2006 WL 3930142 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, Division 5, California.

Alison DIXON, Flordeliza Malus, Augustyne Malus, Cassandra Sanders-Ramsey, Helene Duncan, Michele Drese, John C. Carey, Gloria Pruscha, Mike Morehead, Mayda E. Guinalda, Defendants/Cross-Complainants/Appellants,

v.

M-J SF INVESTMENTS, Plaintiff/Cross-Defendant/Respondent.

No. A115070.
December 15, 2006.

On Appeal from the Superior Court of San Francisco, Case No.: 449412 Honorable Ronald E. Quidachay

Appellant's Opening Brief

Waukeen McCoy SBN, 168228, Law Offices of Waukeen, McCoy, 703 Market St., Ste. 1407, San Francisco, CA 94103, (415) 675-7705, Attorneys for Defendants/Cross-Complainants/Appellants Dixon, et. al.

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***1** I. INTRODUCTION

This case arises out of a landlord-tenant dispute. The landlord took several illegal actions as it related to Appellants tenancy rights, including not repairing the building and subsequently destroying the tenants' apartment units. The tenants eventually sued Respondent, alleging that the landlord's conduct violated its obligation to pay tenants consideration for a buyout of their tenancies. The landlord filed a motion to strike the complaint under the anti-SLAPP statute (strategic lawsuits against public participation), Code of Civil Procedure §425.16. The trial court granted the motion in its entirety. The trial court erred in finding that Respondent's purchase of the 901 Bush Street property and subsequent destruction of Appellants' tenancies was a protected right of petition that occurred pursuant to C.C.P. § 425.16. Appellants therefore respectfully request that this Court reverse the trial court's judgment and remand for further proceedings.

II. STATEMENT OF THE CASE

A. NATURE OF ACTION AND RELIEF SOUGHT

Appellants appeal the granting of Respondent's special motion to strike Appellants' cross-complaint filed in San Francisco Superior ***2** Court. The court below improperly granted M-J SF Investments' ("M-J" or "Respondent") special motion to strike the cross-complaint filed in San Francisco Superior Court. A subset of the Defendants ("Appellants") brought a cross-complaint against Plaintiff and Cross-Defendant M-J. As a matter of law, the lower court erred in holding that all of Appellants' claims arose from M-J's protected right to petition in violation of C.C.P. §425.16. Appellants respectfully request that this Court reverse the trial court's judgment and remand for further proceedings.

B. JUDGMENT/RULING OF THE SUPERIOR COURT AND STATEMENT OF APPEALABILITY

Appellants appeal the judgment granting Respondent's special motion to strike pursuant to C.C.P. §425.16. The Court held that the cross-complaint arose out of a protected activity, and was therefore subject to being stricken. The judgment was entered on July 13, 2006 and "[a]n order granting or denying a special motion to strike shall be appealable under Section 904.1" (C.C.P. § 425.16(i); C.C.P. § 904.1(a)(13).)

C. STANDARD OF REVIEW

The Standard of Review of an order granting or denying a special motion to strike under §425.16(b)(2) is de novo. The court ***3** considers "the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based. *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-26. The court neither "weigh[s] credibility [nor] compare[s] the weight of the evidence. Rather, accept[s] as true the evidence favorable to the plaintiff and evaluate [s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Id.*

"[T]he anti-SLAPP statute does not provide immunity. Instead, it places the burden on the plaintiff to establish "that there is a probability that the plaintiff will prevail on the claim." (§425.16 subd. (b)(1).) In order to do so, plaintiff "must demonstrate that the complaint is both legally sufficient and supported by sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Colt v. Freedom Communictions, Inc.* (2003) 109 Cal.App.4th 1551, 1557.

Because a special motion to strike usually comes relatively early in the life of a case, the quantum of evidence Appellants must adduce in order to satisfy the burden of proving a likelihood of prevailing on the merits is less than that needed to succeed at trial; rather, it is akin to the prima facie showing required to survive a ***4** motion for summary judgment, or motion for nonsuit or direct verdict. *Seelig v. Infinity Broadcasting Corp.,* (2002) 97 Cal.App.4th, 798, 809. The causes of action need only be shown to have "minimal merit". *Navellier v. Sletten,* (2002) 29 Cal.4th 82, 89.

