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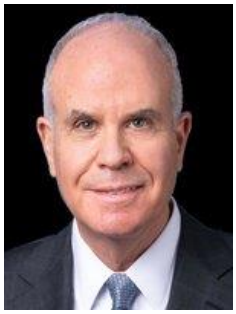
3 Legal Developments Calif. Real Estate Brokers Should Know

By **Mark Loeterman** (October 29, 2019, 3:12 PM EDT)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Housing is one of California's most vibrant and highly regulated industries, with a comprehensive statutory framework and an expanding body of case law. Like so much else, the state frequently leads the way in deciding cutting-edge issues. This year, there have been several important developments, including some that mirror questions roiling other legal practice areas like consumer disclosure, arbitration and independent contractor status.

Suing a Broker Without an Expert

To establish a claim for professional negligence, must a plaintiff designate an expert witness to testify on the standard of care that a real estate licensee owes to its principal? That was the issue in Ryan v. Real Estate of the Pacific, where the Superior Court of San Diego County granted a broker's summary judgment motion on the grounds that the failure to designate an expert was fatal to the seller's claim.

The seller decided to sell their single-family home in La Jolla and listed the property with a broker. During an open house, the next-door neighbor told the broker he intended to do remodeling work that would eliminate the seller's ocean view. Specifically, the neighbor said that his construction would move the neighbor's home closer to the common boundary, create an imposing two-story wing with large windows overlooking the seller's property, and that the project might take up to two years to complete. The broker, however, never communicated any of this to the seller.

A few months after it was listed, the property was purchased and escrow closed without any disclosure to the buyer of the neighbor's remodeling plans or that the property's ocean view and privacy would be seriously impacted. The following day, the buyer's interior decorator happened to talk with the neighbor who told her about his planned remodel.

After learning this information, the buyer immediately attempted to rescind, but the seller refused, based in part on their broker's advice. The dispute proceeded to arbitration. The arbitrator ruled in favor of the buyer, ordering rescission of the contract, return of the full purchase price to the buyer, and transfer of title back to the seller.

In addition, the arbitrator ordered the seller to pay damages and attorney's fees in excess of $1 million. In support of the award, the arbitrator concluded the broker had breached the standard of care and his

agency obligations by failing to disclose the neighbor's extensive remodeling plans, which were material facts affecting the value or desirability of the property.

Following the arbitration award, the seller filed suit against the broker on various theories, all founded in negligence, alleging that the broker was aware of the neighbor's construction plans but did not inform either of the transaction principals. The broker moved for summary judgment on the grounds that the seller could not prove an essential element of its claims; namely, that the broker had breached a legal duty.

The broker argued that expert testimony was required to prove that it had performed in accordance with the standard of care. Since the seller had not designated an expert, the argument went, they could not establish that the standard of care had been breached. The trial court agreed and granted the motion.

On appeal, the California Court of Appeal, Fourth Appellate District, held that the common knowledge theory, which states that expert opinion testimony is not needed where the negligence is obvious to laymen, was applicable, and therefore, the seller's lack of an expert was not fatal.[1] The court rejected the broker's characterization that because Civil Code Section 2079 limits a broker's inspection and disclosure duties to the property offered for sale, disclosure regarding a neighboring property would be outside the statute's scope.

That statute, the court explained, is only one source of a broker's legal duties. Instead, the core of the seller's claim here was that the broker possessed material information that would adversely affect the price of the listed property, and as a fiduciary, was obligated to share that information. "[The broker] did not need to engage in any investigation [about the neighboring property] … They simply chose to remain silent, collect their commission, and allow the [seller] to deal with the consequences."

The case is also interesting from a procedural perspective. Since the seller never advanced the common knowledge theory in the lower court, the broker took the position that this argument had been forfeited, but the court allowed it anyway, saying it presented a new question of law on undisputed facts. "A legal argument may be raised for the first time in a new trial motion or an appeal only 'so long as the new theory presents a question of law to be applied to undisputed facts in the record.'"[2]

In the future, attorneys defending brokers in professional liability claims may find trial judges more skeptical of allowing expert witness testimony, unless it involves a technical question about the standard of care that is outside of a juror's common knowledge and experience.

Custom and Habit Evidence Applied to the Arbitration Clause of the Listing Agreement

In Juen v. Alain Pinel Realtors Inc., the seller sold his home and then filed a class action lawsuit on behalf of California residents who had bought or sold a home through Alain Pinel Realtors Inc. and who had received settlement services using a real estate software program developed by Fidelity Title. The gist of the claim was that Fidelity unlawfully paid a kickback to Pinel in return for the business it generated from licensing its software.[3]

Pinel sought an order to have the matter arbitrated relying on the arbitration clause (paragraph 19B) in the residential listing agreement that the seller had signed. Following that clause, the agreement contained a notice provision, required by Code of Civil Procedure Section 1298(c) in real estate contracts, with spaces for the seller's and broker's initials. In support of its motion to compel arbitration,

Pinel produced a copy of the listing agreement initialed by the seller, but the space for Pinel's own initials was left blank.

