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Court of Appeal, First District, Division 5, California.

2154 TAYLOR, LLC,

Plaintiff and Respondent,

v.

Dennis A. THOMPSON et al.,

Defendants and Appellants.

A159290, A159291, A159295

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Filed 12/11/2020

(San Francisco City and County Super. Ct. Nos.
CUD-19-664666, CUD-19-664667, and CUD-19-664668)

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Opinion

Burns, J.

*1 In these consolidated unlawful detainer actions, defendants Dennis A. Thompson, Cathleen J. Thompson, Samuel E. Hiona, Beth Bledsoe, and Ana Ganovic (Tenants) appeal from judgments of possession entered, after summary judgment, in their landlord's favor. Tenants argue that the trial court erred by granting summary judgment because they established triable issues of material fact regarding their landlord's compliance with the Ellis Act (*Gov. Code*, § 7060 et seq.)¹ and their retaliatory eviction defense. We affirm.

Background

A.

The Ellis Act sets forth the procedure by which a landlord may go out of business by removing all rental units in a building from the market. (§ 7060, subd. (a) [no statute, ordinance, regulation, or administrative action “shall ... compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease”]; *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 589–590 (*Drouet*)). If a landlord complies with the Ellis Act but a tenant refuses to vacate by the withdrawal date, the landlord may file an action for unlawful detainer to evict the tenant and recover possession. (§ 7060.6; *Drouet, supra*, 31 Cal.4th at p. 587.)

Tenants may assert affirmative defenses only to the extent they might defeat the landlord's right to possession. (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 805; *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 452.) Retaliatory eviction and noncompliance with the Ellis Act are two such defenses. (*Gov. Code*, §§ 7060.6, 7060.7, subd. (d)(1); *Civ. Code*, § 1942.5; *Drouet, supra*, 31 Cal.4th at pp. 587, 591.)

B.

2154 Taylor, LLC (Landlord) owns a six-unit apartment building in the North Beach neighborhood of San Francisco, where Tenants have lived for many years. Landlord, which is

owned by Janice Lee and her husband Tom Hua, purchased the building in December 2017.

In March 2018, Landlord served all tenants at the property with a notice of termination of tenancy, which stated Landlord's intent to withdraw the building from residential rental use, pursuant to the Ellis Act and the San Francisco Rent Ordinance (S.F. Admin. Code, §§ 37.9A, 37.9, subd. (a) (13)). Landlord also executed a notice of intent to withdraw residential units from the rental market and filed it with the San Francisco Rent Board.

Based on their qualifying ages and disabilities, Tenants exercised their rights, under the Ellis Act and the San Francisco Rent Ordinance (§ 7060.4, subd. (b); S.F. Admin. Code, § 37.9A, subd. (f)(4)), to extend their units' withdrawal dates to March 30, 2019.

A notice of withdrawal of rental units was recorded, indicating Landlord intended to withdraw the property from the rental market. The notice also indicated constraints on re-renting the units would apply to Landlord and its successors following the withdrawal. (§ 7060.2; S.F. Admin. Code, § 37.9A.)

In April 2019, after Tenants failed to vacate, Landlord filed three unlawful detainer actions—one for each of the three units occupied by Tenants.² Tenants answered and alleged, among other affirmative defenses, retaliatory eviction; Landlord's noncompliance with the Ellis Act; and that Landlord did not intend to withdraw the property from the rental market. Tenants' retaliatory eviction defenses are based on a January 2018 complaint Cathleen raised to Landlord about mold and deteriorated flooring in her son's (Dennis's) unit as well as Ganovic's refusal to accept a buyout offer to terminate her tenancy.

*2 Landlord and Tenants filed cross motions for summary judgment. Landlord argued it fully complied with the Ellis Act and that Tenants could not establish a triable issue of fact with respect to any of their defenses. The trial court granted Landlord's motions and denied Tenants'. Judgments of possession were entered in Landlord's favor.

We consolidated Tenants' three appeals for briefing and decision and, in accordance with the parties' stipulation, stayed enforcement of the underlying judgments during the pendency of the consolidated appeals, on the condition that

Tenants deposit monthly rent with the superior court.³ (See *Code Civ. Proc.*, § 1176, subd. (a).)

Discussion

A.

