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REAL ESTATE
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NEWS YOU CAN USE

Recent Items of Interest to Lenders, Developers and Others in the Real Estate Community

New laws on, among other topics, documentary transfer taxes, real estate brokers, foreclosures and electronic signatures

NEW DEVELOPMENTS AFFECTING REAL ESTATE AND BUSINESS

NEW REQUIREMENTS IN COMMERCIAL REAL ESTATE TRANSACTIONS

Several new laws and case law affecting commercial real estate transactions are now applicable in California (or will shortly take effect).

Documentary Transfer Tax. The first new law requires that the amount of documentary transfer tax due be shown on the first page of a Grant Deed, effectively making the purchase price of the property a matter of public record. Until now, there had been a statutory procedure for attaching a separate statement of tax due that would not be recorded. As a result of this change, anyone with access to public records can do a simple calculation to determine the purchase price based on the amount of documentary transfer tax paid. While this may be viewed as an unnecessary intrusion by property owners, it will be welcome to appraisers seeking to determine recent comparable sales. (As residential sales prices are nearly always included in the Multiple Listing Service and few residential sellers use attorneys, residential owners are unlikely to be aware of the previous provision allowing a separate statement of tax paid that was not available to the public, this change is likely to affect only the subset of commercial property owners aware of, or using attorneys who were aware of, the provision.) If you have transactions closing, be prepared to report the documentary transfer tax on the Grant Deed.

Disclosure Requirements. The second law extends to commercial real estate transactions certain real estate "agency" disclosure requirements previously only applicable to residential transactions. Specifically, the law now requires real estate licensees (brokers and agents) in all "sales" transactions (including exchanges and leases exceeding one year) to deliver the statutory disclosure form to both the buyer and the seller, describing the

obligations of a real estate licensee to the respective parties. Moreover, the licensee must specifically confirm in writing (again, in a prescribed form) that he or she is either exclusively the seller's agent, exclusively the buyer's agent or represents both the buyer and the seller (see Cal. Civ. Code §2079.16). In the past, such a mandatory legislative requirement was deemed unnecessary in the commercial context as buyers and sellers of commercial property are generally more sophisticated about business transactions, and dual agency (where later disputes are more likely to occur) are less common. Brokers will need to comply with this provision for transactions entered into after January 1, 2015. The form is set forth in the statute here: http://codes.lp.findlaw.com/cacode/CIV/5/d3/4/6/3/2/s2079.16.

Foreclosure Sales & Other Auctions. Another new law would impose new limits in connection with real estate "auctions," whether live or on-line, including both judicial and nonjudicial foreclosure sales, but it would not generally apply to lenders making credit bids. Specifically, the law would prohibit the practice of the auctioneer or a third party making a bid "for the sole purpose of increasing the bid on any real property being sold," unless the auctioneer gives notice to all participants that such bidding will be allowed, and the bidder "contemporaneously discloses to all auction participants, including all other bidders, that the particular bid has been placed on behalf of the seller or lender. These restrictions, however, do not apply to the foreclosing lender making a credit bid, "when the credit bid can result in the transfer of title to property to the creditor."

The law also imposes a distinct but related restriction, upon residential lenders: the lender (or its auction company) may not require, as a condition to approval of a loan transaction, that the "homeowner or listing agent" agree to "defend or indemnify the lender or auction company from any liability alleged to result from the actions of the lender or auction company." According to the State Senate legislative analysis, the California Association of Realtors sponsored the bill to address a very narrow circumstance: "Some lenders have reportedly started requiring homeowners to agree to have their property put out for bid using an auction company to see if the property fetches a higher price at auction before a short sale offer will be accepted - a process known as validating the sale price." In addition, the analysis reports that "some lenders impose terms that require the seller to assume liability for damages attributable to the auction company during this validation process as a condition of agreeing to proceed with the short sale." The law, however, is not written so as to apply only to this narrow circumstance. Indeed, read broadly, the law could bring into question all borrower indemnities in residential loan documents.

