



Courtside *Newsletter*

C.A.R. Listing Agreement Has Teeth—Will Bite in Court



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The California Association of REALTORS® (C.A.R.) standard-issued Listing Agreement contains an indemnification provision that serves to save the brokerage from the legal consequences of the conduct of another. But who exactly are these “other” people? Recently, the California Court of Appeal decided Bardack v. Tomjanovich, et al., clarifying who this provision covers.

In 2004 Rudy and Sophie Tomjanovich (“Tomjanoviches”) purchased a home for \$4.5 million in Pacific Palisades. At the time of the purchase, they were advised that the home had active water leaks, and after the transaction closed, experienced these leaks themselves. In 2007, they listed the home for sale with Coldwell Banker Residential Brokerage Company (“Coldwell Banker”). At the time, Coldwell Banker used the standard C.A.R. Listing Agreement, which provides in pertinent part:

“Seller further agrees to indemnify, defend and hold Broker harmless from all claims, disputes, litigation, judgments, and attorney fees arising from the incorrect information supplied by the Seller, or from any material facts that the Seller knows but fails to disclose.”

In May 2007, Steven Bardack (“Bardack”) purchased the home for \$6.5 million under the terms of a C.A.R. Residential Purchase Agreement. According to the terms of that Agreement, the Tomjanoviches were required to “disclose known material facts and defects affecting the property” to Bardack. However, the Tomjanoviches failed

to mention both the disclosures they received about water leaks when they purchased the home, and the fact that they had experienced water leaks themselves.

After the transaction closed, Bardack experienced multiple water leaks and sued the Tomjanoviches, alleging multiple causes of action including breach of contract, intentional misrepresentation, and negligence for failing to disclose the water leaks. The Tomjanoviches then cross-complained against Coldwell Banker for contractual indemnity, alleging Coldwell Banker was negligent and breached its fiduciary duties to the Tomjanoviches in connection with the sale of their home to Bardack.

The jury found the Tomjanoviches liable to Bardack for intentional misrepresentation, concealment, and breach of contract. It was also determined that Coldwell Banker had not acted negligently or breached its fiduciary duty to the Tomjanoviches. As such, Coldwell Banker filed a motion for \$367,790.57 in attorneys’ fees, based on the indemnification provision in the Listing Agreement. The trial court agreed and awarded \$348,372.00 attorneys’ fees to Coldwell Banker, finding that the indemnification provision encompassed direct claims.

The Tomjanoviches appealed the award of the attorneys’ fees, contending the indemnity clause only applied to third party claims unless language in the agreement “clearly and explicitly” shows intent to cover direct disputes between the indemnitee and indemnitor. The Tomjanoviches also

contended that the language used in the provision has been interpreted by the California courts as referring to only third-party liability claims. Coldwell Banker (obviously) disagreed, arguing the indemnification agreement broadly applied to “both first and third party claims, absent language limiting its scope to third party claims.” The Court of Appeal agreed with Coldwell Banker, finding the indemnification provision did not expressly limit itself to third parties. The Court of Appeal pointed out that the lawsuit was the result of the Tomjanoviches’ wrongdoing by failing to disclose construction defects in their home that were known only to them and not to Coldwell Banker, which caused Coldwell Banker to incur attorneys’ fees. Coldwell Banker was also awarded its costs on appeal.

Even though this ruling will remain unpublished, it is still important in the real estate world. It shows that the indemnification provision in the C.A.R. Listing Agreement has teeth. While Coldwell Banker was not able to recover all of its fees and costs in the instant action, it was able to recover a significant amount by invoking this provision. Practitioners who are not using the C.A.R. form should be sure to include similar language in their own listing agreements in order to protect themselves from the costs of a lawsuit. Sellers may not intentionally fail to disclose defects in a home (“it was fixed” is an often heard excuse), but that does not mean their neglect won’t come back to haunt both themselves and their brokers.

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