

# Parties Must Try Mediation to Obtain Award of Attorney Fees

By David M. Grey

An attempt at mediation is a condition precedent to the recovery of attorney fees in litigation arising from the California Association of Realtors form Residential Purchase Agreement (and receipt for deposit), according to the recent case of *Leamon v. Krajkwicz*, 2003 DJDAR 2035 (Cal. App. 5th Dist. Feb. 24, 2003).

This form contract is used for almost every home sale in California. It requires that a party first must request mediation before beginning litigation or else lose the right, under the contract, to recover attorney fees as the prevailing party. Such attempts are necessary to preserve the

right to recovery of attorney fees even if the contract is later found to be invalid.

The *Leamon* court noted that attempts at mediation are supported by public policy, which dictates efforts at informal settlement before resorting to litigation. Moreover, the court held that

attempts at mediation as a condition precedent to recovery of attorney fees do not conflict with Civil Code Section 1717, which makes the right to recovery of fees mutual regardless of contractual language to the contrary.

Joyce Leamon owned a house, which she had listed for sale. After the listing expired, her neighbors, Leonard and Corrie Krajkwicz, expressed interest in buying the house. Leamon orally agreed to sell and that a friend of the Krajkwiczes, Rick Denison, would act as a dual real estate agent, representing both the buyer and seller. No papers were signed.

Leamon then spoke with her daughter, who said that she also wanted to buy the house. The very next day, Denison called Leamon to set up an appointment for the contract to be signed. Leamon told Denison that she did not want to make an appointment and no longer intended to sell the house to the Krajkwiczes because her daughter wanted to buy the house.

Denison showed up at Leamon's house anyway and threatened her with litigation if she did not sign the contract, advising her that she was bound by her oral agreement to sell to the Krajkwiczes, even though she wanted to sell to her daughter instead. With tears in her eyes, Leamon signed the contract, believing that she

would be sued if she did not.

Leamon then consulted legal counsel, who wrote to the Krajkwiczes to cancel the contract. The Krajkwiczes filed a Small Claims Court action for damages. Leamon then filed a complaint to quiet title and for emotional distress, which also was later amended to obtain a judicial declaration that the contract was void. Leamon did not request attorney fees in her complaint. The Krajkwiczes dismissed the small claims action and hired legal counsel, who wrote to Leamon demanding that their dispute be mediated. Leamon did not comply with the request and had never requested mediation before filing her complaint.

The Krajkwiczes filed an answer and cross-complaint, both of which included a request for attorney fees. Leamon's answer to the cross-complaint included a request for attorney fees. Judgment was entered in favor of Leamon after a jury finding that the contract was invalid.

Leamon sought recovery of her attorney fees of \$27,612 as the prevailing party. The trial court granted the Krajkwiczes' motion, refusing to award attorney fees because Leamon never demanded mediation as required under the form contract, which provided at Paragraph 21A: "MEDIATION: Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action . . . . If any party commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fee, even if they would otherwise be available to that party in any such action."

The Court of Appeal rejected Leamon's argument that the mediation provision in the contract conflicted with Section 1717, which requires the contractual right to the recovery of attorney fees to be mutual. Leamon argued that since the Krajkwiczes were entitled to attorney fees, so was Leamon, because of the mutuality imposed by Section 1717, which also permits a prevailing party to recover attorney fees provided by contract even when the contract is shown to be invalid. *Santisas v. Goodin*, 17 Cal.4th 599 (1998).

The *Leamon* court analyzed whether there was a conflict between the concept of mutuality of remedy embodied in Section 1717 and the contractual provision requiring mediation before litigation as a condition precedent to recovery of attorney

fees as the prevailing party.

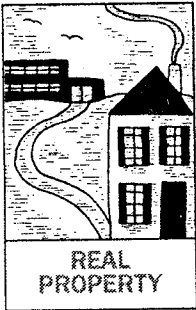
In affirming the trial court's denial of attorney fees to Leamon, the Court of Appeal noted that mutuality of remedy under Section 1717 existed because the Krajkwiczes also were obligated to seek mediation as a condition precedent to any right under the contract to recovery of attorney fees. In addition, the court noted that requiring a party to mediate whether the contract is valid is not a concession that the contract is not voidable. The party can make clear in mediation that they believe the contract is invalid.

What really seemed to motivate the court, however, is the public policy of promoting mediation as a preferable alternative to litigation, which was served by the condition precedent in the form contract. The court noted that through mediation, this dispute, which started as a \$5,000 Small Claims Court case, and later grew to include Leamon's legal fees of \$27,000, could have been resolved more efficiently.

On March 25, the court rendered a supplemental opinion upon the denial of rehearing, *Leamon v. Krajkwicz*, 2003 DJDAR 3369 (Cal. App. 5th Dist. March 25, 2003). The supplemental opinion made clear that mediation as a condition precedent to recovery of attorney fees is consistent with mutuality of remedy, leaving the parties free to contract the conditions upon which fees may be awarded to the prevailing party so long as the specified condition is mutual and does not conflict with Section 1717.

The lesson of *Leamon* is that a party must be sure to demand mediation before starting litigation or else the party may prevail at trial but not be able to take advantage of the right to recover attorney fees as the prevailing party. This also may undermine efforts at settlement because only one party has the right to recover attorney fees, which may serve as leverage to impose a less-favorable settlement.

*Leamon* does not address the need for mediation when it would be futile without the participation of all the parties to the dispute, even those not bound by the condition precedent. Prudence, however, dictates that efforts at mediation need to be made to preserve the right to recover attorney fees, unless the parties to the contract specifically agree otherwise.



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