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Real Property Law Section E-Bulletin

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Upcoming Programs

Sign Up Now For the Real Property Law Section Retreat to be Held April 26 – 28, 2013, at the Silverado Resort & Spa!

The RPLS will soon be hosting its 32nd Annual Real Property Retreat, featuring a total of 27.75 hours of MCLE credits in a wide variety of real property topics and related legal areas, wine tasting, dinners and other social events. The Retreat will be held at the beautiful Silverado Resort in Napa, CA, from

Recent Legal Developments

Legal Update: The Parol Evidence Rule Gets Clipped: Contract Fraud Cases are Expected to Spike

In a contract law decision with far-reaching implications for the business community, *Riverisland Cold Storage v. Fresno-Madera Production Credit Association*, the California Supreme Court has reversed course after 75 years and held that evidence of oral promises or agreements at variance with the terms of a written contract may be considered to determine if the contract should be invalidated as having been procured by fraud.

Previously, in *Bank of America etc. Assn. v. Pendergrass*, decided in 1935, the Supreme Court had specifically limited the fraud exception to California's version of the "parol evidence rule" (Code of Civil Procedure section 1856 and Civil Code section 1625) to preclude introduction of such evidence to challenge the validity of a written contract. The result was that written contracts were routinely upheld by the courts and enforced according to the terms set forth in the contract. That sanctity of contract so heavily relied upon in business (particularly in California's very litigious environment) may now be threatened as aggrieved contracting parties will likely attempt to avoid their obligations by claiming that the written contract was not the intended deal. This decision has potentially far-reaching negative implications for the business community, and it will almost assuredly result in a significant spike in contract fraud litigation.

The case may be an example of "bad facts make bad law" as the Court was dealing with a situation involving alleged misrepresentations by a lender made to relatively unsophisticated borrowers. The borrowers, Pamela and Lance Workman and their operating entities, were in default on agricultural loans from their local production credit association (PCA). The Workmans and the PCA entered into a fairly typical written forbearance agreement pursuant to which the Workmans pledged 8 additional parcels of property as collateral, and the PCA agreed to forbear from enforcement action for approximately 3 months as long as specified payments were timely made. The forbearance agreement contained the customary integration clause confirming that all prior or contemporaneous discussions and agreements were integrated into and superseded by the written contract. Although most of the pages of the forbearance agreement had been initialed by the Workmans, they apparently never read the agreement and simply signed the documents presented to them.

After the Workmans failed to make the payments required pursuant to the terms of the forbearance agreement, the PCA began enforcement of the loans by recordation of a notice of

April 26, through April 28, 2013. Come meet other practitioners from around the state at an educational, informal and fun event. Space is limited, so be sure to sign up right away. For more information look [HERE](#).

Announcing the Fifth Annual Fair Housing and Public Accommodations Symposium on April 19, 2013

Please join us for the Fifth Annual Fair Housing and Public Accommodations Symposium on April 19, 2013 at the Golden Gate University School of Law. Panels include discussions on "ADA, FFHAA, FEHA--Disability Accommodations and Modifications Under State and Federal Law from Plaintiff/Defense Perspective," "CHALLENGES TO FAIR HOUSING FROM ROOMMATES.COM: Are internet service providers ever liable for any discriminatory advertising? Do fair housing laws even apply to shared living situations?" and "HOUSING FOR PERSONS WITH DISABILITIES: Legitimate Neighborhood Concerns Versus Prejudice and Unlawful Discrimination." Ilona Turner of The Transgender Law Center will provide a keynote speech. A flyer with additional information can be found [HERE](#).

Upcoming CEB Programs for April 2013

Residential Unlawful Detainers (3 hours MCLE)

Whether representing landlords or tenants, residential unlawful detainer actions are challenging and demanding. The fast pace, special statutes and rules, and constantly evolving case law provide many traps for the inexperienced or unwary litigator. What seems at first glance to be a matter of simply filling in the Judicial Council forms can result in many an unpleasant surprise for attorney and client, no matter which side of the counsel table they are seated on.

