Dear Friend of Bob Bruss:

This month's newsletter has good and bad news for homeowners. The good news is that the remodel of a home is not subject to the California Occupational Safety and Health Act if the homeowner mistakenly hires an unlicensed contractor. The bad news is that if a homeowner sells a home and builds a new home on a lot which was purchased many years ago, the homeowner may not qualify for a Proposition 60 transfer of assessed basis for real property taxes. Buyers of property subject to recorded CC&Rs will be disappointed to hear that the plain language of the CC&Rs can be changed by the conduct of the neighbors. The good news is that the statute of limitations for construction defects does not necessarily start just because one homeowner in a subdivision complains about water intrusion. The bad news for absentee owners is that they can lose their property due to adverse possession even if they never actually see the adverse use. Finally, landlords need to be on guard because settlement negotiations regarding a notice of rent increase are not privileged communications.

Happy Reading,
Harold

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Homeowner Not Subject To OSHA During Remodel

Lourdes and Omar Abich ("Homeowners") decided to remodel their home in Pasadena ("Property") by adding a new roof, master bedroom, master bath and a garage. The Homeowners hired Miguel Ortiz, an unlicensed contractor ("Handyman") to do the work. The Handyman hired Octaviano Cortez ("Worker"), a day laborer, to do manual labor on the job. The first day that the Worker showed up at the job, the Handyman was on the roof and had taken off one-half of the roof. The Worker went up on the roof and promptly fell through the roof and fractured his spine.

The Worker sued the Homeowners for negligent failure to warn him of a dangerous condition and negligent failure to make the work site safe. The claim that the Homeowners negligently failed to make the work site safe was based upon the allegation that the work site violated the safety requirements of the California Occupational Safety and Health Act ("OSHA"). The trial judge entered a summary judgment in favor of the Homeowners and against the Worker, reasoning that OSHA did not apply to a homeowner.

THE DECISION: The Court of Appeal affirmed the trial judge, holding that the Homeowners were not subject to OSHA. The Court of Appeal pointed to Labor Code Section 6303 ("6303") which provides that OSHA does not apply to "household domestic service" workers. The Court of Appeal reasoned that this home remodel was exempt because its purpose was personal – to enhance the owners' enjoyment of their residence. As an aside, the Court of Appeal stated that the intended target of OSHA is business employers. Having concluded that OSHA did not apply to this home remodel project, the Court of Appeal easily found that the Homeowners had no duty to warn the worker that a roof in the midst of demolition is a dangerous condition because that would be obvious to any reasonable person.

WHY THIS DECISION IS IMPORTANT: This decision exempts homeowners remodeling their homes from complying with the onerous requirements of OSHA. Absent this decision, homeowners' liability insurance premiums would have gone through the roof.

COMMENT: When will homeowners learn to hire licensed contractors? When a homeowner hires a licensed contractor, the contractor's employees can't sue the homeowner for job related injuries. (See the January 2009 issue of the California Real Estate Law Newsletter.)

P.S.: The Cortez decision leaves the door open for an injured worker hired by an unlicensed contractor to sue a homeowner who is remodeling the house for sale because the worker can claim that the homeowner is engaged in a business. To avoid a lawsuit, all homeowners should hire licensed contractors to do any work on their homes.


Homeowners Denied Proposition 60 Transfer of Property Taxes

Kenneth Wunderlich and Jeanette Engdahl ("Homeowners") owned a home at 520 Stagg Lane, Santa Cruz ("Original Home") and a vacant lot at 521 Stagg Lane, Santa Cruz ("Replacement Property"). For real property tax purposes, the Original Home was assessed under Proposition 13 for approximately $190,000. The Replacement Property was assessed under Proposition 13 for approximately $63,000. In 2004, the Homeowners sold the Original Home for $830,000 and built a new home on the Replacement Property for a cost of approximately $670,000. After the new home construction, the County reassessed the Replacement Property at approximately $733,000, consisting of the Proposition 13 land assessment of $63,000 plus the new home construction cost of $670,000. The Homeowners then applied for a Proposition 60 transfer of the Original Home assessment of $190,000 to the Replacement Property. Proposition 60 permits qualified homeowners over 55 years of age to transfer the real property tax assessment on the home which they sell to a new home in the same county provided that the new home value is the same or less than the value of the home which they sold.

The Homeowners claimed that the $733,000 Proposition 13 assessed value of the Replacement Property was less than the $830,000 sale price of the Original Home and, therefore, they should be allowed to transfer the Proposition 13 assessed value of the $190,000 on the Original Home to the
Replacement Property. (The Proposition 60 transfer application would reduce the Homeowners’ real property taxes from about $7,330 per year to about $1,900 per year for an annual saving of about $5,430.) The trial judge ruled that despite the Proposition 13 assessment of the Replacement Property at $753,000, for Proposition 60 purposes the value of the Replacement Property should be its fair market value upon the date of completion of construction of the new home, that is, $900,000. Accordingly, the value of the Replacement Property exceeded the sales price of the Original Home and the Homeowners were denied the benefit of Proposition 60.

