

CASE NOTE

One Free Assault: *Castaneda v. Olsher* Affirms the Prior Similar Incidents Test As the Measure of a Landlord's Liability for Gang Violence on the Premises

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I. Introduction

Few would argue with the proposition that criminal street gangs are a major menace to society. For more than half a century, gangs have rampaged through the streets of California, leaving in their wake death, destruction and broken homes. Yet everyone is entitled to a fair chance at housing. More to the point, no one should be denied housing based on associations. This leaves landlords in a quandary: whether to rent to known gang-member tenants or deny them housing to protect other tenants on the property.

*Castaneda v. Olsher*¹ is the first case to squarely address whether a landlord's duty to protect against foreseeable third party crime includes refusing to rent to known or suspected gang members. This controversial issue has ushered in an entirely new, and as of yet undefined, legal standard—extraordinary foreseeability.

Under *Castaneda*, a landlord has no duty to refuse to rent to gang-members absent circumstances making gang violence on the premises extraordinarily foreseeable.² In addition, a landlord has no duty to evict existing gang member tenants absent circumstances making gang violence highly foreseeable,³ as judged by the “prior similar incidents” test.⁴ Finally, without a showing that third party crime is highly foreseeable, a land-

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1. *Castaneda v. Olsher*, 41 Cal. 4th 1205 (2007).

2. *Id.* at 1215.

3. *Id.* at 1215.

4. *Id.* at 1221.

lord has no duty to provide security guards or improve lighting in common areas.⁵

II. Factual Background

Plaintiff, Castaneda, was shot during an altercation between rival gang members in his mobile home park.⁶ He filed a premises liability action, alleging the park's landlord had breached his duty to protect against foreseeable third party crime by knowingly permitting gang members to reside on the premises.⁷ Plaintiff claimed the landlord had a duty to refuse to rent to known or suspected gang members, to evict them when they harass other tenants, and in the absence of such action, to hire security guards and improve lighting in common areas.⁸

At trial, the plaintiff produced a laundry list of prior crimes on the property: there had been two gunshot incidents in the previous two years, the shooter and his companions had harassed and intimidated other tenants, gang graffiti was a continuous problem,⁹ and the property manager had regularly observed drug sales on the property.¹⁰ In addition, the previous five years had seen a rape in the park's laundry room as well as several incidents of theft, burglary, and vandalism.¹¹

The trial court granted the landlord's motion for non-suit,¹² but the Fourth District of California Court of Appeal reversed, finding that the plaintiff's evidence presented a triable issue of fact as to whether the landlord had a duty to undertake additional security measures.¹³ In assessing whether Castaneda's injury was highly foreseeable, that court looked to the totality of the circumstances, instead of whether there had been previous similar acts of violence on the premises.¹⁴ The Supreme Court of California granted the landlord's petition for review to determine if the proper test was utilized.¹⁵

III. Discussion

A. A Landlord Has a Duty to Take Reasonable Measures to Protect Tenants Against Foreseeable Third Party Crime

In addition to discussing a landlord's duty toward gang member tenants, *Castaneda* clarifies a landlord's duty to protect against all third party

5. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1215 (2007).

6. *Id.* at 1211.

7. *Id.* at 1212.

8. *Id.* at 1212.

9. *Id.* at 1212.

10. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1224 (2007).

11. *Id.* at 1215.

12. *Id.* at 1212.

13. *Castaneda v. Olsher*, 132 Cal. App. 4th 627, 632 (2005) (depublished).

14. *Id.* at 640.

15. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1210 (2007).

crime.¹⁶ Two factors are key in determining the existence and scope of this duty: the foreseeability of harm to the plaintiff and the extent to which preventing the harm burdens the defendant.¹⁷ These factors frame the issue for the court by weighing the potential sources of harm to a plaintiff against the measures a landlord can take to prevent that harm.¹⁸ The landlord's duty is measured on a sliding scale.¹⁹ Where the burden of preventing future harm is great, such as evicting a tenant or hiring a security guard, third party crime must be highly foreseeable.²⁰ However, where the harm can be prevented by simple means, such as fixing a lock or moving a gate, a lesser degree of foreseeability may be required.²¹

B. The Evolution of High Foreseeability, The Dawn of Extraordinary Foreseeability, and A Landlord's Duty to Evict and Refuse to Rent

The California Supreme Court has gone back and forth several times in stating the proper test for determining when third party crime is highly foreseeable. *Castaneda* is the latest in a line of cases spawned by *Ann M. v. Pacific Plaza Shopping Center* to hold that high foreseeability must be shown by prior similar incidents of violent crime on the landowner's premises.²² *Ann M.* overturned *Isaacs v. Huntington Memorial Hospital*, which held that high foreseeability is determined by the totality of the circumstances, "and not by a rigid application of a mechanical prior similar rule."²³ Notably, with *Isaacs* foray into the "totality of the circumstances" test, California became the only state in the nation to adopt this standard in the business landowner context.²⁴ This test left landlords drastically more exposed to liability for injuries on their premises. Indeed, the test threatened to make landlords "insurers of public safety," an obligation the law has consistently refused to impose.²⁵

A landlord's duty to evict a dangerous tenant applies regardless of the tenant's gang member status.²⁶ Generally, "a landlord has a duty to evict a vicious or dangerous tenant only where the tenant's behavior makes vio-

16. *Id.* at 1213.

17. *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2007), *as recognized in* *Mastro v. Petrick*, 93 Cal. App. 4th 83 (2001).

18. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1214 (2007).

19. *Delgado v. Trax Bar and Grill*, 36 Cal. 4th 224, 243 (2005).

20. *Castaneda*, 41 Cal. 4th at 1214.

21. *Id.*

22. *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 679 (1993), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2007), *as recognized in* *Saelzler v. Advanced Group 400*, 25 Cal. 4th 763 (2001).

23. *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 126 (1985).

24. Uri Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89, 97 (1990).

25. *Ann M.*, 6 Cal. 4th at 679.

26. *See Castaneda v. Olsher*, 41 Cal. 4th 1205 (2007).

lence toward neighbors or others on the premises highly foreseeable.”²⁷ This finding must be supported by “prior similar incidents or other indications of reasonably foreseeable risk of violent assault from which a property owner could have predicted the third party crimes would likely occur.”²⁸

Landlords face difficulty in determining “other indications of reasonably foreseeable risk of violent assault”²⁹ An implied exception to the prior similar incidents rule, extrapolated from *Ann M.*, holds that “the requisite degree of foreseeability *rarely, if ever* can be proven in the absence of prior similar incidents of violent crime on the landowner’s premises.”³⁰ If not an exception, this reasoning is perhaps a subtle retreat from the totality of the circumstances test. However, the *Ann M.* court explained that the requisite degree of foreseeability might be proven by “some other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises.”³¹ *Ann M.* strictly analyzed a landlord’s duty to provide security guards, not evict a dangerous tenant. Regardless, it bears emphasis that the duty to evict does not arise simply because one tenant accuses another of harassment.

In contrast to the settled concept of “high foreseeability,” *Castaneda* broke new ground when the case held that a landlord’s duty to refuse to rent arises only under circumstances making gang violence “extraordinarily foreseeable.”³² The court did not state a test to determine when this ambiguous threshold would be met. Given the effort of proving even high foreseeability, it becomes difficult to imagine what might rise above this level. If a prospective tenant who has a history of causing harm to others does not rise to this level it makes it hard to foresee anything that would reach this bar established by the court. Until the courts more precisely define “extraordinary foreseeability,” its contours will remain uncertain.

