Filed 11/24/03 Balistreri v. Rosenthal CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

VINCENT BALISTRERI, Plaintiff and Appellant, v. PETER ROSENTHAL, Defendant and Respondent.	A101785 (San Francisco County Super. Ct. No. 320040)

Vincent Balistreri brought this action against his former landlord, Peter Rosenthal, to recover damages for eviction in violation of San Francisco Residential Rent Stabilization and Arbitration Ordinance (hereafter Rent Control Ordinance).[1] Balistreri now appeals from a judgment in favor of Rosenthal entered following an order granting summary adjudication of two causes of action and the voluntary dismissal with prejudice of the remaining cause of action. We affirm.

PROCEDURAL BACKGROUND

The original complaint, filed on March 28, 2001, alleges that Rosenthal, the owner of an apartment building, sent to Balistreri a 30-day eviction notice, causing him to vacate his apartment in the building, and that Rosenthal did not have grounds to evict Balistreri under the Rent Control Ordinance. On the basis of these facts, the amended complaint alleges three causes of action: (1) a right to treble damages, attorney fees and costs under section 37.9, subdivision (f), of the Rent Control Ordinance, (2) negligent breach of the right to quiet enjoyment of the leased premises, and (3) fraud.

[1] San Francisco Administrative Code, section 37.1 et seq.

After a brief period of discovery, Rosenthal moved for summary judgment or, in the alternative, summary adjudication on the ground that the first two causes of action were barred by the applicable one-year statute of limitation and that one or more of the elements of the cause of action for fraud could not be established. The trial court denied the motion for summary judgment but granted summary adjudication in favor of Rosenthal on the first two causes of action based on the statute of limitations. Balistreri subsequently dismissed with prejudice the cause of action for fraud. On January 16, 2003, the parties stipulated to entry of judgment in favor of the defendant Rosenthal based on the dismissal and summary adjudication of the first two causes of action.

FACTUAL BACKGROUND

The record of the summary judgment motion reveals that, in 1998, Balistreri occupied unit No. 2 of 2829 Steiner Street, where he had lived for approximately seven years. For several years, he had shared the apartment with his girlfriend, Jennifer Cherry. On August 1, 1998, his landlord, Rosenthal, sent Balistreri a letter, which said in pertinent part: "As you are aware, your lease on apartment No. 2 at 2829 Steiner Street expired on July 31st, 1998. As such, I would like to take possession of these premises on September 30th 1998. This should give you ample time to find other accommodations. [¶] You might consider the apartment I am currently living in, at the corner of Scott and North Point. The apartment is approximately the same size and the neighborhood is wonderful. You can reach me at work during the day to make arrangements to see the apartment."

On September 28, 1998, Cherry sent an e-mail to Rosenthal, in which she proposed to vacate the apartment on October 28, 1998, and noted that she had spoken "with the San Francisco Rent Board . . . to inquire about our thirty days' notice." The same day, she mailed a letter to Rosenthal confirming the e-mail and asking for seven years' interest on the security deposit. Balistreri did not himself talk to Rosenthal about the notice.

In a declaration filed in opposition to the motion for summary judgment, Balistreri stated that he understood that Rosenthal gave them the notice to vacate so that he could

himself move into the apartment. This understanding was based on what Rosenthal had told him and on the offer in the eviction notice to make Rosenthal's current apartment available to them. After they moved out of the apartment, Cherry kept in touch with another resident and learned that the unit remained empty. Balistreri was not troubled by this information because he thought that a landlord had an extended period in which to move into an apartment that he owned.

On August 16, 1999, Balistreri entered federal prison to serve a sentence for conspiracy to distribute cocaine. Approximately a month thereafter, he learned through Cherry that the apartment had been rented out to other tenants. This information caused him "to believe that Mr. ROSENTHAL was not in fact moving in as he had represented, and that [they] had been wrongfully evicted." Balistreri was released from prison on December 1, 2000.

