Fall 2012

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REAL ESTATE PROFESSIONAL LEGAL UPDATE

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Defendant's Failure to Participate in Mediation Bars Recovery of Attorney's Fees:

Cullen v. Corwin (June 2012) 206 Cal App 4th 1074

By Fredric W. Trester

Cullen sued Corwin for failing to disclose a defective garage roof. The Cullens failed to demand mediation before they filed lawsuit. After filing the lawsuit, however, they demanded mediation. The Corwins' attorney rejected it stating that he first wanted to engage in discovery and file a Motion for Summary Judgment. It was only if they lost their Motion for Summary Judgment that then they would mediate.

Ultimately the Corwins prevailed on the statute of limitations

After prevailing, the Corwins sought and recovered their attorney's fees at the trial court level. They argued that since the Cullens did not demand mediation, that they were not required to engage in mediation, or alternatively, they were entitled to engage in discovery and file their Motion For Summary Judgment before engaging in Mediation. The Appellate Court rejected this argument quoting the mediation provision in the CAR contract which states,

> "If . . . any party commences an action without first attempting to resolve the matter through mediation, **or** refuses to mediate after [the making of] a request. . ., then that party shall not be entitled to recover attorney fees . . . ." (Emphasis added).

The Court felt that the "parallel structure of this language" did not support a reasonable interpretation, "that a mediation request must precede the initiation of the litigation." Further, the Court did not believe it was reasonable for the Corwins to wait until they had obtained discovery and file their Motion for Summary Judgment before engaging in mediation, reasoning that there was a strong public policy to mediate early.

PRACTICE TIP

In view thereof, even if a defendant believes a plaintiff has waived his/her attorney's fees by failing to demand mediation before filing the lawsuit, if the demand is made after the lawsuit is filed, the defendant must engage in mediation if the defendant wants to recover attorney's fees. As a practice point, it is suggested that defense counsel write a letter accepting a post filing mediation request, but stating that by partici-

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pating in mediation the defendant does not waive its argument that the plaintiff has lost its right to attorney's fees (for failing to engage in Mediation before filing a complaint).

The interesting point with respect to the Statute of Limitations which was mentioned in the unpublished part of the Opinion is that the Court found that the 3 year statute of limitations applies to a cause of action premised on fraud or negligent misrepresentation, "regardless of the label that a plaintiff applies to it," citing, 4th III. Witkin, Cal. Procedure (5th Ed. 2008) Actions §653. This is significant in light of a number of cases which have recently held that the Statute of Limitations for breach of fiduciary duty, even if based on fraud (a 3 year statute) or negligence (a 2 year statute), would be 4 years. It shows that there is still a split of authority on this point.

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Corporate Broker Entity's Designated Officer Not Personally Liable to Third Parties for Negligence of Salespersons

By John P. Cogger

California law makes a licensed individual real estate broker who is the designated officer of a corporate broker "responsible for the supervision and control" of the corporate broker's employees pursuant to Business and Professions Code section 10159.2.

A recent court ruling found that a designated officer's failure to supervise a corporate employee, without more, does not subject the officer to direct personal liability to third parties for harm caused by his or her failure to supervise.

As a general rule, *apart from the officer's own direct liability or malfeasance*, the designated officer will not be held vicariously liable under traditional agency principles for the tortious conduct of the corporate employees he or she is responsible for supervising.

The Court of Appeals recent holding in *Sandler v. Sanchez (2012)* 206 Cal.App.4th 1431 clarified the designated officer's lack of personal liability for an alleged failure to supervise the corporate broker's employees. In short, absent special circumstances, officers of a corporation are not responsible to third parties for negligence amounting merely to failure to supervise. The officer may still be liable to third parties for their own malfeasance, and their failure to supervise may give rise to an action by the corporation against the designated officer and/or result in disciplinary action by the Department of Real Estate. This is because the duty of supervision by the broker/officer is owed by statute to the corporation, not to third parties.

