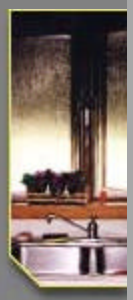

Breaking Legal Developments

Published by:
Peter A. Lynch, Esq.
of Cozen O'Connor
palynch@cozen.com
http://www.cozen.com

05-27-2006

EXECUTIVE SUMMARY: This weekly newsletter covers:

1. City Immune for Failure to Abate Known fire Hazard at Hotel

(1) CITY IMMUNE FOR FAILURE TO ABATE KNOWN FIRE HAZARD AT HOTEL

In Donna Atabey v. City of San Bernardino, E038360, Court of Appeal, Fourth Appellate District, Division Two, unpublished (May 16, 2006), Plaintiff Donna Atabey, individually and as representative of the Estate of Gregory Abdun-Nur, and the Estate of Gregory Abdun-Nur (referred to collectively as plaintiff) sued the City of San Bernardino (City) and other defendants, who are not parties to this appeal, for damages arising from Gregory Abdun-Nur's death in a hotel fire. Plaintiff's three causes of action against the City include negligence, nuisance, and a survival action. The claims are based on the City allowing the Sunset Hotel to operate despite numerous code violations and failing to abate numerous known fire hazards and unsafe conditions which led to the hotel catching on fire and decedent's death.

Plaintiff appealed the judgment of dismissal following the trial court sustaining, without leave to amend, City's demurrer to the fourth amended complaint. The trial court concluded plaintiff had not alleged mandatory duty liability under Government Code section 815.6 and that the City was immune from liability under section 818.6, which provides immunity for failing to inspect, or negligent inspection of, property.

The Court of Appeals affirmed the trial court's ruling.

Factual and Procedural Background

Plaintiff Donna Atabey's son, Gregory Abdun-Nur (decedent), died in a fire at the Sunset Hotel on December 28, 2002. Donna Atabey and decedent's estate sued the City and the County of San Bernardino, as well as the hotel and the owner of the hotel. The only causes of action alleged against the City in the fourth amended complaint, the operative complaint (complaint), consist of the fifth cause of action entitled, "wrongful death due to negligence"; the sixth cause of action entitled "wrongful death due to nuisance"; and the seventh cause of action entitled "survival action."

In the general allegations section of the complaint, plaintiff alleges that on December 28, 2002, Gregory Abdun-Nur lived at the Sunset Hotel in the City and County of San Bernardino. Defendant Dale Faucette, also known as Siegfried Faucette, lived at and operated the Sunset Hotel at the time in

question. The defendants failed to properly maintain, inspect, manage, repair, correct and otherwise assure the hotel was in a safe condition. Due to defendants' negligence, decedent died on December 28th. As a consequence of decedent's death, his mother has been deprived of his love, companionship, and financial support.

In the fifth cause of action for wrongful death due to negligence, plaintiff alleges that on December 28, 2002, the decedent was a tenant at Sunset Hotel. The hotel caught on fire. Decedent was trapped in the hotel and died as a result of the fire, which was caused in part by numerous code violations. The ongoing violations occurred prior to, and up to, the time of the fire. The City knew, authorized, ratified and or negligently allowed the continuing violations. The City further knew or should have known that its failure to prevent, or to negligently allow, the violations subjected the hotel tenants to dangerous and ultra-hazardous conditions. Even though the City knew or should have known the hotel was not safe, was prone to fires, had hundreds of safety, fire, health and building code violations, and was not properly maintained, the City failed to comply with and enforce City codes, regulations, and ordinances, and institute emergency abatement proceedings. The City breached its duty of care by not abating the perilous and life-threatening conditions and by failing to initiate mandatory enforcement proceedings against the hotel owners. As a consequence, the decedent died in a fire at the hotel.

In the sixth cause of action for wrongful death due to nuisance, plaintiff alleges essentially the same allegations contained in the fifth cause of action, along with additional allegations that defendant Faucette's use and improper maintenance of the hotel constituted a nuisance under Civil Code sections 3479, 3484, 3491, 3501, and other city and county ordinances and codes. Such nuisance was injurious to decedent's health, obstructed the free use of his residence, and interfered with his personal enjoyment of life, welfare and safety (it killed him). The County and City notified Faucette of the nuisance.

