

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

|                                     |   |                         |
|-------------------------------------|---|-------------------------|
| TOLL BROTHERS, INC.,                | ) | Case No. 08-987 SC      |
|                                     | ) |                         |
| Plaintiff,                          | ) | ORDER DENYING           |
|                                     | ) | DEFENDANTS' MOTION      |
| v.                                  | ) | FOR SUMMARY JUDGMENT    |
|                                     | ) | OR, IN THE              |
| CHANG SU-O LIN; HONG LIEN LIN; HONG | ) | ALTERNATIVE, PARTIAL    |
| YAO LIN,                            | ) | <u>SUMMARY JUDGMENT</u> |
|                                     | ) |                         |
| Defendants.                         | ) |                         |
|                                     | ) |                         |
| AND RELATED CROSS-ACTION.           | ) |                         |
|                                     | ) |                         |

**I. INTRODUCTION**

This matter comes before the Court on Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment ("Motion"). Docket No. 66. Plaintiff Toll Brothers, Inc. ("Toll") filed an Opposition and Defendants Chang Su-O Lin, Hong Lien Lin, and Hong Yao Lin (the "Lins") submitted a Reply. Docket Nos. 78, 86. For the reasons stated herein, the Defendants' Motion is DENIED.

**II. BACKGROUND**

The following facts are not in dispute. On May 27, 2004, Toll and the Lins entered into a written contract for the purchase and sale of approximately 147 acres of real estate located in

Dublin, California. Inderbitzen Decl. ¶¶ 4-5.<sup>1</sup> The purchase price was \$241,500,000. Id. Ex. A ("PSA") § 2.1. Toll was required to make a deposit of \$21,735,000. Id. § 2.2. Toll was to acquire the land in three stages, and the deposit was to be credited as follows: \$7,000,000 at the closing of Sub-Area 1; \$7,000,000 at the closing of Sub-Area 2; and \$7,735,000 at the closing of Sub-Area 3. Id. § 2.2(c).

The scheduled date of the first closing was September 30, 2005. Id. § 5.1. Escrow closed on Sub-Area 1. Inderbitzen Decl. ¶ 10. The scheduled date of the second closing was June 30, 2006. PSA § 5.2. On May 31, 2006, Toll notified the Lins that:

Toll wants to "assign" the Purchase Agreement with respect to Subarea 2 to Regent Land Investment LLC. This is a land banking transaction of the type referred to in the Purchase Agreement's assignment clause . . . . The reason this is not a real "assignment" of the Purchase Agreement is that Toll is only designating a title holding nominee. Because Toll retains all the duties under the Purchase Agreement . . . it satisfies the requirements of the assignment paragraph of the Purchase Agreement.

Inderbitzen Decl. Ex. C ("May 31, 2006 Email"). In response to questions from the City of Dublin, Toll explained that:

Toll is entering into a Nomination Agreement and Construction Agreement by which Toll will continue to seek entitlements and develop the infrastructure for Area F West as the contractor/agent for Regent Land Investment. . . Toll will continue to work toward the entitlement and development of the Property.

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<sup>1</sup> Martin Inderbitzen, attorney for Defendants, filed a declaration in support of Defendants' Motion ("Inderbitzen Decl."). Docket No. 67. He also filed a supplemental declaration in support of Defendants' Reply ("Inderbitzen Supp. Decl."). Docket No. 87.

1 Id. Ex. D ("June 26, 2006 Email").

2 Homebuilders enter into land banking transactions as a means  
3 of retaining rights to acquire undeveloped real property without  
4 having to reflect the acquisition of the property on their  
5 financial statements. Kalt Decl. ¶ 3.<sup>2</sup> The land banker becomes  
6 the owner of the property, but grants an option to the  
7 homebuilder, so that the homebuilder can acquire the property when  
8 it is ready to begin construction of residential units. Id. The  
9 homebuilder typically performs infrastructure work on the property  
10 pursuant to a construction agreement with the land banker. Id.