Presented in San Francisco (April 12) and in Los Angeles (April 19)

<http://ceb.com/progUrl.asp?prodno=RE08181>

Commercial Landlord-Tenant Disputes (3 hours MCLE)

California is bouncing back from a period of sharply rising vacancies and declining rents, which, when accompanied by extremely tight credit markets, resulted in more defaults on commercial leases and loans. While some of these situations are still making their way through the system, the strengthening new economy brings new types of business models into the market. For example, many new economy tenants want more workers in less space, 24-hour access to building services, and may use greater electrical and other building resources than in the past. All of these scenarios can lead to disputes between landlord and tenant. It makes sense to try to resolve these lease disputes, where possible, to help preserve the landlord and tenant relationship.

Presented in San Francisco (April 12) and in Los Angeles (April 19)

<http://ceb.com/progUrl.asp?prodno=RE08067>

Mastering the Map Act (6 hours MCLE)

This program will acquaint you with the scope and implications of the Subdivision Map Act and the different roles played by attorneys in the mapping and development

default. The Workmans eventually paid off the loan and filed an action against the PCA for fraud, negligent misrepresentation, rescission and reformation. The action was predicated on their claim that the PCA's vice president had previously, and at signing, told the Workmans that the forbearance would be for a term of two years and that only 2 additional properties would be required as collateral.

The trial court applied *Pendergrass* to exclude evidence of the claimed conflicting contract terms and entered summary judgment in the action in favor of the PCA. The Court of Appeal reversed and the California Supreme Court affirmed allowing the Workmans' action against the PCA to proceed. In affirming, the California Supreme Court expressly overruled its prior decision in *Pendergrass* which it characterized as "ill-considered" and (i) being unsupported by the California statute codifying the parol evidence rule, (ii) conflicting with the law in other states, and (iii) providing a shield for fraudulent conduct rather than preventing fraud. The result is that the Workmans will have their day in court to assert that they were fraudulently induced into signing the forbearance agreement and that the signed contract does not embody the terms agreed upon. Responding to the fact that the Workmans had failed to read the forbearance agreement, the Court did note that a showing of justifiable reliance would still be necessary to establish the alleged fraud but left that issue for determination by the trial court in further proceedings.

The Court's decision in *Riverisland* will have broad implications and leaves open many significant questions. Although the case involved a real estate finance transaction, the Court's expansion of the exception to the parol evidence rule will be applicable to virtually all contracts regardless of context. Early resolution of contract and fraud claims through summary judgment will now be much more difficult or impossible, as the mere allegation of oral promises and/or misrepresentations will create a question of fact to be decided at trial. How can a lender or other contracting party be assured that the borrower or other contracting party does not think it was promised something different than or in addition to what is contained in the written contract? What protective steps can the lender or other contracting party take to prevent or discourage these claims?

Although there is likely no bullet-proof way to completely avoid this expanded exposure to contract fraud claims, there are some steps that lenders and others can take to reduce their risks: (i) provide final copies of complex documents to the other parties well in advance of closing to allow sufficient time for such parties' review, (ii) encourage or require that the other parties (particularly less sophisticated parties) have legal counsel review and advise them with regard to the contract documents, and (iii) have the other parties confirm verbally before witnesses (who in turn sign a confirming declaration) or on audio tape (to be retained for the life of the contract), or in a separate hand-written statement, that they have read and understood the documents and that no contradictory or supplemental representations or promises have been made and are being relied upon

The unavoidable outcome of the Court's decision in *Riverisland* will be an increase in litigation. Contracting parties should be increasingly careful with whom they deal and how they document their transactions.

process. How should you advise developers and subdividers or public agencies reviewing applications under the Act? What should you look for in reviewing subdivision proceedings for local agencies? Our speakers discuss the Act's legal requirements, map approval process, frequently encountered problems, and practical solutions. They draw on their own practical experience for the information you will need to counsel your clients and avoid common pitfalls.

