

Court Upholds Developer's Breach of Contract Judgment Against Town

Mammoth Lakes withheld information about FAA concerns on airport project.

By Jason W. Armstrong
Daily Journal Staff Writer

In a major win for a developer, a state appellate court affirmed a \$30 million judgment for a company that spent millions of dollars planning a hotel and condominium project in Mammoth Lakes before the town backed out of the agreement.

The developer, Mammoth Lakes Land Acquisition LLC, signed an agreement with the town more than a decade ago to build the sprawling project as part of a plan to redevelop its local airport.

But the 3rd District Court of Appeal held

that the town improperly reneged on the contract based on concerns of the Federal Aviation Administration, which disagreed, among other things, with a clause giving the developer the option of buying the property where the project was to be built.

The justices added that the town entered into the contract despite knowing the FAA had concerns, but didn't tell the developer there was a problem until years later, when planning was well under way.

"The developer established a breach attributable to the town by evidence of the actions of town officials, acting within their authority," Justice George W. Nicholson wrote, upholding Mono County Superior Court Judge Roger D. Randall. "Those actions constituted repudiation of the FAA's objections before moving forward with the development agreement, which resolution was not a condition for performance in the

development agreement."

Nicholson was joined by Presiding Justice Vance W. Raye and Justice Arthur G. Scotland.

According to the opinion, when principals of the developer first contracted with the town in 1997, the FAA already had told municipal officials they had concerns with the agreement.

Seven years later, the town told the developer the project couldn't proceed as planned because of FAA concerns. Besides the agency's qualms with giving the company the right to buy property at the site, the FAA officials also worried that the airport would run out of land for aeronautical purposes, the justices wrote.

The FAA later sent Mammoth Lakes a letter saying federal funding for airport improvements was in jeopardy because of

the project.

In correspondence with the developer, the panel wrote, the town said it was willing to work with the company to resolve the FAA issues.

"However, in private, the mood was not cooperative," the court said.

"I believe the FAA and the Town need to jointly investigate ... what means we have to unilaterally eliminate this clause," Mammoth Lakes Manager Robert Clark wrote the FAA in 2005.

The next year, with the project stalled, the developer filed a claim for \$150 million in damages against the town. Mammoth Lakes rejected the claim and the developer sued for breach of contract.

Jurors awarded the company \$30 million in damages, finding that the developer met its obligations under the contract and the town breached its agreement.

The appellate court on Dec. 30 disagreed with Mammoth Lakes' argument that no breach of contract occurred because, among other things, the evidence was insufficient to establish that the town violated the terms.

Daniel L. Brockett, an attorney for the developer with Quinn Emanuel Urquhart & Sullivan LLP in New York, referred comment to Mark Rosenthal, a principal with Mammoth Lakes Land Acquisition. Rosenthal could not be reached for comment.

Andrew J. Morris, a partner with Best, Best & Krieger LLP in Sacramento who represents Mammoth Lakes, also could not be reached for comment.

The case is *Mammoth Lakes Land Acquisition, LLC, v. Town of Mammoth Lakes*, C059239.

jason_armstrong@dailyjournal.com

Professor Inspired Study of Law Clerk Idea

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amounts to about a quarter of the court's workload.

In the 1960s and '70s, the court routinely used term clerks. One of its best-known former clerks is Gov. Jerry Brown, who worked for state Supreme Court Justice Mathew O. Tobriner after graduating from Yale Law School in 1964.

The court made a conscious move toward permanent staff in the 1980s, and Chief Justice Ronald M. George stuck with that practice. A number of experienced staff lawyers who have been at the court for decades are nearing retirement.

"The court erred on the side of efficiency rather than training new lawyers."

—Justice Carlos R. Moreno

"The court erred on the side of efficiency rather than training new lawyers," Moreno said.

To fulfill their duty to train young lawyers, most of the justices bring in first-year law students as unpaid externs for a semester at a time.

Moreno said he uses his externs to review conference memos, work on portions of cases and sometimes help draft opinions.

But externs can't assume as much responsibility as term clerks because they are on board for even shorter periods of time.

A handful of state Court of Appeal justices, including Justice Mark B. Simons of the 1st District in San Francisco, also tried using term clerks.

Simons brought three students onto his staff for one-year clerkships, saying, "They were excellent. They brought fresh insights."

