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REAL ESTATE PROFESSIONAL LEGAL UPDATE

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ANOTHER BAD CASE FOR BROKERS; WILLIAM L. LYON & ASSOCIATES v. SUPERIOR COURT (2012) 204 CAL.APP. 4TH 1294

By Fredric W. Trester & Christopher A. Kanjo

The Henleys purchased a house from the Costas on May 9, 2006. Broker William Lyon & Associates (Lyon) acted as a dual agent entering into a listing agreement with the Costas and a Buyer's Broker's Agreement with the Henleys.

After discovering defects, the Henleys filed a lawsuit on May 8, 2009 alleging breach of the Buyer's Broker's Agreement, as well as common law fraud, negligence and breach of fiduciary duty. Lyon filed a Motion for Summary Judgment (contending that the statute of limitations had run as to all claims based on California Civil Code §2079.4 two year statute of limitations from close of escrow) and on the Buyer's Broker's Agreement which contained a two year statute of limitations for legal action "for breach of [the Buyer-Broker Agreement], or any obligation arising therefrom. . ." The Court held that the statutes of limitation did not bar the claim.

REAFFIRMATION OF FIELD v. CENTURY 21 KLOWDEN-FORNESS REALTY

In this poorly reasoned decision the Court essentially reaffirmed the strained reasoning in *Field v. Century 21 Klowden-Forness* (1998) 63 Cal.App.4th 18, that Civil Code §2079 (which states that "it is the duty of a real estate broker or salesperson. . . to a prospective purchaser of residential real property comprising one to four dwelling units . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer **or is a broker who acts in cooperation with that broker to find and obtain a buyer.**") does not apply to buyer's agents for purposes of the statute of limitations. As noted above, §2079 has a two year statute of limitation beginning to run at the close of escrow. Both *Field* and *Lyon* ignore the language of California Civil Code §1086(h), which defines a selling agent (i.e., the agent who represents the buyer) as:

> "an agent participant in a multiple listing service **who acts in cooperation with a listing agent and who sells, or finds and obtains a buyer for, the property**."

Since the Legislature essentially used the same language in §1086 (h) as it did in §2079, one would expect the courts would find that §2079 applies not only to a listing agent but also the buyer's agent as well. The courts have instead chosen to limit Civil Code §2079 to listing agents, because the case of *Easton v. Strassburger* (1984) 152 Cal.App.3rd 90, which gave rise to the enactment of Civil Code §2079 *et seq.*, only involved a listing agent.

In any event, *Lyon* stands for the proposition that Civil Code §2079 does not apply to a buyer's agent and/or dual agent and thus they will not benefit from its two year statute of limitations.

STATUTE OF LIMITATIONS IN THE BUYER'S BROKER'S AGREEMENT

Recognizing that the analysis did not end with C.C.P. §2079 because of the two year statute of limitations in the Buyer's Broker's Agreement, the Court split hairs further by stating that while the two year statute of limitations the Buyer's Broker's Agreement would apply to a breach of contract claim, it would not apply to common law tort claims. Even as to the Breach of Contract claim, however, the Court found, not unexpectedly, that the two year statute of limitations would be subject to the "Discovery Rule." The Discovery Rule means that the statute of limitations is triggered only when a plaintiff knew, or should have known, of their claim.

The Court's finding that the two year statute of limitations in the contract only applies to a contract and not tort claims seems to fly in the face of the reasoning in a case entitled *Xuereb v. Marcus and Millicap, Inc.* (1992) 3 Cal.App.4th 1338, which specifically held that an attorney's fees provision in a contract would not only support an award of attorney's fees in a breach of contract action, but also for any lawsuits to which the agreement "gave rise," i.e., common law tort claims. The Court in Lyon used exactly the opposite reasoning to find the opposite result with respect to the statute of limitations here.

STATUTE OF LIMITATIONS FOR COMMON LAW TORTS

The *Lyon* Court then analyzed the statutes of limitations for the remaining causes of action, i.e., breach of fiduciary duty, negligence, and negligent misrepresentation. The Court ignored a seminal case in California known as *Carlton v. Tortosa* (1993) 14 Cal.App.4th 745, which essentially held that a fiduciary duty arises from contract, and therefore can be limited in scope by contract. The Court in *Lyon* held that as to breach of fiduciary duty, the statute of limitations is four years (presumably from the date of discovery) under Code of Civil Procedure §343.