Tenants contend the trial court erred in granting summary judgment because triable issues of fact exist regarding Landlord's bona fide intent to withdraw the property from the residential rental market. (See *Civ. Code*, § 1942.5, subd. (g); *Drouet, supra*, 31 Cal.4th at pp. 590, 599–600.)

1.

The retaliatory eviction statute (*Civ. Code*, § 1942.5) makes it unlawful for a landlord to engage in specified conduct against a tenant who is not in default on rent, including “bring[ing] an action to recover possession” because of a tenant's lawful and peaceable exercise of any rights under the law (*id.*, subd. (d)) or because of a tenant's complaints regarding habitability (*id.*, subd. (a)). However, a landlord retains the right to bring an action to recover possession “for any lawful cause.” (*Id.*, subd. (f).) To recover possession for a good faith, non-retaliatory reason, the landlord must give the tenant notice of such grounds and, if controverted, the landlord must prove the truth of the reason stated. (*Id.*, subd. (g).)

Drouet, supra, 31 Cal.4th 583 harmonized the Ellis Act and the retaliatory eviction statute. In that case, the landlord and tenants had a long history of conflict and the landlord served notice he was withdrawing his property from the rental market not long after the tenants requested various repairs. (*Id.* at p. 588.) When the tenants failed to vacate, the landlord filed an unlawful detainer action and unsuccessfully moved for summary adjudication of the tenants' retaliatory eviction defense. (*Id.* at pp. 588–589.) Division One of this appellate district agreed with the landlord and held that the Ellis Act superseded the retaliatory eviction statute. (*Drouet, supra*, at p. 589.)

Our Supreme Court reversed and remanded. (*Drouet, supra*, 31 Cal.4th at pp. 593, 600.) Giving effect to both statutory sections, the *Drouet* majority held: “[W]here a landlord has complied with the Ellis Act and has instituted an action for

unlawful detainer, and the tenant has asserted the statutory defense of retaliatory eviction, the landlord may overcome the defense by demonstrating a bona fide intent to withdraw the property from the market. If the tenant controverts the landlord's bona fide intent to withdraw the property, the landlord has the burden to establish its truth at the hearing by a preponderance of the evidence. ([Civ. Code, former] § 1942.5, subd. (e).)” (*Drouet, supra*, at pp. 599–600.) On remand, the trial court was directed to “consider first whether the landlord's intent to withdraw the property is bona fide. If it is, the statutory defense of retaliatory eviction has been overcome. If the landlord's intent is contested, the landlord has the burden to establish its truth. ([Civ. Code, former] § 1942.5, subd. (e).) Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of [Civil Code former] section 1942.5.” (*Drouet*, at p. 600.)

2.

*3 “[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted; accord, Code Civ. Proc., §§ 437c, subd. (c), 1170.7 [summary judgment in unlawful detainer actions “shall be granted or denied on the same basis as a motion under Section 437c”].)

“[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact.” (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 851.) If a plaintiff meets its burden to prove each element of a cause of action (*id.* at p. 853; Code Civ. Proc., § 437c, subds. (o), (p)(1)), “the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(1).)

On review, we examine the record de novo to determine whether triable issues of fact exist. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We accept as true all facts and reasonable inferences shown by the

losing party's evidence and resolve evidentiary ambiguities in their favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) But we ignore inadmissible evidence. (Code Civ. Proc., § 437c, subds. (c), (d); *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 367.) To establish a triable issue, the opposing party must do more than attack the credibility of the moving party's evidence. (§ 437c, subd. (e).) An issue of fact “can be created only by a conflict in the evidence.” (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.)

3.

The trial court correctly concluded Landlord's evidence demonstrated a bona fide intent to withdraw the property from the rental market. Both Lee's and Hua's declarations, filed in support of Landlord's motion for summary judgment, state that they intended, “[f]rom at least December of 2017,” to withdraw the building from the rental market so that they could live there with extended family members.

We reject Landlord's argument, based on a concurring opinion, that its submission of a notice of intent to withdraw the property establishes a rebuttable presumption of bona fide intent. (See *Drouet, supra*, 31 Cal.4th at pp. 600–601 [landlord's filing of notice of intent to withdraw property from rental market “creates a nonstatutory rebuttable presumption that the landlord's intent is bona fide”] [conc. opn. of J. Brown].) “[C]oncurring opinions are not binding precedent.” (*In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629.) However, we agree that Landlord's acts of filing the notice of intent and recording the notice of withdrawal constitute additional evidence corroborating its stated intent to withdraw from the rental business. (See *Drouet, supra*, 31 Cal.4th at p. 598 [maj. opn. of Baxter, J.].)

