CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

APPELLATE DIVISION

Joel Drouet, Petitioner, v. California Superior Court, County of San Francisco, Respondent.	)	Appellate No.: 5181 Municipal Court No. 171534 ORDER DIRECTING ISSUANCE OF WRIT OF MANDATE
Jim Broustis and Ivy McClelland, Real Parties in Interest.	)	

Petitioner Joel Drouet has petitioned this court for a writ of mandate to compel the trial court to reverse its order denying summary adjudication on an issue in an unlawful detainer action.[1] Petitioner objects to Respondents Jim Broustis and Ivy McClelland's assertion of an affirmative defense of retaliation. Petitioner contends that , as a matter of law, a tenant may not assert a retaliatory eviction defense where the landlord has complied with all of the procedural requirements of Government Code § 7060 et seq., commonly referred to as the Ellis Act (the

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[1] This court granted an alternative writ of mandate, because this issue is important to the legal community and because, in an unpublished opinion, this court previously ruled on this issue. In *Creola Love* v. *Aaron Christianson* and *Giampiero Mancinelli*, App. No. 5143. Case No. 161194, filed November 22, 1999, this court affirmed the trial court's judgment in favor of the landlord in an unlawful detainer proceeding. The trial court has granted summary judgment on the ground that Civil Code 1942.5, which prohibits retaliatory evictions, is not an affirmative defense to an eviction pursuant to Government Code § 7060 et seq.

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"Act").[2] We hold retaliation defense is not available in these circumstances. When a landlord has complied with all procedures for withdrawing his rental units from the rental market, his motive for withdrawing the units is irrelevant.

The writ of mandate shall issue. The trial court is ordered to grant summary adjudication in the above-captioned matter.

. FACTS AND PROCEDURAL HISTORY

On a motion for summary judgment, facts presented in "the moving party's affidavits are strictly construed while those of the opposing party are liberally construed." (*Kelsey* v. *Waste Management of Alameda County* (1999) 76 Cal. App. 4th 590, 594 [quoting *Hanooka* v. *Pivko* (1994) 22 Cal. App. 4th 1553, 1558]; see also Code Civ. Proc., 437c, subd. (o)(2).) Thus, the court strictly construes the facts presented to the trial court by Appellants and liberally construes those presented by Respondents.

Petitioner Drouet owns a two-unit apartment building at 378-380 San Carlos Street, San Francisco. Real Parties in Interest Jim Broustis and Ivy McClelland ("Real Parties") occupy one of the units, a two-bedroom apartment. Mr. Broustis has lived in the apartment for twelve years, and Ms. McClelland has lived there for approximately one year. Mr. Broustis and Petitioner have had conflicts for many years. Real Parties allege the following problems, among others: in 1990, Petitioner refused to permit another person to move in as Mr. Broustis's housemate, so that for three to five years Mr. Broustis was forced to pay the entire rent himself; for eight years Petitioner led Mr. Broustis to believe that Petitioner was paying one-half of the garbage bill when in fact he was not, and the non-payment of the bill allegedly led the City to place liens on the property;

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[2] All statutory references are to the Government Code unless otherwise indicated.

several times during his tenancy, Mr. Broustis had to make repairs and deduct them from his rent; in 1999, after Real Parties complained repeatedly about a leaking shower wall and sewage drain, and about deteriorating back stairs, Petitioner made only minimal repairs and did not eradicate the problems.

On August 5, 1999, Petitioner took the following action: (1) he field with the Rent Board a “Memorandum of Notice Regarding Withdrawal of Rental Unit from Rent or Lease;” (2) he served Real Parties with written notice requiring all occupants to quit the premises by October 4, 1999; and (3) he filed with the Rent Board a second “Notice of Intent to Withdraw Residential Rent Unit from the Rental Market,” in which he certified under penalty of perjury that actions had been initiated to terminate all existing tenancies in the building.

On September 7, 1999, Petitioner caused to be recorded in the Recorder’s Office for the City and County of San Francisco a Memorandum of Notice Regarding Withdrawal of Rental Unit from Rent or Lease.

On October 6, 1999, Petitioner filed a complaint for unlawful detainer. Real Parties answered the complaint, asserting four affirmative defenses. Petitioner filed a motion for summary judgment, or in the alternative summary adjudication of issues directed to all four of Real Parties’ affirmative defenses.

