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Uncertain Dangers in Unlawful Detainers

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Gill Petrolium v Hayer

The unlawful detainer action constitutes an essential remedy for landlords, given that our public policy now effectively prohibits all forms of self-help eviction against defaulting tenants. However, this remedy has the downside effect of heavily complicating how tenants are to negotiate with their landlords over honest disputes, because it raises the stakes so high for them if they turn out to be on the wrong side of the dispute. With unlawful detainer in the picture, the playing field is not level, as *Gill Petrolium, Inc. v Hayer* (2006) 137 CA4th 826, 40 CR3d 648, reported at p 276, shows.

In *Gill*, the parties to a market/gas station lease disagreed over who was required to pay the quarterly underground storage tank fees the state was demanding. Outside the landlord-tenant context, when two sides quarrel over an issue like that, the one who actually pays the fee, or is forced to pay it, thereafter files an ordinary civil action against the other to recover that amount. But when a lease is involved, tenants who refuse to pay a claimed obligation can be subject to an unlawful detainer action for possession and termination of their lease; if they turn out to be wrong on the underlying question, they will not only owe the landlord the disputed amount, they may also be out of the lease. This is a much greater risk to take; it forces many tenants to think twice about whether they really want to take on that battle. (This case presented a typical example: Because the tenants believed that the landlord was the one who owed those fees, they did not pay them; that forced the landlord to do so. The landlord then sued the tenants not only for the amount it had paid, but also for forfeiture of the lease.)

This risk to tenants who find themselves being wrong in honest debates with their landlord is probably the reason that CCP §1179 permits a trial court to grant relief from forfeiture when they lose: Even if they are wrong in asserting their defenses, they may have the chance of preserving their leasehold.

However, to gain relief under §1179, tenants who lose must show "hardship." This is not a precise term; it obviously leaves considerable discretion to the trial judge (who has probably just held against the tenants on the merits). Hardship clearly has to mean more than loss of the leasehold estate, for that would just "strangle the discretionary power at the very inception of its exercise." *Olympic Auditorium, Inc. v Superior Court* (1927) 81 CA 283, 285, 253 P 944. Instead, it must include "a full examination of all of the equities involved" (*Gray v Maier & Zobelein Brewery* (1906) 2 CA 653, 658, 84 P 280), including "hardship" to the lessor (*Thrifty Oil Co. v Batarse* (1985) 174 CA3d 770, 777, 220 CR 285).

A landlord who has just completed a bitter fight to throw the tenants out is not likely to tolerate their immediate return afterwards. Tenants' counsel ought to warn her clients that she cannot guarantee that they will be able to stay for the balance of the term if a judge (or jury) concludes that they were wrong in the dispute. That would require being a sympathetic client, on top of being legally correct. Merely assuring the tenants that they have a good argument is not

enough—their burden of proof is effectively raised from simple preponderance to clear and convincing (or maybe beyond a reasonable doubt). Thus, in a case like *Gill*, the tenants may be wiser to pay the charge themselves—or, if they have already paid it, not to withhold that amount from their next rental payment—and to thereafter sue separately to recover it. (Parenthetically, full rent checks thereafter should be carefully monitored for language waiving any such rights, and the tenants' lawyer should obviously check all of the in terrorem clauses in the lease to make sure that your client has not inadvertently run afoul of some other trivial, but potentially fatal, obligation.) Theoretically, there are other alternatives available to threatened tenants. Forfeiture may not be appropriate unless the lease contains a forfeiture clause—but who ever saw a lease that did not contain one? Forfeiture is also, technically, not mandatory when the landlord's 3-day notice does not state an intent to forfeit, because CCP §1174(c) gives the losing tenants 5 days after judgment to pay all that they now owe and have their estate restored. But that cure period is mandatory only when the lease omits a forfeiture clause; otherwise, it is discretionary, which again means that an angry judge may not allow it and the lease will have terminated.

In *Gill*, the relief sought was not only restoration of a forfeited lease, but reduction in the daily rental liability imposed on the tenants for their continued possession after they received the 3-day notice. Code of Civil Procedue §1179 does require as a condition of relief that the application not be granted except on "full payment of rent due, or full performance of conditions or covenants." The combination of holding over after having received a 3-day notice and then ultimately losing the case makes the tenants retroactively trespassers during the holdover period. That meant that they were liable for rental value rather than contract rent for that time period. See CC §3334. (The interval in *Gill* was close to a year.) If they are thereafter granted relief from forfeiture, and thus become tenants again, rather than trespassers, does that salvation also apply retroactively? The statute isn't clear, and good arguments can be made both ways. The landlord argued that such relief should not be allowed; had that position been accepted by the court, the ante for tenants would have been raised all the higher: Even if they were lucky enough to have their leasehold restored, after they lost the underlying case, they would still have to pay any higher amount that was found to have been the rental value of their possession for the interim.

This decision holds that reduction from rental value down to contract rent is also a proper kind of relief for hardship. But do not forget that it, too, is discretionary: Nobody seemed to argue that once the tenants' leasehold is restored, back damages must be reduced to contract rent.

Thus, judges can restore leaseholds, but they need not necessarily also write down the damages awarded. Keeping this in mind, counsel for disputing tenants should want to include—as a precautionary part of her case—evidence that keeps those "trespass" damages low. Rental value is an issue of fact, and a defendant tenant should be as free to opine on it as is the plaintiff landlord. (An appraiser, of course, would be an even better witness.) If the tenant can show that the contract rent was fair—*i.e.*, equal to rental value—it could go a long way toward mitigating the financial dangers of losing.