2017 WL 1382566
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 2, California.

John HAYES, Defendant and Appellant,

v.

Mounir KARDOSH, Plaintiff and Respondent.

A142573
|
Filed 4/18/2017
|
As Modified on Denial of Rehearing 5/16/2017

(San Francisco City and County Super. Ct. No. CGC–13–530191)

Attorneys and Law Firms

Andrew Mayer Zacks, Zacks & Freedman, 235 Montgomery Street–Suite 400, San Francisco, CA, 94104, Paul Jeffrey Katz, Law Office of Paul J. Katz, 60 29th Street #557, San Francisco, CA, 94110, for Plaintiff and Respondent.

Daniel Berko, 819 Eddy Street, San Francisco, CA, 94109, for Defendant and Appellant.

Opinion

Kline, P.J.

***1** John Hayes appeals from a judgment against him in his former landlord's ejectment action. Hayes maintains that the parties' rights must be determined under a 1997 lease that the trial court found had been superseded by a different lease in 2000. Hayes argues that he is entitled to judgment under the terms of the 1997 lease, the trial court abused its discretion in refusing to allow him to introduce evidence on the meaning of the 1997 lease, and the trial court erroneously instructed the jury that he had the burden of proving the landlord's dominant motive in evicting him was not a valid basis for eviction. We affirm.

STATEMENT OF THE CASE AND FACTS

Hayes moved into a four-bedroom apartment at 772 Pine Street, in August of 1992. The room he moved into had been advertised by the person who was moving out, who got his security deposit back by collecting Hayes's security deposit. Hayes did not initially sign a rental agreement or speak to the landlord. Each of the four roommates paid their personal share of the rent directly to the landlord. When another roommate moved out, the roommate advertised the room and someone new moved in.

At some point during the first year he was at the apartment, Hayes entered into a verbal agreement with the building manager under which Hayes became the master tenant. His name was on the lease and he would collect the rent from his roommates and pay the landlord with one check for the full amount. From then until 1997, at least 5 and perhaps 10 people moved in and out of the apartment; Hayes did not ask the landlord for consent. He did maintenance work for the landlord, including taking out the garbage for the building once a week, for which he received a $40 discount on his rent.

In 1997, Kardosh bought the apartment building, and Hayes signed a lease with him. The lease named Hayes as "Tenant" and, in paragraph 3, provided that "Tenant" agreed to pay "a total rent of $1212.50," "payable as follows: *one check written on the first day of the month.*" Paragraph 9 of the lease stated, "OCCUPANTS: The premises are for the sole use as a residence by the following named persons only: *John T. Hayes and 3 roommates*." Paragraph 17 stated, "ASSIGNMENT & SUBLETTINGS: Tenant shall not let or sublet all or any part of the premises nor assign this agreement or any interest in it." The italicized language was handwritten into the spaces provided on the preprinted standard form lease.

Hayes testified that when Kardosh walked through the apartment before buying the building, there were people living in each room. People continued to move in and out of the apartment and Hayes did not ask for Kardosh's permission. Hayes paid the rent before the first of the month 90 percent of the time, and otherwise on the first. He called Kardosh when repairs were needed. He continued to do the maintenance work he had been doing for the former landlord, for the same

rent discount. In March 2000, the parties agreement to this arrangement was documented in writing.[1]

***2** Also in March 2000, Kardosh's attorney sent Hayes a new lease, which listed Hayes as the tenant and specified a rental term to begin April 1, 2000, and end April 30, 2000, "thereafter reverting to a month to month tenancy." Hayes did not like it because his name was misspelled, it was "filled with spelling errors and grammatical errors" and there were terms and conditions Hayes found "impossible to adhere to" and language he did not understand. He informed the attorney that he was not comfortable signing the lease and refused to do so. One of the things Hayes had a problem with was paragraph 13 of the 2000 lease (Paragraph 13).

Paragraph 13 stated, "Tenants may not assign this Agreement or sublet the whole or any portion of the Premises without the prior written consent of Owner which MAY be withheld. The named Tenants above is the only 'original' Tenants. No person other than the named Tenants shall be permitted to regularly or continuously use or occupy the Premises unless all the following conditions are met: (1) Tenants notifies Owner in writing, signed by every Tenants, stating a request to have a new person occupy the Premises; (2) said prospective occupant completes and gives Owner Owner's rental application; (3) Owner approves of the prospective occupant's creditworthiness and references from prior landlords; and (4) Tenants(s) and prospective occupant acknowledge, in writing, receipt of a copy of Section 6.14 of the Rules and Regulations of the San Francisco Rent Ordinance, if applicable, and the new occupant signs Owner's standard form Agreement for such Occupancy BEFORE occupying the Premises, which Agreement will include a provision that the new occupant will abide by and perform all the obligations of this Agreement and that the rent for the Premises may be raised to market rates when the last of the original Tenants(s) moves from the Premises.

