Fourth Quarter 2010 and 2011 Real Estate Case Law Update

As we begin 2012, Luce Forward's Real Estate group would like to highlight a number of new developments in California law affecting developers, real estate professionals and others in the real estate industry during the past year. Below you will find a short summary of each decision and a link to the opinion. If you have any questions regarding this *e-Update*, please contact any member of Luce Forward's Real Estate group.

Online Resources.

To obtain PDF copies of the case law referenced in this *e-Update*, please see this article on our web site: www.luce.com/relaw2012

Related Practices.

Real Estate Transactions
Common Interest Development
Construction Transactions
Land Use / Zoning
Leasing

Related Industry.

Real Estate

Adverse possession by co-tenants

Hacienda Ranch Homes, Inc. v. Superior Court, 198 Cal. App. 4th 1122 (Cal. App. 3d Dist. 2011)

In an action to quiet title by adverse possession where unimproved real property was owned by tenants in common, action by some co-tenants of discing the property two or three times a year, posting a "for sale" sign near the property, and introducing themselves as owners of the property at a meeting did not establish "ouster" of the other cotenants. Establishing ouster is a precondition to being able to claim adverse possession against co-tenants. The court found that one cotenant cannot acquire the title of another cotenant simply through possession, and that ouster of cotenants must be proved by acts of an adverse character, such as refusing entrance to the property, putting up a fence or barrier prohibiting entry on the property, changing locks, posting no trespassing or similar signs, and denying title.

Enforcement of arbitration provisions in CCRs

Promenade at Playa Vista Homeowners Assn. v. Western Pacific Housing, Inc., 200 Cal. App. 4th 849 (Cal. App. 2d Dist. 2011)

Developers who had sold all of the units in a condominium development could not compel arbitration under the project's declaration of covenants, conditions and restrictions. (See our *e-Update* of January 17, 2011 > www.luce.com/arbitrationprovisions4.)

On January 25, 2012, the California Supreme Court granted review of this case. The California Supreme Court has already granted review in two other cases concerning the enforceability of an arbitration provision in CC&Rs against a homeowners association. *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US) (2010) 187 Cal.App.4th 24, review granted November 10, 2010, S186149, is the lead case, followed by *Villa Vicenza Homeowners Assn. v. Nobel Court Development, LLC* (2011) 191 Cal.App.4th 963, review granted April 20, 2011. The California Supreme Court has placed the *Promenade* case on hold pending a decision in *Pinnacle*.

Waiver of anti-deficiency protections by guarantor

Gramercy Investment Trust v. Lakemont Homes Nevada, Inc., 198 Cal. App. 4th 903 (Cal. App. 4th Dist. 2011)

In a judicial foreclosure proceeding involving California property, California's anti-deficiency laws were applied notwithstanding New York choice of law provisions in the guaranty and other loan documents. The court held that the New York anti-deficiency statue was inapplicable to judicial foreclosure proceedings involving a California property where the documents were executed in California, the debt was created and guaranteed in California, the default occurred in California, and the only contact with New York was the plaintiff's place of business.

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The court also held that the guarantor's waiver of any of its rights under the California anti-deficiency laws was also enforceable, notwithstanding the New York choice of law provisions in the guaranty, where the guarantor was a sophisticated business person with expertise in real estate development and the language of the waiver in the guaranty agreement clearly and unequivocally expressed an intention to waive any rights and defenses based on Code of Civil Procedure sections 580a, 580b, 580d, or 726.

SB 800.

Anders v. Superior Court, 192 Cal. App. 4th 579 (Cal. App. 5th Dist. 2011)

In the situation where a homebuilder adopted an alternative repair procedure that was found to be unenforceable, the homebuilder as an alternative could not then compel the homebuyers to follow the statutory pre-litigation procedures of Chapter 4 of Title 7 of the California Civil Code (often referred to as the "Right to Repair Act") as a condition to commencing an action for construction defects. (See our *e-Update* of February 16, 2011 > www.luce.com/alternativedisputeresolution.)

Prescriptive easements.

Main Street Plaza v. Cartwright & Main, LLC, 194 Cal. App. 4th 1044 (Cal. App. 4th Dist. 2011)

Main Street Plaza used an alleyway adjacent to its property for the purposes of making deliveries, truck turn-arounds, and parking for several years, and sought to quiet title to a prescriptive easement over it for those purposes. The alleyway was already subject to a railway easement for railroad purposes; however, the original grantors of the railway easement had reserved the right to use the easement area for purposes that did not interfere with the railway's use of the easement. The railway easement was separately assessed by the taxing authority, but the railway, not Main Street Plaza, had been paying the taxes on it. During the litigation, the adjacent property owner acquired the railroad's interest in the railroad easement. The adjacent property owner argued that payment of taxes on the easement was a condition to the acquisition of the prescriptive easement by Main Street, but the court disagreed. Rather, the court held that paying taxes on the railway easement was not required to establish the claimed prescriptive easement because Main Street was not seeking to use the area for railroad purposes, and Main Street's claimed uses were not inconsistent with the railway easement.

