



THE KEYS TO THE HOUSE

Unraveling Damages in Real Property Sales

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Jeffrey H. Belote, Esq.

CLARK HILL

jbelote@clarkhill.com

415.984.8508

Jeff Belote concentrates on civil litigation matters with an emphasis in real estate. He prosecutes and defends actions in commercial, residential, and real estate litigation with an emphasis in the areas of commercial contracts, corporate, limited liability company and partnership disputes, commercial and mortgage banking, foreclosure, fraud, commercial and residential construction disputes, real estate brokerage disputes, seller and broker misrepresentation and non-disclosure, title insurance, escrow disputes, homeowner association disputes, adjoining landowner and boundary disputes, unlawful detainer, landlord/tenant disputes, and secured creditors rights in state and federal courts.

Jeff counsels commercial and residential owners, partners, investors, buyers and sellers of real property, developers, contractors, architects, lenders, brokers, mortgage bankers and landlords. He has worked closely with expert consultants in construction, accounting, economics, and standards of care concerning professional liability in the areas of real estate, brokerage, construction, architecture, engineering, and title and escrow issues. Jeff has successfully litigated, settled and, where necessary, arbitrated and tried multiparty, complex litigation cases. He has collected over \$6 million in commissions for real estate brokers. Jeff is a settlement panelist for the Marin Superior Court in all types of disputes, including real estate, business disputes, and personal injury matters. Jeff has been named AV (Judicial Edition) and AV Preeminent®, the highest peer rating standard from Martindale-Hubbell.

Sean E. Ponist, Esq.

PONIST LAW GROUP

sponist@ponistlaw.com

858.412.1211

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.

In acknowledgment of his accomplishments, he has been recognized as a "Super Lawyer" for the past eight years (2011-present) and has also been recognized as being one of the Best of the Bar by the *San Diego Business Journal*. Additionally, Mr. Ponist is a fellow of the Litigation Counsel of America, a trial lawyer honorary society whose membership is limited to less than one-half of 1% percent of North American lawyers, judges and scholars.

Mr. Ponist has published numerous articles on real estate topics, including 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").

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.

Kaitlyn J. Sikora, Esq.

CLARK HILL

ksikora@clarkhill.com

415.984.8535

Kaitlyn Sikora focuses her practice on commercial law, real estate law and insurance coverage matters. Kaitlyn handles all aspects of litigation in federal and state courts, and has extensive experience negotiating resolutions to multi-million dollar claims involving multiple parties. She currently serves as the Co-Chair of Clark Hill BOLD – San Francisco, the firm's strategy to promote women within the firm, the legal profession, and the business community. Kaitlyn has been selected to the Northern California Rising Stars list from 2016 to 2018. Kaitlyn has served as the Vice-Chair, Real Estate of the Bar Association of San Francisco's Environment, Land Use and Real Estate Barristers Section since 2018.

Prior to joining Clark Hill, Kaitlyn spent several years representing and advising policyholders, particularly property owners, property developers and homeowners associations seeking insurance coverage under various insurance policies, in addition to representing property owners and developers in the defense and prosecution of various claims.

Kaitlyn attended law school at the University of San Francisco, School of Law where she was a Literary Editor of the *Maritime Law Journal* and Community Outreach Chair of the Student Bar Association. Kaitlyn attended the University of Notre Dame for her undergraduate studies earning a Bachelor of Arts degree with a double major in History and Sociology. Kaitlyn was a AmeriCorps award recipient while at the University of San Francisco and Notre Dame.

THE KEYS TO THE HOUSE: UNRAVELING DAMAGES IN REAL PROPERTY SALES (PART 1 OF 2)

I. PRE-CLOSING ISSUES

A. BREACH OF CONTRACT

1. BUYER'S DAMAGES FOR SELLER'S FAILURE TO CONVEY

a. Monetary damages. Damages are the difference between purchase price and value of land, at time of breach, plus consequential damages and interest (Civ. Code § 3306)

