2003

Retaliatory withdrawals from rental housing market: Drouet v Superior Court, 2003

Roger Bernhardt
Golden Gate University School of Law, rbernhardt@ggu.edu

Retaliatory withdrawals from rental housing market: *Drouet v Superior Court,* 2003

Roger Bernhardt

In unlawful detainer action, landlord's bona fide intent to withdraw property from rental market under Ellis Act will defeat statutory defense of retaliatory eviction.

Drouet v Superior Court (2003) 31 C4th 583, 3 CR3d 205

Drouet (Landlord) owned a two-unit apartment building in San Francisco, which has a municipal rent control ordinance. Over the years, Landlord and the Tenants of one unit had conflicts involving the tenancy. In 1999, Landlord began Ellis Act (Govt C §§7060–7060.7) proceedings for the building. Under the Ellis Act, a residential landlord in a rent control jurisdiction may go out of the residential rental business by withdrawing the rental property from the market, and may recover possession of the property by bringing an unlawful detainer to evict the tenants. Landlord complied with all the procedures and served Tenants with written notice terminating the tenancy and a 60-day notice to quit. Tenants did not quit and Landlord filed a complaint for unlawful detainer. Tenants answered and alleged four affirmative defenses, including retaliatory eviction under CC §1942.5. After Landlord moved for summary adjudication on each of the defenses, the trial court granted the motion, in part, but denied it with respect to retaliatory eviction without considering whether Landlord's invocation of the Ellis Act was bona fide. The appellate division of the superior court granted Landlord a writ of mandate and the court of appeal agreed, holding that in "unlawful detainer proceedings properly commenced under the Ellis Act, a tenant may not raise an affirmative defense of retaliatory eviction to prevent displacement."

The California Supreme Court reversed, holding that a tenant may raise the statutory defense of retaliatory eviction in unlawful detainer proceedings brought under the Ellis Act—but the landlord's bona fide intent to withdraw the property from the rental market under the Act defeats the defense of retaliatory eviction. The court stated that, on remand, the superior court must consider whether Landlord had asserted a bona fide intent to withdraw the property and, if so, whether Tenants had controverted that intent.

The court explained that under the Ellis Act a residential landlord cannot be compelled to continue to offer accommodations in the property. However, the Act specifically states that it does not supersede §1942.5. Govt C §7060.1(d). Therefore, the court had to harmonize Landlord's right to withdraw his property from the rental market with the statutory defense of retaliatory eviction by construing the two statutes together. The court determined that permitting a landlord to invoke in good faith his or her right to withdraw property from the rental market would not replace, set aside, or annul §1942.5, explaining that a landlord's withdrawal of property from the rental market under the Ellis Act constituted an exercise of rights under a law pertaining to the hiring of property as specifically allowed by §1942.5(d).

The court then rejected both Landlord's argument that once the landlord has complied with the Act's procedural requirements there can be no defense of retaliatory eviction, and Tenants' argument that Landlord still had to demonstrate an absence of retaliatory motive to prevail in the

unlawful detainer action. The court instead held that landlords must assert their invocation of the Ellis Act "in good faith" (31 C4th at 596; see §1942.5(e)):

[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—*i.e.*, a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence.

Therefore, the court concluded that a landlord may go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord also has the bona fide intent to go out of business.

Justice Brown concurred, writing separately to express her understanding on three points the superior court will have to consider on remand:

1. Landlord's filing of a notice of intent to withdraw his property from the rental market, as required by the San Francisco Municipal Code, creates a nonstatutory rebuttable presumption that Landlord's intent is bona fide.

2. Tenants will, therefore, bear the burden of producing evidence sufficient to overcome this presumption, *i.e.*, sufficient to establish that Landlord intends to re-rent the property.

3. Landlord's motive in withdrawing his property from the rental market is irrelevant.

Justice Moreno, joined by Justices Kennard and Werdegar, in dissent opined that nothing in the language of the Ellis Act or the statutes governing the defense of retaliatory eviction permits a landlord to evict tenants under the Ellis Act for a retaliatory purpose.

THE EDITOR'S TAKE: It is inevitable that when you have two statutes each deferring to the other, as the Ellis Act and the retaliatory eviction code section do, a court has no real guidance on what to do, and any outcome is going to be arbitrary. I think the court of appeal was more candid than the supreme court in admitting that it was making a de facto policy decision when it decided this case. The high court's purported reconciliation of the two statutes can hardly to be said to come from their plain language, as the court's 4–3 split shows.

From a practical point of view (rather than from a policy level or claim of pretended statutory interpretation), the majority decision certainly leads to workable results; indeed, far more workable than the minority outcome would have produced. A landlord who has tired of hearing and responding to his tenant's complaints will rarely be able to show that his motive for withdrawing his property from the rental market was not retaliatory. Even if the decision was not taken in order to "get even" with the tenant, if the decision was made in response to the tenant's behavior, it might well qualify as retaliatory. Thus, the majority opinion lifts a relatively impossible evidentiary burden off the landlord's back by not treating him as retaliatory just because he concluded that it wasn't worth staying in the rental business in light of his tenant's demands.

The new test imposed on a landlord should be easy to meet (and stupid to try to avoid). She need merely show a bona fide intent to withdraw her building from the rental market.

The fact that she probably also intends to sell it thereafter, as an empty, *i.e.*, untenanted, building should not impair her intent to withdraw, since selling and renting clearly constitute different activities and markets. A landlord could sell her units even while rented—thereby preserving the tenancies—or she can empty the building out (under this decision) and then hope to sell it empty. As a result, the population of potential purchasers may be reduced, because they cannot immediately put the property back into the rental market. However, in this case, the property was a two-unit building and it might be quite attractive to two tenants looking to use the tenancy-in-common route as their escape into ownership. Similarly, a single family trying to get out of the rental market may find the property attractive since, even with the costs of remodeling to convert two units into one single-family house, the resulting property may indeed, on resale, command a far higher price than a tenanted two-unit in a rent-controlled market such as San Francisco. —*Roger Bernhardt*