To establish that the original listing agreement was actually initialed by Pinel, it submitted the declaration of an individual who served as its managing broker, explaining that the file relating to the seller's transaction had been destroyed in accordance with Pinel's document retention policy.

The declaration further stated that it was Pinel's custom and practice to adopt the election of the client respecting arbitration; i.e., if a client chose to initial the arbitration provision, then Pinel would do so as well. Evidence Code Section 1105 provides "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom."

The Santa Clara County Superior Court found no enforceable arbitration provision and the California Court of Appeal, Sixth Appellate District, affirmed. The existence of a policy requiring sales agents to present executed listing agreements to the managing broker for review is not evidence of adherence to that policy. Here, Pinel offered no evidence (either directly or circumstantially through custom or habit) showing that the seller's listing agreement had been presented to the managing broker for initialing.

Pinel, relying on Serafin v. Balco Properties Ltd. LLC, also argued that its assent to arbitrate was shown, even without initialing the form, by invoking the arbitration process.

Serafin involved an arbitration agreement imposed as a condition of employment. The employee signed the agreement, which acknowledged his assent to the employer's policy to submit disputes to binding arbitration. However, there was no signatory acknowledgement required by the employer, which the employee contended rendered the agreement illusory and lacking consideration.

After noting that the presence or absence of a signature was not dispositive, the Serafin court found evidence of a mutual agreement, observing that the provision was authored by the employer, printed on its letterhead and that its subsequent conduct of invoking the arbitration process further evinced an intent to be bound.

Unlike the employment agreement in Serafin, however, the listing agreement used by Pinel was a standard industry form published by a third party. Mere use of that form, by itself, did not demonstrate Pinel's assent to arbitrate disputes. An essential element of contract formation is that consent must be communicated by each party to the other. Thus, Juen is a cautionary tale for brokers who wish to have their professional liability claims decided by an arbitrator instead of a jury.

Independent Contractor Status Still Viable for Real Estate Agents

California employers, including many brokerage firms, have been keeping a close eye on whether they would be allowed to continue classifying their real estate salespeople as independent contractors. Following last year's California Supreme Court landmark decision in Dynamex Operations West Inc. v. Superior Court, it was debatable whether brokers could meet the conditions of the newly adopted ABC test that distinguishes independent contractors from employees. The Dynamex court embraced a presumption that all workers are employees for purposes of wage and benefit claims.

For many years, it has been important for brokers to maintain the independent contractor status of their salespeople, since doing so helps them realize big savings by not having to pay minimum wages and overtime, sick leave, unemployment insurance and expense reimbursements. Salespeople similarly

enjoy the independent contractor designation, particularly the absence of control that is a central feature of an employment relationship.

Any uncertainty about the classification of real estate licensees after Dynamex appears to have been resolved by A.B. 5, signed into law by Gov. Gavin Newsom on Sept. 18. The bill, which effectively codified and expanded the holding in Dynamex, has received much attention in the media for its sweeping changes to employment law.

Notably, however, the bill exempts specific categories of workers, including real estate licensees, who may continue to contract between themselves as independent contractor or employer and employee with respect to their own relationship. This means the long-standing practice, allowed under Business and Professions Code Section 10032, of characterizing salespeople as independent contractors for statutory purposes has been reaffirmed, so long as three conditions are satisfied:

1. They hold a real estate license;

2. Substantially all their remuneration is directly related to sales rather than to the number of hours worked; and

3. The parties have a written contract stating that the individual will not be treated as an employee with respect to those services for tax purposes.

In circumstances where Section 10032 is not applicable, A.B. 5 states that independent contractor status is governed by the multifactor control test in S.G. Borello & Sons Inc. v. Department of Industrial Relations.

Even if the Borello test does apply, a broker's statutory duties of supervision and control under the real estate licensing law cannot be considered. This is a big victory for the brokerage industry because it effectively forecloses the argument that a broker discharging its supervision duty, or the requirement that a salesperson must work under only one broker, results in an employee-employer relationship.

Conclusion

The issues facing brokers in today's complex legal environment are similar to those in other industries and will continue to challenge the business and real estate communities alike.

Mark Loeterman is a mediator at Signature Resolution.

[1] Flowers v. Torrance Memorial Hospital Medical Center.

[2] Nippon Credit Bank v. 1333 North Cal. Boulevard.

[3] Juen v. Alain Pinel Realtors Inc.