

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Horiike v Coldwell Banker Residential Brokerage Company 4/9/14 **Real Estate; Dual Agency; Fiduciary Duty; Constructive Fraud**

In 2006, the owners of a residential property in Malibu engaged defendant Cortazzo to sell their property. The building permit lists the total square footage of the property as 11,050 square feet, with a guest house of 746 square feet and a garage of 1,080 square feet. Cortazzo, a salesperson for Coldwell Banker, listed the property for sale on a multiple listing service in September 2006. The listing service provided Cortazzo with public record information which stated the living area of the property was 9,434 square feet. Cortazzo's listing, nevertheless, stated the home "offers approximately 15,000 square feet of living area." A printed flier for the property made the same representation.

In March 2007, a buyer offered to purchase the property and requested verification of the square footage. Cortazzo provided a letter from the architect stating the size of the house under a current Malibu building ordinance was approximately 15,000 square feet. Additional verifying documents were requested by the buyer and when not provided, the buyer backed out of the deal. In July 2007, Cortazzo changed the MLS listing to state that the approximate square footage was "0/O.T." by which he meant zero square feet and other comments.

Plaintiff Hiroshi Horiike was working with Coldwell Banker salesperson Chizuko Namba to locate residential property to purchase. Namba saw Cortazzo's listing and arranged for Cortazzo to show the property to plaintiff. Cortazzo gave Horiike a copy of the flier stating the property had 15,000 square feet of living area. Escrow opened on November 9, 2007. Cortazzo sent a copy of the building permit to Namba which was provided to plaintiff. The parties to the

transaction signed a confirmation of the real estate agency relationships as required by Civil Code section 2079.17. The document explained that CB, as the listing agent and the selling agent, was the agent of both the buyer and seller. Cortazzo signed as the seller's agent and Namba signed as buyer's agent. Plaintiff also signed a form required under Civil Code section 2079.16 for the disclosure of various real estate agency relationships.

The form explained the relationship of a seller's agent as an agent for the seller only and noted the agent has a fiduciary duty in dealings with the seller. The seller's agent has obligations to both the buyer and the seller to exercise reasonable skill and care, as well as a duty of fair dealing and good faith, and a "duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties." The form also provides that the buyer's agent has a fiduciary duty in dealings with the buyer.

Finally, the form described an agent representing both the seller and the buyer. "A real estate agent, acting either directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer." An agent in a dual agency situation has a fiduciary duty to both the seller and the buyer, as well as duties to the buyer and seller to exercise reasonable care, deal fairly and in good faith, and disclose material facts.

Horiike signed as buyer and Cortazzo signed as an associate licensee for the agent CB. Cortazzo did not provide a handwritten note of advice to hire a qualified specialist to verify the square footage of the home, as he had in the prior failed transaction. Plaintiff completed the property transaction.

In preparation for work on the property in 2009, plaintiff reviewed the building permit and discovered the discrepancy in available square feet. He filed a complaint against Cortazzo and Coldwell Banker for intentional and negligent misrepresentation, breach of fiduciary duty and unfair business practices. At trial, his expert testified that the property had 11,964 square feet and the defense expert testified it had 14,186 square feet. After the presentation of plaintiff's case to the jury, Cortazzo moved for nonsuit on the cause of action for breach of

fiduciary duty against him. The trial court granted the motion on the ground that Cortazzo had no fiduciary duty to plaintiff. Plaintiff stipulated he was not seeking recovery for breach of fiduciary duty against Namba. At the conclusion of trial, the trial court instructed the jury that in order to find CB liable for breach of fiduciary duty, the jury had to find some agent of CB other than Namba or Cortazzo had breached a fiduciary duty to plaintiff.

The jury found Cortazzo did not make a false representation of a material fact to plaintiff, so there was no intentional misrepresentation. The jury did find Cortazzo had made a false representation of material fact to plaintiff, under the negligent misrepresentation claim. The jury found there was no liability for negligent misrepresentation, however, because Cortazzo honestly believed, and had reasonable grounds for believing the representation was true when he made it. Lastly, the jury found CB did not breach its fiduciary duty to plaintiff. Based on the jury findings, the trial court entered judgment in favor of Cortazzo and CB. Plaintiff filed a motion for new trial, which was denied, and this appeal followed.

The Second District Court of Appeal, Division Five reviewed plaintiff's appeal of the grant of nonsuit de novo. The Justices turned to the Civil Code which provides that an associate licensee is a licensed real estate broker or salesperson who is "either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee." "Dual Agent means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." (CC section 2079 et seq.) A broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. (*Field v Century 21 Klowlan-Forness Realty* (1998) 63 Cal.App.4th 18) A dual agent has fiduciary duties to both the buyer and the seller. (*Assilzadeh v California Federal Bank* (2000) 82 Cal.App.4th 399)

Miller & Starr explains: "When one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker. That broker

thereby becomes a dual agent representing both parties. The real estate industry has sought to establish salespersons as “independent contractors” for tax purposes, and this concept has enhanced the misunderstanding of salespersons that they can deal independently in the transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction.” (2 Miller & Starr (3d ed. 2011) p.68-69)

The DCA explained that Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB. Cortazzo and CB contend that Horiike cannot show prejudice as a result of the nonsuit ruling and the jury findings, because the claim for breach of fiduciary duty was found in favor of the defense. The Justices indicated that the jury’s findings that Cortazzo did not provide false information to plaintiff, or provided false information that he reasonably believed to be true, and did not intentionally conceal information, does not satisfy his duty to plaintiff.

A broker’s fiduciary duty to his client requires the highest good faith and undivided service and loyalty. The broker as a fiduciary has a duty to learn material facts that may affect the principal’s decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal’s decision and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent’s duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. (Assilzadeh v California Federal Bank, p. 414-415)

A fiduciary must tell its principal of all information it possesses that is material to the principal’s interests. A fiduciary’s failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (Michel v Palos Verdes Network Group, Inc. (2007) 156 Cal.App.4th 756) Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. Most acts of an agent in breach of his fiduciary duties constitute constructive fraud. A careless misstatement may constitute constructive fraud even though there is no fraudulent intent.

(Salahutdin v Valley of California, Inc. (1994) 24 Cal.App.4th 555)

In this case, the jury's findings do not resolve whether Cortazzo breached his fiduciary duty to plaintiff. A trier of fact could conclude that Cortazzo was aware of material information that he failed to provide plaintiff, even though he did not have a fraudulent intent. Cortazzo knew the square footage of the property had been measured and was reflected differently in different documents. When a potential purchaser sought to confirm the square footage, Cortazzo gave handwritten advice to have the square footage verified by a specialist. He subsequently changed the listing for the property to reflect that the square footage required explanation. He did not explain to plaintiff that contradictory square footage measurements existed. A trier of fact could conclude that although Cortazzo did not intentionally conceal the information, he breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage. He did not even provide the handwritten advice given to other potential purchasers to hire a specialist to verify the square footage.

The jury's verdict did not necessarily decide the cause of action for breach of fiduciary duty based on Cortazzo's actions. The jury's findings are inconsistent on the threshold issue of whether Cortazzo made a false representation about the square footage of the living areas. Therefore, the judgment must be reversed and remanded for a new trial. Plaintiff is awarded his costs on appeal.

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