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Please note:

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorneys for Claimants

IN ARBITRATION BEFORE

IN RE THE ARBITRATION OF
JOHN SMITH & JOAN SMITH,
Claimants,

Case No.
ARBITRATION BRIEF

vs.

TUSCAN HOMES, INC.

Issue

The seller of a \$2.1 million house delivered a building to be built on a premium lot in a gated community that looked dramatically different from the house the seller depicted (it has a brick facade and stained glass windows that buyers did not expect and do not want); dishonored a representation that buyers could transfer a golf club membership from their previous community (requiring them to buy a new membership for \$100,000); fired a subcontractor, hired new ones, and increased the price of upgrades \$10,000 to cover the new subcontractors' higher prices; and generally dealt with buyers with indifference and disrespect that caused one of them to become physically ill. Were the buyers entitled to cancel the contract and recover their purchase-money deposit?

1 **FACTS**

2 In June 2____, John and Joan Smith (collectively “Smith”) agreed to buy a house to
3 be built on a premium lot overlooking the 18th green in a golf club development called
4 “Sienna Hills” in Tuscan, California. The seller was Tuscan Homes. The purchase price,
5 including upgrades, was \$2,100,000. Smith deposited a total of \$100,000, with the
6 balance due at closing.

7 In May 2____, Smith opted to cancel the purchase for reasons described below.
8 Tuscan Homes claims the deposits under a liquidated-damages clause. Buyers claim the
9 deposits based on the following facts:

- 10 (i) Tuscan Homes drastically changed the home’s exterior finish from the
11 finish depicted in the drawing Buyers saw. The changes included a brick
12 facade and stained glass windows, both of which Buyers disliked.
- 13 (ii) Tuscan Homes fired subcontractors for flooring and cabinet upgrades and
14 required Buyers to reorder from new subcontractors at higher prices.
- 15 (iii) Tuscan Homes told Buyers they could transfer their golf club membership
16 from the community where they lived to the Sienna Hills golf club, then
17 told them they would have to buy a new membership for \$100,000.
- 18 (iv) Tuscan Homes also failed Buyers in other ways, such as:
- 19 • firing the general manager (Buyers’ neighbor, in whom they had
 - 20 confidence that helped motivate the purchase);
 - 21 • cutting out night hours for the health club, making the development less
 - 22 attractive to many buyers of working age;
 - 23 • firing the project manager and hiring a new one without any notice to
 - 24 Buyers;
 - 25 • failing to enforce landscaping rules on numerous investor-owned,
 - 26 unoccupied properties;
 - 27 • ignoring security issues after months of notice; and
- 28

- generally providing poor customer service from the inception of the transaction.

This course of events so exasperated Buyers that by March 2____, Joan Smith had developed persistent digestive problems and depression.

Chronology

May 28 {*prior year*}: The Smiths buy the property based in part on representations by the sales agent, Linda Jones, that the exterior finish would be as depicted (they are shown a picture of the model); and that they can transfer their golf club membership from their present community to Sienna Hills without charge.

June: Buyers arrange to meet Tuscan Homes representatives on June 5, a business day, to see the lot as staked, to be sure the house will directly face the 18th. The lot is *not* staked as promised, so the meeting (for which Buyers had to cancel appointments) is a waste of time. Later, when it is staked, it does not face the 18th green. Tuscan Homes resists shifting the siting slightly to correct the problem (but later gives way).

Buyers select interior upgrades with Tuscan Homes’s Design Center Manager, and are told that they can make electrical system changes during the “electrical walkthrough.”

Buyers contact Homewerk, Tuscan Homes’ subcontractor, to select other finishes: flooring, carpeting, and countertops. They are told that the earliest available appointment is with “Joyce” on August 3; their request to work with a different representative is refused.

July 5: Buyers learn that the General Manager, Mike Murphy, whom they knew and trusted to keep Sienna Hills as it should be kept, had been fired before they went to contract. The new General Manager, Leo Butler, immediately cuts amenities. Among other things, Butler eliminates evening hours for the health club, even though Sienna Hills is marketed as a “young” community, which means that many members, including

1 Buyers, can't use the club at all except on weekends. Butler dismisses Joan's complaint,
2 suggesting that she buy her own gym equipment and exercise at home.

3 **August:** Appointment with Joyce is rescheduled for August 31 (the earliest Joyce
4 will offer), which is beyond Tuscan Homes's deadline. Tuscan Homes approves the
5 change. Buyers make their selections.

6 **September:** Buyers learn, in passing, that Tuscan Homes is changing sub-
7 contractors. Tuscan Homes gives them the new subs' names on a post-it note and tells
8 them to call the subs in a month or so.

9 **October:** Buyers wait a month, then contact new subs to make appointments. The
10 new subs know nothing about Buyers and won't make appointments because Tuscan
11 Homes hasn't sent the subs their files.

12 **January 6:** Tuscan Homes' new subs finally meet with Buyers. Buyers re-select
13 the same upgrades they had previously made with Homewerk, only to find that the costs
14 are now \$10,000 higher than before. Tuscan Homes refuses to cover this increase.

