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INTRODUCTION

Prana Nine Properties, LLC (hereafter "Prana" or "appellant", has filed the instant appeal based on the order of the San Francisco Superior Court sustaining a demurrer without leave to amend filed on behalf of respondent, Yue Chang Ye (hereafter "Ye" or "respondent"). Appellant's complaint was fundamentally flawed in two ways. First, the complaint for declaratory relief was filed in the absence of an actual controversy. Second, it requested equitable declaratory relief when there were other remedies available at law which would have been equally or more effective to the relief requested. It is undisputed that appellant never attempted to avail themselves of the available remedies at law. For these reasons, the court was within its discretion to sustain the demurrer without leave to amend.

STATEMENT OF FACTS

Prana is a California limited liability company which owns and leases residential property in the San Francisco, California. (Appellant's Appendix (hereafter "AA") 01) Among the rental units it owns, Apartment 9 at 752 Stockton Street, San Francisco (hereafter "subject premises") is occupied by a tenant Ye. (AA 01) Prana alleges that all of the original tenants of the subject premises have ceased to live there. (AA 02) Therefore, appellant believes that it should be able to raise the rent on the subject premises to market rate under the provisions of Costa-Hawkins Act (Civil Code § 1954.50 et seq.) (hereafter Costa-Hawkins). (AA 02)

Prana eventually filed its First Amended Complaint (hereafter "complaint") on April 11, 2006, and served Ye soon thereafter. (AA 01) This was the first time

that there is any evidence that Prana indicated that it wished to set to a new base rent for the subject premises. (AA 01 – 03) Appellant sought a judicial determination of its rights prior to exhausting any available, a fact which has not been disputed by Prana. Prana desires a judicial determination, despite failing to exhaust any available administrative and legal remedies. (AA 02)

STATEMENT OF THE CASE

Appellant filed its first amended complaint on April 11, 2006. (AA 01) Ye filed a demurrer to the complaint on May 11, 2006. After oral arguments, the trial court sustained Ye's demurrer without leave to amend in an order dated June 16, 2006. (AA 27) Judgment was entered on November 17, 2006. (AA 28) Prana filed its notice of appeal on December 29, 2006. (AA 29)

ISSUE PRESENTED

Did the trial court judge abuse their discretion in sustaining Ye's demurrer? Ye contends that the judge properly sustained the demurrer. Based on the facts alleged, appellant cannot show that 1) there is an actual controversy or 2) that appellant's failure to exhaust available administrative and/or legal remedies is excusable.

STANDARD OF REVIEW

The standard of review in this case is whether the lower court abused its discretion. Appellant is appealing from a final judgment based on an order sustaining a demurrer without leave to amend. The matters at issue involve the application of facts alleged in the appellant's complaint to law. In situations like

this, California courts have reviewed these cases under the abuse of discretion standard. (C.J.L. Const., Inc. v. Universal Plumbing (1993) 18 Cal.App.4th 376, 383)

Appellant argues that the appropriate standard of relief is de novo, relying on the holding in Holiday Matinee, Inc. v. Rambos, Inc. (2004) 18 Cal.App.4th 1413. This reliance is misplaced. De novo review is appropriate for demurrer cases where the facts of the case are not at issue, but rather the complaint itself is being challenged on a question of law only. (Holiday Matinee, Inc., supra, 118 Cal.App.4th at 1420) California courts have consistently held that where a demurrer is sustained by the lower court because the complaint failed to state a basis for which relief could be granted, the appropriate, and well settled, standard of review is abuse of discretion. (Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1126; Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966 – 967; DeLaura v. Beckett (2006) 137 Cal.App.4th 542, 545, fn.3, citing Filarsky v. Superior Court (2002) 28 Cal.4th 419, 433) Therefore, the method of review for this case is the abuse of discretion standard. As will become evident, the lower court did not abuse its discretion.

ARGUMENT

I) PRANA FAILED TO PROPERLY PLEAD A COMPLAINT FOR DECLARATORY RELIEF

The demurrer to appellant's complaint for declaratory relief was properly sustained by the lower court. Appellant's complaint was defective, as a complaint for declaratory relief, since it failed to plead any predicate facts to support the appellant's conclusion that a controversy existed.

A) Declaratory Relief Is Only Appropriate Only Under Certain Circumstances

Under California law, declaratory relief is appropriate only under certain circumstances. California courts have long sustained the proposition that, "Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute…. Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (Lass v. Eliassen (1928) 94 Cal.App. 175, 179) In addition to a lack of other alternatives at law, a party seeking equitable relief must also demonstrate that there is an actual, present, and justiciable controversy. (City of Cotati v. Cashman (2002) 29 Cal.4th 69, 79)

To properly plead a complaint for declaratory relief, the appellant's complaint must meet four criteria. First, they must show the existence of an actual controversy. Second, the controversy must have existed prior to actual filing of the complaint. Third, there must not be a more appropriate form of relief available at law to the appellant. Finally, it must be justiciable.

