

Supreme Court Case No. S218734

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,
Plaintiff and Appellant,

v.

COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, a
California Corporation, and CHRIS CORTAZZO, an individual,
Defendants and Respondents.

After A Decision By The Court Of Appeal
Second Appellate District, Division 5
2d Civil Case No. B246606
Los Angeles County Superior Case No. SC110477

SUPREME COURT
FILED

**OPPOSITION TO PETITIONERS' REQUEST
FOR JUDICIAL NOTICE**

JUN - 5 2014

Frank A. McGuire Clerk

Deputy

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INTRODUCTION

Petitioners, COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY and CHRIS CORTAZZO, attempt to request judicial notice of certain documents in connection with their Petition for Review. Plaintiff, HIROSHI HORIIKE, respectfully requests that this Honorable Court exercise its discretion to deny Petitioners' request for judicial notice, as the documents were not properly introduced and are not subject to judicial notice.

LEGAL ARGUMENT

I. PETITIONERS' REQUEST FOR JUDICIAL NOTICE DOES NOT SATISFY ALL CONDITIONS REQUIRED, AND IS NOT RELEVANT

According to California Rule of Court Rule 8.252(a)(2)(A), a motion for judicial notice must state "[w]hy the matter to be noticed is relevant to the appeal." Petitioners assert on pages 3 and 4 of their Request for Judicial Notice that the materials provided are relevant to this Petition for Review. In their argument, however, petitioners fail to actually explain how and why the materials are relevant. Rather, petitioners state only in a conclusory manner that "the concurrently-submitted legislative history materials are relevant to the Petitioners' Petition for Review." (p. 3).

Petitioners make no argument for why it is appropriate for the Court to interpret Civil Code section 2079.13, subsection (b) with the legislative

history of the old Civil Code sections 2373-2382 instead of either the plain meaning of the statute or the legislative history of the applicable Civil Code section, 2079.13.

Furthermore, under California Rule of Court Rule 8.252(a)(2)(C), a motion for judicial notice must state “[i]f judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453...” Petitioners did not state in their Request for Judicial Notice why this matter is subject to judicial notice under Evidence Code sections 451, 452, or 453, as required by California Rules of Court Rule 8.252(a)(2)(c), despite the fact that Petitioners admit that this issue was not brought up before the trial court or Appellate Court. No court has ever taken judicial notice of this matter. Thus, the requirements for relevancy need to be satisfied.

Moreover, petitioners state on page 2 of their Request for Judicial Notice: “This request is based on Evidence Code sections 452, 453...” Petitioners make no reference to Evidence Code section 451, and no further reference to Evidence Code sections 452 or 453 other than when petitioners state “...that appellate courts may take judicial notice of a statute's legislative history pursuant to Evidence Code sections 452. 453....” As this matter was not brought before the trial court or Appellate Court, petitioners are required to explain, or at a minimum state, the ways in which judicial notice is now appropriate under Evidence Code sections 451, 452, or 453.

On the contrary, Petitioners make no such showing and only references the Evidence Code as available to appellate courts to take judicial notice pursuant the Code.

**II. PETITIONERS FAIL TO PROVIDE MATERIALS FOR
THE CURRENT CIVIL CODE OR CITE TO THE
CORRECT LAW**

Petitioners state that the 1986 bill provides the pertinent legislative history for Civil Code section 2079.13, claiming that in 1995 the statutes were repealed and recodified without change. Petitioners, however, do not provide a copy of any proof that Civil Code section 2079.13 is exactly the same as its 1986 predecessor. Petitioners do not provide the Court with a copy of the 1986 bill and the present bill in order to contrast any differences in wording; petitioners ask that the Court simply accept their statement that the bill has not changed.

**III. PETITIONERS DO NOT ALLEGE WITH SPECIFICITY
WHAT EACH DOCUMENT OF LEGISLATIVE
INTERPRETATION IS AND WHY IT IS RELEVANT
AND PROPER TO CONSIDER**

Petitioners fail to identify each separate document for which judicial notice is sought as a separate exhibit, and also fail to submit a memorandum of points and authorities citing authority why each exhibit constitutes cognizable legislative history. The Fourth District Court of

Appeals has stated that “motions for judicial notice of legislative history materials should be in the following form: (1) the motion shall identify each separate document for which judicial notice is sought as a separate exhibit; and (2) the moving party shall submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history.” *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (Cal. Ct. App. 2005).

