

# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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### *Lyon & Associates, Inc. v Superior Court* 4/12/12

#### **Professional Negligence; Real Estate Broker; Statute of Limitations**

The Costas contacted Lyon in early 2006 regarding the sale of their home. The agent became aware of some of the house's defects. The Costas then decided to use another Lyon associate, Gidal, to sell the property. Defects in the paint and stucco of the house were visible when photos of the property were taken to list it for sale. Gidal was present when the photos were taken.

The Henleys decided to purchase the Costas' house. On May 2, 2006, the Henleys signed a **buyer-broker agreement** giving Lyon & Associates and Gidal the exclusive right to represent the Henleys in any purchase of a house from April 1, 2006, to April 1, 2007. The agreement affirmed that a "dual agent is obligated to disclose known facts materially affecting the value or desirability of the property to both parties." **The agreement limited the period for bringing legal action on the contract to no more than two years from the expiration of the Representation Period.** Escrow closed on May 9, 2006. Subsequently the Henleys began to discover construction defects that had been concealed by the Costas. The problems included water intrusion and efflorescence.

On May 8, 2009, the Henleys filed their first amended complaint against the Costas, and named Lyon, and Gidal, for the first time. They alleged breach of contract for failure to perform an inspection prior to sale, and negligence in failing to perform a reasonable inspection. The Henleys also alleged fraud, breach of fiduciary duty, and negligent disclosure of defects. Lyon moved for **summary judgment** on the 2 year statute of limitations under Civil Code section 2079.4 and under the buyer-broker contract. The Henleys opposed, arguing that 2079.4 does not apply, and the contract limitations period was subject to the

[discovery rule](#). The trial court denied the motion, and Lyon filed a petition for writ of mandate.

The Third District Court of Appeal began its analysis by noting the origin of the statute of limitations imposed by Section 2079.4 lies in Easton v Strassburger (1984) 152 Cal.App.3d 90. That opinion concluded that [the duty of a real estate broker, representing the seller of residential property, to disclose facts, includes the affirmative duty to conduct a reasonably competent inspection of the property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal](#). The Legislature codified the holding by enacting section 2079. That section specifies a statutory duty imposed on sellers' brokers to buyers of residential real property. (Field v Century 21 Klowden-Forness Realty (1998) 63 Cal.App.4<sup>th</sup> 18).

Section 2079 provides that the statutory duty of care owed by a seller's broker to a buyer is subject to the [two year statute of limitations in 2079.4](#). [The statute indicates the action must be commenced within two years of the date of possession, meaning the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first](#). Here, the Henleys did not sue Lyon as broker for the seller, but based upon its duties to the Henleys as brokers for the buyers. Such duties are separate and independent from the duties of the broker to the seller. Lyon argues as a dual listing agent they are a "cooperating broker" owing a duty under 2079, thus triggering the two year statute.

The Justices pointed out that even if the defendant broker had a duty under 2079 as a broker for the seller, that does not mean it does not have other duties to the buyers. The Legislature expressed an intent not to abrogate other fiduciary duties owed to buyers of residential real property. Since the Henleys sued Lyon as broker for the buyers, the claims do not arise under 2079 and are therefore not subject to the two year statute of limitations. Lyon next turned to the buyer-broker agreement signed by Lyon and the Henleys, which imposes its own two year limit on legal action for breach of the buyer-broker agreement. Under this agreement, the Henley's claim is late. The Henleys counter that the two year limit must be extended by [the discovery rule](#).

The Third DCA turned to CCP section 337(1) which provides a four year statute to bring an action on a contract founded upon an instrument in writing. The Henleys alleged a breach of contract by the defendant for failure to conduct a house inspection prior to sale. Thus, unless the buyer-broker agreement applies, the claim is timely because it was filed within three years of the close of escrow. Although a contractual provision cannot excuse future wrongful conduct (Civil Code section 1668), parties to an agreement may shorten the period within which some legal claims must be brought. The qualification is that the period fixed must not be unreasonable or shown to impose undue advantage. (*Capehart v Heady* (1962) 206 Cal.App.2d 386). Reasonable means sufficient time is provided to effectively pursue a judicial remedy. (*Moreno v Sanchez* (2003) 106 Cal.App.4<sup>th</sup> 1415)

The *Moreno* court reversed a trial court dismissal of the buyer's causes of action as untimely, concluding that the contractual limitations period began to run only after the buyers discovered or should reasonably have discovered the defects with the house. Although [the general rule provides for accrual of the cause of action when the wrongful act is done, where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured, a claim under the discovery rule does not accrue until the plaintiff discovers or should have discovered all facts essential to the action.](#) (*Leaf v City of San Mateo* (1980) 104 Cal.App.3d 398) This has been interpreted under the discovery rule to be [when plaintiff either actually discovered his injury and its negligent cause or could have discovered the injury and cause through the exercise of reasonable diligence.](#)