In so holding, the case again confirmed the holding of *Walters v. Marler* (1978) 83 Cal.App.3d 1, after some doubt was cast on that decision by the Federal Court's interpretation of California law in *Holley v. Crank* (9th Cir. 2004) 400 F.3d 667.

However, keep in mind in these situations that the realty company is the salesperson's employer, and it is the corporate entity, not the designated broker, who may be held liable for the salesperson's torts committed within the scope of his employment.

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NEW LAWS AFFECTING ANTI DEFICIENCY PROTECTIONS FOR CALIFORNIA BORROWERS

By Victor Rocha

If you finance the purchase of a 1 to 4 unit owner occupied property, the California anti-deficiency statute set forth in Code of Civil Procedure § 580b prevents the lender from seeking a deficiency against you after a foreclosure sale. (This type of loan is commonly referred to as a "purchase money loan.") However, a question recently arose whether the anti-deficiency statute protects a borrower from a deficiency if the terms of the original purchase money loan are renegotiated years after the loan was made. The Court of Appeal answered that the anti-deficiency statute still applies and protected the borrower from a deficiency. *Weinstein v. Rocha* (2012) 208 Cal.App.4th 92.

In *Weinstein*, the buyer purchased residential property with a loan from a bank secured by a 1st trust deed and a second loan from the seller secured by a 2nd trust deed. After the purchase, buyer discovered some permit issues and sued the seller for non-disclosure. The buyer and seller settled with seller agreeing to, among other things, reduce the amount of the principal owed on the loan. The settlement was reduced to writing approximately 3 years after the transaction. Ultimately the buyer defaulted on both loans, which led to the bank foreclosing on the property and leaving no proceeds or security for the seller. The seller sought to collect on the deficiency pursuant to the terms of the settlement agreement reached during the lawsuit. The Court of Appeal ruled that the anti-deficiency statute still applied because the settlement agreement did not create a new loan but only modified the terms of the original loan. The crucial factor for the Court of Appeal was that the settlement agreement expressly stated that the new agreement was merely a modification of the earlier loan.

Under the *Weinstein* ruling, one can make a creative argument that some refinances, such as a refinance to reduce an interest rate (no cash out) with the same lender, should come under the protection of the anti-deficiency statute because it merely modifies the terms of the original loan. However, such an argument will likely not be needed as the California legislature recently passed SB 1069 which will amend Code of Civil Procedure § 580b to apply to "no cash out" refinances. The new law states, "No deficiency judgment shall lie in any event on any loan, refinance, or other credit transaction (collectively, a "credit transaction") which is used to refinance a purchase money loan, or subsequent refinances of a purchase money loan, except to the extent that in a credit transaction, the lender or creditor advances new principal (hereafter "new advance") which is not applied to any obligation owed or to be owed under the purchase money loan, or to fees, costs, or related expenses of the credit transaction."

The spirit of the anti-deficiency statute has been to protect a homeowner from personal liability on a purchase money loan. However, the new law recognizes that homeowners regularly refinance and that in doing so they lose this valuable protection against personal liability. In some circumstances a refinance is similar to a renegotiation of the original purchase money loan as occurred in *Weinstein*. The new law will protect a homeowner from any personal liability on a purchase money loan that is subsequently refinanced. The protections will not extend to a "new advance" or what is commonly referred to as a cash out refinance. The good thing for consumers is that the law is not "all or nothing", so if you refinance and receive a "new advance," the anti-deficiency statute will still protect your refinance to the extent it covered your purchase money loan, but it will not protect you from a judgment based on the "new advance."

We do not know whether the Court of Appeal's decision in *Weinstein* was influenced by the passage of SB 1069. However, both the *Weinstein* decision and SB 1069 do an excellent job of furthering the principle that borrowers should not be personally liable for purchase money loans. There is no reason why purchase money loans should suddenly lose their protections simply because they are later modified through a refinance or other similar transaction.

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