

#50

6/10/68

Memorandum 68-56

Subject: Study 50 - Leases

Attached hereto (green pages) is a draft statute on leases that reflects the substance of the decisions and suggestions made at the last meeting. We suggest that you study the draft statute with care prior to the meeting. We plan to go through the statute, section by section, at the meeting.

Exhibit I (pink) is a bill on attorney's fees in contract actions generally. The bill has passed the Legislature and has been sent to the Governor.

Respectfully submitted,

John H. DeMouly
Executive Secretary

6856

EXHIBIT I

AMENDED IN SENATE MAY 10, 1968
AMENDED IN ASSEMBLY MARCH 27, 1968

CALIFORNIA LEGISLATURE—1968 REGULAR SESSION

ASSEMBLY BILL

No. 563

Introduced by Assemblyman Brown

February 14, 1968

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1717 to the Civil Code, relating to attorney's fees.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1717 is added to the Civil Code, to
- 2 read:
- 3 1717. In any action on a contract, where such contract
- 4 specifically provides that attorney's fees and costs, which are
- 5 incurred to enforce the provisions of such contract, shall be
- 6 awarded to one of the parties, the prevailing party, whether
- 7 he is the party specified in the contract or not, shall be en-
- 8 titled to *reasonable* attorney's fees in addition to costs and
- 9 necessary disbursements.
- 10 Attorney's fees provided for by this section shall not be sub-
- 11 ject to waiver by the parties to any contract which is entered

LEGISLATIVE COUNSEL'S DIGEST

AB 563, as amended, Brown (Jud.). Attorney's fees.
Adds Sec. 1717, Civ.C.

Declares that in actions on a contract where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to *reasonable* attorney's fees and bars waiver of such fees by parties to any contract entered into after effective date of this act.

Defines term "prevailing party."

Vote—Majority; Appropriation—No; Fiscal Committee—No.

AB 563

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- 1 into after the effective date of this section. Any provision in
- 2 any such contract which provides for a waiver of attorney's
- 3 fees is void.
- 4 As used in this section "prevailing party" means the party
- 5 in whose favor final judgment is rendered.

SECTIONS ADDED TO CIVIL CODE

§ 1951. "Rent" defined

1951. As used in Sections 1951.2 to 1952, inclusive, "rent" includes charges equivalent to rent.

§ 1951.2. Termination of real property lease; damages recoverable

1951.2. (a) Except as otherwise provided in Sections 1951.4 and 1951.6, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates and the lessor may recover from the lessee:

(1) The present worth of the amount of the unpaid rent which had been earned but had not been paid at the time the lease terminated;

(2) The amount by which the present worth of the unpaid rent which had not been earned at the time the lease terminated exceeds the portion of such amount that the lessee proves could have been or could be reasonably avoided; and

(3) Any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

(b) Reasonable efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's

right. to recover damages under this section. Unless the parties otherwise agree, if the lessor relets the property after the lease terminates under this section, he is not accountable to the lessee for any rent received from the reletting; but such rent, less the reasonable expenses of reletting, shall be offset against any amount sought to be recovered under this section.

(c) Nothing in this section affects the right of the lessor under a lease of real property to indemnification, or to specific or preventive relief, in any case where such remedy or relief is appropriate, whether or not the lease is terminated under this section.

§ 1951.4. Continuance of lease in effect after breach and abandonment

1951.4. (a) Unless the lessor has retaken possession of the premises, a lease of real property continues in effect after the lessee has breached the lease and abandoned the property and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease provides that it shall continue in effect notwithstanding breach and abandonment by the lessee and includes one or more of the following provisions:

(1) The lease permits the lessee to sublet the property to any person reasonably acceptable as a tenant to the lessor and does not set any unreasonable standards for the determination of whether a person is reasonably acceptable as a tenant or for such subletting.

(2) The lease permits the lessee to assign his interest in the lease to any person reasonably acceptable as a tenant by the lessor and does not set any unreasonable standards for the determination

of whether a person is reasonably acceptable as a tenant or for such assignment.

(3) The lease permits the lessee to sublet the property or to assign his interest in the lease if the consent of the lessor is obtained and provides that such consent shall not unreasonably be withheld.

(b) For the purposes of this section:

(1) Efforts by the lessor to maintain and preserve the property after the lessee has vacated the property do not constitute a retaking of possession by the lessor.

(2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease does not constitute a retaking of possession by the lessor.