15 Buyers are informed that their house will have a brick facade and stained glass
16 windows—neither of which were in the drawing they were shown and both of which they
17 dislike.

18 Sienna Hills homeowners meet to discuss security problems and make
19 recommendations to the Homeowners' Association (which Tuscan Homes still controls).

20 Tuscan Homes informs Buyers that construction is behind schedule and closing
21 will not occur by the end of April, as promised.

22 Buyers discover that they cannot transfer their golf club membership as promised.
23 They will have to buy a new \$100,000 membership and sell the old one or carry both.

24 Buyers learn by word of mouth that Joe Nguyen, the Project Manager, has
25 resigned and been replaced by "Alex." Tuscan Homes provides no notice of this change.
26 "Alex" never calls, writes, or otherwise contacts Buyers to introduce himself.

27 Joan, in distress over Tuscan Homes's repeated delays, mishandling, and ill
28

1 treatment, begins to feel unwell, with digestive problems that do not respond to treatment,
2 and depression.

3 **May:** Problems with Sienna Hills persist or grow worse.

4 Security issues, including Sienna Hills's gate lighting, which homeowners have
5 been complaining about since February, remain unresolved.

6 The Main Entrance hasn't had landscape lights or fountain lights since January,
7 despite numerous calls to management and the HOA.

8 Many homes bought by investors remain unoccupied and unlandscaped, in
9 violation of Sienna Hills's by-laws, creating unsightly conditions and depressing property
10 values.

11 On **May 18**, Buyers give notice, through counsel, that they are cancelling their
12 purchase and want their deposits back.

13 On **May 26**, Tuscan Homes, through Project Manager Alex Nelsand, declares
14 Buyers in material breach.

15 16 **DISCUSSION**

17 **1. Tuscan Homes breached the contract by delivering a house substantially**
18 **different from the house Buyers agreed to buy, entitling claimants to**
19 **cancel the purchase and recover their deposits.**

20 The model and elevation of the house the claimants agreed to buy was the model
21 *as depicted by Tuscan Homes' sales agent, Linda Jones*. On the day of the sale, Jones
22 told Buyers that no example of that model was available to view, but that they had no
23 need to see a model because the model's appearance was the same as was shown in the
24 drawing.

25 Buyers agreed to buy the house based on Jones's depiction. They were entitled to
26 rely on that depiction because Jones was the sales agent for Sienna Hills and purported to
27 know the appearance of the model she described.

1 The house as built may have been substantially similar to the model house Tuscan
2 Homes intended, but it was *not* the same as or substantially similar to the picture. The
3 pictured model had a stucco facade and clear windows, but the house as constructed had a
4 brick facade and stained glass windows. These features completely altered the
5 appearance of the house, changing it from the style the Buyers chose to one they found
6 unacceptable.

7 In sum, the parties did not have in mind the same design for the house. There may
8 have been a mutual mistake on the part of claimants and Jones, or a negligent
9 misrepresentation by Jones, which she never corrected. In either case, claimants are
10 entitled to rescission and restitution.

11
12 **2. A mutual mistake prevents contract formation.**

13 A mistake of fact can prevent contract formation if the fact (past or present) is
14 material and the mistake is not caused by the mistaken party's neglect of a legal duty.
15 Civ. Code § 1577. When there is a mutual misunderstanding regarding the identity of the
16 contract's subject matter and both parties or neither is at fault in creating the mistake,
17 there is no meeting of the minds as to a material matter and no contract is formed. *Id.*,
18 § 1580. See 1 Miller & Starr, CALIFORNIA REAL ESTATE (3d ed., 2000), §§ 115-116 at
19 398-399.

20 For example, in *Chakmak v. H. J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124,
21 a trade journal erroneously advertised that a contractor was preparing to bid on a state
22 project in Hayward when in fact he intended to bid on a different project (for the same
23 state agency) in Fresno. A subcontractor submitted a bid for the Hayward project and the
24 contractor accepted it, thinking it was for the Fresno project, but neither party specifically
25 identified it. When the contractor sued to enforce the subcontractor's bid, the court held
26 that it could not do so unless the subcontractor had bid negligently. *Id.* at 129; 1 Miller &
27 Starr, *supra*, § 116 at 399-400 and n.3, citing *Raffles v. Wichelhaus* (1864), 2 H. & C. 906
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1 (the “Peerless” case, in which the parties contracted for a sale of cotton “ex Peerless,
2 arriving from Bombay” but *two* ships named “Peerless” were arriving from Bombay, one
3 in October and one in December, and the buyer and seller meant different ships).

4 This case is factually different from *Chakmak* or *Raffles* but legally similar. If
5 Jones had in mind a different model or elevation than the one the contract specified and
6 described it to claimants incorrectly, then the parties were mutually mistaken as to a
7 material fact: the appearance of the house.

