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SAN FRANCISCO APARTMENT ASSOCIATION, a California non-profit trade association,
SAN FRANCSICO ASSOCIATION OF REALTORS, a California non-profit trade association,
COALITION FOR BETTER HOUSING, a non-profit trade association, and
SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, a California non-profit corporation,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAN FRANCISCO APARTMENT ASSOCIATION, a California non-profit trade association, SAN FRANCSICO ASSOCIATION OF REALTORS, a California non-profit trade association, COALITION FOR BETTER HOUSING, a non-profit trade association, and SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, a California non-profit corporation,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation, and DOES 1 – 25,

Defendants and Respondents.

Case No.: CPF-20-517087

[~~PROPOSED~~]

ORDER GRANTING PETITION FOR WRIT OF MANDATE

Date: September 15, 2020
Time: 9:30 a.m.
Dept.: 501
Judge: Hon. Charles F. Haines

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The hearing on the Petition of Plaintiffs/Petitioners SAN FRANCISCO APARTMENT ASSOCIATION ("SFAA"), SAN FRANCSICO ASSOCIATION OF REALTORS ("SFAR"), COALITION FOR BETTER HOUSING ("CBH") and SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE ("SPOSF") (collectively "Petitioners") for writ of mandate challenging San Francisco Ordinance 36-20 ("the Amended Buyout Ordinance") came on regularly for hearing on September 15, 2020 at 9:30am in Department 501 of the above-entitled Court, the Honorable Charles F. Haines presiding. Andrew M. Zacks, of Zacks, Freedman & Patterson, PC appeared for Petitioners, and Deputy City Attorney Tara Steeley appeared for Defendant/Respondent CITY AND COUNTY OF SAN FRANCISCO ("the City").

The Court having considered the papers submitted by the Parties, supporting documents and oral arguments, and for good cause shown, the Court hereby finds as follows:

I. FACTUAL BACKGROUND

A. The Buyout Ordinance and the Ordinance as Amended

For the first time in 2015, Section 37.9E of the San Francisco Administrative Code ("the Buyout Ordinance") regulated "tenant buyout agreements" - defined as agreements where the landlord pays the tenant money or other consideration to vacate a rental unit. The Buyout Ordinance expressly exempted the settlement of unlawful detainers. On April 5, 2020, Ordinance 36-20 ("the Amended Buyout Ordinance") became effective. Ordinance 36-20 purports to apply procedural requirements to the settlement of *all* unlawful detainer actions, unless the landlord/plaintiff initiates "buyout negotiations" and then waits 120 days before filing an unlawful detainer action.

B. Procedural History/Petitioners' Contentions

Petitioners filed the present petition on May 12, 2020, alleging that the Amended Buyout Ordinance is unenforceable under the litigation privilege (Cal. Civ. §47(b)), the unlawful detainer statutes (Cal. Code Civ. Proc., §§1159, *et seq.*) and the rights of litigants to settle pending litigation through settlement agreements with judicial oversight, enforcement and supervision (Cal. Code Civ. Proc., §664.6). The City filed a demurrer to the petition on July 16, 2020, and Petitioners filed a First Amended Petition ("FAP") on August 5, 2020, thereafter setting their hearing on the petition for September 15, 2020. As of the date of this Order, the City has not filed an answer to the FAP.

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C. The City's Contentions

The City raises several arguments in opposition to the petition and in support of the validity of Ordinance 36-20, including a challenge to Petitioners' standing. The City argues that the Petitioners only alleged associative standing, but that they should be required to show a direct and substantial, beneficial interest in being free of the injury alleged on their own behalf. The City further argues that Petitioners did not show that any of their members engaged in buyout negotiations or unlawful detainer litigation, and that they therefore could not maintain this litigation.

As for the merits, the City argues that Ordinance 36-20 does not interfere with the unlawful detainer statutes, and that landlords remained free to serve eviction notices, file unlawful detainer actions, seek summary judgment, and go to trial without needing to comply with Ordinance 36-20. It further argues that Ordinance 36-20 does not delay a landlord's ability to file an unlawful detainer action, nor restrict a landlord's ability to invoke unlawful detainer remedies, and it did not impose local procedural requirements on evictions (as opposed to *settlement* of unlawful detainer cases).