Plaintiff further alleges that, during the time in question, City violated the following provisions: "AB2034, AB34, internal policy and procedure, rules, statutes, and regulations that govern the City . . . including but not limited to SBMC [San Bernardino Municipal Code] 5.04.650, 8.01.010, 8.05.010, 8.18.010, 8.18.050, 8.18.060, 8.30.010(v), 8.30.030, 8.30.150, 15.04.105, 15.04.020, 15.04.030, 15.16.020, 15.16.055, 15.16.061, 15.16.061[sic], 15.16.155, 15.16.080, 15.16.087, 15.20.030, B&PC§25503.16, HSC§13113.7, 13220, 17921, 17960, G.C.§814, §815.4 as well as other statutes, ordinances and codes herein involved." As a result of City's knowledge and assumption of responsibility, the City was negligent. City's negligence resulted in foreseeable risk of harm to decedent when the hotel caught on fire, and proximately caused his death. City breached its mandatory duty to abate the emergency nuisance, which constituted a serious and threatening risk to decedent's life. City also ratified and authorized the continued nuisance caused by the violations and failed to shut down the hotel or remediate the violations as required by law.

In the seventh cause of action entitled "survival action," plaintiff simply alleges that prior to decedent's death, decedent sustained personal and economic injuries from the City's and the other defendants' wrongful acts or omissions alleged in the complaint.

The City demurred to plaintiff's complaint on the grounds plaintiff failed to allege facts establishing a mandatory duty cause of action against the City under section 815.6, and the City is immune from liability under sections 818.2 (failure to enforce any law) and 818.6 (inspection immunity). The City also argued plaintiff could not allege both negligence and nuisance since the nuisance claim is not a separate tort apart from the negligence claim.

After hearing lengthy argument, the trial court sustained, without leave to amend, the City's demurrer as to each cause of action against the City, primarily on the grounds plaintiff failed to allege a breach of any mandatory duty under section 815.6 and plaintiff's claims were barred under the inspection immunity (§ 818.6).

Mandatory Duty Nuisance Cause of Action

Plaintiff attempted to allege in her nuisance cause of action liability based upon a claim of mandatory duty under section 815.6. Plaintiff alleged that under various city municipal code provisions the City breached its mandatory duty to abate or to cause the Sunset Hotel owner to abate ongoing hazardous conditions and fire code violations existing at the Sunset Hotel.

The court began its analysis with the well-established rule that "[u]nder the California Tort Claims Act (Gov. Code, § 810 et seq.), 'a public entity is not liable for injury arising from an act or omission except as provided by statute. (Gov. Code, § 815, subd. (a); [citation].)' [Citation.] Thus, in California, 'all government tort liability must be based on statute [citation].' '"In the absence of a constitutional requirement, public entities may be held liable only if a statute . . . is found declaring them to be liable."' " (Hoff v. Vacaville Unified School Dist. (1998) 19 Cal.4th 925, 932, fn. omitted.)

One such statute is section 815.6. It provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

"[A]pplication of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]" (Haggis v. City of Los Angeles (2000) 22 Cal.4th 490, 498 (Haggis). Whether an enactment is intended to impose a mandatory duty, as opposed to a mere obligation to perform a discretionary function, is a question of law for the court. (Id. at p. 499.)

In the instant case, plaintiff cited a myriad of provisions in her nuisance cause of action, many of which clearly do not impose on the City mandatory duties designed to protect the hotel residents from dying in a hotel fire. Only the provisions requiring the City to abate or commence abatement proceedings to correct hazardous conditions create a mandatory duty under section 815.6. Those provisions include SBMC sections 8.30.030; 8.30.150; 15.16.061; 15.16.065; and 15.16.087.

While the determination as to whether a nuisance or hazardous condition exists or is believed to exist involves the exercise of judgment and discretion, once the City has made that determination, these provisions mandate that the City, including city agencies such as the fire department and police department, shall initiate abatement proceedings and/or correct the violations. (See Haggis, supra, 22 Cal.4th at p. 502.)

In Haggis, the California Supreme Court held that a city ordinance requiring the city to record a certificate of substandard condition created a mandatory duty to do so even though the city inspection and determination as to whether the land was substandard, or unstable, was discretionary. The Haggis court stated: "We agree that the determinations whether a property is unstable, and what conditions make it so and thus must be remedied, rest, under the ordinance, with the judgment and discretion of the superintendent of building or his or her staff. But once these determinations have been made-as they allegedly were in this case in 1966 and 1970-the ordinance does not contemplate any further discretionary decision as to whether to record the certificate of substandard condition; rather, the ordinance commands that such a certificate be recorded when the owner is given notice of the substandard condition." (Haggis, supra, 22 Cal.4th at p. 502.)

