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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JIAN MING CHEN et al.,

Cross-Complainants and Appellants,

v.

VICENTE RIVERA,

Cross-Defendant and Respondent.

A109285

(San Francisco County  
Super. Ct. No. 04-428327)

Jian Ming Chen and Chun Si Lin (appellants) appeal from a judgment dismissing their cross-complaint for declaratory relief against their tenant, Vicente Rivera. The court entered the judgment of dismissal after it sustained, without leave to amend, Rivera's demurrer to the second amended cross-complaint, on the grounds that it failed to allege a justiciable controversy. We shall affirm the judgment.

**FACTS**

On January 28, 2004, Vicente Rivera, an 80-year-old man who had been a tenant of the premises located at 2723 Harrison Street in San Francisco since 1964, filed a complaint for damages and injunctive relief against the owner and landlord, Jian Ming Chen (Chen). The complaint alleged that the San Francisco Residential Rent Stabilization and Arbitration Ordinance, San Francisco Administrative Code, Chapter 37 (hereafter "the Rent Stabilization Ordinance"), applied to the premises. It further alleged that in 2002, 2003, and 2004, Chen had illegally attempted to force Rivera to vacate the premises by, among other things, refusing to make repairs, illegally increasing the rent, and refusing to accept rent. The complaint alleged a cause of action for wrongful

eviction without good cause pursuant to Section 37.9 of the Rent Stabilization Ordinance, retaliatory eviction, and other causes of action.

On April 9, 2004, appellants filed a cross-complaint for declaratory relief against Rivera, and other tenants.<sup>1</sup> The cross-complaint alleged that Rivera was a tenant of the property located at 2721-2723 Harrison Street, owned by appellants. On March 22, 2004, appellants filed with the San Francisco Residential Rent Stabilization and Arbitration Board (Board) a Notice of Intent to Withdraw Residential Units from the Rental Market and a Memorandum of Notice Regarding Withdrawal of Rental Unit from Rent or Lease. On that same date, appellants served these documents on Rivera by certified and first class mail. Appellants also served Rivera with a written notice to quit on or before July 20, 2004. Appellants recorded the Memorandum of Notice Regarding Withdrawal of Rental Units from Rent or Lease with the San Francisco County Recorder.

The cross-complaint further alleged that Rivera “invoked the one-year Ellis Act notice requirement,” stating that he is a low-income senior citizen. On March 31, 2004, appellants notified Rivera that they would extend his tenancy to March 22, 2005, and enclosed an amount alleged to be equal to 50 percent of the relocation assistance to which he is entitled based upon his claimed status as a low-income senior. Appellants informed Rivera that they would provide the remaining balance upon the date he vacated the premises. On that same date appellants notified the Board that they had extended the tenancy to March 22, 2005. Soon thereafter Rivera notified appellants that he would not cash or deposit the relocation assistance check because he disputed that the “Ellis Act withdrawal is legal or valid.”

Based upon the foregoing factual allegations, appellants sought a declaration that: (1) They had “properly complied with all state and local laws, ordinances, and rules regarding the withdrawal” of their property from the rental market; (2) the extended

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<sup>1</sup> Appellants voluntarily dismissed their claims against all the other named cross-defendants after the court sustained Rivera’s demurrer to their second amended cross-complaint. Since Rivera is the only named cross-defendant involved in this appeal, we shall refer only to him.

tenancy shall terminate on March 22, 2005; and (3) upon tender of the remaining relocation assistance, appellants would be entitled to recover possession. They also sought a declaration as to whether Rivera was actually entitled to relocation assistance. Appellants alleged that “a judicial declaration is necessary and appropriate” because Rivera claimed “that said [Ellis Act] withdrawal is defective,” and declaratory relief would allow them promptly to re-serve and refile documents, if necessary, and restart the one-year notice period, and avoid, or minimize, the civil liability they could incur if they filed a “defective unlawful detainer.”

On September 1, 2004, Rivera voluntarily dismissed his complaint. A few days later, the court sustained Rivera’s demurrer to the cross-complaint, and gave appellants 10 days to amend to state a “justiciable controversy if [appellants] can do so in good faith.” On October 4, 2004, appellants filed a second amended cross-complaint. The only differences between the allegations of the second amended cross-complaint and the original cross-complaint were that the second amended cross complaint: (1) alleged that Rivera’s counsel had notified appellants in writing that Rivera, and the other tenants, “dispute that the subject Ellis Act withdrawal is legal or valid” and attached a copy of that writing as an exhibit; (2) eliminated the request for declaratory relief that, upon tender of the balance of the relocation assistance, appellants would have the right to possession at the termination of the tenancy; (3) alleged that Rivera had cashed the check for relocation assistance; and (4) sought a declaration that Rivera was therefore “estopped from denying the validity of the withdrawal.”