4.

We also agree with the trial court that Tenants failed to submit “sufficient admissible evidence” to create a factual question for a jury.

*4 In challenging that conclusion, Tenants rely primarily on a declaration from David Ross, the property manager for the building's former owner. Ross stated Lee told him, in December 2017, that “[Landlord] purchased the [property] as

an investment.” Ross took this to mean the building would serve “as a source of income for them.”

Tenants overlook the fact that the trial court sustained Landlord's objection to this part of Ross's declaration on grounds of hearsay, speculation, and improper expert opinion. Tenants failed to address the evidentiary ruling *at all* in their opening brief on appeal. There may be ambiguity in the transcript from the summary judgment hearing as to whether the trial court intended to sustain Landlord's objections to the Ross declaration at the hearing, but the court thereafter took the matter under submission, and its written orders denying the Tenants' motions are unambiguous. The record cannot be read to suggest Landlord's objections to this portion of Ross's declaration were *overruled*. Even in their reply brief, Tenants address only one of Landlord's three objections (speculation).

By failing to challenge the evidentiary ruling, or even address the ambiguity in the record, at any time before they filed their reply brief on appeal, Tenants have forfeited any argument that the trial court abused its discretion. (*Orange County Water Dist. v. Sabic Innovative Plastic US, LLC, supra*, 14 Cal.App.5th at p. 368 [treating evidentiary challenges as forfeited when not pressed in opening brief]; *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679 [party challenging evidentiary ruling bears burden of demonstrating abuse of discretion].)

5.

Tenants' additional evidence—that the deed of trust executed by Landlord in December 2017 contained a boilerplate assignment of rents clause, under which Landlord warranted it would not interfere with the lender's right to collect rent from the property should Landlord default on its loan, and that Landlord's statement of information (filed in February 2018) described “the type of business ... of the Limited Liability Company” as “6 unit apartment rental”—is insufficient to establish a triable issue.

Neither piece of evidence contradicts Landlord's statements that it intended to withdraw the building from the residential rental market. The “Statement of Information” Landlord filed with the Secretary of State in February 2018 merely described its business at that time. In the form, the Secretary of State did not ask about Landlord's future intent. And there is no dispute that Landlord intended to remain in the residential rental business for some time while the appropriate procedure

was followed—in this case up until the withdrawal date of March 30, 2019. It is speculative to infer from the February 2018 statement that Landlord intended to continue renting the six units *after* March 30, 2019. Similarly, we cannot read the boilerplate assignment of rents clause in the deed of trust as evidence of *Landlord's* intent to continue in the residential rental market, as Tenants assert, beyond March 2019.

Nor is there any material contradiction between the location of the building—a few blocks from Chinatown in the adjoining North Beach neighborhood—and Lee's statement that she bought the property and invoked the Ellis Act because she wanted to have her extended family live together “in an immersive Chinese environment.”

*5 The inferences raised by Tenants' evidence would not support a reasonable juror's finding that Landlord did *not* intend to withdraw the units in the building after March 2019. (See *Aguilar, supra*, 25 Cal.4th at p. 845; *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 “[N]ot every issue of fact is worth submission to a jury”]; *Code Civ. Proc.*, § 437c, subd. (c) [“court shall consider all the evidence set forth in the papers ... and all inferences *reasonably* deducible from the evidence”], italics added.)

6.

Coyne v. De Leo, supra, 26 Cal.App.5th 801 does not change our conclusion. *Coyne* was not a summary judgment case, and, in any event, it involved much stronger evidence controverting the Landlord's stated intent. (*Id.* at pp. 808-809, 812-813, 823, fn. 10.)

Tenants also do not persuade us that the trial court abused its discretion under *Code of Civil Procedure* section 437c, subdivision (e).⁴ (*Butcher v. Gay* (1994) 29 Cal.App.4th 388, 404 [although trial court is not required to accept party's declaration regarding its state of mind as conclusive, it is not compelled to deny summary judgment on that basis]; *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 417 [“the trial court retains discretion to grant the motion based on such declarations”].) And, as we stated previously, Lee's and Hua's declarations were not the sole evidence of their bona fide intent to withdraw the building from the residential rental market.

