

Memorandum 77-7

Subject: Study 78.50 - Unlawful Detainer Proceedings

Assembly Bill 13 was introduced to effectuate the Commission's recommendation relating to damages in action for breach of a lease. The bill has passed the Assembly and is pending before the Senate Judiciary Committee. A copy of the bill in the form in which it passed the Assembly is set out in Exhibit 1.

Garrett Elmore prepared an analysis of AB 13 for the State Bar Committee on the Administration of Justice. Although the State Bar Committee has not yet considered the analysis, the staff believes that it should be considered by the Commission because the bill will soon be set for hearing by the Senate Judiciary Committee. A copy of the analysis is set out as Exhibit 2.

Staff Suggested Revision of Civil Code Section 1952.3

Taking into account the problems raised by Mr. Elmore and suggestions from other sources, the staff suggests that Section 1952.3 as proposed to be added to the Civil Code by AB 13, be revised as follows:

1952.3. 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 surrendered to the lessor before ~~trial~~ ~~(a)~~ The case may proceed as trial, the case becomes an ordinary civil action, action in which:

~~(b)~~ (a) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1951.2 ~~or~~ if ; but, 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 to state a claim for such damages .

~~(c)~~ (b) 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 426.30 of the Code of Civil Procedure does not apply unless, after giving up possession of the property, the defendant (1) files a cross-complaint or (2) files an answer or an amended answer in response to an amended complaint filed pursuant to subdivision ~~(b)~~ (a) .

Comment. [Only technical changes are required to the Comment. See Exhibit 3.]

Staff Suggested Amendment to Civil Code Section 1952

To clarify the relationship of subdivision (b) of existing Civil Code Section 1952 (referring to an unlawful detainer proceeding) to proposed Section 1952.3, the staff recommends that subdivision (b) of Section 1952 be revised to read:

(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, whether or not such action becomes an ordinary civil action as provided in Section 1952.3, does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8, 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.

Comment. The language added to subdivision (b) of Section 1952 makes clear that the conversion of an unlawful detainer proceeding to an ordinary action for damages (see Section 1952.3) does not eliminate the lessor's election to seek the remedies afforded by Sections 1951.2, 1951.5, and 1951.8 in a separate action, whether or not the lessor prosecutes the unlawful detainer proceeding to judgment.

Mr. Elmore has raised a number of other problems which the staff has not dealt with above. These problems are discussed in the order they are presented by Mr. Elmore.

1. Mr. Elmore suggests that the introductory paragraph of proposed Section 1952.3 be amended to read: "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 surrendered to the lessor after commencement of the proceeding before trial" The staff recommends against adoption of this suggestion. It may be difficult or impossible for the lessor to determine exactly when the defendant has given up possession, and if the defendant has given up possession prior to the filing of the unlawful detainer complaint, there is no sound reason why the lessor should be required to dismiss the unlawful detainer proceeding and file a new action for damages. A main purpose of the proposed legislation is to avoid such a multiplicity of actions.

2. Mr. Elmore raises the question whether the language of proposed Section 1952.3 allowing the lessor to "obtain any relief to which he is entitled" would permit the lessor to elect to treat the lease as breached

but continuing under Civil Code Section 1951.4 and to collect rent as it becomes due under the lease. Under Sections 1161 and 1174(a) of the Code of Civil Procedure, the lessor may require the lessee to cure the breach or surrender possession of the property without declaring a forfeiture of the lease. Before the enactment of Civil Code Sections 1951.4 and 1952 in 1970, the lessor could under such circumstances obtain in an unlawful detainer action a judgment for restitution of the premises without forfeiture of the lease and recover in a separate action rental installments becoming due after judgment. See Golden State Mutual Life Insurance Co. v. Frankfurt, 210 Cal. App.2d 223, 26 Cal. Rptr. 444 (1962).

Under Section 1951.4, however, the lessor may now recover "rent as it becomes due under the lease" only if the lease so provides and the lessor "does not terminate the lessee's right to possession." Although the lessor may terminate the lessee's right to possession without declaring a forfeiture of the lease (Code Civ. Proc. § 1174(a)), the very purpose of an unlawful detainer suit is to recover possession, and an unlawful detainer suit may not be successfully maintained unless the lessor has demanded possession in unequivocal terms. Horton-Howard v. Payton, 44 Cal. App. 108, 111-115, 186 P. 167 (1919). See also Neuhaus v. Norgard, 140 Cal. App. 735, 35 P.2d 1039 (1934) (notice to cure breach or surrender possession or that lessor will commence legal action followed by unlawful detainer suit operates to terminate lease). It thus appears that, when an unlawful detainer suit is commenced after proper notice has been given to the lessee, the lessee's right to possession has been terminated within the meaning of Section 1951.4(b), and the lessor may no longer recover rent as it becomes due. This was the conclusion we reached in our original memorandum on this subject. See Memorandum 76-11, at 3 n.2. See also Civil Code § 1952(c) (possession by lessor pursuant to unlawful detainer judgment precludes relief under Section 1951.4 unless court relieves tenant against forfeiture).

