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Attorney for Plaintiffs
SAMI SMITH and
MARY SMITH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAMI SMITH and
MARY SMITH
Plaintiffs,

v.

EDWARD JONES, DOES 1-2, inclusive,
Defendants.

No. xxxxxx

PLAINTIFF'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER PERMITTING DISCOVERY OF DEFENDANT'S FINANCIAL CONDITION

Date:
Time:
Department:

STATEMENT OF FACTS

Plaintiffs Sami Smith and Mary Smith, in September of 1987, moved into an apartment owned and managed by Defendant Edward Jones located at XXX Trxxxx Street, San Francisco, California. Almost from the moment they moved in, Plaintiffs repeatedly plead with Defendant, both orally and in writing, to repair several serious defects in the premises. These defects included a leaking roof in the children's bedroom, an infestation of cockroaches and rats, and dangerous live electrical wiring in the garage.

The vermin problem finally had to be taken care of and paid for by the Plaintiffs themselves. They deducted this amount from their rent. It took as much as over two years before the landlord fixed

some of the minor problems such as unopenable windows and a defective garage door. To this day many problems remain unresolved, such as the dangerous electrical wiring hanging down in the garage, despite repeated pleas to Defendant to fix them, and his continued assurances that he will.

The leakage in the ceiling of the children's room caused all of the furniture, bedding, and carpeting in the room to be ruined. A strong odor of mildew, the dampness, and the cold in the room necessitated moving the children out of the room to sleep on the couch and on the floor in the living room. Finally, Plaintiffs moved the children into their bedroom and they themselves slept in the bedroom with the leaking roof. Despite being covered with nylon and plastic covers, Plaintiff's bed was also ruined from the dampness.

At some point Defendant called in a roofer to get an estimate on repairing the roof. The roofer told Plaintiff Mary Smith that he had given the estimate to Defendant and Defendant said the he would not fix the roof because it cost too much. During the summer of 1988 Plaintiffs tried to lessen the foul odor in the room by painting the room themselves, but that did not help and the leaking continued.

On May 20, 1989, Plaintiffs wrote a letter to Defendant requesting once again that the roof be fixed, and informing Defendant of Plaintiff's intention to have the city come out and inspect the premises if Defendant did not repair the roof. This brought no response.

In July, August, and September of 1989, in order to avoid yet another winter with the roof leaking, Plaintiffs decided to withhold the rent until the roof was fixed. Plaintiffs informed Defendant of this.

On July 12, 1989 Plaintiffs were served with a three day notice to pay rent or quit. On July 24, 1989, a complaint and unlawful detainer action was filed against Plaintiffs by Defendant. (Case Number xxxxx, in the Municipal Court of California, City and County of San Francisco.) On July 31, 1989, Plaintiffs filed a demurrer to the action. On August 21, 1989, in Law and Motion in room 379, the demurrer was heard. Judge William J. Mellon sustained the demurrer with ten days leave to amend. On August 24, 1989, Defendant requested dismissal of the unlawful detainer action.

After the filing of the unlawful detainer action, Plaintiffs were advised by the San Francisco Residential Rent Stabilization and Arbitration Board to contact the Department of Public Works, Bureau of Building Inspection, which they did in August of 1989.

On August 7, 1989 the Department of Public Works, Bureau of Building Inspection inspected the apartment at Plaintiff's request and subsequently served a 30 day Notice on the owner to repair the leaking roof and several other violations, including the electrical problems in the garage. The inspector

found the wiring to be hazardous and that it had been installed without the necessary permits.

On August 23, 1989 the Department of Public Works re-inspected the roof and also came by to see if the repairs had been performed. They had not.

Sometime late in August of 1989 the sheriff came to notify Plaintiffs of their eviction. This was their first notice of a new action for unlawful detainer filed by Defendant. Defendant claimed that he personally served a new three-day notice to pay rent or quit on Plaintiffs on August 27, 1989. On September 1, 1989 Plaintiffs filed a Notice of Motion and Motion to Vacate and Set Aside Default Judgment with the Municipal Court of California, City and County of San Francisco on the grounds that Plaintiffs were never served or handed any papers on August 27, 1989. Defendant subsequently requested dismissal of this second unlawful detainer action.

The rent was subsequently paid, and accepted by Defendant. The repairs to the roof were finally performed in October of 1990, *25 months* after this problem was originally complained of by Plaintiffs. The rest of the necessary repairs to the building, ordered by the Department of Public Works in their 30 day notice issued August 10, 1989, as of March 31,1991, have *never* been performed. There is no record of Defendant ever having contacted the Department of Public Works in response to the 30-day Notice, correcting the substandard conditions, or applying for the necessary permits, as of March 31,1991.

As a result of Mr. Jones's failure to diligently repair the premises and to obtain permits and inform the Bureau of Building Inspection of such actions, a Notice To Show Cause was issued on March 20, 1992 and Mr. Jones was ordered to appear before the Bureau on March 31, 1992 at 10 A.M., Room 605, 450 McAllister Street, San Francisco, for failure to comply with the Notice of violation dated August 10, 1989.

