

Memorandum 77-78

Subject: Study 39.165 - Attachment (Unlawful Detainer Actions)

Is Attachment Available in Unlawful Detainer Actions?

The question has arisen whether attachment is available in an unlawful detainer action where there is an incidental claim for rent.

Subdivision (a) of Section 483.010 of the Code of Civil Procedure provides in part:

an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of such claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interests, and attorney's fees.

The question is whether an unlawful detainer action--which is an action for the summary recovery of possession of real property with incidental award of unpaid rent to the time of judgment--is one described in the language quoted above.

There is no doubt but that the Commission intended to permit an attachment for unpaid rent in an unlawful detainer action. An express decision to this effect is found in the February 1972 Minutes. However, it is not certain that this decision is clearly reflected in the statute.

Subdivision (d) of Section 483.010 provides that an attachment is not precluded because other forms of relief are demanded in the action:

(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

The Legislative Counsel has concluded that an attachment may be issued in an unlawful detainer action. The opinion relies on statements in Comments prepared by the Commission but fails to note that the statements are included in the official Comments. A copy of the Legislative Counsel opinion is attached as Exhibit 1.

Should the Attachment Law Be Clarified?

The clarification could be accomplished by an amendment of Section 483.010 in the bill on the Attachment Law currently in preparation

(relating to attachment of property subject to security interests). If the Commission desires to clarify this matter, the following amendment of Section 483.010 is suggested:

§483.010. Cases in which attachment authorized

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of such claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees.

(b) An attachment may not be issued on a claim which is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount for which such attachment may issue shall not exceed the lesser of the amount of such decrease or the difference between the value of the security and the amount then owing on the claim, or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

(c) If the action is against an individual, an attachment may be issued only on a claim which arises out of the conduct by the individual of a trade, business, or profession. An attachment may not be issued on a claim against an individual which is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the individual primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

(e) If the requirements of this section are satisfied, an attachment may be issued in an unlawful detainer action on a claim for rent due and unpaid.

The Comment to the section would point out in substance that subdivision (e) applies only to an incidental claim for nonpayment of rent for premises leased for business purposes and is intended to nullify the potential effect of decisions holding that unlawful detainer actions are actions for recovery of possession, the claim for rent being incidental to the main object. See, e.g., *Markham v. Fralick*, 2 Cal.2d 221, 227, 39 P.2d 804, 807 (1934).

Reconsideration of Policy

The Commission may want to review the use of attachment in unlawful detainer actions and consider the manner in which attachment would operate in unlawful detainer actions which are converted into ordinary civil actions for damages for breach of a lease pursuant to Civil Code Section 1952.3 (1977 Cal. Stats., Ch. 49, enacted on Commission recommendation). A copy of Section 1952.3 is in Exhibit 2.

General principles governing amount for which attachment may be issued. An attachment may be issued for the amount claimed by the plaintiff's claim which is in a "fixed or readily ascertainable amount" (Section 483.010(a)) less claims which would diminish the plaintiff's recovery (Section 484.020(a)). The "fixed or readily ascertainable amount" standard continues prior law. The following language from *Force v. Hart*, 205 Cal. 670, 673, 272 P. 583 (1928) is frequently quoted in the decisions:

It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite. The fact that the damages are unliquidated is not determinative. But the contract sued on must furnish a standard by which the amount due may be clearly ascertained and there must exist a basis upon which the damages can be determined by proof. [Citations omitted.]

In *Greenebaum v. Smith*, 51 Cal. App. 692, 694, 197 P. 675 (1921), the court held that

merely because the amount is uncertain, consisting of damages to be proven at trial, is no reason why an attachment may not issue where, as here, such damages are easily ascertainable according to fixed standards supplied by the contract or the law acting upon it.

See also *Bringas v. Sullivan*, 126 Cal. App.2d 693, 698-702, 273 P.2d 336 (1954); *Lewis v. Steifel*, 98 Cal. App.2d 648, 650, 220 P.2d 769 (1950).

