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Ratification of sales agreement through other documents referring to it:

Behniwal v Mix, 2005

Roger Bernhardt

Home sellers effectively ratified purchase agreement that agent signed in their names when sellers signed disclosure statements that sufficiently referred to specific purchase agreement.

Behniwal v Mix (2005) 133 CA4th 1048, 35 CR3d 162

The Mixes listed their condominium for sale with Seidenberg, an agent with Prudential Realty. The Behniwals presented a written purchase offer. Seidenberg prepared a counteroffer, to which she signed the Mixes' names. The Behniwals accepted and signed the counteroffer. An "Addendum to Counter Offer #1" was ostensibly signed by the Behniwals and the Mixes but, in fact, Seidenberg signed the Mixes' names. After the parties entered escrow and the Mixes signed several disclosure documents, the Mixes decided not to sell their house; the Behniwals sued the Mixes for specific performance. The trial court ruled for the Mixes, finding there was no enforceable contract.

(In a subsequent jury trial on the Mixes' and Behniwals' claims against Seidenberg and Prudential for attorney fees, the jury found for the Behniwals but against the Mixes. The Mixes successfully moved for attorney fees against the Behniwals in the original action. The court specifically noted the Behniwals could recover the fees from Prudential.)

The court of appeal reversed, holding that the Behniwals were entitled to specific performance. When Seidenberg signed the Mixes' names to the addendum, which directly referenced the original offer, a contract existed because Seidenberg's act showed an acceptance of the Behniwals' offer, embodied in the counteroffer. The agreement, however, did not at that point satisfy the statute of frauds, because the Mixes had not signed a writing setting forth enough terms for there to be an enforceable contract. However, an agent's act may be adopted expressly or by implication based on a principal's conduct, from which an intention to consent to or adopt the act may be fairly inferred. Thus, ratification does not require that the writing sufficiently set forth the terms of the agreement; the terms are already identifiable. It is only necessary to determine whether the principal accepted them.

Here, the Mixes ratified the sales agreement with the Behniwals when the Mixes signed the subsequent disclosure documents. The Mixes could not rely on a defense that the Behniwals were not able to specifically perform the sales contract due to lack of funds. There was sufficient evidence of the Behniwals' ability to perform because they demonstrated the financial ability to qualify for a loan; they had previously obtained a pre-approved loan, and had arranged with a relative to help with the deposit.

In a related writ proceeding (*Behniwal v Superior Court* (2005) 133 CA4th 1027, 35 CR3d 320), the court of appeal granted the Behniwals' petition for an order requiring the trial court to vacate a previous order expunging a notice of lis pendens on the Mixes' property. Previously, the court of appeal had ordered the trial court to expunge the lis pendens on the residence (*Mix v Superior Court* (2005) 124 CA4th 987, 21 CR3d 826, reported in 28 CEB RPLR 82 (May 2005))

because, under the “probable validity” standard from the perspective of the trial judge, the trial court was required to expunge the notice of lis pendens unless it was willing to predict its own reversal on appeal. 124 CA4th at 996. Given the court of appeal’s ruling that the Behniwals were entitled to specific performance, the Behniwals were entitled to maintain a lis pendens on the property until completion of court proceedings or until the California Supreme Court directs otherwise.

THE EDITOR’S TAKE: One has to be grateful to the Behniwal and Mix families for giving Judge Sills of the Fourth District the occasion to write two of the most intelligent real estate decisions of the year. A few months ago, in *Mix v Superior Court* (2005)124 CA4th 987, 21 CR3d 826, reported in 28 CEB RPLR 82 (May 2005), he authored an extremely persuasive analysis of the expungeability of a lis pendens when the claimant has lost at trial but nevertheless has a good shot at getting a reversal on appeal, a ruling noted in the companion decision to this opinion (*Behniwal v Superior Court* (2005) 133 CA4th 1027, 35 CR3d 320). Here, when such a reversal does occur, Judge Sills gives us a no less lucid explanation of how the statute of frauds is satisfied in a multiple counteroffer situation when the real estate agent does the signing instead of the principal.

The buyers had two hurdles to overcome in order to force the sellers to specifically perform their contract to sell their property:

First, the special acceptance signature called for in the CAR multiple counteroffer had not been signed at all.

Second, all of the signatures on the key formation documents were by the seller’s real estate agent rather than by the sellers themselves.

The opinion says that the agent “forged” their signatures. However, since he appears to have been orally authorized to sign, I don’t believe that he was technically a forger (although the equal dignities provision of our statute of frauds requires that such authorization itself be in writing).

The CAR form provides—as it must in such cases—that when sellers have made counteroffers to several buyers, acceptance by a buyer alone does not make a contract—the sellers need to specially accept it. Otherwise, they could find themselves in contract with two or more different buyers over the same piece of real estate. The absence of this special extra signature led the trial court to hold that there was no enforceable buyers’ acceptance of the earlier multiple counteroffer.

Judge Sills’s solution to this predicament was to hold that the signing of a contemporaneous “Addendum” (by the sellers’ agent) was the “functional equivalent” of signing the required special acceptance. Although it is true that signing a separate piece of paper and stapling it to the original piece of paper can be equivalent to signing the original paper itself, I would have been more comfortable with that holding if the terms of the Addendum had been told to us, since an addendum usually makes some change in some term. That makes it a counteroffer that ought to then itself be accepted by the other side in order to bring the parties into a final, complete, binding contract. Even so, the conclusion here appears to be subjectively true, since the parties thereafter acted as if they were in

contract. (Estoppel might have been an easier way to explain all this, but as Judge Sills notes in his opinion, the buyers did not argue that on appeal.)

Had the functionally equivalent Addendum been signed by the sellers themselves, that would have been enough to end the dispute; but it had been signed only by their agent, who lacked written authority to do so, as our statute of frauds requires. To get around this second discrepancy, it was necessary to hold that the agent's acts had been ratified by the sellers, the proof of which came from the fact that the sellers thereafter signed various disclosure forms that referred to the contract and that made little sense if there was no underlying contract of sale. (While Judge Sills makes the wonderful statement "Human nature being what it is, there is no reason to go to the irritating trouble of filling out disclosure forms unless there is a sale in progress" (133 CA4th at 1040), that may not be entirely accurate for cautious real estate agents who have their clients sign all the disclosure forms in advance so that they can be shown to a buyer before she makes her offer in order to disable them from backing out later based on the disclosure statement.)

Overall, it was pretty apparent to everybody—parties and trial judge—that the buyers really had a contract to purchase the property if only a way could be found around the sellers' technical defenses. It took a lot of work, but the appellate tribunal was able to do that job.

I also admire the court's treatment of the sellers' other contention, that the buyers no longer had the funds to make them a ready and able purchaser (because they had used up so much money in litigation expenses). The explanation ("In essence, the difference between the property's 2002 price of \$540,000 and its current value represents a kind of extra downpayment made by the Behniwals, thus making lenders that much easier to find" (133 CA4th at 1045)) certainly shows a tribunal that understands how real estate markets work.

Finally, taking account of the \$540,000 sales price of this property and the fact that the reversal meant that the buyers escaped an original attorney fee liability of \$64,000 and instead recovered over \$170,000 in such fees: When costs and fees on appeal are added in, there was probably an overall swing of over half of the original price of the house—all because the sellers were attracted by a later offer that was \$25,000 better. But then I wonder if I would have advised the sellers differently, given that they had neither signed the CAR form in the right place nor given their agent written authorization to sign for them.—*Roger Bernhardt*