He clerked for federal District Court Judge Alvin B. Rubin in New Orleans the year after he graduated from law school, and called the experience "probably the single most valuable year I spent."

"I think there is a benefit to the legal profession when positions like that are more available," he said.

Simons agreed that the ramp-up period for new clerks was a drawback, particularly since it didn't fall only to him to supervise the rookies, but also to his colleagues.

Dennis P. Maio, who worked at the state Supreme Court for 20 years before joining Reed Smith, said term clerks would be valuable only if the court could draw top law students.

"If you could get clerks of the caliber of the 9th Circuit and U.S. Supreme Court that would benefit the court," he said. "Or even people with firm experience, if they're willing to leave their partnership for a year or two."

Kevin M. Fong, president of the California Academy of Appellate Lawyers, said he doubts the Supreme Court will change its long-standing practice. He said he can see how it would be difficult to handle a heavy load of capital cases and petitions for review with a more transient staff.

"If the current system works for them, that's great," said Fong, a partner at Pillsbury Winthrop Shaw Pittman LLC.

At the symposium, Kozinski talked about the large amounts of work his clerks do for much lower salaries than staff attorneys.

"I can get about 28 hours a day from my clerks, because they only work one year," Kozinski said.

Joking, at the expense of his clerks sitting in the audience, he said, "They may look like they're sleeping, but they're really writing an opinion."

Kozinski offered to be a resource for Cantil-Sakauye if she's interested in trying out term clerks.

Cantil-Sakauye said the court's criminal central staff uses annual clerks, some of whom have gone on to become permanent attorneys.

She said she's drawn to the idea because of the opportunity to mentor young lawyers and to get them interested in appellate work.

"Once I get a handle on what I'm doing here, I would like to give it a try," she said.

laura_ernde@dailyjournal.com



The Power of Listening

By Timothy Tosta

Recently, I found myself speaking on the issue of "transformative listening." I started speaking on this subject as part of a longer talk entitled "Lessons for the Living," in which I tell of my work as a public hospital hospice volunteer reshaped not only the way that I practiced law but my way of living life. It has become one of my most requested talks and I have delivered it throughout the state to lawyers, judges, business and real estate executives, government officials as well as community groups.

The long and the short of transformative listening is this — if you learn how to listen in an authentic and empathetic way, you will change your relationship with your speaker and yourself; access greater meaning; and become empowered to reach better outcomes. This is not a work practice. It is a life practice. It will enrich your professional encounters. But, more importantly, it will build and enhance sustainable relationships throughout your life.

Generally, how do we listen? The unfortunate answer is that, generally, we don't. We are distracted. We are multitasking, which is a form of insult to the speaker. We listen to meet societal expectations. Think, for example, about how closely you attend to the words of a police officer writing you a ticket after you have made a "California" stop. We listen to confirm what we already know or to make distinctions. This is selective listening. Lawyers excel at this. We listen for agreement ("Yes, I know that") or for disagreement ("No, that's not right"). But, in all events, we are not attending to the entirety of the communication. We are either hyper-focused on some particular aspect or generally disengaged.

What message do you believe is being conveyed to the speaker by our actions? And, given that message, how do you expect the

speaker to attend to you when it is your turn to speak? Early in the talk, I ask my audience to find a partner, preferably someone that they do not know. I ask each to identify an event of some emotional content, which can safely be disclosed to the other. I give them a few pointers that are likely to enhance the listening experience (be open and face on, do not cross legs or arms, assume a relaxed

information becomes available to you, without the background noise of your own narrative's filter. This, in turn, allows you to better respond, leading to better results.

What is transformative listening? It is what happens when you suspend your memory, desire, beliefs and judgments and, for a few moments, exist only for the other person. Its essence is empathy. It is best to think about it not as a need

Listening is a form of healing for both the speaker and listened.

Transformative listening brings with it a "beginner's mind" — an absence of predetermined belief or judgment. It leaves room for silence, and silence honors the speaker. It allows for deeper thoughts to emerge, which permits the real issues to surface. Transformative listening teaches us to recognize our defensive reactions and to take charge of our responses. It confirms that we are most reactive to those perceived negative characteristics of the speaker that we secretly accuse ourselves of.

And how else do we achieve transformative listening? By focusing on the speaker. Only 7 percent of the perceived meaning of our communications is expressed through words. The remaining 93 percent is communicated through gestures and facial expressions, combinations of speech rate, rhythm, patterns, tone and emphasis. If you are not fully aware of where you are in your body and where the speaker is in hers, you risk missing the great majority of what is being communicated.