Amount of attachment in unlawful detainer actions. Under former Code of Civil Procedure Section 537, subd. 4 (held unconstitutional in *Damazo v. MacIntyre*, 26 Cal. App.3d 18, 102 Cal. Rptr. 609 (1972) on the basis of *Randone v. Appellate Dep't*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)), a writ of attachment could be issued in an unlawful detainer action by the clerk based upon an affidavit. The amount for

which the writ was issued was the amount of "rent actually due and payable ... for the premises sought to be recovered" as shown in the verified complaint. Assuming that the lessor has not taken possession before judgment, the lessor could recover the amount of unpaid rent until the date of the trial, the findings, or the judgment. See Roberts v. Redlich, 111 Cal. App.2d 566, 569, 244 P.2d 933 (1952) and cases cited. Prospective damages may not be recovered. Id. at 569-70; Pfitzer v. Candeias, 53 Cal. App. 737, 740-41, 200 P. 339 (1921). While it is possible to recover damages occasioned by the detainer and punitive damages, in addition to rent, it would appear from the language of former Code of Civil Procedure Section 537 subd. 4 that an attachment could be issued only for the amount of unpaid rent up until the probable time of judgment (presumably plus costs and interest), subject to the qualification that the lessee is not liable for rent after the lessor has entered the premises for his own benefit. See Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52 (1952).

Under the Attachment Law, the amount of the attachment would not be specifically limited to rent. Although prospective damages would not be recoverable (unless the action is converted into an ordinary civil action), costs and attorney's fees otherwise recoverable may be included in the amount of the attachment pursuant to Section 482.110 and presumably, other types of damages could be included if the plaintiff satisfies the "fixed or readily ascertainable" standard of Section 483.010.

Amount of attachment in ordinary civil action for damages for breach of lease. The lessor should be able to obtain a writ of attachment for the amount of damages under the standards set forth in Civil Code Section 1951.2 (applicable to leases executed after June 30, 1971). See Exhibit 2.

Amount of attachment where unlawful detainer action converted into ordinary civil action. If the lessee delivers possession of the property to the lessor before judgment, the action becomes an ordinary civil action in which the lessor may amend the complaint to recover damages not recoverable in the unlawful detainer proceeding. See Civil Code Section 1952.3 in Exhibit 2. If new claims are made, the lessor will

have to amend the application for the right to attach order and writ of attachment in order to be able to attach a greater amount of property. The Attachment Law does not specifically provide for the situation where the complaint upon which the attachment is issued has been amended. The additional writs procedures assume that a new writ is needed which describes different property, but that the original right to attach order is sufficient. Under former law, which also ignored the situation of an amended complaint providing a different basis for attachment, it was held that the attachment affidavit could be amended to the same extent as a complaint and that a new ground for attachment may be substituted by way of amendment so long as it is based upon the same transaction. *Peninsula Properties Co., Ltd. v. County of Santa Cruz*, 34 Cal.2d 626, 631, 213 P.2d 489 (1950). This principle should apply equally under the Attachment Law.

Usefulness of attachment in unlawful detainer actions. We do not know how often attachment was used in unlawful detainer actions in pre-Randone days. Its use has, like all attachment, been greatly limited since the enactment of the noticed hearing requirements (other than in extraordinary circumstances) and the restriction of domestic attachment to commercial situations. Where the unlawful detainer action proceeds very quickly, there would not be time for issuance of a writ of attachment pursuant to the noticed hearing procedures. However, it is likely that the unlawful detainer situation satisfies the grounds for issuance of an ex parte writ--e.g., that there is a danger that property sought to be attached would be concealed or that other circumstances exist showing that great or irreparable injury would result if the matter were delayed to be heard on notice. See Section 485.010. Consequently, attachment should still be of some use in commercial cases.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

REPLY TO: Memorandum 77-78

EXHIBIT 1

#39.165

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JOINT LEGISLATIVE
AUDIT COMMITTEE
SELECT COMMITTEE ON
GENETIC DISEASES

Senate California Legislature

PAUL B. CARPENTER
SENATOR
37TH DISTRICT

October 20, 1977

John H. DeMouilly
California Law Revision Commission
Stanford Law School
Stanford, Calif. 94305

Dear Mr. DeMouilly:

It is my understanding that the Law Revision Commission is interested in a recent opinion prepared for me by the Office of Legislative Counsel on the subject of attachments and unlawful detainers. Enclosed is a copy for your information and analysis.

I would appreciate your insights especially should there be a need for remedial legislation.

Sincerely,



Paul B. Carpenter
Senator - 37th District

PBC:EWb

Enclosure

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Sacramento, California

October 14, 1977

Honorable Paul B. Carpenter
 1600 N. Broadway
 Suite 550
 Santa Ana, CA 92706

Attachment: Unlawful Detainer - #16229

Dear Senator Carpenter:

QUESTION

May an attachment be issued, consistent with the provisions of Section 483.010 of the Code of Civil Procedure, in an action for an unlawful detainer where there is an incidental claim for nonpayment of rent for commercial premises leased for business purposes?

