San Francisco Rent Ordinance Section 37.10B: Plaintiffs' Attempt to Thwart Anti-SLAPP Protection

By: Jeffrey V. Ta, Esq.
Richard S. Diestel, Esq.

Historical Background

For the last twenty years, lawsuits by San Francisco tenants regularly claimed "wrongful eviction" under section 37.9 of the San Francisco Rent Ordinance, even if the claims had little merit, and, frequently, little connection to any actual eviction or attempts to evict. Typically, a simple habitability claim (where damages are generally measured by a percentage reduction in rent) almost always includes a claim for wrongful eviction under the Ordinance reasoning that the alleged habitability issues amounted to a constructive eviction. This then segued into a claim for treble damages (3X) and attorney's fees.

In 2007, the climate of landlord/tenant cases changed when the Supreme Court issued its ruling in the case entitled Action Apartment Association, Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232. The Supreme Court held that the serving of any notice to quit or other eviction notice was preempted to the extent it prohibited eviction notices where litigation was contemplated in good faith and under serious condition. In other words, Action Apartments made wrongful eviction claims based on the serving of the requisite notice to quit improper, and subject to an anti-SLAPP motion to strike under CCP §425.16 at the outset of the lawsuit.

Property owners and their insurers benefited from the SLAPP motions because (1) it provides for a quick summary procedure by which defendants could dispose of such lawsuits at the beginning of the lawsuit, and thus avoid costs and delays of lengthy litigation; (2) forces plaintiff to establish a probability of prevailing on the claim (which they generally can not); (3) pierces the pleadings and requires an evidentiary showing; and (4) defendant (insurers) could recover their fees and costs as the prevailing party.

Several Appellate cases followed Action Apartments, which clarified and expanded the Supreme Court's ruling, including a San Francisco case handled by our firm entitled 1100 Park Lane Associates v. Feldman (2008) 160 Cal.App.4th 1467. Prior to this decision, defense lawyers generally limited the use of anti-SLAPP motions to lawsuits based on a landlord's right to file an unlawful detainer. The 1100 Park Lane decision expanded the protections under the anti-SLAPP statute.

In 1100 Park Lane, the landlord brought an unlawful detainer action against tenant and subtenants. The subtenants subsequently filed a cross-complaint against the landlord alleging (1) retaliatory eviction; (2) negligence; (3) misrepresentation; (4) breach of the implied covenant of quiet enjoyment; (5) wrongful eviction; (6) breach of contract; and (7) unfair business practices. Following dismissal of the unlawful detainer action, we filed a motion to strike the cross-complaint pursuant to the anti-SLAPP statute on behalf of the landlord/property owner. The Appellate Court ultimately made several key holdings, including:

1) The prosecution of an unlawful detainer action was protected activity under the anti-SLAPP statute;

2) The service of the three day notice to quit was protected under the anti-SLAPP statute;

3) A landlord's alleged threats against a subtenant were within the scope of the anti-SLAPP statute;

4) A breach of contract cause of action arose from protected activity for purposes of anti-SLAPP statute;

5) The filing of the unlawful detainer action fell within the litigation privilege;

6) The service of the notice to quit fell within the litigation privilege.

In other words, we were able to utilize a SLAPP motion to dispose a case disguised as a wrongful eviction claim that was, in truth, a habitability case. Based on our experience, the success of SLAPP motions at the onset of litigation led to fewer frivolous wrongful eviction claims. Cases that once combined both wrongful eviction and habitability claims became limited to habitability claims.

Now, with the addition of section 37.10B, the trend in landlord/tenant cases has once again changed.

Proposition M and Section 37.10B

In November 2008, San Francisco voters approved Proposition M which amended the already tenant friendly Rent Ordinance. The new provisions are now codified as section 37.10B of the San Francisco Rent Ordinance. Section 37.10B prohibits a landlord or an agent, employee, or contractor of a landlord from doing any of the following things in "bad faith or with ulterior motive or without honest intent:

1. failing to provide, interrupting, or terminating "housing services required by contract or . . .housing health or safety laws;

2. failing "to perform repairs and maintenance required by contract or . . .healthy and safety laws;

3. failing "to exercise due diligence in completing repairs and maintenance once undertaken or failing to follow appropriate industry repair containment or remediation protocols designed to minimize exposure to noise, dust, lead

paint, mold asbestos, or other building materials with potentially harmful health impacts;

. . . . . .

9. interfere with a tenant's right to quiet use and enjoyment of a rental housing unit as that right is defined by California law;

A landlord that violates 37.10B is liable for each offense for money damages of not less than three times actual damages suffered by an aggrieved party, as well as reasonable attorney's fees and costs.

This section effectively expanded exposure to treble damages once only available for wrongful eviction claims to habitability claims, or so the tenant lawyers like to claim. As a result, habitability claims and demands by tenants have correspondingly increased as a result of the exposure to treble damages.

However, defense attorneys practicing in the post 37.10B environment should note that the provisions trebling of damages only applies to "actual" damages such as out of pocket expenses, i.e., those damages actually incurred -moving expenses, additional payments of rent at other premises, damages to possessions, and the like. They do not include benefit of the bargain damages (difference between the market rent and the controlled rent over a period of years) which are frequently claimed by plaintiffs because this measure of damages often results in excessively high damages. (See Balmoral Hotel Tenants Ass'n v. Lee (1990) 226 Cal.App.3d 686, 690-91; Beeman v. Burling (1990) 216 Cal.App.3d 1586, 1599-1601.) Even more, tenants are not automatically entitled to treble damages and attorney's fees under this section simply because a property owner fails to make repairs. The failure must be the result of bad faith, ulterior motive, or lack of honest intent.

Although there is no mechanism to dispose of frivolous 37.10B claims as the SLAPP Motion provides for frivolous wrongful eviction claims at the onset of litigation, understanding the scope of "actual damages" as well as the requisite intent under 37.10B will assist in containing a tenant's alleged damages.