PROPERTY LAW

Realtor Cannot Rely on Purchase Agreement to Avoid Liability for Intentional Misrepresentation

by Theresa M. Brehl, Column Editor

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In *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, the Fourth District Court of Appeal (Division One) addressed whether real estate brokers may avoid liability for intentional misrepresentations based upon exculpatory or other clauses contained in standardized purchase and sale agreements, generally drafted by the California Association of Realtors ("CAR"). At issue was whether those contract provisions block a buyer's ability to prove "justifiable reliance," an essential element to proving fraud.

The court decided that the brokers could not "rely" on contract clauses that provide buyers with a right to conduct pre-purchase investigations of the condition and zoning of property, and that recommending such investigations does not shield the brokers from liability. Instead, despite the cautionary and exculpatory "buyer beware" type of language contained in the standard CAR form purchase and sale agreements, buyers could still "justifiably rely" on a broker's prior misrepresentations. In so holding, the appellate court relied upon California Supreme Court Justice Traynor's 1941 quote from an out-of-state case for the proposition that "'[n]o rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [citation.]" *Id.*, at 1503, citing *Seeger v. Odell* (1941) 18 Cal. 2d 409, 414.

Facts in *Manderville*

The Mandervilles were looking for land in the City of El Cajon in San Diego County. They planned to subdivide the land and build two homes on the subdivided property, one for themselves and one for their daughter and son-in-law. Their agent found a multiple listing service ("MLS") advertisement for a property in El Cajon that stated: "ALL USABLE 2.62 ACRES COUNTY STATES 1 ACRE MIN. LOT SIZE COULD BE SPLIT." *Manderville v. PCG& S Group, Inc., supra,* 146 Cal. App. 4th at 1489. An earlier MLS listing for the same property did not include that language. Therefore, the Mandervilles' agent called the sellers' broker to ask about that discrepancy. The Mandervilles' agent's notes of the call indicated that during that conversation she was told both that the "split had been approved" and that the lot was "splitable." *Id.* at 1491. After obtaining this information, the Mandervilles made an offer to purchase the property and entered into a purchase agreement with the sellers.

Included in the CAR form purchase and sale agreement were standard provisions that advised the

buyers to investigate the condition and suitability of the property and provided the buyers the right to do such investigations, including language urging the buyers to investigate:

> **Past, present, or proposed laws [and] ordinances … affecting the current use of the property, future development [and] zoning … (Buyer should also investigate whether these matters affect Buyer's intended use of the property.)**

Id. at 1492, note 7. The buyers also received, prior to the close of escrow, a disclosure packet noting that the zoning was "RR-1", with a minimum lot size of one acre and that it was within the "(24) Impact Sensitive" area.

After escrow closed, the buyers hired a civil engineer to submit an application to the County for permission to split the property. That engineer conducted research at the County and reported that the land could not be split because of its designation as "(24) Impact Sensitive" under the County's general plan, which specified a minimum lot size of four acres for such a split. He noted that although the zoning allowed a minimum lot size of one acre, because of the general plan, the minimum lot size for a lot split was actually four acres. He told the Mandervilles that he had not seen that type of discrepancy between the zoning and the general plan before.

Trial Court Proceedings

The buyers sued the selling broker for intentional misrepresentation and other claims arising from the representations made about the splitability of the lot. The broker filed a motion for summary adjudication with respect to the intentional misrepresentation claim, arguing that under the language contained in the purchase and sale agreement, the buyers had an obligation to investigate. The broker claimed that a diligent investigation by the buyers would have disclosed the impediments to their planned lot split. The broker, therefore, argued he was exonerated from any liability because the buyers could not have "justifiably relied" on the broker's representations as a matter of law. The trial court agreed and granted summary adjudication in the broker's favor, finding that buyers could not prove the essential justifiable reliance element of their cause of action.

Appellate Court Ruling

The Fourth District Court of Appeal disagreed and held that:

> **Neither the exculpatory clauses contained in the CAR form agreement, nor Buyers' alleged lack of due diligence in exercising their right to investigate the zoning and other laws restricting the development and use of the property, bars Buyers' cause of action against Brokers for intentional misrepresentation as a matter of law.**
> *Id.* at 1497.

The court explained that reliance exists "when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." *Id.* at 1498, quoting from *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal. 4th 1226, 1239. The question of whether reliance is reasonable or justifiable is generally a question of fact that may not be adjudicated summarily. *Manderville, supra,* 146 Cal. App. 4th at 1498-1499.

With respect to the exculpatory provisions specifically raised by the brokers in their motion, the court cited Civil Code §1668 (in effect since 1872) which provides:

> **All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.**

Based upon Civil Code §1668 and the longstanding precedent interpreting that statute, the court stated it would be against public policy to allow the provisions of the purchase and sale agreement to exempt the brokers from liability, even though those defendants may not have actually been parties to the purchase and sale agreement, citing *Simmons v. Ratterree Land Co.* (1932) 217 Cal. 201; *Smith v. Richards* (1957) 149 Cal. App. 2d 648; and *Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal. App. 3d 1463. The court further held that the plaintiffs' justifiable reliance could not be negated by recommendations in the purchase and sale agreement that the buyers conduct investigations because:

> **It is well established in California that in an action for fraud or deceit, negligence on the part of the plaintiff in failing to discover the falsity of the defendant's statement is no defense when the misrepresentation was intentional.**

Manderville, supra, 146 Cal. App. 4th at 1503. The appellate court further noted that the purchase and sale agreement did not impose a contractual obligation on the buyers to investigate whether the property could be split, but merely provided them with the right to do so, distinguishing the case from another decision in which a duty to investigate was expressly assigned to the buyers in an option to purchase property. *Id.* at 1503; *see, Bank of America National Trust & Savings Association v. Vannini* (1956) 140 Cal. App. 2d 120 (option agreement that expressly imposed duty upon optionor to conduct inspection before entering into purchase agreement).

CONCLUSION

The *Manderville* decision clarifies and restates the established law that real estate brokers cannot avoid liability for **intentional** misrepresentations by virtue of language contained in the standard CAR purchase agreement forms. A buyer may justifiably rely upon pre-agreement representations and brokers are responsible for their intentional misrepresentations. It goes without saying that the courts believe the best way for brokers to avoid liability is to refrain from making representations that they either know are false or that they do not know are true. This is especially so when it comes to questions regarding zoning and other governmental activities that may impact the allowable uses of real property.