as a real estate developer and investor, and excerpts from the legislative history of section 1102, of which he asked the trial court to take judicial notice. Hartley submitted the declaration of a Ventura real estate broker, Joseph Kapp. The trial court admitted some parts of this evidence and rejected others. On appeal, each party challenges the trial court's evidentiary rulings that did not favor his position. Because the defining issue is one of statutory interpretation, there is no

need to resolve these evidentiary issues. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432, 101 Cal.Rptr.2d 200, 11 P.3d 956.)

6 Richman observes correctly that sections 1102 and 2079 are "complementary" statutes. For example, both statutes were enacted as a response to *Easton v. Strassburger, supra,* 152 Cal.App.3d 90, 199 Cal.Rptr. 383, and both statutes utilize the same disclosure form.

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APPENDIX 3

224 Cal.App.4th 563
Court of Appeal,
Fourth District, Division 2, California.

George SAFFIE, Jr., Plaintiff and Appellant,
v.
Robert SCHMELING, Cross–complainant and Appellant;
Burton Commercial, Inc. et al., Cross–defendants and Respondents.

E055716 | Filed March 7, 2014

Synopsis

Background: Purchaser of undeveloped commercial real estate parcel brought action against purchaser's broker, vendor, and vendor's broker, alleging negligence and breach of fiduciary duty after discovering that property was not considered "ready to build" but rather required additional geological investigation which was not feasible. Vendor and vendor's broker filed cross-claims for indemnity. Following a bench trial, the Superior Court, Riverside County, No. RIC500477, Mac R. Fisher and Craig Riemer, JJ., entered judgment against purchaser's broker, but entered take-nothing judgment against vendor and vendor's broker. Purchaser appealed judgment as to vendor's broker, which filed conditional cross-appeal regarding indemnification claims.

Holdings: The Court of Appeal, Hollenhorst, Acting P.J., held that:

[1] broker's multiple listing service (MLS) statement that property had "a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist" was neither false nor inaccurate, and

[2] purchaser was not injured by alleged inaccurate statement by vendor's broker.

Affirmed.

West Headnotes (6)

[1] **Brokers** Misrepresentation or fraud of broker

Brokers Representation of principal in general

While real estate brokers owe their own clients fiduciary duties, they owe third parties who are not their clients, including the adverse party in a real estate transaction, only those duties imposed by regulatory statutes, including a general obligation of honesty, fairness and full disclosure toward all parties.

Cases that cite this headnote

[2] **Appeal and Error** Cases Triable in Appellate Court

Court of Appeal would review de novo question of whether vendor's real estate broker's statement in multiple listing service (MLS) was false or inaccurate in the meaning of negligent listing statute, as dispositive facts were largely undisputed in trial court and were not challenged on appeal. Cal. Civ. Code §§ 1087, 1088.

Cases that cite this headnote

[3] **Brokers** Misrepresentation or fraud of broker

Statement by vendor's real estate broker in listing on multiple listing service (MLS) that undeveloped commercial parcel "is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist" was neither false nor inaccurate, even if report was outdated due to new geological investigation requirements and property was not currently buildable; statements were true, and any misleading characteristic was cured by notification that report, which displayed publication date on the cover, was available for serious buyers. Cal. Civ. Code §§ 1087, 1088.

Cases that cite this headnote

[4] **Brokers** Misrepresentation or fraud of broker

A vendor's real estate broker is not responsible for ensuring that true statements in a multiple listing service (MLS) are not misconstrued, or to make certain that the purchaser and the purchaser's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes. Cal. Civ. Code §§ 1087, 1088.

Cases that cite this headnote

[5] **Brokers** Misrepresentation or fraud of broker

Brokers Fraud of broker or his agent

An omission of information may sometimes render an otherwise true statement false or inaccurate, in the meaning of statute providing that a real estate broker shall be responsible for the truth of all representations and statements made by the agent in a multiple listing service (MLS) of which that agent had knowledge or reasonably should have had knowledge. Cal. Civ. Code § 1088.

