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Two New Case Developments in Landlord-Tenant Law

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Introduction

My good friend Roger Bernhardt asked me to write a piece on some recent landlord-tenant cases. In a past life, I was somewhat of a maven in this area. Now I've moved on, having just formed a new appellate law firm with some retired appellate justices and law clerks—and, of course, Roger, the state's leading expert in real property litigation. See MoskovitzAppellateTeam.com.

So, here's my contribution to this august journal.

Anti-SLAPP Motions: *Olive Props., LP v Coolwaters Enters., Inc.*

An "anti-SLAPP" motion to strike a complaint (see CCP §425.16) is a powerful tool in the hands of a clever defense counsel. As soon as it's filed, everything stops—except the motion. Trial is stayed. Even discovery is stayed. If the motion is denied, the defendant can immediately appeal—and everything stays stayed.

In an unlawful detainer case, of course, the landlord wants nothing stayed. He wants to get to trial, judgment, and eviction ASAP.

So, the tenant's lawyer should look for every opportunity to use the anti-SLAPP motion, right? Not so fast....

In *Olive Props., LP v Coolwaters Enters., Inc.* (2015) 241 CA4th 1169 (reported at p 20), a shopping center owner filed an unlawful detainer complaint based on nonpayment of rent and common area maintenance charges. The tenant filed an anti-SLAPP motion, claiming the action was filed to punish the tenant for filing an earlier action against the owner for breach of the covenant of quiet enjoyment (by renting another space to a pizza restaurant whose customers allegedly took up all of the available parking spaces). The trial court denied the tenant's motion, finding the tenant had failed to satisfy the "first prong" of the anti-SLAPP procedure (*i.e.*, a prima facie case that the present suit was brought to punish activity protected by the First Amendment) because the tenant had failed to supply evidence that the landlord brought his unlawful detainer action *because* the tenant had sued the landlord.

The court of appeal affirmed, noting that "merely because Tenant's lawsuit for breach of the covenant of quiet enjoyment and negligent interference with prospective economic relations *preceded* Landlord's unlawful detainer action does not mean that the unlawful detainer action *arose from* Tenant's protected activity in bringing the prior lawsuit." 241 CA4th at 1176 (emphasis in original). The court noted the danger the tenant's claim posed: "[A] nonpaying tenant should not be able to frustrate or stall an anticipated eviction by filing a preemptive complaint against the landlord, followed by a special motion to strike the landlord's unlawful detainer complaint on the ground it arose out of the tenant's protected petitioning activity in filing the first lawsuit." 241 CA4th at 1176.

The court might have also noted that when the unlawful detainer suit is based on nonpayment of rent, it would seldom make sense to find that it was brought for some reason *other than* a desire to get rid of a nonpaying tenant. Isn't getting the rent the whole point of renting out property? Unless the landlord had a history of putting up with late payment or nonpayment, his motive would seem to be to collect rent, not to punish the tenant.

The court also affirmed the trial court's award of attorney fees against the tenant for bringing a frivolous anti-SLAPP motion, noting that the tenant had "succeeded in stalling the unlawful detainer action for a protracted period of time by bringing a meritless special motion to strike." 241 CA4th at 1172. The amount awarded ($3392) wasn't much because not much litigation happened up to the ruling on the anti-SLAPP motion. But I've seen heavier anti-SLAPP battles that could have resulted in much higher awards.

The bottom line: It's OK to use it, but don't abuse it. There are other more effective and time-tested pretrial motions and defenses that a tenant can successfully launch in defending an unlawful detainer action. See, *e.g.*, California Landlord-Tenant Practice, chap 10 (2d ed Cal CEB). For discussion of anti-SLAPP motions in landlord-tenant actions generally, see Landlord-Tenant §§5.18A–5.18B, 7.78B.

Materiality of Breach of Lease: *Boston, LLC v Juarez*

Here's a curious appellate department opinion that won't be followed, in my humble opinion. In *Boston, LLC v Juarez* (2015) 240 CA4th Supp 28 (reported at 38 CEB RPLR 158 (Nov. 2015)), the rental agreement provided that "any failure" to comply with the terms of the agreement would allow the landlord to terminate the tenant's right to possession. The court held that because of this provision, the tenant's failure to obtain renter's insurance (required under the rental agreement) allowed the landlord to evict, whether or not the breach was material.

