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PARK WATCH ™ LEGAL DEVELOPMENTS NEWSLETTER

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"Sociopathic Narcissist" Landlord May Sue for Defamation

Factual assertions of a false and slanderous nature are actionable.

By Kasey C. Phillips, Esq.

UPSHOT

Landlords have long been called derogatory names; been falsely accused of all manner of unfathomable evils. But for the first time in a long while, a court has vindicated a landlord who had had "enough" and took affirmative action to stop the defamation.

With the rise of consumer review websites, ranking forums, discussion boards and blogs, defamation is more and more commonplace. Management is increasingly vulnerable to scandalous falsehoods by a handful of angry tenants ostensibly interested in no more than character assassination or self-aggrandizement. While first amendment guarantees have long protected all forms of speech, courts are now beginning to draw a line in the sand between implied facts and true opinions. The courts are no longer sanctioning every miscreant who hides behind the First Amendment to falsely condemn those with whom they are unhappy. Enmity has its limits.

Bently Reserve v. Papaliolios manifests a new and increased unwillingness to allow disgruntled tenants to post whatever they may please without any factual support.

FACTS

Bently Nob Hill, L.P. owned the Jones Building since March 2005. Christopher Bentley (hereinafter "Bently") is the managing partner of the Limited Partnership and married to Amber Bently (collectively "the Bentlys"). Andreas Papaliolios (hereinafter "Papaliolios") moved into the building in 2004. In 2005, the Bentlys moved into the penthouse of the Jones Building. Over the next three years, Papaliolios engaged in controversial and litigious dealings with the Bentlys before finally leaving the Jones Building in 2008.

Approximately four years later in 2008, Papaliolios, under an assumed pen name, posted a review of the Jones Building to the popular consumer review website *Yelp.*[1] The statements in question are these:

> *"Sadly, the Building is (newly) owned and occupied by a sociopathic narcissist—who celebrates making the lives of tenants hell. Of the 16 mostly-long-term tenants who lived in the Building when the new owners moved in, the new owners' noise, intrusions, and other abhorrent behaviors (likely) contributed to the death of three tenants (Pat, Mary, & John), and the departure of eight more (units 1001, 902, 802, 801, 702, 701, 602, 502) in very short order. Notice how they cleared-out all the upper-floor units, so they could charge higher rents?"*
>
> *"They have sought evictions of 6 of those long-term tenants, even though rent was paid-in-full, and those tenants bothered nobody. And what they did to evict the occupants of unit #902, who put many of tens of thousands of dollars into their unit, was horrific and shameful."*
>
> *"This is my own first-hand experience with this building, and its owners. I know this situation well, as I had the misfortune of being in a relationship with one of the Building's residents at the time, have spent many days and nights over many years in the Building, and have personally witnessed the abhorrent behavior of the owners of the Building."*

[1] http://www.yelp.com, last visited October 24, 2013.

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In this Issue:

Coming Events:

MHET Breakfast:
Orange County Holiday Breakfast
Wednesday, December 4, 2013
Wyndham Hotel, Costa Mesa, CA

Inland Empire Holiday Luncheon
Thursday, December 5, 2013
The Mission Inn, Riverside, CA

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The review was posted to *Yelp* a number of times with only minor changes. Every time the review was posted, Bently complained to *Yelp* and the review was removed. However, a version of the review *remained posted* to the site in a forum related to how *Yelp* deals with the removal of certain reviews on its site.

Often, landlords do not dignify such insults with any response at all. Or deem such defamatory matters to be just an opinion regarding a heated social or political matter and ignore it. Or, deem the defendant to be judgment proof and hence unable to respond to a judgment in damages even if pursued in a clear case. But not in this instance.

In late March 2012, the Bentlys sued Papaliolios for libel *based on the posted review*. Papaliolios sought a dismissal of the case. He filed a special motion to strike the complaint and terminate the lawsuit claiming that the libel suit sought to *"suppress[] his right to speak in an open forum about an issue of public interest"* and that the Bentlys would be unable to show a probability of prevailing on their claim because the statement was an opinion. The Bentlys opposed the motion, proffering evidence to the contrary for most of the key statements in the review.

Landlord posited facts to show each and every claim was false. In response to the comment that Bently was a *"sociopathic narcissist,"* the Bentlys submitted a declaration that *neither he nor his wife ever sustained such a medical diagnosis*. In response to the statement that the Bentlys had "contributed to the death of three tenants" the Bentlys provided statements of relatives showing *that two of the tenants were still alive and provided the death certificate of the third tenant showing cause of death as pneumonia and cancer*. In reply to the allegation that the Bentlys contributed to the "departure of eight" tenants because of the owners' "noise, intrusion, and other abhorrent behaviors," the Bentlys supplied a declaration stating that *exit interviews with the former residents showed that none of them left for the supposed reasons*. The Bentlys juxtaposed each statement in the review with corresponding, contradictory evidence. Based on the evidence presented, the trial court denied Papaliolios' motion to strike. The case was brought to the Court of Appeals for review of the trial court decision; the Appellate Court discussion and ruling follows.

