

New Decision Allows the Recovery of Lost Profits in Real Estate Purchase Disputes

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December 2010

For many years, California courts have held that plaintiffs suing for breach of a real estate purchase contract can recover no more than the difference between the agreed upon purchase price and the actual value of the property. However, a recent decision of the California Court of Appeal, *Greenwich S.F., LLC v. Wong*, holds that plaintiffs may also be able to recover the lost profits they expected to obtain as a result of the transaction. To obtain such damages, plaintiffs must prove, with "reasonable certainty," that they would have received such profits if not for the defendant's breach.

The events at issue in *Wong* occurred between 2003 and 2006, in a real estate market that now seems difficult to remember. The defendant agreed to sell real estate to the plaintiff for \$760,000. The plaintiff planned to demolish the existing structure, construct a new residence in its place, and sell the property. Before the closing, the defendant informed the plaintiff that the value of the property had appreciated to more than one million dollars and she demanded a corresponding increase in the purchase price. Rather than acceding to this demand, the plaintiff sued the defendant for breach of contract.

The case went to trial in 2008. The jury found that the defendant had breached the parties' agreement. Addressing damages, the jury determined that there was no difference between the purchase price set forth in the agreement and the fair market value of the property on the date of the breach. However, the jury concluded that the plaintiff had suffered "consequential damages" of \$600,000, representing the lost profits that the plaintiff would have earned by redeveloping the property.

In her appeal, the defendant argued that in allowing the plaintiff to recover lost profits, the trial court had disregarded a long line of California case law precluding such damages in real estate contract cases. The Court of Appeal acknowledged that "[h]istorically, the measure of damages...for a seller's breach of a contract to sell real property has been held not to include lost profits." However, the appellate court noted that the governing statute was amended in 1983 to allow the recovery of "consequential damages." The Court of Appeal held that this change authorized the recovery of lost profits, even though no other court had reached this conclusion.

Nevertheless, the Court of Appeal reversed the jury's verdict awarding lost profit damages to the plaintiff. The appellate court held that, to be recovered, such damages must be proven with "reasonable certainty." In this case, the plaintiff had scant experience developing real estate and there was little empirical data supporting plaintiff's lost profits claim. Instead, the assumptions underlying plaintiffs' damages calculations "were inherently uncertain, contingent, unforeseeable and speculative." Accordingly, the Court of Appeal concluded that "the evidence was insufficient to show lost profits with reasonable certainty."

Conclusion. The *Wong* decision opens a new source of potential recovery for plaintiffs in real estate disputes, especially in markets – like the current one – in which the fair market value of the property is less likely to exceed the agreed upon purchase price. At the same time, the opinion shows that to succeed in a claim of lost profits, plaintiffs must carefully develop their damages analysis to withstand scrutiny from both trial courts and courts of appeal.