D. SUMMARY OF MATERIAL FACTS

In approximately January 1999, the building at 901 Bush Street ("Bush Property") sustained fire damage forcing Appellants to temporarily evacuate their homes. As a result of the 1999 fire Appellants were temporarily displaced from their rental units and forced to secure alternative housing while the Bush Street Property was supposedly being repaired. (Appendix, p.2) Appellants maintained the intent to return to their rental units upon completion of repairs. (Appendix, p.8 , 85, 89)

In approximately June 2004 M-J purchased the 901 Bush Street Property. Upon taking possession of the property M-J inherited the obligations to the tenants from the prior owner. M-J had actual or constructive knowledge of Appellants' tenancy rights, interests and privileges in the Bush Property. (Appendix, p.10) After purchasing the Bush Property in June of 2004, M-J applied for and received permits to repair the building. (Appendix, p. 10) Under the auspices of ***5** the approved permits for repairs, M-J began illegally reconstructing the Bush Property from a larger number of low-income and moderate-income rental apartments into a smaller number of higher income units with no notice whatsoever to Appellants, no permits or prior city approval. (Appendix, p.11) By its construction activities, M-J destroyed the Appellants' ability to return to their dwellings, and interfered with their enforceable tenancy rights.

After substantially altering the structure of the property without city approval, M-J in October 2005 submitted an application to the City of San Francisco for approval of a condominium map, in order to convert the building from a larger number of small apartments into a smaller number of luxury units. (Appendix, p.12) M-J's application was denied by the Department of Public Works. (Appendix, p. 13) On October 13, 2005, M-J filed an appeal with the Board of Supervisors challenging the Department of Public Works' disapproval of M-J's Preliminary Parcel Map submitted for the 38-unit condominium project at 901 Bush Street. The hearing for the appeal was scheduled for November 1, 2005. (Appendix, p. 11)

In anticipation of the scheduled hearing date, M-J approached Appellants with an offer to buy out their tenancy rights on October 31, ***6** 2005, with two purposes: First, M-J wanted Appellants to release all their tenancy rights and possessory interests in the property. Second, M-J believed that it could influence the Board of Supervisors to waive the permit requirements mandated by the Department of Public Works and obtain approval of its condominium map and 38-unit condominium project at 901 Bush Street if it could demonstrate that it had the Appellants' support. (Appendix, p. 13)

M-J and Appellants entered into the buy out agreement that required a cash payment from M-J to Appellants in exchange for them relinquishing all their claims against M-J and agreeing to support M-J's application before the San Francisco Board of Supervisors. (Appendix, p.13) During the negotiation of the buy out agreement, M-J representative James Nunemacher never disclosed that the intended conversion of the building had already taken place, resulting in an interference with Appellants' tenancy and possessory interests. Indeed, Appellants had been unaware that their tenancies had been destroyed by reconstruction incompatible with low-income rental units until January 2006, when the Board of Supervisors affirmed the Department of Public Works' denial of M-J's application (Appendix, p. 12-14) ***7** Between November 1, 2005 and January 10, 2006, the San Francisco Board of Supervisors informed M-J that it would not waive or relax any of the building requirements necessary to convert the 901 Bush Property from low-income apartments into market rate condominiums. M-J refused to comply with the requirements of the Board of Supervisors and the Department of Public Works or the city's general plan and city code requirements. (Appendix, p. 12)

Accordingly, on January 10, 2006, the Board of Supervisors upheld the decision of the Department of Public Works, and disapproved M-J's preliminary parcel map for the 38-Unit condominium project. The Board of Supervisors affirmed the Department of Public Work's determination because M-J's project did not conform to the density and affordable housing requirements of the Planning Code. The Board of Supervisors also found that the proposed condominium project was not consistent with the General Plan Priority Policies for the City of San Francisco. M-J then decided not to remedy the deficiencies in its proposed parcel map despite the fact that the Board of Supervisors provided an extension to M-J specifically to address the aforementioned issues. (Appendix, p. 14)

***8** On January 31, 2006, after the Board of Supervisors denied the preliminary map, M-J filed an Ellis Act Notice of Intent to Withdraw Residential Units from the Rental Market to remove the Bush Property from the rental market. (Appendix, p. 14-15) M-J took this step in order to absolve itself from the liabilities it had incurred with respect to Appellants' tenancy rights and possessory interests.

