Legal Events in Real Estate

MCALLISTER LAW GROUP (650) 948-7536

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Newsletter

**Special points of interest:**

- Transfer Disclosure Statement Pre-Requisite to Enforcement of Agreement
- Dual Agency Increases Risk to Broker
- Homeowner Liability for Injuries to Unlicensed Contractors
- Arbitration Clause in Residential Lease Found Unconscionable
- Legislative Updates

## Seller Who Does Not Provide Statutory Transfer Disclosure Statement Cannot Enforce Purchase and Sale Agreement

For many years, section 1102, *et seq.* of the Civil Code has required sellers of residential real estate to provide potential purchasers with a transfer disclosure statement (TDS) "as soon as practicable before transfer of title." If a transaction is completed without delivery of the required TDS, the buyer cannot rescind the sale, but can sue for damages. In *Realmuto v. Gagnard*, 110 Cal.App. 4th 193 (2003), the court held that a seller who does not provide the requisite TDS cannot force a buyer to complete the transaction.

In that case, a homeowner contracted to sell his property "as is." When the buyers reneged, he sued, seeking to force the buyers to complete their purchase. The buyers argued they were not required to complete the transaction because the seller had never provided them with a TDS. The court agreed.

In reaching its decision, the court pointed out the disclosure requirement was not merely contractual but was part of a statutory scheme. Under Cal.Civ.Code § 1102.3 (b), when a TDS is delivered after execution of an offer to purchase, the buyer has three days after delivery in person or five days after delivery by mail, to terminate his or her offer.

This provision would be superfluous if the seller were able to force completion of the sale without having provided the TDS. The court stated: "Our review of this statutory scheme convinces us that the Legislature intended the seller's delivery of a disclosure statement to be a nonwaivable condition precedent to the buyer's performance. . . . [T]he Legislature plainly contemplated that buyers would never be irrevocably committed to performing the contract without having received the required disclosures. This legislative purpose would be defeated if a seller could enforce a contract without having complied with the disclosure requirements."

This decision underscores the importance of compliance by sellers with the transfer disclosure requirements.

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## Dangers of Dual Agency

Many real estate brokers consider dual agency to be a great benefit because they are entitled to the entire commission. There can, however, be a significant downside if one of the parties is unhappy with the transaction.

In *Fragale v. Faulkner*, 110 Cal.App.4th 229 (2003), a broker holding an open house met a couple interested in purchasing the property. He suggested they use him as their broker, and they agreed. The seller checked the box on the transfer disclosure statement to indicate she was aware of significant defects/malfunctions in interior walls, ceilings, floors, driveways and sidewalks, but provided no explanation. The buyers asked the broker about the walls in the bonus and laundry room, which had been constructed without a permit. The broker responded, "[D]on't worry about it . . . They are fine. [T]hey are going to go for another 20 years. There is no problem with those rooms."

The buyers completed the transaction and, after moving into the home, discovered the walls needed $80,000 worth of work.

The buyers sued the broker and the jury found in their favor. The court awarded the higher benefit-of-the-bargain measure of damages because the broker, as dual agent, was a fiduciary as to the buyers. Had the broker represented only the seller, the buyers would not have been able to recover the higher measure of damages.

Before undertaking dual agency, a broker should ensure the benefits will outweigh the risks.

## Legislative Updates

**Homeowner Association Accounting Disclosure:** Homeowner associations must make copies of the accounting records available to members for reasonable copying cost. Cal.Civ.Code §1365.2.

**Homeowner Association Costs Associated with Sale of Condominium:** Homeowner associations may not charge unreasonable fees for title record transfers or for copies of CC&Rs, by-laws and other documentation. Cal.Civ. Code §1368.

**Display of Contractor's Name and License Number:** All contractors must display both their business name and contractor's license number on all commercially registered vehicles used in the business. Bus. & Prof. Code § 7029.6.

**Mandatory Jail Time for Unlicensed Contractor:** An unlicensed contractor who is convicted of a repeat offense must be sentenced to not less than 90 days in the county jail. Bux. & Prof. Code §7028.

## Arbitration Clause in Residential Lease Found Unconscionable

In *Jaramillo v. JH Real Estate Partners, Inc.*, 111 Cal.App.4th 394 (2003), a couple signed a lease to rent an apartment. The lease contained a provision that required them to arbitrate "[a]ny dispute . . . relating to a claim for personal injury . . . ." After they moved into the apartment, the tenants discovered water leaks that resulted in the growth of mold. In addition, one of them slipped and fell on a ramp on the property, suffering a knee injury. When they sued for damages, the landlord sought to compel them to arbitrate their claims. Finding the arbitration provision unconscionable, the court denied the arbitration petition.

**"We think the most reasonable interpretation . . . is the general rule that a tenant of residential premises cannot validly agree, in a residential lease agreement, to binding arbitration . . . ."**

The court recognized the strong public policy in favor of arbitration and noted that California law favors enforcement of valid arbitration agreements.

It also considered section 1953(a) of the Civil Code, however, which provides that provisions in residential leases under which a tenant agrees to modify or waive certain specified rights, including his procedural rights in litigation, are "void as contrary to public policy." As the court pointed out, running through the legislative history for this section is a "profound concern with the generally weaker bargaining power of tenants as compared to landlords and leverage a landlord may exert by making the availability of rental housing contingent upon the waiver of rights."

As a result, the court concluded: "We think that the most reasonable interpretation of section 1953, subdivision (a)(4), is that it establishes the general rule that a tenant of residential premises cannot validly agree, *in a residential lease agreement*, to binding arbitration to resolve disputes regarding his or her rights and obligations as a tenant."

To be valid, therefore, any arbitration agreement between a landlord and residential tenant must be contained in a document other than

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## Homeowner Liability for Injuries to Unlicensed Contractor Employees

The Fall 2002 issue reported that, in *Fernandez v. Lawson*, 98 Cal.App.4th 388 (2002), the court found a homeowner who hired an unlicensed contractor was subject to OSHA. In *Fernandez v. Lawson*, 31 Cal.4th 31 (2003), the Supreme Court overturned that decision.

That reversal notwithstanding, under Labor Code § 2750.5, a homeowner who hires an unlicensed contractor to perform work for which a license is required is deemed to be the employer of the contractor for purposes of worker's compensation. Before hiring a contractor, a homeowner should first verify the contractor is licensed, either by calling the Contractors State License Board at 1-800-321-2752 or by logging on to its website at www.cslb.ca.gov, and also ensure it carries appropriate insurance.

**Caveat:** This issue does not typically arise for casual domestic work lasting less than fifty-two hours, for which there is a household domestic service exception under the statute. In addition, in California, homeowner's comprehensive personal liability insurance policies are required to include coverage for worker's compensation benefits for people who provide domestic services.

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