B) **Declaratory Relief Is Not Appropriate Where A Party Has Failed To Plead An Actual Controversy.**

1) **For Prana to be entitled to equitable relief, it must first demonstrate the existence of an actual controversy.**

Prana has failure to demonstrate an actual controversy existed at the time the complaint was filed. A prerequisite for every case requesting declaratory relief, "is the existence of an actual, present controversy over a proper subject.'" (City of Cotati, supra, 29 Cal.4th at 79) Simply filing a lawsuit does not meet this requirement unless the lawsuit can point to an actual dispute that is ongoing between the parties. City of Cotati, 29 Cal.4th at 80. As the City of Cotati court noted,

> The requirement that plaintiffs seeking declaratory relief allege "the existence of an *actual, present controversy*" (5 Witkin, Cal. Procedure, supra, Pleading, § 817, p. 273) would be illusory if a plaintiff could meet it simply by pointing to the very lawsuit in which he or she seeks that relief. Obviously, the requirement cannot be met in such a bootstrapping manner; "a request for declaratory relief will not create a cause of action that otherwise does not exist." (Mallenbaum v. Adelphia Communications Corp. (E.D.Pa., Dec. 29, 1994, Civ. A No. 93-7027) 1994 WL 724981, *6, fn. 9, affd. (3d Cir. 1996) 74 F.3d 465.) Rather, "an actual, present controversy must be pleaded specifically" and "the facts of the respective claims concerning the [underlying] subject must be given.
>
> Id. (Emphasis in original).

In this case, the appellants are trying to bootstrap their way to a controversy, by simply citing to their own complaint, fashioning a dispute where none existed.

2) **Prana's complaint fails to establish the existence of an actual controversy**

Although Prana's complaint states that a controversy exists, the complaint fails to establish the existence of any actual controversy. In reviewing the

complaint at issue, it is clear that no controversy was ever alleged. Paragraphs 1 through 4 identify the parties in this action. Paragraph 5 alleges who the original tenants of the subject premises were. (AA 01) Paragraph 6 then makes a series of conclusory statements which begin by simply stating that "An actual controversy has arisen and now exists between Plaintiff and Defendant Ye." (AA 02) Paragraphs 7 states that the appellant seeks a judicial determination of their rights. Id. In paragraph 8, the appellant states that the relief requested is necessary and appropriate at this time. Id. Merely stating that a controversy exists does not make it so. Appellant was required to plead specific facts to support such a claim.

In their opening brief, the appellant essentially argues that there is no requirement of "magic words" to state that a dispute exists, relying instead on cases which hold that the fact pleading can suffice to demonstrate the existence of the dispute. (Levi v. O'Connell (2006) 144 Cal.App.4th 700, 705; Photochart v. Del Riccio (1949) 94 Cal.App.2d 315, 319; Tolle v. Struve (1932) 124 Cal.App. 263, 270) In all of these cases, the plaintiff plead facts which demonstrated the existence of an actual controversy. In Levi, the complaint stated that the California Department of Education was required to pay for the plaintiff/appellant's education but did not. (Levi, supra, 144 Cal.App.4th at 704) In Photochart, the pleadings revealed that there was a dispute between the parties over intellectual property rights as well as allegations, denied by Photochart, that they had breached the terms of the agreement. (Photochart, 94 Cal.App.2d at 316 – 317) In both of cases, the courts found that there were facts plead in the complaint which

evidenced the existence of a controversy. This is not the case in appellant's complaint.

Appellant relies on the holding in Tolle to support its position that declaratory relief is proper because it allows a party to shape their conduct to avoid legal liability. However, the appellant is misconstruing the language of Tolle in an attempt to justify the non-existence of a controversy in the present action. In the Tolle case, one of the parties requested declaratory judgment as to their rights under the series of leases and sublease which were at issue in the case. (Tolle, 124 Cal.App. at 265 – 266) On appeal, the court found that although specific words were not required, the request for declaratory relief was proper since the pleading demonstrated that, "one party has thrown down the gauntlet…. it does appear, from the complaint, that the defendants… became obligated to the plaintiffs upon the sublease; that having succeeded to the interests of the rest the Suttons undertook, under claim of right based on the alleged condition of the building, to cancel the sublease,… and that the plaintiffs refuse to acquiesce in such cancellation." (Id. at 270)

In finding that a controversy did in fact exist, the Tolle court relied on a well plead, detailed set of facts which explained the complicated history between the various parties and the underlying dispute. (Id. at 270) The appellant's complaint contains no such illustrative facts, such as were included in the Tolle complaint. In truth, no facts were plead by appellant which could establish that a controversy ever existed between themselves and Ye.

Unlike the Tolle case, there is no evidence that any dispute existed between Prana and Ye existed until the filing of the initial complaint. Nor are there any allegations that a notice of increase in rent has been served. (AA 01 – 03) Appellant only makes conclusory statements, but alleges no other facts to support its contention that a controversy existed. (AA 02) Appellant does not even allege that there has been so much as a single conversation or other communication between the parties.

