

Memorandum 76-23

Subject: Study 78.50 - Lessor-Lessee Relations (Unlawful Detainer Proceedings)

On January 16, 1976, the Commission considered Memorandum 76-11 relating to unlawful detainer, and approved in principle (with Commissioner Stanton dissenting) the codification of existing law which converts an unlawful detainer proceeding into an ordinary civil action for damages when the tenant surrenders possession before trial and allows the lessor thereafter to plead and recover damages for loss of future rent under Civil Code Section 1951.2. The attached staff draft of a recommendation relating to damages in actions for breach of lease is to effectuate that decision.

The Commission also directed that the staff give further consideration to the following matters:

1. Whether, after the tenant surrenders possession, the plaintiff may in some circumstances be required to join additional parties under existing rules of joinder and how the rights of such parties can be protected.
2. Whether the original complaint in unlawful detainer might be drawn to put the tenant on notice that damages for loss of future rent will be sought in the unlawful detainer proceeding if the tenant surrenders possession before trial, thereby obviating the need to amend to seek such damages.
3. Whether application of the contract concept of damages contained in Section 1951.2 to unlawful detainer actions would reallocate the burden of pleading and proof on the issue of mitigation of damages.

The Commission also expressed concern that to amend Section 1174 of the Code of Civil Procedure to incorporate the contract concept of damages might cause problems with respect to forcible entry and forcible detainer situations. The attached staff draft proposes to put the language in a new section of the Civil Code (proposed Section 1952.3), and not in the unlawful detainer statute, thus avoiding the difficulty. The other problems are discussed below.

Rules of Joinder in Actions for Breach of Lease

Under the rules of joinder applicable to unlawful detainer proceedings, "[n]o person other than the tenant of the premises and sub-tenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding" Code Civ. Proc. § 1164. Although the statute purports to say merely that a nontenant need not be joined, the judicial decisions have gone further and have developed the rule that a nontenant cannot be joined. See Chase v. Peters, 37 Cal. App. 358, 362, 174 P. 116, ___ (1918) (assignor not in possession held improper party in unlawful detainer).

If the action becomes converted to an ordinary action for damages, then the rules of joinder in civil actions generally become applicable. See Code Civ. Proc. §§ 379 (permissive joinder), 389 (compulsory joinder). A number of cases have held that, in actions involving parties to a lease, where a judgment against one party would jeopardize another's interest in the use of the leased land, the latter person is an indispensable party. See 3 B. Witkin, California Procedure, Pleading § 145, at 1819 (2d ed. 1971). Since, in an action brought under Civil Code Section 1951.2, there must be a finding that the lease has terminated before the

damages authorized by that section may be awarded, it would appear that a lessee not in possession is within the compulsory joinder statute as a person "so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest" Code Civ. Proc. § 389. The court must therefore determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." Id.

It therefore appears that the court now has the power under Section 389 to protect fully the interests of a lessee not a party to an unlawful detainer proceeding which becomes converted to an action for rent and damages.

Pleading to Afford Notice in Unlawful Detainer of Potential
Prospective Damage Claim in the Event of the
Tenant's Surrender of Possession

The damages authorized by Civil Code Section 1951.2 may be calculated (subject to the lessee's proof of avoidable loss) by reference solely to the lease. If a copy of the lease is attached to the unlawful detainer complaint, the lessor will have alleged all of the facts necessary to enable ascertainment of prospective damages. However, the unlawful detainer complaint must also allege the amount of rent or other damages then due. See Code Civ. Proc. §§ 425.10(b), 1177; Feder v. Wreden Packing & Provision Co., 39 Cal. App. 665, 673, 265 P. 386, ___ (1928); 3 B. Witkin, supra § 513, at 2168. When such amount is alleged, the plaintiff cannot recover a greater amount without first amending the complaint. See 3 B. Witkin, supra § 376, at 2040. If the lessor were to attempt to anticipate and avoid this requirement by alleging prospective

damages in the unlawful detainer complaint, that would be improper and subject to a motion to strike. M. Moskowitz, P. Honigsberg, & D. Finkelstein, California Eviction Defense Manual §§ 3.26-8.27, at 67 (1971).

The possibility appears to be ruled out that the lessor might allege that if the tenant were to vacate, then prospective damages will be sought. It has been said that the rule is "long established" that hypothetical pleading (if something is so, then something else follows) is not permitted. 3 B. Witkin, supra § 288, at 1963. It therefore appears, under current rules of pleading, that the only way the lessor can recover prospective damages in an action commenced as one for unlawful detainer and later converted to an action for rent and damages is to amend the complaint.