DISCUSSION

In resolving an anti-SLAPP motion, the analysis is two-fold, asking (1) does the cause of action arise from the protected activity within the statute, and (2) can the plaintiff establish the probability of prevailing? The court summarily decided the first prong of the test, stating that "the libel claim undoubtedly arises from protected activity," and turned its focus to the second prong.

The Court defined defamation as consisting of "among other things, a false an unprivileged publication, which has a tendency to injure a party in its occupation." The Court further explained that to be considered libelous, "a statement must contain a provable falsehood" and thus, a court must distinguish between opinion and fact. The key in this distinction is not whether the actual statement is fact or opinion, but *"whether a reasonable fact finder could conclude that the published statement declares or implies a provable false assertion of fact."* Thus, the Court makes it clear that not all statements appearing to be or intended to be opinions are necessarily inoculated and that "simply couching … statements in terms of opinion" or with "cautionary language" such as "apparently" or "some sources say" does not mean the statements do not imply an assertion of objective fact.

Courts employ a *totality of the circumstances test* in determining whether a statement expresses or implies a provable falsehood. The court, therefore, takes into account "both the language of the statement and the context in which it is made."

Juvenile Insults Insufficient. To evaluate the context of the statement by Papaliolios the court consulted three different cases as a frame of reference. In *Krinsky v. Doe 6* (hereinafter "*Krinsky*"), the defendant used a *camouflaging screen name* to post a critical review of a company's president to an Internet discussion forum. The Court viewed the post "in the context of what was a *particularly '[h]eated' discussion forum*" in which other posts similarly criticized the company's management. *The Court in Krinsky found that the style of the defendant's post which included "juvenile name-calling" combined with its placement in a fiery forum rendered it a nonactionable opinion*.

Grammatical and Spelling Mistakes Cannot Be Taken Seriously and So Is Insufficient: In *Summit Bank v. Rogers* (hereinafter "*Summit*"), the defendant posted a poorly written review under an assumed name to the *"Rants and Raves"* section of *Craigslist*.[2] Taking into consideration the location of the post and the fact that is was full of grammatical and spelling mistakes, the Court concluded that people who viewed the post would be reading with "a certain amount of skepticism, and with an understanding that [the review would] likely present one-sided viewpoints rather than assertions of provable fact." The *Summit* Court, like *Krinsky* Court, found the statements in the post to be nonactionable.

Too Generalized, Nonspecific, and Vitriolic Not Sufficient: In *Chaker v. Mateo* (hereinafter "*Chaker*"), the Court examined posts to "the Ripoff Report" a website designed as a forum for public comment on companies that provide goods and services as well as "Topix," a social networking forum. The *Chaker* Court found that many of the statements made were "too generalized, nonspecific, and vitriolic to be actionable" with the only statement that might fall outside of this category being one that was true and accurate, making it nonactionable for that reason.

Krinsky, *Summit*, and *Chaker*, emphasized the importance of context in a court's evaluation fact versus opinion but the Court cautioned that "by no means do they categorically immunize anonymous Internet speech or even give anonymity special weight." While each of these cases enable courts to expeditiously expel defamation claims arising from "true rants and raves, they do not preclude the

[2] www.craigslist.org/, last visited October 24, 2013.

courts from taking serious internet speech seriously." The court expressly stated that where the writer characterizes himself as "unbiased" and with personal knowledge or where the writer claims his reviews are "Research Reports" or "bulletins" or "alerts," such posts may be "reasonably perceived as containing actionable assertions of fact."

After assessing the location of a post, the court here then discussed the nature of a review as either general or specific, indicating that "specifics, if given … may render an Internet posting actionable." The court compared the facts in this case to *Wong v. Jing* (hereinafter "*Wong*"). In *Wong*, the defendant also posted a review to *Yelp*, accusing a dentist of failing to inform the defendant that a filling contained mercury, mis-diagnosing the case, and using the wrong General Anesthetic beyond her scope of practice. *Wong* found that the specifics of the review and assertion of knowledge regarding incorrect practices made the review actionable. Here, the Court finds Papaliolio's Yelp post "every bit as factually specific and earnest as the Yelp review in Wong" and that it contained:

> *". . . statements that could reasonably be understood as conveying facts - each provable, and each meant to be used by prospective tenants to evaluate the Jones Building as a future residential choice."*

Papaliolios raised two defenses. First he argued that this case was distinguishable from *Wong* because he had used a completely false name whereas the defendant in *Wong* used initials; Papaliolios argued that his post was anonymous whereas the review by the defendant in *Wong* was not. The Court dismissed this argument stating that "in both cases, the consuming public had no way of identifying the poster from the reviews" and that "anonymity is only one of the many contextual factors to be considered."

