2019 WL 3081973 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, California.

HILALY, et al.,

v.

ALLEN.

No. A157659.
July 5, 2019.

Appeal of Case No. CUD 17-658964
Judge Richard Ulmer
Petition for Transfer to Court of Appeal California Rules of Court 8.1006

Amicus Curiae Letter Supporting

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Dear Justices:

Action Apartment Association respectfully requests that the Court of Appeal transfer *Hilaly, et. Al. v. Allen* (Case No. A157659; CUD 17-658964) to the Court of Appeal and submits this amicus curiae letter in support of Plaintiffs and Appellants' Naser and Naseem Hilaly Petition.

Action Apartment Association, Inc., is a full-service trade association, representing apartment owners in the City of Santa Monica and throughout Los Angeles County. The organization's constituents consist of approximately 3,200 housing providers, which the group supports in judicial, legislative, and regulatory affairs. It was the plaintiff in *Action Apartment Association Inc. v. City of Santa Monica* (2009) 41 Cal.4th 1232; *Action Apartment Association v. Santa Monica Rent Control Board* (2001) 94 Cal.App.4th 587; Action Apartment Association also has filed amicus briefs in many cases dealing with housing law, such as *Drouet v. Superior Court* (2003) 31 Cal.4th 583.

Many Housing Providers and builders resort to the Ellis Act to remove their properties from local rent control jurisdiction. The Housing Providers normally have different reasons than builders. What is not recognized is that the Ellis Act plays an extremely important role in the production of new rental housing. In most cases, a few older rent controlled units on a property will be "Ellised" and then demolished, and a much larger amount of new rental housing will be built on the same property. In Los Angeles for instance, it is not unusual for a 4 unit building to be demolished and 50 units to be built on site. The new housing is not necessarily exempt from rent control for new construction, either. See for instance, Government Code § 7060.2 (d) - Ellis Act provision which allows local jurisdictions to rent control new construction built on Ellised property if rented within 5 years of date of withdrawal.

What is going unnoticed and unacknowledged is that without the Ellis Act, very little new rental housing construction will be built, because local jurisdictions do not allow owners to demolish rent controlled units, even to build new and more apartment units. Without the Ellis Act - and the state preemption which comes with it - there simply would be no new housing built.

Also, what is known but not discussed in any meaningful way, is the length of time it now takes to build rental housing. The delays caused by local jurisdictions' burdensome laws has reached great heights. In 1930 it took 13 months to build the Empire

State Building in New York. - the building is 102 stories tall. It takes 3 years today to build a 5-unit apartment building in Santa Monica.

What Hilaly v. Allen's holding does is to simply extend the time to complete an Ellis by at least one year, and thus extend construction time from 3 years to 4 years. This will increase the cost of construction by 25% over the previously expensive price. And *Hilaly v. Allen* now removes all certainty in the Ellis eviction process. Builders can no longer anticipate when they will be able to demolish to build new, i.e., when the tenant will be required to leave. Any and all tenants can now raise the "change-in-terms" defense, play on the good graces of the juries to engage in "jury nullification." *Indeed, the Hilaly v. Allen* case shows an excellent example of jury nullification wrapped within a finding of parking space disputes. We must remember that a lost Ellis eviction means that the Owner must re-Ellis the property and give another 1-year notice to vacate; awaiting another jury trial on perhaps a new "change-in-terms" defense. The end of this saga is only limited by the ingenuity of the defense counsel. This "change-in-terms" defense will lead to the end of new rental housing construction.

Furthermore, *Hilaly v. Allen* misinterprets the language of the Ellis Act and creates an unsupportable "change-in-terms" defense. While the Ellis Act clearly allows senior and disabled tenants to extend their tenancy for one full year "on the same terms and conditions as existed" prior to the start of the Ellis Act process. (Gov't Code § 7060.4, subd. (b)(1). The Act clearly does not allow the Tenant to negate the Ellis eviction because of disputes over terms and conditions of occupancy. This language does not create a defense to the Ellis eviction, but rather is meant to control the relationship between Owner and Tenant during the one-year Ellis extension.

The lower court's published opinion extends the clear wording of the Act beyond what it was intended to accomplish. The appellate division below, held that the Ellis Act provided Allen with a change-in-terms-of-tenancy defense. (Op. at pp. 9-10.) The court reasoned that the Act makes non-compliance with its provisions a defense to unlawful detainer. (Op. at p. 10, citing Gov't Code § 7060.6.) However, it should be remembered that in Drouet v. Superior Court (2003) 31 Cal.4th 583, 599, our Supreme Court narrowly construed the only defense (retaliatory eviction) that has been recognized in the Ellis Act context to avoid enabling "tenants to force the landlord to remain in business indefinitely..." As the language in question reads when a tenant elects to extend his or her stay for the full year:

In that situation, the following provisions shall apply: (1) The tenancy shall be continued ***on the same terms and conditions*** *as existed on the date of delivery to the public entity of the notice of intent to withdraw,* ***subject to any adjustments otherwise available*** *under the system of control. (2) No party shall be relieved of the duty to perform any obligation under the lease or rental agreement.* (Bolding added)

First, Civil Code § 837 allows a Housing Provider to change the terms of tenancy upon 30 days prior notice. Thus, Ellis does not provide a "lock" on the existing rental terms and conditions. Local housing laws do not prohibit a Housing Provider from changing terms and conditions, but rather only outlaw the Housing Provider's attempt to evict a tenant for breach of a term of rental agreement which was term was created without the tenant's permission. Thus, as in Hilaly v. Allen's case, the parking dispute in question is not an alleged illegal alteration of a preexisting term of the rental agreement; but only a change or adjustment in terms allowed by local rent control laws.

Second, Ellis Act does not state that a breach of the terms of the rental agreement is a defense to the Ellis eviction. Rather, Government Code § 7060.6 states:
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

Note that this section does not state that the tenant's defense can be non-compliance with "any" provision of the law, but rather only "with the applicable provisions" of the Act. And what are the applicable provisions? Clearly the procedural provisions about notice and disclosures. However, what happens after proper notice is served on the local entity and the tenant cannot be a defense to eviction. Especially considering Ellis' strong language: *"compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease..."*

Action Apartment Association urges this Court to act, so as to consider the important issues of law presented by this case.

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