

Memorandum 76-49

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

Attached to this memorandum is a revised staff draft of a recommendation relating to damages in actions for breach of lease for approval for distribution for comment. At the April meeting, the Commission made the following decisions which are incorporated in the revised draft:

1. The language "given up possession" should be substituted for "surrender of possession" in proposed Civil Code Section 1952.3 in view of decisions requiring the landlord's consent to a "surrender."

2. Proposed Section 1952.3 should be revised to make clear that, when an unlawful detainer proceeding becomes converted to an ordinary civil action by the defendant having given up possession, the defendant is not subject to the compulsory cross-complaint statute (Code Civ. Proc. § 426.30) unless the defendant subsequently files or amends the answer.

3. The Comment should indicate that among the effects of conversion of the action is loss of trial precedence (see Code Civ. Proc. § 1179a).

Respectfully submitted,

Robert J. Murphy III
Legal Counsel

TENTATIVE 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

Legislation recommended by the Law Revision Commission⁶ was enacted in 1970⁷ to add Sections 1951 through 1952.6 to the Civil Code relating

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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.

to leases. Under Section 1951.2, the lessor may under certain conditions recover damages for the rental loss for the balance of the term of the lease after the time of award.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 gives up possession after commencement of an unlawful detainer proceeding, the need for a summary proceeding no longer exists.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.

8. The lessor may only recover the amount by which the present value of the unpaid rent for the balance of the term after the time of the award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss as could reasonably have been avoided. In order for the lessor to recover such damages, there must be (1) a breach by the lessee, (2) either abandonment of the property by the lessee or termination by the lessor of the lessee's right to possession, and (3) either a provision in the lease for the recovery of such damages or, subject to any limitations in the lease, a reletting of the property by the lessor prior to the time of the award of the damages. See Civil Code § 1951.2, set out in the Appendix to this Recommendation.
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).

The Commission recommends that this apparent state of the law be made explicit by statute since 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. If the lessor intends to seek prospective damages, however, the Commission recommends that the lessor be required to amend the complaint to put the defendant on notice that such relief will be sought. The Commission also recommends that the statute recognize the defendant's right to seek affirmative relief and assert all defenses after the action has been thus converted and make clear that, when the defendant has given up possession after having filed an answer, the compulsory cross-complaint statute¹⁴ does not apply unless the answer is amended.

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 an unlawful detainer proceeding and possession of the property is no longer in issue because the defendant has given up possession before trial, the case may proceed as an ordinary civil action.

(b) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1951.2. If the lessor seeks to recover damages described in 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.

14. See Code Civ. Proc. § 426.30(a).

(c) The defendant may seek any affirmative relief, and assert all defenses, to which he is entitled. If the defendant gives up possession of the property after the defendant's answer has been filed, the provisions of subdivision (a) of Section 426.30 of the Code of Civil Procedure shall not apply unless the defendant amends the answer.

Comment. Subdivision (a) of Section 1952.3 codifies case law to the effect that, if the tenant surrenders possession of the property 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 unlawful detainer action." Green v. Superior Court, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, ___ n.18, ___ Cal. Rptr. ___, ___ 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 designed to preserve the summary nature of the proceeding are no longer applicable. See, e.g., Cohen v. Superior Court, 248 Cal. App.2d 551, 553-554, 56 Cal. Rptr. 813, ___ (1967) (no trial precedence when possession not in issue); Heller v. Melliday, 60 Cal. App.2d 689, 696-697, 141 P.2d 447, 451-452 (1943) (cross-complaint allowable after surrender); Bell v. Haun, 9 Cal. App. 41, 97 P. 1126 (1908) (defendant not in possession entitled to same time to answer as in civil actions generally). The limitation of subdivision (a) to unlawful detainer proceedings is not intended to preclude application of the rule to forcible entry or forcible detainer cases.

Subdivision (b) makes clear that, when the statutory conditions for the application of Section 1951.2 are met, the damages authorized by that section are among the remedies available to the lessor when an unlawful detainer proceeding has been converted to an ordinary civil action. This serves the salutary purpose of avoiding multiplicity of actions. The statutory conditions for the application of Section 1951.2 are that there be a lease, breach of lease by the lessee, and either abandonment by the lessee before the end of the term or termination by the lessor of the lessee's right to possession. Civil Code § 1951.2(a).

If damages for loss of rent accruing after judgment are sought by the lessor pursuant to paragraph (3) of subdivision (a) of Section 1951.2, the additional conditions of subdivision (c) of that section must be met. And, if the lessor seeks such damages, the second sentence of subdivision (b) of Section 1952.3 requires the lessor to 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 has a right to answer "within 30 days after service thereof" or within such time as the court may allow. Code Civ. Proc. §§ 471.5, 586. Subdivision (c) makes clear that the defendant may assert a cross-complaint, may plead any defenses to the lessor's action for damages, and, where the defendant surrenders possession after the answer has been filed, is not obliged to "allege in a cross-complaint any related cause of action" (Code Civ. Proc. § 426.30) unless the answer is in fact amended.

APPENDIX

Civil Code § 1951.2

§ 1951.2 Termination of lease; remedy of lessor

(a) Except as otherwise provided in Section 1951.4, 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 retakes the property prior to the time of award and proves that in retaking 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.

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May 12, 1976

John H. DeMouilly, Executive Secretary
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Re: Study 75.80 - Lessor-Lessee Relations (Unlawful Detainer
Proceedings - Memorandum 76-49 (4-30-76)

Dear Mr. DeMouilly:

Thank you for the copies of the above-referenced materials.

This most-recently revised draft (Tentative Recommendation relating to Damages in Actions for Breach of Lease, pp. 3-4) resolves several problems which Mr. Young and I had perceived.

Nevertheless, I believe that one further modification should be made to clarify proposed Section 1952.3 of the Civil Code:

The last sentence of subsection (c) should read "If the defendant gives up possession of the property after the defendant's answer has been filed, the provisions of subdivision (a) of Section 426.30 of the Code of Civil Procedure shall not apply unless the defendant, after giving up possession, amends the answer in response to an amended complaint filed pursuant to subdivision (b) of this section."

This modification is consistent with the intent of the subsection and eliminates possible interpretation that the compulsory cross-complaint section would apply whenever the defendant has amended the answer regardless of when such amendment occurred and regardless of the relationship of such amended answer to the subject matter of proposed Section 1952.3 of the Civil Code.

Thank you in advance for your courtesy and consideration.

Sincerely,

Thomas W. Pulliam, Jr.
Thomas W. Pulliam, Jr.