

Eviction of a Tenant? Surprise!
by Dale Alberstone, Esq.

On March 15, 2006, the California Court of Appeal determined that even though the tenant had a monetary judgment for high daily damages entered against it in an unlawful detainer action, the tenant could thereafter pay the landlord the lesser ordinary rent which was past due, be relieved of its forfeiture of the lease, and remain as a tenant. Okay, that was a mouthful. Here is the detail.

In *Gill Petroleum v. Hayer*, the tenant claimed, and the court agreed, that California Code of Civil Procedure §1179 allowed the tenant to pay the delinquent rent past due under the lease (rather than the higher market value of the premises), and thereby prevent his eviction. The following is a summary of the facts and court rulings.

The parties began a business relationship in 1999 when the defendants purchased a market and gas station from the then existing tenant for nearly \$627,000. The lease had an initial term of 10 years and options to extend it for total of an additional 20 years.

The initial rent was \$6,200 per month, and would increase periodically based upon increases in the cost of living and other factors.

After the judgment was entered, the tenant petitioned the trial court for equitable relief under C.C.P. §1179 asking the judge to allow it to remain in possession of the premises ...

Under the lease, the tenant was responsible to pay permit and other fees for an underground storage tank at the property. Those fees ultimately amounted to \$23,500. Because the tenant did not pay them as required under the rental agreement, the landlord advanced the money to the State Board of Equalization and then filed an unlawful detainer proceeding against the tenant for non-payment of the storage tank fees.

Following trial, the court found in favor of the landlord and entered a judgment forfeiting the lease, ordered restoration of the premises to the landlord and awarded the landlord damages for the breach together with reimbursement of the landlord's attorney's fees and court costs.

More specifically, the trial court awarded rental damages against the tenant at the fair market daily rate of \$340 per day (i.e. \$10,200 per month) for each day/month the tenant remained in possession after the expiration of the three-day notice to cure or quit.

After the judgment was entered, the tenant petitioned the trial court for equitable relief under C.C.P. §1179 asking the judge to allow it to remain in possession of the premises (that is, cancel and rescind the court's determination of unlawful detainer) provided that the tenant paid all amounts due to the landlord. However, the tenant's petition asked that the court reduce the daily damages of \$340 (which was the daily market rent for the premises) to the lesser contract rent of approximately \$206 per day. In other words, although the unlawful detainer judgment included rental damages of \$10,200 per month following the expiration of the three-day notice, the tenant only wanted to pay at the rate of \$6,200 per month.

The court granted the tenant's petition, relying on the provisions of C.C.P. §1179. That statute provides:

“The court may relieve a tenant against a forfeiture of of a lease or rental agreement, whether written or oral, . . . and restore him or her to his or her former estate or tenancy, in the case of hardship. . . . In no case shall the application or motion be granted except on the condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.”

The astonishing aspect of the trial court’s ruling, as upheld by the California Court of Appeal, was the fact that the judge signed a judgment awarding the landlord daily damages of \$340 for each day the tenant remained in possession following the expiration of the three-day notice, but for purposes of relief from the forfeiture, the same judge reduced the amount the tenant needed to pay to the daily sum of roughly \$206. The trial court explained that “equity will be served if the tenant pays to the landlord only the contract amount of rent (including, of course, the underground tank fees, penalties and interests) as opposed to the per diem damages set forth in the judgment.”

The appellate court upheld that reasoning by declaring that courts retain the inherent equitable power to relieve a party from the burdens of a judgment. The court said that while §1179 mandates that the trial court require the full payment of rent due, it does not make the court require the tenant to pay other sums, such as the higher daily rental value of the premises.

Thus, Court of Appeal upheld the trial court’s determination to relieve the tenant from a forfeiture provided that the tenant made his payment based on a lesser prorated monthly rate due under the lease, rather than the greater amount of daily damages provided by the Code of Civil Procedure.

The 3-Day Notice form distributed by AOA contains this “declaration of forfeiture” as standard language.

Important Ideas for Landlords and Attorneys

What is important for apartment landlords and their attorneys to keep in mind are the following:

1. Almost always you should include in the three-day notice to pay rent or quit which is served on the tenant a provision which declares a forfeiture of the rental agreement if the rent is not pay within three days. The 3-Day Notice form distributed by AOA contains this “declaration of forfeiture” as standard language.
2. Discuss with your attorney prior to the time he/she files the unlawful detainer the daily rental value of the premises. Most of the time a landlord’s lawyer will ask for daily damages based on the monthly rent divided by 30. That rent might be unrealistically low because the daily (or monthly) market rental value is significantly higher. If the market rent exceeds the contract rent, consider a demand for the higher daily rate in your unlawful detainer complaint.
3. For attorneys only: Consider the difference between declaring a forfeiture versus not including a forfeiture clause. C.C.P. §1174(c) provides that if a forfeiture is not included in the notice, the tenant may reinstate the lease within 5 days after the entry of judgment, provided that he pays the landlord both the amount of *rent* found due *plus the amount of damages* determined by the court to also be owed. Under the *Gill Petroleum* case, the court held that the tenant only had to pay the contract rent due, rather than the market damages, in circumstances where the notice declared a forfeiture. Thus, if the notice does not declare a

forfeiture, the tenant has the automatic right of reinstatement, but only if it pays both the rent and the higher daily damages adjudged owing. It appears that the court has no discretion to allow the tenant to pay the lesser lease rate during that five-day period. As a strategic response, the tenant might then be better off waiting until after the five days has elapsed to seek relief from the eviction under C.C.P. §1179. (Of course, if the tenant waits until the expiration of the five days, he loses his automatic right to remain in possession by paying the amount awarded by the judgment.) After five days, the court has discretion to reduce the higher daily damages to the contract rent and allow the tenant to remain if the tenant will suffer hardship. Not including a forfeiture provision in the 3-Day Notice leads to a gambit which the landlord, the tenant and their attorneys must carefully analyze.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 30 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

*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.

Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.