

Court Of Appeal Narrowly Construes Pre-Litigation Mediation
Requirement In Awarding Attorney's Fees To Prevailing Defendants
In A California Residential Purchase Agreement Dispute

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In a victory for parties to residential purchase contracts who have been sued for breach of contract without any pre-litigation mediation, the California Court of Appeal, Second District, recently ruled that defendants to a specific performance and breach of contract action who did not engage in pre-litigation mediation but were merely seeking attorney's fees to defend the case, may recoup attorney's fees even though the defendants had also filed a cross-complaint without a written request for mediation and the subject Residential Purchase Agreement provided that attorney's fees were not recoverable unless the parties mediated prior to filing of suit.

That decision was issued in the matter of Van Slyke v. Gibson 2007 DJAR 905 which was filed on January 18, 2007. The Van Slyke case had facts which are certainly common enough. In Van Slyke, plaintiff Mike Van Slyke made an offer to purchase twenty-three acres of undeveloped property in Santa Maria, California owned by defendants Oliver E. Gibson, Jr. and Joni Ruth Gibson. Shortly thereafter, the Gibsons made a counter-offer which required that the buyer provide a pre-qualification letter from lender as well "as written confirmation from lender that they would loan on acreage with existing modular home." Van Slyke accepted by executing the counter-offer, but did not provide the lender prequalification or confirmation letters which were required by the counter-offer. One week later, the Gibsons accepted an all cash offer from David Daniels and Jennifer Daniels.

Shortly thereafter, Van Slyke brought an action for breach of contract and specific performance against the Gibsons (the Daniels also brought a separate action for specific performance as well). No attempt was made to mediate prior to Van Slyke's filing suit. Van Slyke as well as the Daniels also filed separate lis pendens against the subject property.

Thereafter, the Gibsons filed a cross-complaint in the Van Slyke case against Van Slyke and Van Slyke's realtor. The Gibsons did not seek mediation before filing the cross-complaint although their attorney filed a declaration in which he stated that an offer to mediate was made by telephone by him to the Van Slyke's attorney. The Gibsons later dismissed Van Slyke from the cross-complaint. The trial court later severed the Gibsons' cross-complaint from the Van Slyke case, anyway.

The trial court consolidated the Van Slyke and Daniels specific performance actions and, following trial, decided that Van Slyke did not accept the counter-offer because he did not provide the lender's written confirmation letter and also because Van Slyke was found to have unclean hands (indeed, the trial court found that Van Slyke's hands "couldn't get any dirtier" citing the fact that Van Slyke's \$10,000.00 deposit check was returned not sufficient funds).

The Gibsons then sought attorney's fees to defend the Van Slyke case pursuant to the California form Residential Purchase Agreement. The California form Residential Purchase Agreement, which is believed in that case to have been C.A.R. Form RPA-CA, is a commonly used purchase agreement form which is issued by the California Association of Realtors. The California form Residential Purchase Agreement contains a clause in paragraph 17 of the form which provides that:

"If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."

The trial court then awarded the Gibsons \$94,974.00 in attorney's fees plus costs. Van Slyke appealed and contended that the Gibsons' failure to offer mediation of their cross-complaint precluded them from recovering attorney's fees.

The Court of Appeal affirmed the trial court's award of attorney's fees and also ruled that the Gibsons were entitled to an award of attorney's fees on appeal, in an amount to be determined by the trial court. The Court of Appeal addressed two issues in its decision.

First, the Court of Appeal found that since the Gibsons sought their attorneys' fees for defense of the Van Slyke case, and not for pursuit of the cross-complaint against Van Slyke, attorney's fees were awardable under Code of Civil Procedure section 1717 which "permits an award of attorney's fees even when the party prevails on grounds the contract is...non existent if the other party would have been entitled to attorney's fees had it prevailed" citing the California Supreme Court decision Hsu v. Abbara (1995) 9 Cal.4th 863, 870.

In addition, the Court of Appeal held that the Gibsons had complied with the pre-litigation mediation requirement based upon the Gibsons' attorney's declaration, wherein counsel stated that he had telephoned Van Slyke's attorney and requested mediation prior to filing the cross-complaint, but that Van Slyke's attorney refused. Based on that, the Court of Appeal found there was a substantial conflict in the evidence and stated it would not disturb the trial court's ruling.

The Van Slyke case presents a victory to parties to residential real estate transactions who have been named as party defendants without a reasonable opportunity to mediate before being named as defendants. The Van Slyke case also provides, at least given the facts in that case, that a defendant which files a cross-complaint arising from a California form Residential Purchase Agreement without first mediating will not necessarily be barred from recouping attorney's fees in that litigant's capacity as a party defendant.

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