- (1) Title and escrow expenses
- (2) Expenses in preparing to enter the property
- (3) Property inspection expenses
- (4) Interest

b. Specific Performance

2. SELLER'S DAMAGES FOR BUYER'S FAILURE TO PURCHASE

a. Monetary damages. Damages are the difference between purchase price and of value of property as of the date of the breach, plus consequential damages and interest (Civ. Code § 3307; *Kuish v. Smith* (2010) 181 Cal.App.4th 1419, 1426)

- (1) Seller's duty to mitigate.
- (2) Accelerating Market: If seller resells for price equal to or higher price, then no loss of bargain damages (*Kuish v. Smith*, supra, 181 Cal.App.4th at 1426; *Askari v. R&R Land Co.* (1986) 179 Cal.App.3d 1101)
- (3) Seller Carryback notes: Must be discounted to present value (*Abrams v. Motter* (1970) 3 Cal.App.3d 828)
- (4) Seller may recover sale expenses, including broker's commission, where seller required to pay broker despite failed sale.

b. Specific Performance

- (1) CC § 3307 allows seller to recover consequential damages and interest as well as excess above value that would have been covered in sales contract, therefore, sellers would have adequate remedy at law.

(2) However, Courts have allowed specific performance to seller based on presumption that breach of any agreement to transfer real property cannot be adequately compensated for by money damages (*Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129,134; *BD Inns v. Pooley* (1990) 218 Cal. App.3d 289)

3. LIQUIDATED DAMAGES

a. Seeking the Deposit Where No Liquidated Damage Clause, seller can utilize as a fund from which actual damages can be obtained (*Beason v. Griff* (1954) 127 Cal.App.2d 382)

(1) Restricted to actual damages regardless of whether innocent or willful breach (*Caplan v. Schroeder* (1961) 56 Cal.2d 515)

(2) "THE NONREFUNDABLE DEPOSITS—NOT!" (*Kuish v. Smith* (2010) 181 Cal.App.4th 1419 – "nonrefundable" deposit is not necessarily nonrefundable)

b. General/Commercial liquidated damages provisions

(1) Civ. Code § 1671(b) – a liquidated damages provision is valid unless an opposing party demonstrates that the provision was "unreasonable under the circumstances existing at the time the contract was made."

(2) Generally unreasonable, and hence unenforceable, if it bears no reasonable relationship to the range of anticipated actual damages. (*Krechuniak v. Noorzoy* (2017) 217 Cal.Rptr.3d 740.)

(3) "Impractical or extremely difficult to fix the actual damage." (Civ. Code § 1671(d); see also, *Del Monte Properties & Investments, Inc. v. Dolan* (2018) 26 Cal.App.4th Supp. 20.)

c. Residential liquidated damages provisions

(1) Civ. Code § 1675(e) provide that the "reasonableness" of the liquidated damages provisions shall be determined by taking into consideration both of the following:

(a) The circumstances existing at the time the contract made, and

(b) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer's default.

(2) Technical requirements:

(a) separately signed or initialed by both buyer and seller,

(b) if included in a printed contract, it must be set out in either minimum 10-point bold type or minimum 8-point bold contrasting red type. (Civ. Code § 1677(a) & (b).)

d. Presumed valid if 3% or less of the purchase price. (Civ. Code § 1675(c).

4. LOST PROFITS

a. Lost Profits Too Speculative

(1) *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739– lost profits permitted as consequential damages, but, here, too uncertain based on a “flipper’s” prospective profit.

(2) *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747.

b. Lost Profits Permitted

Mammoth Lakes Land Acquisition LLC v. Town of Mammoth Lakes (2010) 191 Cal.App.4th 435– lost profits permitted as consequential damages, but properly awarded based on developer’s plan.

B. MISREPRESENTATION DISCOVERED BEFORE CLOSING

1. General rule: To recover damages, must establish “reliance” on the misrepresentation (see CACI 1900/1907).

2. But “reliance” does not necessarily require purchaser to close escrow.

a. *Jue v. Smiser* (1994) 23 Cal.App.4th 312 – so long as purchaser relied on misrepresentations at time of purchase, even if truth discovered before COE, s/he can nonetheless still close and recover for misrepresentation (but see unpublished decision *Hutchinson v. McCarty* (2003) 2003 WL 21083850 decision)

b. *Holmes v. Summer* (2010) 188 Cal.App.4th 1510 – buyer entered into contract to purchase property unaware that the property was a short sale and required the agreement of two lenders. The sale did not close because the lenders would not consent to reduce their loans. Court held that plaintiff stated a claim for nondisclosure against the listing broker who failed to disclose information in the listing or other disclosure information.

