Kriger LAW FIRM News

First Quarter · 2019

Assistance Animal Costs Association $600,000

By Joel Kriger, Esq.

The United States District Court for the District of Nevada held an Association, individual directors, developer, and the manager liable for requiring a disabled resident to show proof of her disability and her assistant animal's training before the animal could enter the clubhouse. *Sanzaro v. Ardiente Homeowners Association.*

In 2004, Ms. Sanzaro became permanently disabled and required use of a walker for mobility. In 2008, she acquired a Chihuahua, named Angel, to help her cope with pain. Angel was eventually trained to retrieve things such as her walker and car keys. In 2009, Ms. Sanzaro attempted to enter the clubhouse with Angel but was denied entry by the manager. She explained that Angel was a service animal, but the manager still refused entry and demanded documentation for the dog.

Counsel for the Association sent Ms. Sanzaro a violation notice regarding the incident to schedule a hearing before the board. The notice also requested documentation from medical providers to substantiate the disability and the necessity of the dog's presence in the clubhouse. She did not appear for the hearing and subsequently received notice from counsel for the Association that fines of $100 each were being imposed for attempted entry into the clubhouse.

Legal fees and fines continued to escalate until the Association filed a lien against Ms. Sanzaro's home and eventually began foreclosure proceedings for a debt of over $4000. The debt was paid but forced Ms. Sanzaro to file bankruptcy. Subsequently, Ms. Sanzaro again tried to enter the clubhouse but was refused entry. More fines and attorney fees were imposed for different attempted entries. Ms. Sanzaro eventually chose to move out of the community because of ongoing harassment and threats. In 2013, this action was filed.

The District Court made the following findings. The Fair Housing Act (FHA) obligates an Association to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. The defendants admitted that Ms. Sanzaro was handicapped but still contend that they were not required to recognize Angel as a service animal without proper documentation. The court held no documentation, or specialized training was needed for Angel. Under the FHA, an Association may only inquire as to the need for a requested accommodation (an assistance animal) if neither the disability nor the need is readily apparent.

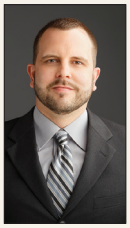
The court found that all the defendants knew that Angel assisted Ms. Sanzaro with retrieving her walker providing a clear connection between her disability and the services provided. Further, the defendants could not identify why accommodating Angel would be unreasonable as the dog was so inconspicuous and well-mannered that most people in the clubhouse would never notice her.

The court ordered the defendants including the Association and developer to pay $350,000 in damages including pain, suffering, humiliation and emotional distress. Also, the court found the defendants acted with reckless indifference and awarded her an additional $285,000 as punitive damages.

In This Issue:

Associations must be extremely careful in dealing with requests for reasonable accommodation. Residents of the community can contest the refusal of an Association to accommodate them without even going to court. A complaint can be filed with the Department of Fair Employment and Housing that will pursue such claims against an Association without charge to the resident. When requests for reasonable accommodation are received, or questions regarding assistance animals are raised, the Association should consult with counsel to avoid the potential liability that can occur when these matters are mishandled. ■

Boards Cannot Rely on Anti-SLAPP Statute to Absolve Wrongful Actions



By Tyler Kerns, Esq.

A California Court of Appeal recently (in November of 2018) decided the case of *Chemers v. Quail Hill Community Association*. The court's decision was not published, so the decision cannot be cited as binding authority but can still provide useful insight as to how a court might rule on a similar matter.

The case involved a lawsuit brought against an association (Quail Hill Community Association in Irvine) by a former board member (Evan Chemers) who argued, among other things, that he had been improperly removed from the board by the other directors and denied access to association records. During Mr. Chemers' time on the board, the relationship between Chemers and the other board members deteriorated. There were confrontations during meetings, a fellow board member posted critical comments on social media about Mr. Chemers, Mr. Chemers distributed email newsletters to homeowners regarding board decisions, and the board mailed letters to the homeowners disputing the content of Chemers' newsletters. At one point, the association's attorney sent a cease and desist letter to Chemers alleging that his conduct was disruptive and that he had made offensive and disparaging statements to other board members at meetings.

failing to afford a director due process before removing the director from the board is not protected activity and neither is refusing a member's right to inspect association records.