Papaliolios then argued that "the gist of his review is true, and truth is a complete defense to a libel claim." The Court agreed with Papaliolios' assertion that substantial truth is a defense to a libel claim and that slight inaccuracies in a claim do not undermine the general truth of a claim. However, the Court also acknowledged the flip side of the coin, "not every word of an allegedly defamatory publication has to be false and defamatory to sustain a libel action." The Court found that Papaliolios offered "only speculation" as to the truth of many of his statements and that the Plaintiff countered such statements with direct evidence to the contrary.

CONCLUSION

The Court concluded that it could be reasonably determined that Papaliolios' review was not substantially true and was defamatory. Because the plaintiff made the requisite showing as to the probability of prevailing on their claim for libel, the Court determined that Papaliolios' special motion to strike was properly denied by the trial court.

Testing for actionable defamation is a fact-intensive examination. A prudent judgment about proceeding with a defamation action calls for wisdom, experience and circumspection. Keep in mind that the defamation suit generates hostility, ad if the suit backfires, it may well generate a "snap-back" malicious prosecution action, placing the landlord on the receiving end of the lawsuit. Careful review of all facts is therefore *de rigeur*. No one should trust a snap judgment based on the false language alone.

COMMENT

This case brings forth a couple of key "takeaways":

(1) Anonymity does not mean immunity.
(2) Implied facts masquerading as opinions may be actionable.
(3) Cautionary language is not a protect-all.
(4) Specific allegations tilt the scale toward a review being actionable.
(5) And to the contrary, published statements which a reasonable person would not take seriously, or which are placed in a location reputed for unsubstantiated rumor mongering, or filled with sophomoric errors, cannot be the subject of legally cognizable harm.

So what does this mean for management? First, you need to know what is being said about you. In order to be aware of what is being said about you, do this:

- 1. Set up alerts. "Google Alerts" [3] and similar programs allow you to set constant searches for key phrases. Include park name, owner's names, management names, key personnel, and any variations, so that anytime a comment appears on the net, it will alert you to the posting. When any of your set phrases are posted, you receive an email alerting you of the post and directing you to it. For instance, you could set up an alert for the name of your mobilehome park and each time that name is posted on the internet (good, bad, or ugly) you will receive an alert. This allows you to keep constant vigil without too much effort.

- 2. Be positive. Of course, tenants or former tenants can post negative reviews, but keep in mind that positive reviews can be just as powerful or at least call into question the negative review. Encourage happy tenants to post reviews to consumer review sites describing the attributes of your Park that make it great.

- 3. Keep a File. Whenever you see a bad review of the Park, print it out and keep it. You want to have a record of who made posts, when, where and for what reasons. Posts can be removed or changed. You will want to have these reviews taken off the websites to which they are posted, so printing them is the only way to ensure a permanent record. Try to have the reviews printed with a time and date stamp and make sure the website name and/or the URL are visible in the printout. Also, a great tool to have is screen

[3] http://www.google.com/alerts, last visited October 29, 2013.

capture software: it allows you to keep exactly what you see on the screen (often called a "screen shot").[4]

- 4. Request Removal. After you have printed the post, contact the forum administrator or website director and politely ask that the post be removed. Clearly but objectively state why the removal should occur. After removal is requested, monitor the post and see whether it is removed. If necessary, follow-up. A demand letter from your attorney may produce better and faster results. Demand a retraction from the author if known. A retraction letter does not compromise the claim but does stop the harm and damage.

- 5. Investigate. If, despite removal, the same post keeps appearing, attempt to find out who is doing the posting. Review the complaint or complaints and try to piece together who might have knowledge of everything in it.

- 6. Evaluate and Act. Take an objective view of the post and determine if any of the issues are in fact problems in your Park. Is the clubhouse rundown? Does the Park need landscape work?

- 7. Take Action. Should you find yourself in the situation like the Bentlys where you have tried working with a tenant and tried removal of the posts, but the complaints still keep appearing, consider taking legal action.

- 8. Don't Take Action. Sometimes, given the nature of the communications, the falsity is of no moment and can be ignored. In our offices, a picture of a posted sign in a park is framed and displayed. It was placed near the tenant's homesite. It says in pertinent part: *"Buy here, Die here."* Another posted, framed masterpiece of poetic brilliance says:

. . .The rules and regulations of (blank blank) Park,
They are many,
The benefits,
There aren't any.

One cannot take too seriously all the reports emanating from the mother ship.

Court Upholds Carson Rent Controls, Again

The California Courts Continue Open Hostility to Park Owners, Claim the Rate of Return is Just Fine Given the Economic Times.

