



Real Estate

# CPDB Update

## Real Estate Buyer's Partial Performance Saves Otherwise Unenforceable Option Agreement

A recent California Supreme Court case found that a buyer's partial performance of its efforts to subdivide a property was sufficient consideration to render a real estate agreement enforceable. This decision overturned the California Court of Appeal's ruling that such partial performance did not constitute valid consideration and was not sufficient to render the contract enforceable.

In *Steiner v. Thexton*,<sup>1</sup> the buyer (Steiner) and the seller (Thexton) of a 10-acre parcel entered into an agreement to sell Thexton's property upon the completion of a subdivision of a larger parcel. The agreement contained typical contingencies in favor of Steiner, such as investigation and title review, as well as a contingency relating to Steiner's pursuit of the subdivision approvals which were anticipated to take up to three years to obtain. The agreement also contained the unilateral right in favor of Steiner to terminate the agreement at any time, without cause, at Steiner's "sole and absolute discretion" giving Steiner the right to abandon the pursuit of the subdivision approvals.

After signing the agreement, Steiner placed a \$1,000 refundable deposit into escrow and began pursuing the necessary approvals with Thexton's cooperation, expending approximately \$60,000 in such efforts. More than a year after signing the agreement, but before the subdivision approvals had been obtained, Thexton sought to cancel the escrow and communicated his refusal to sell the property to Steiner. Nonetheless, Steiner opposed canceling the escrow, proceeded in the subdivision efforts and sought specific performance of the agreement.

### **Real Estate Purchase Contract was a Disguised Option**

The California Supreme Court, in agreement with the California Court of Appeal,<sup>2</sup> held that since Thexton was bound to sell the property for a period of three years, but Steiner was not

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obligated to perform under the agreement (referencing the aforementioned termination right), the agreement was an option agreement, not a bilateral contract. The California Supreme Court differentiated the Steiner contract from a “common form” of bilateral real estate contract, as the later only allows termination upon the failure of a contingency, while the Steiner contract permitted termination for any or no reason, even if all contingencies had been satisfied.

## **Substantial Efforts and Expenditures are Adequate Consideration**

The California Supreme Court also addressed Thexton’s contention that there was no consideration given in connection with the option, therefore it was unenforceable and merely a continuing offer that could be revoked by Thexton at any time. The California Court of Appeal previously concluded that since no money was paid to Thexton (the deposit was refundable) and Steiner was under no obligation to pursue the subdivision approvals at the time the agreement was entered into, Steiner’s promise to pursue the subdivision approvals was illusory and did not constitute valid consideration<sup>3</sup> rendering the agreement an unenforceable revocable offer. The California Supreme Court rejected this position, holding that Steiner’s part performance of the bargained-for obligation to seek the subdivision approvals was sufficient consideration to render the agreement enforceable. The California Supreme Court concluded that the consideration may have been illusory when the agreement was entered into given Steiner’s broad termination right, but once Steiner took substantial steps and incurred significant expenses toward obtaining the subdivision approvals a bargained-for benefit was conferred upon Thexton, curing the initially illusory nature of the promise.

The *Steiner* decision should be carefully considered when entering into real estate purchase agreements, as “free look” provisions may render such agreements unilateral options to purchase. In addition, buyers and sellers should be particularly careful to exchange adequate consideration in connection with real estate purchase agreements (including options) to ensure that the agreements are enforceable at the time signed by the parties.

<sup>1</sup> S164928, Supreme Court Of California, 2010 Cal. LEXIS 1913, March 18, 2010.

<sup>2</sup> See *Steiner v. Thexton*, 163 Cal. App. 4th 359 (Cal. App. 3d Dist., 2008).

<sup>3</sup> See Cal. Civ. Code § 1605 for the elements of consideration.

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