11 The Lins did not object to the proposed assignment.  
12 Inderbitzen Decl. ¶ 12. Toll assigned all of its "right, title  
13 and interest" under the PSA relating to Sub-Area 2 to Regent Land  
14 Investment LLC ("Regent"). Austin Decl. Ex. A ("Nomination  
15 Agreement") at 1.<sup>3</sup> Toll and Regent entered into an option  
16 agreement so that Toll could buy back Sub-Area 2, or parts of Sub-  
17 Area 2, from Regent. Id. Ex. B ("Option Agreement"), Ex. C  
18 ("First Amendment to Option Agreement"). Toll and Regent entered  
19 into a construction agreement, whereby Toll would act as Regent's  
20 contractor and continue working on the property. Id. Ex. D  
21 ("Construction Agreement") at 3-4. Regent took title to Sub-Area  
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23  
24 <sup>2</sup> Scott Kalt, a real estate partner at Jeffer, Mangels, Butler  
25 & Marmaro LLP, filed a declaration in support of Plaintiff's  
Opposition ("Kalt Decl."). Docket No. 81.

26 <sup>3</sup> David Austin, an associate at McNichols Beers LLP, filed a  
27 declaration in support of Defendants' Motion ("Austin Decl.").  
Docket No. 75. The declaration was filed under seal.

2. Request for Judicial Notice Ex. 1 ("Grant Deed").<sup>4</sup> Escrow for Sub-Area 2 closed on or about July 20, 2006. Inderbitzen Decl. ¶ 13; Inouye Decl. ¶ 7.<sup>5</sup>

The scheduled date of the third closing was June 30, 2007. PSA § 5.3. Between April and June 2007, disputes arose concerning closing conditions, the construction of utility vaults and power lines, and the recording of easements on Sub-Area 3. Inderbitzen Decl. ¶¶ 15-22; Inouye Decl. ¶¶ 9-17. The third closing never occurred. Inderbitzen Decl. ¶ 23. On December 7, 2007, Toll notified the Lins that it was terminating and rescinding the contract. Id. Ex. R ("Notice of Termination").

Toll's Second Amended Complaint seeks (1) rescission of the contract and restitution of the remaining deposit of \$7,735,000; (2) damages for breach of contract; (3) foreclosure of a contractual lien against the property; (4) foreclosure of a purchaser's lien against the property; and (5) a declaration that the PSA is illegal under California's Subdivision Map Act ("SMA"), Cal. Gov't Code § 66410 et seq. See Docket No. 39.

### III. LEGAL STANDARD

Entry of summary judgment is proper "if the pleadings, the

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<sup>4</sup> The Lins request the Court to take judicial notice of a Grant Deed. Docket No. 68. The Grant Deed is a matter of public record, and it describes a fact not subject to reasonable dispute. See Fed. R. Evid. 201; see also Neighbors v. Mortgage Elec. Registration Sys., Inc., No. 08-5530, 2009 WL 192445, at \*3 (N.D. Cal. Jan. 27, 2009). The Court grants the request.

<sup>5</sup> Warren Inouye, an attorney for Plaintiff, filed a declaration in support of Plaintiff's Opposition ("Inouye Decl."). Docket No. 80.

discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of demonstrating the absence of a genuine issue of fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To survive a motion for summary judgment, the responding party must present competent evidence that creates a genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986).

#### **IV. DISCUSSION**

The Lins contend that Toll's first, second, third, and fourth causes of action fail as a matter of law because Toll was in breach of the PSA by assigning its interest in Sub-Area 2 to Regent. Mot. at 12-16. The Lins contend that Toll's fifth cause of action fails as a matter of law because the PSA is valid, legal, and enforceable under California's SMA. Id. at 16-20.

##### **A. The PSA's Provisions**

###### **1. The Assignment Provision**

The Assignment paragraph of the PSA provides that:

Neither Buyer nor Seller shall assign all or any portion of its interest in this Agreement without the prior written consent of the other (which consent shall not be unreasonably withheld); provided, however, that (so long as Buyer and Seller remain liable for the performance of it's [sic] obligations under the terms of this agreement) either Buyer or Seller shall have the right to assign this Agreement in whole or in part without the other's consent to: (i) any affiliate of Buyer or Seller; (ii) any entity in which Buyer or Seller or such affiliate hold at least a 50%

interest; or (iii) as to Buyer, to any entity that serves as a "land banker" for Buyer, and any such assignee shall have the same right to assign with respect to its interest in this Agreement.

PSA § 18.7.