The trial court granted the motion as to two of the issues, and denied the motion as to the defenses of retaliation and violation of local ordinance. Petitioner then petitioned this court for writ of mandate, or an alternative writ of mandate, seeking to compel the trial court to grant summary adjudication on the remaining two issues. In their Opposition to the Petition for Writ of Mandate, Real Parties have withdrawn their defense of violation of local ordinance. The one remaining issue is whether, as a matter of law, retaliation is a defense available to Real Parties.

Petitioner is supported by Amici Curiae Small Property Owners of San Francisco and Berkeley Property Owners Association. Real Parties are supported by Amicus Curiae New College of California, School of Law, Housing Advocacy Clinic.

II. DISCUSSION

A. STANDARD OF REVIEW

"Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance." (*Payne* v. *Superior Court* (1976) 17 Cal. 3d 908, 925 [citing Code Civ. Proc., §§ 1085, 1086; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 61, p. 3838].) On a writ seeking the reversal of a denial of summary adjudication, we review the trial court's ruling de novo. (*Dyer* v. *Superior Court* (1997) 56 Cal. App. 4th 61, 65.) "[O]ur review precisely mirrors what occurs in the trial court, i.e., we make a de novo evaluation which, after it be shown that there are no disputed issues of material fact, requires a legal determination of the moving party's entitlement to judgment." (*Ibid*.; see also Code Civ. Proc., § 437c, subd. (f)(1) and subd. (o)(2).)

The writ petition before us involves only the availability of an affirmative defense to an unlawful detainer proceeding undertaken pursuant to the Ellis Act. The parties do not dispute that Petitioner complied with all procedures under the Ellis Act. Any remaining disputed issues of fact are not material to our determination of the legal issue on which Petitioner moved for summary adjudication.

Whether or not such a defense is available is a matter of statutory interpretation. In interpreting the Ellis Act, we are guided by the intent of the Legislature.

> [A court's] task in construing a statue is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such an intent, we first look to the words of the statute themselves, giving the language its usual, ordinary import. The words of the statute must be construed in context, keeping in mind

> the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists, consideration should be give to the consequences that will flow from a particular interpretation. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

(*San Francisco International Yachting Center Development Group* v. *City and County of San Francisco* (1992) 9 Cal. App. 4th 672, 680 [citing *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245, 268].)

B. THE *NASH* DECISION

The Ellis Act was a direct legislative response to the Supreme Court's decision in *Nash* v. *City of Santa Monica* (1984) 37 Cal. 3d 97. "[B]ecause the Ellis Act was passed in response to *Nash*, it is acceptable to construe the former with reference to the latter in order to effectuate the Legislature's professed intent to supersede *Nash*." (*Bullock* v. *City & County of San Francisco* (1990) 221 Cal. App. 3d 1072, 1096.) Thus, we begin our analysis with a review of *Nash*.

In the late 1970's, the City of Santa Monica faced a scarcity of rental housing. (*Nash* v. *City of Santa Monica, supra*, 37 Cal. 3d at p. 100.) A crisis was precipitated by what came to be known ad the "Demolition Derby," a 15-month period in which owners razed more than 1300 rental units and converted many others to condominiums. (*Ibid*.) In response, voters passed a charter amendment aimed at preserving the City's rental housing stock. Among its provisions, the amendment required that a landlord obtain a permit before removing a rental unit from the market. Permits were issued only if the rent control board made the following findings: the unit was not occupied by a person of low or moderate income; its rent was unaffordable to those of low or moderate income; removing the unit would not adversely affect the City's housing supply; and the landlord could not make a reasonable return on his or her investment. (*Id*. at pp. 100-101.)

Jerome Nash was a 17-year old student whose mother bought him a six-unit apartment building in Santa Monica the year before rent control took effect. (*Nash* v. *City of Santa Monica, supra*, 37 Cal. 3d at p. 101.) Nash "soon become disenchanted…with operating rental housing." (*Ibid*.) Although he was earning a fair return on his investment, he decided to demolish the building. He said, "There is only one thing I want to do, and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment." (*Ibid*.) When he realized he would not be granted a permit, Nash challenged the ordinance as a deprivation of property without due process of law. (*Id*. at pp. 101-102.)