Cases that cite this headnote

[6] **Brokers** Misrepresentation or fraud of broker

Purchaser of undeveloped commercial property was not injured by alleged inaccuracy by vendor's broker in multiple listing service (MLS) listing, even if listing implied that Fault Hazard Investigation report for the property was recent and therefore could be relied on as a current geological evaluation of the property, as report itself was disclosed to buyer during escrow, prior to the close of the transaction, and report's date appeared prominently on the cover; buyer's alleged injury arose from a failure to investigate and understand the implications of the information that the report dated from a prior decade. Cal. Civ. Code §§ 1087, 1088.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 607.

Cases that cite this headnote

APPEAL from the Superior Court of Riverside County. Mac R. Fisher and Craig Riemer, Judges. Affirmed. (Super. Ct. No. RIC500477).

Attorneys and Law Firms

Snyder Dorenfeld and David K. Dorenfeld for Plaintiff and Appellant George Saffie, Jr.

Reynolds, Jensen & Swan and Barry R. Swan for Cross–complainant and Appellant Robert Schmeling.

No appearance for Cross–defendants and Respondents Burton Commercial, Inc. and Yousef Sasa.

Opinion

OPINION

HOLLENHORST, Acting P.J.

***565** This case arises from a real estate transaction that did not turn out as well for the buyer, plaintiff George Saffie, Jr. (buyer), as he had hoped. Saffie brought suit against his broker, Anthony Burton (buyer's broker) and his firm, Burton Commercial, Inc., as well as the seller, Yousef Sasa (seller), and the seller's broker, Robert Schmeling (seller's broker). Defendants filed cross-complaints against one another for indemnification.

After a bench trial on buyer's claims, and a separate hearing regarding defendants' indemnification claims, the trial court decided that buyer should take nothing on his claims against seller and seller's broker, but found buyer's broker and his firm liable in the amount of $232,147.50 for breach of ***566** fiduciary duty and negligence. [1] ****768** The court held that none of the defendants should recover anything on their cross-complaints for indemnity.

Buyer appeals the trial court's judgment only with respect to its finding of no liability as to seller's broker. Seller's broker cross-appeals with respect to the trial court's ruling on his cross-complaint, seeking to revive his indemnification claims only if the trial court's judgment that he is not liable to buyer were to be reversed.

Buyer contends that seller's broker's statement on a multiple listing service was false or inaccurate. For the reasons stated below, the trial court's judgment will be affirmed. The affirmance renders the cross-appeal moot, and it will be dismissed; thus, neither the cross-appeal nor the cross-complaint will be further mentioned.

I. FACTS AND PROCEDURAL BACKGROUND

In June 2006, seller's broker posted information about an undeveloped commercial parcel, 0.62 acres in size and located in Hemet, California, on a multiple listing service (MLS). (See Civ.Code, [2] § 1087 [defining “multiple listing service”].) Included in seller's broker's listing was the following language: “This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers.”

The Fault Hazard Investigation report seller's broker cited dates to 1982: “May 20, 1982” appears prominently on its cover. The report, prepared by a “Registered Geologist,” finds “no evidence of an active fault” on the property, and concludes that “the secondary effects of ground fissuring and cracking and the primary effects of ground rupture and displacement on a fault are unlikely to occur on the subject property.” The report makes certain recommendations regarding the potential forces and effects of earthquakes that “[t]he design of all commercial structures to be constructed on the subject property should take into consideration.”

***567** On July 23, 1982, an engineering geologist for the Riverside County Planning Department issued a letter granting "[f]inal approval of the report," based on his opinion that the report "was performed in a competent manner consistent with the present 'state-of-the-art' and satisfies the requirements of the Alquist–Priolo Special Studies Zones Act and the associated Riverside County Ordinance No. 547."

In 2006, buyer sought to purchase, through his broker and his firm, an undeveloped commercial parcel, with the intent of building a commercial building on the property. Buyer's broker brought to his attention the property owned by seller and listed in the MLS by seller's broker. In June 2006, buyer made an offer to purchase the property; seller made a counteroffer, which buyer accepted.

