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## Broker buying and then reselling: Roberts v Lomanto, 2003

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## **Broker buying and then reselling:**

### ***Roberts v Lomanto, 2003***

**Roger Bernhardt**

**Seller's real estate agent breached her fiduciary duty to seller when she contracted to purchase property, assigned contract to third party buyer, and then refused to disclose to seller the amount of assignment fee or third party buyer's purchase price.**

*Roberts v Lomanto* (2003) 112 CA4th 1553, 5 CR3d 866

Roberts owned a shopping center and retained Lomanto as his agent to sell the shopping center. While Lomanto was still acting as Roberts's agent, Roberts agreed to sell Lomanto the property for \$11 million. Lomanto assigned the purchase contract to a third party buyer, Pan Pacific, with Roberts's consent. Although Lomanto disclosed to Roberts that Pan Pacific was paying her an assignment fee, she refused to disclose the amount of the fee or the price Pan Pacific agreed to pay. After learning that Pan Pacific paid \$12.2 million for the property, Roberts sued Lomanto. Concluding that Lomanto had not breached any duty to Roberts, the trial court granted her motion for summary judgment.

The court of appeal reversed, explaining that, to be entitled to summary judgment, Lomanto would have to show that Roberts could not establish a triable issue of fact on one of the following elements: a fiduciary relationship; breach of that relationship; or resulting damages. Because triable issues of material fact did exist regarding whether Lomanto breached her fiduciary duty to Roberts, the trial court granted summary judgment. Real estate agents, as fiduciaries, are charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. The court rejected Lomanto's argument that she ceased to be Roberts' fiduciary once she agreed to purchase the property.

The court also pointed out that a real estate licensee who takes a secret profit is subject to discipline. See Bus & P C §10176(g). The court determined that Lomanto violated her fiduciary duties toward Roberts and she should not be allowed to retain that secret profit, regardless of whether the transaction was otherwise fair to Roberts.

The court rejected Lomanto's argument that, as a matter of law, she did not breach any fiduciary duty of disclosure by refusing to reveal the amount of her assignment fee, because that fact was not material to Roberts's decision to complete the sale. Also, Lomanto did not show that it would have been unreasonable, as a matter of law, for Roberts to withhold consent to the assignment if he had known the undisclosed facts. The court summed up the "unfairness in Lomanto's position" (112 CA4th at 1568):

When she entered into the assignment with Pan Pacific, she owed Roberts a fiduciary duty to obtain the best price for the property for Roberts. (footnote omitted). However, Pan Pacific paid Lomanto \$1.2 million that was presumably available to pay to Roberts, as part of the purchase price. There is nothing in the record to suggest that Pan Pacific cared to whom it paid its total purchase price. By refusing to disclose the million-dollar-plus assignment fee, Lomanto deprived Roberts of his ability to insist that the fee be paid to him as a part of the purchase price of the

property. In this transaction, Lomanto clearly acted in her best interest and not in the best interest of her principal, in breach of her fiduciary duty to Roberts.

Finally, the court rejected Lomanto's argument that Roberts's failure to object to the closing of escrow after she had refused to disclose the amount of the assignment fee established that the amount of the fee was immaterial to him. The court observed that Roberts only did what was reasonably necessary to mitigate his damages and avoid being sued by Pan Pacific.

The court refused to grant summary judgment for Roberts per his request for the return of Lomanto's commission: Only deliberately fraudulent or duplicitous conduct would justify depriving her of a commission for breaching her fiduciary duty of disclosure, and the court could not say as a matter of law that her conduct was deliberately deceptive or fraudulent.

**THE EDITOR'S TAKE:** This decision takes real estate brokers pretty close to a rule of strict liability for any profit they make when they purchase their principal's property and then resell it for a profit. I doubt that the court seriously believed what it said about the broker's agency (for selling) continuing after the purchase contract was signed; the contract provision that she "is and has been seller's exclusive agent for leasing and selling" of the property seems clearly to mean, given its context, that she is the leasing agent and has been the selling agent; in other words, her leasing duties regarding a particular named tenant are to survive her purchase of the property. That makes me suspect that the same result would have been reached even without that clause.

I also think that this is a new rule. The statements by Miller & Starr, quoted in the opinion, about fiduciary responsibilities coexisting with a purchase of the property refer to facts known by the broker prior to agreeing to purchase—not to information acquired after the broker has already bound herself to purchase.

The blurring of such a distinction by the *Roberts* court should warn brokers that they may have a much greater duty to share any resale profit with their sellers than they thought. Maybe they can resell freely, but only if they negotiate to do so after the first deal has completely closed—but even then, if the broker learns before the first closing that someone else is interested, that knowledge may be enough to get the broker into trouble.

A broker purchasing her client's property should, arguably, deal with this issue in that purchase contract. Maybe the contract can specify that all fiduciary obligations end on the date the contract is executed, and that thereafter she has only the ordinary obligations of any nonfiduciary seller. If that is trying for too much, maybe the contract can at least cut the broker in on the resale profit by providing that, if she does learn of and accept a higher offer before this contract has been consummated, she will split the profit with the seller—even half is better than nothing. —*Roger Bernhardt*