Nash prevailed both at trial and on appeal. (*Nash* v. *City of Santa Monica, supra*, 37 Cal. 3d at p. 99; *Nash* v. *City of Santa Monica* (1983) 143 Cal. App. 3d 251, overruled.) In 1984, the Supreme Court reversed, deeming the burden imposed on Nash's liberty interests minimal, and holding that the permit requirement was reasonably related to the important goal of protecting Santa Monica's scarce supply of rental housing. (37 Cal. 3d at pp. 99, 104.)

C. THE ELLIS ACT

In direct response to the *Nash* decision, Senator Jim Ellis introduced the bill that was later enacted as Government Code section 7060 et seq., commonly referred to as the Ellis Act. The Act includes an explicit statement of legislative intent: "It is the intent of the Legislature in enacting this chapter to supersede any holding or portion f any holding in Nash v. City of Santa Monica, 37 Cal. 3d 97, to the extent that the holding, or portion of the holding, conflicts with this chapter, so as to permit landlords to go out of business. (§ 7060.7.)

The Ellis Act prohibits any public entity from "compel[ling] the owners of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease." (§

7060, subd. (a).) The Act does, however, allow localities to prescribe procedures for withdrawing property from the rental market. These include notice and recording requirements. (See §§ 7060.3 and 7060.4.) In addition, the Act allows localities to impose rental restrictions and other penalties if an owner re-rents within a certain number of years a withdrawn unit.[3] (§ 7060.2.) For example, a public entity may require an owner who re-rents within ten years to first offer the unit to any displaced tenants. (§ 7060.2, subd. (b)(2).) A public entity may also allow a displaced tenant to sue for actual and exemplary damages if an owner fails to comply with its regulations regarding re-rental, and a public entity may itself initiate a suit against an owner under such circumstances. (§ 7060.2, subd. (a)(2) and (3).)

The Act further provides that if an owner seeks to displace a tenant by an unlawful detainer proceeding, the tenant "may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter." (§ 7060.6.)

Under the healing "Contracts or agreements, zoning or planning ordinances and statutes; effects of chapter," the Act states that "nothing in this chapter…supersedes" any provision of various code sections, including "Title 5 (commencing with Section 1925) of Part 4 of Division 3of the Civil Code."[4] (§ 7060.1(d).) Of particular relevance to our discussion is Civil Code section 1942.5, which appears in Title 5 and which forbids retaliatory evictions.[5]

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[3] In San Francisco, the Residential Rent Stabilization and Arbitration Ordinance, Administrative Code § 37.9 constitutes the implementing regulation for the Act. The right to evict under the Act appear in § 37.9(a)(13). A comprehensive scheme of notice and recording requirements appear in § 37.9A.

[4] Other code sections that are not superseded by the Act include: "any provision of Chapter 16 (commencing with Section 7260) of this division, Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of this code, Chapter 5 (commencing with Section 17200) of Part 2 of

Finally, the Act explains that while it is intended to permit landlords to go out of business, it is not intended to:

(a) Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease under this chapter.

(b) Preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property.

(c) Override procedural protections designed to prevent abuse of the right to evict tenants.

(d) Permit an owner to withdraw from rent or lease than all of the accommodations, as defined by paragraph (1) or (2) or subdivision (b) of Section 7060.

(e) Grant to any public entity any power which it does not possess independent of this chapter to control or establish a system of control on the price at which accommodations may be

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Division 7 of the Business and Professions Code, Part 2 (commencing with Section 43) of Division 1 of the Civil Code,…Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or Division 24 (commencing with Section 33000) of the Health and Safety Code." (§ 7060.1(d).)

[5] Civ. Code, § 1942.5 provides in pertinent part:

> 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, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days.

Section 1942.5 also provides that a "lessor or agent of a lessor who violates this section" may be liable for actual and punitive damages, as well as for attorney's fees.

offered for rent or lease, or to diminish any such power which that public entity may possess, except as specifically provided in this chapter.

(f) Alter in any way either Section 65863.7 relating to the withdrawal of accommodations which comprise a mobilehome park from rent or lease or subdivision (f) of Section 798.56 of the Civil Code relating to a change of use of a mobilehome park. (§7060.7.)