M-J argued that Appellants' cross-complaint sought relief arising from its petition to the City to rebuild the Property and have it classified as a new condominium. (Appendix, p. 45). To the contrary, the cross-complaint was not based on M-J's petitioning activity, but rather its illegal, unpermitted conversion of the property from a larger number of low-income rental units to a lower number of units in violation of Appellants' tenancy rights and possessory interests as well as a breach of the buy out agreement between M-J and tenants whereby tenants agreed to give up their tenancy rights for a specified amount of money.

On July 13, 2006, the trial court issued an order granting the special motion to strike, and on July 24, 2006, the court issued a judgment awarding attorneys fees.

III. ARGUMENT

A. Standard for the anti-SLAPP statute C.C.P. § 425.16(b)(1).

***9** The anti-SLAPP statute provides that

A cause of action against a person arising from any act in furtherance of the person's right of petition or free speech under the United States Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. C.C.P. §425.16(b)(1).

The court follows a two-step process to resolve an anti-SLAPP motion. *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66. The first prong requires that the moving defendant satisfy its burden "to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech ...' as defined

in the statute." *Id.,* at 67. If the court finds such a showing has been made, the court will move to the second prong to determine whether the plaintiff has demonstrated a probability of prevailing on the merits of the claim. *Equilon, supra* 29 Cal.4th at 66-67.

B. M-J SF Investments did not satisfy its burden of establishing that Appellants' causes of action "arise from" protected activity.

To meet the first prong of C.C.P. 425.26(b)(1) the Court must determine whether M-J satisfied its burden of establishing that the claims "arise from" protected activity. The phrase "arising from" in ***10** C.C.P. 425.26(b)(1) has been interpreted to refer to " 'the act underlying the plaintiff's cause' or 'the act which forms the basis for the plaintiff's cause of action' " *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 *see also Gallimore v. State Farm Fire & Casualty Ins.* Co., (2002) 1.02 Cal.App.4th 1388, 1397. The act itself must have been done "in furtherance of the right of petition or free speech." *Id.* at. In the anti-SLAPP context, the critical point is whether Appellants' cause of action was itself based on an act in furtherance of Respondent's right of petition. (*Id.*) The court "must consider the actual objective of the suit and grant the motion if the true goal is to interfere with and burden the defendant's exercise of his free speech and petition rights." *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1064.

The timing of the cross-complaint is also not evidence that the Appellants' causes of action arise from protected activity. The fact that Appellants filed their cross-complaint after M-J went before the Board of Supervisors and after M-J invoked the Ellis Act on the Bush Property do not in any way establish that the causes of action contained in that cross-complaint "arise from" these protected activities. *City of Cotati v. Cashman, supra,* 29 Cal.4th at 77; ***11** *Navellier v. Stetten, supra,* 29 Cal.4th at 88. The Anti-SLAPP statute simply does not stand from the proposition that "any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights." *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002.

"[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not be subject to the cause of action to the anti-SLAPP statute" *Martinez v. Metabolife Internet., Inc.,* (2003) 113 Cal.App.4th 181, 188. Thus it is the "principal thrust," the "gravaman" or "substance of" plaintiff's cause of action to determine whether the anti-SLAPP statute applies. *Ibid.; Scott v. Meabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419.

The case of *Santa Monica Rent Control Bd. v. Pearl St., LLC* (2003) 109 Cal.App.4th 1308 is also instructive in determining the principal thrust or gravaman of Appellant's claims here. In that case, a landlord commenced statutory procedures to increase the rents on his rent-controlled apartments. Subsequently, the Santa Monica Rent ***12** Control Board brought an action against the landlord for violating the city's rent control ordinance. The Court held that even if the Rent Control Board's suit was "triggered by" the landlord's petitioning activity (seeking to increase rents), it was not objectionable under the anti-SLAPP statute because it was *not based on the landlord's petitioning activity,* but rather on the charging of an illegal rent under the ordinance. *Id.* at 1318.

Although the instant action involves private parties the same rationale applies. The act of destroying the tenancies of Appellants by by constructing high-income units without notice is clearly not an act in furtherance of the right of petition or free speech. Although M-J's construction activities were done under the auspices of repairing the damage to the building, the permit process is not the gravaman of Appellants' causes of action. Appellants' claims, brought after discovery of the reconstruction of the property, cannot be converted to an action arising out of a petitioning activities simply by virtue of the fact that M-J's filed a petition for approval of condominiums.

