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Mediating landlord-tenant disputes

WITH THE ONSLAUGHT OF COURT DELAYS AND INCREASED COURT COSTS, MEDIATION IS MORE EXPEDITIOUS, ESPECIALLY IN THE CONTEXT OF THE IMPLIED WARRANTY OF HABITABILITY DEFENSE

Landlord-tenant disputes are among the most-often-filed cases in our court system. The Judicial Council of California projected a workload of approximately 120,000 filings in 2019-2020. It further believed that it would not be unreasonable to estimate the number of cases to double (to 240,000), given a large number of rental households at risk. (*2021-22 Governor's Budget Proposal, Implementation of the Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020 (AB 3088)*).

The end of the COVID-19 pandemic and the expiration of the various tenant protection measures by state and local governments were expected to add further pressure on the courts. The impact and the details of the various COVID-19 ordinances and emergency orders are beyond the scope of this article. However, these added pressures make mediation even more attractive in these cases.

A brief history of landlord-tenant law in California

Statutes controlling landlord-tenant relationships are as old as the advent of the California Civil Code and Code of Civil Procedure in 1872. The right of a landlord to terminate a tenancy was stated in Civil Code § 789: "[a] tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than one month to be specified in the notice." (*Deering, James H., The Civil Code of State of California, Bancroft-Whitney Company (1897).*)

In 1873, more statutes were enacted to delineate the responsibilities of landowners and tenants, explicitly providing for "tenantable" premises, perhaps a precursor to the Implied Warranty of Habitability. For example, Civil Code sections 1941 and 1942 provided for each party's responsibility in maintaining the premises:

> [t]he lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine. (§ 1941), *and* [i]f within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so,

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> the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

(Civ. Code, §1942).

Therefore, as provided in the 1873 statutes, the sole remedy for tenants was to repair and deduct. Through the years, additional laws were enacted allowing for eviction proceedings, also called Unlawful Detainer actions.

Mediation/arbitration clauses in leases

With the proliferation of alternative dispute resolution methods in California, most (if not all) leases in California, whether commercial or residential, contain mediation/arbitration clauses. Some of these clauses are opt-in, and some are built-in, i.e., mandatory (e.g., California Association of REALTORS, Residential Lease or Month-to-Month Rental Agreement).

In many clauses, a prevailing party forfeits his/her/its right to recovery of attorney's fees if that party fails to mediate before proceeding to litigate the case. Eviction proceedings for non-payment of rent are typically exempt from such leases' mediation/arbitration requirements. However, there is no reason for landlords and tenants to refuse to engage in good faith mediation, even in eviction cases for non-payment of rent.

The implied warranty of habitability

While it is true that *all* landlord-tenant cases could benefit from mediation, the remainder of this article attempts to identify one of those areas, i.e., the "implied warranty of habitability" (Civ. Code, § 1941, et seq.), which has become an essential issue in residential tenancies in recent years. A tenant can use the breach of the implied warranty of habitability as an affirmative defense for non-payment of rent or as an independent action against a landlord for dilapidated conditions.

Before 1972, courts applied the long-established common law rule that a landlord owed no duty to a tenant to repair or maintain the premises. This common law rule went back to its agrarian origin when most leases were for agricultural land. A structure on the land was considered incidental to the land and capable of being repaired by a skilled tenant farmer. This was true despite the Civil Code, which already required "tenantable" premises. Courts, however, treated the issue as purely statutory and pointed to the existing repair-and-deduct statutes as the sole remedy for a tenant.

In *Hinson v. Delis* (1972) 26 Cal.App.3d 62, the Court of Appeal imposed an implied warranty of habitability on all residential landlords, thereby overruling the prevailing common law rule. Because the *Hinson* case was in the context of a tenant's action for declaratory relief, many trial courts chose to limit its application and would not permit breach of warranty as a defense in an unlawful detainer action brought for non-payment of rent.

The issue was finally resolved by the California Supreme Court in *Green v. Superior Court (Jack Sumski)* (1974) 10 Cal.3d 616, where a unanimous court ruled that the breach of the implied warranty of habitability could be raised as a defense in an action for non-payment of rent.

Green further held that the implied warranty of habitability "does not require that a landlord ensure that leased premises be in perfect, aesthetically pleasing condition, but that it did mean that bare living requirements must be maintained." The Court stated in most cases, substantial compliance with building and housing code standards materially affecting health and safety suffice to meet the landlord's obligation. It was clear that conditions partially or wholly created by the tenant would not be the landlord's responsibility.

Current version of Civil Code section 1941

The current version of Civil Code section 1941 (et seq.) is the controlling statute for habitability requirements. It states: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine." Additionally, relevant health and housing codes should be observed.

