

1 Hon. John Flaherty (Ret.)
2 JAMS
3 160 W. Santa Clara St.
4 Suite 1150
5 San Jose CA, 95113
6 408-288-2240
7 fax 408-295-5267

6 JAMS

8 Timothy Prichard and Brandie Prichard,

) JAMS Reference No. 1110010030

) **Final Award**

10 Claimants,

11 vs.

12 Greg Handy and Shannon Handy,

13 Respondents.
14

15 INTRODUCTION

16 This arbitration proceeding was heard in the JAMS Walnut Creek office on October 9,
17 and 10, 2007. Brian Gearinger appeared for the Prichards and Steve McNichols and Randy
18 Sullivan for the Handys.

20 THE FACTS

21 The Handys were interested in buying a home with a tennis court in late 2005. On
22 November 1, 2005 they made an unsolicited written offer to purchase the Prichard home for
23 \$2,275,000. (Exhibit A.) The Prichard home was not being marketed for sale. The Prichards
24 responded with Addendum B to the purchase agreement which provided that all contingencies
25 were to be removed within 17 days and the deposit was to be increased from \$25,000 to \$68,000
26 upon removal of contingencies. The Prichards were represented by real estate agent Marilee
27 Headen. Greg Handy, a real estate appraiser and licensed real estate agent since 1976 acted as
28 agent for himself and his wife as buyers.
29

1 November 20, 2005, Handy removed the buyers' inspection contingency. He had not
2 hired a professional to inspect the property and had not obtained a current inspection report.
3 Instead he relied on reports given him from March of 2004 when Prichards had purchased the
4 property.

5 December 2, 2005, Handy prepared Addendum D to the purchase agreement which
6 provided for close of escrow to be March 27, 2006 and buyers' deposit to be increased to
7 \$100,000 on February 1, 2006.

8 During the last two weeks of December and first week of January the Danville area
9 received steady rainfall. On January 14, 2007 the Handys visited the property with Greg Handy's
10 twin brother. Greg Handy testified that the pool was "full of mud" and "the spa had some mud in
11 it too." He couldn't tell where the mud came from, and he did not see mud on the retaining wall
12 above the pool. The tennis court was a mess despite the fact that it had not rained in 6 days.
13 Handy noticed blisters on the court and saw water leaching out of the retaining wall onto the
14 northwest corner of the court. He was concerned because one half the tennis court was
15 unplayable even though there had been no rain for a week.

16 Handy called Marilee Headen and expressed his concerns. They agreed to meet at the
17 property a week or two after January 14th. Handy testified that he had meetings with Headen after
18 the 14th. The first one was a week or two after the 14th, and the second one "a week or two after
19 that." She told him to put his concerns in writing.

20 Timothy Prichard testified that rain was heavier than usual in early January when it rained
21 on a daily basis. He noticed dirt in the pool during the first week of January. The pool was
22 cloudy but he could see the bottom. He called his pool maintenance service and was told to shut
23 off the pumps and filters. The pool cleaning process took three regularly scheduled visits. By
24 the end of January or first of February all of the dirt was out of the pool.

25 Marilee Headen called Prichard on January 24th, the date of her visit to the property with
26 Greg Handy. Marilee told Prichard the issues Handy had raised but did not mention an amended
27 disclosure. She told Prichard she asked Handy to put his concerns in writing, and he agreed to do
28 so. Prichard told Headen that his pool maintenance man was taking care of the pool problem.
29

1 On the 31st of January or February 1st Prichard again spoke with Marilee Headen. She sent him
2 Exhibit 15 by fax or hand delivery. He did not think the issues raised were material and she
3 agreed. She told him to respond in writing. He next talked to her on February 2nd when she
4 called to tell him of the cancellation notice (Exhibit 16). Prichard did respond in writing (Exhibit
5 17) to Handy's concerns, but that was on February 3, 2006, after Handy had sent the cancellation
6 notice of February 2nd. The cancellation notice is based on sellers' failure to provide amended
7 disclosures regarding paragraphs 5 A3, 5 A4, 7A, 14 C2 and 14e of the agreement.
8

9 DISCUSSION

10 Handys contend the Prichards breached section 5 of the agreement by failing to properly
11 disclose and to amend their transfer disclosure statement. Prichards counter that Handys
12 breached the agreement by failing to increase their deposit on February 1, 2006 and by failing to
13 close escrow.