2. The School Site Provisions

In the section of the PSA that establishes "Special Closing Conditions" for the Third Closing, it states that "Buyer shall have reconveyed to Seller or Seller's assignees the elementary school parcel in Sub-Area 2." PSA § 5.3.2(g). In the section of the PSA entitled "Buyer's Work," it states that:

Buyer shall acquire title to all of Sub-Area 2 subject to the obligation to reconvey the school site to Seller, or Seller's assignee, without consideration and with no new title exceptions but otherwise without any representation, warranty or liability to Seller when Buyer has obtained a Parcel Map creating the school site as a legal parcel.

PSA § 7.5(b).<sup>6</sup> The Lins included these provisions in the PSA because they were parties to a Mitigation Agreement with the Dublin Unified School District that allowed the Lins to offset mitigation payments to the District by dedicating a ten-acre site to the District. Mot. at 7; Inderbitzen Decl. Ex. B ("Mitigation Agreement") § 3.

3. The Parcel Map Provisions

Section 5.5 of the PSA outlines the Buyer's Closing Conditions. One of these conditions is that "Seller shall have caused the Map (or Maps) to be recorded." Agreement § 5.5(d).

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<sup>6</sup> The same obligation to reconvey appears in section 13.13 of the PSA, in the section entitled "Covenants."

1 The PSA states that "if any Buyer's Closing Conditions remain  
2 unsatisfied as of the date then established as the Closing Date,  
3 Buyer shall have the right, in its sole and absolute discretion,  
4 to (1) waive one or more of Buyer's Closing Conditions and proceed  
5 with the Closing." Id. § 5.5(h).

6 In the section of the PSA entitled "Parcel Map to Create  
7 Legal Parcel," it states:

8 The entirety of the Property is not currently  
9 subdivided in a manner that would permit its  
10 conveyance in the contemplated Sub-Areas.  
11 Seller shall, at its sole cost and expense,  
12 cause the City to record a parcel map or other  
13 map or maps (the "Map") in order to create the  
14 Property as legal parcels that can be conveyed  
15 consistent with the requirements of the  
16 Subdivision Map Act and the City's Subdivision  
17 Ordinance.

18 Id. § 3.2. This section of the PSA is not part of the section  
19 entitled "Buyer's Closing Conditions." In the section of the PSA  
20 that establishes special closing conditions for each of the three  
21 closings, it states that the entirety of each sub-area shall be  
22 conveyed "pursuant to an Approved Map." PSA §§ 5.1.2(a),  
23 5.2.2(a), 5.3.2(a).

24 **B. The Obligation to Reconvey the School Site Parcel**

25 The Lins contend that Toll's assignment to Regent breached  
26 the PSA because, after the assignment, Toll was no longer able to  
27 reconvey the ten-acre school site parcel to the Lins, as required  
28 by section 5.3.2(g) of the PSA. Mot. at 12.

Toll contends that the assignment did not breach the PSA  
because after the assignment the obligation to reconvey the school  
transferred to Regent. Opp'n at 11. While the Lins allege that

1 Toll misrepresented that it would repurchase Sub-Area 2 from  
2 Regent, neither party disputes that Regent obtained title to Sub-  
3 Area 2 in July 2006. See Inderbitzen Decl. ¶¶ 10, 12; Opp'n at  
4 11. Since Regent was the buyer of Sub-Area 2, it is entirely  
5 consistent with the terms of the agreement to view sections  
6 5.3.2(g), 7.5(b), and 13.13 of the PSA as imposing the obligation  
7 to reconvey the school site on Regent, not Toll. Furthermore, the  
8 Mitigation Agreement between the Lins and the City of Dublin  
9 indicates that the obligation to dedicate a school site parcel ran  
10 with the land. See Mitigation Agreement § 17(c).

11 Whether the parties understood the obligation to reconvey the  
12 school site as belonging to Regent or Toll is a disputed factual  
13 issue. When the dispute arose between Toll and the Lins about the  
14 closing conditions for Sub-Area 3, the Lins did not raise any  
15 concerns about the obligation to reconvey the school site. See  
16 Opp'n at 7-9; Inouye Decl. ¶¶ 7-8. Toll implies that if the Lins  
17 viewed the obligation to reconvey the school site as belonging to  
18 Toll, the matter would have been raised during that dispute.  
19 Opp'n at 7-9. Furthermore, since November 14, 2008, Regent has  
20 been prepared to reconvey the school site parcel, but has received  
21 no direction from the Lins on how to proceed. Opp'n at 9; Hoban  
22 Decl. ¶ 7.<sup>7</sup> Regent has deposited a grant deed for the school site  
23 into an escrow account. Opp'n at 9; Inderbitzen Supp. Decl. ¶ 14.