Appellant also relies on the Malish v. City of San Diego (2000) 84 Cal.App. 4th 724 decision to support its position that the mere filing of the complaint against Ye created a controversy. Appellant's Opening Brief (hereafter AOB) at 7. While Malish does state that a person is not required to violate an administrative regulation, and subject themselves to possible criminal or disciplinary action, it does not support the appellants basic contention. (Malish v. City of San Diego (2000) 84 Cal.App.4th 724, 728) In fact, Malish dealt with a situation where one party claimed that a municipal administrative entity's power was superseded by California state law. (Id. at 727) When the city attempted to enforce the municipal regulations against Malish, Malish appeared at the administrative hearing and argued that state law preempted the city's ability to enforce the municipal code against him. (Id.) At that point, the administrative officer conducting the hearing concluded that "he lacked the authority to decide the legal issue of preemption, so he stayed the administrative proceedings and directed Malish to seek a judicial determination." (Id.) The suit, in that case, dealt with the question of whether the

municipal law was preempted by the State law. Again, in Malish, an actual controversy between the two parties. One had sought to enforce the municipal law and the other was resisting its enforcement claiming it violated their rights. (Id. at 728)

That is not so in the case at hand. Appellant has not appeared before any administrative agency over this matter. In fact, the pleading fails to demonstrate that it took any action which could have given rise to an actual controversy, including communicating with Ye, or availing itself of the mandatory procedures established by the Rent Board, before the initial filing of its complaint. (AA 01 – 03)

Virtually all of the cases cited by the appellant share one thing in common. In each one, there is an actual dispute, where one party has sought to enforce its claim to a right, to payment under a contract, or their rights and duties in regards to another. (See e.g. Watson v. Sansome (1971) 19 Cal.App.3d 1, 2 – 3 [Action arose out of a refusal of one party to pay on an invoice]; Copley v. Copley 126 Cal.App.3d 248, 256 [Action arose out of a dispute between trustors and trustees with regards to the sale of stock.]; Carruth v. City of Madera (1965) 233 Cal.App.2d 688, 691 – 692 [Equitable action arose out of a dispute between the city and a developer over whether the city was required to install public utilities]; Alhambra Municipal Court District v. Bloodgood (1982) 137 Cal.App.3d 29, 44 [Action arose out of a dispute over whether the County Counsel had a duty to provide representation.]; Cardellini v. Casey (1986) 181 Cal.App.3d 389, 394

[Action arose over the protest payment of a water board fee by a home builder.]; Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal.App.3d 678, 682 [Action arose after Kaiser refused on multiple occasions to pay for medical treatment.]; Los Angeles Transit Lines v. Dawson (1951) 105 Cal.App.576 [Action arose over a dispute as to whether a settlement constituted a full release of liability.]) In the instant case, there is no evidence that Ye ever refused to comply with the appellant's claimed right to increase the rent other than this lawsuit or ever was even notified that appellant was dissatisfied with the current rent. Absent something occurring prior to the filing of the complaint which would evidence the existence of an actual controversy, the appellant is not entitled to a declaratory judgment.

In order for a party to be able to seek the protections provided by equity, there must be a controversy. Here, nothing in the record demonstrates the existence of an actual controversy beyond the conclusory statements of the appellant.

3) In the absence of an actual, present controversy, it is within a court's discretion to grant a demurrer.

Where the plaintiff has failed to plead the existence of an actual controversy, it is within the court's discretion to sustain a demurrer. (Filarsky v. Superior Court (2002) 28 Cal.4th 419, 433) In fact, under the California Code of Civil Procedure, a court may sustain a demurrer without leave to amend if there is a determination that declaratory relief is not "necessary or proper at the time under all the circumstances." (Code Civ. P. § 1061)

As can be seen by the complaint, there are no facts plead showing the existence of a controversy. (AA 01 – 03) Therefore, the court did not abuse its discretion in granting the demurrer. (Wilson v. Transit Authority of Sacramento (1962) 199 Cal.App.2d 716, 721 – 722)

C) Declaratory Relief Is Not Proper In This Case

Declaratory relief is not proper in this case. Appellant's argument that the declaratory relief requested in its complaint is proper is based on a misconception. Appellant argues that: 1) declaratory relief is broad and flexible; 2) it allows parties to shape their conduct to avoid legal liability; 3) that equitable relief can avoid a multiplicity of actions; and 4) that declaratory relief is appropriate is appropriate in this action. The first three contentions of the appellant are not disputed by Ye. Declaratory relief is a broad and flexible remedy. It does allow parties to alter their conduct so as to avoid liability. Equitable relief can avoid a multiplicity of actions. However, to obtain declaratory relief, appellant must plead facts evidencing an actual controversy. It is on this fourth and critical prong that they fail.