C. Analysis of Premises Liability Claims Based on Third Party Crime

Castaneda follows the established approach to analyzing premises liability claims based upon the criminal acts of third parties.³³ This analysis, as stated in *Vasquez v. Residential Investments, Inc.*, does not depend on whether a gang member perpetrated a crime.³⁴ Under this approach, the court must first identify the specific action or actions the plaintiff claims the

27. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1219 (2007).

28. *Delgado v. Trax Bar and Grill*, 36 Cal. 4th 224, 243 (2005).

29. *Id.*

30. *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 679 (1993), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2007), *as recognized in Saelzler v. Advanced Group 400*, 25 Cal. 4th 763 (2001) (emphasis added).

31. *Id.*

32. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1215 (2007).

33. *Vasquez v. Residential Investments, Inc.*, 118 Cal. App. 4th 269, 285 (2004).

34. *Id.* at 285.

defendant had a duty to undertake.³⁵ If, after balancing the risks and burdens, the court deems it is appropriate to impose specific obligations on the landlord, the court must then undertake a five-step analysis.³⁶ The court first identifies the specific measures the plaintiff asserts the defendant should have taken to prevent the harm.³⁷ Then, the court determines how financially and socially burdensome these proposed measures would be to a landlord.³⁸ Next the court identifies the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures.³⁹ Using these factors the court then considers how foreseeable it is that the conduct would occur, placing the conduct on a continuum from mere possibility to a reasonable probability.⁴⁰ Finally, the court balances the burden to the defendant against the foreseeability of harm in determining the scope of the duty the court imposes.⁴¹ The more certain the likelihood of harm, the higher a burden a court will impose on a landlord to prevent the harm from occurring. The less foreseeable the harm, the lower a burden the court will place upon a landlord.⁴²

If the landlord had evicted Castaneda's shooter or hired security guards, as the plaintiff claimed was the landlord's duty, the landlord would shoulder a heavy burden in the form of lost rent and possible claims of discrimination. Castaneda contended that the landlord's alleged negligence was a substantial factor in bringing about his injury, but the court disagreed.⁴³ Although there had been past incidents of crime on the premises, the court concluded this crime was not of such a nature as to make Castaneda's injury highly foreseeable.⁴⁴ For his injury to have been highly foreseeable, under the "prior similar incidents" test, the shooter would have had to have shot someone else on the premises and the landlord would have had to have known about the incident.⁴⁵ While there had been previous gang-related shootings on or near the premises, none involved Castaneda's shooter.⁴⁶

35. *Id.* at 285.

36. *Id.* at 285.

37. *Id.* at 285.

38. *Id.* at 285.

39. *Vasquez v. Residential Investments, Inc.*, 118 Cal. App. 4th 269, 285 (2004).

40. *Id.* at 285.

41. *Id.* at 285.

42. *Id.* at 285.

43. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1213 (2007).

44. *Castaneda*, 41 Cal. 4th at 1216.

45. *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 680 (1993), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2007), *as recognized in Saelzler v. Advanced Group 400*, 25 Cal. 4th 763 (2001).

46. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1212 (2007).

D. *Castaneda* Balances Two Competing State Interests: Combating Gang Violence and Protecting Civil Rights

The Legislature has acknowledged that California is “in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”⁴⁷ The *Castaneda* court readily acknowledged the serious threat posed by street gangs, but remained unconvinced that imposing a duty upon landlords to withhold rental units from those they believe to be gang members was a fair or workable solution, or one consistent with California’s public policy.⁴⁸

As *Castaneda* makes plain, the state’s commitment to protecting civil rights is even greater than its commitment to combating gang violence. The Unruh Civil Rights Act (hereinafter “Unruh”) prohibits discrimination on the basis of unconventional dress and appearance,⁴⁹ as well as reputation or suspicion of criminal tendencies.⁵⁰ Because the law “does not permit a landlord to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole is more likely to commit misconduct than some other class of the public,”⁵¹ allowing a landlord to determine who is a gang member would encourage the very behavior Unruh seeks to prohibit.

