

How to Draft an Enforceable Settlement Agreement By Dale Alberstone, Esquire

My article this month is geared a little more toward attorneys than apartment owners. However, it is the apartment owner, not the attorney, who suffers if a settlement agreement of a pending litigation is not well drafted.

When a case is settled, hopefully in favor of the owner, damages are typically tendered by a single payment at the time of execution of the agreement, or in multiple installments, over time.

The easiest agreement to draft is one in which payment is made concurrently with the execution of the document. That type of settlement agreement is written so as to provide that the money is paid at the same time the agreement is exchanged between the parties. The principal concern about a concurrent payment is that the tender should be made by a cashier's check, rather than a personal check. While it is true that the drawer of a cashier's check may stop payment on the instrument in the same manner that he may stop payment on a personal check, the cashier's check offers two benefits. First, the payee (hopefully, the apartment owner) knows that the bank's account contains sufficient funds to pay the cashier's check at the time it was drawn. The account, on which a personal check is drawn, may not. Second, drawers of cashier's checks stop payment far less frequently than on personal checks.

When payment is made concurrently with the execution of the settlement agreement, generally the court is not called on to render a judgment. The case is simply dismissed.

With payments over time, a procedure should be established in the settlement agreement by which a court judgment may be entered if the debtor misses an installment payment. There are two principal ways by which the payments can be reduced to a court judgment in the event that they are not timely made.

Of the two, the better procedure, though often overlooked, is to have the debtor and his counsel execute a Stipulation for Judgment which provides that in the event any installment is not paid on time, the apartment owner's attorney can immediately file the Stipulation with the court and immediately obtain a judgment thereon. This procedure, though frequently objected to by the debtor or his counsel, maximizes the likelihood that the court will enter a judgment against the debtor without the debtor's interference.

The settlement agreement should be drafted to include a provision that the apartment owner's attorney will hold the original Stipulation for Judgment in his office and not file the same with the court so long as the debtor strictly and timely complies with his payment obligations. The agreement should also provide that if the debtor fails on any occasion to make the payment on the date due, the owner's attorney may immediately thereafter file the Stipulation with the court and obtain judgment for the remaining unpaid indebtedness.

The second procedure by which unpaid installment amounts can be reduced to a judgment is by a "C.C.P. Section 664.6" motion to enforce the settlement. This is a procedure by which the court retains jurisdiction over the case to enter a judgment based on the appropriate motion filed by the apartment owner's attorney. There is one major drawback and one major pitfall in connection with a "664.6" motion.

The drawback is that at least 21 days' advance written notice must be given to the debtor. The debtor's attorney will have at least 11 days following that notice to prepare his opposition and reasons why the motion should not be granted. Granting of the motion then becomes a discretionary decision of the judge. Contrast that procedure with the Stipulation for Judgment procedure whereby the judgment is entered immediately and potentially without any opportunity for the debtor's counsel to object.

The pitfall to the "C.C.P. Section 664.6" motion is that lawyers sometimes do not realize that they cannot dismiss the case just because the settlement agreement might say that the court will retain jurisdiction to enforce the settlement. I have to get somewhat technical to explain this problem.

C.C.P. Section 664.6 allows the parties to request the court to retain jurisdiction to enforce the settlement even though the case is otherwise going to be dismissed. That request for retention of jurisdiction, and the court's agreement to do so, must occur prior to the dismissal, rather than following it. Although that may seem simple enough, the recent case of Hagan Engineering vs. Mills (January 29, 2004) is illustrative of the problem. There, the plaintiff's attorney specifically provided in the settlement agreement that the court would retain jurisdiction to enforce the provisions of the agreement pursuant to Section 664.6. Both parties and both attorneys signed the document. The plaintiff's attorney then dismissed the lawsuit. After the other side breached the settlement agreement, the plaintiff's attorney

filed a motion with the court to enforce the agreement. The court held that because neither side had requested the court to retain jurisdiction prior to the dismissal of the action, the court had no jurisdiction to grant the motion enforcing the settlement.

Thus, it is imperative that the creditor's attorney make a formal motion with the court for retention of jurisdiction prior to dismissal of the case.

Conclusion

Settlement agreements are of the utmost importance. They should be carefully drafted and then carefully read by all parties to be certain that they are not just generic in nature. The document should be crafted for the specific case in mind, and not just be a preprinted form that the lawyer might find somewhere on some computer disc.

Where installment payments are contemplated, the best settlement agreements are those which include a pre-signed Stipulation for Judgment so that the creditor's attorney can immediately obtain a judgment following the debtor's default. If the debtor won't agree to that procedure, then the creditor should not dismiss the litigation without first seeking and obtaining the court's specific order by which is reserves jurisdiction to later enforce the settlement.

Mr. Alberstone is a prominent attorney who has practiced real estate and business law for the past 28 years. He has been appointed to periodically serve as a Judge Pro Tem for the Los Angeles Superior Court and an arbitrator for the American Arbitration Association. The foregoing discussion is intended solely 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 810, Los Angeles, California 90067-5899. Phone (310) 277-7300, Ext. 202.