As for the settlement of pending litigation, the City asserts that neither the 30 day hold on signing buyout agreements nor the 45-day rescission period in the buyout ordinance conflicts with Section 664.6, and that nothing in Section 664.6 assures that parties to litigation will be able to "fully and finally settle disputes" before locally-created conditions subsequent (like the timely filing of settlement agreements with the rent board) occur.

Finally, the City contends that Ordinance 36-20 does not violate the litigation privilege, because it does not restrict access to the courts or create any derivative tort liability based on a landlord's communications in connection with litigation. The City argues that landlords are free to file unlawful detainer actions and speak freely in connection with those proceedings without facing any liability under Ordinance 36-20, and that there is no right to settle unlawful detainer litigation under State law.

II. DISCUSSION

A. Petitioners Have Standing

Petitioners have sufficiently alleged standing to challenge Ordinance 36-20. (*See, Hunt v. Washington Apple Advertising Com.* (1977) 432 U.S. 333, 343; *Pennell v. City of San Jose* (1988)

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485 U.S. 1, 8) Indeed, *only* parties like Petitioners' members are affected by the Amended Buyout Ordinance. Unlike the plaintiff in *SJJC Aviation Services, LLC v City of San Jose* (2017) 12 Cal.App.5th 1043 relied on by the City, petitioners are uniquely and perhaps exclusively affected by the Amended Buyout Ordinance. The "public at large" has no interest in the validity of Amended Buyout Ordinance as it only applies to landlords (such as petitioners' members) and tenants. The allegations of the FAP establish that petitioners are beneficially interested in this action and therefore have standing. (See, FAP discussing standing for SFAA (FAP at ¶2), SFAR (FAP at ¶3), CBH (FAP at ¶4) and SFOSF (FAP at ¶5).

Petitioners are each associations whose members – property owners, property managers, real estate agents, etc. – are uniquely affected by Ordinance 36-20. Since these individual members would have standing to sue in their own right over restrictions on the manner in which they can initiate, prosecute and ultimately settle unlawful detainer actions, they are beneficially interested for purposes of seeking the relief sought in the FAP. (See, First Amended Petition (FAP) at ¶¶ 2-5.)

The interests the lawsuit seeks to protect - to permit petitioners' members to settle litigation free from the unlawful and unauthorized restrictions of Ordinance 36-20 - are germane to the organizations' purposes and those of their individual members. (See, FAP at ¶¶ 2-5.) Neither the claim asserted nor the relief requested require the personal participation of the members. (FAP at ¶¶ 18-21, 23-26) Moreover, the only persons affected by the Amended Buyout Ordinance are litigants such as petitioners' individual members and their tenants. The Court finds that petitioners are beneficially interested in the validity of the ABO and therefore have standing to bring this action.

B. Ordinance 36-20 Improperly Interferes with Litigants' and the Judiciary's Ability To Resolve Lawsuits with Enforceable Settlement Agreements:

Section 664.6 of the California Code of Civil Procedure provides that, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The plain language of Section 664.6 therefore allows the full and final resolution of active litigation (including unlawful detainer cases) once parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or

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orally before the court, for settlement of the case. This Court is aware that litigants in unlawful detainer proceedings (like all other litigants) regularly include and rely on Section 664.6 to provide certainty of enforceability of settlement agreements.

Ordinance 36-20 imposes the restrictions described above on any unlawful detainer action commenced within 120 days of the commencement of negotiations. (SF Admin. §37.9E(c).) Therefore, in all applications of Ordinance 36-20 to unlawful detainer actions (i.e., all those commenced within 120 days of a settlement offer), the ordinance interferes with Section 664.6 by preventing litigation from fully and finally resolving.

Specifically, a landlord-plaintiff must disclose tenant rights and then file a declaration of having done so, before she may make such a settlement offer. (SF Admin. §§37.9E(d), (e).) If 30 days have not passed since the commencement of negotiations, a tenant cannot enter an unlawful detainer settlement agreement for possession (even if that agreement is negotiated, e.g., at the Superior Court's mandatory settlement conference), which may result in trial continuances and other delays for parties who in good faith seek to resolve their respective claims by agreement. (SF Admin. §37.9E(f)(1).)