Here, the City determination as to whether there is a fire code violation or public nuisance is discretionary but, upon determining such condition exists, the City's duty to abate or initiate abatement proceedings is mandatory.

Section 818.6 Immunity

Even assuming without deciding that the duties alleged by plaintiff are mandatory within the meaning of

section 815.6, the court concluded they still come within the scope of section 818.6 inspection immunity, and thus plaintiff's nuisance cause of action was barred. (Cochran v. Herzog Engraving Company (1984) 155 Cal.App.3d 405, 411.)

Under section 818.6, "A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of Section 830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." (§ 818.6.) Section 818.6 grants absolute immunity from liability regardless of whether the duties to abate or initiate abatement proceedings are construed as "mandatory" or "discretionary." (Cochran, supra, 155 Cal.App.3d at p. 411.)

Plaintiff argued the inspection immunity does not extend to the duty to abate known dangerous conditions. Plaintiff emphasized that it is not claiming the City breached its duty to inspect or it negligently inspected the hotel. Rather, plaintiff claimed the City failed to take action to abate known fire code violations and permitted the hotel to operate despite the numerous, ongoing violations. Plaintiff thus claims the inspection immunity did not apply.

The City, citing Cochran, supra, 155 Cal.App.3d 405, Harshbarger v. City of Colton (1988) 197 Cal.App.3d 1335 and Haggis, supra, 22 Cal.4th 490, argued that its duty to abate hazardous conditions is directly connected to the inspection process and therefore section 818.6 inspection immunity bars plaintiff's claims. The Court of Appeals agreed. While Cochran, Harshbarger and Haggis did not discuss whether inspection immunity encompasses the duty to abate after a public entity discovers a dangerous condition, these cases indicated the inspection immunity is to be broadly applied.

In Harshbarger, supra, 197 Cal.App.3d 1335, the court held section 818.6 inspection immunity applied not only to negligent inspections but also to fraudulent inspections. Harshbarger provides little guidance in the instant case since Harshbarger involved liability based on the inspection itself. It did not address the issue of whether inspection immunity extends to abatement.

In Cochran, which arose from a fatal fire, the court extended the inspection immunity to the city fire department's duty to report dangerous conditions discovered during inspections and to recommend needed safeguards to correct the hazardous conditions. The plaintiff in Cochran alleged that various municipal code provisions required the city to inspect the premises of an engraving business, which caught on fire; to specify needed safeguards against fires, fire suppression materials and safe means of escape; and to make appropriate recommendations to the property owner to eliminate or reduce fire hazards. The defendant city argued in its summary judgment motion that the city was immune from liability under including section 818.6 inspection immunity.

The Cochran trial court granted summary judgment, concluding the city was immune from liability under section 818.6, as well as under several other governmental immunity provisions. Without deciding whether the various alleged duties were mandatory, the Cochran court concluded the alleged duties were encompassed by the section 818.6 inspection immunity. The Cochran court explained that inspection immunity is not narrowly restricted to the failure to inspect or the failure to detect hazards during an inspection. Inspection immunity is applied more broadly. (Cochran, supra, 155 Cal.App.3d at p. 412.) It necessarily encompasses determining that given conditions are in fact hazardous or not, reporting these hazardous conditions, and fully disclosing them to all interested parties. (Id. at pp. 411-412.)

The Cochran court noted that applying inspection immunity broadly is consistent with the purpose of section 818.6, which "is to protect public entities from liability not only for failures to detect technical safety code violations, but for any negligence directly connected to the inspection process itself. In order for the immunity to apply, the negligence in question must have been part and parcel of the inspection or have had a direct or proximate effect on it, either by impairing its value, frustrating its goals or purposes, affecting the results or findings made, or in some other way resulting in damage to the investigation itself." (Cochran, supra, 155 Cal.App.3d at pp. 411-412; italics added.)

In Haggis, supra, 22 Cal.4th 490, the California Supreme Court held that section 818.6 inspection immunity extended to the city's mandatory duty to record a certificate of substandard condition, following a city inspection revealing the plaintiff's land was vulnerable to future landslides: "Construing the immunity of section 818.6 broadly to include the entire process of inspection and reporting [citation], the Court of Appeal correctly held that section 818.6 immunizes the City from liability for failing, after an inspection, to take the additional step of recording with the county recorder the information so discovered." (Haggis, supra, at p. 504.)

