

Mediate Your Real Estate Case— Or Else!

By Louise A. LaMothe

Mediation of real estate disputes is nothing new. Local attorneys have found it can successfully end acrimonious litigation between buyers and sellers at an early stage. Susan Petrovich, of Hatch & Parent, says for example, "Most buyers and sellers are very receptive because no one wants to spend enormous sums on attorneys fees that otherwise could be used to resolve a dispute that usually is over money anyway, despite the emotion that each side feels at the outset."

But not all clients are willing to agree to mediation, at least until they have paid a few attorney's bills and realize that there is no quick end in sight. To circumvent the parties' reluctance, the standard California Association of Realtors' real estate sales form now provides:

"**MEDIATION:** Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. ...Mediation fees, if any, shall be divided equally among the parties involved. If any party commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action." **THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION**

IS INITIALED."(Paragraph 21A)

Local realtors, such as Chris Casebeer of Casebeer & Co., mention that buyers and sellers now need less explanation of ADR: "Since the public sees these provisions in many contracts other than real estate, they are more accepting of them."

If there was any doubt that the public policy in California encourages mediation of real estate disputes, it was put to rest by the Fifth District Court of Appeal in *Leamon v. Krajkiwcz*, 2003 Daily Journal DAR 2035 (Feb. 24, 2003), rehrg den. 2003 Daily Journal DAR 3369 (Mar. 27, 2003).

In the *Leamon* case, the seller, Mrs. Leamon, orally agreed to sell her house to her neighbors, the Krajkiwczes, through a broker who offered to represent both seller and buyers. The form contract had not been signed when she backed out because her daughter said she wanted to buy the house instead. When Mrs. Leamon decided not to go through with the sale to the Krajkiwczes, the broker demanded she sign the form contract to sell to them or he would sue her for his lost commission. Yielding to his threats, she reluctantly signed the contract. After consulting a lawyer, she declared the signed agreement cancelled.

The dispute escalated. When the Krajkiwczes sued in small claims court for breach of contract, seeking \$5000 in damages, Mrs. Leamon and her daughter¹ sued them and the broker to

quiet title and declare the contract void. The Krajkiwczes got an attorney also, and relying on the standard provision in the form contract, demanded mediation of the dispute, but the Leamons refused. In their answer, the Krajkiwczes demanded their attorneys fees under the form contract, which provided:

"**ATTORNEY'S FEES:** 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's fees and costs from the non-prevailing Buyer or Seller, except as provided in Paragraph 21A." (Paragraph 25)

Though the Leamons did not at first seek attorneys fees, they eventually did as well. The legal tangle went forward ultimately to trial. The jury returned a verdict in favor of the Leamons, finding the written contract invalid, but when the Leamons sought to recover over \$27,000 in attorneys fees as prevailing party, the court refused to award them.

The Leamons appealed, arguing that the court's decision ran afoul of Civil Code Section 1717,² the provision allowing either party to claim attorneys fees if the contract allowed fees to either party. The court of appeal agreed with the trial court—no attorneys fees were awardable since the Leamons had refused to mediate the dispute before litigating it even though they claimed the contract was invalid. By failing to mediate, the court said, the Leamons had failed to comply with a contractual condition precedent when compliance was completely within their control. The appellate court chided the parties as follows: "In this case, had the parties resorted to mediation, their dispute may have been resolved in a much less expensive and time-consuming manner."

On rehearing, the Leamons relied on *Wong v. Thrifty Corp.*, 97 Cal. App. 4th 261 (1st Dist. 2002), which had held

that a landlord was entitled to recover attorneys fees under §1717 after having accepted the tenant's CCP §998 offer to settle the case. But the court of appeal was not swayed from its earlier ruling. The court distinguished *Wong* on several grounds, principally that it did not involve satisfaction of a condition precedent within the control of the party requesting attorneys fees.

The contractual restriction on attorneys fees if the prevailing party refused mediation did not offend public policy, the court said. The public policy in favor of mediation was so strong that it trumped the right of a party to recover its attorneys fees even if §1717 were otherwise applicable. The court stated: "Moreover, on the instant facts, public policies of section 1717 are served by contractual conditions encouraging parties to settle their disputes through mediation rather than proceeding to a lengthy, costly trial." 2003 Daily Journal DAR 3369, 3370.

The instruction is clear: A party to a real estate transaction covered by the standard form who refuses to resort first to mediation, even when claiming that the contract providing for mediation is invalid, will not be later able to recover its attorneys fees, even if it prevails at trial or arbitration. ■

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¹ For convenience, Mrs. Leamon and her daughter, Mrs. Herrera, are referred to here as "the Leamons."

² Section 1717 (a) provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."