THE DECISION: The Court of Appeal affirmed the trial judge and denied the Homeowners the benefit of a Proposition 60 transfer of assessed value.

WHY THIS DECISION IS IMPORTANT: This is a case of first impression, that is, there was no published case on this issue before this case. Now there is a bright line on how to comply with Proposition 60 if you own a lot which you intend to build a new home on in order to transfer your Proposition 13 assessed value.

COMMENT: The lesson to be learned is that if the Homeowners had spent about $70,000 less on building their new home, they could have qualified for a transfer of the Proposition 13 assessed value to the new home. (It is easy to spend less by postponing a part of the construction, like expensive upgrades for the kitchen or exterior finish, until after the Proposition 60 transfer.) Once you qualify for the Proposition 60 transfer, a remodel of the kitchen or exterior finish won’t affect your Proposition 60 entitlements.


Plain Language of CC&Rs Trumped by Conduct of Homeowners Association

Stephanie Hunter-Bloor (“Homeowner”) owns a home in a subdivision in Temecula. All of the homes in the subdivision are subject to recorded Covenants, Conditions and Restrictions (“CC&Rs”), which CC&Rs created the Starlight Ridge South Homeowners Association (“HOA”). The subdivision has both landscaped areas and an extensive, large storm drainage system which maintains the integrity of the land in the subdivision. The Homeowner had both a landscape area and a drainage area at the rear of her lot. In the landscape area was a V-shaped ditch which had partially collapsed. The HOA sued the Homeowner for an injunction, ordering the Homeowner to repair the V-shaped ditch. The HOA pointed to paragraph 7 of the CC&Rs which provided, in effect, that a homeowner was required to repair the drainage structures on his or her lot. The Homeowner pointed to paragraph 6 of the CC&Rs which provided, in effect, that the HOA was required to maintain the landscape area. The trial judge granted a summary judgment in favor of the Homeowner and against the HOA. The trial judge ruled that the V-shaped ditch was in a landscape area and was the responsibility of the HOA.

THE DECISION: The Court of Appeal reversed and ordered a judgment in favor of the HOA and against the Homeowner. The Court of Appeal admitted that the plain language of the CC&Rs could support both the HOA’s interpretation and the Homeowner’s interpretation. Accordingly, the Court of Appeal decided the case based upon the HOA’s evidence that for more than 20 years, the HOA had been making homeowners repair the V-shaped ditches on their lots.

WHY THIS DECISION IS IMPORTANT: This case puts homebuyers on notice that just reading the CC&Rs on the home or condominium which they are buying won’t tell them for sure what they will be paying for regarding repairs to their property.

COMMENT: Pity the poor homebuyer of a condominium or home in a planned unit development who can’t rely on the plain language of the CC&Rs.

One Complaint by HOA Member Does Not Start Statute of Limitations for Construction Defect Claim

In 1997, the Creekridge Townhome Owners Association ("HOA") hired C. Scott Whitten Inc. ("Construction Manager") to manage and inspect the re-roofing of eleven buildings, consisting of 61 units, in a townhome community ("Project"). The Project involved replacing shake roofs with concrete tile roofs. Before the end of 1997, one townhome owner complained that there were broken roof tiles above her unit and moisture inside her second story bedroom window. There were no other roof problems until 2003. As a result of numerous roof leaks in 2003, the HOA sued the Construction Manager for construction defects. The Construction Manager contended that the statute of limitations had run on the latest defect claims because of the 1997 roof complaint. The trial judge agreed with the Construction Manager and entered a summary judgment against the HOA.

THE DECISION: The Court of Appeal reversed the trial judge, reasoning that the report of a small problem does not require a homeowners association to conduct an extensive investigation for possible latent defects. The Court of Appeal held that the statute of limitations does not commence to run until there is sufficient damage to cause a reasonable person to suspect a construction defect. That is, the HOA had no duty to discover the latent defects in 1997. Accordingly, the lawsuit in 2004 was timely.

WHY THIS DECISION IS IMPORTANT: This decision will save homeowners associations significant money. Because of this decision, homeowners associations will not have to conduct expensive investigations for possible construction defects just because one homeowner complains about a small problem.

COMMENT: Every homeowners association with numerous members has one complainer who nitpicks every repair or improvement made to the project. This case will allow the HOA to ignore the complainer until there is really something to look into.