While appellant brief states what equitable relief is and what it affords it seekers, appellant ignores several salient facts of declaratory relief which clearly negate their ability to assert it. First, it can only be granted where there is an actual dispute. (City of Cotati, supra, 29 Cal.4th at 79; Filarsky, supra, 28 Cal.4th at 433) Without a controversy, any decision by the court would be an advisory one at best, which are not permitted under California jurisprudence. (Pacific Legal Foundation

v. California Coastal Com. (1982) 33 Cal.3d 158, 170) Second, declaratory relief can only be properly granted when there is no other remedy available at law. (Filarsky, supra, 28 Cal.4th at 433; Yamaha Motor Corp. v. Superior Court (1986) 195 Cal.App.3d 1232, 1240; Lass, supra, 94 Cal.App. at 179)

The appellant has failed plead the existence of a controversy, a necessary predicate to any action. Therefore, declaratory relief is not proper in this case. The court did not abuse its discretion, and its ruling should be upheld.

II) DECLARATORY RELIEF IS NOT AVAILABLE TO PRANA IN THIS CASE BECAUSE ANOTHER REMEDY EXISTS AT LAW

Even if this Court were to find that a controversy did exist, appellant is still not entitled to have the lower court's decision overturned. Despite appellant's arguments to the contrary, the lower court did not abuse its discretion in sustaining the demurrer because declaratory relief was unavailable on the grounds that an adequate remedy at law already existed.

A) Equitable Relief May Not Be Granted If There Is An Adequate Remedy Available At Law

Declaratory relief is improper where an adequate legal remedy exists. According to California law, the equity powers of California courts are only available where there is no adequate remedy at law. (Morrison v. Land (1915) 169 Cal. 580, 586; Taliaferro v. Taliaferro (1956) 144 Cal.App.2d 109, 111) "Rules of equity cannot be intruded in matters that are plain and fully covered by positive statue… Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (Lass, supra,

94 Cal.App. at 179) Where an adequate remedy exists at law, equitable relief is not available because it would allow parties to circumvent established, legislated procedures. (DeLaura v. Beckett (2005) 137 Cal.App.4th 542, 545 – 546)

Exhausting administrative remedies is a prerequisite to seeking equitable relief. "'[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'… This is a jurisdictional prerequisite, not a matter of judicial discretion." (Yamaha Motor Corp., supra, 195 Cal.App.3d at 1240 (citations omitted)) The Bleeck court stated, "The doctrine of exhaustion of administrative remedies may not be circumvented by bringing … actions for declaratory relief [citation omitted], or actions seeking injunctive relief…. Judicial intervention is premature until the administrative agency has rendered a final decision on the merits." (Bleeck v. State Board of Optometry (1971) 18 Cal.App.3d 415, 432 (citations omitted))

B) Prana Has Failed To Utilize The Available Remedies At Law

4) Appellant failed to exhaust the administrative remedies available through the established Rent Board arbitration procedure.

The San Francisco Rent Ordinance creates a remedy at law for landlords who wish to determine whether they may safely raise the rent for rental unit under Costa Hawkins. (San Francisco Administrative Code § 37.3(d)) Appellant argues that this is not adequate remedy for three reasons. First, they argue that the Rent Ordinance does not apply the Costa-Hawkins determinations. Second, the appellant argues that requiring a landlord to ask for permission from the Rent

Board violates Costa-Hawkins. Finally, the appellant argues that seeking a determination from the Rent Board would violate its due process rights. As will become evident below, all of these arguments are unfounded.

(a) The Rent Board Arbitration Scheme

The Rent Ordinance provides an administrative remedy which is available to landlords seeking to establish a new base rent, as is the case in the instant action. Section 37.3(d)(2)(A) and San Francisco Rules and Regulations (hereafter "Rules and Regulations") §§ 6.14 and 5.10 create a procedure by which a landlord can establish a new initial rental rates. Section 37.3 sets forth that, "

> Where the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no longer permanently reside there, an owner may increase the rent by any amount allowed by this section to a lawful sublessee or assignee who did not reside at the dwelling or unit prior to January 1, 1996. …"
>
> SFAC § 37.3(d)(2)(A).

Rent Ordinance continues by stating that "This Subsection 37.3(d) is intended to be and shall be construed to be consistent with the Costa-Hawkins Rental Housing Act (Civil Code Sections 1954.50 et seq.)." Id.

The Rent Board, pursuant to the municipal code, adopted rules specifically governing a landlord's request for determination of increasing the initial base rent. The Rent Board's rules state,

> When all original occupant(s) no longer permanently reside in a rental unit, and the last of the original occupants vacated on or after April 25, 2000, the landlord may establish a new base rent of any subsequent occupant(s) who is not a co-occupant and who commenced occupancy of the unit on or after January 1, 1996

> without regard to the limitations set forth in Section 37.3(a) of the Rent Ordinance unless the subsequent occupant proves that the landlord waived his or her right to increase the rent by:
>
> (1) Affirmatively representing to the subsequent occupant that he/she may remain in possession of the unit at the same rental rate charged to the original occupant(s); or
>
> (2) Failing, within 90 days of receipt of written notice that the last original occupant is going to vacate the rental unit or actual knowledge that the last original occupant no longer permanently resides at the unit, whichever is later, to serve written notice of a rent increase or a reservation of the right to increase the rent at a later date; or
>
> (3) Receiving written notice from an original occupant of the subsequent occupant's occupancy and thereafter accepting rent unless, within 90 days of said acceptance of rent, the landlord reserved the right to increase the rent at a later date.
>
> …
>
> This Section 6.14 is intended to comply with Civil Code Section 1954.50 et seq. and shall not be construed to enlarge or diminish rights thereunder.
>
> Rules and Regulations § 6.14(c) and (f).

