

JAMS ARBITRATION
Case No. 1110009512

BRADLEY PETTIT and DONNA PETTIT,

Claimants,

vs.

ZHENBIAO WANG and LEI ZHENG,

Respondents.

FINAL AWARD

Counsel:

Counsel for Claimants

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Arbitrator:

Hon. Robert A. Baines (Ret.)
JAMS
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Place of Arbitration: JAMS Office, 160 W. Santa Clara Street, Suite 1150, San Jose, California.

Date of This Final Award: February 26, 2007.

* * * * *

THE UNDERSIGNED ARBITRATOR, having been appointed and having been duly sworn, and having examined the submissions, proof and allegations of the parties, finds, concludes, and issues this Final Award, which disposes of all claims herein, as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Agreement to Arbitrate: The parties' agreement to arbitrate is contained in that PRDS® Real Estate Purchase Contract dated February 28, 2006 ("Contract").

Commencement of Arbitration: The parties stipulated to the use of JAMS for this arbitration, and the arbitration process was formally commenced on September 20, 2006, with the sending of the JAMS Commencement of Arbitration letter to counsel herein. The parties stipulated to the appointment of the Hon. Robert A. Baines (Ret.) as the arbitrator, and he was appointed as the sole arbitrator on September 20, 2006. The Arbitrator's Written Disclosures were sent to all counsel on September 20, 2006.

Claims: Claimants' claims are contained in their "Statement of Claim of Sellers, Bradley Pettit and Donna Pettit," filed with JAMS on November 7, 2006. Respondents' answer, captioned "Response to Statement of Claim," was filed with JAMS on November 13, 2006.

Applicable Law and Rules: The applicable substantive law is that of the State of California [Contract, at ¶ 21(F)]. By agreement of the parties, the JAMS Streamlined Rules ("Rules") were applied to these proceedings.

Arbitrability of Claims: Pursuant to Rule 8(c) of the Rules, the Arbitrator was empowered to resolve, *inter alia*, all issues concerning the scope of the arbitration clause contained in the Contract. The parties had no dispute that the claims presented herein were encompassed by the arbitration agreement in the Contract.

The Evidentiary Hearing and Subsequent Events: The arbitration hearing commenced on January 17, 2007, at 9:00 a.m., and was completed and submitted on that date. The hearing was not reported. Post-hearing briefs were thereafter requested by the Arbitrator and submitted on January 29, 2007. The Arbitrator's Partial Final Award, addressing all issues other than attorneys' fees and costs, was issued on February 2, 2007. Briefing on Respondents' request for attorneys' fees and costs was completed on February 21, 2007. Neither party requested a hearing on the fees and costs issue.

II. FACTS

The following is a statement of those facts found by the Arbitrator to be true and necessary to this Award. To the extent this recitation differs from any party's position, that is the result of the Arbitrator's resolution of factual disputes, including the making of determinations as to credibility of witnesses and the relevancy of evidence, as well determinations of the burden of proof, and an overall weighing of the evidence, both oral and written.

The essential facts are easily summarized: The Respondents (hereinafter “buyers”) submitted their second offer to purchase Claimants’ (hereinafter “sellers”) residence at 1075 Danbury Drive, San Jose, California, in the evening of February 28, 2006. The sellers accepted, and relayed their acceptance to the buyers that same evening. This contract provided for an “as is” purchase, with no contingencies placed on the buyers' duty to perform.

The next day, March 1, 2006, buyers' agent requested and obtained a hardcopy of sellers' disclosure documents, which included the statutory Transfer Disclosure Statement (hereinafter "TDS") required by Civil Code §§ 1102 *et seq.*, and delivered these to the buyers around midday of that same day. That evening, buyers faxed a "Cancellation of Contract" form to the sellers' agent, purporting to exercise their right to terminate the contract under ¶ 8 (relating to the disclosure documents). A copy of this cancellation notice was hand delivered to sellers' agent the next morning. Thereafter, despite sellers' demands, buyers refused to perform this contract.

III. THE CLAIMS

Sellers are seeking to recover damages flowing for the buyers alleged breach of the purchase contract. They maintain that these buyers had no post-offer statutory right of rescission because buyers had seen the sellers' TDS online *prior to* submitting their offer, and thus could not avail themselves of the protections of Civil Code § 1102.3(b)¹.

Buyers, however, claim that they retained their right to rescind the contract pursuant to § 1102.3(b), and that they had given timely notice of their exercise of this right, and thus there was no contract remaining for them to breach. Buyers also dispute sellers' claimed damages, in the event their rescission is found defective.

IV. ANALYSIS

The resolution of this dispute depends entirely on whether buyers had the legal right to rescind the purchase contract, pursuant to § 1102.3(b), at the time they gave their cancellation notice.