So, watch the speaker and listen to the speaker's patterns, rhythm and emphasis. Never interrupt. Wait for the speaker to pause. Advise...only if asked. Remember, being a transformative listener is first about the speaker, not you. Once the speaker is done, genuinely acknowledge and appreciate what you have heard. And, if you have done this right, there is a very good chance that the speaker will be prepared to listen to you.

Henry David Thoreau once said, 'The greatest compliment paid to me was when someone asked me what I thought and attended to my answer.'

posture). Then the first speaker addresses the listener for three minutes without interruption. The listener then has two minutes to repeat back what she heard, in her own language. The parties then reverse the process, with the first speaker becoming the listener. Then, as a group, we discuss the experience. What is so remarkable about this 10-minute interlude is how surprising it is to the audience to experience genuine listening. There is an excitement generated by the experience. At the same time there is connection, because emotional experiences have been exchanged.

Henry David Thoreau once said, "The greatest compliment paid to me was when someone asked me what I thought and attended to my answer." Listening is a much-overlooked talent. It gives us an opportunity to look through another's eyes to expand our creative potential. It allows us to connect and understand one another. It allows for real dialogue, which often enables both parties to shift perspectives.

Why should we listen? Because it serves you. It allows you to better connect to the speaker. Effectively done, it keeps you calm and grounded. From that state, more

we have, but as a gift we give — the gift of our attention and understanding. That gift makes the speaker feel validated and valued. Do not underestimate the value of this gift. We spend much of our lives wishing to be "seen" by our loved ones, family, colleagues and friends. We go to extremes to achieve "recognition," when all that we really may need is simply to be heard.

This lesson is one that I never forget. It has been taught to me by every dying person with whom I have had the honor to serve at their bedside. To be seen is to be "real." And, remarkably, you need not be an intimate, or even a friend. You can be seen by someone with whom you have had great difficulties. And, in the course of being seen, you inevitably and irreversibly alter your relationship.



Timothy Tosta is a partner with Luce Forward's San Francisco office, specializing in land use law. He blogs at www.coachingcounsel.com/ blog. He can be contacted at (415) 356-4612 or tosta@luce.com.

Judge: Michael Jackson's Family Can Sue Promoter

Associated Press

LOS ANGELES — Michael Jackson's mother can go forward with her civil lawsuit against entertainment giant AEG Live involving the death of the pop superstar, a judge ruled Wednesday.

City News Service reported that Superior Court Judge Yvette M. Palazuelos turned down a motion by AEG Live to dismiss the case that claims the company is responsible for medical decisions made by Dr. Conrad Murray, who has pleaded not guilty to involuntary manslaughter in Jackson's death.

The lawsuit filed Sept. 15 on behalf of Katherine Jackson and the pop star's three children suggests Jackson was forced to maintain a grueling rehearsal schedule for his planned "This Is It" concerts in London, and was showing signs of physical stress in the months before

his June 25, 2009 death.

The judge said she had doubts about a conspiracy claim in the suit because there were no details in the complaint stating AEG Live and Murray had an agreement to do something unlawful, City News Service reported.

"If the object was to get him to rehearsals, I don't see that as a wrongful or an illegal act," Palazuelos said.

Attorneys for AEG Live have said Jackson made his own medical decisions and hired Murray to accompany him on the tour.

Attorney Marvin S. Putnam, who represents AEG Live, argued that his clients could not have realized Murray's decisions would lead to Jackson's death.

"It's not foreseeable that Michael Jackson or anyone else was going to die in their own home of propofol," Putnam said.

A coroner found that Jackson died of an overdose of the powerful anesthetic combined with other drugs he was using to induce sleep.

Katherine Jackson's lawsuit claims the star was cold and shivering during the summer rehearsals for his show while others were perspiring from the heat. She claims he was told by AEG to stop taking medication, and that if he missed even one rehearsal the tour would be cancelled.

The suit also claims Michael Jackson's eldest son, Prince Michael, suffered "great trauma and severe emotional distress" when he saw his father suffering on the day he died.

The judge commented, "The question is, did he witness the negligence and did he understand what was going on?"

She gave the plaintiffs' lawyers 20 days to amend their complaint and set a case management conference for March 22.

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