II. POST-CLOSING CONSIDERATIONS

A. CONTRACT DAMAGES

1. In general – the purpose of compensatory damages for breach of contract is to put plaintiff in as good a position as s/he would have been if defendant had performed as promised (CACI 350)
2. Special contract damages – to recover special damages for breach of contract, plaintiff must prove that when the parties made the contract, defendant knew or reasonably should have known of the special circumstances leading to such harm (CACI 351); *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1270 (Special damages for breach of contract are limited to losses that were either actually foreseen or were reasonably foreseeable when the contract was formed.)

B. TORT DAMAGES

1. NEGLIGENCE

Civ. Code § 3333. The amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Generally, diminution in value.

2. FRAUD

a. Civ. Code § 3343.

Damages are difference between amount paid and value actually received, plus consequential damages including expenses, loss of use and enjoyment, lost profits, as of the date of the fraud.

b. Compensatory Damages

“Benefit-of-the-Bargain” Rule – The difference between the value of what plaintiff *expected to receive* the value of what plaintiff actually received (*Stout v. Turney* (1978) 22 Cal.3d 718.)

“Out of Pocket” Rule – The difference between what plaintiff paid (purchase price) and what plaintiff received (market value) (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226 (Buyer ordinarily limited to ‘out-of-pocket’ loss)

c. Lost Profits

Seller: Civ. Code § 3343(a)(3)

Seller induced to sell is entitled to be compensated for profits or other gains which might have reasonably have been earned by use of property had seller retained ownership.

Buyer: Civ. Code § 3343(a)(4)

Buyer is entitled to be compensated for lost profits where property acquired for purpose of using or reselling for a profit and the buyer reasonably relied on representation to purchase and to anticipate profits from subsequent use or sale, and loss was proximately caused by fraud.

Note: Generally, Buyer must acquire property to claim lost profits for fraud - whereas in a breach of contract case buyer can potentially obtain lost profits even where the seller was aware of buyer's intent to resell at a profit. *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53-56. (but see unpublished decision *Scurich Brothers, Inc. v. Frederickson* (2016) 2016 WL 3960170.)

d. Timing: Damages are determined as of the date of the fraudulent transaction.

Gagne v. Bertran (1954) 43 Cal.2d 481, 490-492

A buyer who is induced to purchase property in reliance on the fraudulent representations of seller and his agent cannot recover damages when the value of the property on the date of the sale is equal to or greater than the price paid for the property, even though he would not have purchased the property if he had known of the fraud.

McCue v. Bruce Enterprises Inc. (1964) 228 Cal.App.2d 21, 31-32

As a general rule, damages for fraud are assessed as of the date of the fraudulent transaction. "In determining the difference between the actual value of that which a defrauded person received and that with which he parted as the result of a fraudulent sale, the value of property received should be determined as of the date of the sale, taking into consideration subsequent material circumstances." (Citations Omitted.)

e. Effect of Foreclosure

Burkhouse v. Phillips (1971) 18 Cal.App.3d 661, 665

"Damages need not invariably be the difference in value between market price and purchase price at the time of the purchase. The section [Civ. 3343] must be applied realistically so as to give the defrauded person his actual out-of-pocket loss, and, where necessary to reach that result, the court must consider subsequent circumstances. ... Sale under foreclosure is a circumstance subsequent to the original sale which may be considered under Garrett [supra]. In view of their total loss of the property, appellants received nothing, and had paid the down payment and some installments. They should be allowed to recover in this amount if liability is found."