B.

Tenants also contend there is a triable issue of fact regarding whether Landlord accepted rent after the withdrawal date, which would violate the Ellis Act (§§ 7060.6, 7060.7, subd. (d)(1)). We disagree.

1.

Tenants rely on the fact that the leases for two of the three involved units required prepayment of “[l]ast [m]onth’s [r]ent,” in addition to a security deposit. Ganovic and Cathleen state they paid both—in 2005 and 2004—when the respective tenancies were created.

In 2017, when Landlord purchased the building, a “Rental Information Questionnaire” signed by Ganovic stated that she had paid both a security deposit and a prepayment of her last month’s rent. Before the withdrawal date (March 30, 2019), Landlord returned Ganovic’s “last month’s rent” payment.

A similar questionnaire signed by both Cathleen and Dennis in 2017, with respect to his unit, stated only that a “security deposit” had been paid. In July 2019, Cathleen testified at her deposition that she had, in fact, made a “last month’s rent” payment to the prior landlord at the beginning of Dennis’s tenancy. Landlord thereafter refunded that payment.

2.

We agree with Landlord and the trial court that there is no evidence Landlord accepted rent from any tenant after March 30, 2019 because Tenants’ disputed (and now refunded) payments were security deposits rather than true rent as a matter of law.

The leases’ use of different labels—requiring payment of both a “security deposit” and the “[l]ast [m]onth’s [r]ent”—is not determinative. (*Granberry v. Islay Investments* (1984) 161 Cal.App.3d 382, 389-391 [payment denominated “rent” could nevertheless be found to be additional security deposit].) Beyond the labels, there are no written lease provisions supporting Tenants’ interpretation—that the “last month’s rent” payment was a nonrefundable payment of true rent that paid for a tenancy covering all 31 days of March. On the other hand, the leases do state: “Owner may, but shall

not be obligated to, apply all or portions of [the security deposit] on account of tenant’s obligations hereunder. Any balance remaining upon termination shall be returned to tenant. Tenant *shall not* have the right to apply the security deposit in payment of the last month’s rent.” (Italics added.)

*6 In light of these contractual terms, and the undisputed fact that Landlord refunded the “last month’s rent” payments, there is no triable issue of fact regarding the classification of the disputed payments. (See Civ. Code, § 1950.5, subd. (b) (1) [“ ‘security’ means *any payment*, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge ... that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, ... [¶] (1) The compensation of a landlord for a tenant’s default in the payment of rent”], italics added; *Kraus v. Trinity Management Services Inc.* (2000) 23 Cal.4th 116, 141 [payment is security, rather than earned rent, if payment is intended to secure landlord against future defaults]; *People ex rel. Smith v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 690, overruled on other grounds by *Kraus, supra*, 23 Cal.4th at pp. 136-138.)

Tenants do not persuasively explain why the record before us—which shows at most that Landlord delayed in returning one unit’s security deposit—necessitates a trial on Tenants’ Ellis Act noncompliance defense. We need not reach the parties’ remaining arguments. (See *Drouet, supra*, 31 Cal.4th at p. 600 [if landlord demonstrates intent to withdraw property is bona fide, “the statutory defense of retaliatory eviction has been overcome”].)

Disposition

The judgments of possession are affirmed. Landlord is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

WE CONCUR:

Needham, Acting PJ.

Reardon, J.*

All Citations

Not Reported in Cal.Rptr., 2020 WL 7300584

Footnotes

- * Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- 1 Undesignated statutory references are to the Government Code.
- 2 There are also three separate appeals. Appeal A159290 involves Dennis's and Bledsoe's tenancy in a unit for which Dennis's mother, Cathleen, also signed the lease. Appeal A159291 relates to Hiona's and Cathleen's tenancy in a separate unit. Ganovic filed appeal A159295.
- 3 After the appeals were consolidated and briefing was complete, Tenants' attorney indicated Dennis and Bledsoe vacated their unit and surrendered possession, along with Cathleen, but were not abandoning their appeal.
- 4 [Code of Civil Procedure section 437c, subdivision \(e\)](#) provides: "[S]ummary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof."

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