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Real Estate And Construction Highlights—A Newsletter for Real Estate and Construction Professionals

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Recovering Attorney Fees

THIS ISSUE

Most real estate purchase agreements contain some form of prevailing party attorney fees provision. Understanding how those provisions work, and the pitfalls associated with them can enhance a litigation negotiation position significantly.

BACKGROUND

A typical attorney fee provision in a residential real estate sales contract states "In any action, proceeding, or arbitration between Buyer and seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller."

Commercial real property sales agreements frequently contain these clauses as well, though the language varies widely. Sometimes these are written to benefit only one party, such as "in the event Buyer brings an action… Buyer shall be entitled to recover his fees…" Some states (notably, New York) will enforce these one-way provisions. Others, (such as California) will interpret them to run both directions.

WHAT FEES WILL BE AWARDED?

The award of attorney fees after litigation or arbitration is left to the discretion of the judge or the arbitrator who presided over the case. They are supposed to use their common sense and background in law to determine a reasonable fee for the services provided. And the judge's determination of reasonableness does not always fully reimburse the prevailing party for its actual expenses. Though a judge may award the prevailing party everything spent in prosecuting or defending a case, it is more common that a judge will award less– sometimes much less– than the amount requested.

DETERMINING A REASONABLE FEE

Frequently, the initial value of a real estate claim is outstripped by the attorney fees incurred, such that resolution of these cases becomes far more difficult. Parties often demand to recover all of their litigation expenses, "because the contract says so." But what are the parties truly entitled to?

The determination of a "reasonable fee" is left to the sound discretion of the judge. As a result, the award of prevailing party attorney fees is typically upheld on appeal unless a party can prove that the judge abused his discretion in making the award. And abuse of discretion is difficult to prove. There are numerous cases upholding the award of attorney fees vastly outstripping the initial value of the case. For example, in one recent decision the Court of Appeal upheld a $1,113,905.40 attorney fees award despite a damages award of only $30,300. The key factor is whether the judge feels the amount is reasonable under the circumstances.

RECOVERING COSTS

Along with the possibility of not recovering all of the attorney's fees spent in pursuit of a matter, a party to litigation is also not likely to recover all of the costs associated with litigation or arbitration. In fact, in California, there is an entire statutory section listing costs that may not be recovered by the prevailing party after litigation. That list includes many of the costs incurred in the modern practice of law and routinely charged to clients, such as expert witness fees, postage, telephone expenses, photocopy charges, and other costs that are merely "convenient or beneficial" to the litigation, but not "necessary." Thus, many judges deny recovery of things such as electronic legal research costs, facsimile expenses, overnight delivery charges and "rush charges" for the preparation of deposition transcripts.

FAILURE TO MEDIATE

Recently, several residential purchase forms commonly in use in California were modified to impose a penalty on those who refuse or resist pre-litigation mediation. The prevailing party who refused to mediate will not be entitled to recover prevailing party attorney fees. Thus, contrary to the norm in California, this particular attorney fee provision may be interpreted to run only one direction.

Negotiations during litigation may be significantly affected by this shift in fees recovery. A party with a weaker position may well press forward, knowing that the down side is limited, but that the upside in the event of a win is much greater. And because the attorney fees may well exceed the value of the case itself by the time of trial, this can be a significant negotiation issue.

A recent appellate decision upheld the validity of this clause. The parties were only $18,400 plus modest expenses apart at the outset of litigation. But the litigants spent collectively over $500,000 prosecuting the action through trial and appeal.

One party demanded mediation at the outset. The other party delayed at first, then refused to mediate, stating that the other's intransigence made it so unlikely that mediation would be successful that it would not have been worth the effort, and that the parties had engaged in substantial negotiations that accomplished essentially the same thing as mediation. The refusing party prevailed in litigation (on appeal after losing at the trial court level) and made a claim for recovery of his attorney fees, which was granted at the trial court level. In reversing that award of fees, the court of appeal held that the contract means what it says: "a party refusing a request to mediate a dispute that ripens into litigation may not recover attorney fees at the conclusion of the litigation, even if that party is the prevailing party."

WHY IS THIS IMPORTANT?

This column is not customarily dedicated to an inside look at the workings of litigation. But when there are disputes between buyers and sellers of real property, the only point of contact between them may be the agents involved in the transaction. Thus, when one party demands mediation pursuant to the contract, he will usually do that by sending a demand letter to the agent.

Agents who fail to realize the importance of that demand for mediation, and fail to advise their clients to get legal counsel immediately, may help set the stage for an imbalance in later negotiations between the parties.

Also, parties to real estate transactions frequently believe that they can sue and, if they prevail, recover all of their costs of suit. But, while it does happen, that is not customarily the outcome.

CONCLUSION

Obviously, real estate agents must be facile with the contracts they employ. But when it comes to interpreting the nuances of law contained within them, real estate agents should refer their clients to an attorney familiar with real estate law.

NEXT ISSUE

Construction law: progress payment penalties.

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