"In the event that Owner consents to any sub-tenancy, it is hereby agreed that the Original Tenants may not charge more to the sub-Tenants(s) than that proportional share of the rent which is being charged by and paid to Owner which is attributable to any exclusive use area leased to the sub-Tenants, plus a reasonable pro-rata share of the common area space of the apartment unit that the sub-Tenants has a right to utilize. Said sub-Tenants shall receive, and acknowledge the receipt of, a copy of this Agreement.

"No action or inaction or acceptance of rent or knowledge on the part of Owner shall be deemed to be a waiver of the provision of this Paragraph on the part of the Owner and shall not be deemed an approval of any person as a 'sub-Tenants' for any purpose."

Hayes did not think Paragraph 13 was fair because he did not think the landlord should have a right to decide who Hayes lived with. Moreover, Hayes did not think it would be possible to pay the rent on time if Kardosh had two weeks to approve or disapprove prospective roommates. Hayes testified that there had been times people had moved out suddenly, leaving Hayes with 24 or 48 hours to find a new roommate; if he had to wait two weeks for Kardosh to approve or disapprove a roommate, he would be forced to be late with the rent, which would be grounds for eviction. Hayes did not like this provision because it "makes it very easy for a landlord to evict." Kardosh's attorney informed Hayes that Kardosh did not agree to Hayes's request to change Paragraph 13 and that the lease would become effective on April 1, 2000.

Hayes did not consider the 2000 lease to be in effect because he did not sign it and told Kardosh's attorney that he refused to do so. After April 1, 2000, Hayes did not request Kardosh's approval in advance of replacing roommates but supplied roommates' names upon request. Hayes did not have roommates fill out a rental application before renting to them, did not provide them with any notices under the San Francisco rent ordinance and did not provide them with copies of the 2000 lease.

***3** Hayes made frequent trips to Thailand. Oloudille testified that during the six months she lived in the apartment, Hayes went to Thailand three times. She gave him two months' rent before he left. Takshi Natsui testified that Hayes went to Thailand at least seven times in a year, for a month or for as much as two months at a time. Hayes testified that he did not personally pay rent from September 2012, to February 2013, as well as for some months prior to September 2012. Asked who paid during these months, Hayes testified, "Well, I had roommates, and if I had an extra roommates, then that would pretty much cover the rent." During this period from September 2012, to February 2013, Hayes collected more from his roommates than he paid Kardosh in rent, a total of $2,130 per month. At the time of trial in May 2014, the total monthly rent due to Kardosh was "a little under $1,500." Hayes felt he was justified in collecting "a little bit of extra money" because he did most of the cleaning, bought the supplies and "was working for the landlord on top of that,"

as well as having the responsibility of paying the rent and bills on time, dealing with the landlord, and advertising for, interviewing and choosing roommates.[2] Oloudille testified that Hayes did not tell her how much rent was being paid for the whole apartment.

Hayes did not think of himself as his roommates' landlord and in his view, replacing a roommate was not "subletting." He denied having made any physical alterations to the apartment, including turning the dining room into a bedroom, but acknowledged that the dining room had sometimes been used as a bedroom without any physical changes.

In February 2013, Oloudille's boyfriend, Alexander Fulks, got into a fight with Hayes in which Fulks threatened Hayes, leading Hayes to make a police report. Hayes testified that about a month later, he had the police come to the apartment when he confronted Fulks about being at the apartment too much and sleeping there every night. Hayes had "house rules" posted in the kitchen that he made sure everyone read and agreed to before moving in, which included a rule against overnight guests that he was "very lenient" about. Hayes called Kardosh because he thought the landlord had a right to know the police had been called, and to ask if Kardosh had advice about what to do because the police had not been helpful. Kardosh said he was "100 percent" on Hayes's side and said he did not need to hear the other side of the story and would have his attorney send Oloudille a 30–day notice to move out. Hayes then learned that Oloudille was moving out and called Kardosh to say he did not need to waste his attorney's time with the letter.

