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Making the Broker Pay When the Deal Goes Bad

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Strebel v Brenlar Invs., Inc.

The lesson of *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 37 CR3d 699, is, I believe, that you should never turn down a broker fraud case merely because you don't see good damages in it. The $305,000 recovery that this plaintiff obtained is the result of the most creative lawyering (and perhaps the most sympathetic judging) that I have seen in a long time. (The opinion is described in full on p 256, but, for purposes of this column, it is enough to say that Strebel prematurely sold his old San Bruno house because the defendant broker misrepresented to him the ability of the sellers to convey good title to the new Sonoma house he was purchasing.) There was good liability but problematic damages in Strebel's claims. When a buyer is aggrieved over a house purchase, there are generally three theories of recovery available, each with different, and problematic, measures of damages.

First, there is breach of contract that, under CC §§3300 and 3306, gets the buyer benefit of the bargain: the difference between the price he was to pay for the property and the value it had on the date of breach. In this case, that would not do Strebel much good against his broker—not only because his contract of purchase was with the sellers rather than with the broker, but also because his claim was not based on the lost benefit of buying the Sonoma house at a bargain. Instead, it was founded upon the independent loss that arose from selling his San Bruno house too soon.

Under the old rule of *Hadley v Baxendale* (1854) 9 Exch 341 that we all learned in law school: Any loss arising from the San Bruno sale would not be recoverable under a breach of contract theory unless it had been made foreseeable by having been specified in the purchase contract. (Remember, if you order a part for your factory to be delivered by a certain date, you can't recover for all the employees you have to lay off when it doesn't arrive in time, unless that contract so provides.) Since we are not told that there was anything in the Sonoma purchase contract (or in any agency agreement with the Sonoma broker) relating to the sale of the San Bruno property, losses from the San Bruno sale do not qualify as proper consequentials. (The sale of his San Bruno house was apparently contingent on Strebel's purchasing the Sonoma house, but not vice versa.)

Second, there is fraud—but under CC §3343, that only gives a buyer the difference between what he paid and what he got: out-of-pocket damages. Strebel's biggest problem with recovery under this theory is that the purchase never went through; the statutory measure of damages makes sense only for buyers who take title and then discover that the house wasn't all it was represented to be. There may have been misrepresentation or concealment in this case, but this looks more like attempted fraud than actual actionable fraud. Had Strebel purchased the house and only then learned about the tax and judgment liens on it, §3343 would provide an appropriate measure of damages, but does not do him much good if he isn't able to purchase it because the seller cannot deliver clear title.

Even in that kind of case, it is hard to see how the award could also include any loss incurred from the early sale of his San Bruno house. Not only is that not an item enumerated in the allowable consequentials of §3343, but Strebel received the full market value for San Bruno when he sold it.

Third, there is tort: compensation for all detriment proximately caused under CC §3333. While, generally, tort recovery under this section is preempted by §3343 when there is real estate transactional fraud, our courts have long held that this displacement does not occur when the fraud is by a fiduciary. No statute says that—and no real reason has ever been given for making that exception—but our courts have repeated it often enough as to give it the same force as a statute. Under that rule, Strebel can recover from his broker losses that he would not be allowed under contract or fraud theories.

But even tort damages have their outer limits—remember *Palsgraf v Long Island R.R. Co.* (1928) 248 NY 339, 162 NE 99, and the doctrine of proximate cause? Strebel has to show that selling his San Bruno house *and* then watching it appreciate under someone else's ownership was the proximate result of his broker's false assurances that his purchase of the Sonoma house was going to go through. I have trouble connecting these consequences to the wrong done to him.

Proximate Results

First, how did the Sonoma broker proximately cause the San Bruno sale? Since the purchase in Sonoma was not contingent on the sale in San Bruno, and the San Bruno sale was contingent on the Sonoma purchase, Strebel had the power to delay or cancel the San Bruno sale. He had a different broker for his San Bruno sale, and nothing in the opinion indicates that his Sonoma broker urged him to sell San Bruno ahead of time. It requires a real stretch to let the issue of whether the timing of the San Bruno sale was proximately caused by the Sonoma misstatements get to a jury.

Second, how was the Sonoma broker proximately responsible for the loss following the San Bruno sale? The San Bruno house was sold at market value; Strebel netted $321,000 from that deal. With that much cash, he had sufficient funds to buy another house in Sonoma to replace the $420,000 one that fell through. How, then, is his decision to put the money in a bank account rather than another house a proximate result of his broker's concealment of the Sonoma sellers' tax lien problems?

Negligence Versus Fraud

To justify upholding Strebel's recovery, it was necessary for the court to get around the rule that losses due to market value changes after the event are generally not recoverable against a guilty defendant. It did so by distinguishing *Safeco Ins. Co. v J & D Painting* (1993) 17 CA4th 1199, 1204, 21 CR2d 903, on the ground that the defendant there was merely negligent, whereas this case involved a fraudulent fiduciary. That may be the real explanation behind this decision.

First, although our statutes make no such distinctions, the losses that are considered as proximately resulting from a tort now may depend on the morality of the tort. If the defendant is merely negligent, post-tort market changes may be irrelevant—whereas they will count if the wrong was intentional. Had Strebel's broker simply failed to inform him that the sellers had tax problems, or had he merely failed to investigate and learn that fact, this opinion suggests that he might not have been held liable for the lost spurt in real estate values in the four years following the disintegration of this deal.

Second, and probably far more importantly, *Safeco* was distinguished on the ground that this was fraud by a *fiduciary*. What made real estate agent Smith a fiduciary is that his broker, Frank Howard Allen, was acting as a dual agent in the transaction. Our agency disclosure statute says that a dual agent is a fiduciary of both parties. So, here, Smith was Strebel's fiduciary and therefore subject to a different measure of liability than would be imposed on a fraudulent seller's agent (which would go back to §3343 and out-of-pocket losses).

Dual Agency

The election to be a dual agent was undoubtedly made by the broker, not by the sellers or the buyer. That choice obliged Smith not only to render fiduciary obligations to Strebel, but also to the sellers. How could Smith have warned Strebel that the sellers were having tax problems without getting into trouble with them for disclosing confidential information that was derogatory and prejudicial to the deal? If silence is what he owes the sellers, that almost automatically amounts to concealment as far as the buyer is concerned. A dual agent is in the impossible middle. Thus, this outcome is very much the result of Frank Howard Allen selecting dual agency (and dual commissions!) rather than single-agency status.

Nor can it be said that the dual agency hurt only because the jury found intentional concealment. Negligence by a fiduciary is often regarded as constructive fraud (*Fragale v Faulkner* (2003) 110 CA4th 229, 239 n8, 1 CR3d 616), so that even an innocent failure to disclose, or learn, by a dual agent could have the same consequences.

Overall, I am skeptical about much of the reasoning in this opinion and not certain that it will necessarily be followed by other courts or in other situations. But I am certain about one thing: As long as real estate brokers continue to insist on claiming the right to be dual agents, the more certain they are to get hurt by that choice.