Rivera filed another demurrer contending that the new allegations did not cure the failure of the cross-complaint to allege an actual present controversy with respect to the issues upon which appellants sought declaratory relief. He suggested that appellants were actually seeking a premature determination on the issue of possession, based upon a hypothetical refusal to vacate the premises, which might or might not occur. Nor, he argued, did appellants allege any facts that placed in dispute Rivera’s eligibility for relocation assistance, or to support the elements of estoppel. Rivera concluded that the request for declaratory relief, in effect, sought a judicial determination of the validity of a

defense to an unlawful detainer action that might never even be initiated, and which would not be ripe until the termination notice expired.

In opposition, appellants contended that the complaint adequately alleged an actual and present controversy based upon the allegation and attached letter stating that Rivera disputed the validity of the Ellis Act withdrawal. They further reiterated their contention that an immediate resolution of the dispute was necessary so that they either could re-initiate the withdrawal process and avoid filing an unmeritorious unlawful detainer action, or “proceed safely” in the knowledge that they had complied with the Act.

At the hearing, the court stated that the addition of the general allegation and attached letter that Rivera had, in writing, disputed the legality and validity of the Ellis Act withdrawal did not cure the defect identified in its first order sustaining Rivera’s demurrer with leave to amend a “justiciable controversy.” It explained that the vague assertion in the letter that the Ellis Act withdrawal was invalid was “just a tenant shaking his fist in the dark, very unhappy obviously because he’s lived there for a long time, he’s rather elderly and he has to move and he’s making a lot of noises. Whether those noises have validity or not, I don’t know, but it’s something the Court can’t do at this stage, it really does become an advisory opinion. . . . [T]here is in my view no need for it, so the demurrer is sustained without leave to amend.”

Appellants filed a premature notice of appeal from the order sustaining Rivera’s demurrer without leave to amend. Thereafter, at appellants’ request, the court entered a final judgment on the cross-complaint in favor of Rivera. We shall construe the notice of appeal as being from that judgment. (Cal. Rules of Court, rule 2(e).)

#### **ANALYSIS**

The primary relief sought by the second amended cross-complaint was a general declaration of the legal validity of the withdrawal of their property from the rental market under the Ellis Act. Appellants sought this relief in anticipation of the possibility that Rivera would refuse to vacate the premises and assert a legal challenge to the Ellis Act withdrawal as a defense to an unlawful detainer action. The Ellis Act is codified at

sections 7060-7060.7 of the Government Code. Its core provision is that: “No public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease.” (Gov. Code, § 7060, subd. (a).) (See also *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1095-1096.) The Ellis Act leaves in place procedural protections designed to prevent abuse of the right to evict tenants (Gov. Code, § 7060.4, subd. (b)), such as relocation assistance for displaced persons (Gov. Code, § 7260 et seq.). It also expressly provides: “If an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the tenant or lessee may appear and answer or demur pursuant to Section 1170 of the Code of Civil Procedure and may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter.” (Gov. Code, § 7060.6.) “Concerned about the possible adverse effect on rent control ordinances, the Legislature included provisions to insure against the removal of rental units for the sole purpose of circumventing rent control ordinances by, e.g., subjecting withdrawn accommodations to rent control if offered again for residential purposes. (Gov. Code, § 7060.2.) Also, the Act contains specific guidelines for public entities wishing to enact supplemental ordinances consistent with the Act. (Gov. Code, §§ 7060.2-7060.5.)” (*City of Santa Monica v. Yarmark* (1988) 203 Cal.App.3d 153, 168.)

“ ‘The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.’ ” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) The court may sustain a demurrer on the ground that the complaint fails to allege an actual or present controversy, or that it is not “justiciable.” The court also may sustain a demurrer without leave to amend if it determines that a judicial declaration is not “necessary or proper at the time under all the circumstances.” (Code of Civ. Proc., § 1061; *Wilson v. Transit Authority of Sacramento* (1962) 199 Cal.App.2d 716, 721-722.)

Appellants contend that the second amended cross-complaint adequately alleged an actual and present controversy, that it was justiciable, and that declaratory relief was necessary and proper.