D. JUDICIAL INTERPRETAION OF THE ACT.

Following enactment of the Ellis Act, the City of Santa Monica adopted a new chapter amendment seeking "to protect tenants against potential abuses by landlords seeking to withdraw residential rental units under the authority of the Ellis Act." (*City of Santa Monica* v. *Yarmark* (1988) 203 Cal. App. 3d 153, 157-158.) It provides that an owner could not evict tenants from rent-controlled units unless: "the landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica." (*Id*. at p. 164.) The permit requirements were prescribed in an amended version of the regulation at issue in *Nash* v. *City of Santa Monica, supra*, 37 Cal. 3d at p. 105. Thus, a landlord could not remove units from the rental market unless: (1) the landlord was not making a fair return on investment, (2) the property was uninhabitable, or (3) plans for the site called for future rent-controlled units, of which 15% were to be affordable to person of low income. (*City of Santa Monica* v. *Yarmark, supra*, at pp. 157-158.)

The court of appeal invalidated the new ordinance in two opinions. *City of Santa Monica* v. *Yarmark, supra*, 203 Cal. App. 3d 153, and *Javidzad* v. *City of Santa Monica* (1988) 204 Cal. App. 3d 524. In *Yarmark*, the court stated:

> The legislative history of the Act consistently demonstrates the purpose of the ACT is to allow landlords who comply with its terms to go out of the residential

> rental business by evicting their tenants and withdrawing all units from the market, even if the property is habitable, and the landlords lack approval for further use of the land. In addition to the statement of legislative intent contained in the Act. (Gov. code, § 7060.7), the various legislative committee reports concerning the Act indicate the Act was intended to overrule the Nash decision so as to permit landlords the unfettered right to remove all residential rental units from the market, consistent, of course, with guidelines as set forth in the Act and adopted by local governments in accordance thereto.

(203 Cal. App. 3d at p. 165.)

In *Javidzad*, the court quoted with approval from the trial court's statement of decision, as follows:

> The plain effect of this Charger provision is to compel the landlord to remain in the rental business at that particular location since it allows no means to permit the landlord to just simply go out of that business. By contrast, the Ellis Act contains no such limitations. The Court must refuse to require a Removal Permit under § 1803(t).

In subsequent opinions the court of appeal invalidated other municipalities' ordinances determining they were preempted by the Ellis Act. (*Channing Properties* v. *City of Berkeley* (1992) 11 Cal. App. 4th 88, 90 [ordinance required relocation assistance to all displaced tenants]; *Los Angeles Lincoln Place Investors, Ltd.* v. *City of Los Angeles* (1997) 54 Cal. App. 4th 53, 62 [ordinance conditioned issuance of demolition permit on City approval of subsequent land use]; *First Presbyterian Church of Berkeley* v. *City of Berkeley* (1997) 59 Cal. App. 4th 1241, 1252.)

The Ellis Act allows local governments to enact a scheme of procedures and penalties designed to prevent withdrawal of rental units in order to circumvent rent control laws. However, as the aforementioned opinions explain, the Ellis Act prohibits localities from imposing additional restrictions on a landlord's ability to remove rental units from the market in order to preserve the rental housing supply.

E. A TENANT CANNOT ASSERT A RETALIATORY EVICTION DEFENSE WHERE THE LANDLORD HAS FOLLOWED ALL PROCEDURES REQUIRED BY THE ELLIS ACT

The question before this court is whether the Legislature, in enacting the Ellis Act, intended to allow a tenant to assert a retaliatory eviction defense to an unlawful detainer proceeding undertaken pursuant to that statute. The defense of retaliatory eviction is available to tenants in unlawful detainer proceedings through the Civil Code and decision law. (Civil Code § 1942.5; *see, e.g., S. P. Growers Assn.* v. *Rodriguez* (1976) 17 Cal. 3d 719, 724, 730 ["It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding."].)

In answering that question, we seek to harmonize various subsections of the Act, keeping in mind the purpose of the legislation. (*San Francisco International Yachting Center Development Group* v. *City and County of San Francisco, supra*, 9 Cal. App. 4h at p. 680.)