Chemers sent an email to the association's manager requesting to inspect certain association records. A relatively short time thereafter, the board voted to remove Chemers from the board for allegedly failing to meet the association's requirement that all directors must be residents of the community. The board did not afford Mr. Chemers any notice or hearing at which to present evidence of his residency in the community (Chemers alleged that he was, in fact, residing within the community at the time of his removal from the board).

Chemers sued the association and the individual board members, and the association and the board members sought to have the case dismissed as a strategic lawsuit against public participation (SLAPP) under California's anti-SLAPP statute codified at Code of Civil Procedure §425.16. Section 425.16 provides for a special motion to strike "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."

Courts have held that homeowners association matters can be issues of public interest within the "quasi-government" homeowners association and can, therefore, fall within the scope of the anti-SLAPP statute. As one example, in a 2016 case, a lawsuit filed against board members for decisions and statements made during board meetings was dismissed on the basis that such decisions and statements made in duly noticed board meetings while conducting board business involve acts in furtherance of constitutionally protected activity within the meaning of the anti-SLAPP statute. [See *Lee v. Silveira* (2016) 6 Cal.App.5th 527.] Perhaps most routinely in the context of homeowners association matters, anti-SLAPP motions to strike are used to try seek the dismissal of lawsuits involving claims of defamation.

However, in the case of *Chemers v. Quail Hill Community Association,* the court held that for the anti-SLAPP statute to apply, the defendant's act underlying the plaintiff's claim must itself have been protected activity under the anti-SLAPP statute. In other words, while making decisions at board meetings is protected activity, the court focused on the underlying activity asserted to give rise to liability and whether that activity was protected. Based on that standard, the court unsurprisingly found that, among other things, failing to afford a director due process before removing the director from the board is not protected activity and neither is refusing a member's right to inspect association records.

Boards should be mindful that actions taken at board meetings are only protected activity within the scope of the anti-SLAPP statute to the extent that the underlying action itself is protected activity. The anti-SLAPP statute is not going to protect a board that, for example, wrongfully denies a member due process or the right to inspect association records. ■

What's happening at Kriger LAW FIRM

Attorney Brad Schuber, Attorney Steven Banks, Janet Wilcox, Jackie Finn and Andre Mejia attended the CACM Annual Law Seminar and Expo.

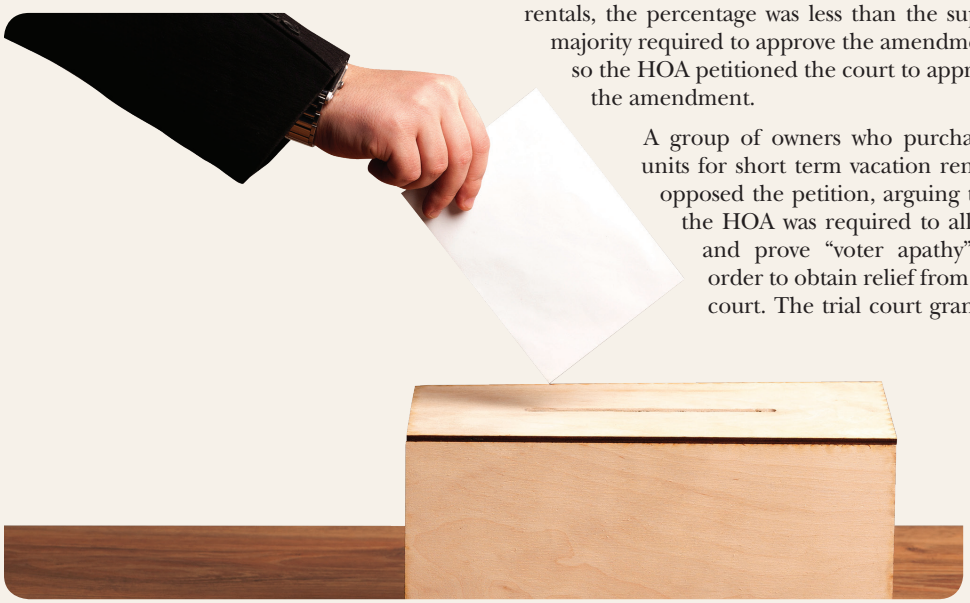
The Law Seminar provides an opportunity for managers to attend classes to brush up on their skills, learn new skills and gain up-to-date information, as well as an eye towards the future.

The theme for the Expo this year was Land of Discovery. The booths were amazing and included Alice in Wonderland, Pirates, and the discovery of King Tut. All who attended enjoyed visiting with managers they knew, and meeting new managers. A good time was had by all.