Garrett v. Perry (1959) 53 Cal.2d 178

Buyer was defrauded in the sale of a cattle ranch. The purchase price was \$700,000 and buyer paid \$100,000 down and had a \$600,000 seller carry-back loan. Buyer was unable to make the payments because of seller's misrepresentations and seller foreclosed. The actual value of the property at the time of the sale was \$530,000. The trial court computed damages of \$170,000 based on the difference between the value and the purchase price. The Supreme Court reduced the damages by \$11,000 based on the subsequent foreclosure because buyer didn't really pay the full purchase price since he was not liable for a deficiency judgment on the purchase money loan. Damages were based on the \$100,000 down and \$59,000 in payments.

C. ESTABLISHING DAMAGES

1. TESTIMONY RE MARKET VALUE

Evid. Code § 813 – value of property may be shown by: (1) Qualified expert appraiser, (2) Owner or spouse of owner, or (3) Officer, employer or partner of corporation or partnership if knowledgeable about property. (“Owner” also includes persons entitled to possession of the property.)

2. IMPORTANCE OF APPRAISER

a. Owner's right to testify to value limited – “While Evidence Code section 813 permits opinion testimony from the owner on the value of property, the opinion ‘is limited to such an opinion as is based on matter perceived by or personally known to the witness... that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property’ – affirming trial court's refusal to allow owner to testify to “market value of the code violations and structural defects.” (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229.)

b. Nonsuit where market value not established – In an action for deceit in the sale of real property, a buyer must offer evidence that the price paid for the property was greater than its actual value. While plaintiffs testified that they paid \$87,500 for the house, they offered no evidence of what the market value of the house would have been had the true facts been known regarding the lack of permits and the lack of compliance with building codes. Accordingly, they failed to show that they had suffered any actual damages. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538.)

3. DAMAGES TOO SPECULATIVE OR REMOTE

Damages are not recoverable if the fact of damage is too remote, speculative or uncertain. (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 219; *Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 516.)

D. OTHER RECOVERABLE DAMAGES

1. "APPRECIATION" DAMAGES

Strebel v. Brenlar Investments, Inc. (2006) 135 Cal.App.4th 740 – “appreciation” damages recoverable where buyer relied on misrepresentations in selling home and lost out on appreciation in rising real estate market. (See also, *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866.)

2. STIGMA DAMAGES

a. “Stigma damage’ is the residual loss of market value of property after repairs have been made.” (*Aas v. The William Lyon Company* (1998) 64 Cal.App.4th 916 (review granted and opinion superseded), citing Miller, California Construction Defect Litigation: Residential and Commercial (2d ed. 1993) § 10.7, p. 384 (reference subsequently removed).)

b. Ordinarily, a property owner cannot recover both the cost of repair and diminution in value because this would constitute a double recovery. Nevertheless, some property owners have sought to recover for a special type of alleged diminution in property value even though the repairs have been completed. These “stigma” damages are based on the theory that in some circumstances, even fully repaired properties with a history of past defects may command less market value than equivalent properties with no history of defects. (Miller and Starr California Real Estate 4th, Measure of owner's damages for defective construction, 9 Cal. Real Est. § 33:12 (4th ed.).)

c. No right to stigma damages where the injury can be abated, i.e. must be a continuing trespass/ nuisance. (*Gehr v. Baker Hughes Oil Field Operations, Inc.* (2008) 165 Cal.App.4th 660, 667; *Santa Fe Partnership v. ARCO Products Co.* (1996) 46 Cal.App.4th 967, 980.)

d. Civil Code Section 1710.2(a) – “an owner of real property or his or her agent, or any agent of a transferee of real property, is not required to disclose either of the following to the transferee, as these are not material facts that require disclosure: (A) The occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property. (B) That an occupant of that property was living with human immunodeficiency virus (HIV) or died from AIDS-related complications.

3. "STEARMAN COSTS"

a. Recoverable damages include expert fees incurred for experts and professionals who “investigated the problems in order to formulate an appropriate repair plan.” (*Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, 624.)

b. Distinguishing Stearman costs from litigation costs. (*Gorman v. Tassajara Dev. Co.* (2009) 178 Cal.App.4th 44, 81-84.)