Buyers base their right of rescission on that portion of § 1102.3(b) which provides that “[i]f any disclosure . . . required to be made by this article, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person . . . to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor’s agent.” This section has been interpreted to also give buyers a right of rescission in the event their offer has been accepted prior to delivery of the required disclosure documents, provided that title has not yet transferred. *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193.

¹ All statutory references are to the California Civil Code, unless otherwise indicated.

Although there are numerous disclosure requirements (both statutory and common law) imposed upon sellers of residential real property in California, the only disclosure requirement involved here is that found in §§ 1102 through 1102.18². This statutory scheme requires the seller and the seller's agent to complete a very specific disclosure form (this TDS form is contained within § 1102.6 itself). Once completed, the form is to be delivered to the buyers' agent for delivery to the buyers: “. . . the broker who has obtained the offer made by the transferee shall, except as otherwise provided in this article, deliver the disclosure required by this article to the transferee . . .” §1102.12. The manner of this delivery by the buyer's agent likewise is clearly defined by the act: “Delivery of disclosures required by this article shall be by personal delivery to the transferee or by mail to the prospective transferee.” § 1101.10.

There is no dispute that physical delivery of hardcopies of the TDS did not take place until March 1, 2006, when the buyers' agent obtained the completed forms from the sellers' agent, and delivered them to the buyers. However, sellers point to the fact that on or about February 21, 2006, their escrow agent, Stewart Title Company, posted these same disclosure documents on an online website (www.getdisclosures.com) and that the website records indicate that on five occasions prior to submission of their offer, buyers logged onto this website, which ostensibly gave them access to all of sellers' disclosure documents, including the TDS. Sellers believe they satisfied their statutory disclosure obligations by this process, and argue that because this process took place *prior to buyers' offer*, buyers had no post-offer rescission rights under §1102.3(b).

Buyers acknowledge that they attempted to access this online site prior to making their offer, but claim that, because of software incompatibility, they were unable to view the documents on their home computer. They further claim that on the one occasion that Mr. Wang was able to access the website from his work computer, he had to terminate his visit before viewing any of the documents because of the sudden appearance of his boss at his cubicle. Buyers also claim they were unable to open the electronic copies of these documents sent to them as email attachments by their agent³. Thus, buyers maintain that the first time they saw the contents of these documents was upon receipt of hardcopies from their broker on March 1, 2006.

Unfortunately for the sellers' position, even if the buyers had viewed some or all of these documents online before making their offer, buyers would still retain their rescission rights under §1102.3(b):

1. The statute calls for *personal or by mail delivery by the buyers' agent* of *written* copies of the disclosures: “the [buyers'] broker . . . shall . . . deliver the disclosure” [§ 1102.12(a)], and “[d]elivery of disclosures required by this article shall be by personal delivery to the transferee or by mail to the prospective transferee.” (§1102.10) The statute further provides that an escrow officer or entity “shall not be

² This statute was the buyers' only basis for rescission, as there were no other facts warranting rescission, and buyers had eagerly bid to buy this property "as is" and with no contingencies.

³ These documents apparently were sent in the "asp" format, not as "pdf" or "doc" files.

deemed the agent of the transferor or transferee for the purposes of the disclosure requirements . . . unless the person or entity is empowered to so act by an express written agreement to that effect.” (§ 1102.11) No such express written empowerment was produced in our case. Thus, Stewart Title Company cannot be deemed to have performed the buyers' agents' duty of "delivery" under the statute.

Further, even if the escrow company had been authorized to deliver these documents, they were not delivered in the manner required by § 1102.10. And, our rescission section [§ 1102.3(b)] specifically provides “the transferee shall have three days *after delivery in person or five days after delivery by deposit in the mail* . . . to terminate his or her offer.” The Arbitrator has found no case approving a different method of delivery of the TDS documents, such as via a website.

2. Also, sellers cannot avail themselves of the Uniform Electronic Transfer Act (§ 1633.1 *et seq*) to prove "delivery" of the disclosure statements to the buyers at the pre-offer stage. That act specifically provides that it “applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means.” See § 1633.5. No such agreement was produced in our case, and it cannot be said that buyers, by their conduct, impliedly agreed to use an electronic process for the exchange of documents herein.

3. Even if the buyers had viewed some or all the TDS information online at the title company’s website, or had acquired the same information from other sources, their statutory right of rescission would be unaffected. As noted by Miller & Starr: “The statute gives the buyer a right of rescission *without requiring a cause*. Thus, the buyer is given the rescission right *even though there is no material matter disclosed in the statement that was not known to the buyer*. This requirement is not unreasonable because it is a strong incentive to induce prompt disclosure, and the buyer should not be saddled with the burden and uncertainty of establishing whether a particular matter is 'material'.” Miller and Starr, *California Real Estate, Third Edition* (updated 2006) at § 1:145 (italics added). As such, even if buyers' cancellation notice was motivated by "buyers' remorse," rescission was still available to them⁴. As noted in *Realmuto v. Gagnard, supra*, the buyers' right of rescission is "unqualified." 110 Cal.App.4th 193, at p. 202.