During the first week of March, however, Hayes called Kardosh and was told that Fulks had accused Hayes of illegal subletting and making money off the apartment. When Hayes said he could try to fix whatever Kardosh did not like, Kardosh said the matter was already in his attorney's hands and Hayes would have to look for a new place to live.

Oloudille moved out on March 9, and Hayes paid her $900, her March rent plus deposit. On March 15, 2013, Hayes received a three-day notice to cure or quit. A second three-day notice was then served on March 22, 2013. Hannah Choi moved out the next day, leaving Hayes, Takashi Natsui, and Kenta Kagawa living in the apartment. Hayes asked Natsui and Kagawa to vacate, based on his understanding that he had three days to cure the problems stated in the notice. One of the options he and Natsui discussed was Natsui staying at a hotel for a few days so Hayes could show the landlord he had cured. Hayes denied an intent to then have Natsui move back in without the landlord's knowledge.

***4** Hayes did not remove all the roommates from the apartment. As of March 26, 2013, Hayes and Natsui remained living in the unit; Kagawa moved out about a day after the three-day period expired. Hayes continued his weekly maintenance work until August 2013. At the end of July 2013, he had his attorney send Kardosh a letter stating that Hayes no longer wanted to work for Kardosh.

Oloudille testified that after Hayes had the police come to the apartment claiming Fulks had threatened him, Fulks contacted Kardosh. In an email responding to Fulks, Kardosh said that he was not aware there were roommates in the apartment and Hayes was violating the clause of the lease prohibiting sublease of the bedrooms. Oloudille and Fulks met with Kardosh, who said he would compensate Oloudille "for the troubles," although Oloudille testified that Kardosh did not pay her or Fulks anything. They did not know at this point that Hayes had been overcharging the roommates for rent. Oloudille acknowledged that she had unsuccessfully sued Hayes in small claims court and currently had another suit pending against him to recoup the money he had over-charged her for rent, a total of $1,800. She was represented by Kardosh's attorneys and was not paying anything for them.

Kardosh testified that each of the six flats in the building comprised three bedrooms, a kitchen, a formal dining room and a formal living room. In each, he had a master tenant with roommates. Kardosh testified that when Hayes called him to ask for help evicting a roommate, Kardosh replied that he would talk to his attorney and see what they could do to help. Hayes had never sought Kardosh's consent to sublease the premises. He first learned that Hayes had people living in the apartment that he had not approved when he received a call from Fulks at the beginning of March 2013. In an email dated March 3, 2013, Kardosh told Fulks he was not aware that his tenant was subleasing the unit in violation of his lease, or of deferred maintenance in the unit, and asked for a copy of Oloudille's lease, other information to substantiate their allegations, and a declaration stating the facts. When he met with Oloudille and Fulks a few days later, Oloudille told him that Hayes claimed the apartment's heater was not working and the landlord was not fixing it, which led Kardosh to conclude that Hayes was turning the heater off to save money on utilities. Oloudille also related problems with Hayes playing loud music and pressuring the roommates to prepay rent two or three months in advance when he travelled

to Thailand for months at a time. Concerned about his own liability, Kardosh promised to deal with the situation. His concerns at this point were that Hayes had not been notifying Kardosh and getting his written consent for new roommates and that, according to Oloudille, Hayes had converted the dining room and living room into bedrooms by adding doors with locks, converting the three bedroom apartment into a five bedroom with five tenants, which Kardosh believed was illegal.

Kardosh acknowledged receiving an email dated March 7, 2013, from Fulks that stated, " 'Per our discussion, in exchange for the agreed upon amount of $4,000 ... Claire Oloudille is willing and able to provide the following,' " and then listed eight things, but testified that there was never an agreement, only a demand Fulks made that Kardosh did not approve. Kardosh did not respond to the email.[3]

***5** Kardosh authorized his attorney to serve on Hayes a three-day notice to cure or quit, to give Hayes a chance to cure the violations of his lease. At this point, Kardosh had also learned about Hayes overcharging the subtenants. With respect to the lease requiring Kardosh's written consent for roommate changes, Kardosh testified that he needed to make sure the roommate was aware that he or she would not be entitled to the same below market rent rate if the master tenant moved out and was aware of the total rent paid for the apartment. He testified that master tenants in other units had requested consent for subleases and he had never denied tenants the right to sublease when they asked.