14 Paragraph 5.A. of the purchase agreement provides in pertinent part:

15 (3) In the event seller, prior to the Close of Escrow, becomes aware of adverse conditions
16 materially affecting the property, or any material inaccuracy in disclosures, information or
17 representations previously provided to Buyer of which Buyer is other wise unaware,
18 Seller shall promptly provide a subsequent or amended disclosure or notice, in writing
covering those items.....

19 Greg Handy has been a licensed real estate agent since 1976 and been involved in
20 approximately 100 residential real estate transactions. He has advised many buyers about what
21 kinds of inspections buyers can request and how to obtain inspections. He is now self-employed
22 as a real estate appraiser and is very experienced in residential real property transactions. This is
23 important because when a buyer conducts an inspection of the property he is held to a standard
24 involving his own intelligence, knowledge, information and experience rather than the standard
25 of the hypothetical reasonable man.

26 Attorney and real estate broker John C. Till testified that Handy's conduct fell below the
27 standard of care for a buyer's real estate agent. It was below the standard of care not to order his
28 own inspections including a geotechnical report because one and one-half year old reports are no
29 longer timely. He testified that given the slope of the subject property common knowledge

1 dictates that rains bring debris to pools with water run off. In his opinion the Prichards provided
2 adequate disclosures and were not required to amend them because there were no material
3 changes involving the pool or tennis court. As a buyer, Handy fell below the standard of care of
4 a reasonable buyer by failing to contact the inspector who had done the 2004 report or obtain his
5 own soils inspection.

6 Both real estate experts were knowledgeable and credible, but I find Mr. Till's testimony
7 more persuasive on those issues, in part because of the testimony of Gary New. Mr. New does
8 pool inspections for residential buyers. He inspected the pool March 8, 2004 and again on
9 August 24, 2007. There is no discernible difference in the two reports. His testimony buttressed
10 that of Mr. Prichard that the pool problem was temporary and not material.

11 Case law has established the test of materiality by focusing on the value of the property,
12 so if the matter does not affect the value of the property it is not material. See Nece vs. Bennett
13 (1963) 212 C.A, 2d 494,496; Shapiro vs. Sutherland (1998) 64 C.A, 4th 1534, 1544.

14 A buyer is not entitled to demand an amended disclosure regarding conditions he knew or
15 should have known. The condition of the tennis court is an example of that rule. Both Handy
16 and Marilee Headen had noted cracks in the surface of the tennis court in their disclosures and
17 Handy saw the blisters on the court.

18 Because this purchase agreement contained an "as is" provision, the buyer takes the
19 property in the condition visible or observable by him, and the seller is relieved from liability for
20 defects in that condition.

21 There is no evidence that the run-off dirt in the swimming pool was more than a
22 temporary problem and no evidence that it affected the value of the property. Steven O'Conner
23 testified the pool problem was surface water run off which picked up loose soil and carried it
24 down the hill to the pool. He also testified it was due to an unusually intense rainstorm period in
25 December 2005, and there was no hillside failure on this property. His opinion was that the
26 white markings on the tennis court retaining wall were evaporative salt deposits, and they are an
27 aesthetic issue only. He did not recommend repairs.

1 There is insufficient evidence to establish that the disclosures made by sellers were
2 inadequate or that amended disclosures were required. As a result of that finding, nothing
3 excused buyers from increasing their deposit. It was undisputed that buyers failed to increase
4 their deposit from \$68,000 to \$100,000 on February 1, 2006 and to close escrow on March 27,
5 2006. Due to these inactions buyers are in breach of contract.