In addition to establishing these rules concerning when a new base rent may be established, the Rent Board has also enacted the rule found in section 5.10. This states that,

> Landlords who seek a determination that a tenant is not a tenant in occupancy pursuant to Section 1.21 above must petition for an arbitration hearing prior to issuing a notice of rent increase on such grounds. Any petitions seeking a determination that a tenant is not a tenant in occupancy shall be expedited.
>
> Rules and Regulations § 5.10.

Appellant claims that Ye is not an original tenant. (AA 02) Assuming, arguendo, that Ye was not on the original lease, her status should be defined as one of tenant in occupancy under the Rent Ordinance. Rules and Regulation section 1.21. Prana receives monthly rent from Ye, and has been for years, yet they claim ignorance as to whether Ye is a tenant. Therefore, they seek a determination as to whether a new initial base rent could be established under the applicable provisions of Costa Hawkins. Instead of immediately filing suit at the court, appellant should have sought the expedited administrative proceedings available under the Rent Board's arbitration scheme. There is no evidence in the pleadings or the record of this case that this ever happened.

(b) The Rent Board's Arbitration Scheme Is Applicable Under Costa Hawkins

The Rent Board has an administrative scheme which is applicable in situations where increases are sought under Costa Hawkins. In previous cases, California courts have upheld the administrative decisions made by the Rent Board in its administrative adjudications. (See e.g. Cobb v. San Francisco Residential Rent Stabilization Arbitration Bd. (2002) 98 Cal.App.4th 345) In Cobb, the court considered whether the administrative agency's action constituted an abuse of discretion. (Cobb, 98 Cal.App.4th at 350) The Cobb court considered whether the Rent Board's arbitration decisions, in regards to a landlord's use of Costa Hawkins as the basis of an increase in the base rent, were within its ability to make. The Cobb court held that the Rent Board could make a determination as

to whether Costa Hawkins could provide authority to a landlord to increase the initial base rent. (Id. at 353)

Appellant is creating an illusory distinction between the cases by arguing that Cobb is inapplicable in this situation because the proceedings were initiated by the tenant. (AOB 28 – 29) In point of fact, it is irrelevant who initiates the proceedings before the rent board. Arbitration standards are not contingent on whether the party is a landlord or a tenant, since the hearing officers are expressly required to take make their rulings in compliance with Costa Hawkins. The importance of Cobb decision is that the court upheld the Rent Board's ability to make determinations as to whether Costa Hawkins is applicable to a given fact pattern. (Cobb, supra, 98 Cal.App.4th at 353) The court did not make a distinction between which party initiated the proceeding.

(c) Arbitration Under the Rent Board Scheme does not violate Costa Hawkins

An administrative hearing to determine whether a new base rent may be set pursuant to the rights created by Costa-Hawkins does not run afoul of Civil Code § 1954.50 et seq. Appellant argues that Costa Hawkins has preempted local rent boards from conducting hearings to determine whether a landlord may initiate a rent increase under Costa-Hawkins. The appellant bases this assertion on Civil Code § 1954.53(e). While the appellant is correct that local rent control is curtailed by the act, the Legislature has specifically retained rent control in jurisdictions, such as this one, where it existed prior to the enactment of Costa-Hawkins and did not conflict with the statute.

Appellant, in their brief, initially relies on the dicta found in Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles (hereafter "Apartment Association") for the proposition that under Costa-Hawkins local rent control agencies are powerless. However, their reliance is misplaced. In Apartment Association, the appellate court was asked to determine whether a municipal ordinance which directly contradicted state law enacted as part of Costa-Hawkins was preempted. (Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal.App.4th 119, 123 – 124) In that case, the City of Los Angeles enacted a municipal ordinance governing a landlord's ability to terminate or not renew a contract to accept rental assistance (e.g. being part of the Section 8 vouchers program) and preventing the landlord from setting base rents once the contract had ended. (136 Cal.App.4th at 124) The Apartment Association court found that the language of Civil Code section 1954.53 clearly preempted the local ordinance since it established a comprehensive plan which prevented local governments from legislating in that area. (Id. at 130 – 131)

However, in this case, the Rent Board rules do not conflict with the provisions of Costa-Hawkins. In fact, the municipal ordinance and Rent Board rules are written specifically to ensure that any decision of the Rent Board must be in compliance with the Costa Hawkins Act. (SFAC § 37.3(d); Rules and Regulations § 6.14(f)) The Rent Board's arbitration is limited to determining a factual question, namely, whether Costa Hawkins applies under a given set of circumstances. This program has been upheld as a proper municipal ordinance

creating an administrative hearing and not an abuse of the administrative agency's discretion. (Cobb, supra, 98 Cal.App.4th at 353) The Rent Ordinance, unlike the City of Los Angeles' ordinance in Apartment Association, is not preempted by Costa-Hawkins.