OPINION

An attachment may be issued, consistent with the provisions of Section 483.010 of the Code of Civil Procedure, in an action for an unlawful detainer where there is an incidental claim for nonpayment of rent for commercial premises leased for business purposes.

ANALYSIS

Section 483.010 of the Code of Civil Procedure* defines the claims which are subject to the provisional remedy of attachment, as follows:

* All section references are to the Code of Civil Procedure.

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"(a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of such claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees.

"(b) An attachment may not be issued on a claim which is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount for which such attachment may issue shall not exceed the lesser of the amount of such decrease or the difference between the value of the security and the amount then owing on the claim, or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

"(c) If the action is against an individual, an attachment may be issued only on a claim which arises out of the conduct by the individual of a trade, business, or profession. An attachment may not be issued on a claim against an individual which is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the individual primarily for personal, family, or household purposes.

"(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded." (Emphasis added.)

Thus, except as otherwise provided by statute, before an attachment may be issued, there must be a claim for money and the claim must be based upon a contract.

The requirement of a claim based upon a contract, as expressed in subdivision (a) of Section 483.010, is susceptible of at least two constructions, each of which would result in opposite conclusions, in the context of the question which is the subject of this opinion. In this connection, the portion of Section 483.010 emphasized above by underlineation could be construed as requiring that the underlying cause of action include a claim for money based upon a contract or requiring that the underlying cause of action be based in contract.

If Section 483.010 required the underlying cause of action to be based in contract, an attachment may not be issued in an action for unlawful detainer. An action for unlawful detainer is one for recovery of possession of property and is not a contract action (see Sec. 1161, C.C.P.; see also, Witkin, California Procedure, Vol. 2, p. 1552). While an action for unlawful detainer has characteristics of a contract action, as, for example, by seeking termination of a lease and recovery of rent, the main purpose is the recovery of possession (Witkin, California Procedure, Vol. 3, p. 2164; Markham v. Fralick, 2 Cal. 2d 221, 226-227). Thus, if an attachment may only be issued properly in actions based upon a contract, an attachment could not properly be issued in an action for unlawful detainer.

However, such construction, in our opinion, is not the proper one, especially in view of the history behind Section 483.010.

In this regard, until 1972, former Section 537 expressly provided for the issuance of an attachment in an action for unlawful detainer where it appeared from the verified complaint that rent was actually due and payable from the defendant to the plaintiff for the premises sought to be recovered in the action. In 1972, (Ch. 550, Stats. 1972) such Section 537 was repealed, following the case of

Randone v. Appellate Department, 5 Cal. 3d 536 which declared the statute unconstitutional as being in violation of due process requirements. In its place, Section 537.1 was added to the Code of Civil Procedure. Section 537.1 deleted express reference to unlawful detainer actions and all other actions as the categories of actions in which an attachment properly could be issued and, instead, provided that an attachment could be issued if, among other requirements, the action was based upon the lease of real property. In other words, the underlying theory of a cause of action no longer controlled the issuance of an order of attachment. Such language in Section 537.1, in our opinion, was sufficiently broad to permit an attachment to be issued in unlawful detainer cases.

In 1973, the California Law Revision Commission published a tentative recommendation relating to prejudgment attachment. In the commission's comment pertaining to Section 483.010, (Reports, Recommendations and Studies, (1972-1973) Cal. Law Rev. Comm., Vol. 11, page 562), the commission expressly indicated that Section 483.010, as it read in the tentative recommendation, was intended to encompass each of the situations described in the pertinent portion of Section 537.1. Further, the commission stated that the term "contract" includes a lease of real property.

In other words, an attachment would be permissible in actions based on a lease of real property. Since the language of subdivision (d) of the section as quoted above, was part of the recommendations, (i.e., an attachment may issue whether or not other forms of relief are demanded), we think that an attachment would lie in an unlawful detainer action in the case at hand (see Ch. 1516, Stats. 1974).

