Legal Events in Real Estate

MCALLISTER LAW GROUP (650) 948-7536

Spring 2003

Newsletter

**Special points of interest:**

- Home Sold to Two Different Buyers Belongs to Purchaser in Foreclosure
- Release of Liability Exculpates Tortfeasors
- Notice of Non-Responsibility May Not Protect Property Owner
- Sign Up Now For National Do Not Call Registry
- Legislative Updates

## Home Transferred Simultaneously Through Sale and Foreclosure Belongs To Purchaser Through Foreclosure

In *Nguyen v. Calhoun*, 105 Cal. App.4th 428 (2003), a home was sold on the same day both through a negotiated sale and through a foreclosure proceeding. The court awarded ownership of the property to the purchaser through foreclosure.

The problems started when the seller ceased payment on his loan and the lender recorded a notice of default and election to sell. The seller then hired a broker to sell the property. The broker found a buyer, but during escrow, the lender recorded a notice of trustee's sale.

When the escrow did not close as originally scheduled in advance of the trustee's sale, the broker contacted the lender and asked that it postpone the sale. The lender agreed, so long as the broker provided proof the purchaser's loan had funded. The loan funded that same day and, the following day, the title company closed the escrow, sent a pay-off check to the lender by overnight delivery, and recorded a grant deed transferring title to the purchaser. The title company also sent a certified copy of the final escrow settlement statement to the lender by facsimile, but sent it to the wrong person and used the wrong fax number. As a result, the individual awaiting the confirmation did not receive the document until the following day.

Later that same day, the foreclosure trustee sold the property to another buyer.

The court awarded title to the individual who purchased the property through foreclosure because the other purchaser took title subject to the pre-existing deed of trust. The seller's debt was not paid off prior to the foreclosure sale because the lender did not receive payment until the following day.

The foreclosure sale was not in violation of the lender's promise to postpone the sale because that promise was contingent on confirmation the purchaser's loan had funded, and the proper person did not receive confirmation until the day following the sale.

In this situation, it is likely the purchaser who lost the home will be made whole through his title insurance, which is probably the right result.

## Effect of Liability Releases

Many proprietors, event sponsors and others require guests and participants to sign liability releases under which they are relieved from liability for injuries and other damage suffered by the guest or participant.

The court recently considered such a release in *Benedek v. PLC Santa Monica, LLC*, 104 Cal.App.4th 1351 (2002), in which a health club member injured his knee. The court confirmed the validity of the release, stating "[a] written release may exculpate a tortfeasor from future negligence or misconduct."

To be effective, the terms of the release must be unambiguous and apply to the particular negligence at issue, but need not spell out every possible potential specific act of negligence.

There are some limitations to the circumstances in which such a release can apply, but they can otherwise generally be an effective means of limiting liability.

## National Do Not Call Registry

Are you tired of receiving unwanted sales calls, seemingly endless requests for donations and other intrusions over the telephone at dinner and other times? As of October 2003, it will be illegal for most telemarketers to call any telephone number listed on the national Do Not Call Registry. You can now add your residential and cellular telephone numbers to the registry by visiting the California Attorney Gen-

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## Legislative Updates

**New Real Estate Salespersons Must Take Second Course:** As of July 1, 2003, new real estate salespersons must take two courses, including Real Estate Practices, within 18 months. B&P § 10153.4.

**60-Day Notice Required To Terminate Tenancy:** A residential landlord must now give any tenant of a year or more 60 days notice to terminate the tenancy. CC § 1946.1(b).

**Tenant's Right To Demand Inspection:** A departing residential tenant has a right to demand a pre-termination inspection for the purpose of remedying any identified deficiencies. CC § 1950.5(f).

**Notice To Tenant Of Intent To Sell Property:** A landlord who wants to show residential rental property to prospective purchasers must provide written notice to the tenant that the property is for sale as well as 24-hour notice of each showing. CC § 1954.

**Tax Withholding Requirement For Real Estate Purchasers:** The purchaser of real property in California must now withhold 3.3% of the gross sales price in all transactions and remit that amount to the Franchise Tax Board with form FTB 597. Exemptions apply, including that for property that constitutes the seller's principal residence. R&T Code § 18662.

**Pre-Filing Right To Repair In Defect Cases:** Before a homeowner may sue a contractor for defects in the construction of a new home sold after January 1, 2003, the homeowner must provide the contractor with an opportunity to repair the defects. CC §§ 43.99, 895.

## Notice of Non-Responsibility Does Not Always Protect Property Owner

A contractor who performs work on a property has an automatic lien against the property so long as his work was done "at the instance of the owner." When improvements are undertaken by a tenant, but performed with the owner's knowledge, they are deemed to be at the instance of the owner unless the owner gives notice of non-responsibility. Thus, it has become commonplace for owners to give such notice when tenants undertake improvements.

A Notice of Non-Responsibility does not protect the property owner, however, when he has "caused the work . . . to be performed" and he will be deemed to have caused the work to be performed when it is required by the lease.

This issue arose recently in *Howard S. Wright Construction Company v. Superior Court (BBIC Investors, LLC)*, 106 Cal.App.4th 314 (2003). The tenant in that case hired a contractor to convert a warehouse into a telecommunications facility, then ended up in bankruptcy. The contractor sued the property owner and filed a notice of lis pendens, which the owner sought to expunge, arguing the contractor could not establish the probable validity of its claim because the owner had filed a Notice of Non-Responsibility. The court disagreed, finding the contractor was likely to succeed because the lease required the tenant to make the improvements.

The court's conclusion was based on several provisions in the lease. For example, the lease limited the use of the premises to telecommunications, a provision with which the tenant could not have complied absent significant improvements. In addition, the lease required the tenant to obtain the landlord's approval of the plans and specifications, the landlord's representatives met regularly with the contractor, insisting at times on modifications to the work, and the landlord collected an administrative fee for its efforts in overseeing the construction. Further, the landlord benefited from the improvements to its property because it was able to charge a substantially higher rent for the improved space.

From this case, it is apparent the property owner should not rely on a Notice of Non-Responsibility when improvements to the property are contemplated in the lease.

**"The question is whether the improvements were a practical necessity for the contemplated use of the premises."**

### Do Not Call (continued)

eral's website at http://nocall.doj.state.ca.us. For more information about the registry, visit the Federal Trade Commission's website at www.ftc.gov/donotcall.

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