Presented in San Francisco (May 17) and in Los Angeles (May 23)

<http://ceb.com/progUrl.asp?prodno=RE08289>

Check CEB.com for more information

Section News

Report From REAL Symposium 2013: the Impact of Tech and the Future of Redevelopment

The second Real Estate and Law (REAL) Symposium was held on January 30, 2013 at Paul Brest Hall on the Stanford University campus. Sponsored by The State Bar of California Real Property Law Section and Stanford Professionals in Real Estate (SPIRE), the REAL Symposium has established itself as the premier multidisciplinary real estate business and law event in Northern California. This year's REAL Symposium was co-chaired by Ken Whiting of Schiff Hardin LLP, representing the Real Property Law Section, and Steve Dostart of Dostart Development Company LLP, representing SPIRE. The attendees comprised a true cross-section of the real estate industry, and included lawyers, business professionals, government employees and students.

REAL Symposium 2013 featured an impressive roster of keynote speakers and panelists. Keynote speakers included Michael Covarrubias, Chairman and CEO of TMG Partners, a prominent development company, and John Taylor, a noted economist from Stanford University who has served as an economic advisor to three American presidents.

In the day's first panel, hosted by Tim Tosta of McKenna, Long & Aldridge LLP, real estate experts from Twitter, Google, Facebook and Stanford discussed the impact of the tech industry on real estate.



The second panel, moderated by Gillian van Muyden, Chief Assistant City Attorney of the City of Glendale, addressed the future of redevelopment in California, and boasted "stakeholder" participants from the legal, development and governmental fields.



Plans are already under way for next year. The location is beautiful, the presentations are thought-providing and informative, the company is excellent, and the networking opportunities are abundant. See you there!

Article submitted by Scott Rogers of Rutan & Tucker, LLP (srogers@rutan.com) and Ted Klaassen of Rutan & Tucker, LLP (tklaassen@rutan.com). Scott is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. Ted is senior counsel in the Palo Alto office of Rutan & Tucker, LLP where he represents developer, investor, corporate, and institutional clients in a broad spectrum of real estate transactional and litigation matters.

Legal Update: Prevailing Party in an HOA Enforcement Action May Recover Pre-Litigation Attorneys' Fees Under the Davis-Stirling Act

Navigating the Davis-Stirling Act's various ADR and attorneys' fees requirements can be difficult at times given the various hurdles one must clear. In *Grossman v. Park Fort Washington Association*, the Fifth Circuit reconciled the various provisions of the Davis-Stirling Act in a decision which awarded the prevailing party homeowners the attorneys' fees they incurred in pre-litigation ADR.

Grossman involved a dispute between the Park Fort Washington Association, a homeowners association, and association members Neil and Doredda Grossman. The Grossmans undertook a renovation project of their backyard which included the construction of a cabana. However, the Grossmans failed to obtain prior approval for their renovations in accordance with the Association's governing documents and petitioned the Association for approval after the fact. The Association refused to approve the cabana, determining that the cabana's construction and location was in violation of the CC&Rs. The Grossmans appealed the Association's decision through the Association's administrative process to no avail.

Having exhausted their Association's appeal process, the Grossmans and the Association went to mediation in accordance with the Davis-Stirling Act. Mediation was unsuccessful and the instant lawsuit ensued. After a three day bench trial, the court found in favor of the Grossmans. As the prevailing party, the Grossmans petitioned for their attorneys' fees, including attorneys' fees incurred in the pre-litigation enforcement action. The court awarded those fees. The Association appealed arguing that the Davis-Stirling Act only awarded attorneys' fees incurred in the litigation, not pre-litigation ADR.

Dismissing the Association's arguments as merely textual, the Fifth Circuit Court of Appeal affirmed the trial court's ruling. In so doing, the Fifth Circuit employed an analysis of three different sections of the Davis-Stirling Act. When an association or a member of the association is seeking to enforce the governing documents, California Civil Code Section 1369.520(a) prevents them from filing a legal action unless the parties have endeavored to submit their dispute to alternative dispute resolution. If alternative dispute resolution fails and the parties end up in litigation to enforce the governing documents, pursuant to California Civil Code Section 1354(c), the prevailing party *shall* be awarded reasonable attorneys' fee and costs. Of course, in order to encourage the parties to participate in ADR, the legislature enacted Civil Code Section 1369.580, which states that in determining the amount of the