

Mediating a luxury home construction defect case

By Ross W. Feinberg

Residential construction defect actions typically take four forms: (1) statutory condominium actions, filed by an elected Board of Directors; (2) grouping of tract single family residences; (3) a planned unit development suing for common area defects; and (4) the luxury custom estate, filed by often times a discerning homeowner concerning their “one of a kind” property. It is the last of these that require the broadest range of skills by the mediator.

Luxury home cases often require different insights and approaches than that of their construction defect counterparts. The homes typically involve complex construction schematics combined with amenities that bespoke desires of grandeur, such as infinity pools to nowhere; priceless art; floating decks; recording studios; elevators; walls of glass and the like which lead to a web of expectations by the homeowner and resultant ramifications. Put simply; the homes are stunning in design and aspirations.

Take these issues and couple them with a homeowner, who is more often than not, a high profile individual and extremely invested in the building of their “one of a kind home” and you have a recipe for conflict. The homeowner often expects certainty and perfection not just in their home, but also in the results of litigation.

As a result, when mediating this type of case, the parties should select a mediator who can execute a variety of skills. The mediator must be friendly but also firm, and develop a keen understanding of the goals of the homeowner and aspects of the case that have triggered the need for litigation.

The initial step in this process is to gauge the personality and temperament of the homeowners and bond with them as early as possible during the mediation process. This is no easy task and can often be hampered by the homeowner’s dreams for their very own dream home. Such a combination can result in a perfect storm



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at mediation.

While a mediator is always neutral, bonding with the homeowner serves all parties in luxury home cases. When a mediator truly recognizes the owners’ passion, traits and expectations, he or she can begin to diffuse the intense emotions associated with every one of these cases.

The mediator can quickly earn the homeowner’s respect by scheduling a meeting on-site at the homeowner’s property. This meeting should be set early and is for dual purposes of establishing the homeowner’s trust while at the same time garnering a deep understanding of their personality traits.

The mediator in these cases, as with any construction defect case with multiple parties, must be a strong case manager. It is imperative for the mediator to establish an aggressive, yet sustainable set of deadlines for investigating and resolving the dispute.

To resolve the case efficiently, a mediator must quickly grasp the source and breadth of the alleged defects, sort out the parties and insurance coverage, clearly communicate an analysis of the legal issues, and anticipate likely obstacles to settlement. In fact, the mediator of the luxury home construction defect case, must do all of the above and more.

In addition to functional and aesthetic problems, these defect cases can trigger personal injury or health-related claims. I recently mediated a luxury home case in which

the owner’s child had been repeatedly hospitalized for respiratory issues that, it turned out, were caused by problems with the home’s forced-air unit that terminated into the child’s bedroom.

Beyond these intangible, emotional aspects of a luxury home construction defect case, these matters often come with significant other challenges. Examples include a lack of written contracts, lack of insurance and builders who, themselves, are as emotionally tied to the very home that is the subject of the litigation.

In my experience, the average luxury home case can involve upwards of 40 parties, including builders, design professionals, subcontractors and insurance carriers, all of whom are usually looking to shift the risk to others. To diffuse the inevitable tension that arises among them during mediation, I’ve done everything from bringing ice cream into a conference room filled with 45 parties to writing “Tuesday” on the conference room’s white board and asking the group, “Can we start here? Can we all agree that it’s Tuesday?”

Equally important, appropriate and oft times necessary, is for the mediator to draw on experts within the construction community to assist in determining the wisest and most cost efficient repair.

An experienced mediator can actually match an appropriate contractor with the luxury homeowner dependent on their respective personalities,

goals and needs.

Once comfortable that the homeowner’s trust has been procured, the experienced mediator can look to trusted contacts who will actually perform the repair work. Specifically, the mediator can help define the scope of repair, review repair proposals and personally introduce the owner and the contractor so they can bond.

To be effective, the mediator must possess and utilize a myriad of cognitive listening skills in addition to resolving a complex web of issues. Similarly, the mediator must not only step into the shoes of all the parties, but also into the shoes of all the lawyers and experts.

In traditional litigation, it can take as many as five years to land a trial date. And even if a construction defect case is fully litigated, there will likely be continued post-trial fighting among insurance companies regarding coverage, damages, indemnity, and the duty to defend.

When it comes to someone’s multi-million dollar custom home, five years can feel like a lifetime. In contrast, with the right mediator, at least 98 percent of luxury home cases can settle. An experienced mediator can help the parties transparently collaborate on all aspects of the resolution so that the owners can return to their dream home as quickly, efficiently and affordably as possible.

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