Based primarily on Respondents' allegations concerning the condominium and eviction proceedings, the trial court concluded that the gravaman of the claims against M-J "arise from" protected ***13** activity. Although we agree that Ellis Act is a right to petition and that the SLAPP statute covers California Government Code §7060(a) nonetheless, the fact "that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such". *Navellier, supra,* 29 Cal.4th at 89.

The California Court of Appeals discussed this distinction between protected activity that merely triggers a cause of action and a cause of action that arises from protected activity in *Gallimore, supra,* 102 Cal.App.4th 1388. In *Gallimore,* the compliant alleged that the California Department of Insurance investigated State Farm and found violations for which the department recommended repayment to policyholders. State Farm, however, failed to adopt the recommendation. Plaintiffs sued State Farm for mishandling claims. State Farm brought an anti-SLAPP motion, which the trial court granted stating the suit arose from protected communications during the investigation. The Court of Appeals reversed the trial court holding that "the act plaintiff complained of did not 'arise from' protected communication. The Court held that State Farm's argument that the complaint 'arises from' the protected communication 'confuse [d] the acts of alleged misconduct [i.e., mishandling claim] ***14** with the evidence [the communication] needed to prove them." *Ibid;*. *Santa Monica Rent Control Bd. V. Pearl Street, LLC,* (2003) 109 Cal.App.4th 1308.

Here too the trial court and respondent confused M-J's alleged acts of misconduct with the evidence cited to prove that misconduct. It is correct that the amended cross-complaint refers to the Ellis Act and condominium petitioning M-J instituted, both of which are protected activities. *Kajima Engineering and Construction v. City of Los Angeles,* (2002) 95 Cal.App.4th 921, 929. The acts of petitioning for condominium approval and Ellis'ing the building occurred after the actions which form the core of tenants' complaint. Specifically, the illegal evictions first instituted by Lantana, the liability M-J inherited when it bought the building, and M-J's further destruction of Appellants' apartment units form the gravaman of tenants' complaint.

The trial court erroneously relied on *Navarro v. IHOP Properties, Inc.* (2006) 134 Cal.App.4th 834, 838, 841-842 for the proposition that Appellants' action stemmed from the right of petition. *Navarro* was a breach of a contract case where the plaintiff was delinquent on her franchise payments. The defendant filed an action against the plaintiff and both parties entered into a settlement ***15** agreement, which was only to be filed as a judgment entered if Plaintiff failed to make timely payments pursuant to the settlement agreement. *Id.* at 838-39.

When plaintiff continued to be late in her payments defendant instituted the action to take back the property. Plaintiff then brought an action against defendant for enforcement of the settlement agreement. *Id.* In *Navarro* defendant exercised its right to petition by instituting the original action against the plaintiff for delinquent payments that resulted in the settlement agreement. The subsequent issues of breaches by either party were based upon the original action taken by defendant to file an action to reclaim the franchised property.

The facts of this case are completely contrary to the facts in *Navarro.* Here the Appellants were private individuals, not a commercial entity or person engaged in business. The Appellants were tenants of the Bush Property with tenant and possessory rights. When Respondent commenced construction of non-approved condominiums instead of repairs of the building for tenants to return Respondent breach Appellants' tenancy rights to said rental units. The commencing of this construction with the intent to deprive ***16** tenants of their possessory rights is the basis of Appellants' causes of action.

Thus although Appellants' cross-complaint references both protected activity and unprotected activity, the principal thrust of the claims against M-J does not arise from its institution of condominium proceedings or the Ellis Act. To the contrary the principal thrust of the complaint against M-J is that it purchased the 901 Bush Street property and illegally destroyed the tenancies of the Appellants. Additionally the cross-complaint alleges a breach of the buy out agreement by M-J wherein Appellants agreed to give up their tenancy rights in the 901 Street Property in exchange for financial compensation. If M-J believed that Appellants did not have tenancy and possessory rights there would be no reason to buy out tenants' possessory rights. Therefore, the violation of tenants' tenancy and possessory rights is the gravaman of Appellants' cross-complaint against M-J therefore Appellant's cross-complaint does not arise from protected activity.