1. The Act explicitly provides defenses to unlawful detainer based on procedural defects only

The portions of the Act that discuss defenses to unlawful detainer action indicate defenses based on procedural defects only. Section 7060.6 reads in pertinent part:

> [The tenant] may assert by way of defense [to an unlawful detainer action] that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations or public entities adopted to implement this chapter, as authorized by this chapter.

Section 7060.7 also focuses on procedure: "[T]his act is not otherwise intended to…override procedural protections designed to prevent abuse of the right to evict tenants."

In contrast to the Act's clear declaration of a tenant's rights to assert a defense based on a landlord's non-compliance with procedure, the only reference in the Act to substantive statutory protections for tenants facing unlawful detainer actions is oblique. Section 7060.1(d) declares that the Act does not supersede certain statutes, among them Civil Code section 1942.5. Without

any indication in the Act itself or how these protections were meant to apply, we must choose the interpretation that best conforms with the overall intent of the Act, that is, to allow landlords who comply with the Act's procedural requirements to go out of the residential rental business.

2. Interpreting the Act to permit a retaliation defense may indefinitely bar a landlord's ability to withdraw from the rental business

"Where uncertainty [in statutory interpretation] exists, consideration should be given to the consequences that will flow from a particular interpretation." (San Francisco International Yachting Center Development Group v. City and County of San Francisco, supra, 9 Cal. App. 4th at p. 680.)

Real Parties contend that the consequences of a successful retaliation defense would be merely to delay the landlord's exit from the rental business until the landlord's invalid motivation dissipates. It is true that ordinarily a successful retaliation defense does not permanently foreclose a landlord's right to evict a tenant, as long as the landlord can later present a lawful reason for the eviction. (*Schweiger* v. *Superior Court* (1970) 3 Cal. 3d 507, 517 [relating to the common law right to present a retaliatory eviction defense.]) But we find the situation very different in an eviction pursuant to the Ellis Act.

According to Real Parties' theory, if the trier of fact found that Petitioner's underlying purpose in evicting his tenants and going out of business was to retaliate against them for their complaints regarding leaking shower walls, etc., then Petitioner would have to continue renting to Real Parties until his invalid motive dissipated. Real Parties suggest in their brief to this court that a landlord "may simply wait for six months or so without engaging in acts that could be countenanced as further retaliation." It is unclear what such acts might be. Presumably, some months after losing in the unlawful detainer action, a landlord could go through the notice procedures again, institute another unlawful detainer action if necessary, and attempt to convince

the trier of fact that his decision to cease renting the units was no longer a reaction to his tenants' complaints. Complicating the matter, tenants in each of the units in a withdrawn property would be entitled to raise the retaliation defense, with the possibility of different results at trial.

3. The Act's legislative history indicates the Legislature did not intend to preserve a retaliation defense

"Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*San Francisco International Yachting Center Development Group* v. *City and County of San Francisco, supra*, 9 Cal. App. 4th at p. 680.)

The parties have brought two items of recorded legislative history to our attention: an analysis issued by the Senate Rules Committee, authored by the California Association of Realtors; and a letter signed by Senator Ellis to Governor Deukmejian seeking the Governor's signature after the Legislature passed the bill.

The Senate Rules Committee report stated, in part:

> In response to concerns that the bill could permit property owners to evade rent control and other laws by ceasing to rent under the guise of going out of business, the bill has been amended to provide some safeguards against abuse.
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> The bill would provide that its provisions would not supersede any rights of a tenant under the Unruh Civil Rights Act, the Fair Employment & Housing Act, the Civil Code, the unlawful detainer statutes, the Community Redevelopment Law, and the relocation assistance laws, and the Unfair Business Practices Act.
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> This provision would limit a landlord's right to go out of business if the exercise of that right would jeopardize a tenant's rights under state law. For example, this provision would probably prohibit a landlord from going out of business if the tenant had requested repairs or reported housing code violations. An eviction of the tenant under such circumstances could be deemed a prohibited retaliatory eviction.

(Sen. Rules Comm., Off. Of Sen. Floor Analyses, September 10, 1985.)

