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Steven R. Kellman on the Uses of the Retaliation Doctrine in Unlawful Detainer Actions

Introduction to Retaliation. In the arena of California landlord-tenant relations, use of the doctrine of retaliation by a tenant is a complex, often misunderstood legal approach. Retaliation is both a defense to certain landlord actions and a basis of a tenant's affirmative claims. The retaliation doctrine was born of common law's attempt to protect a tenant from the effects of a vengeful landlord. Relief available under the doctrine can be both injunctive and monetary. Although the retaliation doctrine is mostly codified [*see, e.g.,* Civ. Code § 1942.5], a careful reading of the statutes may not reveal the true application and limitations of the doctrine. The careful practitioner will enter this practice area only with the understanding and tools necessary to avoid the traps and pitfalls awaiting the unwary.

Retaliation Doctrine's Basis in Law. Retaliation against tenants in residential tenancies has long been disfavored by the law. Landlords historically have had the power to suppress tenants' assertion of rights by threats of punitive action including eviction, increased rent, and decreased services. Tenants are often afraid to complain or take action against landlords for fear of retribution. This threat has a chilling effect on many tenants, who keep silent and endure unsafe and abusive living conditions rather than asserting their rights and thereby risk suffering the vengeance of the landlord.

Retaliation case law evolved over time, resulting in legislative action to protect tenants, in the enactment Civil Code Section 1942.5 [*see, e.g., S.P. Growers Ass'n v. Rodriguez* (1976) 17 Cal. 3d 719, 723, 131 Cal. Rptr. 761, 552 P.2d 721; *Vargas v. Mun. Ct. (McAnally Enterprises, Inc.)* (1978) 22 Cal. 3d 902, 916, 150 Cal. Rptr. 918, 587 P.2d 714; *see also Barela v. Super. Ct. (Valdez)* (1981) 30 Cal. 3d 244, 249, 178 Cal. Rptr. 618, 636 P.2d 582; *Rich v. Schwab* (1998) 63 Cal. App. 4th 803, 810, 75 Cal. Rptr. 2d 170]. These cases illustrate the evolution and application of this doctrine to Civil Code Section 1942.5. Retaliation is also prohibited by Government Code Section 12955(f).

Provisions of Civil Code Section 1942.5. The rights in Civil Code Section 1942.5 are broken into two main parts. First, Section 1942.5(a) provides a bar to residential eviction, increase in rent, or decrease in services within 180 days of the tenant's protected acts of the tenant. Protected acts are covered in Section 1942.5(a)(1)–(5). A tenant may use this subdivision only once in a 12-month period [Civ. Code § 1942.5(b)]. The sec-

ond part, Section 1942.5(c), provides more general protection for both residential and commercial tenancies, proscribing retaliation against a tenant who has "lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights under the law" [Civ. Code § 1942.5(c)]. The rights granted in Section 1942.5 are generally nonwaivable [Civ. Code § 1942.5(d)].

There is an exemption to the remedies for a tenant found in Subsections (a) and (c), such as recovering possession, if the landlord "states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c)" [Civ. Code § 1942.5(e)].

There are penalties against a landlord for violating Section 1942.5 including actual damages, attorney's fees (if requested at the inception of the case), and punitive damages between $100 and $2,000 for each retaliatory act, if the landlord was guilty of fraud, oppression, or malice [Civ. Code § 1942.5(f), (g)].

Provisions of Government Code Section 12955. Government Code Section 12955 proscribes various housing discrimination and adds a component of retaliation in Section 12955(f), which makes retaliation unlawful when the "dominant purpose is retaliation against a person who has opposed practices unlawful under this section." Although this lends support to an affirmative claim, it is not intended to delay an eviction. "Nothing herein is intended to cause or permit the delay of an unlawful detainer action" [Gov. Code § 12955(f)].

Application of Retaliation Doctrine in Unlawful Detainer. The most common use of a claim of retaliation is as a defendant's (the tenant) affirmative defense to a plaintiff's (the landlord) unlawful detainer action. Although most common in residential cases, a retaliation defense can also be supported in commercial cases [*see Custom Parking v Sup. Ct.* (1982) 138 Cal. App. 3d 90, 93, 187 Cal. Rptr. 674].