The following detailed list of lessor requirements for a dwelling unit is set out in Civil Code section 1941.1, as a floor for maintaining habitable conditions:

> (a) A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:
> (1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
> (2) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.
> (3) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
> (4) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.
> (5) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of

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installation, maintained in good working order.
(6) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under the control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.
(7) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.
(8) Floors, stairways, and railings maintained in good repair.
(9) A locking mail receptacle for each residential unit in a residential hotel, as required by Section 17958.3 of the Health and Safety Code.

Hybrid contract-tort damages and risks

Courts have held that different measures of damage recovery are available to a tenant in a habitability case. These include contract as well as tort damages. The *Green* case provided for recovery of contract damages: "'tenant's damages shall be measured by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition.'" (*Green*, 10 Cal.3d at 638.)

In *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, it was held that: "[u]nder the law in California today, a tenant, by pleading proper facts, may state a cause of action in tort against his landlord for failure to keep the premises in a lawful state of habitability." Therefore, the court created "[a tenant's] right to sue the landlord and his agents in tort for damages for mental distress and injury to personal property suffered as a result of the failure to maintain the premises." (*Id.* at p. 931.)

Per *Stoiber*, a tenant can sue its landlord in an independent action for habitability issues based on contract and tort theories and recover previously unavailable damages. These damages could include special damages (such as medical bills), general damages (mental distress, pain, discomfort, etc.), damages to personal property, and in the most extreme cases, punitive damages. Punitive damages are more probable in the so-called "slumlord" cases.

It, therefore, becomes quickly apparent that litigating a habitability case carries a tremendous risk, and the parties are well advised to attempt to manage that risk by engaging in mediation.

Mediating habitability cases

Insurance coverage

The existence of insurance coverage for a landlord is a vital issue in the context of mediating a habitability case. Many habitability cases are covered under a landlord's general liability insurance policy, even though the claim is a hybrid contract-tort claim. It should be noted, however, that not all damages are covered by general liability policies, e.g., mold, lead paint, statutory damages, rent reductions, attorney's fees, and punitive damages. Therefore, while insurance coverage could greatly help a landlord (as well as provide a reliable source of recovery for a tenant), exclusions from coverage should be carefully considered.

The following damages can be recovered: medical specials, loss of earnings, property damage, miscellaneous damages (pest control products, loss of food, washing expenses, cleaning products, etc.), emotional distress, and loss of consortium. The more detailed and well-documented damages are, the easier for an insurance carrier to evaluate a claim. Nothing is more problematic in mediating a habitability case than a tenant whose claim is not carefully presented and lacks proper documentation. Insurance company adjusters need to be able to document their decisions and justify them to their higher-ups. So, the more a tenant helps with documentation, the more likely it is for that adjuster to compensate the tenant.

Other factors considered by insurance companies in evaluating a habitability case are the length of tenancy, proof of notice to the landlord, whether the claimed tenants are the ones listed on the lease, tenant's documentation of issues, and whether the tenant cooperated with maintenance personnel or third-party vendors (e.g., was the unit properly prepped for pest control?).

Itemization of the damages is crucial because it makes determining coverage issues easier. So, for example, if certain damaged items are due to an uncovered event (e.g., mold), it is easier for the carrier to parse through the claim.

Items not covered by insurance

While a general liability policy may be obligated to provide a defense in a habitability case, it may reserve its right to decline indemnity coverage for those items of damages not covered in the policy, e.g., mold. This could present a complicated situation at the mediation.

The landlord and the insurance company inevitably become adversaries regarding non-covered damages. At this point, the insurance company may seek a contribution by the landlord to any discussed settlement amount. A landlord is advised to have their own counsel (*Cumis* or otherwise), separate from the insurance company-appointed defense counsel, to deal with the demand for contribution from the insurance company. The existence or lack of coverage is equally important to a claimant and their counsel because it could make the claim settlement more challenging.

Important factors in evaluating and mediating a habitability claim

Generally, the following are issues and documentation that insurance companies are concerned with when dealing with habitability cases: whether or not there is a rental agreement, photographs/videos of the interior and/or

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exterior of the subject property depicting the problems complained of, property damage estimates/costs, the existence of vermin, any insect bites or bodily injury issues, whether or not there has been written communication(s) with the landlord, and medical expenses (if any).

Also important is whether there has been coverage by multiple insurance companies over the period in question, what insurance companies refer to as "time on risk." There will then have to be a process by which the multiple insurance companies determine their contribution to any settlement with a claimant.

Although mediating a habitability claim may sound like a "run of the mill" personal-injury and/or property-damage case, it is not. Multiple issues come into mediating a habitability case, such as whether the tenant wishes to continue to remain in the premises, and on the flip side, whether the landlord wishes for the tenant to vacate, back-rent owed, and whether the parties are willing to enter into a mutual release. The above issues become even more complex in those cases where there are multiple tenants involved. The history between the parties also plays a significant role in attempting to resolve a habitability case. The parties become less flexible in negotiating a resolution if there has been bad blood between them.