Senator Ellis' letter reads, in part:

> Very simply, the bill states that a public entity may not compel the owner of any residential real property to offer, or continue to offer, accommodations in such

> property for rent or lease. From a practical standpoint it overturns a 5-? [sic] California Supreme Court decision in the case of Nash v. City of Santa Monica, 37 C 3d 97.
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> During progress of the measure through the Legislature, a large number of amendments were added to deal with such situations as if a landlord were to go temporarily out of business and then again offered his units for rental (tenant rights, possible penalties, etc.); and, declaring that the bill only extended the right to go out of business and not any further right which the owner did not already possess (in other words – the bill does not convey a right to rezoning, to condominium conversion, etc.).
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> Despite the many amendments, the original thrust has been maintained: the good faith right to make a personal decision to go out of business for whatever reason, including potential liability, frustration with a personal service aspect of this business, psychological demands, or investment decisions.

(Sen. Jim Ellis, letter to Governor Deukmejian, September 13, 1985.)

In his letter, Senator Ellis explains it was the intent of the Legislature to codify a landlord's "good faith right to make a personal decision to go out of business for whatever reason." Judicial opinions interpreting the Act consistently have confirmed this was the Legislature's intent. Interpreting the Act to prohibit a landlord from going out of business if a tenant had requested repairs is inconsistent with such intent.

A quick review of *Nash*'s facts support an interpretation of the Legislature's intent so as to bar a retaliation defense. Jerome Nash called his tenants "a group of ingrates inhabiting my building". (*Nash* v. *City of Santa Monica, supra*, 37 Cal. 3d at p. 101.) He was willing to forego a fair return on his investment and take a chance on selling vacant land "at a price which will not mean a ruinous loss on my investment" rather than continue to rent to those "ingrates". (*Ibid.*) An element of "retaliation" can easily be read into Jerome Nash's decision to quit being a landlord.

Finally, the appellate court's holdings that the Act preempts a variety of local ordinances which placed substantive limits on a landlord's ability to withdraw units from the rental market are in line with this interpretation of the Legislature's intent. (*City of Santa Monica* v. *Yarmark,*

supra, 203 Cal. App. 3d 153; *Javidzad* v. *City of Santa Monica, supra*, 204 Cal. App. 3d 524; *Channing Properties* v. *City of Berkeley, supra*, 11 Cal. App. 4th 88; *Los Angeles Lincoln Place Investors, Ltd*. v. *City of Los Angeles, supra*, 54 Cal. App. 4th 53; *First Presbyterian Church of Berkeley* v. *City of Berkeley, supra*, 59 Cal. App. 4th 1241.)

In sum, the Act's legislative history indicates the Legislature did not intend to compel a landlord such as Jerome Nash to sty in business upon a finding by a trier of fact that he was seeking to withdraw from the business in order to avoid responding to his tenants' complaints.

4. The Legislature's amendment of Civil Code, section 1942.4 does not imply the Legislature intended to preserve a retaliation defense

In 1992, the Legislature amended Civil Code section 1942.4, which immediately precedes the anti-retaliation statute in the Civil Code. Section 1942.4 imposes liability on a landlord for actual and special damages if the landlord collects or demands rent for a rental unit that substantially lacks any of the characteristics of a tenantable dwelling (such as adequate plumbing); and if a public official has notified the landlord in writing of his or her obligations to make the repairs. The 1992 amendment reads, "Nothing in this section shall require any landlord to comply with this section if he or she pursues his or her rights pursuant to Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of eh Government Code."

Section 1942.4 is included along with 1942.5 in the list of code sections "not superseded" by the Ellis Act. (§ 7060.1(d).) At oral argument on the hearing on the writ petition, Real Parties argued that the Legislature's actions in amending section 1942.4 while failing to amend section 1942.5 implies that the Legislature meant to preserve the retaliation defense to an Ellis Act eviction. In other words, Real Parties argued, if the Legislature had meant section 1942.5 should

not apply in the context of the Ellis Act, it would have amended section 1942.5 when it amended the preceding section.