As to the negligence claim, the Court agreed that a two year statute of limitations under C.C.P. §339 applied (again triggered by the Discovery Rule) which on its face would appear favorable. The problem however, as revealed by a case entitled *Thomson v. Canyon* 198 Cal.App.4th 594 (see MKERT Fall 2011 Newsletter), every act of negligence by a fiduciary is essentially a breach of fiduciary duty, and thus the two year versus four year analysis is really a distinction without a difference.

In other words, negligence on the part of a fiduciary will always give rise to a four year statute of limitations unless the fiduciary can somehow establish that a negligent act by the fiduciary was not a breach of fiduciary duty (which is possible in the legal malpractice context where typically breaches of ethical rules are required to show breaches of fiduciary duty; but no case law has established the distinction in a real estate broker context). Practitioners should review the *Hydro-Mills v. Hayward* (2004) 115 Cal.App.4th 1145 case which prior to *Thomson* and *Lyon* was arguably supportive of the proposition that even a breach of fiduciary duty claim would be barred under the two year statute of C.C.P. §339 where the underlying conduct is negligent.

As to the negligent misrepresentation claim, the Court stated that either the two year statute or three year statute (for fraud under C.C.P. §338(d)) would apply. The Court failed to mention the case of *Loken v. Century 21 Award Properties* (1995) 36 Cal. App.4th 263, which specifically held that negligent misrepresentation claims are governed by the two year statute of limitations in Civil Code §2079.4.

STATUTE OF LIMITATIONS FOR SELLERS' CLAIMS

Finally, the Court found that the claims brought by the sellers against Lyon were not barred by the statute of limitations, primarily because the claims by the buyers were not barred (Lyon's position was essentially that the sellers' claims were artfully pled indemnity claims, despite being called breach of fiduciary duty, breach of contract and negligence.) In other words, since the buyer's claims were not barred, the derivative claim would not be barred either.

The Court's mistake in its analysis as to the sellers' claims is that the Court reasoned that these were not derivative claims because the broker owed duties independently to the sellers which did not arise from their duties owed to the buyers. These independent duties should not make a difference as the real question in determining whether the claim is really for indemnity is whether the damages being sought by the seller derive from their exposure to the buyer. *Cal-Jones Properties v. Evans Pacific* (1989) 216 Cal.App.3rd 324. As such, it would not matter what the sellers called their claim, as the damages would simply be derivative.

CONCLUSION

In conclusion, this case simply confirmed what has already been established in *Field* and *Thomson*. It also however, provides some good points in that it held that the two year statute of limitations in a Buyer's Broker's Agreement is valid, but it is subject to the Discovery Rule. It also confirms that the two year statute of limitations for negligence (even against a fiduciary) is applicable.

Now broker's attorneys have to figure out how to 1) distinguish between negligence and breach of fiduciary duty (like lawyers' counsel do in legal malpractice cases), 2) convince the California Supreme Court that the Legislature intended §2079 to apply to buyers' and listing agents; and 3) clarify that the *Carlton* reasoning is correct with respect to the fact that *Carlton* and *Xuereb* support that the Buyer's Broker's Agreement statute of limitations should apply not only to the breach of contract causes of action, but also common law tort causes of action as well.

Homeowners Association Has Standing to Sue Realtor On Behalf of Its Members; Statute of Limitations Extended Approximately Nine Years After Sales Closed Escrow

By Fredric W. Trester

In the case of *Glen Oaks Estates Homeowners Association v. Re/Max Premier Properties* (2012) 203 Cal.App.4th 913, the HOA sued the Re/Max Premier Properties, Inc. (Re/Max) and Dilbeck Realtors (Dilbeck) after a landslide damaged its common areas. While both firms acted as listing agents (presumably at different periods of time), Re/Max and Dilbeck acted as dual agents only in the sales of three parcels and one parcel, respectively. Sales took place prior to February of 2001, and the slope failure occurred in January of 2005.

Once sued, both Realtors filed motions to dismiss the complaint (known as demurrers) arguing first that the HOA did not have the right to sue them (known as "standing") because the claims (such as breach of fiduciary duty, misrepresentation, and concealment) were personal to the members, and not the HOA.

The Realtors also argued that the statutes of limitations barred all of the claims, which included not only those listed above, but also claims based on violations of Business & Professions Code §17200, et seq. (known as unfair business practices claims). The trial court dismissed the claims against the Realtors and the HOA appealed.