The official comment to the actual recommendation of the commission relating to revision of the attachment law (Reports, Recommendations and Studies, Cal. Law Rev. Comm. (1975)) contains no similar indication of intent, or the lack of it, although the pertinent language in Section 483.010 is couched in terms substantially the same as in the earlier tentative draft (see Ch. 437, Stats. 1976). However, none of the cases or publications which contain a discussion of the legislation concerning attachment expressly or impliedly indicate that attachment is unavailable in an action for unlawful detainer (see, e.g., Great American Ins. Co. v. National Health Services, Inc., 62 Cal. App. 3d 785; Shaw,

Hooker & Co. v. Haisman, 59 Cal. App. 3d 262; Gill v. DeSanz, 52 Cal. App. 3d 457; Advance Transformer Co. v. Superior Court, 44 Cal. App. 3d 127; Comment, 4 Pacific Law Journal 146). This fact, together with the historical inclusion of unlawful detainer actions as among those in which an attachment may be issued, and the plausible construction of the term "contract" as relating to a claim for money, irrespective of the theory or nature of the underlying cause of action, rather than to the theory or nature of the underlying cause of action, and the language of the commission in its tentative draft, would, in our opinion, persuade a court to construe Section 483.010 as requiring that there be a claim for money based upon a contract in connection with any particular cause of action. Thus, it would be permissible under Section 483.010 to permit an attachment in an action for unlawful detainer where, ancillary to such action, there is an incidental claim for nonpayment of rent for commercial premises leased for business purposes.

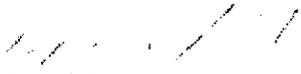
Such conclusion is consistent with the underlying policy of the 1972 legislation which formed the basic structure of the existing law, to permit creditors, in a situation where a business is failing and its managers refuse to recognize or acknowledge the inevitable failure of the business, to attach assets of the business to prevent further dissipation (see Memorandum in Support of S.B. No. 1048, printed as an appendix to Bill v. De Sanz, supra, at pp. 469-474).

We note that the multi-volume treatise entitled California Real Estate Law & Practice (Johnson & Moskovitz) expresses the same conclusion (Vol. 7, Sec. 210.51).

Accordingly, in our opinion an attachment may be issued, consistent with the provisions of Section 483.010, in an action for an unlawful detainer where there is an incidental claim for nonpayment of rent for commercial premises leased for business purposes.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By 
C. David Dickerson
Deputy Legislative Counsel

§ 1961.2 Termination of lease; remedy of lessor

(a) Except as otherwise provided in Section 1961.4, 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. Upon such termination, the lessor may recover from the lessee:

(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;

(3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and

(4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

(b) The "worth at the time of award" of the amounts referred to in paragraphs (1) and (2) of subdivision (a) is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The worth at the time of award of the amount referred to in paragraph (3) of subdivision (a) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

(c) The lessor may recover damages under paragraph (3) of subdivision (a) only if:

(1) The lease provides that the damages he may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss for the same period that the lessee proves could be reasonably avoided; or

(2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

(d) 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.

(e) Nothing in this section affects the right of the lessor under a lease of real property to indemnification for liability arising prior to the termination of the lease for personal injuries or property damage where the lease provides for such indemnification.

SEC. 2. Section 1052.3 is added to the Civil Code, to read:

1052.3.

(a) Except as provided in subdivisions (b) and (c), if the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action in which:

(1) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1051.2; but, if the lessor seeks to recover damages described in paragraph (3) of subdivision (a) of Section 1051.2 or any other damages not recoverable in the unlawful detainer proceeding, the lessor shall first amend the complaint pursuant to Section 472 or 473 of the Code of Civil Procedure so that possession of the property is no longer in issue and to state a claim for such damages and shall serve a copy of the amended complaint on the defendant in the same manner as a copy of a summons and original complaint is served.

(2) The defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he is entitled, whether or not the lessor has amended the complaint; but subdivision (a) of Section 420.30 of the Code of Civil Procedure does not apply unless, after delivering possession of the property to the lessor, the defendant (A) files a cross-complaint or (B) files an answer or an amended answer in response to an amended complaint filed pursuant to paragraph (1).

(b) The defendant's time to respond to a complaint for unlawful detainer is not affected by the delivery of possession of the property to the lessor; but, if the complaint is amended as provided in paragraph (1) of subdivision (a), the defendant has the same time to respond to the amended complaint as in an ordinary civil action.

(c) The case shall proceed as an unlawful detainer proceeding if the defendant's default (1) has been entered on the unlawful detainer complaint and (2) has not been quashed by an amendment of the complaint or otherwise set aside.

(d) Nothing in this section affects the pleadings that may be filed, relief that may be sought, or defenses that may be asserted in an unlawful detainer proceeding that has not become an ordinary civil action as provided in subdivision (a).

Approved and filed May 13, 1977.