During escrow, prior to the close of the transaction, seller's broker gave buyer's broker a copy of the 1982 Fault Hazard Investigation report, together with the letter from the Riverside County Planning Department approving the report. Buyer's broker provided these documents in turn to buyer, but buyer's broker testified that he did so without reading the report or even understanding what a fault hazard investigation report is. Though buyer's broker testified that he told buyer to "check out" the report, the trial court found that buyer's broker led buyer to believe that the report was current and could be relied on as an indication that the property was "ready to build." The transaction ****769** closed without buyer or buyer's broker performing any further investigation in relation to geological issues on the property generally, or with respect to the Fault Hazard Investigation report in particular.

After the close of the transaction, when buyer began to try to develop the property, he discovered that the County of Riverside did not agree that the property was "ready to build." The County's understanding of the "state of the art" regarding investigation of fault hazards had changed after the 1994 Northridge earthquake, and it no longer accepted fault hazard investigation reports performed under earlier standards. The additional geological investigation now required by the County for approval rendered buyer's intended use of the property impractical; such investigation would have required substantial excavation that, together with the small size of the parcel and required setbacks from such excavation for any construction, meant buyer could not feasibly move forward with his plans for a commercial building on the property.

***568** After a bench trial on buyer's claims, the trial court issued a "Tentative Decision" on June 30, 2011, which it supplemented and incorporated by reference in an August 18, 2011, "Statement of Decision."

As noted, buyer appeals the trial court's judgment only with respect to seller's broker.

II. DISCUSSION

Buyer contends that seller's broker's statement in the MLS regarding the Fault Hazard Investigation report is false or inaccurate because the statement fails to specify that the report dates to 1982, thereby giving a false impression that the report was current as of the date of the MLS listing and remained "valid" as a basis for commercially developing the property in 2006. He argues that the trial court erred in its application of the law to the facts by finding seller's broker not liable for damages under section 1088.

Buyer does not dispute the truth of seller's broker's statement in the MLS with respect to the existence of a Fault Hazard Investigation report regarding the property at issue. Nor does he challenge the accuracy of seller's broker's summary description of the author's conclusions (though no specific declaration that the property is "buildable" is contained in the Fault Hazard Investigation report).

[1] **[2]** While real estate brokers owe their own clients fiduciary duties, they owe third parties who are not their clients, including the adverse party in a real estate transaction, only those duties imposed by regulatory statutes. (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1279, 63 Cal.Rptr.2d 373.) These duties include a general obligation of " 'honesty, fairness and full disclosure toward all parties.' " (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1524, 116 Cal.Rptr.3d 419 (*Holmes*) [quoting

Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 43, 269 Cal.Rptr. 228]; see also *Field v. Century 21 Klowden–Forness Realty* (1998) 63 Cal.App.4th 18, 24–27, 73 Cal.Rptr.2d 784 (*Field*) [distinguishing duties owed by brokers to their clients from duties owed to nonclients].) A broker's duties with respect to any listing or other information posted to a MLS are specified in section 1088. Section 1088 states in relevant part that the broker "shall be responsible for the truth of all representations and statements made by the agent [in an MLS] ... of which that agent ... had knowledge or reasonably should have had knowledge," and provides a statutory negligence claim for "anyone injured" by the "falseness or inaccuracy" of such representations and statements. ****770** (§ 1088; *see* ***569** *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077, 76 Cal.Rptr.2d 911 (*Furla*) [discussing § 1088].) Here, the dispositive facts are not challenged on appeal, and indeed were largely undisputed below, so we review de novo whether seller's broker's statement in the MLS was false or inaccurate in the meaning of section 1088. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765, 123 Cal.Rptr.3d 562 [a statute's interpretation and application to undisputed facts are questions of law reviewed de novo].)

