Legal Events in Real Estate

MCALLISTER LAW GROUP (650) 948-7536

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Newsletter

Special points of interest:

- Pitfalls of Arbitration
- Community Property-Joint Tenancy Ownership
- Liability of Home Inspector to Realtor
- Escrow Holder Owes No Duty to Non-Parties

Arbitration: What Many Once Thought Of As A Panacea May Be A Costly Mistake

To many, arbitration seems to be a panacea — simplified, cost-effective resolution without the delays inherent in costly litigation. At first blush, it appears giving up even significant procedural rights is worth the end result. If the decision of the arbitrator is erroneous, however, arbitration may end up being a costly mistake because the wronged party has no right to challenge the decision.

With home values rising by leaps and bounds, the amount of potential damage a bad arbitrator may inflict increases significantly. A recent case illustrates this pitfall.

In *Carole Ring & Associates v. Nicastro*, 87 Cal.App.4th 253 (2001), the listing agreement provided for payment of a commission if the property was withdrawn from sale and leased or otherwise rendered unmarketable by the seller.

When the seller withdrew his property from the market and leased it, the broker initiated arbitration to recover her commission. The arbitrator denied her claim, finding the execution of the lease did not breach the listing agreement because it did not render the property unmarketable.

The broker sought judicial review of the arbitrator's decision and the trial court agreed the arbitrator was wrong.

The court of appeal overturned the trial court, however, because it was without authority to evaluate the merits of the arbitrator's decision. "Even if erroneous," the court of appeal ruled, "the Arbitrator could, without exceeding his powers . . . and without being irrational or arbitrary, construe the withdrawal-from-sale clause as applying only to homeowner conduct which materially impaired the marketability of the property . . . ."

Thus, the broker lost her $25,000 commission in what appears to have been an incorrect decision by the arbitrator.

The same analysis would apply equally to an arbitration initiated by a buyer or seller under the arbitration provi-

(continued on back page)

Community Property-Joint Tenancy Ownership

The legislature has recently added section 682.1 to the Civil Code to provide for a hybrid community property-joint tenancy form of property ownership.

Under the new form of ownership, a married couple, which formerly could hold property only as either community property or in joint tenancy, can now take advantage of the benefits of both forms of property ownership simultaneously.

If the couple's circumstances change prior to the death of either spouse, the right of survivorship that comes with joint tenancy can be terminated.

The new section is effective as of July 1, 2001 and applies to instruments created on or after that date.

Other Legislative Changes

- Advance notice of pest control treatment must be given to tenants. Bus. & Prof. Code §8538.
- Additional 30 days notice required for residential rent increases in excess of 10%. Civ. Code §827.
- Common interest development CC&Rs entered into, amended or modified after January 1, 2001 must allow pet(s). Civ. Code §1360.5.

Home Inspector Liable To Realtor For Failure To Discover Defects

Brokers and agents have a statutory duty to conduct a "reasonably competent and diligent visual inspection of the property offered for sale and to disclose to [a] prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal."

A home inspection company has a statutory duty to "conduct a home inspection with the degree of care that a reasonably prudent home inspector would exercise."

If the broker and/or agent and home inspector fail to discover and disclose the same defect, the home inspector may be required to indemnify the broker and/or agent for any liability to the purchaser.

In *Leko v. Cornerstone Home Inspection Service*, 86 Cal. App.4th 1109 (2001), purchasers sued sellers and both realtors for failure to disclose damage caused by the Northridge earthquake.

Purchasers had hired a home inspection company to perform an inspection for them and a prior prospective purchaser had also hired a (different) home inspection company to provide the same service. The purchasers had reports from both companies and neither report disclosed any earthquake damage.

The realtors sought indemnity from the home inspection companies for any non-disclosure liability they might have to the sellers. The court recognized that realtors and home inspection companies have separate duties of disclosure. It also acknowledged the prior prospective purchaser's home inspection company had no relationship to any of the parties to the transaction. The court nonetheless ruled that, under proper circumstances, a home inspection company may be liable to indemnify brokers and agents for their failure to disclose.

Escrow Holder's Duty Limited To Parties To Escrow

"We conclude an escrow holder owes a duty of care only to the parties to and participants in the escrow."

An escrow holder is the dual agent of, and owes duties to, the parties to the escrow. The primary duty owed by an escrow holder is strictly and faithfully to perform the instructions given to it by the parties to the escrow. Effecting a change in California law, the court recently ruled an escrow holder does not have any duty to anyone not a party to the escrow.

In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, 87 Cal. App.4th 1268 (2001), a lender assigned its deed of trust to another lender and the second lender failed to provide the required notice of the assignment to the property owner. When the property owner refinanced, the escrow holder obtained a payoff demand from the first lender and, consistent with the escrow instructions, paid the first lender. The first lender did not pay the second lender.

After the property owner filed for bankruptcy protection, the second lender sued the escrow holder for payment on the note. Consistent with an earlier decision, the trial court entered judgment for the second lender. The court of appeal reversed, stating: "We conclude an escrow holder owes a duty of care only to the parties to and participants in the escrow . . . ."

Pitfalls of Arbitration (continued)

sion of the purchase contract. Arbitration should not be confused with mediation, in which negotiations between the rivaling parties are facilitated by a neutral (the mediator). The mediator does not make any decisions that are imposed on the parties, so the danger of a wrong decision by the arbitrator is absent.

McAllister Law Group
Post Office Box 1964
Los Altos, CA 94023
voice 650-948-7536
fax 650-948-7502

Marlis McAllister is an attorney with 15 years of experience, much of which relates to real estate and the construction trades. She graduated from Golden Gate University in San Francisco with highest honors.

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