ARGUMENT

I. PLAINTIFFS MUST DETERMINE DEFENDANT'S FINANCIAL CONDITION TO RECOVER PUNITIVE DAMAGES

In determining the amount necessary to impose the appropriate punitive effect, the court must consider the wealth of the defendant. Adams v. Murakami (1991) 54 Cal3d 105, 109-116, 284 CalRptr 318, 813 P2d 1348. The plaintiff bears the burden of presenting evidence of the defendant's financial condition. Adams v. Murakami (1991) 54 Cal3d 105, 119-123, 284 CalRptr 318, 813 P2d 1348; see Evid. Code § 500. A defendant's net worth is generally considered the best measure of wealth for the purpose

of assessing punitive damages. Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 CalApp3d 1090, 1100, 234 CalRptr 835.

II. A COURT ORDER IS REQUIRED FOR DISCOVERY INTO DEFENDANT'S FINANCIAL CONDITION

No pretrial discovery is permitted into Defendant's financial condition and profits from the rental of his property without a court order. Such order can be granted only if the court finds there is a "substantial probability that the plaintiff will prevail" on their claim for punitive damages. Civil Code § 3295(c), emphasis added.

II. THERE IS A HIGH PROBABILITY THAT PUNITIVE DAMAGES WILL ISSUE

A. RETALIATORY EVICTION CALLS FOR PUNITIVE DAMAGES TO ISSUE

Civil Code § 1942.5(f) specifically states that a lessor who is guilty of retaliatory eviction "shall be liable to the lessee in a civil action for *all* of the following: (2) Punitive damages..." (emphasis added.)

A second way to prove that punitive damages are likely to issue is to file a motion supported by declarations stating facts sufficient to support a finding of "oppression, fraud or malice" under Civil Code § 3294. Civil Code § 3295(c).

Before an action for retaliatory eviction was codified, it existed in the common law. In the case of Gause v. McClelland, (1951) 102 CalApp2d 762, 764, 228 P2d 91, the court, in an action for wrongful eviction, stated, "There is no such thing as a cause of action for unlawful or malicious eviction of a tenant. Where the eviction arises from the wrongful use of judicial processes the cause of action is one for malicious prosecution." Such a cause of action implicitly requires malice on the part of the lessor.

B. DEFENDANT IS GUILTY OF RETALIATORY EVICTION

Civil Code § 1942.5 says in pertinent part:

(a) If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling...the lessor may not recover possession of a dwelling in any action or proceeding...within 180 days:

(1) After the date upon which the lessee, in good faith...has made an oral complaint to the lessor regarding tenantability; or

(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

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

In each instance, the 180-day period shall run from the *latest* applicable date referred to in paragraphs (1) to (5), inclusive.

(emphasis added.)

In the present case Defendant landlord brought two unlawful detainer actions against Plaintiffs. The first action was brought after countless oral complaints, and several written complaints, as to the tenantability and safety of the premises, had been given to Defendant, and *52 days* after the latest written complaint (on May 20) had been given. The written complaint of May 20 also threatened to report the violations to the Department of Health. Defendant dropped this action and soon thereafter brought another action for unlawful detainer.

The second action for unlawful detainer was brought immediately after Plaintiffs had reported Defendant to the San Francisco Residential Rent Stabilization and Arbitration Board, and to the Department of Public Works, Bureau of Building Inspection. This second unlawful detainer action also was filed *within a month* of the Department of Public Works having done an inspection of the apartment building at Plaintiff's request. The Department of Pubic Works found numerous violations, the same violations that Plaintiffs had been complaining about to Defendant for years, and ordered Defendant to repair them.

Both unlawful detainer actions were filed well within the 180-day proscribed period under Civil Code § 1942.5.

Civil Code § 3294 defines "malice" as:

[C]onduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

and it defines “oppression” as:

[D]ispicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

The acts of Defendant in trying to evict Plaintiffs and their children from their apartment for exercising their rights to have the premises made tenantable and their right to complain to authorities can only be regarded as a despicable act in conscious disregard of a tenant’s rights, and also as an act which subjects that tenant to cruel and unnecessary hardship in having to defend against unwarranted and illegal civil prosecution.

III. CONCLUSION

Defendant has no reasonable defense to his reprehensible actions. He has caused Plaintiffs and their children to live in substandard, unhealthy and dangerous conditions for over four years. As of March 31, 1992, he has still not fully repaired the premises and made them safe, as he was ordered to do by the Department of Public Works, Bureau of Building Inspection. He has brought two clearly illegal unlawful detainer actions against Plaintiffs. An award of punitive damages seems certain in this action. Therefor Plaintiffs respectfully request that their Motion for Order Permitting Discovery of Defendant's Financial Condition be granted.

Dated: , 1992

Respectfully submitted,

VASQUEZ & VASQUEZ

by _____
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