24 In response, the Lins point out that they were engaged in  
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26 <sup>7</sup> Timothy Hoban, regional counsel for Toll, filed a  
27 declaration in support of Plaintiff's Opposition ("Hoban Decl.").  
28 Docket No. 79.

1 "parallel discussions" with Toll representatives about Toll's  
2 obligation to reconvey the school site, and that explains why they  
3 expressed no concerns about the issue during the closing condition  
4 dispute. Reply at 3-4; Inderbitzen Supp. Decl. ¶ 10. In these  
5 parallel discussions, it was representatives of Toll, not Regent,  
6 who were working on grading the school site and preparing a map of  
7 the school site. See Inderbitzen Supp. Decl. ¶¶ 7-9. Toll  
8 representatives were also involved in preparing to deed the school  
9 parcel over to the Lins. See id. ¶¶ 10-11. However, this  
10 involvement is consistent with Toll's status as a contractor and  
11 agent for Regent after the assignment. See June 26, 2006 Email.

12 Because of these factual disputes concerning who was obliged  
13 to reconvey the school site parcel, the Lins have not shown as a  
14 matter of law that the assignment to Regent breached the contract.  
15 The Lins' motion for summary judgment on Toll's first, second,  
16 third, and fourth causes of action is DENIED.

17 **C. The PSA and the Subdivision Map Act**

18 The Lins contend that Toll's fifth cause of action fails as a  
19 matter of law because the PSA is valid, legal, and enforceable  
20 under California's SMA. Mot. at 16-20. As outlined above, the  
21 PSA gives the buyer the right to waive one or more of the buyer's  
22 closing conditions. See PSA § 5.5(h). One of the buyer's closing  
23 conditions is that "Seller shall have caused the Map (or Maps) to  
24 be recorded." See id. § 5.5(d). However, in a section of the PSA  
25 that is not part of the buyer's closing conditions, it states that  
26 "Seller shall, at its sole cost and expense, cause the City to  
27 record a parcel map or other map or maps . . . consistent with the  
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requirements of the Subdivision Map Act." See id. § 3.2. Also, under the special closing conditions for each sub-area, each area has to be conveyed "pursuant to an Approved Map." PSA §§ 5.1.2(a), 5.2.2(a), 5.3.2(a).

On January 14, 2009, the Court denied Toll's Motion for Judgment on the Pleadings. See Order. Docket No. 76. The Court found that the PSA is ambiguous as to whether the Buyer's ability to waive the Buyer's closing conditions in section 5.5 gives Toll the right to waive the Lins' obligation to cause the City to record a parcel map as required by section 3.2. Order at 5.

In the present Motion, the Lins contend that section 3.2 was a condition for the benefit of both Toll and the Lins and, as such, it could only be waived by the consent of both parties. Mot. at 17. In support of this contention, the Lins draw attention to an exhibit attached to a memorandum sent by Toll on April 23, 2004, which states that:

Each of the parcels or lots within the Takedown shall be a lot which can be legally conveyed in compliance with the California Subdivision Map Act and the City's Subdivision Ordinance. This condition shall benefit both Buyer and Seller.

Inderbitzen Decl. Ex. T ("Memo.") at 8 § 2.6.

This evidence, by itself, is not sufficient to establish that the parties understood section 3.2 to be a condition for the benefit of both Toll and the Lins. The relationship between this draft of a general closing condition and the final terms and conditions of the PSA is not clear. This draft is attached to a document that contemplates the sale of four parcels of land, not

three, and it refers to takedown prices that differ from the terms of the PSA. Unlike this draft, the PSA does not have a section called "General Closing Conditions," but instead divides them up into "Seller's General Closing Conditions," and "Buyer's General Closing Conditions." See PSA §§ 5.4, 5.5. Hence, there is still a triable issue of fact as to whether the PSA gives Toll the right to waive the Lins' obligation to cause the City to record a parcel map. Id. at 4-5. The Lins' motion for summary judgment on Toll's fifth cause of action is DENIED.

**V. CONCLUSION**

For the reasons stated above, the Court DENIES Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment.

IT IS SO ORDERED.

Dated: February 9, 2009



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UNITED STATES DISTRICT JUDGE