Landlords may conduct criminal background checks before they rent to those they suspect are gang members. This approach is ill advised, however, because landlords who treat applicants differently when deciding whether to obtain a criminal history could be subject to claims of discrimination under the Fair Employment and Housing Act (hereinafter “FEHA”).⁵² The alternative requiring landlords to conduct criminal background checks on all applicants would be time consuming and costly. Moreover, it “would . . . unfairly deprive many Californians of housing.”⁵³

Rental decisions may not be based on arbitrary discrimination. Yet imposing a duty on residential landlords to refuse to rent to gang members would “force them to make rental decisions according to stereotypes about gang members’ ethnicity and appearance” in violation of FEHA.⁵⁴ Moreover, “if landlords regularly face liability for injuries gang members cause on the premises, they will tend to deny rental to anyone who might be a gang member”⁵⁵

47. CAL. PENAL CODE § 186.21 (West 2007).

48. *Castaneda*, 41 Cal. 4th at 1216.

49. *In re Cox*, 3 Cal. 3d 205, 217-18 (1970); CAL. CIV. CODE § 51 (West 2007).

50. *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 741 (1951); CAL. CIV. CODE § 798.74 (a) (West 2007).

51. *In re Cox*, 3 Cal. 3d at 217-18; CAL. CIV. CODE § 51 (West 2007).

52. CAL. GOV’T CODE § 12900 (West 2007).

53. *Castaneda v. Olsner*, 41 Cal. 4th 1205, 1217 (2007).

54. *Id.* at 1215.

55. *Id.* at 1216.

E. Landlords Have Options in Dealing with Gang Member Tenants

Legal duty aside, landlords may have the right to oust gang-member tenants before they injure someone on the premises. A tenant's prior violent bad acts on the premises may, of course, serve as the basis for eviction. Landlords have other options: they may terminate the lease with notice or include crime free addendums to the lease.⁵⁶ Also, landlords have the option of having a gang member's residence declared a nuisance and abated, for offenses ranging from vandalism and drug activity to burglary, robbery, rape and murder.⁵⁷ Whichever option is pursued, the threat of retaliation against person or property demands that landlords proceed with caution.

IV. Conclusion

Castaneda essentially reinforces the California Supreme Court's commitment to protecting the civil rights of all members of society, even gang members. This does not suggest, however, that a landlord has no options in dealing with a gang member tenant. A landlord must simply point to something other than a tenant's gang-membership before taking action against a particular tenant.

For all practical purposes, *Castaneda* does not change the approach to analyzing premises liability claims based on the criminal acts of third parties. *Castaneda* irons out one wrinkle in the fabric of landlord liability. Gang membership alone does not create the requisite level of foreseeability such that a landlord has a duty to deny housing, institute eviction proceedings, or provide security guards.⁵⁸ The *Castaneda* court stated no test for determining when gang violence is so extraordinarily foreseeable that a landlord has a duty to reject a prospective tenant. However, this was of little consequence, as it was enough that the plaintiff failed to show there had been prior similar acts of violence on the premises that made his injury highly foreseeable.⁵⁹

One feels naturally inclined to join in Justice Mosk's lament that, "[s]urely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property."⁶⁰ Given that all fifty states continue to adhere to the "prior similar incidents" test for determining when third party crime is highly foreseeable, it is unlikely California will again deviate from this standard.

56. http://www.crime-free-association.org/lease_addendums.htm (last visited Feb 28, 2009).

57. CAL. PENAL CODE § 186.22a (West 2007).

58. *Castaneda*, 41 Cal. 4th at 1216-18.

59. *Castaneda v. Olsher*, 41 Cal. 4th 1205, 1212 (2007).

60. *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 681 (1993), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2007), *as recognized in Saelzler v. Advanced Group 400*, 25 Cal. 4th 763 (2001) (Mosk, J., dissenting).

