



Courtside *Newsletter*

California Court Increases the Fiduciary Obligations in Dual Agency Transactions

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In Horiike v. Coldwell Banker Residential Brokerage Company, et al., the California Court of

Appeal further clarified the fiduciary duty of a salesperson in a dual agency relationship. Specifically, the Court addressed the question of whether a listing agent working under a dual agent brokerage owes a fiduciary duty to the buyer of a real property.

Pursuant to California Civil Code Section 2079.13(d), a “dual agent” is “an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.” A dual agency is also created when an agent represents the seller, and a different agent from the same brokerage firm represents the buyer. It can become a point of contention when one considers the fact that both agents owe a fiduciary duty—a duty of utmost care, integrity, honesty, and loyalty in dealings—to both the buyer and the seller.

In the instant action, in 2006 owners of a residential property in Malibu, California hired real estate agent Chris Cortazzo (“Cortazzo”) of Coldwell Banker Residential Brokerage (“CB”) to sell their property. The building permit at the time listed the property as having “11,050 square feet, a guest house of 746 square feet, a garage of 1,080 square feet, and a

basement of unspecified area.” When listing the property in the multiple listing service, Cortazzo stated that the home “offers approximately 15,000 square feet of living areas.” Cortazzo also prepared a flier for the property reconfirming the 15,000 square feet of living area.

In July 2007, after prospective buyers cancelled a purchase transaction in March, Cortazzo changed the MLS listing. He stated that the approximate square footage was “0/O.T.,” by which he meant “zero square feet and other comments.” At that time, Hiroshi Horiike (“Horiike”) was working with another CB agent, Chuziko Namba (“Namba”), to purchase a residential property, Namba arranged for his client to view Cortazzo’s Malibu property, at which time Cortazzo provided Horiike with a copy of the flier stating the property had 15,000 square feet of living areas. Escrow opened soon thereafter, during which both Cortazzo and Namba disclosed in writing the nature of the dual agency relationship. The form they executed and provided to Horiike “explicitly stated that a dual agent has a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with either the seller or the buyer.”

During the transaction, visual inspection disclosure that Cortazzo provided to Horiike noted adjacent vacant lots were subject to building development. At no

time did Cortazzo advise Horiike to hire a qualified specialist to verify the square footage of the home. However, Horiike completed the property transaction. It was while he was preparing to do work on the property in 2009 that Horiike realized the discrepancy between Cortazzo’s report of square footage, and the actual square footage of the property’s living area.

In November 2010, Horiike filed a suit against Cortazzo and CB for breach of fiduciary duty, intentional and negligent misrepresentation, and other allegations. Horiike contended that Cortazzo, as an associate licensee of CB, owed a fiduciary duty to him equivalent to the fiduciary duty owed by CB and his own CB agent. Cortazzo filed a motion for nonsuit on the cause of action for breach of fiduciary duty, and the trial court granted the motion on the ground that Cortazzo, as listing agent, had no fiduciary duty to Horiike.

On appeal, the Court of Appeal reversed and found that Cortazzo did, in fact, have a fiduciary duty to Horiike. The Court explains the nature of the dual agency relationship stating, “when one salesperson obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker.

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Calendar

Broker Supervision

Date: June 26, 2014
 Time: 9:00 a.m. – 12:00 p.m.
 Location: Tri-Counties Association of REALTORS®

Contact Tri-Counties to sign up!
www.tricorealtors.com

Brown Bag

Date: June 27, 2014
 Time: 11:30 a.m. – 1:00 p.m.
 Location: Southwest Riverside County Association of REALTORS®

Contact SRCAR to sign up!
www.srcar.org

Property Management

Date: July 16, 2014
 Time: 9:00 a.m. – 1:00 p.m.
 Location: Tri-Counties Association of REALTORS®

Contact Tri-Counties to sign up!
www.tricorealtors.com

Changes to the RPA

Date: August 8, 2014
 Time: 10:00 a.m. – 11:30 a.m.
 1:00 p.m. – 2:30 p.m.
 Location: Pacific West Association of REALTORS®

Contact PWR to sign up!
www.pwr.net

RPA

Date: September 12, 2014
 Time: 9:00 a.m. – 1:00 p.m.
 Location: Pacific West Association of REALTORS®

Contact PWR to sign up!
www.pwr.net

C.A.R. Business Meetings

Date: October 8-11, 2014
 Location: Anaheim Convention Center
 Go to www.car.org for more information and registration!

That broker thereby becomes a dual agent representing both parties.” (Emphasis added.) The Court goes on to explain where the confusion with dual agency under a brokerage may arise, stating “the real estate industry has sought to establish salespersons as ‘independent contractors’ for tax purposes..., and this concept has enhanced the misunderstanding of salespersons that they can deal independently in the transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction.”

In light of this analysis, the Court found that “Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB. The motion for nonsuit should have been denied and the cause of action against the Agent for breach of fiduciary duty submitted to the jury.” Cortazzo had a “duty to perform all necessary research and investigation in order to know those important matters that [would] affect [Horiike’s] decision,” and he had a duty to counsel and advise Horiike. In the instant action, a jury may find that, since Cortazzo knew the square footage of the property measured differently in different documents, he should have advised Horiike to have a specialist verify the square footage. Since he did not, a jury could also find that Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage.

The California Association of REALTORS®’ Legal Action Fund Trustees have instructed the C.A.R. attorneys to prepare a brief in support of a petition for rehearing the Horiike case in front of the California Supreme Court.

With the ruling in this new Appellate Court case, brokers may need to update their policy manual and agent training programs to properly reflect that the sale person that obtains the listing will also have a fiduciary duty to the buyer in a dual agency situation. Agents will need to be educated on the details on the dual agency rules and how they will now be required to communicate with the principals on the other side of the transaction. While brokers always enjoy the potential financial benefits from dual agency, it remains one of the most litigated real estate issues in the State of California. Brokers may also need to take special care and provide additional supervision over both agents any time the brokerage office represents both sides to a transaction.

Dual agency is a hot button issue in California real estate and for good reason. It can be confusing to determine what duties are owed and to whom. Any real estate agents or brokers who are considering entering into a dual agency relationship must be sure to understand the laws surrounding such a delicate situation, so that no party leaves the transaction feeling slighted.

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