For a local ordinance to be preempted by the state legislature, there must be a showing that the local ordinance, "'... duplicates…, contradicts …, or enters an area fully occupied by general law, either expressly or by legislative implication ….." (Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 423 citing Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 484 (citations omitted)) There is no express legislative mandate prohibiting the local rent boards, including the Rent Board, from making a factual determination in light of a California state statute. (See Civil C. § 1954.50 et seq.) In fact, the statue specifically states that the law does not strip the authority of municipal governments to regulate or "monitor the grounds for eviction." (Civil. C. § 1954.53.) Therefore, it is a question of whether the state has preempted local municipalities from enacting laws which create an administrative board to conduct hearings to determine whether an action by a landlord is in compliance with Costa-Hawkins.

The test for preemption was summed up by the Western Oil & Gas Assn. decision as,

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially

> covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. [Citations Omitted]
>
> Western Oil & Gas Assn., supra, 49 Cal.3d at 423.

California courts, in applying this test have come to the conclusion that although there are numerous statutes, the State "has not preempted all local regulation of landlord/tenant relationships despite numerous statutes regulating these relationships." (Roble Vista Assocs. v. Bacon (2002) 97 Cal.App.4th 335, 341) By its own language, the Costa-Hawkins act acknowledges that there are exceptions to the field which may be regulated at the local level. (Id.) The Dezerega court found, in dealing with a claim that Costa-Hawkins in fact did in fact preempt local rent control, found that it did not. (Dezerega v. Meggs (2000) 83 Cal.App.4th 28, 40 – 41) As the Dezerega court notes, "

> Its overall effect is to preempt local rent control ordinances in two respects. First it permits owners of certain types of property to adjust the rent on such property at will, 'notwithstanding any other provision of law.' (Civ. Code, § 1954.52, subd. (a).) Second it adopts a statewide system of what is known among landlord-tenant specialists as "vacancy decontrol," declaring that "notwithstanding any other provision of law," all residential landlords may, except in specified situations, "establish the initial rental rate for a dwelling or unit." (Civ. Code, § 1954.53, subd. (a).)"
>
> Dezerega, supra, 83 Cal.App. 40 – 41.

Since the field is not completely committed to the state's control, there is an opportunity for local governments to use their own police power to regulate it. In

this case, the Rent Ordinance, and applicable Rent Board Rules and Regulations, do not conflict with the rights created by Costa-Hawkins. It does not curtail the rights afforded by Costa-Hawkins. Instead, it merely provides a forum in which an expedited hearing may be had to determine whether the statute is applicable in a given situation.

Assuming, arguendo, that the appellant's argument is correct, and that the Rent Board lacks the authority to conduct hearings with regards to rent increases authorized by Costa-Hawkins, Prana, nonetheless, still had an obligation to utilize the process. As the Supreme Court has held, "In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue." (Coachella Valley Mosquito and Vector Control Dist. v. California (2005) 35 Cal.4th 1072, 1082) In this case, the appellant has not demonstrated that any or all of these factors indicate that the available administrative remedy should not be used.

First, there is no injury or burden that will be incurred by using the Rent Board proceedings. As noted above, the Rent Board remedy offers a less expensive, more expeditious fashion. There would be no irreparable or unusual injury if the appellant were required to litigate its claim under the Rent Board procedure before obtaining a judicial resolution of the issue.

Appellant has argued that the Rent Board is incapable of granting the relief required, namely a declaration that Prana is entitled to increase the base rent for the rental unit under the applicable provisions of Costa-Hawkins. However, as noted above, this is clearly not the case. Rent Board Rules and Regulations clearly establishes that a landlord "who seek a determination that a tenant is not a tenant in occupancy pursuant to Section 1.21. above must petition for an arbitration hearing prior to issuing a notice of rent increase on such grounds." (Rules and Regulations § 5.10) The Rent Board's ability to conduct these hearings has been confirmed as being within the jurisdiction allowed under the Costa-Hawkins Act. (Cobb, supra, 98 Cal.App.4th at 353)

The final factor is the extent to which the administrative agency's experience. The Rent Board has experience in handling determinations as to whether rental increases are allowed under law. (See e.g. Fox v. San Francisco Residential Rent Board (1985) 169 Cal.App.3d 651) The Rent Board also has experience in making determination as to whether a person is subject to a rental increase because they are not an original tenant under a Costa-Hawkins analysis. (See e.g. Cobb, supra, 98 Cal.App.4th at 353)

The Rent Board's arbitration procedure does not run afoul of Costa-Hawkins. The mandatory arbitration procedure is not pre-empted by state law. Even if this Court were to agree that the mandatory Rent Board proceedings are defective, it is without question that the appellant must still exhaust the available administrative remedies before seeking a judicial determination.

