

## THE EVIDENCE CODE & REAL PROPERTY DISPUTES

By Elizabeth Brekhus

There are significant provisions in the Evidence Code that apply to real property disputes. Certain provisions determine the admissibility of evidence and others create presumptions effecting the burden of proof. A good understanding of these provisions and the case law interpreting them can give the practitioner a real advantage.

I recently tried a case in which the issue was whether one party was the owner of property even though he was never on title. Evidence Code §662: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." This rule, which favored my opponent, was never cited by my opponent and the case was tried under the preponderance of evidence standard instead of the more stringent clear and convincing evidence standard.

Evidence Code §§ 810 et. seq consists of rules relating to evidence of market value of property. Knowledge of the case law interpreting these code sections is essential; case law limits the effect of certain provisions in ways not readily apparent from a reading of the statutory language.

For example, case law interpreting Evidence Code §813, which allows an owner of real property to testify as to the value of the property owned, prohibits such testimony in construction defects cases or real estate sales cases involving nondisclosure.

In *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, the plaintiffs purchased property with code violations and structural defects which they alleged had been intentionally misrepresented to them by the seller and the real estate agent representing both the buyer and seller.

The plaintiffs sought to introduce evidence of the value of the real property without the code violations and structural defects and the lesser value of the property that was sold to plaintiffs with the code violations and structural defects.

The trial court refused to allow plaintiffs to testify concerning the difference in value and the appellate court held that plaintiffs were properly precluded from testifying as to the value of plaintiffs' property which they claimed was diminished by code violations and structural defects. *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 241.

The *Fragale* court read Evidence Code §813 in conjunction with Evidence Code §814, which provides that the owner's testimony "is limited to such an opinion as is based on matters perceived by or personally known to the witness ... that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property ...." The court found that the plaintiffs made no offer of proof as to the basis for the opinion of diminished value due to code violations and structural defects. The plaintiffs were therefore awarded the repair cost to the property, which they did prove, but not the amount of the diminished value to the property. *Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 241.

It should be noted that it is possible that the rule cited in the *Fragale* case could be overcome if an owner could substantiate the basis for the opinion testimony. The *Fragale* plaintiffs did not make a very convincing offer of proof to show that there was a reasonable basis for the opinion. It seems plausible that the plaintiff-owner may have been allowed to testify if the offer of proof demonstrated some factual basis, such as comparable sales in a subdivision, to testify as to market value.

It also should be noted that sometimes the *Fragale* rule is not an issue because, in some cases, cost of repair represents the reasonable loss of market value.

As a practical matter, I have only successfully argued this case in my favor, as a bar to testimony, one time and I have never had an opposing attorney raise it. However, I am careful to let clients know about the rule and to recommend retaining an appraiser or real estate agent.

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