The First Amended Cross Complaint (Appendix, p. 1 - 34) alleges several causes of action against M-J both as successor in interest to Lantana and of its own accord:

***17** 11. Cross-Complainants are informed and believe and thereon allege that Cross-Defendants intentionally delayed completion of reasonable repairs to the Bush Street Property and failed an refused to restore Cross-Complainants to possession of their dwelling units at the Bush Street Property as required by state and local law, including, among other things, the San Francisco Rent Control Ordinance and the Rent Control Board and Regulations. Instead, Cross-Defendants delayed repairs to Cross-Complainants rental units and substantially changed the structure and design of the Bush Street property making it impossible for Cross-complainants to be restored to possession of their rental units.

12. On or about October 2005, Cross-Complainants are informed and believe and thereon allege that cross-Defendants converted Cross-Complainant's dwelling units into condominium units. Despite having actual or constructive knowledge of Cross-Complainants' rights, interest, and privileges in the Bush Street Property, Cross-Defendants did not inform Cross-Complainants of such construction work at any time. (First Amended Cross-Complaint, Appendix, p. 5 - 6).

Apparent from the foregoing paragraphs is the fact that the gravaman in Appellants' Cross-Complaint is that the causes of action stated therein are based upon their tenancy and possession rights, not upon anything M-J did or said to the Department of Public Works or the Board of Supervisors.

An action is not a strategic lawsuit against public participation simply because a party engages in a protected activity. That protected activity must be the source of the causes of action in order to qualify ***18** as a SLAPP suit. Again, the First Amended Cross-Complaint is clear that the gravaman complained of occurred long before the protected activity, and arises out of M-J's handling of the Appellants' tenancy rights:
44. Cross-Defendants interfered with Cross-Complainants' rights, interests, and privileges in the Bush Street Property by 1) substantially changing the structure and design of 901 Bush Street and 2) intentionally delaying completion of reasonable repairs to the building thereby preventing Cross-Complainants return to their rental units at the Bush Street Property. (First Amended Complaint, ¶ 44, Appendix, p. 14).

Because the trial court's opinion indicates some confusion on this point, it should be noted that the "conversion" alleged in the First Amended Cross-Complaint is not the conversion of identical units from rental units to condominium units. The Bush Street Property housed a larger number of rental units prior to the fires than the number of units reconstructed by M-J as condominium units. The "conversion" alleged, therefore, is not the changing of the character of identical units, or the removal of those units from the rental market, but rather the destruction and reconstruction of units in the building that would preclude all the tenants from returning to their homes.

Based on the foregoing the Court should find that Appellants' cross-complaint does not arise out of petitioning activities.

***19 C. If The Court Determines That Appellants' Causes of Action Arise Out Of Petitioning Activity, Appellants Have Proven A Likelihood of Success On The Merits**

A cause of action is subject to being stricken under the anti-SLAPP statute only if it "*lacks even minimal merit." Navellier, supra,* 29 Cal.4th at 89 [emphasis added]. A plaintiff is not required "to prove the specified claim to the trial court" instead, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. *Rosenthal v. Great Western Fin. Securities Corp.,* (1996) 14 Cal.4th 394, 411-412.

In deciding this question a court should consider the pleadings and evidentiary submissions of both the plaintiff and the defendant pursuant to C.C.P. § 425.16(b)(2). However, the court may not weigh the credibility or comparative strength of competing evidence. *Mann v. Quality Old Time Serv.,* (2004) 120 Cal.App.4th 90, 105. It may only determine if the plaintiff has made a prima facie showing of the facts based upon competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor, "but only to determine if it defeats plaintiff's showing as a matter of law. *Id.* at 106.

***20** Appellants set forth sufficient facts in the First Amended Cross-Complaint to establish a prima facie case defeating the anti-SLAPP statute for each cause of action.

1. *Wrongful Eviction*

Cross-Defendants wrongfully attempted to recover or wrongfully recovered Cross-Complainants dwelling units a the Bush Street Property through reconstruction completed at the Bush Street Property in violation of section 37.9 of the San Francisco Rent Control Ordinance. This illegal reconstruction created a wrongful eviction as it destroyed Appellants rights of tenancy in the 901 Bush Street Property. Therefore the gravaman of this cause of action is defendant's illegal construction of small higher-income units thereby breaching Appellants tenant and possessory rights.

2. *Tortious Eviction*

Cross-Defendants wrongfully attmpted to recover or wrongfully recovered Cross-Complainants dwelling units a the Bush Street Property through reconstruction completed at the Bush Street Property in violation of section 37.9 of the San Francisco Rent Control Ordinance. This illegal reconstruction created a wrongful eviction as it destroyed Appellants rights of tenancy in the 901 Bush Street ***21** Property. Therefore the gravaman of this cause of action is defendant's illegal construction of small higher-income units thereby breaching Appellants tenant and possessory rights.