Burden of Proving That Rental Loss Is Avoidable

Prior to the 1970 legislation (Cal. Stats. 1970, Ch. 89), the lessor had no duty to mitigate damages. When the lessee surrendered possession of the premises, the lessor could either "accept" the surrender in which case the lessee's obligation to pay rent ceased, or could leave the premises unoccupied and sue for each installment of rent as it became due. 9 Cal. L. Revision Comm'n Reports 157-159 (1969). In the latter case, the lessor could relet the premises for the benefit of the lessee and thus minimize damages, but he was not required to do so. 3 B. Witkin, Summary of California Law, Real Property § 518(d), at 2192 (3th ed. 1973).

In unlawful detainer, "only those damages accruing during the actual period of unlawful detention are recoverable." Chase v. Peters, 37 Cal. App. 358, 360, 174 P. 116, ___ (1918)(emphasis in original). Accord, Roberts v. Redlich, 111 Cal. App.2d 566, 569, 244 P.2d 933, 935

(1952). The lessor cannot, of course, relet the premises during the detention period, and after the detention period ends there are no damages to mitigate. The mitigation question, therefore, never arises in unlawful detainer cases.

The mitigation question became meaningful under the 1970 legislation which moved away from real property concepts and toward contract concepts in dealing with leases. See 9 Cal. L. Revision Comm'n Reports 157-159 (1969). Civil Code Section 1951.2 assigns to the lessee the burden of proving that some or all of the lessor's claimed loss of rent could reasonably have been avoided. Since there was no preexisting rule applicable to landlord-tenant situations, the rule was transplanted from the analogous situation involving breach of an employment contract. See Erler v. Five Points Motors, Inc., 249 Cal. App.2d 560, 562-568, 57 Cal. Rptr. 516, ___ (1967); Comment to Civil Code § 1951.2. See generally Annot., 21 A.L.R.3d 534, 577 (1968)(split of authority in other jurisdictions on who has burden of proving avoidable loss in landlord-tenant cases).

Thus Section 1951.2 did not reallocate the burden of proof on the question of avoidable loss, but created a new rule in landlord-tenant cases.

Respectfully submitted,

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Staff Draft

RECOMMENDATION

relating to

DAMAGES IN ACTIONS FOR BREACH OF LEASE

A lessor who seeks to evict a lessee who has breached the lease may obtain possession of the premises in an unlawful detainer proceeding.¹ Unlawful detainer is a summary proceeding with its main object being restitution of the premises.² Incidental to restitution of the premises, unpaid rent and damages may be awarded up to the date of judgment.³ Damages accruing after judgment, however, are not recoverable in an unlawful detainer proceeding.⁴ The defendant's normal procedural rights are also restricted: For example, a cross-complaint is not allowed.⁵

Acting at the recommendation of the California Law Revision Commission,⁶ the Legislature in 1970 added Sections 1951 through 1952.6 to the Civil Code relating to leases.⁷ Under Section 1951.2, the lessor may

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1. See Code Civ. Proc. § 1174; 3 B. Witkin, Summary of California Law, Real Property § 529, at 2202 (8th ed. 1973). Possession may also be obtained in an action for ejectment or to quiet title, but these are rarely used to evict a tenant. M. Moskowitz, P. Honigsberg, & D. Finkelstein, California Eviction Defense Manual 4 (1971)[hereinafter cited as Moskovitz]. See also 3 B. Witkin, supra §§ 523-524, at 2198-2199.
 2. E.g., Markham v. Fralick, 2 Cal.2d 221, 227, 39 P.2d 804, ___ (1934); Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 721, 84 Cal. Rptr. 756, ___ (1970).
 3. Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52, ___ (1952); Moskovitz, supra § 13.33, at 125.
 4. E.g., Cavanaugh v. High, 182 Cal. App.2d 714, 722-723, 6 Cal. Rptr. 525, 530-531 (1960); Roberts v. Redlich, 111 Cal. App.2d 566, 569-570, 244 P.2d 933, 935 (1952).
 5. E.g., Knowles v. Robinson, 60 Cal.2d 620, 625, 387 P.2d 833, ___, 36 Cal. Rptr. 33, ___ (1963); Moskovitz, supra § 9.37, at 90.
 6. See 9 Cal. L. Revision Comm'n Reports 153-174 (1969).
 7. See Cal. Stats. 1970, Ch. 89.

under certain conditions recover damages for loss of future rent after breach of the lease by the lessee.⁸ However, this provision was not extended to unlawful detainer proceedings; subdivision (a) of Section 1952 provides in part that:

nothing in Sections 1951 to 1951.8, 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.

Thus, although prospective damages may be recovered in an action for damages,⁹ they may not be recovered in an unlawful detainer proceeding.¹⁰

However, if the tenant surrenders possession after commencement of an unlawful detainer proceeding, the need for a summary proceeding evaporates.¹¹ The action is converted into an ordinary one for damages,¹² and the restrictions on the defendant's procedural rights no longer apply.¹³ Since the action is no longer one for unlawful detainer, it seems clear that the language of subdivision (a) of Section 1952 (no effect on unlawful detainer) does not apply, and that the lessor may in a proper case plead, prove, and recover prospective damages under Section 1951.2.

