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CAN REHABILITATED CRIMINALS OF IMMORAL OR DISHONEST CRIMES BE ALLOWED TO OBTAIN A BROKER LICENSE?

by Rinat Klier-Erlich

This issue was recently reviewed in the unpublished opinion of *Singh v. Davi* at 2012 Cal. App. Unpub. LEXIS 7730, where the Court of Appeals concluded that as long as the applicant meets the rehabilitation test he/she can apply and receive a broker license.

Jeff Davi, the Commissioner of the Department of Real Estate (DRE) denied Dave Singh's application for a real estate broker's license based on the "dishonest nature" of his prior conviction for theft by false pretenses. Singh petitioned for a writ of administrative mandamus, to set aside the Commissioner's decision, contending that he was entitled to a broker's license because he had met all criteria for rehabilitation. The trial court granted Singh's petition and the Commissioner appealed. The Commissioner argued that Singh failed to show rehabilitation, since he failed to take full responsibility for his crime. Yet, there was no specific such findings by the administrative law judge (ALJ) who heard the case.

Singh, formally a decorated police officer and detective, was found guilty for improperly pursuing an insurance benefit claim. At the time, he lived with his wife and children, parents and mentally disabled brother and his brother's wife and kids. Singh's wife and father applied for and received in Home Supportive Services for Singh's brother. The payments came in the name of the father however, in 2001 the father suffered a stroke while in India and he remained there for three months while continuing to receive the support payments in the US. After a fraud investigation, Singh, his father and brother were charged with presentation of a fraudulent claim (Pen. Code, § 72) and grand theft by false pretenses (Pen. Code, § 487, subd. (b)). The jury convicted Singh of grand theft, but acquitted him of presenting a fraudulent claim. The court reduced the offense to a misdemeanor and granted Singh three years of probation. Singh lost his job as a police officer as a result of the conviction.

Singh's probation was terminated in January 2007. His conviction was subsequently expunged.

In 2006, Singh filed an application for a real estate broker's license with the DRE. The Commissioner denied the application. In late 2008, Singh again applied for a license as a real estate broker. Singh provided the DRE with an explanation of the details of his crime, in which he stated that he was convicted because he was the head of the household and therefore must have condoned the action. The DRE denied the license again under Bus. & Prof. Code § 10177(f) which provides that an application for a real estate license may be denied where the person has previously been denied a license.

A hearing was held before an ALJ. Four witnesses testified to Singh's good character and in support of his application. At the time of the hearing, Singh worked at a farm supervising over 400 employees. Singh also presented testimony of his community activities. Singh paid his fines. The ALJ found that despite Singh's rehabilitation, it would not be in the public interest to issue a broker license to Singh given the dishonest nature of his conviction. Singh petitioned for a writ of mandate to set aside the Commissioner's decision arguing that he complied with all applicable criteria of rehabilitation. The trial court agreed and the Commissioner appealed.

The Court of Appeals confirmed that the Commissioner may deny issuance of a license to an applicant who has been convicted of a felony or a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Bus. & Prof. Code, § 10177(b); see also Bus. & Prof. Code, § 480(a)(1). Yet, subdivision (b) of Bus. & Prof. Code § 480 provides: "Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis that he or she has been

convicted of a felony if he or she has obtained a certificate of rehabilitation . . . or that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation.” This general prohibition prevails over the sections of the Bus. & Prof. Code that prescribe licensing requirements for a particular business or professional license. Bus. & Prof. Code, § 475; *Pieri v. Fox* (1979) 96 Cal.App.3d 802, 805-806.

The DRE has developed 14 criteria to be used to evaluate rehabilitation of an applicant for a license who has committed a crime. They include, the passage of not less than two years since the most recent criminal conviction, restitution, expungement, successful completion of probation, stability of family life, vocational training courses for economic self-improvement, involvement in community, and change in attitude. The Commissioner contends that there was substantial evidence that Singh has failed to show a change of attitude sufficient for full rehabilitation.

The Commissioner adopted the ALJ’s finding that Singh complied with most of the criteria, however, it also adopted the ALJ’s findings that the criteria was not sufficient to support issuance of a real estate broker license. Given the dishonest nature of the crime underlying conviction, in order to protect the public interest, safety and welfare, Singh should not be allowed to begin working at the level of a real estate broker without appropriate supervision.

