THE REAL PROPERTY SECTION

OF THE ORANGE COUNTY BAR ASSOCIATION

Presents

DUAL AGENCY LAW FOLLOWING THE CALIFORNIA SUPREME COURT'S LANDMARK *HORIIKE* DECISION

Speaker

SEAN PONIST, ESQ.

PONIST LAW GROUP

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Sean Ponist

Sean Ponist is the founder of the Ponist Law Group, 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 30 cases to verdict. For the past seven years, Mr. Ponist has been recognized as a Super Lawyer and has also been recognized as being one of the Best of the Bar by the San Diego Business Journal.

Mr. Ponist 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?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured for the San Diego County Bar Association ("Deconstructing Commercial Leases" and "Commercial Real Estate Brokerage Standard of Care"), 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," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care," and "Contract Interpretation"), 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").

Additionally, he serves as the Chair of the Real Property Section for the San Diego County Bar Association and as the Vice-Chair of the Real Property Section for the San Francisco Bar Association.

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.

DUAL AGENCY

I. BACKGROUND

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. 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."

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

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. Particulars of the Disclosure

Timing—Disclosure should be made so that the principals have the optimum opportunity to make an informed decision whether to retain the broker as agent in the transaction before signing an agency agreement. (Civ. Code §2079.13(g); Civ. Code § 2079.14(d); *Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 685.)

Refusal to sign disclosure—where principal refuses to sign, dual agent must execute a signed and dated written declaration of the facts of the refusal. (Civ. Code § 2079.15.)

Confirmation in sales contract—the agent's relationship, dual or otherwise, must be confirmed in the purchase and sale agreement. (Civ. Code § 2079.17; see also, *Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 685.)

4. The (Only) Proscribed Limits on Disclosure of Information

Unless the seller expressly consents, a dual agent "shall not" disclose to the buyer that the seller is willing to sell the property for an amount less than the listing price; and, conversely, unless the buyer expressly consents, the dual agent "shall not" disclose to the seller that the buyer is willing to pay more than the offering price. (Civ. Code § 2079.21.)

5. Remedies for Nondisclosure of Dual Representation

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 ... ")

II. LANDMARK CALIFORNIA SUPREME COURT DECISION: *HORIIKE V. COLDWELL BANKER RESIDENTIAL BROKERAGE CO.*

Horiike v. Coldwell Banker Residential Brokerage Company (2016) 1 Cal.5th 1024.

A. Facts

B. Procedural History

C. Issue Presented

"The sole question before us is whether [listing agent] owed a duty to Horiike to take certain measures to inform him about the residence's square footage: specifically, **to investigate and disclose all facts** materially affecting the residence's value or desirability, regardless of whether such facts could also have been discovered by Horiike or [selling agent] through the exercise of diligent attention and observation." (*Horiike*.)

D. Holding of Court

The California Supreme Court found that Cortazzo, even though he did not represent Horiike, owed a fiduciary duty to him because of the dual agency relationship through Coldwell Banker. Thus, the Court concluded that Cortazzo, even though he was not the buyer's agent, "had an obligation to learn and disclose all facts materially affecting the value or desirability of the property," including the square footage of the property. Thus, as posited by the Court, it is now an open question as to what can and should still be kept confidential and how much investigation and disclosure is now required by the listing agent and brokerage when also representing the buyer in a dual agency transaction.

* * *

1. Because a brokerage has a fiduciary duty, so does every agent who hangs a license thereunder

2. Standard agency disclosure forms indicate that agents have a fiduciary duty to both parties in dual agency situations

3. Learn and disclose obligations

III. IMPACT

A. Agent's new perspective and responsibilities

1. Stand-in-the-shoes of your counterpart (responsible for other agent's failures and mistakes).

2. How far does duty to investigate and learn extend? Listing agent now arguably required to interview seller regarding all material issues and disclose same. (Also, selling agent, arguably responsible to interview client, too.)

B. 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/Correcting Prior Statements

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

C. Off-the-Cuff Statements

Normally, no duty to disclose off-the-cuff statement (*Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298), but unclear in dual agency situation now.

D. Other Examples

1. Gaming the transaction by using contingencies

2. Dragging out the transaction

3. Confidentiality agreements

4. Impact of imputed knowledge, i.e., where the knowledge of an agent on transaction is imputed to the brokerage and, hence, each of the brokerage's agents in subsequent transactions.

IV. LEGISLATIVE PROPOSALS IN RESPONSE

A. Understanding Both Sides

Argument in favor of restricting dual agency—how can a brokerage, with a duty of undivided loyalty and good faith to each of its clients (see e.g., *Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131), possibly represent two opposing clients in the same transaction?

Argument in favor allowing dual agency—this is how the industry works and clients benefit from a brokerage's ability to handle both sides of the transaction. In fact, to not allow it, would deprive sellers and landlords of the benefits of having the listing aggressively marketed inhouse and, worse yet, potentially deprive sellers and landlords of the pool of other clients from that brokerage.

B. Assembly Bill 1059

Assembly Bill 1059 was introduced by Assembly Member Lorena Gonzalez Fletcher on February 16, 2017. The bill proposed adding a section to the California Code of Civil Procedure prohibiting a brokerage firm, broker or any of the broker's or brokerage's licensees from acting as a dual agent in its representation of both the buyer and seller or any of their principals in the same commercial property transaction. One of the bill's strongest supporters was Jason Hughes, president and CEO of Hughes Marino. The bill was pulled from committee by the author on April 25, 2017.

C. Assembly Bill 1626

A competing bill, Assembly Bill 1626 was introduced by Assembly Member Jacqui Irwin and supported by the real estate industry. Rather than proposing an outright ban on dual agency, AB 1626 proposes to clarify and expand current disclosure requirements. The bill was pulled from committee by the author on April 17, 2017.

D. Potential Legislation that could Follow

"To the extent there is any uncertainty about the scope of a dual agent's fiduciary duties in other contexts, the Legislature certainly could enact defendants' preferred solution to the problem by, for example, adopting legislation to uncouple associate licensees' duties from those of the brokers they represent."

- Alaska Stat., § 08.88.640;
- Conn. Gen. Stat., § 20-325i;
- 225 Ill. Comp. Stat. 454/15-50.

(*Horiike*.)