

Checklist of Landlord Defenses to Tenant Litigation

by Dale S. Alberstone, Esq.

We live in a litigious society. Southern Californians are lawsuit happy and certainly there is no shortage of litigation filed by tenants against their former or present landlords. This month's legal forum will discuss the 25 main "Affirmative Defenses" often available to a landlord to defend against tenants' causes of action.

- 1) **Parole Evidence Rule**: This defense bars a tenant from relying on an alleged oral agreement which is inconsistent with the written lease or other written agreement between the landlord and tenant.
- 2) **Statute of Frauds**: This defense requires that contracts for a lease longer than one year be in writing to be enforceable. It also requires that a tenant's option to buy or right of first refusal to purchase be in writing.
- 3) **Offset**: This defense allows a landlord to offset from any amount of money which the landlord may owe to the tenant by the amount of money which the tenant owes to the landlord (such as for unpaid rent and damages to the apartment building).
- 4) **Estoppel**: If the tenant represents certain things to the landlord, which the landlord then relies upon to his detriment, the tenant is estopped from denying the truth of the representations.
- 5) **Waiver**: If a tenant has previously waived a claim or allegation against a tenant, then the defense of waiver may bar further litigation of that claim.
- 6) **Unclean Hands**: If the tenant has not acted fairly, he may be said to have "unclean hands," and thereby be barred from the relief he is seeking.
- 7) **Material Breach Excusing Performance**: If the tenant has breached the lease or other contract in a material way, the landlord's performance under the instrument might be excused.
- 8) **Excuse**: If the tenant has excused the landlord of any required performance, then the tenant cannot later hold the landlord liable for failing to perform what was previously excused.
- 9) **Discharge of Duties**: If the landlord has fully performed any duty or obligation on his part to be performed, then he is discharged of any further performance.
- 10) **Lack of Proximate Cause**: If the acts or omissions of the landlord did not cause the injuries allegedly suffered by the tenant, then this defense applies.
- 11) **Failure to Mitigate Damages**: A tenant is required to attempt to mitigate (i.e. lessen) his damages. If he fails to do so, the landlord may avoid liability to the extent that the damages could have been reduced had the tenant acted reasonably.
- 12) **Release**: If the tenant has released the landlord of an obligation or performance, then the landlord cannot be in breach for not thereafter performing it.
- 13) **Extinguishment**: Sometimes an obligation by a landlord may be extinguished under certain facts, in which event "extinguishment" is an appropriate defense.
- 14) **Failure of Consideration**: If the landlord did not receive any consideration from a tenant arising in a contractual arrangement, the landlord might escape liability for any type of promise he made.
- 15) **Untimely Rescission**: If a tenant seeks to rescind an agreement with the landlord, any delay in that rescission which results in substantial prejudice to the landlord will bar the tenant's claim for rescission.

- 16) **Statute of Limitations**: Generally a tenant must file an action for breach of contract within two years following the breach if the contract is verbal and four years if the contract is written. Failure to file within that time period bars the tenant's cause of action.
- 17) **Laches**: This is similar to the statute of limitations, but laches may bar the tenant's cause of action even if the statute of limitations has not expired. This occurs where the tenant has unreasonably delayed in filing the litigation to the landlord's prejudice.
- 18) **Assumption of Risk**: If the tenant, with full knowledge of the matters, voluntarily assumes the risks, hazards or perils involved, the landlord might avoid liability for the tenant's injuries or damages on the basis that the tenant has "assumed the risk."
- 19) **Accord and Satisfaction**: If the landlord and tenant entered into a new agreement subsequent to the original lease, and the landlord performed the landlord's obligations under the agreement, then any further liability by the landlord may be barred by the doctrine of accord and satisfaction.
- 20) **Adequate Remedy At Law**: If the tenant is seeking equitable relief, such as a restraining order or injunction, the defense of "adequate remedy at law" (i.e. money damages would adequately compensate the tenant) might defeat the tenant's claim.
- 21) **Fictitious Names**: With a commercial tenant, if the lease references the tenant's fictitious business name, he/she must have filed and published that name in accordance with the statutes that regulate fictitious names prior to filing suit. Failure to do so will stay (i.e. postpone) the litigation until the tenant has properly complied.
- 22) **Spoliation of Evidence**: If the tenant intentionally destroys relevant evidence prior to or during the litigation, his action may be barred or his recovery diminished because of those acts.
- 23) **Res Judicata**: If a judgment has already been entered in a prior case between the same two parties over the same controversy, the tenant will be barred from again litigating it, even if the tenant lost the first action.
- 24) **Splitting Causes of Action**: A tenant is not allowed to sue under a primary right in a first litigation, and then sue under a different theory involving the same right in a second litigation. Splitting causes of action in such a manner bars the second suit.
- 25) **Comparative Negligence**: If the tenant is partially at fault for the injuries he sustained, then the defense of comparative negligence will hold that the landlord is only liable to the tenant for the proportionate amount that the landlord is at fault, rather than for the entire amount of damages.

I recognize that most landlords defend a litigation with the assistance of counsel. It is counsel, not the landlord, who typically determines which affirmative defenses should be included in the landlord's Answer to Complaint. Nevertheless, counsel may from time to time overlook important defenses because he/she was unaware of the facts which would support those defenses. I encourage each landlord who is sued to go over each of the foregoing affirmative defenses with his/her attorney to ascertain whether there are any facts upon which the defense could be imposed. While a lawyer should not assert a defense for which he does not believe that facts may exist which support it, on the other hand, the attorney might overlook a potential defense unless the landlord carefully discusses the facts with his counsel.

It is often said that "the best defense is a good offense." In that regard, a landlord who has been sued by a tenant might consider filing a cross-complaint against the tenant for the following

causes of action: Breach of contract, damages for rent due, damages to the apartment building, intentional infliction of emotional distress and negligent infliction of emotional distress. Also, if no facts exist upon which a reasonable attorney or other person might believe that the tenants' causes of action have merit, the landlord (or his counsel) might notify the tenant (or his counsel) that following the conclusion of the case, the landlord will sue the tenant and/or attorney for malicious prosecution. Malicious prosecution may only be filed, however, after the tenant's case has ended. An action for malicious prosecution may not be filed while the action is still pending. Also there must exist a termination of the case in the landlord's favor before the landlord is allowed to sue the tenant or the tenant's attorney for malicious prosecution.

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Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity. The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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