IV. THE INTERPRETATION OF A DOCUMENT SHOULD NOT BE SUBJECT TO JUDICIAL REVIEW

Petitioners seek to have this Honorable Court interpret the documents provided to mean that the legislature intended to not allow for dual agency without the consent of the associate real estate licensees. Although Plaintiff contends that the documents provided by Petitioners do not support this argument, the fact remains that “[a]lthough the existence of a document may be judicially noticeable,... its proper interpretation [is] not subject to judicial notice.” *Fremont Indemnity Co. v. Fremont General Corp.*, (2007) 148 Ca. App. 4th 97, 113. Petitioners seek to have this Honorable Court find one interpretation of the documents provided to be proper. Petitioners point to, and Plaintiffs find, nothing that expressly states the legislature’s intent is what the Petitioners state it to be. Thus, Petitioners are improperly asking this Court to find a proper interpretation in its

Request for Judicial Notice. “Interpretation of a statute, however, remains a matter of law.” *Post v. Prati*, (1979) 90 Cal. App. 3d 626, 634-635.

Therefore, Plaintiff requests that this Court find Petitioner’s Request for Judicial Notice improper and find it within its discretion to deny Petitioner’s motion.

**V. A REVIEWING COURT MAY PROPERLY DENY A
REQUEST FOR JUDICIAL NOTICE NOT PRESENTED
TO THE LOWER COURTS**

Petitioners’ request for judicial notice should be denied because Petitioners failed to raise it in the trial court or the Court of Appeal. This Honorable Court reviews the judgment of the Court of Appeal. “In deciding the question raised by an appeal, a reviewing court will ordinarily look only to the record made in the trial court.” *Brosterhous v. State Bar of California*, (1996) 12 Cal. 4th 315, 325. Petitioners seek judicial notice of a “fact.” “Facts,” however, are ordinarily not introduced for the first time on appeal; “facts” must be properly raised in the lower court so that the lower court can make a proper determination of the issue.

Petitioners acknowledge that they did not raise the issue in either the trial court or the Court of Appeal, and that this issue is now being raised for the first time. Petitioners, however, fail to offer an explanation for their failure to raise this issue in either of the two tribunals below. It is therefore proper for this Court to deny Petitioner’s request. *See Brosterhous*, 12 Cal.

4th at 325-326, (denying request for judicial notice pursuant to California Evidence Code sections 452 and 459 where the party requesting the Court take judicial notice “put forth no reason for its failure to request the trial court and Court of Appeal to take judicial notice.”). As it did in *Brosterhous*, this Court should “properly decline to take judicial notice under Evidence Code sections 452 and 459 of a supposed matter of ‘fact’ which should have been presented to the trial court for its consideration in the first instance.” *Id.* at 325-326.

VI. CONCLUSION

Given the foregoing Plaintiff requests that this Honorable Court deny the Petitioner’s request for Judicial Notice.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Victor Pippins, declare that:

I am and was at the time of the papers herein, over the age of eighteen (18) years and am not a party to the action. I am employed in the County of San Diego, and my address is 401 West "A" Street Suite 2600, San Diego, California, 92101.

On June 3, 2014, I caused to be served the following documents:

APPELLANTS' OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

o VIA MAIL: By placing a copy thereof for delivery in a separate envelope addressed to each addressee, respectively, as follows:

o BY OVERNIGHT DELIVERY: On the above-mentioned date, I placed a true copy of the above-mentioned document(s) in a sealed envelope or package with delivery fees paid or provided for, addressed to the person(s) as indicated below and deposited same in a box or other facility regularly maintained or delivered to an authorized courier or driver to receive documents:

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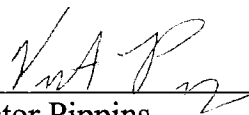
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I am readily familiar with the business's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 4 2014, at Los Angeles, California.



Victor Pippins