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Early Mediation Preserves Value of Disputed Property

By Max Factor III

The mediation landscape has changed for single-family residential real estate disputes.In the recently decided case of *Frei v Davey* (Dec. 17, 2004) 2004 DJDAR 15051, a prevailing party was denied recovery of any of the more than $120,000 incurred to defeat a plaintiff's action for specific performance and to cause the Buyer's lis pendens to be removed. The prospective defendant seller and plaintiff buyer had entered into a standard CAR Residential Real Estate contract for the sale of the defendant's home.

The simple reason given by the *Frei* Court is that the now standard additional clause in residential real estate contracts that provides for a forfeiture of attorneys fees in the event a party refuses to mediate prior to the filing of civil litigation is to be enforced in a reasonably strict fashion. The *Frei* Court refused to consider several strong equitable reasons why the defendant seller should have been entitled to at least some of the $120,000.00 in attorneys fees that were otherwise reasonably incurred.

To begin with, the blameless Seller had made "a concerted effort and good faith attempt to settle" the case through pre-litigation negotiations. But, the Court stated that "concerted and good faith" negotiations are not sufficient, without the presence of a mediator to facilitate the process, based on the express contractual precondition of a mediation prior to commencing an action. *Frei v Davey, supra* at 15053.

Second, the Buyer and counsel were said to have created a threatening, presumably litigious, environment once the pre-litigation negotiations broke off, such that the Seller had no reasonable expectation that an early mediation "was likely to be fruitful." *Frei v Davey, supra* at 15053.

Third, the Seller understandably contended that the basic principles of Civil Code Sec. 1717are violated in that the Buyer clearly was entitled to attorneys fees if it were to have prevailed, so that the Seller being denied attorneys fees as a prevailing party is a lack of mutuality of remedy. But, the appellate court followed the holding in *Johnson v Siegel* (2000) 84 Cal. App. 4th 1087, 1100-01, and held that each side had an equal opportunity to agree to mediate, so each side had mutuality of opportunity for attorneys fees. The Seller's refusal to mediate early in the progress of the case amounted to a complete forfeiture of the Seller's right to attorney's fees as the prevailing party. *Frei v Davey, supra* at 15055.

Fourth, the Seller did agree to mediate several months after the case was initiated, just prior to trial. The appellate court found that the Seller should be allowed a "reasonable time" [presumably a few weeks, based on the facts of the case] after the commencement of the litigation to agree to an early mediation. But to wait nearly a year, until just before the proposed trial, was so belated a mediation that the ultimately prevailing Seller was not to be awarded attorney's fees even for the period prior after the mediation occurred or on appeal. In so doing, the Court distinguished away *Blackburn v Charnley* (2004) 117 Cal. App. 4th 758 in a quite similar situation (although the prevailing parties were reversed). *Frei v Davey, supra* at 15054-55.

In *Blackburn v Charnley*, the plaintiff filed a lis pendens and sought specific performance, just as occurred in *Fries v. Davey, supra*. Blackburn, however, did not make a request for mediation prior to filing or shortly thereafter, although the contractual language was identical to the language in *Frei v Davey*. Blackburn prevailed and was awarded reasonable attorneys fees even though no demand for mediation was made by plaintiff, because that appellate court believed plaintiff agreeing to mediation, when asked in the normal course of the litigation to do so by the trial court, was sufficient to satisfy an identically worded set of contract provisions.

The *Frei* and *Blackburn* cases were decided based on pre-litigation contractual language that is actually less broad than the current California Association of Realtors' mandatory Early Mediation clause in its standard California Residential Purchase Agreement (CAR Agreement, Par. 17) and in one of its standard Commercial Agreements. The CAR Agreement now provides that (absent certain familiar exclusions such as for unlawful detainer

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actions and provisional remedies) as a precondition of a Buyer or a Seller receiving contractual attorneys fees, each litigant that brings an action or a cross-complaint must request and agree to mediate, and each party that defends an action brought against it must not refuse to mediate.