E-SIGNATURES: TWO RECENT CASES AND A LAW CHANGE

At the end of the year, two cases were published that considered whether electronic signatures were validly executed so as to create a binding agreement. In both cases, the court ruled that that the signatures were not validly executed. In addition, a new law removed a restriction against using e-signatures in certain instances involving residential security deposits.

The first case involved a dispute over real estate investment partnerships.[1/] After the

1. *J.B.B. Investment Partners, LTD. et al., v. Fair*, A140232, A141228 (Dec. 30, 2014)

dispute arose, lawyers for the plaintiffs emailed the defendant and told him that unless he express his agreement to the terms of settlement, by emailing "I agree" and his name, they would file a lawsuit and seek immediate relief from the court. He did so, after they filed the lawsuit but before the hearing on their requested relief. They then drafted a "final" settlement agreement, which included a provision reserving jurisdiction with the court (under Cal.Civ.Proc. Code §664.6). After reviewing the agreement, the defendant "changed his mind." The court largely focused on two requirements under California's Uniform Electronic Transactions Act ("UETA," Cal. Civ. Code §1633.1, *et seq.*): (1) the parties must "agree to conduct a transaction by electronic means," which is determined from "the context and surrounding circumstances"; and (2) to be a valid "electronic signature," a "sound, symbol or process" must be "executed or adopted by a person with the intent to sign the electronic record." Under UETA a "sound, symbol or process" can mean virtually anything that can signal intent, from checking a box, to clicking a link to writing your name or other mark where indicated. The court essentially found that the plaintiffs were trying to have it both ways – first stating in their emails that no deal was final until the formal settlement agreement was signed by both sides, while also stating that the original email was binding when the defendant failed to sign the formal agreement. The parties could have expressly agreed that the original email deal would be binding until and unless it was superseded by the formal writing, but they did not do so.

The second case involved an agreement with employees requiring them to arbitrate disputes (California, unlike federal courts, disfavors arbitration in the employment context.)[2/] The court found that the employer had failed to establish that the signature was in fact that of the plaintiff, despite the fact that each employee had a "unique login and password" required to access and sign the "Employee Acknowledgment form." The court provided a useful roadmap for employers seeking to authenticate an electronic signature, but a future court in a different division (this case was in San Bernardino) could nevertheless impose additional requirements.

The take-away from both of these cases is that while even large commercial transactions have tended to become less formal with the rise of electronic communications, there remain formal statutory requirements that the parties must comply with if they wish courts to enforce their agreements as valid and binding, including that there be some form of "sound, symbol or process." By way of example, if your e-mail has boilerplate language stating that the e-mail does not constitute a contract, then the boilerplate should be removed if you intend for an e-mail to be binding. We encourage you to consult counsel for a review if you are using electronic signatures, or intend to use e-mails to create binding contracts or portions thereof (for example, an extension).

With respect to the new legislation, under current law, the collecting, holding and returning of a residential security deposit is strictly controlled by Cal. Civil Code § 1950.5. (Commercial security deposits, by contrast, are governed (slightly less strictly), by Cal. Civ. Code § 1950.7.) In addition, California's Uniform Electronic Transactions Act included 1950.5 (but not 1950.7) in a long list of code sections that were excluded from its

2. *Ruiz v. Moss Bros. Auto Group, Inc*., E057529 (December 23, 2014)

provisions, meaning that UETA would not apply and electronic signatures would not be enforceable. As of January 1, 2015, however, the exception referencing Section 1950.5 (governing residential security deposits) was deleted, so that approvals relating to security deposits pursuant to the Section may now be obtained by e-signature ***if both parties agree in advance to allow it***. For example, the notice of the right to an "initial inspection" before move-out (to determine any damage that may be deducted from the security deposit) may be electronic, and the tenant may waive by electronic signature the right to at least 48-hours' notice of the date of the inspection. Please note, however, that the Section still requires the landlord's notice to the tenant following move-out regarding the disposition of the security deposit be delivered personally or by regular mail. Accordingly, if you are a residential landlord, you may wish to revise your lease form to specifically permit electronic signatures where permitted by law.