There are two previous published appellate opinions that discuss section 1088. In *Furla, supra,* 65 Cal.App.4th at pp. 1077–1079, 76 Cal.Rptr.2d 911, the appellate court reversed a grant of summary judgment to a defendant broker, finding triable issues of material fact regarding whether the broker's inaccurate representation regarding the square footage of a property should give rise to liability under section 1088, among other statutory provisions. In *Holmes, supra,* 188 Cal.App.4th at p. 1525, 116 Cal.Rptr.3d 419, the appellate court noted, but did not resolve, the question of whether section 1088 is violated where a broker knows, but does not disclose in a listing, that the property is so overencumbered with debt that any attempted transaction at the listed price is unlikely to close. Neither *Furla* nor *Holmes* provides a dispositive answer to the question posed by this case.

[3] Buyer correctly identifies seller's broker's statement in the MLS as a statement of fact, the truth of which is seller's broker's responsibility under section 1088. Buyer's claim against seller's broker fails, however, for the fundamental reason that he does not identify anything about seller's broker's statement itself that is false or inaccurate, as would be required for liability under section 1088. As noted, the existence of the Fault Hazard Investigation report is undisputed. Buyer has not argued that seller's broker's description of the conclusions of the report—that the property was "declared buildable by the investigating licensed geologist"—is an untrue or inaccurate summary of the report's conclusions. Furthermore, by disclosing a copy of the Fault Hazard Investigation report and associated approval letter during escrow, seller's broker fully satisfied his duty to buyer of "honesty, fairness and full disclosure toward all parties." (See *Holmes, supra,* 188 Cal.App.4th at p. 1524, 116 Cal.Rptr.3d 419.)

Buyer contends only that the passage of time ***570** between 1982 and 2006 rendered the Fault Hazard Report unreliable and invalid, thus making seller's broker's statement in the MLS false or inaccurate. We disagree with buyer's conclusion. Certainly, the significance of the Fault Hazard Investigation report for purposes of acquiring approval from the County of Riverside to build a commercial development on the site changed between 1982 and 2006: as the trial court found, the report had become "outdated" for that purpose. Buyer's broker and buyer believed that the property was fully cleared for building, without any further scientific analysis or governmental approvals, at the time of the transaction in 2006. The property, as buyer discovered after closing, was not "buildable" in that sense. *But seller's broker never said that it was.* [3] Seller's broker ****771** wrote in the MLS that the "parcel ... has been declared buildable by the investigating licensed geologist" and that the "[r]eport [is] available for serious buyers." Those statements were true, and he provided the report to buyer's broker. Whatever conceivably misleading characterization of the report may arguably be implied by the MLS statement, notification that the report itself was available for "serious buyers," and actually providing the report, cured any such mischaracterization.

[4] Furthermore, in the MLS statement the seller's broker did *not* affirm that the geologist performed his investigation in accord with current County of Riverside requirements, nor did he state that all necessary approvals for building had been obtained. A realtor is "responsible for the truth of all representations and statements" he or she posts in an MLS. (§ 1088.) There is nothing in section 1088, or any other source of law, imposing responsibility on a seller's broker to ensure that true statements in an MLS are not misconstrued, or to make certain that the buyer and the buyer's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes.

[5] To be sure, an omission of information may sometimes render an otherwise true statement false or inaccurate, in the meaning of section 1088. For example, in *Holmes* the Court of Appeal noted the possibility of a violation of section 1088 where the broker listing a property omitted the information that the transaction could only close at the listed price if lenders agreed to accept less money than the amounts owed by the seller or the seller had sufficient cash to deposit into escrow to cover the excess debt. (*Holmes, supra,* 188 Cal.App.4th at pp. 1522–1523, 1525, 116 Cal.Rptr.3d 419.) In that case, however, there was something false about the broker's representation in the MLS, namely, the suggestion that the property could be bought at a particular price—it was highly unlikely the transaction could close at the listed price, even if ***571** buyer and seller wanted it to. (*Id.* at p. 1525, 116 Cal.Rptr.3d 419.) Here, by contrast, nothing about the passage of time between 1982 and 2006 makes seller's broker's description of the report or the nature of the report's conclusions any less true; the omission of the report's publication date therefore does not render his statement false or inaccurate. Again, we observe that any misleading effect the omission of the report's publication date conceivably had on a reader was corrected by offering to the reader who is a "serious buyer" a copy of the report itself, which displayed the date on its cover, and by actually providing the report to buyer.

