

Awarding Attorney's Fees: You Be The Judge! by Dale S. Albertstone, Esq.

An interesting decision was rendered by the California Court of Appeal on May 28, 2008 pertaining to the award of attorney's fees where an aggrieved buyer of a house failed to propose mediation to the seller before resorting to litigation.

What is Mediation?

Before proceeding to the facts of this new case, entitled Lange v. Schilling, let's first examine the nature of mediation. Mediation is a process by which two (or more) parties, with the assistance of a neutral third party (i.e. the mediator), attempt to resolve one or more legal disputes arising between themselves.

In the typical situation, the parties will meet with the mediator in private office building. The parties explain their relative positions to the mediator, who then evaluates their respective concerns, rights and obligations. The mediator then offers suggestions or encouragement to the parties in an effort to help resolve their differences and reach a settlement.

Often, the parties will submit to the mediator a written statement of their positions before they participate in person. If the parties are represented by attorneys, submission of pre-mediation briefs occurs nearly 100% of the time.

Mediators usually distance the parties from one another by providing them with separate conference rooms at the facility. The mediator then walks back and forth between the rooms to listen to the participants' positions. By segregating the parties, rather than having them in the same room at the same time when discussing the issues, egos are typically kept out of the picture, so that reason can prevail.

Perhaps the most important aspect of mediation is that any resolution of the disputes requires the consent of all parties and neither the mediator nor one of the parties can compel the other to settle.

If the contested issues are resolved at the mediation, they are usually reduced to a written settlement agreement which is dated and signed before anyone goes home (therefore preventing one of the parties from later changing his/her mind). If the disputes are not resolved, then the session is ended by the mediator and the parties remain in exactly the same legal position relative to their disputes as they were in prior to the commencement of the mediation.

If the matter does not settle, nothing discussed at mediation can be used at a subsequent trial or other formal proceeding.

Among the benefits of mediation is that, in a real estate context, probably 50% to 75% of all cases settle. In addition, the cost of the mediation (including the mediator's fee and any attorney's fees), are nominal compared to the cost of litigation. Further, the parties have the opportunity to control their own destiny in mediation, whereas in court or

arbitration, a binding decision will be made by a third party, such as a judge, jury or arbitrator.

The Lange Case

In Lange, the buyer and seller used the California Association of Realtors' standard residential form agreement as their contract for the purchase and sell of a lakeside home. The contract contained three provisions relevant to the within discussion. The first stated that in any litigation or arbitration, the prevailing buyer or seller shall be entitled to recover reasonable attorney's fees from the non-prevailing party.

The second provision provided: "Buyer and Seller agree to mediate any dispute or claim arising between them out of this agreement, before resorting to arbitration or court action."

Finally, the contract stated that if "any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recovery attorney's fees," even if they win the action.

During the calendar year following the sale, the buyer learned of various construction problems with the property and believed that the seller misrepresented matters concerning the level of the lake.

Before filing the suit, the buyer was unable to locate the seller. He knew that the seller had moved from his last known residence in Copperopolis, California and was traveling in California and Nevada in an RV. The buyer also attempted to ascertain an address for the seller through an internet search, but was unsuccessful.

Thus, not being able to find the seller, the buyer initiated litigation. Soon thereafter, the buyer hired a private investigator who, 16 days later, discovered a mailing address for the seller in the small town of Pahrump, Nevada. The seller was then served by mail with the Complaint. Thereafter, the buyer, through his lawyer, proposed that the parties submit the disputes to mediation.

Evidently, the seller did not agree to mediate.

The case went to trial, with the buyer prevailing to the tune of a \$13,000 judgment, after spending \$113,000 in attorney's fees.

The trial court determined that plaintiff offered a reasonable justification for failing to mediate prior to suit (i.e. he did not know the seller's whereabouts) and thereupon awarded the buyer \$80,710 in fees. (No reason was given why the court reduced the fees from the \$113,000 actually incurred.)

The seller then appealed the award of attorney's fees to the California Court of Appeal. **So, you be the judge! If you were one of the justices on the appellate court, would you uphold the attorney's fees award or reverse it?**

The Appellate Court's Determination

Here is what the three justices assigned to the case decided. First, they rejected the buyer's contention that the buyer should be excused from mediation because he was unable to locate the sellers prior to filing the action. Indeed, the court observed that within just over 2 weeks after commencing the proceedings, the investigator discovered the seller's mailing address, whereupon the buyer then sent the Complaint.

Second, the Court of Appeal rejected the buyer's contention that he "substantially complied" with the mediation requirement of the contract because some time after the litigation was filed, but before it was actively pursued, the buyer offered to mediate. The justices unanimously determined that "substantial compliance" does not satisfy the clear and unequivocal provisions of the contract which expressly stated that attorney's fees are not recoverable to the prevailing party unless he participates in mediation prior to the commencement of the action.

The Court of Appeal then reversed the award of the trial court and held that the buyer could retain his \$13,000 judgment, but not recover the \$113,000 attorney's fees he expended to obtain the judgment. Ouch!

Conclusion

Lange is one of the better reasoned cases recently published by the California Court of Appeal. I say that in the context that the justices enforced the literal provisions of the contract exactly as they were written, unlike the trial court which created its own exception to the absolute requirement of mediation as required by the contract.

While the Court of Appeal might have upheld the trial court's finding in favor of the buyer on the attorney's fees issue had the buyer engaged in diligent efforts (rather than a cursory internet search) to locate the whereabouts of the seller prior to filing suit, the appellate did not have to reach that more difficult issue since the seller's mailing address was ascertained just 2 weeks after the buyer hired the investigator.

What is important to learn from this case is that whether one is a buyer or seller under a contract requiring mediation, he/she should always endeavor to participate in mediation, if given the opportunity, prior to the filing of a lawsuit or arbitration proceeding.

In addition, even if the contract does not compel mediation, sound business judgment often dictates that the parties voluntarily participate in mediation before formal proceedings are commenced. Since the majority of mediated cases settle, mediation is a wonderful opportunity to avoid expensive legal proceedings while at the same time empowering the parties to have input in their own destiny.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert

witness for and against other attorneys who have been accused of legal malpractice. Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.