Further, a breaching tenant could defensively rescind 45 days after execution, even if a judge orders entry of judgment after reserving jurisdiction under CCP 664.6. (SF Admin. §37.9E(g)). Finally, all unlawful detainer settlement agreements are void, unless the landlord files them between 46 and 59 days after they are executed. (SF Admin. §37.9E(h).) None of these requirements or conditions is found in Section 664.6 of the Code of Procedure. Local governments may not impose restrictions on the authority of the California State Judiciary to conduct the orderly administration of its own cases. *See, e.g.,* Cal. Code Civ. Proc., §§128(a)(3), (4) and (8); Cal. Code Civ. Proc., §187; *See, also, Cottle v. Superior Court* (1992) 3 Cal. App. 4th 1367, 1377 (int. cit. om.): "courts have inherent equity, supervisory and administrative powers, as well as inherent power to control litigation before them. Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute." Because Ordinance 36-20 does so, it is preempted. (*Cottle, supra.*)

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C. Ordinance 36-20 Violates the Unlawful Detainer Statutes

State law occupies the field of summary procedures to recover possession of real property in unlawful detainer actions. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 151.) Those procedures are intended to provide a means of recovering possession in less than 45 days. (See, e.g., Cal. Ct. R. Stds of Jud. Admin. §2.2(i), seeking to dispose of 90% of unlawful detainer cases within 30 days, and 100% of unlawful detainer cases within 45 days of filing.) Under Ordinance 36-20, an unlawful detainer action cannot be settled for 30 days after the date the parties began negotiating an agreement for possession.

Ordinance 36-20 further prevents these unlawful detainer settlement agreements from becoming final for another 45 days after execution, further delaying recovery of possession. (SF Admin. §37.9E(g).) Even once final, these agreements can become undone at any time, if not timely recorded at the rent board by the landlord. (SF Admin. §37.9E(h).)

Ordinance 36-20 permits landlords to avoid the above interference with their procedural rights under the unlawful detainer statutes. However, they must trade this boon for an even greater interference: A landlord can only avoid these regulations if, after initially demanding possession, she waits 120 days before *commencing* the summary unlawful detainer proceeding. (SF Admin. §37.9E(c).)

As Ordinance 36-20 either improperly elongates the summary unlawful detainer procedures for unlawful detainer plaintiff landlords who submit to it, or improperly delays by 120 days the summary action to recovery possession for landlords who chose not to, Ordinance 36-20 is preempted by the unlawful detainer statutes. The City's police power does not permit it to interfere with state unlawful detainer procedure in this manner.

D. Ordinance 36-20 Violates the Litigation Privilege

Ordinance 36-20 is preempted by the litigation privilege (Cal. Civ., §47(b)), because it imposes liability when a landlord threatens litigation but does not *also* comply with Ordinance 36-20. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232.) One of the promises of the litigation privilege is that plaintiffs may threaten (or file) lawsuits, and defendants may not sue over these privileged acts, unless they come within a recognized exception to the

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litigation privilege. (*Id.* at 1241, 1245.)

The threat of an unlawful detainer action is a made "in anticipation of litigation" (*Feldman v. 1100 Park Lane Assocs.* (2008) 160 Cal. App. 4th 1467, 1481) and service of an "eviction notice" is a "legally required prerequisite to the filing of the unlawful detainer action" (*Id.* at 1480). These are privileged acts. However, because they also constitute demands for the tenant to vacate (to avoid further litigation) they come within the definition of "buyout offers" under Ordinance 36-20.

Therefore, in 100% of cases where a landlord threatens an unlawful detainer action and actually litigates an unlawful detainer action, but does not *also* comply with Ordinance 36-20, the ordinance imposes derivative tort liability for acts expressly protected by the litigation privilege. (SF Admin., §§37.9E(k)(1), (2).) While not every landlord negotiating for a buyout agreement pursues an unlawful detainer action, Ordinance 36-20 applies to *all* unlawful detainer actions preceded by regulated buyout offers and therefore violates the litigation privilege. Accordingly,

IT IS HEREBY ORDERED that Ordinance 36-20 is invalid and unenforceable. Accordingly,

(1) A writ of mandate shall issue, commanding Respondent City to set aside the actions approving and enacting Ordinance 36-20; and

(2) Respondent City is enjoined from enforcing Ordinance 36-20, per the findings set forth above.

SO ORDERED

Dated: 10/8/2020

Charles F. Haines

THE HONORABLE CHARLES F. HAINES
JUDGE OF THE SUPERIOR COURT

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