Appellants' argument is premised largely upon the assertion that they needed a judicial declaration prior to the expiration of the one-year notice period, so that they could either cure any defects in their Ellis Act withdrawal, and avoid the delay that would be caused if they had to restart the one-year notice period, or proceed with an unlawful detainer if Rivera refused to vacate, without fear of incurring civil penalties for wrongful eviction under the San Francisco ordinance. The threshold problem is that the passage of time has rendered their action for declaratory relief arguably moot, because the termination notice expired on March 22, 2005. Therefore, even if this court were to agree with appellants that their second amended cross-complaint alleged a justiciable controversy, the need for declaratory relief no longer exists since the issues can now be litigated in an action at law, in the context of an unlawful detainer, or if Rivera vacated the premises, in an action for damages if he can state a cause of action. Appellants nevertheless contend that their appeal is not moot because the termination notice is not self-executing, and they could still incur civil penalties if they were to proceed with an unlawful detainer that is without merit. They also suggest that, if the action is moot, we should nonetheless exercise our discretion under an exception to the mootness doctrine to reach the merits. (See, e.g., *Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 144 [discretionary exception may apply if case presents an issue of broad public interest that is likely to recur].) We need not resolve the mootness question because we shall affirm the judgment on the ground that the trial court correctly determined that the second amended complaint failed to allege a justiciable controversy.

“ ‘[A]n actual, present controversy must be pleaded specifically’ and ‘the facts of the respective claims concerning the [underlying] subject must be given.’ ” (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 80.) In *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 63-64, the court explained that the related concept “ ‘of justiciability

involves the intertwined criteria of ripeness and standing.’ [Citation.] . . . A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate outcome of an action. [Citations.] . . . ‘Ripeness’ refers to the requirements of a current controversy. According to the Supreme Court, ‘an action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law . . . will not be entertained.’ [Citation.] A controversy becomes ‘ripe’ once it reaches, ‘but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.’ [Citation.]” (*Id.* at p. 59.) “Ripeness is aimed at ‘prevent[ing] courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of . . . opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.’ [Citation.]” (*Id.* at pp. 63-64.)

In this case, the trial court’s determination that the cross-complaint failed to allege a justiciable controversy did not turn on an issue of standing, but rather upon the absence of “ripeness.” “A two-pronged test is used to determine the ripeness of a controversy: (1) whether the dispute is sufficiently concrete so that declaratory relief is appropriate; and (2) whether the parties will suffer hardship if judicial consideration is withheld. [Citation.] ‘Under the first prong, the courts will decline to adjudicate a dispute if “the abstract posture of [the] proceeding makes it difficult to evaluate . . . the issues,” if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a “contrived inquiry.” Under the second prong, the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay.’ ” (*City of Santa Monica v. Stewart, supra,*

126 Cal.App.4th at p. 64.) Under either prong, the court correctly concluded that the controversy alleged in the second amended cross-complaint was not justiciable.<sup>2</sup>

Under the first prong, the allegations of the second amended cross-complaint failed to establish the alleged dispute “is sufficiently concrete to make declaratory relief appropriate.” (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502.) It alleged that appellants had taken steps required under the Ellis Act, and the San Francisco Rent Stabilization Ordinance, to withdraw the premises from the rental market, that Rivera had invoked the one-year notice period, and that appellants had therefore extended the tenancy until March 22, 2005. It further alleged that they had tendered 50 percent of what they calculated to be the amount of relocation assistance payable to Rivera. Rivera, through his counsel, had notified them that he would not cash or deposit the relocation assistance check because he disputed that the “subject Ellis Act withdrawal is legal or valid.” Based upon the foregoing facts, appellants sought a sweeping declaration that they had “properly complied with all state and local laws, ordinances, and rules regarding the withdrawal” of their property from the rental market. The breadth and generality of the declaration appellants sought illustrates the absence of a concrete issue appropriate for declaratory relief. Since Rivera, through his counsel, had only vaguely and generally asserted the Ellis Act withdrawal was illegal or invalid, the complaint did not, and could not, specify whether the alleged dispute was over the procedure followed in noticing the withdrawal, or appellants’ good faith intent to actually withdraw from the rental market (see *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 598), failure to comply with the local ordinance, or some other legal challenge. Instead of alleging a concrete legal dispute, the complaint alleged only nonspecific posturing that the court aptly characterized as “just a tenant shaking his fist in the dark.”

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<sup>2</sup> The court in *City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th at pp. 58-59 also noted that it is unclear whether the appropriate standard of review should be abuse of discretion or de novo. It deemed it unnecessary to resolve the question because it would affirm the judgment under either standard. For the same reason, we also need not decide which is the applicable standard of review.