[6] Additionally, even if seller's broker's language could be construed to imply that the Fault Hazard Investigation report was recent and therefore could be relied on as a current geological evaluation of the property, there is nothing in the record that supports the conclusion buyer was injured by the alleged inaccuracy, as would be required for liability under section 1088. (See § 1088 [providing a claim to "anyone injured by [the] falseness or inaccuracy" of representations and statements in an MLS].) Buyer contends that the absence of the date of the report from the MLS listing rendered seller's broker's statement misleading. But the report itself was disclosed to buyer during escrow, prior to the close of the transaction. Buyer and buyer's broker need not have even read the report following its disclosure to learn that ****772** it was authored in 1982: as noted, the date appears prominently on the cover. Thus, to the extent seller's broker's statement could be considered false or inaccurate for failure to include the date of the report, that purported defect was cured prior to the time when buyer could have suffered any damage from the lack of such information. (Cf. *Holmes, supra,* 188 Cal.App.4th at p. 1519, 116 Cal.Rptr.3d 419 [buyers sold their existing home to purchase seller's property, and were damaged when seller failed to convey title].) Buyer's alleged injury arises from a failure to investigate and understand the implications of the information that the Fault Hazard Investigation report dates to 1982—a failure the trial court found was buyer's broker's responsibility—not any failure to provide that information in a timely manner on the part of seller's broker. In short, we conclude that seller's broker's statement in the MLS was true and neither violated section 1088 nor caused buyer any damage.

Buyer's arguments on appeal generally suffer from a failure to engage with what seller's broker actually wrote in the MLS listing. If seller's broker had stated in the MLS listing that "the Property had been cleared to build upon by the County of Riverside," or had seller's broker "blindly assert [ed] the ability to build," as buyer would have it, seller's broker would be responsible for the truth of such statements. But that is not what the record shows seller's broker wrote in his posting on the MLS. Rather, as noted, seller's broker asserted the existence of a Fault Hazard Investigation report, summarized its conclusions, and offered to provide the report to serious buyers. Absent anything untrue or ***572** inaccurate about the statement seller's broker actually made in the MLS, and absent damage to buyer from such falsity or inaccuracy, seller's broker is not liable under section 1088.

Buyer further contends that "any reasonably competent realtor in Southern California" would be aware of the changes to the regulatory landscape that occurred after the 1994 Northridge earthquake, so seller's broker should have known that the 1982 Fault Hazard Investigation report was outdated. Seller's broker never affirmed, however, that the report was current to 2006 standards. He described the existence of a report, summarized its conclusions, and offered to provide the report to serious buyers; he is responsible for the truth of *that statement.* It was incumbent on buyer—and on buyer's broker, in his role as a fiduciary for buyer—to determine whether the Fault Hazard Investigation report was something buyer should rely on for his particular purposes. Seller's broker had no obligation to perform that research for buyer and buyer's broker. (See, e.g., *Field, supra,* 63 Cal.App.4th at pp. 24–25, 73 Cal.Rptr.2d 784 [stating that "a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property," but the buyer's broker " 'is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision' "]; *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 605, 43 Cal.Rptr.2d 399 ["[i]t is not the obligation of the seller to research local land-use ordinances and advise a buyer as to their effect on the realty"], disapproved on another ground in *Santisas v. Goodin* (1998) 17 Cal.4th

599, 609, fn. 5, 71 Cal.Rptr.2d 830, 951 P.2d 399.) To the extent seller's broker's statement in the MLS could be interpreted to imply that the report was recent and therefore likely to have been performed under current standards, that purported inaccuracy was cured by disclosing the report itself during escrow, prior to any possible injury to buyer from lack of ****773** information regarding the date of the report.