The staff recommends against further revision of the bill or Comment to deal with this question since it is collateral to the purpose of the bill.

Mr. Elmore asks why proposed Section 1952.3 makes the compulsory cross-complaint statute (Code Civ. Proc. § 426.30) inapplicable to the defendant unless he files an "answer" as opposed to a demurrer. This is because the compulsory cross-complaint statute should not be made applicable to the defendant until he has had and foregone the opportunity to "allege in a cross-complaint any related cause of action." At the demurrer stage, such a pleading would be premature.

Mr. Elmore suggests that the proposed statute make clear that the defendant has the right to file a cross-complaint when the proceeding becomes an ordinary civil action, whether or not the plaintiff has amended the complaint. This is accomplished by the recommended addition to the last subdivision of Section 1952.3 above.

3. Mr. Elmore raises the question whether the provisions of Section 1952(b) (unlawful detainer suit does not affect lessor's right to bring separate action for damages under Section 1951.2) continue to apply after the unlawful detainer proceeding has become converted to an ordinary civil action. That the lessor retains this election will be made clear by the recommended amendment to Section 1952(b) above.

4. Mr. Elmore asks whether there may be a need for special provisions concerning transfer of the case to another court when, for example, the unlawful detainer complaint has been filed in the municipal court and the lessor amends the complaint to seek increased damages which exceed the court's jurisdiction. Under existing rules, the court which is thus ousted of jurisdiction must transfer the case to a court with jurisdiction. 1 B. Witkin, California Procedure, Jurisdiction § 275(1), at 814 (2d ed. 1970). Accordingly, the staff recommends no amendment to deal with this question.

Respectfully submitted,

Robert J. Murphy, III
Staff Counsel

Memo 77-7 EXHIBIT 1
AMENDED IN ASSEMBLY FEBRUARY 14, 1977
AMENDED IN ASSEMBLY JANUARY 24, 1977

CALIFORNIA LEGISLATURE--1977-78 REGULAR SESSION

ASSEMBLY BILL

No. 13

Introduced by Assemblyman McAlister

December 7, 1976

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

LEGISLATIVE COUNSEL'S DIGEST

AB 13, as amended, McAlister. Leases: damages.

Existing case law provides that if the tenant gives up possession of real property after commencement of an unlawful detainer proceeding, the action becomes an ordinary civil action for damages.

This bill codifies the above case law *where possession of the property has been surrendered to the lessor before trial*.

This bill also specifies that among the remedies available to a lessor when an unlawful detainer proceeding has been converted to an ordinary civil action are the damages authorized by statute if (1) a lessee breaches the lease and abandons the property before the end of the term or if (2) his right to possession is terminated by the lessor because of a breach. This bill permits the recovery of damages for the amount by which 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 only if the lessor first amends his complaint.

This bill also specifies that the defendant in such an action may cross-complain and may plead any defenses to the lessor's action for damages. It also provides that the defendant does not waive any related cause of action he has against the plain-

tiff unless the defendant after giving up possession of the property either files a cross-complaint or files an answer or amended answer in response to the plaintiff's amended complaint.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

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

3 1952.3. If the lessor brings an unlawful detainer
4 proceeding and possession of the property is no longer in
5 issue because ~~the defendant has given up possession~~
6 *possession of the property has been surrendered to the*
7 *lessor before trial:*

8 (a) The case may proceed as an ordinary civil action.

9 (b) The lessor may obtain any relief to which he is
10 entitled, including, where applicable, relief authorized
11 by Section 1951.2. If the lessor seeks to recover damages
12 described in paragraph (3) of subdivision (a) of Section
13 1951.2, the lessor shall first amend the complaint pursuant
14 to Section 472 or 473 of the Code of Civil Procedure.

15 (c) The defendant may, by appropriate pleadings or
16 amendments to pleadings, seek any affirmative relief,
17 and assert all defenses, to which he is entitled, but
18 subdivision (a) of Section 426.30 of the Code of Civil
19 Procedure does not apply unless, after giving up
20 possession of the property, the defendant (1) files a
21 cross-complaint or (2) files an answer or an amended
22 answer in response to an amended complaint filed
23 pursuant to subdivision (b).

Note: Form is adapted to Legislative Representative Reporting Form

CAJ Member/Advisor's Report on Legislative Bill

By: G.H. Elmore

Bill Number: A.B. 13

Date: 2/1/77

A. Yes. The bill is in CAJ's field of interest.

B. The purpose of this bill, sponsored by the Law Revision Commission, is to provide clarification of the rights of a plaintiff-landlord, and to provide procedural detail for both parties, in the following situation: Plaintiff-landlord brings an unlawful detainer proceeding; after it has been filed, the defendant-tenant abandons or surrenders possession. Under decisional law, it appears that in this situation, though the main purpose of the proceeding -- recovery of possession -- is no longer present, the defendant-tenant may cross complain and the remaining issues (rent due, tenant's rights in a security deposit, and attorney fee liability, for example) will be determined by continuing the action in the same manner as a civil action. Limited research does not disclose a case in which the plaintiff-landlord was permitted to amend the complaint and seek to recover damages for breach of lease. That he should have the right appears to follow, if the defendant-tenant is permitted to cross complain against him. See Union Oil Co. v. Chandler, 4 CA3d 716, 721; Servais v. Klein, 112 Cal.App. 26, 35; Heller v. Melliday, 60 CA2d 689, 696.