To effectively defend an unlawful detainer action with a retaliation defense, the tenant must raise the defense within the time for filing a response. This is most easily accomplished by alleging retaliation as an affirmative defense in the answer. The tenant may also raise this issue by motion, such as summary judgment, or by demurrer. However, these methods are not favored by courts, because retaliation is usually a question of fact to be determined by a trial court.

Tread carefully here, because the retaliation waters become murky. The notices that lend themselves to a retaliation defense are the 30- or 60-day termination of tenancy notices in periodic tenancies. Defending against a three-day notice to pay or quit is unavailable under Civil Code Section 1942.5(a) because the tenant must not be "in default as to the payment of his rent" [Civ. Code § 1942.5(a)]. Of course, if a tenant can prove that he or she was not in default, even though rent was unpaid, it is arguable that this can be raised [*see EDC Assoc. v. Gutierrez* (1984) 153 Cal. App. 3d 167, 174, 200 Cal. Rptr. 333 (Andreen, J., concurring)].

Because retaliation is an affirmative defense, the tenant must raise it in the answer or face the possibility of its use being precluded at trial. Of course, the tenant may file an amended answer before trial if the retaliation defense later becomes apparent. Further, the answer can be amended at or before trial, with leave of court, if it becomes clear that the defense is applicable. On motion to the court, especially during trial, the tenant should point out that a plaintiff may amend the complaint during trial if the facts warrant [Code Civ. Proc. § 1173], so basic fairness would allow a similar amendment for the defendant (tenant).

Proving the Defense in an Unlawful Detainer Trial. The defendant (tenant) must first have alleged retaliation as an affirmative defense in the answer with supporting facts. Merely checking the box on the Judicial Council answer form for retaliation may not be sufficient and could be stricken by the plaintiff (landlord) by motion at trial [Code Civ. Proc. § 436]. Pleading retaliation is one thing, proving it is another.

Proving a Case in Retaliation. Through common law derivations and codification, the basis of the retaliation defense is the unlawful motive or intent of the landlord (the plaintiff) in taking the action complained of. "From our review of the history surrounding Civil Code section 1942.5, we conclude that in enacting the latest version of the statute the Legislature did not intend to alter the common law rule regarding the burden of proving retaliatory motive" [*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal. App.3d 724, 742, 220 Cal. Rptr. 722].

Proving motive is difficult because the landlord will rarely admit an illegal intent. Proof will be from various types of evidence including direct, indirect, inferential, extrinsic, and other forms of evidence to show the landlord's true motive. The defendant (tenant) initially bears the burden of proof, by a preponderance of evidence, that the landlord has acted in unlawful retaliation in serving the eviction notice. "To sum up: In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code

section 1942.5, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence" [*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal. App. 3d 724, 742, 220 Cal. Rptr. 722].

Proof of retaliation can be as simple as a declaration of vengeance or as complex as can be imagined. Civil Code Section 1942.5(a) allows a retaliation claim for an eviction in response to many enumerated acts, including these:

(1) After an oral complaint to the landlord regarding tenantability.

(2) After a written or oral complaint which with an appropriate agency, of which the landlord has notice, to obtain correction of a condition relating to tenantability.

(3) After an inspection or issuance of a citation, resulting from a complaint described in (2) of which the landlord did not have notice.

(4) After filing appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.

(5) After entry of judgment or signing an arbitration award, if any, when in the proceeding or arbitration the issue of tenantability was determined adverse to the landlord.

Besides these enumerated instances, Section 1942.5(c) provides broad protections against causing a tenant to quit involuntarily, bringing an action to recover possession, or threatening these for the purpose of retaliating against the tenant for lawfully organizing or participating in a lessees' association or organization advocating lessees' rights, or lawfully and peaceably exercising any rights under the law [Civ. Code § 1942.5(c)].

This allows a tenant a variety of grounds for the basis of a retaliatory connection in defending against a notice to quit. Further, there are additional avenues to claim retaliation by using the prohibitions against rent increases or the decrease in services as a defense to an eviction [*see* Civ. Code § 1942.5(c)]. In these cases, for example, the tenant can claim the nonpayment was not a default in the payment of rent, if the increased rent was due to an illegally increased rent. In this case, the tenant would not be in "default" of the payment of rent, because a retaliatory rent increase could void the rent claimed due. The tenant could also claim that the nonpayment of a service (e.g., utility charge)

in a three-day notice to cure or quit was not improper if the charge was connected to an illegally decreased service.