The decision did not explicitly mention Singh’s lack of change in attitude, but the Commissioner argued that Singh’s change in attitude was incomplete and it was implied from the decision, therefore, he had not met all the criteria for rehabilitation.

The Court of Appeals compared this to other cases where there was actual finding of lack of remorse. Here, the Court found that even if there was ‘substantial evidence’ to support the decision, the ALJ must have had to have had a ‘factual finding—supported by substantial evidence’—to support the decision. The factual finding must “bridge the analytic gap between the raw evidence and the ultimate decision or order.” Rather, the ALJ did not find Singh’s rehabilitation inadequate because he failed to fully satisfy the change of attitude or any other criteria of rehabilitation (in fact, the ALJ found Singh had assumed more responsibility and exhibited more remorse than in prior proceedings, which address change of attitude). Instead, the ALJ expressly held that Singh’s rehabilitation was inadequate “given the dishonest nature” of his crime and his status as a police officer at the time he committed the crime. The nature of the crime and the applicant’s position as a peace officer however, are not among the criteria for rehabilitation established by the DRE.

In other words, there was no express findings, as a matter of fact, that Singh did not have a change of attitude. Although a finding may be implied, here it is impossible to imply such findings since there was not just one piece of evidence leading to just one finding. Moreover, the ALJ decision clearly states its basis: It was the underlying crime. Change of attitude was not mentioned as the basis for the finding Singh’s rehabilitation was insufficient.

To conclude, it is not that potential brokers now have a free reign to engage in criminal activity that is directly related to licensing activities and then expect that rehabilitation can eliminate the hurdle from getting a license. Rather, it is the case that the ALJ decision did not specifically state one of the 14 conditions considered for rehabilitation and cited the crime itself and not the rehabilitation as a reason for its findings as to lack of change of attitude. Hopefully the ALJ will do a better job next time.



CAREFUL WHEN YOU TRIM THAT TREE

by: Thomas R. Gill

Under normal circumstances, a property owner has the right to trim portions of a neighbor’s tree which overhangs the property owner’s property.

This premise goes back to the 1889 case of *Grandona v. Lovdal*, 78 Cal. 611 (1889). Grandona was subsequently followed in the 1952 case, *Bonde v. Bishop*, 112 Cal. App. 2d 1 (1952), which harshly held that it is the absolute right of a land owner to remove portions of trees which encroach on his land whether they caused damage or not.

In 1994, the First Appellate District addressed this issue again in reviewing a case wherein summary judgment was granted in favor of the defendant on the grounds that he had an absolute right to sever roots that entered on his property.

One needs to be very careful when trimming someone else’s tree as Paolo Costa found out the hard way after hiring an unlicensed tree trimmer to trim his neighbor’s tree. His unlicensed tree trimmer essentially “butchered” a Monterey Cypress tree owned by neighbor, Ellen Rony. Not only did the trimmer trim portions of the tree on Costa’s property, but also cut off substantial portions of the tree located on Rony’s property.

On October 26, 2012, the Court of Appeal for the First Appellate District held that Rony had incurred substantial property damage as a result of Costa’s trimmer’s conduct and confirmed an award of \$45,060 and against Costa. (*Rony v. Costa*, 2017 DJDAR 14945; Appellate Case No. A128596.)

Ellen Rony lived in a home in Tiburon, California since 1979. Her lot included two very large Monterey Cypress trees which Rony described to the Court as being “tall and magnificent” and “the major landscaping feature” of her yard and over the years, Rony had the trees professionally trimmed.

In 2000, Mr. Costa moved into the neighboring property and in 2008 decided to install an outdoor pizza oven. As part of the construction, in order to clear the area over the oven, he hired an unlicensed contractor to trim one of Rony’s trees, apparently without

consulting Rony. The trimmer virtually cut off all of the branches on one side of the tree, including parts on Rony's property.

Rony sued and a four day bench trial followed.

Experts disagreed on the damage to the tree but Rony's expert testified that the tree had been damaged to the point that it was a hazard and needed to be removed.

The issues in this case have been previously addressed by the same court as in the case of *Booska v. Patel*, 24 Cal. App. 4th 1786 (1994). In the Booska case, the court essentially held that when one trims another's tree, one had to do so in a reasonable manner. In the Booska case, Patel's conduct was more outrageous than that of Costa. Patel actually severed the roots of his neighbor's tree clearly causing severe damage if not death to the tree.

