



R.E.A.C.H.

Real Estate And Construction Highlights

***A Newsletter For Real Estate
and Construction Professionals***

THOITS, LOVE, HERSHBERGER & MCLEAN
By Kenneth R. Van Vleck

Enforcement of Unsigned Real Estate Sales Contracts

THIS ISSUE: Under what conditions will a court enforce an unsigned real estate sales contract?

FACTUAL SCENARIO:

Sellers listed a condominium for sale. Two sets of prospective buyers made offers, which the Sellers refused. But the Sellers' agent prepared and delivered two identical counteroffers. The Sellers never signed the counteroffers; rather, Sellers' agent signed their names. The counteroffers noted on their face that this was a multiple-counteroffer situation, and indicated that the buyers' return of a signed counteroffer was not binding on the Sellers unless the Sellers again signed that counteroffer indicating their acceptance of it. The Sellers never signed the counteroffer returned to them by the Buyers.

Other documents that should have been signed by the Sellers were not signed, including an addendum to the counteroffer, to which the Sellers' agent forged their signatures. Thus, it was undisputed that the Sellers hadn't signed

the offer, hadn't signed the counteroffer, hadn't re-signed the counteroffer after it was accepted by the Buyers, and hadn't signed the addendum to the counteroffer bearing their forged signatures. What the Sellers *had* signed was a series of disclosure documents that stated on their face that they were related to (but not a part of the contract for) the real estate sale at issue. The Sellers, nevertheless, admitted that they *intended* to go forward with the sale, and in all other ways acted as if that was their intention, until they asked that the escrow be cancelled "because [of] health reasons." The Buyers argued to the court that there was a much more sinister reason for the Sellers wanting to cancel the escrow, largely supported by the fact that the Sellers received a backup offer on the property for \$25,000 more than the Buyers' offer.

The trial court found (despite Sellers' testimony to the contrary) that one of the Sellers had authorized their agent to sign the basic sales documents, the Sellers knew there was an agreement to sell the property, and the Sellers' actions misled the Buyers into believing they had purchased a condominium. Nevertheless, the trial court refused to force the sale of the property because, among other things, there was no written contract, as the Sellers had not signed the counteroffer when it was returned to them.

The court of appeal reversed this decision. (*Behniwal v. Mix*).

IMPORTANT ISSUES DETERMINED BY THE COURT:

In reversing the trial court's refusal to enforce the "contract," the court of appeal looked to Civil Code section 1641, which states, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Other code sections made it clear that there are clauses in contracts that are intended to be subordinate to others, and that all must be taken together with the other documents in the transaction, in light of their evident purpose.

After reciting this law, the court determined that the only possible purpose of the required "additional" Sellers' signature on the returned counteroffer was to indicate which of the two counteroffers the Sellers were

accepting. But the court then entertained a legal leap of faith, holding that the Sellers agent's forged signatures on the addendum to the counteroffer created a contract, even though it was never signed by the Sellers themselves.

Under normal circumstances, courts will not enforce an unsigned contract for the sale of any real property interest. The Statute of Frauds is intended to protect real property interests and other "big ticket" items from being transferred without proper written documentation. Thus, normally, the party to be charged with the terms of an agreement must have signed it.

To get around that requirement, the court found that the Sellers had *ratified* the agreement after the fact. The court found that by signing the disclosure statements, which on their face state that they are not part of the contract, the Sellers ratified the contract because "one of the disclosure documents expressly refers to 'the Residential Purchase Agreement and Receipt for Deposit.'"

Thus the court created a contract based upon admittedly forged signatures, where a key document and part of the intended agreement was never signed by the Sellers, and found that the Sellers ratified the forged signatures by signing a set of documents that state on their face that they are not part of the contractual agreement, but rather were merely intended to satisfy the California real estate sales disclosure laws.

WHY THIS CASE IS IMPORTANT:

It happens every day that important documents in residential purchase agreements go unsigned despite the best efforts of all involved. At first glance this case may offer some hope that an unsigned purchase agreement may nevertheless be enforced if the resisting party went forward with the opening of the escrow, created escrow instructions, or signed other contemporaneous documents. Only time will tell whether this case, decided in late October 2005, will significantly undermine the protection of the Statute of Frauds, or whether it will be simply considered an anomaly, a case so factually distinct as to be inapplicable to most real estate purchases. In the mean time, however, it

remains clear that it is good practice to always ensure that all required signatures are obtained on all real property sales contracts. While this court entertained an unusual legal analysis to reach what it considered the “right result,” that will not always be the case where someone merely forgets to sign important documents. In the past, lawyers dealing with this kind of unsigned contract might have believed it would be a simple task to set aside the deal. The decision, however, makes that result much less certain.

NEXT ISSUE: Can commercial property owners protect themselves from mechanics’ liens for construction work performed by their tenants?

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