DISCUSSION

A. Violation of Rent Control Ordinance

The parties do not dispute that the one-year limitations provision of Code of Civil Procedure section 340, former subdivision (1), applied to Balistreri's first cause of action under section 37.9, subdivision (f), of the Rent Control Ordinance (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 243-245) and that the running of the statute of limitations was tolled during the period of Balistreri's imprisonment. (Code Civ. Proc., § 352.1.) However, they offer different theories as to when the statute of limitations began to run.

Balistreri maintains that the statute began to run when he discovered that Rosenthal did not intend to move into the apartment. He notes that section 37.9, subdivision (a), of the Rent Control Ordinance prohibits a landlord from evicting a tenant unless one of 14 specified conditions exists. One of these conditions provided in subdivision (a)(8)(i), authorizes a landlord to recover possession of a rental unit "[f]or the landlord's use or occupancy as his or her principal residence . . . ." Balistreri claims he first had reason to suspect that Rosenthal did not have grounds to terminate his tenancy under this provision when he was informed shortly after his incarceration that the

unit had been rented to a third party. The running of the statute was then tolled until the end of his prison term.

Rosenthal argues that running of the period of limitations began when Balistreri received the letter dated August 1, 1998, since the letter did not comply with the requirements of section 37.9, subdivision (c), and section 37.9B of the Rent Control Ordinance. Under the former provision, the landlord must inform the tenant in writing "of the grounds under which possession is sought and that advice regarding the notice to vacate is available from the Residential Rent Stabilization and Arbitration Board, before endeavoring to recover possession." In addition, the landlord must file the notice to vacate with the Board within 10 days of service of the notice. Section 37.9B, subdivision (c), adds elaborate requirements regarding disclosure of the landlord's ownership and the tenant's possible right to re-rent the unit at the same rental rate or to recover relocation costs. The letter failed to comply with these technical requirements of a notice to vacate.

Under Code of Civil Procedure, section 312, civil actions must be commenced within the time prescribed by the statutes of limitation "after the cause of action shall have accrued . . . ." "Generally, a cause of action accrues when, under the substantive law, the wrongful act is done and liability arises, i.e., when a suit may be brought." (*Menefee v. Ostawari, supra,* 228 Cal.App.3d 239, 245; see also *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886-887; *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 205; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 459, p. 580.)

The case at bar presents the question whether Balistreri's alleged cause of action for violation of the Rent Control Ordinance narrowly embraces his chief grievance -- the landlord's failure to use the unit for his principal residence -- or also includes the landlord's attempt to recover possession through a defective notice to vacate. In various procedural contexts, California courts have "applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 24, p. 85.)

For guidance in applying the primary rights concept, we look to *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854. An attorney was sued for malpractice in connection with enforcement of a mechanic's lien on a construction project based on two alleged acts of negligence, a failure to serve a stop notice on the project's lenders and to timely foreclose the mechanic's lien. Construing a provision of the malpractice insurance policy limiting coverage "for each claim," the court held that the attorney's negligence gave rise to a single claim: "Bay Cities had one primary right -- the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained. He allegedly breached that right in two ways, but it nevertheless remained a single right." (*Id.* at p. 860.)

Balistreri here claims a right to recover treble damages, plus attorney fees and costs, under subdivision (f) of section 37.9 of the Rent Control Ordinance. The operative language of the subdivision authorizes the action "[w]henever a landlord wrongfully endeavors to recover possession or recovers possession of a rental unit in violation of Section[] 37.9 . . . ." The record shows that Rosenthal first violated subdivision (c) of section 37.9 by giving a defective notice to vacate: Since notice requirements must be strictly followed in eviction proceedings, Balistreri then had a right to sue. (*Kwok v. Bergren* (1982) 130 Cal.App.3d 596, 600.) Subsequently, as Balistreri argues, Rosenthal demonstrated that he did not possess a right to recover possession for his own use under subdivision (a)(8). This later action, however, related to violation of the same primary right to be free of interference, or attempted interference, with possession of his rental unit in violation of section 37.9 of the Rent Control Ordinance.

