

RECENT DEVELOPMENTS

- *The Giardinelli Law Group, APC recently settled a wrongful death matter resulting in a victorious settlement for our client.*
- *The Giardinelli Law Group, APC recently settled a lawsuit against a counterfeit loan modification company, resulting in the clients keeping their home.*

CALENDAR

NOTICE

NEW CARETS MLS Rules will go into effect on April 1, 2011!!

C.A.R. Business Meetings

Date: May 4 – 7, 2011
Location: Sacramento, California

Please visit C.A.R.'s website for registration and details!
www.car.org

MLS Rules & Regulations / Data Integrity (Traffic School)

Date: May 13, 2011
Time: 9:00 a.m. – 11:30 a.m.
Location: The Pacific West Association of REALTORS®

Please contact the Pacific West Association of REALTORS® to sign up!

Brown Bag - Seminar

Date: May 18, 2011
Time: 11:30 a.m. – 1:00 p.m.
Location: Southwest Riverside County Association of REALTORS®

Please contact the Southwest Riverside County Association of REALTORS® to sign up!

Courtside Newsletter

Informing Real Estate Brokers, Association members, and local Businesses for over thirty years.

To Mediate or Not to Mediate, That is the Question...

BY: J NISWONGER
RIVERSIDE COUNTY OFFICE



This month's newsletter focuses on the mediation provisions contained in many of the agreements drafted by the California Association of Realtors® (C.A.R.). The following list includes the more frequently used forms that contain mediation provisions: (1) the California Residential Purchase Agreement (RPA-CA, paragraph 26); (2) the Residential Listing Agreement (RLAA, paragraph 19); (3) the Residential Lease/Rental Agreement (LR, paragraph 39); (4) the Property Management Agreement (PMA, paragraph 9); and, (5) the Business Listing Agreement (BLA, paragraph 19). A cursory review of these agreements reveals that the mediation provisions are substantially similar, if not identical. Many Realtors®, however, do not fully understand the mediation clauses, and often ask: "Do I have to mediate my dispute?" and "What happens if I do not mediate a dispute?"

To answer the first question, the agreements do not and cannot compel the parties to mediate a dispute. It is also important to remember that only parties to a contract are affected by the duties imposed. A party who does not want to participate in mediation cannot be forced to do so. That said, however, there are potentially severe consequences for not attempting mediation in good faith before taking other legal action or refusing to mediate when requested to do so.

To answer the second question, if a party prevails but did not attempt to mediate the dispute before filing a lawsuit or requesting arbitration (if the

arbitration paragraph is initialled), the prevailing party waives the right to recover attorneys' fees. Further, if a party refuses to mediate the dispute after the other party requests mediation, the right to recover attorneys' fees is waived, pursuant to the terms of the contract (for example, see Paragraph 26 of the RPA Contract).

The general rule for most C.A.R. drafted agreements with mediation provisions, therefore, is that the aggrieved party must attempt mediation before filing a lawsuit or commencing arbitration if he or she wants to recover attorneys' fees. Of course, if the other side refuses to mediate, the right to attorneys' fees is preserved for the party who attempted to or offered to mediate, and attorneys' fees will generally be denied to the party who refused to participate in mediation.

There are exceptions to this general rule requiring that mediation be attempted. These exceptions are spelled out in the individual standard form agreements and often cause confusion. If a dispute falls under the listed exception, mediation is not required. The exceptions are specific and involve matters that are of an emergency nature or that do not involve primary issues set forth in the agreement. The standard forms contain a number of exceptions. These basic exceptions are discussed below.

Foreclosure. If a party to a standard C.A.R. contract has to begin foreclosure proceedings, mediation does not have to be attempted first. This situation may arise in a purchase agreement

Continued...

that requires the seller to carry paper or any time a party to the contract has a security interest in the property.

Eviction. If a party to the agreement has to file an unlawful detainer action for failure to pay rent, no mediation is required. Requiring mediation would defeat the summary nature of unlawful detainer proceedings and allow the non-paying party an opportunity to cause further delay. This could occur in a rent back situation or where a buyer takes possession before the close of escrow and then breaches the agreement.

Mechanic's Lien. If a party to the contract has performed work on the property, no mediation is required before a mechanic's lien is recorded. Mechanic's liens are strictly governed by statute, and requiring mediation may interfere with the statutory scheme.

Probate, Small Claims, Bankruptcy. A situation may arise where a party to the contract dies, and the property must go through probate proceedings. Additionally, perhaps there is a minor dispute that can be resolved in small claims court, or one of the parties needs to file for bankruptcy. Probate petitions, bankruptcy petitions or small claims actions may be filed without the parties having to first attempt mediation.