By Terry R. Dowdall, Esq.

■UPSHOT

Another admirable effort of a park owner seeking a fair return fails.

It is becoming clearer by the day that park owners need to consider alternative ways by which to protect and advance their investments when located in a rent-controlled jurisdiction. Sad fact is, that rent control has been with us long enough that the current incumbent tenant today paid the inflated premiums from the original tenants who took their profits created by vacancy controls. Now, there is no low income tenant to protect, because the tenants had to pay market prices for their valuable leaseholds and *oh yes*, the mobilehome. Rather, rent controls exist only to protect a tenant's rather myopic investment for an overvalued and very tired pre-HUD mobilehome–purchased just for the rent.

Since 1987 (if not before), this author has said that rent controls are *here to stay*; that investing in expensive court action is only for the wealthy and the Pacific Legal Foundation or WMA Property Rights Committee. But for the usual park owner, the court option (lawyers, experts, cost) is not plausible or the best answer.

We continue to strongly suggest that it remains time to forego the lawyers and the courts: *investigate alternate means by which to engineer a prosperous future despite rent controls.*

■FACTS

Colony Cove Properties, LLC appealed adverse rent increase decisions from the City Board. Earlier, it attacked in Federal Court as well (unsuccessfully). The decision this month involves the Board hearing, and illustrates the need for rock solid economic analysis when it is decided to seek a rent increase application in an owner-hostile city such as Carson. The opinion also illustrates how inept a court can be in respect to the real world ownership and management of mobilehome parks.

Owner sought a new rent control hearing after being denied by the City of Carson. Owner contended that the rent control ordinance deprives park owners of the value of their property and transfers it to the residents. This transfer occurs because (it is virtually undisputed) tenants can sell at a premium because they are located on under-market rent-controlled spaces. Successor-tenant buyers must pay market prices for the home, and do so to enjoy the continuing control on rent. *In other words, the housing is no longer affordable or protected after first sale*.

Park owner purchased the Park for $23,050,000 in April 2006, putting $5,050,000 down and financing the $18 million balance at a variable rate, which in 2007 was approximately 7 percent. Colony Cove has 404 spaces. At the time of the sale, the Park's tenants were paying rents averaging $408 per space per month. This is half or less than fair rental value. The Park's gross income totaled approximately $2.2 million per year, including miscellaneous income from sources other than rent. The Park's "net operating income" (a figure calculated by subtracting regular operating expenses, but not debt service, from gross income) was

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[4] For example, "Screen hunter"(tm) from http://www.wisdom-soft.com/ is free.

$1.1 million. The prior owner's debt service was approximately $350,000 per year, leaving over $700,000 in cash profit.[5]

The ordinance goes back to 1979. Our office had succeeded in holding the Carson ordinance unconstitutional in the trial court and in the Court of Appeal, just to be reversed in the California Supreme Court. See inset.

But *east coast jurisprudence* beat us to it, and the Supreme Court followed suit, allowing for the gradual erosion of property rights based on the presupposed notion that the market had failed and could never be re-established, locking property owners into a fixed return, viz., *de facto public utility*. A preexisting profit level is good enough, and forever fixed and regulated, perpetually. So long as "all relevant evidence" can be considered, the methodology used is of no moment. One prominent lawyer used to say that you can use a "ouija board" if you like, so long as the result is fair.

Carson in the Supreme Court, 1984: We had argued that the ordinance lacked sufficient standards and safeguards to assure a park owner of a fair return. The Supreme Court disagreed. We had argued, in essence, much like "*ham and eggs,*" that the control over the cost of breakfast was nonsensical if both commodities were not both and simultaneously controlled. One cannot control the price of breakfast if the price of eggs is fixed but the cook can charge as he likes for the ham. Likewise, if rents are controlled but housing prices are *not*, housing prices will rise to fair market value, so there is in fact *no control at all over housing cost*. This simple, unassailable proposition, was first raised in the Oceanside case in 1984, in a brief written by your author. Mention thereof is made in the opinion. Still, the courts refuse to accept the patently clear and plain reality.

Thus, pursuant to a portion of the Guidelines that has not changed since 1998, in light of the assumption that rents set prior to the adoption of the Ordinance provided a fair return when the first park owner made the first application for a rent increase, *"each rent increase application after the first application is evaluated only on the basis of changes in income, expenses, profit, the CPI, maintenance, amenities and services that have occurred since the date of the last increase approved by the Board."* In 2006, formal resort to the most punitive policies was enacted. The 2006 Amendments provide "maintenance of net operating Income (MNOI) analysis."

This restriction rather curbs any enthusiasm one may have for the lip service to overarching goals of the law professed to include the duty of the rent board to grant "... such rent increases as it determines to be fair, just and reasonable." "A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner."