After the three-day notice was served, Hayes's other roommates contacted Kardosh. They were not the roommates that originally had been disclosed to Kardosh. He referred them to his attorney. The roommates told Kardosh that Hayes would coerce them into prepaying two or three months of rent when he took one of his trips to Thailand, and Kardosh told them that to his knowledge they were not legally obligated to prepay rent this way. He "made it very clear" to the roommates that the three-day notice required Hayes to force them to leave the apartment. He denied having told Natsui he could stay in the apartment as long as he wanted, that he could move his girlfriend into the apartment or that he did not have to pay rent. Kardosh testified that any such understanding on Natsui's part would have been due to a "language barrier" and misunderstanding of what Kardosh said. He told Natsui that he had no objection to the girlfriend staying with him but that Taka was Hayes's tenant and Kardosh had no say about it.

Kardosh denied having had workmen in Hayes's unit "at least 25 times in the last five years." He testified that he knew Hayes was hiding his roommates by not calling about maintenance issues because immediately after the three-day notice was served, Hayes reported to the building department a three-page list of maintenance issues with the apartment.[4] At this point, Kardosh had his workman, Leo, go to the unit. Kardosh was not aware of Hayes having ever complained about conditions at the property before.[5]

After filing the present lawsuit, Kardosh had not accepted rent from Hayes; Hayes's rent checks had not been cashed since April 2013. He believed Hayes had attempted to hide from him who else was living in the apartment. Kardosh acknowledged that in March 2012, Hayes sent him a letter complaining about other tenants in the building that was signed by his roommates (Taka Natsui, Kenta Kaguwa and Keoki Takagouro), whose names appeared in "very big print." Kardosh testified that this letter did not tell him who was living in the unit: Kardosh was focused on the contents of the body of the letter, which was about a dispute with a neighbor, not looking to compare the names of the roommates with the names from the original rental agreement.

Kardosh denied that his main reason for evicting Hayes was that he was upset about Hayes overcharging the subtenants; he testified that this was unfair but was not the "main reason." Kardosh testified that "cumulative reasons" led to the eviction—Hayes's putting locks on the doors, his violation of the terms of the lease, the way he was treating the tenants, his overcharging the tenants, and his failing to report maintenance issues—and "all the reasons are important." He testified that the "most important" reason was that Hayes was "in violation of the terms of his lease" and then that the "most important thing" was the lease requirement that Hayes obtain Kardosh's written consent every time there was a new roommate so Kardosh could "do the due diligence" of checking the new roommate's credit worthiness and references, and make sure the new roommate knew he or she would not be entitled to the below market rent if the master tenant left and was aware of the total apartment rental so the amount could be fairly shared between the roommates. Kardosh denied being unwilling to admit that his "real reason" for evicting Hayes was his anger about Hayes overcharging his roommates because he knew the jury would be instructed that this was not a valid basis for eviction.[6]

***6** Natsui testified that in March 2013, Hayes told him he had to leave the apartment in three days but did not explain

why. When Natsui said this was impossible because he had nowhere to go, Hayes told him to stay in a hotel and put his belongings in storage, then come back in three or four days, after someone had come to check that the apartment was empty. Natsui went to talk with Kardosh with another roommate who had gotten Kardosh's phone number from Oloudille. Kardosh told Natsui not to worry, said Natsui could stay in the apartment and said he had a problem with Hayes. Natsui testified that the only reason he was still living at the apartment at the time of trial was that he wanted to come to court and "tell everybody what's happening." He acknowledged that he and his wife, who was living there with him, were paying nothing for rent or utilities, testimony the court instructed the jury to disregard except to show the landlord knew he was not paying rent and to show bias. He also testified that Hayes asked him to testify and "make him look good," telling him to tell the truth but also to say his rent was $250 (when it was really $450) and say he had been living at the apartment for a year (when it was really almost two years). Natsui acknowledged that he did not mention this at his deposition. Hayes testified that he did not say the things Natsui described.

On April 2, 2013, Kardosh filed a complaint for injunctive relief and restitution against Hayes, alleging that the rental agreement for the apartment prohibited Hayes from subletting any portion of the premises, but Hayes "acted as the for-profit landlord" for the apartment, installing deadbolt locks on the doors to the bedrooms and dining room, advertising rooms for rent, entering into monthly rental agreements, primarily with foreign students or travelers, and collecting rental payments that collectively exceeded the monthly rent owed by Hayes to Kardosh, all without Kardosh's knowledge or consent. Kardosh alleged a cause of action for unfair business practices in violation of Business and Professions Code section 17200 and sought a permanent injunction prohibiting Hayes from entering into rental agreements except where he first obtained Kardosh's consent, the total rent collected by Hayes was not disproportionate to or in excess of Hayes's rent, and the arrangements did not violate any City habitability codes or other relevant laws. Kardosh additionally sought appointment of a receiver to collect and account for rent collected by Hayes and an order of restitution of Hayes's "ill-gotten profits."

