Abdulaziz, Grossbart & Rudman
NEWS
Emphasizing All Phases of Construction Law

FEBRUARY 2010 VOLUME 6, NUMBER 1

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EASEMENTS

I do not believe that we have written about easements in the past. I thought that it would be a good idea to give you some information dealing with easements.

Generally speaking, an easement is a restricted right to use another person's property to ravel across and it must be less than the right of ownership. That means that the easement allows someone to use the property in accordance with an agreement, but it is less than any ownership right. That is what this case is all about.

This is an appeal from a judgment of the Superior Court of Orange County. The Appellate Court disagreed and overturned the decision.

Douglas and Hope Gray, on the one hand, and Daniel and Marilyn McCormick, on the other hand, owned neighboring properties in a subdivision of multi-million dollar luxury homes. The contract between the parties stated that the Grays hold an exclusive access easement over the property owned by the McCormicks. The Grays believed that the McCormicks were kept from making any use whatsoever of the easement area, and they sued to obtain a judgment to that effect. The McCormicks on the other hand, argued that they are entitled to make any use of the easement area "that does not interfere with the Grays' use of the easement," and they filed a cross-complaint in response to Grays' complaint.

The easement area is currently unimproved. However, the McCormicks have been using the easement area for the passage of their horses and the transportation of their rubbish, horse feed, manure, etc. The Grays, who paid for the unimproved six acres, said they planned to spend several times that amount in the construction of the residence and other improvements and intended to improve the easement area with a driveway, perimeter walls, and landscaping. They objected to the McCormicks' continued use of the easement area. The McCormicks, on the other hand, objected to the Grays' plans to exclude them from use of the easement area and to place walls on it. They say that they designed their landscaping to make continued use of the easement area for the passage of their horses and for the transportation of their rubbish, horse feed and manure. The Grays' position was that the "exclusive easement" was to mean that the Grays could exclude all other persons from the use of the easement area, including, specifically, the owners of lot 3 (the McCormicks). They also emphasized that the Supplemental Declaration of Covenants, Conditions, Restrictions and Reservations of Easements for Coto de Case (Supplemental CC&Rs) were clear with respect to the exclusivity of the easement and that an exclusive easement, in effect, prohibits the owners of the servient tenement from using that easement area at all.

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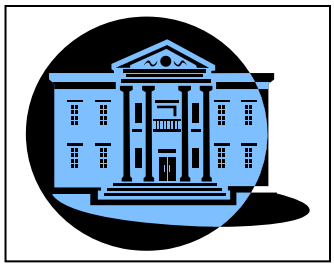
The question was whether the language of the Supplemental CC&Rs clearly expressed the intention that the use of the easement area should have been exclusive to the owners of Lot 6 (the Grays), in the sense of excluding all other owners of property in the subdivision, including the owners of Lot 3 (the McCormicks). The court saw that it did.

Section 12 of the language expressly defined the easement as an "exclusive easement of access, ingress and egress." It specifically stated that "[t]he Easement is created for the benefit of the Owner of Lot 6 . . . ." It emphasized that the "[u]se of the Easement by the Owner of Lot 6 and such Owner's family, guests, tenants and invitees shall be exclusive . . . ." In other words, the provision repeatedly used language of exclusivity. It clearly states that the "[u]se" by the owner of Lot 6 "shall be exclusive."

"I AM" is reportedly the shortest sentence in the English language. Could it be that "I DO" is the longest sentence?

GEORGE CARLIN .



DOES AN ARBITRATION PROVISION IN AN AGREEMENT AUTOMATICALLY REQUIRE ARBITRATION OF STATUTORY WAGE CLAIMS?

In 2003, the Los Angeles Unified School District (LAUSD) entered into a "project stabilization agreement" (Agreement) with various entities and craft unions.

The improvement required certain labor relations policies with respect to LAUSD's plan to construct and rehabilitate school facilities.

Axxis Network & Telecommunications, Inc. (Axxis) performed services on the project under contract with LAUSD. LAUSD required that Axxis agree to be bound by the Agreement. Sometime later, three employees sued Axxis alleging that Axxis failed to pay proper wages.

Axxis tried to have the dispute over the wage claim of the employees arbitrated. The trial court stated that the Agreement "did not contain a clear and unmistakable waiver of employee's rights to a judicial forum." The Appellate Court agreed.

The Appellate Court stated that the agreement in this case requires arbitration of statutory claims only when it is "clear and unmistakable." If an agreement does not clearly state the intent, arbitration may still be required if the agreement contains a general arbitration clause and is "unmistakably clear" that the statutes at issue are part of the agreement.

The Appellate Court stated that the Agreement contained no express provision clearly requiring arbitration. The arbitration provision applied only to disputes over the contract, and not statutory violations. Therefore, arbitration was not required.

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Signs Seen Around Town:

On a fence:

"Salesmen welcome! Dog food is expensive!"

At a tire store:

"Invite us to your next blowout"

In a non-smoking area:

"If we see smoke, we will assume you are on fire and take appropriate action."

SUPPLIERS LIEN SEMINAR

Join attorney Milene C. Apanian of our firm for an extended and useful coffee break, and the coffee is on us.

You are invited to a complimentary Mechanic's Lien & Stop Notice seminar for Material Suppliers on March 11, 2010, at The Beverly Garland Holiday Inn, North Hollywood.

While you may not be a material supplier, you definitely know and work with suppliers. Join us to hear about collection strategies used by material suppliers. Learn how to recognize invalid and unenforceable Mechanic's Liens & Stop Notices in only two hours!

Take advantage of our practical tips, useful checklists and complimentary forms. It will pay off!