(c) Nothing in this section affects the right of the lessor to elect to terminate the lease and recover damages under Section 1951.2.

§ 1951.6. Attorney's fees

1951.6. If the lease so provides, a lessor or lessee of real property may recover, in addition to any other relief or amount to which he may be entitled, reasonable attorney's fees incurred in any action in enforcing or defending his rights under the lease if he is the party in whose favor final judgment is rendered in the action. Section 1717 of the Civil Code applies to leases of real property.

§ 1951.8. Advance payments and deposits

1951.8. (a) As used in this section, "advance payment or deposit" means moneys paid upon the execution of a lease of real property, whether designated (1) as advance payment of rent, (2) as a bonus or consideration for the execution of the lease, (3) as liquidated damages, or (4) as a deposit to secure faithful performance of the terms of the lease.

(b) Any advance payment or deposit shall be applied toward any damages which are recovered by the lessor. If the lessee establishes that the amount of the advance payment or deposit exceeds the amount of damages that the lessor is entitled to recover, the excess may be recovered by the lessee.

§ 1952. Lessor relieved of obligations after retaking possession

1952. (a) Unless the parties otherwise agree, when the lessor of real property retakes possession of the property after the lessee has relinquished possession of the property to the lessor or after the lessee has breached the lease, the obligation of the lessor thereafter to perform his obligations under the lease is excused.

(b) Nothing in this section relieves the lessor of his obligation to mitigate the damages caused by the lessee's breach of the lease.

(c) Nothing in this section affects the right of the lessor to seek relief for the default of the lessee or to enforce any other provisions of the lease.

§ 1952.2. Effect on unlawful detainer, forcible entry, and forcible
detainer actions

1952.2. (a) Except as provided in subdivision (c), nothing in Sections 1951 to 1952, inclusive, affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

(b) The bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure does not affect the lessor's right to bring a separate action to recover damages under Section 1951.2, but no damages shall be recovered in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action.

(c) Notwithstanding the fact that the judgment referred to in Section 1174 of the Code of Civil Procedure does not declare the forfeiture of the lease, the lessor's right to damages after the lessor evicts the lessee is limited to the damages that the lessor is entitled to recover under Section 1951.2. Nothing in this subdivision affects the right of the lessor to obtain specific or preventive relief in any case where that relief is appropriate.

§ 1952.4. Leases executed before January 1, 1971

1952.4. Sections 1951 to 1952.2, inclusive, do not apply to:

- (a) Any lease executed before January 1, 1971.
- (b) Any lease executed on or after January 1, 1971, if the terms of the lease were fixed by a lease or other contract executed before January 1, 1971.

§ 1953. Natural resources agreement

1953. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of Sections 1951 to 1952.2, inclusive.

§ 1953.2. Lease purchase agreements of public entities

1953.2. Where an agreement for a lease of real property from or to any public entity or any nonprofit corporation whose title or interest in the property is subject to reversion to a public entity would be made invalid if any provision of Sections 1951 to 1952.2, inclusive, were applicable, such provision shall not be applicable to such a lease. As used in this section, "public entity" includes the state, a county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

CONFORMING AMENDMENT OF CIVIL CODE SECTION 3308

3308. (a) As used in this section, "rent" includes charges equivalent to rent.

~~(b) The parties to any lease of real or personal property may agree therein that if such~~ Unless the lease otherwise provides, if a lease shall be of personal property is terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee : ~~the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.~~

(1) The present worth of the amount of the unpaid rent which had been earned but had not been paid at the time the lease terminated;

(2) The amount by which the present worth of the unpaid rent which had not been earned at the time the lease terminated exceeds the portion of such amount that the lessee proves could have been or could be reasonably avoided; and

(3) Any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

(b) ~~The rights of the lessor under such agreement shall be cumulative to all~~ Nothing in this section precludes the lessor from resorting to any other rights or remedies now or hereafter given to ~~the lessor~~ him by law or by the terms of the lease .
~~;~~ ~~provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination.~~ ~~The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred.~~

SECTIONS TO BE ADDED TO CODE OF CIVIL PROCEDURE

§ 337.5. Damages recoverable upon abandonment or termination of written lease of real property

337.5. Where a lease of real property is in writing, no action shall be brought under Section 1951.2 of the Civil Code more than four years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

§ 339.5. Damages recoverable upon abandonment or termination of oral lease of real property

339.5. Where a lease of real property is not in writing, no action shall be brought under Section 1951.2 of the Civil Code more than two years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.