Real property contracts.

Conservatorship of Buchenau, 196 Cal. App. 4th 1031 (Cal. App. 2d Dist. 2011)

In a contract for the sale of real property where the escrow instructions did not contain a "time of the essence" clause, the court declined to imply an essential time for performance and held that the parties had a "reasonable time" to perform. The court found that seller's delivery of the deed for the property to escrow 19 days following the scheduled closing date was not an unreasonable time for performance under the circumstances of the case. Accordingly, buyer's failure to consummate the purchase following seller's delivery of the deed to escrow was found to be a breach of the purchase contract by Buyer entitling seller to retain buyer's deposits.

Greenwich S.F., LLC v. Wong, 190 Cal. App. 4th 739 (Cal. App. 1st Dist. 2010)

Lost profits may be awarded as a component of consequential damages under California Civil Code Section 3306 in a case of breach of a real property sales contract, as long as the lost profits are shown to be within the contemplation of the parties at the time the contract was made and are proven to be more than speculative, remote, or contingent.

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Development agreements.

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 191 Cal. App. 4th 435 (Cal. App. 3d Dist. 2010)

A California Court of Appeal affirmed a jury's $30 million damage award to a developer due to the town's breach of a statutory development agreement. (See our *e-Update* of January 31, 2011 > www.luce.com/30millionjudgment.)

Commercial leases.

Munoz v. MacMillan, 195 Cal. App. 4th 648 (Cal. App. 4th Dist. 2011)

A commercial tenant was evicted by a landlord who had followed all judicial process requirements in an unlawful detainer action. However, when the unlawful detainer judgment was reversed, the tenant was permitted to sue the landlord for damages for breach of contract damages arising from the eviction of the tenant from its premises.

Frittelli, Inc. v. 350 N. Canon Drive, 202 Cal.App.4th 35 (Cal.App. 2d Dist. 2011)

A landlord was not liable to a tenant for damages and the tenant was not entitled to rescind a lease because of the disturbance caused by the remodeling of the shopping center where the lease contained express provisions exempting landlord from liability for such events, and where the lease limited tenant's remedies for breach of the covenant of quiet enjoyment to rent abatement.

The court found that the tenant had sufficient notice of the landlord's exemption from liability because, among other things, the tenant had a full and reasonable opportunity to read and understand the lease, and the paragraph containing the exemption was set out in bold print and captioned "Exemption of Lessor and its Agents from Liability."

Kumar v. Yu, 201 Cal.App.4th 1463 (Cal.App. 2d Dist. 2011)

In a commercial lease where the tenant was evicted for failure to pay rent, the court held that rents received by the landlord from two subsequent tenants in excess of the balance of rent due under the original tenant's lease after the lease was terminated could be applied as mitigation (or an "offset") against the damages original tenant owed before and after he vacated the premises. Accordingly, the court found such excess rents could be used to reduce original tenant's liability to landlord for the rent the original tenant failed to pay both before and after vacating the premises, as well as the cost to repair damage to the premises caused by the original tenant.

Subdivision Map Act.

Aituo v. City & County of San Francisco, 201 Cal.App.4th 1347 (Cal.App. 1st Dist. 2011)

Owners of below market rate or "BMR" units in San Francisco challenged an ordinance adopted by the City of San Francisco amending the existing ordinances governing the city's BMR program. The owners claimed that the ordinance retroactively changed the conditions placed on the original subdivisions of their properties. However, the court held that the challenge was time barred by the 90-day statue of limitations set forth in the Subdivision Map Act at Government Code Section 66499.37, stating that Section 66499.37 did not apply solely to challenges to the conditions originally imposed on the property as part of the subdivision process, or to other subdivision-related decisions, that had a "temporal aspect" to them. The court held that the 90 day limitation period for any action or proceeding to attack a governmental decision "concerning a subdivision ... or to determine the reasonableness, legality, or validity of any condition attached thereto ...." under Section 66499.37 is applicable to any decision of a local legislative or advisory body concerning subdivisions and that there is no limitation, temporal or otherwise, on the type of decision that is being challenged.