We are not persuaded. First, we are aware of no rule of statutory construction that would support such an inference. Second, if one inferred such a high degree of intentionality to the Legislature's failure to act, one would also necessarily assume the Legislature intended what amounts to an absurd result. "[P]pertinent here is the settled principle that when uncertainty arises as the meaning of a statute, courts must consider the consequences that will flow from a particular interpretation. It must be presumed that the Legislature intended reasonable and practical results consistent with its express purpose, not absurd or adverse consequences." (*In re Bittaker* (1997) 55 Cal. App. 4th 1004, 1009.)

For example, consider the following scenario. A rental unit contains defective plumbing, and the tenants complain to the health department of another City agency. At this point, the landlord begins procedures to withdraw the entire building from the rental market pursuant to the Ellis Act. Under section 1942.4, the landlord may withdraw the unit from the rental without fixing the plumbing or being liable to the tenants for damages for renting a unit with broken plumbing. Yet Real Parties argue that, because it did not amend section 1942.5, the Legislature must have intended to compel the landlord to remaining business, or be liable to the tenant for damages, if the tenant can prove that the reason the landlord wants to go out of business is to avoid fixing the plumbing.

The Ellis Act does not prevent a landlord from going out of business in reaction to tenant complaints, nor does it prevent a landlord from going out of business rather than responding to tenant complaints. Such a statutory scheme would not only be illogical, but would contradict the Legislature's intent to permit a landlord to simply go out of business.

5. Applicability of Civil Code section 1942.5 to an unlawful detainer proceeding under the Ellis Act

"[S[tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (San Francisco Internat. Yachting, 9 Cal. App. 4th at 680.)

Civil Code section 1942.5 provides that the anti-retaliation defense is unavailable when a landlord evicts tenants "for any lawful cause." (Civ. Code § 1 942.5, subd. (d).) We interpret this to mean, in the context of the issue before us, that a tenant cannot raise retaliation as a defense (even if the landlord's motive was retaliatory), if there is a legal basis for the eviction unrelated to the landlord-tenant relationship. In the context of foreclosure related eviction, the court of appeal explained:

> Our Supreme Court recently noted that the defense of "retaliatory eviction" has been firmly ensconced in this state's statutory law and judicial decisions for many years. "it is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding." Our high court went on to note that the landlord, having entered into the landlord-tenant relationship…,may no subsequently evict a tenant for an invalid reason.
>
> A crucial premise underlying the "retaliatory eviction" doctrine and the tenant's right to raise the issue in an unlawful detainer proceedings is that, but for the landlord's "invalid reason" for the eviction, the tenant would be entitled to remain in possession of the premises pursuant to the underlying lease or rental agreement. In the case of evictions following valid foreclosure sales, however, there is no antecedent landlord-tenant relationship between the trustor and the purchaser. There is no lease or rental agreement entitling the trustor to remain in possession of the premises; which has been lost at a valid foreclosure sale. Thus, even if the purchaser were precluded from using an "invalid reason" for eviction, the trustor would still have no lawful claim to continued possession.
>
> Our Supreme Court recently noted that the defense of "retaliatory eviction" has been firmly ensconced in this state's statutory law and judicial decisions for many years…"It is settled that a landlord may be precluded for evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has n

> right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding."…Our high court went on to note that the landlord, having entered into the landlord-tenant relationship…may not subsequently evict a tenant for an invalid reason…
>
> A crucial premise underlying the "retaliatory eviction" doctrine and the tenant's right to raise the issue in an unlawful detainer proceeding is that, but for the landlord's "invalid reason" for the eviction, the tenant would be entitled to remain in possession of the premises pursuant to the underlying lease or rental agreement. In the case of eviction following valid foreclosure sales, however, there is no antecedent landlord-tenant relationship between the trustor and the purchaser. There is no lease or rental agreement entitling the trustor to remain in possession of the premises, which has been lost at a valid foreclosure sale. Thus, even if the purchaser were precluded from using an "invalid reason" for eviction, the trustor would still have no lawful claim to continued possession.

(California Livestock, supra, 165 Cal. App. 3d at p. 143 [internal citations omitted.])

In the foreclosure context, the legal basis for the mortgagor's possession of the premises is extinguished when the property is foreclosed. Retaliation, even if proved, is irrelevant to a mortgagor's right to possession.[6]

As implemented by San Francisco ordinance, the Ellis Act requires a landlord to record a deed restriction on the property within thirty days of the effective withdrawal of the property from rental. The date of effective withdrawal applicable to the case before us is sixty days after the date the landlord notified the Rent Board of his intention to withdraw the rental units. (See San Francisco Administrative Code, § 37.9A, subd. (f)(3).)