Click on the link to register. **Register Now!**

If you have questions about the seminar or how to register, please call Debbie at (818)760-2000.

Also, if you know material suppliers who will benefit from the seminar, please share this invitation with them."

YOUTH v. AGE

A wealthy old lady decides to go on a photo safari in Africa, taking her faithful old poodle named Cuddles, along for company.

One day the poodle starts chasing butterflies and before long, Cuddles discovers that he's lost. Wandering about, he notices a leopard heading rapidly in his direction with the intention of having lunch.

The old poodle thinks, "Oh, oh! I'm in deep doo-doo now!" Noticing some bones on the ground close by, he immediately settles down to chew on the bones with his back to the approaching cat. Just as the leopard is about to leap, the old poodle exclaims loudly, "Boy, that was one delicious leopard! I wonder if there are any more around here?"

Hearing this, the young leopard halts his attack in mid-strike, a look of terror comes

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over him, and he slinks away into the trees. "Whew!" says the leopard, "That was close! That old poodle nearly had me!"

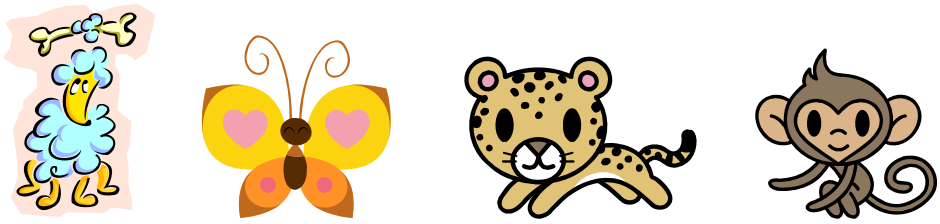
Meanwhile, a monkey who had been watching the whole scene from a nearby tree, figures he can put this knowledge to good use and trade it for protection from the leopard. So off he goes, but the old poodle sees him heading after the leopard with great speed, and figures that something must be up. The monkey soon catches up with the leopard, spills the beans and strikes a deal for himself with the leopard.

The young leopard is furious at being made a fool of and says, "Here, monkey, hop on my back and see what's going to happen to that conniving canine!"

Now, the old poodle sees the leopard coming with the monkey on his back and thinks, "What am I going to do now?" but instead of running, the dog sits down with his back to his attackers, pretending he hasn't seen them yet, and just when they get close enough to hear, the old poodle says.

"'Where's that monkey? I sent him off an hour ago to bring me another leopard!"

THANK YOU CHARLENE MCCOMBS



WHEN DOES THE TEN-YEAR STATUTE OF LIMITATIONS BEGIN TO RUN?

In 1961, the San Diego Unified School District ("District") leased property to the county of San Diego to open a sanitary landfill. The lease required that the County of San Diego agreed to hold the District harmless for liability arising from the property.

The landfill stayed in operation until 1967. The District constructed a school on the property in 1968. In 1987, the San Diego Regional Water Quality Control Board ("Board") ruled that the County of San Diego was the operator of the landfill site and required it to take remedial measures to comply with any newly enacted environmental legislation.

In 1999, the County of San Diego and District were issued a violation notice for failing to comply with the remedial request of the Board. The County of San Diego and District entered into a "sharing" agreement to divide the responsibilities. The District performed all of the remedial actions required and sued the County of San Diego for breach of contract based on the lease and the "sharing" agreement.

The trial court granted the County of San Diego's motion for summary judgment (asking court to find in their favor before trial), finding the complaint was based on a latent defect in the County of San Diego's "improvement" which was time barred and beyond the statute of limitations. The Appellate Court did not agree.

Code of Civil Procedure Section 337.15 bars any action to recover

damages based on a latent defect in an improvement to real property brought more than ten years after substantial completion of the improvement to real property. In this case, the District did not argue that the landfill fell below the standard of care, but the County of San Diego breached its lease contract and "sharing" agreement by not sharing in the costs of the remedial measures required. Therefore, the Appellate Court held that a summary judgment was inappropriate where the causes of action did not fall in Section 337.15's statute of limitations.

SUBSTANTIAL COMPLIANCE

Prior to March 2003, Dave Cohen, Yossi Grimberg and Arie Golan formed a partnership to perform construction work. Golan was the only licensed contractor partner. Then, on May 4, 2003, Golan disassociated from that license in accordance with *Business and Professions Code* Section 7032(c)

On May 6, 2003, Cohen and Grimberg filed a "fictitious business name statement" listing them as the sole partners.

On June 16, 2003 the defendants in this case, Cohen and Grimberg, contracted with Theresa Oceguera for home improvement and construction work. They started work the next day. Neither Cohen nor Grimberg were licensed from May 2003 until June 2003, which is when the job was completed.

The trial court determined that Oceguera was entitled to a return of money paid in accordance with *Business and Professions Code* Section 7031. This was affirmed on appeal.

Business and Professions Code Section 7076, subdivision (c) states: "A partnership license shall be canceled upon the disassociation of a general partner or upon the dissolution of the partnership… Failure to notify the registrar within 90 days of the disassociation or dissolution is grounds for disciplinary action."

Business and Professions Code Section 7031 permits a person to seek a refund of payment from an unlicensed contractor under a construction agreement. The only defense is whether there was a "substantial compliance" with respect to the licensing requirement. In this case there was none.

Golan's disassociation caused a cancellation of the partnership's license. Although I do not believe this is required, the court concluded that the defendants knew or should have known that the partnership was unlicensed as Golan was the only licensed partner. After disassociation the defendants did not submit a written request for continuance, did not later submit a fictitious business name statement, nor did they try in any way to get themselves licensed.

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