This is a very questionable decision. It allows landlords—simply by inserting into the agreement a boilerplate provision that prospective tenants may not

even notice—to evade the well-established materiality requirement, which is designed to protect tenants from losing their homes and businesses for trivial breaches. In rent control jurisdictions, the decision might provide a convenient means to evict tenants paying below-market rent, in order to raise rents to market levels—thereby undermining the ordinance's requirement that landlords have just cause to evict. See, *e.g.*, Landlord-Tenant, chap 7.

There are many other California court of appeal decisions not allowing an eviction for a trivial breach of the lease. See, *e.g.*, Landlord-Tenant §§8.58–8.60, 7.57.

Our Supreme Court Tackles Greenhouse Gas Analysis in EIRs

Alan Ramo

Introduction

The California Supreme Court probably surprised a few observers when it rejected the California Department of Fish and Wildlife's greenhouse gas analysis of the Newhall Ranch development in its recent decision in *Center for Biological Diversity v Department of Fish & Wildlife* (2015) 62 C4th 204 (reported at p 13). State appellate courts have been rather deferential to challenges to the implementation of California's Global Warming Solutions Act (known as AB 32). See *Our Children's Earth Found. v California Air Resources Bd.* (2015) 234 CA4th 870; *Association of Irritated Residents v Air Resources Bd.* (2012) 206 CA4th 1487, reported at 35 CEB RPLR 135 (Sept. 2012). Courts hesitate to wade into technical expert analyses such as greenhouse gas emissions analysis.

Nevertheless, the supreme court's large majority (5–2) did not hesitate to dive into the CEQA "significance" analysis contained in the project's environmental impact report (EIR) and find a fundamental flaw in the project's attempt to use as guidance the state Air Resources Board's (ARB) approach to greenhouse gas regulation. Perhaps even more alarming to proponents of greenhouse gas-emitting projects, the court, while accepting ARB's AB 32 emission reduction goal as a CEQA "threshold" for significance, at the same time questioned the threshold's continued utility after 2020, when more dramatic reductions will be required under state climate change laws. Lurking in the court's willingness to question the project-level compliance with the AB 32 significance threshold calculation is the court's skepticism toward game-playing with such baselines. For an analogous situation, though not cited by the court, see *Neighbors for Smart Rail v Exposition Metro Line Constr. Auth.* (2013) 57 C4th 439, discussed by Golden Gate University Professor Paul S. Kibel in *Sea Level Rise, Saltwater Intrusion and Endangered Fisheries—Shifting Baselines for the Bay Delta Conservation Plan*, 38 Environs: Envt'l L & Pol'y J 259, 260 (Spring 2015). See also Ramo, *The California Offset Game: Who Wins and Who Loses?*, 20 Hastings W-NW J Envt'l L & Pol'y 109 (2014).

Analysis

Because this case was brought under CEQA, the court's analysis is through a CEQA lens rather than simply a policy analysis. The legal issue before the court was whether the EIR properly analyzed whether the greenhouse gases from the proposed development (anticipated to house more than 50,000 people) are significant and thus require mitigation. Alternatively, if there are unavoidable impacts after deploying all feasible and reasonable mitigations, a statement of overriding considerations would be required if the project's benefits are deemed to outweigh its impacts.

The court first analyzed what kind of a cumulative impact problem is presented by greenhouse gas emissions in California. It recognized that California emissions have global impact and that any individual project's impacts are uncertain. However, the question was whether this project, together with present and future projects, is cumulatively considerable. The court then determined that it was appropriate to reference state policies that are attempting to address California's reasonable contribution to a solution to climate change, which led it to accept ARB's plan to achieve AB 32's goal of a reduction to 1990 emission levels as a suitable significance threshold. That plan requires a 29 percent reduction of emissions from what the level of emissions would have been in 2020—the so-called "business as usual" scenario. In developing its analysis, the court cited extensively to an article authored by Sandy Crockett, the Bay Area Air Quality Management District's counsel, published by the GGU Environmental Law Journal—an article every practitioner representing a project proponent or opponent should review. See Crockett, *Addressing the Significance of Greenhouse Gas Emissions Under CEQA: California's Search for Regulatory Certainty in an Uncertain World*, 4 Golden Gate U Envt'l LJ 203 (July 2011).

The court found that while the project would add greenhouse gases to the environment, the issue was whether the added emissions were less than what would happen without the project. After all, the population that would live in the city would live somewhere else; somewhere else may lead to even more emissions. Further, the project should be designed to contribute its appropriate share of reductions consistent with ARB's AB 32 plan.