(d) Rent Board proceedings meet the requirements of Due Process

Appellant contends that the administrative proceedings before the Rent Board deny landlords their due process rights. This argument is raised for the first time in the appellant's opening brief. (AOB 26) Appellant's position is premised on the assumption that the Rent Board arbitration scheme lacks the required judicial character. First, appellant questions their ability to gather any evidence regarding the identity of the original tenant through any other method other than a drawn out court proceeding. (AOB at 29)

Second, appellant asserts that the Rent Board's judicial character renders it impossible for any landlord to meet the necessary burden of proof. (AOB 28) Appellant simultaneously argues that it has sufficient evidence to file a complaint but insufficient evidence to present at an arbitration. (AOB 29) Finally the appellant argues that, without access to formal discovery procedures, tenants will always have the ability to prove their cases while the landlord is always reliant on evidence it cannot discovery absent resorting to the Civil Discovery Act.

According to the Rules and Regulations of the Rent Board, hearings are conducted in the following manner. Oral evidence is taken. (Rule and Regulation § 11.17(a)) Each party has the opportunity to call and examine witnesses, to cross-examine the opposing party's witnesses and to introduce exhibits. (Rule and Regulation § 11.17(b)) Because the administrative hearing is not a formal trial, the rules of evidence are relaxed, allowing in any relevant evidence necessary for the administrative law judge to make a determination. (Rule and Regulation §

11.17(c)) The landlord has the burden of proof of showing that a proposed rental increase is justified while the tenant has the burden to show that it is not. (Rule and Regulation § 11.8) Either party may be represented by counsel at the hearing. (Rule and Regulation § 11.23) Other than the relaxed evidentiary standards and expeditious manner in which the case can be heard, there are only two significant differences between a proceeding before the Rent Board and one instituted in the superior court. First, witnesses do not testify under oath. Second, there is no subpoena and discovery mechanism. This does not create the prejudice first alleged by appellant in their brief on appeal.

The right to due process does not create a general right to discovery. (Holmes v. Hallinan (1998) 68 Cal.App.4th 1523, 1534 [peace officer was not entitled to discovery before termination]; see also Mohilef v. Janovici (1996) 51 Cal.App.4th 267, 302 [no basic constitutional right to pretrial discovery in administrative proceedings]; cf. Gray v. Netherland (1996) 518 U.S. 152, 169-170 [habeas corpus petitioner's notice of evidence claim would require the adoption of a new constitutional rule]; Weatherford v. Bursey (1977) 429 U.S. 545, 559 ["no general constitutional right to discovery in a criminal case"]; Gilbert v. City of Sunnyvale (2005)130 Cal.App.4th 1264, 1280.)

Appellant is the owner of the building which contains the rental unit. Although it may not have been the initial landlord, it presumably has access to a list of people who are supposed to be its tenants. Presumably, there are employees of the appellant who collect and manage the building and are aware, at least to an

extent, of who is living in the building. Furthermore, the appellant's contention that a tenant could avoid the repercussions of not being an original tenant by simply ignoring the notice of a Rent Board proceeding is also without merit. According the Rent Board's own rules, the failure of a party can result in either a continuance, deciding the case based on the record submitted prior to the hearing, or conducting the hearing with the party being absent. (Rule and Regulation § 11.14 (a)) Under either of the last two options, the administrative law judge is empowered to issue a binding order. These orders have been routinely found in the past to be binding by California Courts. (See e.g. Cobb, supra, 98 Cal.App.4th at 353.)

Allowing landlords who do not wish to engage in basic fact gathering exercises to avoid well establish administrative procedures, because they prefer to have access to the formal discovery provided under the Code of Civil Procedure, would be a significant departure from well established California jurisprudence. California courts have recognized that even in cases where the administrative entity did not have the ability to properly decide the case, its existence required the party seeking declaratory relief to exhaust that remedy. (Malish v. City of San Diego (2000) 84 Cal.App.4th 725, 728) Failure to exhaust administrative remedies is only excused in when "the agency lacks authority to hear the complaint, not when the administrative procedures arguable limit the remedy the agency may award." (Campbell v. Regents of University of California (2005) 35 Cal.4th 311,

323 citing Edgren v. Regents of University of California (1984) 158 Cal.App.3d 515, 521)

(e) Rent Board proceedings provide an adequate remedy at law

The Rent Board proceedings provide an adequate remedy at law. California courts have held that a complaint for declaratory relief should be denied when there is a more effective relief which can be obtained. (DeLaura v. Beckett (2006) 137 Cal.App.4th 542, 547) The court in DeLaura noted, "In a declaratory relief action the tenant would be obligated to engage in significantly more protracted and costly legal proceedings, vitiating the protections built into the local ordinance." (Id.) In the instant case, there is: the Rent Board's arbitration procedures. Unlike a formal action for declaratory relief, the Rent Board has a simplified arbitration procedure which offers both parties the advantage of providing a conclusive determination as to their rights of the parties at a significantly lower cost, in terms of time, money, and effort, than the action which was actually initiated by the appellant. The Rent Board specifically contemplated this scenario in fashioning its rules.