C. The bill recognizes the right of the plaintiff-landlord to pursue any other right to relief which he may have, including the right to sue for "breach of lease." (CC §1951.2 provides for recovery generally of the worth of the lease, if the lease has appropriate provisions.) An amended complaint would be required. The defendant-tenant's right to cross complain is recognized, though there may be some question as to broadness of wording. Technical wording is added because of the general application or possible application of CCP §426.30 re compulsory cross complaints.

D. Recommend support, if amended. The bill is not drawn with clarity, in the detail wording. Further, there appear to be possible conforming changes required in adjoining code sections. See Exhibit A-1 attached. NOTE: This analysis is made without benefit of the Law Revision's official comments. The latter possibly would resolve some of the ambiguities in the attached list.

E. A statutory clarification is desirable, to avoid case by case decisions as to how the procedure operates. On principle, as the present case law indicates, an independent action should not be required, once the "possession" point has been mooted by abandonment or surrender.

List of Amendments For Consideration -- A.B. 13

1. Bill, p. 2, l. 6. Insert: "after commencement of the proceeding" before the words "before trial." If the tenant is not in possession at commencement of the unlawful detainer suit, that is another situation.

2. Bill, p. 2, subd. (b). This subdivision seems loosely drawn in referring to "any relief to which (landlord) is entitled, including . . . Section 1951.1." Is there an unresolved question of whether the landlord may elect to treat the lease as breached but as continuing -- an option provided by CC 1951.4? Also CCP, 1952(c) provides in substance that until there is a "judgment" in an unlawful detainer action, the landlord may elect to claim damages for breach under the continuing lease theory of § 1951.4. The question posed: What is the effect of a judgment in favor of the landlord for accrued rent, for example, if in the fact situation here involved, the premises have been abandoned or surrendered? In other words, should the bill or a comment clarify these matters? The second sentence in subd. (b) re compulsory cross complaints is difficult to follow. What is the significance of an "answer" being filed as opposed to a demurrer? Finally, the tenant's right to ask affirmative relief is not stated in very clear terms. It is believed case law permits a cross complaint against a third person. The right to cross complain in question should exist whether or not plaintiff has amended his complaint. This may be the meaning, but need for court interpretation should be avoided.

3. Other code sections. Should § 1952(b) be changed? It refers to the landlord's right to bring an independent suit. The policy question is: May the landlord use the new procedure (going forward with the unlawful detainer suit) at his option, or is the new procedure the sole remedy?

4. Is there any need for provisions on transfers to another court, if the plaintiff-landlord amends and seeks damages for breach of lease. For example, jurisdiction may be originally in the municipal court (based on the accrued rent claimed). If the

landlord amends and seeks the "worth of the lease" damages, the amount probably will exceed the municipal court jurisdiction.

NOTE: The foregoing list is not intended as a list of required changes; however, the points should be brought to the attention of the Law Revision Commission or Mr. DeMouilly.

EXHIBIT 3

Comment. The introductory clause of Section 1952.3 codifies prior case law. If the tenant gives up 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 only where possession is given up "before the trial of the unlawful detainer action." *Green v. Superior Court*, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, 1179 n.18, 111 Cal. Rptr. 704, 715 n.18 (1974). *Accord*, *Erba Corp. v. W. & B. Realty Co.*, 255 Cal. App.2d 773, 778, 63 Cal. Rptr. 462, 465 (1967); *Turem v. Texaco, Inc.*, 236 Cal. App.2d 758, 763, 46 Cal. Rptr. 389, 392 (1965). In this situation, 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, 815-816 (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 Section 1952.3 to unlawful detainer proceedings is not intended to preclude application of the rule stated in the introductory clause in forcible entry or forcible detainer cases.

Subdivision (a) 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. The subdivision serves, among other purposes, 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). The lessor is not required to seek such damages in the unlawful detainer proceeding which has been thus converted, but may elect to recover them in a separate action. See Civil Code § 1952(b).

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 (a) 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 (b) makes clear that the defendant may cross-complain and may plead any defenses to the lessor's action for damages. However, under subdivision (b), the defendant is not obliged to "allege in a cross-complaint any related cause of action" (Code Civ. Proc. § 426.30) unless, after giving up possession of the property, the defendant files a cross-complaint or files an answer, or an amended answer, in response to the amended complaint. This will protect the defendant against inadvertent loss of a related cause of action.