Proving motive usually requires a connection between the protected action of tenant and the retaliatory eviction reaction of the landlord. If the tenant claims the retaliatory grounds arise from Section 1942.5(a), there is a 180-day window for the action-reaction in the proof. Under Section 1942.5(c), there is no such window. Many tenants are misled by the code to believe that a complaint or other protected act from Section 1942.5(a) protects them for 180 days against retaliation. This is not true. In reality, the courts need to see an action-reaction more closely in time than 180 days for both subsections. Many things can happen in that time that can intervene to supersede a retaliation claim.

Meeting Tenant's Burden of Proof. To make the case for retaliation, the tenant must prove by a preponderance of the evidence that the eviction notice, or threat of eviction, was in retaliation for a protected act. The tenant must produce evidence of retaliation, which can be through the landlord's presentation of its case. Certain acts are regarded as so suspect as to create an inference or presumption of retaliation. For example, a landlord may prove a 30-day notice was served. On cross examination, the landlord may admit that one week before the 30-day notice, the landlord received a written complaint about the habitability of the dwelling. With no other refuting evidence, the court will probably find retaliation occurred. The tenant can, in its case, effectively do the same and meet the initial burden. This is where careful attention is required, since meeting the initial burden of proving an unlawful retaliation is only the beginning. Unless care is taken after this point, a tenant can watch this victory evaporate as the landlord takes it away.

Shifting Burden of Proof to Landlord. After the tenant has proved an initial claim in retaliation, the landlord has the opportunity to refute that claim, thus voiding the defense entirely. Once retaliation has been proved, the landlord can do any one of the following:

(1) Refute the claim by alleging the motive was not retaliatory despite the connection evidence.

(2) Refute the evidence and claim it has no weight.

(3) Allege certain legal bars to retaliation.

(4) Allege good cause to evict existed.

Refuting and rebutting the evidence is a case-by-case situational analysis that essentially claims the tenant's evidence was not sufficient or, if it was credible admissible evidence, did not prove what tenant claimed it proves.

There are certain bars to the use the retaliation defense. Nothing limits the exercise by the landlord of rights under any lease or agreement or any law pertaining to the hiring of property or the right to do any of the acts described in Section 1942.5(a) or (c) for any lawful cause [Civ. Code § 1942.5(d), (e)]. This allows exceptions to retaliation claims for specified rights of the landlord in the lease or, for example, in the application of the Ellis Act [*see* Gov. Code § 7060 et seq.], including taking a unit off the market. "We therefore agree with Landlord that section 1942.5, subdivision (d), constitutes an exception to the limitations on landlord conduct set forth in subdivisions (a) and (c)" [*Drouet v. Superior Court* (2003) 31 Cal. 4th 583, 595, 3 Cal. Rptr. 3d 205, 73 P.3d 1185]. Any waiver by a tenant of rights under Section 1942.5 is void as contrary to public policy [Civ. Code § 1942.5(f)].

Civil Code Section 1942.5(e) allows a landlord to act with retaliation in mind as long as he or she has a good faith reason to evict and states that reason in the notice. In the use of Section 1942.5(e), a landlord can issue an eviction notice when the facts would raise the issue of retaliation, but the landlord wants to make it clear that he or she had a valid, dominant reason to evict. By this method, the landlord puts the good faith reason in the notice, which essentially creates a good cause requirement when it would not otherwise have been required on the notice. Of course, the landlord must then prove the existence, validity, and good faith of the cause alleged in the notice. If the landlord successfully refutes or rebuts the tenant's evidence, or the landlord successfully proves an applicable bar or exception to the retaliation claim made, the burden shifts back to the tenant.

Shifting Burden of Proof Back to Tenant. The tenant has now made an initial prima facie case in retaliation. The landlord has, by one or more of the above methods, rebutted, refuted, or demonstrated a legal bar to the use of the retaliation defense. Unless the tenant acts decisively at this point, the defense is lost.

The tenant has a final opportunity to show that the landlord's claim is without merit. For example, the tenant may show that the "good faith" reason in the notice was a pretext, fabricated to cover the true retaliatory motive.