The Haggis court explained that "allowing liability for failure to fully report, by recordation, the results of an inspection, while immunizing the failure to make an inspection at all, would have the effect, contrary to the evident legislative intent, of discouraging municipal safety and health inspections. Even if plaintiff's first cause of action stated a valid claim for breach of a mandatory duty, therefore, section 818.6 would immunize the City from liability for that breach." (Haggis, supra, 22 Cal.4th at p. 505.)

The Haggis court thus concluded the city was immune under section 818.6 from failing to take the additional step of recording a certificate of substandard condition because the alleged negligent failure to record the certificate of substandard condition was "'directly connected to the inspection process itself.'" (Haggis, supra, 22 Cal.4th at p. 504, quoting Cochran, supra, 155 Cal.App.3d at p. 412.)

Here, the issue is whether the City is immune under section 818.6 from taking the additional step of abatement or initiating abatement proceedings. This is an issue of first impression.

In construing section 818.6 inspection immunity broadly "to include the entire process of inspection and reporting" (Haggis, supra, 22 Cal.4th at p. 504), we conclude the trial court correctly held that section 818.6 immunizes the City from liability for not initiating abatement proceedings or abating the hazardous conditions which led to the hotel fire and decedent's death.

Otherwise imposing liability on the City for failing to abate unsafe conditions discovered during inspections would deter the City from conducting thorough inspections, as well as citing and reporting code violations, since doing so would expose the City to liability for failing to take action to abate such conditions. "Construing section 818.6 broadly to include the entire process of inspection and reporting," (Haggis, supra, 22 Cal.4th at p. 504, citing Cochran, supra, 155 Cal.App.3d at p. 412), the court concluded the trial court correctly held that section 818.6 immunizes the City from liability for not abating, or causing to abate, the hazardous conditions discovered during the City's inspections of the Sunset Hotel.

Sufficiency of Investigation Before Issuing Hotel Permit

Relying on Young v. City of Inglewood (1979) 92 Cal.App.3d 437, plaintiff complains that the City failed to comply with SBMC 5.82.050, which mandates that the city police chief shall fully investigate an applicant seeking a hotel permit, along with the facts and circumstances concerning the application, and submit to the city clerk recommendations regarding whether a permit should be granted. Plaintiff argues section 818.6 inspection immunity does not apply because SBMC 5.82.050 is not predicated on an inspection. It involves an investigation of existing information in the City's files concerning the applicant and hotel.

Plaintiff's reliance on Young was misplaced. In Young, the court held there was no immunity under section 818.4 where the city violated a mandatory duty to ensure that the recipient of a building permit was a duly licensed contractor.

Furthermore, plaintiff raises this contention for the first time on appeal, without having cited SBMC 5.82.050 in her complaint. In addition, plaintiff has not established she can allege facts supporting such a claim if permitted to amend to add this new theory.

Also, plaintiff appears to be challenging the sufficiency of the investigation, which pertains to

discretionary acts, and is complaining that the City erred in issuing a permit when it knew the hotel did not have smoke detectors, which also involves the discretionary act of issuing a permit, which is subject to immunity under section 818.4.

Section 818.2 Immunity

The City argues it is immune from liability under section 818.2. Section 818.2 insulates a public entity from liability for damages caused by any activity related to the failure to enforce a law.

Section 818.2 immunity is inapplicable here since plaintiff is not alleging the City failed to enforce a law. Rather, plaintiff is alleging the City failed to initiate proceedings abating hazardous conditions. As noted in Elton v. County of Orange (1970) 3 Cal.App.3d 1053, applying section 818.2 immunity to allegations of noncompliance with duties mandated under municipal codes and statutes "would completely eviscerate Government Code section 815.6 which specifically provides for liability of the public entity for injuries resulting from a failure to carry out a mandatory duty imposed by a public enactment." (Elton, supra, at p. 1059.) The judgment was affirmed.

Mr. Lynch can be reached at Cozen and O'Connor, 501 West Broadway, Suite 1610, San Diego, California 92101, 800-782-3366 (voice), 619-234-7831 (fax), palynch@cozen.com (e-mail), http://www.cozen.com.

Please direct comments, suggestions, stories, and other items to the author by e-mail at palynch@cozen.com