On appeal, the Court found that an HOA may sue Realtors on behalf of its members based on a statute known as Civil Code §1368.3, which essentially states that an HOA may sue in its own name without joining its individual owners regarding matters pertaining to "[d]amage to the common area" or, "[d]amage to a separate interest that arises out of, or is integrally related to, damage to the common area . . ." Here the HOA alleged $3,000,000 worth of damage to the common area.

The Court did not explain the percentage of the $3,000,000 for which the Realtors could be liable in that each of the Realtors was not involved in every sale transaction and, presumably, the Realtors had little or no involvement in subsequent sales to second and third generation buyers.

STATUTE OF LIMITATIONS

In an unpublished portion of the opinion, the Court found that the two year statute of limitations contained in Civil Code §2079.4 only applied to violations of that statute (failure by listing agent to do competent visual inspection and disclose findings), and, since the HOA was not claiming such violations, the statute was inapplicable. The Court did confirm however that the "Discovery Rule" (allowing tolling of a statute of limitations until a claimant learned, or should have learned based on reasonable diligence, facts giving rise to its claim) did not apply to the statute of limitations in Civil Code §2079.4. The Court also confirmed that this statute of limitation did not apply to buyers' agents.

The Court then discussed whether there was a tolling (i.e., extension) of the statute of limitations based on the above described "Discovery Rule" or the doctrine of "Fraudulent Concealment" where the statute of limitations is tolled because a defendant conceals facts which would allow a claimant to discover the claim.

The Court stated that it is the claimant's burden to prove that the statute should be tolled, and explained that the limitations period under the Discovery or Fraudulent Concealment rules begins when the claimant has "notice of or information regarding circumstances sufficient to put a reasonable person on inquiry."

The Court stated that while breach of fiduciary duty and fraud claims are subject to the Discovery Rule, it does not apply to Unfair Business Practices claims. However, the "Fraudulent Concealment" doctrine applies to any type of claim. Ultimately, the Court found that some of the breach of fiduciary duty claims were barred under the facts of that case, that the Unfair Business Practices claims against Dilbeck were barred, and two of the Unfair Business Practices claims were barred as against Re/Max. To make these conclusions the Court had to make specific factual findings as to these claims.

CONCLUSION

While these types of "stale claims" are rare, they do arise from time to time and demonstrate that real estate brokerages must consider the "retroactive" date when purchasing insurance. For example, many real estate E&O policies only cover claims which arose from transactions that occured no more than three or four years prior to the inception of the policy. Thus, claims before that time period would be uncovered. Further, the finding that a HOA may sue based on claims personal to their members is troublesome because a Court will then have to segregate out which damages are to be attributed to the conduct of the agents when the agents were not involved in all of the transactions involving the members of the HOA, especially as to subsequent gen-

eration buyers. This also affects the damages, in that presumably any buyer of units in this development after the landslide would have paid less for their unit, taking into account the fact that a landslide had occurred. As one can see, these cases often create more issues than they resolve.

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Mercedes Perlas v. GMAC Mortgage

(2010) 187 Cal. App. 4th 429

A lender owes no duty to advise a buyer that buyer cannot afford the loan payments. Here the borrower unsuccessfully argued that the lender had misrepresented his qualification for the loan and his ability to make the loan payments.

By Thomas R. Wagner

In December 2007, appellants refinanced their property with loans from the respondents (a commercial mortgage lender) for which they had been told they qualified based upon appellants' statement that they made $50,000 per year. Among the closing documents was an application prepared by the respondents stating that appellants made $9,466 per month. The appellants were not given the opportunity to read or review the closing documents, but they signed them.

A notice of default was posted in June 2008.

The appellants argued that respondents made fraudulent representations that they could afford the refinance based on the correct income figures originally given the respondents. The misrepresentation was indicated by the respondents' misstating the appellants' income in the final application. The court stated

> In effect, appellants argue that they were entitled to rely upon GMAC's determination that they *qualified* for the loans in order to decide if they could *afford* the loans.

(Id. at 436.)The court rejected the appellants' arguments, citing cases such as *Wagner v. Benson* (1980) 101 Cal. App. 3d 27, 35 (a lender "owes no duty of care to the [borrowers] in approving their loan.") and *Renteria v. U.S.* (D. Ariz. 2006) 452 F. Supp.2d 910, 922-923 (a lender is under no duty "to determine the borrower's ability to repay the loan.... The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's."). (Id.at 436.) "[B]orrowers rely on their own judgment and risk assessment in deciding whether to accept the loan." (Ibid.)

The trial court had dismissed the appellants' claim and the Court of Appeal affirmed that judgment.

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