Lis Pendens. A *lis pendens* is a recorded notice that the property is involved in legal proceedings. The purpose of a *lis pendens* is to let potential buyers or lenders know of the dispute affecting title or possession so that if the property is sold, the buyer takes title subject to the outcome of the legal proceedings. The standard contracts do not require the parties to attempt mediation before bringing legal action for the purpose of obtaining and recording a *lis pendens* since these types of actions typically arise in emergency situations. In such cases, the parties should attempt mediation at their earliest opportunity after filing suit, and generally before serving the lawsuit in order to ensure that they do not waive their rights to recover attorneys' fees.

Subject to the stated exceptions, the reason many standard C.A.R. forms contain mediation clauses is to encourage resolution of disputes before the parties incur significant expenses and attorneys' fees in a lawsuit or arbitration. The California Legislature has endorsed mediation as an important alternative to litigation (see Code of Civil Procedure section 1775), and has stated: "Mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes" and, "participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences." Such statements confirm that the Legislature recognizes mediation as an excellent opportunity for parties to resolve their differences in a cost-effective manner.



Mediation is more than just a legal requirement to allow parties to a standard C.A.R. agreement to recover legal fees; it is a great opportunity for the parties to take ownership and control of their dispute and participate directly in fashioning a resolution. Mediation is often superior to litigation because it allows the parties to solve problems in ways that may not be available in court or through arbitration. Thus, mediation should not be viewed as merely a hoop to jump through before starting legal proceedings. If the parties engage in mediation in good faith, they often find creative solutions that cost a lot less in terms of time, money and heartache. Mediations, often prove to be a confidential, cost-effective way to resolve disputes before they get out of hand.

Let us tell you about our Mediator/Attorney, J Niswonger...

J Niswonger is an attorney with The Giardinelli Law Group, APC and currently serves on the mediation panel for the Riverside County Superior Court. J has mediated cases for the Court since February 2001 and has been on the mediation panel for the Riverside County Bar Association since 2003. J has mediated a variety of cases, including property disputes, contract disputes, construction defects, personal injury/medical malpractice matters, employment issues, and eminent domain cases. J has mediated and settled many cases for parties who come to mediation simply because the C.A.R. forms require them to do so. In addition to acting as a mediator, J continues to actively improve his mediation skills through continuing education, and has completed the 42 hour course entitled "Mediating the Litigated Case" through the Pepperdine University School of Law, Straus Institute for Dispute Resolution. J is also actively involved in training mediators through the La Sierra University Center for Conflict Resolution. Through The Giardinelli Law Group, APC, J is available to handle private mediations.

BUSINESS CORNER

"We want to help."



BUSINESS TIPS

THREE POTENTIAL COSTS TO EMPLOYERS

1. Retaliating for Sexual Harassment Complaint

All sexual harassment complaints should be taken seriously. Employers should have a written policy that is communicated to employees and consistently followed. Complaints should be promptly investigated and action taken as appropriate to the situation. No adverse action should be taken in retaliation against the complaining employee. Legal counsel should be consulted before terminating an employee who has complained about harassment or discrimination. Companies with 50 or more employees must train all supervisors every two years. Ignoring these requirements could expose a company to significant damage awards. In a recent California case, an employer was found to have terminated an employee in retaliation for refusing to give false information favoring the company in a legal dispute and for complaining that her assistant was being sexually harassed by another worker. The jury awarded the employee \$2,474,172 in damages after deliberating only one hour.

2. Allowing Gambling in the Workplace

This month we have the "March Madness" college basketball tournament. The NFL playoffs and Super Bowl took place in January and February. In October the MLB playoff and World Series will take place. Employees may bet online, and companies may have office pools predicting a baby birth date or other events. Employers should be aware that participating or receiving money, prizes, time off, or other things of monetary value for gambling in the workplace is illegal under the California Penal Code. The penalty for participating in an office betting pool worth under \$2,500 is an infraction with a maximum fine of \$250. Besides legal penalties, other good reasons exist for having a policy prohibiting office pools, including: wasted employee time; misuse of company equipment and supplies; employee dispute over bet or payment requiring HR involvement. Employers can protect themselves by having a clear and consistently applied policy prohibiting workplace gambling.

3. Ignoring Poster Display Rules

California employers must display required posters at each work site in an area accessible to all employees and must hand out pamphlets advising employees of their rights and the laws. The number of employees and the type of business determine the information to be posted. Changes in the law require updated posters. Ignoring the posting and pamphlet delivery requirements may result in fines up to \$17,000.

If you have questions about your company's compliance with these legal requirements or want help in drafting and implementing appropriate policies, contact attorney Sylvia J. Simmons, at sylvia@glawgroupapc.com

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