Appellant argues that reliance on the DeLaura decision is misplaced because of subsequent Rent Board decisions. DeLaura's basic premise is not specific to any single available administrative remedy. Rather, it is a reaffirmation that where there is an available, it must be exhausted. (DeLaura, supra, 137 Cal.App.4th at 547) The Rent Board's subsequent actions regarding existing procedures, does not affect the provisions which are at issue here. Appellant's

request for judicial notice omits any evidence that anything similar has been decided concerning rental increase hearings under Costa-Hawkins.

5) Appellant failed to use the established method of noticing a rent increase under Costa-Hawkins.

Appellant failed to utilize the established procedure for establishing a new base rent under the provisions of Costa-Hawkins. The record in this case is clear: the appellant never served a notice either increasing the rent pursuant to its rights under Costa-Hawkins or that it served a 6.14 notice. (AA 02) Assuming, arguendo, that appellant is correct and Ye only began living there around the time that the original tenant was dying in 2001, then appellant had the option of properly serving a notice increasing the rent. (Rules and Regulation § 6.14) At this point, the tenant would have the options of any tenant residing in San Francisco. Pay the increase, seek arbitration through the Rent Board procedure, or refuse to pay the increase. In the first case, the landlord's case is solved. As noted above, and indeed accepted in the appellant's opening brief, the Rent Board would be able to make a determination of facts under Costa-Hawkins. Finally, if the tenant refused to pay, the landlord would be able to resort to the summary proceedings of the unlawful detainer statute. (Code Civ. P. § 1159 et seq.; See also Markham v. Fralick (1934) 2 Cal.2d 221, 226 – 227)

C) The Superior Court Did Not Abuse Its Discretion

The Superior Court in this case acted well within its discretion in sustaining the demurrer. It is improper for a court to refuse to grant equitable relief where a positive statue or ordinance has already established a procedure to accomplish the

goal which a petitioner seeks to attain through declaratory relief. (Filarsky v. Superior Court (2002) 28 Cal.4th 419, 433; West Coast Poultry Co. v. Glasner (1965) 231 Cal.App.2d 747, 752; see also Holden v. Arnebergh (1968) 265 Cal.App.3d 87, 91 – 92) Furthermore, where an administrative remedy is available, it is required that the party seeking the equitable relief of a declaratory action must first exhaust those remedies. (Yamaha Motor Corp. v. Superior Court (1986) 185 Cal.App.3d 1232, 1240)

In this case, there are established procedures which are not only available, but superior to the one proposed by the appellant. These administrative procedures have been held to be in compliance with the state statutes at issue. The administrative procedures offer a remedy that does not cause injury to the landlord, which are permitted by law, and which would be in an area where the administrative entity has significant experience. Therefore, the lower court properly sustained the demurrer without leave to amend.

CONCLUSION

The lower court properly sustained Ye's demurrer to appellant's complaint. Although declaratory relief may be used in landlord-tenant cases, the prerequisites for seeking declaratory relief remain the same. A party seeking the court's equitable powers may only seek the remedy where there is 1) an actual controversy which 2) existed prior to the filing of the complaint for which 3) there is no more appropriate form of relief available at law and that 4) the case must justiciable.

The appellant's brief contains no evidence that an actual controversy existed outside their imagination. The amended complaint, included in the Appellant's Appendix, does not contain any well plead facts which would give rise to the controversy necessary for judicial determination. In fact, the mere filing of a complaint cannot be used to create a controversy where none existed. California law is clear on this point. A party may not bootstrap its way to a controversy by filing a complaint and then stating that a controversy exists because the defendant appeared when it received the court summons.

Appellant has also failed to demonstrate that the remedies available at law are inadequate when compared to the relief possible from a declaratory relief action. Where other remedies, particularly administrative ones exist, they must be exhausted prior to seeking equitable relief from the courts. The appellant never attempted to exhaust the available remedies.

Appellant's arguments that they should be excused from administrative exhaustion are also inconsistent with well-established California law. The available Rent Board procedures offer a way to achieve the result sought by this action, in less time and at a lesser cost to both themselves, Ye, and the court system. The Rent Board remedy is not pre-empted by any statute. Finally, the Rent Board remedy affords the appellant with the due process required by both the California and U.S. Constitutions.

In sustaining the demurrer, the lower court did not abuse its discretion. First, the appellant could not, based on the facts before this court, ever establish

the prerequisites for equitable relief. Beyond the complaint itself, which gave rise this action, there are no facts evidencing the existence of an actual, ongoing controversy at the time the complaint was filed. Second, the appellant's request for declaratory relief was also defective because they failed to utilize other remedies which existed at law. Either one of these defects alone would be sufficient to support the decision of a court to grant a demurrer without leave to amend.

The trial court properly exercised its discretion by sustaining the demurrer without leave to amend. The lower court's decision should be upheld.

Respectfully submitted

Date: May 31, 2007

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 8,632 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated:

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