8
9 **3. A negligent misrepresentation as to a material fact allows a misled party**
10 **to avoid a contract.**

11 Alternatively, Jones’s description of the house may be a negligent
12 misrepresentation. The elements of negligent misrepresentation are:

- 13 (i) A representation of a material fact. Here, Jones specifically described the
14 elevation of the model she was offering to sell to claimants in lieu of
15 showing them a model of it.
- 16 (ii) Falsity and lack of reasonable grounds to believe the representation is true.
17 Here, the description departed materially from the house as built.
- 18 (iii) Intent to induce reliance. Here, Jones invited claimants to rely on her
19 description and buy the property without viewing an exemplar.
- 20 (iv) Justifiable reliance on the false statement. Here, claimants had no reason to
21 doubt that Jones’s description was accurate.
- 22 (v) Resulting harm: a dwelling displeasing to claimants in its overall
23 appearance.

24 See 1 Miller & Starr, *supra*, § 126 at 442-443.

1 **4. Rescission is a proper remedy for mutual mistake or material**
2 **misrepresentation of fact.**

3 Consent is not real when it is based on a mutual mistake of fact, and it is not given
4 freely when it is obtained by fraud, deceit, or other wrongful means. 1 Miller & Starr,
5 *supra*, § 115 at 397. Thus a party induced to buy property by a mutual mistake or a
6 material misrepresentation of fact, whether intentional or negligent, is entitled to rescind
7 the transaction. Civ. Code § 1566.

8
9 **5. Tuscan Homes breached the contract in many other ways.**

- 10 (i) *Golf club membership.* Jones told claimants that they could transfer their
11 golf club membership without any additional fee, and claimants justifiably
12 relied on this representation. Later, Tuscan Homes informed claimants that
13 they would have to buy a new membership for \$100,000.
- 14 (ii) *Flooring, carpeting, and counter-tops price increase.* Tuscan Homes
15 changed subcontractors in mid-stream; the new subcontractors demanded
16 \$10,000 more for the same upgrades.
- 17 (iii) *Unacceptable customer service.* An implied term of every consumer
18 contract, similar to the implied covenant of good faith and fair dealing in
19 every contract, is a covenant to provide reasonably satisfactory service
20 during performance. The scope of this duty depends on the contract's
21 subject matter and surrounding circumstances.

22 Here, the contract's subject matter was construction of a \$1.5 million house for
23 claimants on a premier lot in a luxury gated community. These circumstances call for a
24 higher level of service than claimants received. Indeed, Tuscan Homes impliedly or
25 expressly promised a high level of service when, in a letter dated July 10, 2___, the
26 company declared: "Our goal is to make your home building experience a pleasure.
27 During this especially exciting time, your Project Manager and Sales Manager are here to
28

1 guide you every step of the way.”

2 Instead, as described above, Tuscan Homes and its subcontractors:

- 3 (i) changed General Managers without prior notice *before the sale*, even
4 though they knew or should have known that the man they dismissed,
5 whom claimants knew as a neighbor and held in high regard, was a
6 significant factor in claimants’ decision to buy at Sienna Hills;
- 7 (ii) delayed and rescheduled claimants’ appointments, sometimes on very short
8 notice;
- 9 (iii) resisted reasonable requests for changes claimants were entitled to request;
- 10 (iv) chided claimants for missing deadlines Tuscan Homes had waived;
- 11 (v) changed Project Managers in mid-construction without prior notice to
12 claimants and without any subsequent introduction;
- 13 (vi) cut amenities, particularly by eliminating evening hours at the health club;
- 14 (vii) failed to resolve maintenance and security issues after months of requests;
15 and
- 16 (viii) failed to enforce landscaping requirements, leaving many lots unsightly.

17 Such acts and omissions were not at all what Tuscan Homes had led claimants to
18 expect. Cumulatively, this course of conduct led claimants to conclude that they wanted
19 no further dealings with Tuscan Homes. Tuscan Homes, in good faith, should allow
20 claimants to cancel the purchase without forfeiting their \$71,000 deposits.

21

22 **6. Even if Tuscan Homes is not in breach, it is not entitled to liquidated**
23 **damages.**

24 The Civil Code limits the amount of liquidated damages in a real estate purchase
25 and sale:

26 If the amount actually paid pursuant to the liquidated damages provision
27 exceeds three percent of the purchase price, the provision is invalid unless the
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party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

Civ. Code § 1675(d).

The Contract itself contains a similar provision (§ 7.2.4.3).

The amount claimants deposited, \$100,000, is 4.78% of the \$2,100,000 purchase price. Therefore, Tuscan Homes is not entitled to liquidated damages unless it proves that the deposit is reasonable as liquidated damages.

When claimants cancelled the purchase, the market for comparable properties was still rising. Thus the cancellation did not damage Tuscan Homes.

CONCLUSION

Tuscan Homes' conduct entitles claimants to rescind the purchase contract, and to demand that Tuscan Homes return the deposit claimants paid.

Dated: December ____, 2__

Respectfully submitted,

Attorney for Claimants
John and Joan Smith