3. *Constructive Eviction*

A constructive eviction occurs when the acts or omissions ... of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or which has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises. *Stoiber v. Honeychuck,* (1980) 101 Cal.App.3d 903, 925-926.

For constructive eviction to be effective "[a]bandonment of the premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction." *Id.*

In the instant case Appellant's cause of action for constructive eviction stems directly from the facts as set forth in the complaint and the evidence filed in Plaintiff's Opposition to M-J's Special Motion to Strike. In 1999 a fire occurred which partially destroyed the 901 Bush Street Property and Appellants were forced to abandoned the property until the landlord made subsequent repairs. There was no evidence put forth that the fire had entirely destroyed the building. It was ***22** Appellants intention and understanding that they would return to the 901 Bush property upon completion of repairs.

When M-J acquired the property in approximately June 2004, it also acquired the rights and obligations as landlord of the property. Therefore it acquired the obligation to repair the building so the tenants could return to their apartment units. A prima facie case exists based upon these facts as set forth in Plaintiffs Complaint and declarations attached to the Supplemental Declaration of Waukeen McCoy. The gravaman in this cause of action is the breach of Appellants' tenancy rights. Therefore Appellant's constructive eviction, an obligation that M-J inherited by virtue of purchasing the property is not a protected petitioning right.

4. *Breach of Implied Warranty of Habitability*

A tenant has the right to have the landlord maintain the premises in a condition fit for residential occupancy. *Schulman v. Vera,* (1980) 108 CA3d 552, 560-561. It is undisputed the units were unlivable due to fire damage. The landlord had a duty to

repair the premises. Failure to do so breached Appellant's implied warranty of habitability. M-J inherited the obligation under a covenant of implied warranty of habitability when it purchased the building. By failing to ***23** repair the building so tenants could return M-J breached this covenant.

Therefore the gravaman of this cause of action is the failure by M-J to repair the building breaching Appellants' implied warranty of inhabitability. It is clear that no protected petitioning activity occurred by M-J.

5. *Breach of Covenant of Quiet Enjoyment*

A tenant has the right to enjoy their tenancy free of actual or constructive eviction. *Petroleum Collections Inc. v. Swords,* (1975) 48 Cal.App.3d 841,848; *Groh v. Kover's Bull Pen, Inc.,* (1963) 221 Cal.App.2d 611, 614. It is undisputed that Appellants were not in possession of their tenancies when the complaint was filed in the instant action. Based on that fact as set forth in Appellants cross-complaint, the covenant of quiet enjoyment has been breached by actual or constructive eviction by M-J as successor in interest. *Id.* The gravaman in this cause of action is the breach of the covenant of quiet enjoyment based upon tenants' wrongful and/or constructive eviction in violation of their tenancy rights. Therefore Appellants' claims do not arise out of petitioning activity by M-J.

6. *Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing*

***24** Tenants alleged, and adduced evidence substantiating, that in exchange for their agreement to terminate their tenancies and to waive any rights under said tenancies M-J promised to pay tenants $475,000 in cash and then failed to do so. These facts on their face, establish a likelihood of success on Appellants' causes of action for damages on the buy out agreement.

The gravaman of the cause of action for breach of contract in this case did not consist of any act in furtherance of anyone's right of petition or free speech but M-J's failure to pay the money due under the tenancy buy out agreement. It cannot seriously be contended that M-J's conduct in this regard did not establish a prima facie case of breach of contract.

With respect to the breach of the implied covenant of good faith and fair dealing, liability on this cause of action, outside the insurance context, is solely in contract. *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684. Entering into a contract with no intention of performing it constitutes fraud. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638. Here Appellants believed their apartments were being repaired and discovered when illegal conversion was almost complete that M-J had not repaired ***25** the tenancies. M-J entered into a buy out agreement to release Appellants' tenancy rights. M-J never intended on paying the terms of the contract and used the buy out to delay Appellants from bringing their lawsuit until Respondent engaged in alleged petitioning activities. These facts support a prima facie showing of a cause of action for Breach of the Covenant of Good Faith and Fair Dealing. The facts do not evidence any protected petitioning right by M-J.