The ease of proving that a *written* copy of the required disclosures was *delivered* to a buyer, which obviously is one of the goals of this statute, would be defeated if sellers were allowed to claim other possible methods of delivery or claim that buyers already had acquired the TDS information by other means. For example, a seller might testify that a copy of the disclosure statement was prominently displayed on a living room table during an open house, and that a prospective buyer was seen looking at it during that open house. And that buyer might well acknowledge having noticed and picked up the document, yet dispute having read any of it. This is the type of evidentiary dispute the

⁴ It appears that ours was primarily a case of "buyers' remorse" -- the buyers made no effort whatever to check out any of their concerns prior to giving their hasty cancellation notice, despite having three days to investigate. Interestingly, too, buyers subsequently bought a house in the same school districts, and the square footage of our lot actually was *larger* than represented by the sellers' agent in the TDS.

statute seeks to avoid by clearly specifying the method and manner of delivery of the TDS. The statute does not have an "unless the same information was otherwise acquired by the buyer" exception, and one should not be implied. And, it is up to the Legislature, not this Arbitrator, to authorize additional methods for delivery of the required TDS form.

4. The statute is also clear that any purported waiver of its requirements is void as against public policy, even in an "as-is, no contingencies" contract such as ours. See §1102(b) and *Realmuto v. Gagnard, supra*. Thus, although they agreed to the various "as is" provisions in the Contract, including having "0" days to remove any contingencies (§ 20), our buyers cannot be said to have waived the protections of this statute.

5. Finally, in § 8 of our Contract, buyers specifically alerted the sellers to the fact that the buyers were *not* acknowledging prior receipt of any disclosure documents. And, in that same paragraph, the sellers agreed to furnish these documents to the buyers within five days of sellers' acceptance of buyers' offer. There was no indication that the sellers' agent was surprised when buyers' agent called on March 1, 2006, and requested these disclosure documents. Rather, sellers' agent promptly produced a copy of the disclosure documents, with areas marked thereon for the buyers to sign and thereby acknowledge receipt of the disclosed information.

For the above reasons, this Arbitrator finds that the buyers' three-day right of rescission did not arise until their receipt, for their own agent, of the written copy of the sellers' TDS. Thus, the buyers' notice of cancellation on March 1, 2006, was timely under the statute, and served to rescind the contract in question. As such sellers' claim for damages for breach of that contract must be denied.

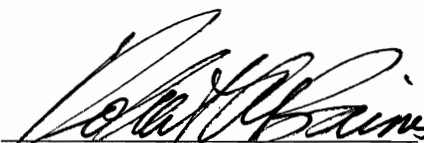
Respondents are deemed the prevailing parties and entitled to reasonable attorneys' fees and costs pursuant to § 21(C) of the Contract. The Arbitrator has reviewed the submittals regarding attorneys' fees and costs and determined that the hourly rate requested by Mr. Gorman (\$400/hour) is reasonable based on his education, training, and experience, and that the number of hours expended on this matter is also reasonable in light of the nature of the proceedings, the issues presented, and the amount in controversy. Thus, attorneys' fees are awarded to Respondents in the sum of \$16,600.00. Respondents' claimed costs are also found reasonable and allowable, and are awarded in the sum of \$5,402.07.

V. AWARD

Claimants Bradley Pettit and Donna Pettit shall take nothing by their claims herein. Pursuant to § 21(C) of the Contract, Respondents Zhenbiao Wang and Lei Zheng are awarded their reasonable attorneys fees and costs incurred herein, in the following amounts: attorneys' fees of \$16,600.00 and costs of \$5,402.07, for a total award of \$22,002.07 in Respondents' favor.

Pursuant to ¶21(C), Respondents shall be entitled to recover, and have added to any future judgment based on this Award, legal fees and costs reasonably and necessarily incurred by them in judicially confirming or enforcing this award.

DATED: February 26, 2007

A handwritten signature in black ink, appearing to read "Robert A. Baines", written over a horizontal line.

Hon. Robert A. Baines (Ret.)
Arbitrator

PROOF OF SERVICE BY FACSIMILE AND MAIL

I, Cynthia Victory, not a party to the within action, hereby declare that on February 26, 2007 I served the attached Final Award on the parties in the within action by mailing and faxing true copies thereof, at San Jose, California, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose, CALIFORNIA on February 26, 2007.



Signature