Colony Cove submitted applications for rent increases in 2007 and 2008. After hearings in 2008 and 2009, the Carson Mobilehome Park Rental Review Board approved rent increases in the monthly rent per unit of $36.74 and $25.02, respectively.

Colony Cove maintained that even after the rent increases, the rental income that it received from the Park's residents was insufficient to cover its expenses, which included interest payments on its purchase loan. Colony Cove argued that rents had to be sufficient to provide a profit after payment of debt service in order to prevent the rents from becoming confiscatory.

September 2007 ("Year 1") Rent Increase Applications:

In September 2007, the owner submitted an application for a rent increase of $618.05 per space per month. The figure was derived from owner's expert witness. He assumed that owner was entitled to a 9 percent per year return on the $23,050,000 purchase price of the Park, or $2,074,500 per year.

In connection with the initial application, he conducted two considered analyses, the expert calculated, based on a 9 percent return on the property's $23,050,000 million purchase price, that even excluding debt service, there would be a shortfall of $1.769 million, requiring an increase in rents of $365 per space per month. He also calculated that in order for the owner to receive a return of 11.5 percent ($580,750) per year on its actual equity (the $5.05 million down payment), rents would need to be raised $327 per space per month when debt service was taken into account. This report was a "Net Operating Income" analysis and the latter calculation a "Net Income to Equity" analysis.

After receiving the Board staff's initial analysis, which concluded that a significant portion of the owner's alleged operating expenses should be disallowed, owner's expert recalculated the rent increase required under his "Net Operating Income" analysis and concluded a lesser increase of $210 was warranted. He also recalculated the rent increase under his "Net Income to Equity" analysis and concluded an increase of $161.84 was warranted.

In May 2008, while the application was pending, owner submitted an MNOI analysis by an experienced economist. For the base year, he used 1978 -- the year prior to imposition of rent control -- and concluded a $208.22 per space per month rent increase was necessary to maintain that year's net operating income based on indexing the 1978 net operating income at 100 percent of the reported increase in the CPI since 1978.

In September 2007, the owner also submitted a supplemental rent increase application, referred to as a "fair return" application. The supplemental application contained a Gross Profit Maintenance (GPM) analysis. The application stated that in order for the owner to maintain the 2005 (pre-purchase) gross profit, an increase of $388.85 per space per month was warranted.

Essentially, it concluded the owner was entitled to approximately $800,000 in gross profits to match the prior owner's 2005 gross profits of $718,240, adjusted for inflation by 100 percent of the CPI. To reach that figure, an additional $1.88 million in revenue was needed in view of appellant's much larger debt service. That figure, divided by 403 spaces and 12 months, equaled the requested $388.85 increase.

Board Experts' Reports: The Board hired Kenneth Baar, Ph.D, who performed both a GPM analysis and an MNOI analysis. Under Baar's GPM analysis, which used 2005 as the base year, increase in rents would have been in the $200 range (the precise number dependent on the rate used for the increase in the CPI between 2005 and 2007), and all but approximately $15 of it would be due to increased debt service.

However, Baar expressed the opinion that use of a GPM approach to calculate fair rent would not be appropriate because the amount owner paid "was not 'reasonable in light of existing rents.'" The case does not explain the basis for this opinion, or what analysis of all conditions was made to justify it (the reader is to assume the unquestioned veracity of the Baar opinion about initial price). Baar also noted that "[i]n recent decades," some real estate investors "have accepted a very low rate of return at the outset in return for the prospects of appreciation and some tax shelter benefits." He does not explain the nature of this "appreciation" (in income property parlance, "appreciation" expectations require analysis, such as caused by what, based on what, and over what course of time or ownership, but no such internal rate of return analysis is offered-Baar would not approve of such a market methodology anyway).

Baar expressed the opinion that the owner had paid an excessive price for the property and incurred negative cash flow based on its belief that it would obtain a substantial rent increase.

[5] The reader will note that this is a lot more than an appellate justice's salary.

Baar stated that rate of return formulas which include debt service "suffer from the shortcoming that they are circular in the context of rent regulations. In the marketplace, investment is determined by the allowable returns. Therefore, it is circular to let the investment determine the allowable return. In effect, this approach allows the investor to set the allowable return by setting the investment."[6]

Baar expressed the additional concern that if debt service were generally to be considered in determining rent increases, "debt service arrangements may be manipulated for the purpose of obtaining larger rent increases," for example, by "refinanc[ing] at a lower interest rate or pay[ing] off [a] loan after the rent increase is granted." Baar reviewed the Board's past actions in resolving rent adjustment applications and concluded:

> *"[I]t has not been the standard practice of the Board to grant substantial rent increases based on increases in debt service."*[7]