In addition to the absence of a concrete defined legal issue, the relevant factual context had not yet fully developed. Without a complete factual context, the issues were not framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. If, for example, the legal dispute were over appellants' good faith intent actually to cease residential use, there were no facts alleged that would demonstrate the existence, or lack, of good faith. Even if the court agreed to resolve the issue before the termination notice expired, other facts could emerge during the remainder of the notice period, or even after it expired, that would be relevant to a final determination of a claim that the landlord actually intends to re-rent the units once the existing tenants have been displaced. (See *Drouet v. Superior Court*, *supra*, 31 Cal.4th at p. 598 [court recognized evidence of re-renting of the premises closely following an Ellis Act eviction would be persuasive evidence of bad faith "in any future Ellis Act proceeding"].) It was also uncertain whether appellants would ever actually have to file an unlawful detainer, because the cross-complaint did not allege that Rivera had stated his intent to refuse to vacate the premises on March 22, 2005, or that he denied that his tenancy would terminate on that date. Rivera could voluntarily vacate and litigate this issue of the validity of the withdrawal outside the context of an unlawful detainer. Or, he might abandon his challenge to the Ellis Act withdrawal altogether if, for example, he finds alternative housing that meets his needs, or determines that he does not have factual or legal support for such a challenge. Therefore, the prospect that appellants would be forced to initiate an unlawful detainer action and, in the absence of declaratory relief, risk exposure to civil penalties under the Rent Stabilization Ordinance, was based upon a set of hypothetical facts that might never materialize. These same factual contingencies also could affect, or obviate the need for, a resolution of appellants' contention that Rivera's decision to cash the relocation assistance check "estopped" him from challenging the validity of the withdrawal.<sup>3</sup>

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<sup>3</sup> Appellants concede that they incorrectly sought a declaration applying equitable estoppel, instead of waiver. We also note, with respect to the request for a declaration of whether Rivera was eligible for relocation assistance, the second amended

Under the second prong, the trial court also correctly concluded that the second amended cross-complaint failed to allege facts showing “ ‘an imminent and significant hardship inherent in further delay.’ ” (*City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th at p. 64.) The hardship appellants claimed was that, *if* Rivera refused to vacate the premises when the termination notice expired, they faced the dilemma whether to enforce their right to regain possession under the Ellis Act by filing an unlawful detainer, and risk civil penalties for wrongful eviction. They also argued that *if* Rivera’s challenge to the validity of the withdrawal turned out to be based upon improper notice, or other procedural defect, a judicial declaration would permit them promptly to cure the defect. Without such a declaration they might have to restart the notice period after the first termination notice expires, which could result in having to wait another year before exercising their right to regain possession based upon an Ellis Act withdrawal. These allegations failed to establish an imminent hardship because the posited dilemma regarding potential exposure to penalties for wrongful eviction depended upon whether, when the termination notice finally expired, Rivera would refuse to vacate the premises, and on what grounds. Moreover, with respect to the possibility of further delay if Rivera’s defense turned out to be that notice was defective, appellants did not allege any factual or legal ambiguity in the Ellis Act or the Rent Stabilization ordinance that required judicial resolution or impeded their ability to determine whether they had correctly followed the procedures, and to cure any defects. The alleged hardship was simply too remote and contingent to qualify for declaratory relief. Instead, at the end of the notice period, if Rivera did not vacate the premises, the unlawful detainer procedure would facilitate expeditious resolution of the issues which, by then, would be more fully

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cross-complaint failed to allege any legal issue or factual dispute for the court to resolve. It alleged only that Rivera claimed “senior status” and that he was low-income, and that appellants therefore gave him the extended one-year notice for the date of withdrawal (see Gov. Code, § 7060.4 subd. (b)) and half of the relocation assistance appellants calculated. There was no allegation that appellants challenged his eligibility, nor did they allege any factual or legal basis for disputing it.

factually and legally defined. (See, e.g., *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 172-173 [mere difference of opinion as to validity of guidelines did not constitute an actual controversy, and no imminent hardship would be caused by refusing declaratory relief where coastal landowners were not immediately faced with the dilemma of either complying with the guidelines or risking penalties for violating them; that situation would not arise unless and until they apply for a development permit and suffer the imposition of invalid dedication conditions]; cf. *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1319 [actual and present controversy existed where landlord claimed amount of rent charged was result of valid vacancy decontrol after termination of initial short-term tenancies following withdrawal of units under Ellis Act, and notice of return of units after sale, and Board contended amount of rent charged was illegal because the short-term tenancies were sham tenancies aimed at evading rent control].)

For the foregoing reasons, we conclude that the court did not err in sustaining the demurrer to the second amended cross-complaint, without leave to amend, on the ground that appellants failed to allege a justiciable controversy.

#### CONCLUSION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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STEIN, Acting P.J.

We concur:

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SWAGER, J.

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MARGULIES, J.