Buyer's reliance on authority regarding a broker's duty to verify the truth of his statements is similarly misplaced. Seller's broker is responsible under such authority for verifying the truth of what he wrote and posted to the MLS. (See, e.g., *Furla, supra,* 65 Cal.App.4th at p. 1081, 76 Cal.Rptr.2d 911 [finding triable issue of fact regarding whether a broker's approximation of square footage of property constituted actionable misrepresentation of fact].) He performed that duty adequately by obtaining a copy of the Fault Hazard Investigation report and accurately describing its conclusions. Had seller's broker relied solely on his client's description of a report seller's broker had never read, and that description turned out to be inaccurate in a material way, buyer's arguments in this regard would be more on point. But the record demonstrates that is not what happened here.

*573 III. DISPOSITION

The trial court's judgment is affirmed. Seller's broker's cross-appeal is dismissed as moot. Seller's broker, Robert Schmeling, is awarded his costs on appeal.

We concur:

RICHLI, J.

KING, J.

Parallel Citations

224 Cal.App.4th 563, 14 Cal. Daily Op. Serv. 2518, 2014 Daily Journal D.A.R. 2849

Footnotes

1 The trial court notes in its June 30, 2011, tentative statement of decision that plaintiff's claims against Burton Commercial were dismissed pursuant to stipulation. The trial court's judgment, however, awards money damages to plaintiff against both Burton and Burton Commercial. Nevertheless, the question of whether the judgment awarded to plaintiff should be against both Burton and Burton Commercial, or against Burton alone, is not relevant to the disposition of this appeal.

2 All further citations to statutes are to the Civil Code unless otherwise specified.

3 At trial, plaintiff's expert opined that seller's broker's statement meant that the property had been “declared buildable” and implied that a buyer could “take that to the bank.” Even assuming this opinion regarding the meaning and implications of seller's broker's statement could properly be given any evidentiary weight, the opinion was rejected by the trier of fact; after a bench trial, the judge found seller's broker's expert “more believable.” We will not disturb that determination here. (See *Cuiellette v. City of Los Angeles, supra,* 194 Cal.App.4th at p. 765, 123 Cal.Rptr.3d 562.)

APPENDIX 4

SENATE BILL No. 1171

Introduced by Senator Hueso

February 20, 2014

An act to amend Section 2079.13 of, and to amend the heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of, the Civil Code, relating to real property transactions.

LEGISLATIVE COUNSEL'S DIGEST

SB 1171, as introduced, Hueso. Real property transactions: agents: obligations.

Existing law requires listing and selling agents, as defined, to provide the seller and buyer in a residential real property transaction with a disclosure form, as prescribed, containing general information on real estate agency relationships. Existing law also requires the listing or selling agent to disclose to the buyer and seller whether he or she is acting as the buyer's agent exclusively, the seller's agent exclusively, or as a dual agent representing both the buyer and the seller.

This bill would extend these disclosure requirements to include transactions involving commercial property, as defined.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The heading of Article 2 (commencing with Section 2079) of Chapter 3 of Title 6 of Part 4 of Division 3 of the Civil Code is amended to read:

Article 2. Duty to Prospective Purchaser of ~~Residential~~ *Real* Property

SEC. 2. Section 2079.13 of the Civil Code is amended to read:

2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

(a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who 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, and under whose license a listing is executed or an offer to purchase is obtained.

(b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.

(d) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.

(e) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.

(f) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.

(g) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.

(h) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.

(i) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent which becomes the contract for the sale of the real property upon acceptance by the seller.

(j) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property which constitutes or is improved with one to four dwelling units, *any commercial property specified in subdivision (a) or (b) of Section 1101.3,* any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.

(k) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.

(*l*) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.

(m) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.

(n) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.

(o) “Subagent” means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, “subagent” does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.

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