Baar ultimately concluded that in determining the amount to increase rent for a new owner with higher debt service, an MNOI analysis was more appropriate than a GPM analysis: "The rationale for an MNOI approach is that regulated owners are permitted an equal rate of growth in [net operating income] regardless of their particular purchase and financing arrangements. Therefore, rents are regulated depending on increases in expenses and the inflation rate ([CPI])." It becomes the investor's task to determine what investment and financing arrangements make sense in light of the growth in net operating income permitted under the fair return standard." Although specific financing and purchase arrangements were not considered, the growth in net operating income allowed some level of increasing debt service and finance costs over time. Furthermore, ''because value is a function ... of net operating income, indexing [net operating income] leads to appreciation in the value of a property, which may be converted into a capital gain. This approach meets the twin objectives of 'protecting' the mobilehome owners from 'excessive increases' and providing park owners with a 'fair return on investment.'" Baar conducted an MNOI analysis, using 2005 as the base year, not the 1979 year of passage.

Using the Park's 2005 net operating income of approximately $1.1 million, he calculated that to maintain that NOI after allowable adjustments, rents would need to be increased $8.61 if indexed at 50 percent of CPI, $12.12 if indexed at 75 percent of CPI and $15.65 if indexed at 100 percent of CPI.

The City also retained James Brabant as an expert, primarily to analyze the owner's expert's reports and calculations. He pointed out claimed discrepancies in the owner's calculations, including that the expert essentially used one figure for net operating income ($304,838) to justify his claim that a rent increase was needed, and another, much higher, figure ($1.1 million) to justify the purchase price paid by the owner.

Brabant further criticized owner's expert's report for contending that 9 percent represented a reasonable rate of return, when the capitalization rate used to justify the sales price was 4.75 percent, and capitalization rates from six comparable sales ranged from 3.9 to 6.3 percent. In this regard, Brabant stated:

> *"If you perform an analysis that uses one rate to justify a purchase price and then use a higher rate for the fair return analysis, a rent increase will always be indicated."*

With respect to the 11.5 percent return used in the owner's ''Net Income to Equity" analysis, Brabant stated that the expert failed to supply "any equity dividend rates extracted from sales of mobile home parks to support his use of an 11.5% rate," and concluded that the Board could "give little weight to or choose not to have confidence in this aspect of the owner's analysis.

Finally, to the extent the owner attempted to justify the high returns he deemed appropriate based on the riskiness of the investment, Brabant concurred with Baar that "after a park has been constructed and occupied with mobilehomes, there is virtually no rental risk," stating that "[t]his conclusion has been supported and documented in countless studies and I have personally observed this phenomena in over 30 years of appraising mobile home parks." As a result of the low risk level, ''the discount\ rates for mobile home park acquisitions are lower than the rates for apartments, office buildings, industrial properties and retail facilities ... reflective, at least in part, of the lower risk of vacancy."

Owner's Expert's Testimony: He testified that the property was purchased on the open market at a price sufficient to beat other prospective purchasers, and that the loan was a typical one because appellant put 20 percent down and 80 percent was financed by a reputable third party lender. He reiterated his conclusion that a 9 percent return on value or a 11.5 percent return on equity were reasonable discount rates based on reported surveys of expectations of real estate investors. He testified that investments such as government bonds and certificates of deposit were returning 4.5 to 5 percent at the time of his analysis.

2008 Board Decision: On August 6, 2008, the Board issued its decision. Again, the owner claimed it was entitled to a monthly rate increase ranging from $208.22 to $618.05 (a 136% to 179% increase) per space based on "the following alternative methodologies and theories. [8]

Based on its review, the Board granted a $36.74 (or 8.10% to 10.62%) increase per space, per month. Among other things, the owner filed suit for a new hearing. It alleged that the City's decisions on its rent increase applications deprived it of a fair return on its investment, and owner asked the Court to compel the City to permit a rent increase of $200 per month per space, rather than the $36.74 increase previously granted.

September 2008 ("Year 2 '') Rent Increase Applications:

On September 28, 2008, owner submitted a new rent increase application to the Board. Owner again provided "Net Operating Income" and "Net Income to Equity" analyses. The expert claimed that in the preceding year, the Park's gross income was $2,053,692 and its operating expenses were $1,512,273, resulting in net operating income of$541,419. Using a 8.75 percent expected return on value, he contended an increase in the amount of$336.76 per space per month was warranted.

Using the same $541,419 for net operating income and deducting $1,353,506 allegedly spent on debt service, he concluded the Park was losing $812,177 per year. Applying the 11.5 percent figure used to calculate expected return on equity for the prior year's application and an "inflation adjusted equity investment" of $6,800,000, he calculated the expected return was $782,000. Adding $782,000 to $812,177, he concluded the shortfall was $1,594,177, necessitating a rent increase of$329.65.