7. *Unlawful Business Practices*

Section 17200 of the California Business & Professions Code is not restricted to restricted or deceptive or fraudulent conduct by extends to any unlawful business practice. *Barquis v. Merchants Collection Assn,* (1972) 7 Cal.3d 94, 111. As the court stated in *Barquis,* "[t]he Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Id.*

Appellants have set forth a prima facie case of unlawful business practice through facts set forth in Appellants Complaint. Namely that after purchasing the 901 Bush Street Property M-J began constructing illegal units in violation of Appellants' tenancy rights.

***26** During the negotiation of the buy out agreement M-J deliberately did not tell Appellants that M-J conversion to high-income condominium units was almost completed. M-J committed a fraud on the Appellants by representing that the building was going to be repaired, not illegally converted. The gravaman in this cause of action is the fraudulent misrepresentations by M-J regarding the state of 901 Bush St.

8. *Intentional Infliction of Emotional Distress*

For a claim of intentional infliction of emotional distress a plaintiff must prove "1) outrageous conduct by a defendant, 2) intention to cause or reckless disregard of the probability of causing emotional distress, 3) severe emotional suffering and 4) actual and proximate causation of emotional distress." *Newby v. Alto Riviera Apartments,* (1976) 60 Cal.App.3d 288, 296. Plaintiff may recover for emotional distress without physically injury if the situation involves extreme and outrageous conduct. *State Rubbish etc. Assn. v. Siliznoff,* (1952) 38 Cal.2d 330. "Behavior may be considered outrageous if a defendant 1) abuses a relation or position which gives him power to damage the plaintiff's interest; 2) knows the plaintiff is susceptible to injuries through mental distress; or 3) acts intentionally ***27** or unreasonably with recognition that the acts are likely to result in illness through mental distress." *Newby, supra.* 60 Cal.App.3d at 297.

In *Newby* the landlord had shouted at the plaintiff and directed her to vacate the premises after she organized an opposition to rent increases. *Id.* at 297-298.

In the instant case as Appellants cross-complaint demonstrates, M-J abused its power over Appellants by illegally converting their home from low income housing to high-income units and failing to inform Appellants that the conversion was almost complete, and would therefore breach their tenancy and possessory rights. Appellants' cause of action clearly stem from M-J's misrepresentation regarding the construction of illegal housing units in violation of Appellants' tenancy and possessory interests and not any petitioning activity by M-J.

9. *Negligent Infliction of Emotional Distress*

Negligent Infliction of Emotional Distress is compensable without physical injury when the case involves tortuous interference with property rights. *Stoiber, supra.*__101 Cal.App.3d at 922. Therefore if M-J fails to repair the premises it constitutes a tort based ***28** upon negligence and Appellants are entitled to prove their damages when there is a failure to repair and said failure to repair causes damage to Appellants property thereby injury Appellant's tenancy interest. *Id.* at 923.

Appellants' cause of action based upon the complaint clearly stemmed from M-J's failure to repair the tenants' rental units and misrepresentation that M-J would repair the units and Appellants subsequent reliance on that representation. There is no evidence that Appellants' enforcement tenancy and possessory interests under this cause of action pertains to any petitioning activity by M-J.

Each of the causes of action set forth above and their factual allegations are clearly directed towards M-J's construction activities on the property which fundamentally altered the character of the property by reducing the number of available units, and utilizing materials and methods which made the building unsuitable for low-income rental housing. Any references in the cross-complaint to the actions of M-J in failing to obtain proper permits and concealing the fact that their construction activities had altered the character of the property are merely incidental to the gravaman of the eviction claims.

***29** The trial court committed reversible error in finding that *each and every cause of action* contained in the Appellants' cross-complaint arose out of M-J's speech and writings before the San Francisco Board of Supervisors. The decision of the trial court should therefore, respectfully be reversed.

IV. CONCLUSION

An anti-SLAPP-suit motion is a vehicle for protecting the right of petition. It is not a device to be abused and used as a shield to force and distort facts to hide behind to escape liability as demonstrated by M-J in this action. Appellants have demonstrated that the claims brought against M-J are based upon Respondent's violation of Appellants tenancy and possessory rights. Therefore Appellants respectfully request that Court reverse the orders and judgments issued by the trial court on M-J's special motion to strike. Appellants also request that the Court reverse the judgment awarding attorneys' fees to M-J.

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