THREE UPDATES: ENERGY USE DISCLOSURES,

SUBDIVISION MAPS, SOLAR ENERGY SYSTEMS

Energy Use Disclosures. In our June 2013 newsletter, we notified you about the then-new requirement that owners of certain buildings disclose specified information about a building's energy use to potential purchasers, lessees, and lenders, in specified transactions. The requirement has since gone into effect for all applicable buildings over 10,000 square feet but the requirement for buildings between 5,000 and 10,000 square feet was delayed by the California Energy Commission, so that now it will not apply until July 1, 2016.

Subdivision Maps. Following the most recent real estate recession, the Legislature passed a series of laws extending the life of tentative subdivision maps that had been approved after January 1, 2000 and prior to the date of the legislation. Most recently, an urgency statute was enacted in July 2013, extending the life of these maps for another two years. The Legislature may have decided that the economy has recovered enough not to grant a future extension – as of this writing, no bill has been introduced to grant a further extension, meaning such maps are all likely to expire in the near future unless they are given further case-specific extensions by the local governing body. The 2013 extension was done as urgency legislation, however, so the Legislature may still see its way clear to granting a further extension at the last minute.

"Active" Solar Energy Systems. Under Proposition 13, both residential and commercial property taxes are limited to 1% of the value of the property, as determined; the value is determined upon sale (and upon new construction, the tax value is increased by the value of the new construction), and then the property may not be reassessed until sale or new construction. Existing law excluded, through the 2015–16 fiscal year, from classification as "newly constructed" the construction or addition of an "active" solar energy system, as defined. The Legislature has now extended this exclusion through the 2023–24 fiscal year, and extended the repeal date to January 1, 2025. This tax break is equally applicable to multi-family residential, commercial and industrial buildings.

NEW LAWS AFFECTING ASSISTED LIVING FACILITIES AND SIMILAR FACILITIES

The Legislature passed (and the Governor signed) a package of ten bills to increase state control and oversight over the state's more than 7,500 assisted-living facilities. Among the laws is one giving assisted living residents a "statutory bill of rights" like the one previously established for nursing home residents. The facilities' staffs also will face increased training requirements, and owners/operators of the facilities will pay higher licensing fees. Operators must also now keep a staff member with CPR training in the facility at all times.

In addition, fines were increased one-hundred fold for the most egregious violations for a variety of facilities – not just assisted living, but also community care facilities, residential care facilities, for persons with chronic life-threatening illnesses, residential care facilities for the elderly, child day care centers, and family day care homes. Effective July 1, 2015, the maximum penalty for a violation that the state Department of Social Services determines results in the death of, or serious bodily injury or physical injury to, a resident, would be increased from $150 to $15,000 per violation (for the largest facilities). Because of the magnitude of the potential fines, the law also provided for an administrative appeal process, to be established in forthcoming regulations.

For more information on the package of bills, a further discussion is provided here: http://www.bizjournals.com/sacramento/news/2014/09/29/governor-signs-legislation-to-protect-seniors-in.html?page=all

NEW REQUIREMENTS IN RESIDENTIAL TRANSACTIONS

A new law sponsored by the California Association of Realtors will put new burdens on developers of residential common interest developments, although it also applies to homeowner associations after the developer has left the picture.

Currently, the law mandates a number of disclosures that the seller must have the association provide to all purchasers of a new or used home in a common interest development. These include the CC&Rs, bylaws, operating rules, rental restrictions, budget reports and the amount of regular and special assessments, among other things. In addition, the seller and/or association (as well as real estate agents) may provide additional notices and disclosures not required by law. The new law requires that the fees for the required disclosures be itemized and individually billed separately from other fees, prohibits an additional fee for electronic delivery, and prohibits the association from "bundling" the mandated disclosures with the voluntary disclosures. The new law also modified a form the association must use to list required fees and documents, which is set forth here:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2430

If you have questions or need assistance with these or other California real estate or finance matters or real estate or business litigation matters, please contact us.

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