The discovery rule is typically applied in cases involving underground trespass, negligently manufactured drugs, products liability, violations of the right of privacy, [latent defects in real property or breaches of contract committed in secret.](#) (*Allen v Sundean* (1982) 137 Cal.App.3d 216) [Delayed accrual of a cause of action is viewed as particularly appropriate where the relationship between the parties is one of special trust such as that involving a fiduciary, confidential or privileged relationship.](#) (*Moreno*, at p. 1423) The first amended complaint against Lyon in their capacity as brokers for the buyer involves a fiduciary relationship. Properly viewed, the Justices explained, the buyer-broker agreement issued by the California Association of Realtors and used in this case

purports to halve the applicable limitations period. Yet, this is an example of a breach of contract claim that was inherently difficult to detect. The breach was nonobvious. The alleged malfeasance contributed to the delay in the discovery of the buyers' injury.

The discovery rule provides that a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified. When the case is tried on the merits, the plaintiff bears the burden of proof on the discovery issue. (*April Enterprises, Inc. v KTTV* (1983) 147 Cal.App.3d 805) Here, the record demonstrates triable issues of fact on the question of when the Henleys discovered or reasonably could have discovered Lyon & Associates' breach of contract. Plaintiffs allege they first noticed peeling paint at the end of 2006. The Henleys were investigating efflorescence in March of 2007. Even after the Henleys told Gidal and the sellers, the Costas, about the efflorescence problems, Gidal did not reveal she was at the house while it was being painted or that she had seen the efflorescence at that time. The Henleys stated they did not suspect Lyon or the Costas concealed the efflorescence problems until the Henleys tried to correct paint and efflorescence problems in mid-2007, and the problems returned in the winter with the first rains.

Thus, there is a disputed issue of material fact as to when the Henleys discovered the facts regarding the defendants' concealment of information about preexisting house defects. If the Henleys prove they did not discover the concealment of the house defects until on or after May 8, 2007, then their cause of action was timely filed in May 2009. In sum, the buyer-broker agreement's limitations period is subject to the discovery rule for a breach of contract action alleging active concealment of the breach by the broker. The trial court correctly denied the summary judgment.

The Henleys also brought suit under the fiduciary duty of real estate brokers to their clients. As the broker for the buyers, Lyon owed a common law fiduciary duty to the Henleys requiring the highest good faith and undivided service and loyalty. (*Field*, at p. 25) Even if the Henleys had not signed the buyer-broker agreement, Lyon would still have had an obligation to exercise reasonable skill and care on the buyers' behalf. (*Leko v Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4<sup>th</sup> 1109) The tort claims in this action are based not on the

buyer-broker agreement, but on the fiduciary relationship between Lyon and the Henleys. Breach of a real estate broker's fiduciary duty to his or her client may constitute negligence or actual or constructive fraud, depending on the facts and circumstances of each case. (*Assilzadeh v California Federal Bank* (2000) 82 Cal.App.4<sup>th</sup> 399) The contractual limitations period in the buyer-broker agreement did not apply to the breach of the common law fiduciary duty owed by Lyon & Associates to the Henleys.

Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four year statute in CCP section 343. Fraud is subject to a three year statute in CCP section 338. Because the Henleys filed their action within three years of the close of escrow, the claims for breach of fiduciary duty and fraud were timely regardless of when the Henleys discovered their right of action. The Henleys also alleged negligence arising out of Lyons' breach of its common law fiduciary duty to the buyers. Under CCP section 339(1), the two year statute of limitations commences when the aggrieved party discovers the negligent conduct causing the loss or damage and has suffered actual injury as a result of the negligent conduct. (*Apple Valley Unified School District v Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4<sup>th</sup> 934)

The first component involves the discovery rule under which the statute begins to run when the plaintiff suspects or should suspect the injury was caused by some wrongdoing. So long as the plaintiff has a suspicion, it is clear that the plaintiff must go find the facts. (*Jolly v Eli Lilly & Co.* (1988) 44 Cal.3d 1103) The negligence statute thus incorporates the discovery rule and the complaint was timely to the extent the Henley's discovered the negligence by Lyon no more than two years prior to filing of their negligence claim.

Finally, negligent misrepresentation by a licensed professional such as a real estate broker may have aspects of negligence or fraud, depending on the circumstances of the case. Breach of a fiduciary duty usually constitutes constructive fraud. (*Salahutdin v Valley of California, Inc.* (1994) 24 Cal.App.4<sup>th</sup> 555) If the claim by the Henleys is for negligence, it was timely if discovered no more than two years prior to filing the action. If considered fraud, the claim is timely because it was filed within three years of the close of escrow.

Lyon & Associates petition for writ of mandate is denied. Real parties in interest, the Henleys and the Costas, shall recover their costs.

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