In September 2008, the owner also submitted a

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[6] Debt service and price are two different things, of course, and this discussion and evidence ignores, for example, the need for a lender's appraisal to support the validity of price. Or ignores the other possibility, which is that the loan was not a commercially regular or arms' length transaction (of which there is zero evidence). However, the reader is cautioned that the discussion of the Court's logic is, in many respects, tilted for the city in illogical and unreal fashion divorced from the real world realities of park ownership, all unquestioned. Another example is the apparently accepted (with no scrutiny), recurrent claim that there is no risk in the business operation of a mobilehome park. Or that price was "too high." Baar has no expertise in that area of real estate appraisal or analysis. Hence, suspending all sense of reality is required to just read the opinion. But *nota bene:* this is emblematic of the "Alice-in-Wonderland" assessments needed when considering seeking protection of the judiciary in promoting and protecting property rights.

[7] But past practice assumes that all situations are the same or that the Board acted properly. Without underpinning of such opinion, one might say such an observation is merely *post hoc ergo propter hoc*. One might as well say it appears all the Board hearing decisions were made after dark.

[8] 1. return on cash investment ($618.05 increase), 2. return on total investment ($365.93 increase), 3. gross profits maintenance ("GPM") analysis ($388.85 increase), and 4. maintenance of net operating income ("MNOI") methodology ($208.22 increase).

supplemental "fair return" application containing a GPM analysis. Based on income of $2,053,692, expenses of $2,865,869 (including debt service of approximately $1.3 million), and a target gross profit of $843,934, appellant claimed a shortfall of$I,656,111 and contended an increase of $342.46 per space was required to maintain the pre-purchase gross profit.

Hearing on Second Application: The hearing on the second rent increase applications took place on June 10,2009.

Baar testified that the issues raised in the 2008 rent increase applications were the same as those raised in the prior year when the Board concluded that the debt service was not reasonable in light of the existing rents. He explained that rates of return had been on the decline since the 1990's and the early 2000's and that current rates of return on rental properties were six percent on average, subject to a great deal of variance. He expressed the opinion that a realistic rate of return analysis must take into account the appreciation that was likely to occur. A member of the Board's staff pointed out that within days of purchasing the Park, appellant sent out notices announcing plans to convert the Park to condominium-style ownership, indicating that appellant paid a premium price for the Park and was expecting a temporary loss which would be made up when the spaces were sold.

The owner's expert testified that according to surveys, the rate of return expected by real estate investors was commensurate with the numbers in his report and analysis. A City expert testified that his post-purchase appraisal was justified by offers received from other parties and recent sales of six other mobilehome parks in California, three of which were rent-controlled and three of which were not.

2009 Board Decision: At the conclusion of the hearing, the Board approved an increase in the amount of $25.02 per space per month.

Contentions after Hearing: Owner contended that the rent increases approved by the Board using its MNOI analysis required it to operate the Park at a loss, resulting in the application of the City's rent control Ordinance in a confiscatory and unconstitutional manner.

Specifically, appellant maintains that the Board was obliged to apply a formula that ensured gross profits and a positive cash flow, taking its debt service into account. Alternatively, the owner contended the Board erred in using 2005 as the base year for its MNOI analysis and applying an inflation adjustment component equal to 75 percent of the CPI. The Court disagreed on all counts.

Debt Service May Be Disregarded. Apart from the inequities that would result from permitting a party who financed its purchase of rent-controlled property to obtain higher rents than a party who paid all cash, there are additional reasons for disregarding debt service.

As explained by Baar, debt service arrangements "could easily be manipulated for the purpose of obtaining larger rent increases, by applying for an increase based on servicing a high interest loan and then refinancing at a lower interest rate or paying off the loan after the increase was granted." (Apparently, Baar has not spent much time around loan approval committees recently). Alternatively says he, an owner might periodically tap the equity in a valuable piece of rental property, thus increasing the debt load.

Still, the Courts side with the City: "In any event, we discern no rational basis for tying rents to the vagaries of individual owners' financing arrangements." The Court took a dim view of the owner's economic analysis:

> [*The] analysis represented an attempt to manufacture a required rate of return using questionable assumptions and unsupported numbers. He began with an investor survey which indicated higher returns (8.52 to 12.44 percent) were necessary because it included a component for anticipated appreciation and was not limited to rent controlled parks. [comparing rates of return that include appreciation with capitalization rates was "like comparing apples and oranges"].) [He] then opined that the acceptable rate of return for the Park should be toward the high end of that spectrum based on his curious conclusion that a rent controlled mobilehome park should be expected to return more than a non-rent controlled one.*
>
> *Then, rather than deduct the Park's historical appreciation rate (which had been quite high) or an appreciation rate based on appellant's proposed use of the property, he estimated a modest 1.5 percent appreciation rate going forward.*

The Court therefore concluded the Board was justified in rejecting the owner's analysis.