Currently, I am aware of at least one case in the Los Angeles Superior Courts in there is a danger of forfeiture of attorneys fees. The defendant promptly mediated in response to the plaintiff's demand. Then, the defendant filed a cross complaint, but had not previously filed its own demand for mediation, so the plaintiff contends the defendant is not entitled to attorneys fees on the cross-complaint.

Presumably, the defen–dant/cross complainant will receive relief by promptly asking the Court for a stay of the cross complaint to provide an opportunity to mediate. One would anticipate that the "reasonable time" standard set forth in *Frei v Davies* will be sufficient to satisfy the preconditions of mediation in the CAR Agreement, but the decision of the trial court to such a motion is uncertain.

Interestingly, this later case did not involve the sale of a single-family residence. It was an entirely different dispute involving commercial real estate, in which one of the transactional attorneys incorporated the mediation requirement of the CAR Agreement. Since mediation provisions are common in industrial and commercial real estate agreements, whether there is a development partnership, a leasing agreement or a purchase and sale, it is important for real estate practitioners insist that their clients agree to pre-litigation mediation. By doing so, one will avoid the inadvertent waiver of the right to recover reasonable attorneys fees as the prevailing party in any subsequent litigation.

Lawrence H. Jacobson, current Chair of the Beverly Hills Bar Association Real Property Committee and former Vice President of Legal Affairs of the California Association of Realtors agrees that mediation is an important tool in resolving litigation. "Unfortunately too many attorneys view it simply as a procedural step to pass over on their way to the Courthouse rather than utilizing it as a serious way of resolving the dispute. This attitude is at best a disservice to the client and at worst unethical."

After *Frei*, real estate practitioners must be quite forceful in advising their potentially blameless clients to seek early mediation, rather than risk a forfeiture of the right to recover reasonable attorneys fees.

Naturally, many accomplished litigators believe that pre-litigation mediations may be too premature to achieve reasoned, principled settlement, because of a lack of information which disables the negotiations of one or more of the disputing parties. Despite this view, there is a Better Practice Approach that is consistent with the Early Mediation requirement in the CAR Agreement and in many other types of real estate contracts.

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Experienced mediators and sophisticated practitioners recognize that Early Mediations may be successful in furthering the interests of the litigants, even when there is not a complete resolution. Mediators are often able to reduce the time and costs of litigation by working collegially with counsel and clients in developing (a) an agreed upon schedule for production of documents (or a repository of documents); (b) an agreement on the number, timing and priority of depositions; (c) earlier stipulations as to the authentication of and foundations for the admissibility of key documents; and (d) early stipulation of agreed and disputed facts. Demonstrating great zeal in the advocacy of one's client's interests does not necessarily require excessively expensive pre-trial discovery and motion practice when both counsel have excellent negotiating skills and a collegial relationship.

On several occasions, counsel in Early Mediations have also agreed to (a) interim provisional or protective remedies, (b) obtaining a "second opinion" from a jointly selected expert accountant as to valuation and, quite frequently, (c) arbitration of the disputed matter on an expedited schedule before an agreed upon arbitrator. As a result, potentially destructive costs to the value of the underlying real estate development, syndication, lease or sale can be avoided or minimized.

At a very minimum, early mediation may be used by wise practitioners to de-escalate hostilities and to humanize (that is, de-demonize) the litigants and counsel. Too often we mediators observe overzealous advocates who firmly believe that demonizing an opposing litigant or counsel will please their own client, who is quite angry at facing expensive litigation. Psychologists recognize that an angry individual usually over–estimates his own strengths and underestimates his vulnerabilities or weaknesses.

A competent mediator, with the cooperation of experienced advocates, can use the Early Mediation to deescalate the anger and hostilities by humanizing, rather than demonizing, the participants. In doing so, some acknowledgement of personal responsibility from both litigants often occurs. Acknowledging one's own contribution to the creation of hostilities allows wise decision-making to occur at the beginning of the litigation, rather than shortly before trial when costs and risks have escalated beyond earlier unrealistic assessments and expectations created in moments of anger.

So, don't wave the sword at Early Mediation. Accept it as an opportunity to preserve your client's right to attorney's fees, to reduce litigation costs by adopting efficient discovery and forum selection procedures, and to encourage wise actions.

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