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8. In order for the lessor to recover damages for loss of future rent under the lease, there must have been (1) breach by the lessee, (2) abandonment of the property by the lessee or termination by the lessor of the lessee's right to possession, and (3) a provision in the lease for the recovery such damages or, subject to any reasonable provisions of the lease, a reasonable, good faith effort by the lessor to mitigate damages. See Civil Code § 1951.2.
 9. Subdivision (b) of Civil Code Section 1952 provides that the bringing of an unlawful detainer action "does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8"
 10. See Note 4 supra.
 11. *Green v. Superior Court*, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, ___ n.18, 111 Cal. Rptr. 704, ___ n.18 (1974); *Moskovitz, supra* § 9.38, at 91. See *Union Oil Co. v. Chandler*, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970); *Servais v. Klein*, 112 Cal. App. 26, 36, 296 P. 123, 127 (1931).
 12. *Union Oil Co. v. Chandler*, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970).
 13. See, e.g., *Heller v. Melliday*, 60 Cal. App.2d 689, 697, 141 P.2d 447, 451-452 (1974); *Servais v. Klein*, 112 Cal. App. 26, 35-36, 296 P. 123, 127 (1931).

It has been suggested to the Commission that this apparent state of the law should be made explicit by statute. There is no sound reason to require the lessor to bring a separate action for prospective damages when the unlawful detainer proceeding has become converted to an ordinary action for damages. The Commission therefore recommends that a new section be added to the Civil Code to accomplish this purpose.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 1952.3 to the Civil Code relating to leases.

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

Civil Code § 1952.3 (added)

SECTION 1. Section 1952.3 is added to the Civil Code to read:

1952.3. (a) If the lessor brings a proceeding under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure and possession of the premises is no longer in issue because of surrender of possession by the defendant before trial, it may proceed as an ordinary civil action. The lessor may obtain the relief authorized by Section 1951.2 and any other relief to which he may be entitled. The defendant may establish all claims and defenses authorized by law.

(b) If the lessor seeks the damages authorized by paragraph (3) of subdivision (a) of Section 1951.2, the lessor shall first amend the complaint pursuant to Section 472 or 473 of the Code of Civil Procedure to state a claim for such relief.

Comment. Under existing law, if the tenant surrenders possession of the premises after commencement of an unlawful detainer proceeding, "the action thus becomes an ordinary one for damages." Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970). This is true so long as the surrender occurs "before the trial of the unlaw-

ful detainer action." Green v. Superior Court, 10 Cal.3d 616, 633 n.18, 517 p.2d 1168, ___ n.18, 111 Cal. Rptr. 704, ___ n.18 (1974). Accord, Erba Corp. v. W. & B. Realty Co., 255 Cal. App.2d 773, 778, 63 Cal. Rptr. 462, ___ (1967); Turem v. Texaco, Inc., 236 Cal. App.2d 758, 763, 46 Cal. Rptr. 389, ___ (1965). Thus the rules limiting the issues which may be litigated in the summary proceeding are no longer applicable. See, e.g., Heller v. Melliday, 60 Cal. App.2d 689, 697, 141 P.2d 447, 451-452 (1943); Servais v. Klein, 112 Cal. App. 26, 35-36, 296 P. 123, 127 (1931).

Section 1952.3 is added to codify the foregoing rules and to make clear that among the remedies available to the lessor when an unlawful detainer proceeding is thus converted are the damages authorized by Section 1951.2. This serves the salutary purpose of avoiding multiplicity of actions.

If at the time the tenant surrenders possession there are pending both an unlawful detainer proceeding and a separate action for damages under Section 1951.2 as authorized by Section 1952, the lessor must elect to seek such damages in one or the other but not both of such actions. See Code Civ. Proc. § 430.10 (objection to complaint will lie for another action pending between same parties on same cause of action).

Under subdivision (b), if the lessor seeks damages for loss of rent accruing after judgment, the lessor must first amend the complaint to state a claim for such relief. If the case is at issue, the lessor's application for leave to amend is addressed to the discretion of the court. See Code Civ. Proc. § 473. The court is guided by a "policy of great liberality in permitting amendments at any stage of the proceeding" 3 B. Witkin, California Procedure, Pleading § 1040, at 2618 (2d ed. 1971). If the lessor amends the complaint, the defendant's answer must be filed "within 30 days after service thereof or within the time allowed by the court." Code Civ. Proc. § 586. But see 3 B. Witkin, supra § 1036, at 2614 (original answer may suffice).