Hyper-technical nature of statutes and strict contract interpretation

Legal professionals who practice in the landlord-tenant field are all too familiar with the hyper-technicalities of the statutes and their applications to each case. Courts require *strict* compliance with the statutes, not *substantial* compliance when dealing with eviction proceedings. For example, in the recent case of *Grp. XIII Props. v. Stockman*, 85 Cal.App.5th Supp. 1 (2022), the purchaser of a residential rental property brought an unlawful detainer action against a tenant for failure to pay rent. The property in question had a change of ownership and had changed management companies a couple of times after the tenant's occupancy of the premises. The manager was a resident manager and lived across from the tenant's unit. The tenant knew her and had delivered rent payments to her previously and knew her position as a manager of the premises. Although the new management companies had notified the tenant of the change of ownership and change in management at least twice and had provided the names and addresses of each, the tenant raised as an affirmative defense the owner's failure to comply with disclosure requirements of Civil Code section 1962 strictly. The tenant argued her position regarding non-compliance in a motion for nonsuit and then again in a motion for directed verdict, alleging that in violation of Civil Code section 1962 the notices failed to specify the times the management office was open, did not identify any person as an owner, manager, or agent, and did not identify the owner's agent for service of process, and did not provide the agent's name, telephone number, and usual street address.

Civil Code section 1962 requires certain disclosures by landlords or their agents: "(a) Any owner of a dwelling structure specified in Section 1961 or a party signing a rental agreement or lease on behalf of the owner shall do all of the following: (1) Disclose therein the name, telephone number, and usual street address at which personal service may be effected of each person who is: (A) Authorized to manage the premises. (B) An owner of the premises or a person who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for all notices and demands. … ."

The trial court ruled the new owner had *substantially* complied with section 1962 and denied the tenant's motions for nonsuit and directed verdict. Tenant appealed. The appellate division of the Los Angeles Superior Court reversed the trial court. The appellate court, quoting *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, stated: "…, the doctrine of substantial compliance does not apply at all when a statute's requirements are mandatory, instead of merely discretionary." Accordingly, the appellate court ruled that a successor owner, was precluded from serving a three-day notice to pay rent or quit or otherwise evicting a tenant for nonpayment of rent that accrued during the period of noncompliance by a successor owner or manager with this subdivision. This meant the new owner was barred from filing a complaint in unlawful detainer premised on a three-day notice to pay rent or quit, seeking the payment of back rent that accrued during the period of noncompliance.

Non-payment of commercial rent during COVID pandemic

In a recent case dealing with a commercial lease involving a fitness studio during the COVID-19 pandemic, which had forced the tenant to close its facilities, the tenant was sued by the landlord for non-payment of rent. The tenant asserted 37 affirmative defenses to the complaint, including the equitable doctrines of frustration of purpose, impossibility, and impracticability.

The tenant alleged that the essential purpose of the lease was for the tenant to operate a full-service health club and fitness facility in the premises, but it was impossible for it to do so for several months because of the COVID-19 pandemic and the resulting closure of the premises in response to government orders.

Landlord moved for summary judgment, alleging that the tenant had withheld more than eight months' rent. It argued that the tenant's failure to pay was not due to lack of funds and that the lease (including its force majeure provision) allocated the risk associated with the pandemic to the tenant and precluded the tenant's asserted defenses.

The trial court granted the landlord's motion for summary judgment, which the appellate court affirmed. (*SVAP III Poway Crossings, LLC v. Fitness International, LLC* (2023) 87 Cal.App.5th 882.) The court based its opinion largely on its conclusion that the purpose of the contract was not

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for the tenant to pay rent in exchange for the landlord providing the premises for a *particular* use. Rather, the contractual performance owed by the tenant was the payment of rent; the landlord's obligation was to provide possession of the premises; the tenant's use of the premises was not the obligation under the contract of the lease; and COVID-19 did not prevent tenant's performance of its obligation to pay rent.

The two cases above illustrate the difficulties faced by landlords, as well as tenants when dealing with statutory or contractual issues in the context of landlord-tenant litigation. In this author's opinion, it is, therefore, much more pragmatic to mediate cases such as the above rather than litigate.

Conclusion

In mediating residential landlord-tenant cases, one should always remember these are *people* cases. We are dealing with people's homes, where they live, where they seek comfort and rest, where they raise their children, and where they seek peace of mind. These become needs and expectations for a tenant. Therefore, any interference with these expectations becomes an interference with their lives. On the other hand, a rental property may be the economic lifeline for a retiree who depends on the rental income for their living expenses.

Therefore, every person comes into the mediation with their background, viewpoint, expectations, needs, requirements, and perhaps angsts. It is the job of a skilled mediator to recognize these differences and get the parties to acknowledge and understand each other's position to resolve the dispute.

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