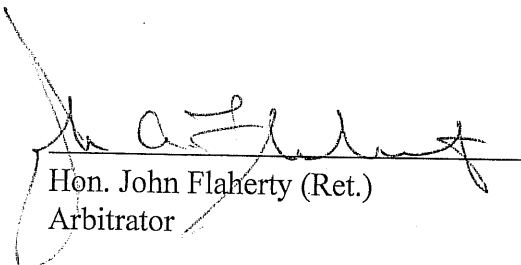
6
7 DAMAGES

8 The Purchase Agreement contains a liquidated damages provision and sellers are entitled
9 to the \$68,000 deposit with Fidelity Title as a result of the breach of contract by buyers. The
10 request by sellers for the additional \$32,000 is denied. There is not sufficient evidence of an
11 extraordinary showing to warrant damages of more than 3% of the purchase price. (See
12 paragraph 16 of the Purchase Agreement).

13
14 CONCLUSION

15 For the reasons set forth above the Handys shall authorize release from escrow holder
16 Fidelity Title of the \$68,000 plus interest to Prichards and Prichards, as prevailing parties, are
17 entitled to their attorneys' fees of \$164,636.49 for the arbitration and mediation including costs
18 of mediation and arbitration costs of \$43,679.07.

19
20
21
22 Dated: Jan. 2, 2008


23 Hon. John Flaherty (Ret.)
24 Arbitrator

1 Hon. John Flaherty (Ret.)
2 JAMS
3 160 W. Santa Clara St.
4 Suite 1150
5 San Jose CA, 95113
6 408-288-2240
7 fax 408-295-5267

JAMS

8 Timothy Prichard and Brandie Prichard,

JAMS Reference No. 1110010030

9 Claimant,

**Ruling On Application For Attorneys' Fees
and Costs**

10 vs.

11 Greg Handy and Shannon Handy,

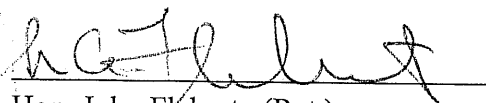
12 Respondents.
13

14 Prichards as prevailing parties request \$43,679.07 in costs related to the arbitration;
15 \$167,224.50 in attorneys' fees related to the arbitration and \$19,313.99 in attorneys' fees and
16 costs in the mediation of this dispute.

17 The request for costs is granted in its entirety. C.C.P. 1033.5(c)(1) does not control in this
18 arbitration proceeding. The Purchase Agreement provides for reasonable costs to the prevailing
19 party. The costs appear reasonable and have been paid by Prichard. Costs are awarded in the sum
20 of \$43,679.07.

21 The Prichards are awarded reasonable attorneys' fees for the arbitration and reasonable
22 attorneys' fees and costs for the mediation in the total of \$164,636.49. In reviewing the submitted
23 billing, deductions have been made for some duplication of time between the two law firms and
24 some pursuit of motions and overbroad discovery.

25
26
27 Dated: Jan. 2, 2008


28 Hon. John Flaherty (Ret.)
29 Arbitrator

PROOF OF SERVICE BY FACSIMILE AND MAIL

I, Elizabeth Medina, not a party to the within action, hereby declare that on January 16, 2008 I served the attached Final Award; and Ruling on Application For Attorneys' Fees and Costs on the parties in the within action by mailing and faxing true copies thereof, at San Jose, California, addressed as follows:

Brian K. Gearing Esq.
Mosley & Gearing, LLP
825 Van Ness Avenue
4th Floor
San Francisco, CA 94109-7837 USA
Tel: 415-440-3102
Fax: 415-440-3103

Randy Sullivan Esq.
McNichols Beers LLP
6600 Koll Center Parkway
Suite 250
Pleasanton, CA 94566
Tel: 925-249-3405
Fax: 925-600-1802

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose, CALIFORNIA on January 16, 2008.

E. Medina

Signature