In the Rony case, Ms. Rony also sought treble damages pursuant to California Civil Code section 3346 which provides for treble damages for wrongful injury to trees. Section 3346 also contains an exception providing for double damages in the case where the damage was caused by "casual or involuntary" conduct. Mr. Costa was found to qualify for this exception.

Actual damages were awarded in the amount of \$22,530 and then pursuant to the statutory exception, doubled to \$45,060.

On a side note, trial court also awarded Rony attorney's fees pursuant to California Code of Civil Procedure section 1029.8 which provides for a fee award against an "licensed person who causes injury or damage to another person as a result of providing goods or performing services for which a license is required." In its review, the appellate court concluded that awarding fees against the person who hired the unlicensed person is not allowed under section 1029.8. The fee award was reversed.

The moral of this story is that one should think about what one is doing before trimming your neighbor's tree. Be a good neighbor, discuss the issue with your neighbor before acting and by all means, use a professional tree trimmer!



BREACH OF FIDUCIARY DUTY CLAIMS CAN GIVE RISE TO DRE RECOVERY ACCOUNT PAYMENTS FOR FRAUDULENT LICENSEE CONDUCT

By John P. Cogger

The Real Estate Consumer Recovery Program provides recourse to "aggrieved persons" who are unable to obtain complete satisfaction of a judgment against wrongdoing real estate licensees. Payments under this program are limited to fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds. (Business & Professions Code § 10471) Under the Program, recovery for claims of negligence are not compensable.

Pursuant to the terms of the Program, where a party is unable to satisfy a monetary court or arbitration judgment from a licensee, that party can apply for payment from the Department of Real Estate Program, up to \$50,000 for any one transaction and \$250,000 for any single license.

Claims for recovery based upon a theory of a licensee's breach of fiduciary duty had been inconsistently determined by the DRE. A recent holding reiterates that a breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case.

Worthington v. Davi (2012, 4th Dist) 208 Cal App 4th 263, involved a Court review following the partial denial of a claim by the DRE, where The Commissioner concluded the aggrieved party would not receive money for certain transactions because the judgment award indicated those transactions arose from the licensee's breach of his fiduciary duty, as opposed to fraud in and of itself. The Commissioner also noted this result was consistent with the allegations pled in the complaint. The reviewing court permitted additional payments on the basis that the breach of fiduciary duty was factually based in the licensee's fraud. The matter was appealed to the Court of Appeals.

The court of appeal held that the trial court was right to look behind the legal terminology in the arbitration award, consider the arbitrator's factual findings, and recognize that the breach of fiduciary duty found by the arbitrator involved more than just negligent conduct. As such, it affirmed the judgment.

In sum, the causes of action alleged against the licensee are not dispositive when determining whether payments under the Real Estate Consumer Recovery Program are available for claims of breach of fiduciary duty. Courts will look to the specific factual allegations which give rise to the breach of fiduciary duty in determining whether claims under the program will be allowed. Breach of a real estate agent's fiduciary duty to his or her client may constitute negligence or fraud, depending on the circumstances of the case.



HOT FLASH

New notice requirements in contracts for sale of residential real property effective on or after July 1, 2013:

The 2012 Legislature has passed AB1511 resulting in statutory changes in the notice requirements for sales of residential real property.

Civil Code § 2079.10.5 now requires:

(a) Every contract for the sale of residential real property entered into on or after July 1, 2013, shall contain, in not less than 8-point type, a notice as specified below:

NOTICE REGARDING GAS AND HAZARDOUS LIQUID TRANSMISSION PIPELINES

The language of the notice reads:

“This notice is being provided simply to inform you that information about the general location of gas and hazardous liquid transmission pipelines is available to the public via the National Pipeline Mapping System (NPMS) Internet Web site maintained by the United States Department of Transportation at <http://www.npms.phmsa.dot.gov/>. To seek further information about possible transmission pipelines near the property, you may contact your local gas utility or other pipeline operators in the area. Contact information for pipeline operators is searchable by ZIP Code and county on the NPMS Internet Web site.”

No further specific information need be provided by the seller or broker in addition to this notice. Providing this notice shall be deemed adequate to inform the transferee about the existence of the statewide database for information regarding locations of gas and hazardous liquid transmission pipelines.



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