4. PUNITIVE DAMAGES

a. Not Recoverable for Breach of an Obligation Arising from Contract (Civ. Code § 3294; see e.g., *I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257; *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375; *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243.)

b. Also Not Recoverable for “Simple” Negligence, including Negligent Misrepresentation, or for “Simple” Breach of Fiduciary Duty (*Lackner v. North* (2006) 135 Cal.App.4th 1188; *Tri-Delta Engineering, Inc. Ins. Co. of North America* (1978) 80 Cal.App.3d 752; *Davis v. Hearst* (1911) 160 Cal. 143.)

c. Punitive damages may, under appropriate circumstances, be recoverable for nondeliberate or unintentional torts. (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1261.) Recoverable where defendant is found “guilty of oppression, fraud, or malice” by “clear and convincing evidence” (Civ. Code §3294). At a minimum, there must be conduct done with willful and conscious disregard of the rights or safety of others or despicable conduct done in conscious disregard of a person’s rights. (*Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525.)

5. EMOTIONAL DISTRESS DAMAGES

Difficult to Recover in Real Estate Cases

Erlich v. Menezes (1999) 21 Cal.4th 543 – no emotional distress damages where claims directly related to economic injury (even though finding of “intolerable living conditions and a constant, justifiable fear about the safety of their home.”)

But see: *Lewis v. Upton* (1984) 151 Cal.App.3d 232

Emotional distress damages permitted in real estate fraud case against broker who breached his fiduciary duty.

But see: *Hensley v. SDGE* (2017) 7 Cal.App.5th 1337

Emotional distress damages permitted based on trespass and nuisance.

E. ATTORNEY FEES

1. By contract or statute (Code of Civ. Proc. § 1021; see also, *McKinsey v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89)

2. As damages under “tort of another” theory: A person who, through the tort of another, has been required to protect his interests by bringing or defending an action against a third person may recover attorney fees and costs incurred (*Prentice v. North Amer. Title Guaranty Corp. Alameda Div.* (1963) 59 Cal.2d 618; see also, *Gray v. D. Miller* (1984) 35 Cal.3d 498)

3. Prevailing Party

Code of Civ. Proc. §1032(b) – (1) party with a net monetary recovery, (2) defendant dismissed from action, (3) defendant where neither plaintiff nor defendant recovers anything, or (4) a defendant as against those plaintiffs who do not recover any relief against that defendant.

Code of Civ. Proc. § 1021 allows “the parties to agree that the prevailing party in litigation may recover attorney fees, whether the litigation sounds in contract or in tort.” (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984.)

Childers v. Edward (1996) 48 Cal.App.4th 1544 (Where buyer established misrepresentation but did not establish damages, defendant seller is the prevailing party entitled to recover attorney fees)

III. BROKER COMMISSIONS

A. STATUTE OF FRAUDS

1. Compensation agreement must be in writing

“An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission” is invalid unless it, or some note or memorandum thereof, is in writing, subscribed by the party to be charged (Civ. Code § 1624(a)(4))

2. Absolute, complete affirmative defense where not in writing

3. Limited exceptions to writing

a. Subsequent ratification – consummating written purchase agreement, which includes separate provision for broker commission, purchasers ratify broker's fee provision (*Fridde v. Epstein* (1993) 16 Cal.App.4th 1649, 1655–1656)

b. Actual fraud – (promise to pay commission or promise to sign commission agreement insufficient (*Phillippe v. Shapell Industries, Inc.* (1987) 43 Cal.3d 1247, 1270); but representation that written commission agreement signed suffices. (*Owens v. Foundation for Ocean Research* (1980) 107 CA3d 179, 183–184.)

c. Finder's fee – unlicensed finder's able to enforce oral agreement to recover commission (*Phillippe, supra*, 43 Cal.3d. at 1260)

B. LISTING AGENT

1. In general – 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.

2. "Ready, willing and able" buyer – most listing agreements condition the payment of compensation upon the broker's procurement of a "ready, willing and able" buyer or consummation of the purchase and sale transaction.

C. SELLING AGENT

1. Seller (lack of) obligation to pay – generally, seller has no duty to pay and third-party beneficiary claims fail.

2. Buyer's obligation to pay – obligated to pay pursuant to any express written agreement.

3. Listing broker's obligation to share commission with cooperating agent – absent an agreement, seller has no obligation to do so (even if broker agrees to "cooperate," still not obligated to share commission).