The effect of the withdrawal and recordation of the deed restriction is to extinguish the legal basis for the tenant's possession; these actions on the part of the landlord cause the unit to cease being rental property. It cannot be said that but for the landlord's invalid reason, the tenant

[6] Admittedly, the analogy to a tenant's position under the Ellis Act is not perfect. In the foreclosure context, there was never a landlord-tenant relationship between the parties. In the Ellis Act context, existing landlord-tenant relationships are extinguished by the landlord's compliance with procedures prescribed by the Act.

would be entitled to remain in possession pursuant to the underlying rental agreement. Once the landlord complies with all procedures, sixty days after the notice is presented to the Rent Board the property is withdrawn from rental, and the rental agreement becomes void. (See *California Livestock Production Credit Assn*. v. *Sutfin, supra*, 165 Cal. App. 3d at p. 143.) As in the foreclosure context, once the unit has been properly withdrawn the issue of retaliation is irrelevant to a tenant's right to possession.

Real Parties in the case before us contend a jury should be allowed to decide if Petitioner's decision to remove his rentals from the market is motivated by a desire to avoid responding to his tenants' complaints. In Real Parties' view, Petitioner has engaged in "scofflaw" behavior for many years in his retaliation with Mr. Broustis; Real Parties view Petitioner's withdrawal of the units from rental as continuation of this scofflaw behavior. However, Real Parties do not dispute that the withdrawal was accomplished in conformance with the Act's procedural requirements. In other words, when Petitioner properly removed his units from the rental market, followed the law. Petitioner was not acting as a scofflaw. Under this court's interpretation of the Act, a retaliation defense is unavailable in these circumstances.

The Legislature's reference to Civil Code 1942.5 is not surplusage, however. "[I]t is a cardinal rule of construction that every word of the statute is presumably intended to have some meaning and that 'a construction making some words surplusage is to be avoided.'" (*Moyer* v. *Workmen's Compensation Appeals Board* (1973) 10 Cal. 3d 222, 230 [quoting *Watkins* v. *Real Estate Commissioner* (1960) 182 Cal. App. 2d 397, 400].)

To harmonize the Ellis Act and the anti-retaliation statute, we focus on an area of great concern to tenants and to this court. This is the potential for what Real Parties call "phony evictions." In their brief in opposition to the writ, Real Parties state:

> Tenants that use the retaliation defense play a valuable role as “whistleblowers.” Such tenants will prevent “bad apples” from conducting phony evictions designed to create an “underground housing market” in San Francisco.

The Ellis Act may not be used “to evade rent control and other laws by ceasing to rent under the guise of going out of business.” (*Valnes* v. *Santa Monica Rent Control Bd.* (1990) 221 Cal. App. 3d 1116, 1122 [quoting Assem. Com. on Judiciary, analysis of May 30, 1985 amendments to Sen. Bill No. 505].) In the context of a withdrawal of apartments from the rental market, this means that a landlord may not evict under the Ellis Act, and then re-rent, except under conditions prescribed by local ordinance. If a landlord re-rents in violation of the ordinance, he or she is subject to damages under the Act which may include punitive damages. This court finds that the Act’s intention not to supersede the state anti-retaliation means that in the event a withdrawal of rental units does not comply with the restrictions expressly stated in the Act, or mandated by local ordinance, a displaced tenant may pursue remedies available under Civil Code section 1942.5 in addition to remedies otherwise available under the Act.

III. CONCLUSION

The retaliatory eviction defense is not available to tenants evicted under the Ellis Act, where the landlord has complied with all procedures prescribed by the Act and local ordinances.

IT IS HEREBY ORDERED THAT a writ of mandate issued directing the trial court in the above-captioned matter to reverse its order denying summary adjudication on the issue of the availability of a retaliatory eviction defense.

DATED: ________________, 2000

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Hon. A. James Robertson, III
Judge of the Superior Court

Hon. James J. McBride
Judge of the Superior Court

Hon. Ernest H. Goldsmith
Judge of the Superior Court