Out of State Land Owner Loses Property by Adverse Possession

Lyman and Mary Bender ("Parents") were the owners of three lots in Granite Bay improved with a home and a cabin. The Parents gift deeded the lot with the cabin ("Cabin Lot") to their daughter, Bettyan Gayl Bender ("Owner"). The Owner later moved to Ireland. Years later, David Nielsen and Tricia Nielsen ("Buyers") wanted to buy the Parents' home and the Cabin Lot. The Parents were unable to obtain a deed from the Owner. Accordingly, the Parents gave the Buyers a grant deed to the home and a quitclaim deed to the Cabin Lot. The Buyers moved into the home and proceeded to maintain the cabin as a playhouse for their children. The Buyers also paid the annual real property taxes for the Cabin Lot. When the Owner died, the Buyers brought suit against the estate of the Owner to establish their title by adverse possession. The trial judge ruled that the Buyers had acquired title to the Cabin Lot by adverse possession. The Owner's estate appealed, contending that the Owner had been in Ireland during the time that the Buyers occupied the property and had no actual or constructive knowledge of the Buyers' possession of the Cabin Lot.

THE DECISION: The Court of Appeal affirmed the judgment quieting title in the Buyers. The Court of Appeal held that open and notorious use of the Cabin Lot was sufficient to impute constructive knowledge to the Owner, if the Owner had looked at the Cabin Lot. Accordingly, the Owner's ignorance of the open and notorious use was the result of a failure to look and, therefore, did not vitiate or undermine the legal effect of the adverse use.

WHY THIS DECISION IS IMPORTANT: This is the first published case which I am aware of which holds that an absentee landowner who has never been physically present to observe the adverse possessor's use of the owner's property is still deemed to have knowledge of the use.

COMMENT: Absentee landowners will need to be more vigilant in managing their California real property.

Tenant’s Settlement of Rent Dispute Does Not Bar Fraud Claim

John Delois ("Tenant") rented a loft at 743 Harrison Street, San Francisco ("Property") from Barrett Block Partners ("Landlord"). The Landlord decided to redevelop the property as condominiums. The Tenant heard about the plans and attended a San Francisco Planning Commission hearing to oppose the plans. After the hearing, the Landlord gave a rent increase notice to the Tenant, increasing the rent from $5,033 per month to $8,900 per month. Following a dispute about the rent increase, the Landlord and Tenant signed a "Tenancy Termination Agreement" ("Settlement Agreement"). When the Tenant moved out pursuant to the Settlement Agreement, the Landlord refused to return the Tenant's security deposit. The Tenant then sued the Landlord for fraudulent misrepresentations and breach of the Settlement Agreement, among other claims. The Landlord moved to strike the fraudulent misrepresentation cause of action, contending that settlement communications are protected speech pursuant to California Code of Civil Procedure Section 425.16 (see also Civil Code Section 47, "Litigation Privilege"). The trial judge agreed and struck the fraudulent misrepresentation cause of action.

THE DECISION: The Court of Appeal reversed the trial judge and reinstated the fraudulent misrepresentation cause of action. While the Court of Appeal acknowledged that settlement communications related to a lawsuit are protected speech, the Court of Appeal held that communications in an unsuccessful attempt by a landlord to settle a rent dispute do not constitute protected speech.

WHY THIS DECISION IS IMPORTANT: This case demonstrates the importance of commencing a lawsuit before negotiating a settlement of a landlord-tenant dispute. Settlements of lawsuits are favored by the courts because the court system is not staffed to try more than a small percentage of civil lawsuits. Accordingly, the courts are protective of statements made in settlement negotiations of lawsuits. If the Landlord in this case had filed an unlawful detainer action and then settled the lawsuit, the Tenant could not sue for misrepresentations in the settlement communications.

COMMENT: In business negotiations of real property transactions, landlords and sellers run the risk of being sued for fraudulent misrepresentations regarding the property. However, if a lawsuit is filed when a dispute arises and then a settlement is negotiated, claims of misrepresentation are barred by the litigation privilege. Real property owners should act accordingly.

Robert J. Bruss (1940–2007)

Robert J. Bruss was a real estate attorney and broker whose nationally syndicated advice columns earned him the nickname of the "Dear Abby of real estate." During his life, Bob wrote as many as seven columns a week, including the "Real Estate Mailbag," question and answer feature that was carried in more than 175 newspapers nationwide, including the Washington Post, the Los Angeles Times, and the New York Post. In addition to his columns, Bob Bruss produced two monthly newsletters, including this California Real Estate Law Newsletter. His book, "The Smart Investor's Guide to Real Estate" (1981), has appeared in multiple editions.

In addition to his writing and an active career in real estate, Bob was an associate professor of real estate at College of San Mateo for 28 years. Following his death in 2007, publication of the Real Estate Law Newsletter was carried on by his estate and then was transferred to the San Mateo County Community College District. The Newsletter is written and edited by Harold Justman. Bob's longtime friend and personal real estate attorney of more than 25 years, who contributes his time to this project as a tribute to Bob's work. Harold is a graduate of Stanford University and a colleague of Bob's at Hastings's Law School; he continues to reach the Legal Aspects of Real Estate Class, which he taught in partnership with Bob for many years at College of San Mateo. The newsletter is published by the San Mateo County Community College District; proceeds benefit the Home Savings Incentive Fund for faculty and staff of the College District.