> *" . . . the Board had no reason to rely on [his] contorted analysis when it had before it evidence, based on actual sales, showing that a capitalization rate of 4.75 percent was acceptable to investors and about average for comparable mobilehome parks. The Board approved an increase in rent which kept the Park's ratio of net operating income to purchase price at about the same level as at the time of purchase, providing a return similar to that of other comparable parks. The [] analysis provides no basis to overturn the Board's determination."*

And then the Court mentions that the owner was barred from asserting claims of loss because a condo conversion had been approved: "Although the Board did not consider appellant's long-term plans when it addressed the rent increase applications, we note that the City has approved appellant's application to convert the Park to condominium-style ownership, allowing appellant to sell the plots individually to the mobilehome owners. Accordingly, appellant cannot reasonably be heard to complain that it has been forced by the Board's decision to operate a losing investment."

■ CONCLUSION

Hence the Court affirmed judgment in part. The Court held that a board may reasonably apply a "maintenance of net operating income" analysis to calculate rent increases that would provide a park owner a fair return on its investment without regard to the park owner's debt service on its purchase loan.

Federal Proceedings: Meanwhile, the owner had also sued the City in federal district court, alleging takings and due process claims. In pertinent part, the Court concluded that the owner's as-applied takings claim was unripe because Colony Cove had never sought compensation under California law as required by law. The court dismissed the as-applied takings claim without prejudice. The Ninth Circuit Court of Appeals affirmed.

Park Owner must remember that the Courts are not going to provide the relief the park owner seeks. Other ways should be pursued. Remember this quote from the cited *Guggenheim* case:

> Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis. Students in Economics 101 have for many decades learned that rent control causes the higher rents and scarcity it is meant to alleviate, but the Due Process Clause does not empower courts to impose sound economic principles on political bodies.

Guggenheim, 638 F.3d at 1123 (footnotes omitted).

You Can't Take It With You – and Your Can't Leave it to Your Caregiver Either

For Older Persons Parks, the Potential Caregiver-Abuser Can be Reminded that They Cannot be an Heir in California.

By Terry R. Dowdall, Esq.

■ UPSHOT

To coerce a bequest from an elderly person, some caregivers they may try to take over the lives of the elderly, gain their trust and then benefit later. *Well, not in California*. Let's catch up on what California law provides and how to squelch efforts to move in with and abuse and exploit your seniors.

California prohibits bequests to caregivers. Elderly and dependent residents who are aware of the law will be better armed to avoid predatory caregivers who scheme to endear themselves in hopes of being left money in the will.

■ THE SETUP

That nice elderly widow in the well-kept double-wide just got a *strange new roommate*. A shady looking guy has moved in and is 'taking care' of her for little or no pay. If you've seen a situation like this, you know Predatory Pete probably isn't doing this out of the goodness of his heart. The unsuspecting widow's dubious new companion may be looking to worm his way into her will, and perhaps establish residency too. That's why, in California, bequests to caregivers are against the law.

■ THE LAW

Revised as recently as 2011, the so-called "care custodian statutes" are specifically intended to protect the elderly, dependent and disabled from avaricious caregivers.[9]

Who qualifies as a "care custodian"? A caregiver, or "care custodian," means any "protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." [10] It applies to a gamut of undesirable characters with ulterior motives, from Predatory Pete to the seemingly innocent and kindly young waif who "volunteers" to help out a senior citizen with their weekly groceries and other errands, in exchange for staying in the spare room. When a suitably duped resident does in fact make a bequest to their caregiver during the time in which the caregiver was providing assistance – or even within 90 days of that time – the law will presume that there has been fraud or undue influence.[11]

At that point, it is up to the would-be beneficiary to prove that undue influence did not in fact occur. Otherwise, that part of the will or other testamentary document that leaves the money to the caregiver will be deemed invalid.

There are exceptions. The presumption may be overcome by satisfying one of the exceptions delineated in *Cal. Prob. Code* §21351, including obtaining a "certificate of independent review," in which an attorney vouches that the testator understands what they are doing.

There is also an exception if the beneficiary had a pre-existing relationship with the testator. The caregiver had to have known the person leaving them money before they took on the role of caregiver – for at least 90 days *before providing that care*, at least six months before the testator died*, and* before the testator entered a hospice.

■ CONCLUSION

The California legislative specifically intended to protect the elderly and other vulnerable persons from the likes of Predatory Pete and his ilk. Homeowners who are aware of these laws will be better armed to avoid being manipulated, and that will help keep devious characters out of your park.

Please Feel Free to Contact Us with Any Questions!

[9] *Cal. Prob. Code* §21360-21392.

[10] *Cal. Welf. & Inst. Code* §15610.17(y) (2008)

[11] *Cal. Prob. Code* §21380(a)(3).