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Judgment if Tenant Prevails. Judgment is entered in the tenant's favor if the tenant prevails in the unlawful detainer action. This restores the tenancy, and the tenant is considered the prevailing party for a motion for attorney's fees [*see* Civ. Code § 1717]. Because the tenant has successfully used the retaliation defense, the landlord risks facing another retaliation claim if he or she tries to evict within 180 days, unless the landlord can use one of the exceptions allowing eviction. However, recall that the retaliation defense can be raised only once in any 12-month period [Civ. Code § 1942.5(a)]. Section 1942.5(c) has no such restriction. In this instance, an affirmative award of damages cannot be obtained, because this is strictly a defensive use of the retaliation doctrine. Cross complaints are generally not permitted in unlawful detainer actions [Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 239, 189 Cal. Rptr. 227].

Affirmative Claims for Retaliation. Retaliation can be used as a sword as well as a shield. Under both Government Code Section 12955 and Civil Code Section 1942.5, a tenant, whether involved in an eviction or not, can now be a plaintiff suing for improper retaliation. Government Code Section 12955 allows for a claim due to retaliation, which sounds more in discrimination. This is typically used when a landlord has retaliated against a tenant for asserting the right to be free from discriminatory practices. There is no cap to damages in an action brought under Section 12955.

In an unlawful detainer eviction proceeding, a tenant who prevailed under Civil Code Section 1942.5 can now file a separate suit for damages for the attempted eviction. Section 1942.5 allows the award of actual damages and punitive damages of $100 to $2,000 to a plaintiff tenant for each retaliatory act, if the landlord or agent was guilty of fraud, oppression, or malice. The tenant can also recover reasonable attorney's fees if either party requests attorney's fees on the initiation of the action [Civ. Code § 1942.5(f), (g)]. The tenant is not limited to punitive damages, which can be difficult to prove. Section 1942.5(h) provides that these are not exclusive remedies.

Therefore, a judgment of landlord retaliation in an eviction proceeding can open the door to a followup claim by a tenant for affirmative damages. The tenant is not limited to the punitive damages cap of $2,000, but is limited to actual damages or other remedies allowed by law for each retaliatory act.

Conclusion. The law disfavors suppressive acts by landlords motivated by vengeance against tenants for assertion of tenant's rights. The law seeks to protect residential tenants, generally in a weaker social and bargaining position than landlords. However, courts tend to disfavor retaliation as a defense, because it is easily alleged and difficult

to prove. It is fraught with complexities, such as shifting burdens of proof and a confusing array of exceptions and defenses to the exceptions. Because unlawful detainer is a summary proceeding, complete litigation of a case in which this defense is raised strains trial courts, which are mandated to handle unlawful detainers expeditiously.

Retaliation as a motive for punitive landlord action against a tenant is wrongful and should be prevented. The main issue to determine is whether the landlord action was indeed unlawfully retaliatory, and whether there is an exception to the action that bars the claim.

For further discussion of retaliation as a defense, *see* MATTHEW BENDER PRACTICE GUIDE: CALIFORNIA LANDLORD-TENANT LITIGATION, Ch. 5, *Unlawful Detainer*, 5.21, and CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender).

About the Author. Steven R. Kellman has practiced landlord-tenant law since 1982 with an emphasis on representing residential and commercial tenants. In 1993, he founded the Tenants Legal Center in San Diego. Mr. Kellman has lectured for professional and educational institutions including the University of San Diego School of Law, Continuing Education of the Bar, the Rutter Group, and government, military, and community groups. Mr. Kellman has contributed to legal publications including the California Journal of Law, San Diego Journal of Law, California Civil Practice, Real Property Litigation, CEB Landlord-Tenant Practice, and CALIFORNIA FORMS OF JURY INSTRUCTION, Ch. 43, *California Judicial Council Unlawful Detainer Instructions* (Matthew Bender). Mr. Kellman has served as judge pro tem and on committees proposing landlord-tenant legislation, including the San Diego Housing Task Force. Mr. Kellman was the proponent of, and instrumental in the passage of, a good cause eviction-protection ordinance in San Diego. Mr. Kellman writes an informational newspaper column on landlord-tenant law appearing in the *San Diego Union-Tribune*, *Los Angeles Times*, *San Francisco Chronicle*, and *Washington Post*.