Voter Apathy Not Required to Reduce Percentage of Votes to Amend Declaration

By Steve Banks, Esq.

Board members and managers who have gone through the process of petitioning the court for approval of CC&Rs amendments – after multiple get-out-the-vote efforts have failed to generate sufficient member interest – are very familiar with the concept of voter apathy. But is voter apathy actually required to support such a petition? Not according to a recent California Court of Appeal Decision.



In *Orchard Estate Homes, Inc. v. The Orchard Homeowner Alliance* (2019) 32 Cal.App.5th 471, a Riverside County HOA brought a Civil Code § 4275 petition to reduce the percentage of affirmative votes required for passage of an amendment to its CCRs to prohibit short term vacation rentals. The HOA had earlier adopted a rule prohibiting such rentals, but when it attempted to enforce the rule, a lower court ruled it was unenforceable because it was not contained in the CC&Rs. As a result, the HOA attempted to seek member approval of a similar CC&Rs amendment. But while about 62 percent of its members voted to prohibit short term rentals, the percentage was less than the super-majority required to approve the amendment, so the HOA petitioned the court to approve the amendment.

A group of owners who purchased units for short term vacation rentals opposed the petition, arguing that the HOA was required to allege and prove "voter apathy" in order to obtain relief from the court. The trial court granted the HOA's petition, and the vacation rental owners group appealed.

The appellate court affirmed the ruling, finding that the trial court could properly grant the petition if it found the HOA met five elements required for relief: (1) notice was properly given; (2) the balloting on the proposed amendment was properly conducted; (3) reasonable efforts were made to permit all eligible members to vote on the proposed amendment; (4) owners having more than 50 percent of the votes voted in favor of the amendment; and (5) the amendment was reasonable. If these elements were met, and if granting the petition would not be improper under other subsections of the statute, the court may, but is not required to, grant the petition.

The appellate court reasoned that the statute does not include voter apathy among the list of elements that must be established.

The appellate court reasoned that the statute does not include voter apathy among the list of elements that must be established. While prior court decisions had mentioned voter apathy as one of the legislative purposes underlying the statute, no prior court decision required voter apathy to be an element that must be alleged or proven as part of the statutory procedure, or as a precondition to relief. The appellate court therefore declined to imply an element in the statute that was not expressed by the Legislature. ■

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Tenants Not Entitled To Due Process

By Joel Kriger, Esq.

The Harbor Island Condominium HOA began receiving numerous complaints from an owner about their downstairs neighbor. The owner indicated that there was stomping all the time and constant slamming of the door since the tenant moved into the upstairs unit. After filing the complaint, the noise intensified as if the tenant was attempting to provoke the owner. There were further problems with the tenant. Members complained that the tenant allowed their dogs to urinate in the common areas in violation of Association rules. The Board President observed the tenant photographing him on numerous occasions at the pool while trying to stay hidden behind a pillar.

The Association filed for preliminary injunction about the noise, pet violations and harassment of the president by clandestinely photographing him against both the tenant and the landlord. The trial court granted a preliminary junction against the tenant requiring him to (1) place throw rugs on all walking areas in the bedroom and office; (2) install a pneumatic mechanism on their front door; (3) install door bumpers or pads approved by the Association; (4) cease recording or photographing the president in the pool area; and (5) cease allowing their dogs to urinate and defecate in the common areas.

A preliminary injunction is a temporary court order that stays in effect pending a full trial in the matter. The preliminary injunction is only to be granted by the trial court when the Association demonstrates that it is likely to prevail at trial and that the balance of harm of issuing the preliminary injunction favors the Association whose members are being oppressed and corrective measures required of the tenant are minimal.

The tenant appealed the preliminary injunction claiming that the Association conspired against him by having meetings at which he was not allowed to attend. The tenant argued that he was unfairly denied an opportunity to challenge violation notices and fines imposed by the Association. The Board president testified that only Association members with an ownership interest have the right to participate in Association meetings. As a tenant, the appellant did not have the right to participate. The landlord was allowed to meet with the board on the issue.

The Harbor Island Condominium Owners Association v. Alexander case was decided on January 24, 2019, and is an unpublished opinion of the Court of Appeal which means that it is not a legal precedent. Even though it is not a legal precedent, it is instructive on how an Association can effectively deal with issues commonly associated with tenant misconduct and that the relief sought by the Association, granted by the trial court, was ratified by the Court of Appeal. ■