On the present record there was no factual basis to argue that Balistreri did not have an opportunity to discover his cause of action at the time the defective notice was served. The defects in the notice to vacate were apparent on its face, and the co-tenant of Balistreri's apartment, Cherry, in fact made efforts to investigate and assert tenant rights on behalf of both of them. The later discovery that Rosenthal did not come within the exception of subdivision (a)(8) of section 37.9 added no more than an additional ground

for recovery for invasion of the same primary right, analogous to the two separate negligent acts of the attorney in *Bay Cities Paving*.

The decision in *Menefee v. Ostawari, supra,* 228 Cal.App.3d 239 is precisely on point. The landlord there served appellant with a notice to vacate on September 15, 1987, that gave a reason that was not included in the conditions of subdivision (a) of section 37.9. Appellant vacated the premises and filed a complaint under subdivision (f) of section 37.9 on September 20, 1988. The court noted that subdivision (f) authorizes an action for attempted interference with possession in violation of the Rent Control Ordinance, i.e., it "authorizes an action whenever a landlord '*endeavors to recover possession*' " in violation of section 37.9. (*Menefee v. Ostawari, supra,* at p. 245.) Appellant's cause of action "therefore accrued . . . on September 15, 1987, in that appellant was entitled to bring suit at that time." (*Ibid*.) "Appellant was damaged at the time of service of the 30-day notice in that [the landlord] interfered with his continued right of possession at that time, and he was entitled to bring suit at that time." (*Ibid*.) Accordingly, the court held that appellant's cause of action was barred by the one-year limitation of Code of Civil Procedure section 340, former subdivision (1). (*Menefee v. Ostawari, supra,* at p. 246.)

In this appeal, Balistreri relies on *Sylve v. Riley* (1993) 15 Cal.App.4th 23, which applied the discovery rule to accrual of a cause of action for violation of the San Francisco Rent Control Ordinance. The *Sylve* plaintiff received a 30-day notice to vacate that properly invoked subdivision (a)(8) of section 37.9 authorizing the landlord to recover possession for the use of a relative, their son. When the rental unit remained vacant over a year after she vacated the unit, plaintiff brought an action under subdivision (f) of section 37.9 for violation of the Rent Control Ordinance. The trial court granted a summary judgment for the landlord on the ground that the action was barred by the one-year statute of limitations. Reversing the judgment, the court of appeal noted that subdivision (a)(8), as then enacted, was "silent as to how soon after eviction the landlord's relative must move in" and did "not say how long the landlord has for renovation and/or repair after the tenant moves out." (*Sylve v. Riley, supra,* at p. 27, fn.

omitted.) Therefore, the court held that the accrual of the cause of action was governed by the discovery rule, which presented "triable issues of fact as to when, if ever, the appearance of vacancy constituted inquiry notice of the [landlords'] lack of intent to move their son into the premises, and what, if any further investigation was reasonable under the circumstances." (*Ibid.*)

We can easily distinguish *Sylve* on the ground that the notice to vacate there complied with the requirements of the Rent Control Ordinance. The plaintiff's cause of action thus was predicated solely on discovery that the landlord did not intend to move their son into the rental unit and therefore did not come within the exception of subdivision (a)(8). In the present case, the alleged discovery of Rosenthal's failure to occupy the premises constituted a further ground for bringing the action, which could have been brought earlier following service of the defective notice to vacate.

B. Negligence

Our analysis also applies to the second cause of action for negligence. The alleged negligence consisted of the breach of "a duty to manage the premises in a lawful manner, to refrain from wrongfully causing damage to the plaintiff, and to refrain from unnecessarily breaching plaintiff's right to occupancy and quiet enjoyment of the premises." The negligence thus was predicated on the same violation of the Rent Control Ordinance as the first cause of action; and since the pleading alleges a personal injury, it was again subject to a one-year statute of limitations under Code of Civil Procedure section 340, former subdivision (3).

The judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.