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“[T]he Real Estate License Law requires a property manager to have a broker’s license, [but] the law does not prevent a plaintiff from seeking compensation for acts for which no real estate license was required.”

Property Managers May Collect for Some Unlicensed Work

THIS ISSUE

We have written many times about the impact of a contractor working without a license. But there is a similar law requiring that real estate agents be licensed as well. And while an unlicensed contractor may not collect for any work performed, the rule seems more relaxed with regard to real estate agents and brokers, at least with regard to collecting for property management work.

BACKGROUND

A plaintiff seeking to recover compensation for acts for which a real estate license was required must allege that he or she possessed the required license at the time the cause of action arose. (Bus. & Prof. Code, § 10136.) And the law is clear that an unlicensed real estate broker or agent is not entitled to collect for work requiring such a license. At least the law seemed clear until last month, when the Second Appellate District Court decided the case of *MKB Management Inc. v. Melikian*. Note: because this case is so recent, there is a possibility that it could be depublished or taken up by the California Supreme Court for further review.

MKB and Melikian entered into a property management agreement, in which Melikian granted MKB "the exclusive right to rent, lease, operate and manage" several apartment buildings. Melikian granted MKB the authority to advertise rentals; sign, renew, and cancel leases; collect rents and other charges; terminate tenancies and sign notices on behalf of the owner; prosecute unlawful detainer actions; cause repairs and alterations to be made; decorate the premises; purchase supplies; hire and supervise employees to operate and maintain the premises; and contract with others for services on behalf of the owner.

MKB agreed to deposit in Melikian's bank account all receipts less disbursements. Melikian agreed to pay any expenses in excess of the receipts and also agreed to pay a management fee of the greater of \$2,000 per month or 4 percent of the gross rents.

MKB sued Melikian and several others, alleging that they failed to pay amounts due under the property management agreement and failed to pay for services rendered and money paid by MKB at their request. MKB alleged that it was exempt from the real estate license requirement for property managers under Business and Professions Code section 10131.01, subdivision (a)(3) (which provides certain exceptions to the license law – for example, employees of a licensed broker). MKB also alleged that it performed those services under the supervision and control of the defendant (and property owner) Melikian, a licensed real estate broker.

The defendants demurred to the complaint, saying that the plaintiff's failure to obtain a real estate license precluded it from collecting for any portion of the work it performed, and precluded it from collecting back any of the money it expended on behalf of the owner in fulfillment of the management agreement.

As an aside, the defendants' argument has been validated by the California courts with regard to unlicensed contractors – who are not entitled to recover any portion of the amount due to them if they were unlicensed for any part of the performance of the work of improvement.

MKB, argued that it should be able to parse out the work it performed into two categories: work for which a license was required, and work for which no license was required. By doing that, it would be able to maintain an action to recover for the work that didn't require a license. Also, it argued, it should be able to recover money it spent on the owner's behalf.

Essentially, the plaintiff argued that the Court in ruling on the demurrer should remove from its management agreement those portions that were unlawful – the portions requiring it to have either a real estate license or a contractor's license. If it did that, the remaining portion of the contract would be enforceable against Melikian.

The trial court concluded that the property management agreement was unlawful because its "principal object" was for MKB, which admittedly possessed no real estate broker's license, to provide services for which a real estate broker's license was required. The court concluded that the exemption under Business and Professions Code section 10131.01, subdivision (a)(3) was inapplicable. The court stated further that the courts will not enforce illegal contracts as a matter of law or lend assistance to parties seeking compensation for illegal acts, and that to sever the illegal parts and enforce the rest of such an agreement would undermine the real estate licensing laws. Thus, trial court sustained the defendants' demurrer, entering a judgment of dismissal. MKB appealed that ruling.

APPELLATE COURT ANALYSIS

The Court of Appeal reversed the trial court's sustention of demurrer. It found that the trial court should have done as the plaintiff asked and excised from the contract those portions that were illegal.

Although the Court recognized that the Real Estate License Law requires a property manager to have a broker's license, the law does not prevent a plaintiff from seeking compensation for acts for which no real estate license was required. It found that some of the services provided under the property management agreement required a real estate broker's license, but others did not. It held, for example, that a broker's license was required for offering for lease and leasing apartment units and collecting rents, but was not required for other management duties such as causing repairs to be made, decorating, and general maintenance.

The extent to which the property management agreement may be enforceable depends on the doctrine of severability. "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." The doctrine of severability "preserves and enforces any lawful portion of a parties' contract that feasibly may be severed." If, on the other hand, a contract has only a single object and that object is unlawful, in whole or in part, the entire contract is void.

As the Court said (using language that only a judge would use), "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate."

The trial court had concluded that the property management agreement could not be severed as a matter of law because to do so would undermine the real estate licensing statutes. But the Court of Appeal disagreed. Again, using the strained language of judges, the Court held:

[T]he real estate licensing statutes prohibit a person from acting as a real estate broker without a real estate license. The statutes here go further by expressly prohibiting an unlicensed real estate broker from maintaining an action to recover compensation for the performance of acts for which a license was required. The real estate licensing statutes, however, do not state that an unlicensed real estate broker cannot maintain an action to recover compensation for acts for which no license was required, and there is no indication that the Legislature intended to preclude the recovery of compensation for such

services or to repudiate the generally applicable doctrine of severability. Moreover, we cannot conclude as a matter of law based on the complaint alone that all of the services provided under the property management agreement were dependent upon or inextricably related to the acts for which a real estate broker's license was required.

...

In light of our conclusion that the absence of a real estate broker's license or a contractor's license does not necessarily preclude the recovery of payment for those services for which no license was required, the judgment must be reversed.

CONCLUSION

Contrary to the very harsh Contractors' License Law, in which the Courts find there are simply very few if any loopholes for unlicensed contractors to skirt the license requirements, at least one Appellate Court has now concluded that an unlicensed property manager may collect for some of the work it performed, if it can show that no license was required for that work. The Court in this decision was quite vague about what work requires a license and what does not, so expect that if this decision is followed by other appellate courts, there will be some refinement of that issue over the next few years.

NEXT ISSUE

A new interpretation of arbitration agreements in the standard California Association of Realtors Residential Purchase Agreement.

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