Hayes filed a cross-complaint on May 3, 2013, alleging that he was Kardosh's tenant and employee, employed 12 hours a month to take out and return the building's trash and recycling bins each week, clean up excess trash, sweep and hose the sidewalk, sweep various areas, make phone calls to the Department of Public Works to have discarded property hauled away, and wait for workers needing access to the building. He alleged causes of action for violation of San Francisco's and California's minimum wage laws, and a cause of action for unfair business practices. In an amended cross-complaint filed on July 10, 2013, he added the specific statute and provisions of the San Francisco Administrative Code on which the unfair labor practice claim was based.

Kardosh filed a first amended complaint on November 7, 2013, adding a cause of action for ejectment. Kardosh alleged that the terms of Hayes's tenancy were governed by the 2000 lease's modification of the 1997 lease, which amended the earlier lease's absolute prohibition against subletting to allow subletting with the landlord's consent and removed a term in the first lease providing a prevailing party with attorney fees. The cause of action for ejectment alleged that Hayes breached the terms of his tenancy prohibiting subletting without prior written consent of the landlord and adding or changing locks without written consent of the landlord, and that he failed to cure these breaches as stated in the March 22, 2013, three-day notice and remained in possession of the premises.

Hayes filed a cross-complaint (identical to his previous amended cross-complaint) on December 16, 2013.

Kardosh filed an in limine motion to exclude evidence or argument relating to the 1997 lease, arguing that there were no relevant issues concerning the 1997 lease because the 2000 lease was the one in effect when the three-day notice was served, the 2000 lease was not unconscionable, and the 2000 lease's subleasing provisions were authorized by the San Francisco Rent Ordinance or required by local law. The court ruled that the 2000 lease governed Hayes's tenancy and excluded evidence of the 1997 lease.[7] At trial, Hayes tried to show that Kardosh was aware he had always had three roommates and periodically replaced them without seeking Kardosh's consent and that Kardosh's true reason for evicting him was that the total sum of rent Hayes collected from his roommates exceeded Hayes's actual rent obligation to Kardosh, a reason that does not provide a ground for eviction under the San Francisco Residential Rent Stabilization and Arbitration Ordinance (Rent Ordinance).

***7** The jury returned a verdict in Kardosh's favor on the ejectment cause of action and awarded damages of $4,858.75. The cross-complaint was then tried to the court, which found Hayes was never Kardosh's employee and his causes of

action based on the employment relationship were meritless. Judgment was entered on June 12, 2014.

Hayes filed a timely notice of appeal on July 8, 2014.

DISCUSSION

I.

Hayes argues that judgment should have been entered in his favor because the 1997 lease allowed him to sublet to "three roommates" without Kardosh's prior consent. He maintains that the 1997 lease permitted him to replace his three roommates as needed without first obtaining Kardosh's approval, and that the Rent Ordinance and its implementing rules did not permit him to be evicted for violating the unilaterally imposed sublet provisions of the 2000 lease.

Although Hayes never signed the new lease Kardosh presented him with in March 2000, that lease became operative under Civil Code section 827. Civil Code section 827 permits a landlord to change the terms of a lease with specified requirements for notice to the tenant, and provides that the notice, "when served upon the tenant, shall in and of itself operate and be effectual to create and establish, as a part of the lease, the terms, rents, and conditions specified in the notice, if the tenant shall continue to hold the premises after the notice takes effect." Since Hayes remained in the apartment, the 2000 lease terms took effect notwithstanding Hayes's refusal to sign the new lease.

The San Francisco Residential Rent Stabilization and Arbitration Board Rules and Regulations (Rules), however, limit reliance upon unilaterally changed lease terms as the basis for a tenant's eviction. Section 12.20, subdivision (a), of the Rules provides, "Notwithstanding any change in the terms of a tenancy pursuant to Civil Code Section 827, a tenant may not be evicted for violation of a covenant or obligation that was not included in the tenant's rental agreement at the inception of the tenancy unless: (1) the change in the terms of the tenancy is authorized by the Rent Ordinance or required by federal, state or local law; or (2) the change in the terms of the tenancy was accepted in writing by the tenant after receipt of written notice from the landlord that the tenant need not accept such new term as part of the rental agreement. The landlord's inability to evict a tenant under this Section for violation of a unilaterally imposed change in the terms of a tenancy shall not constitute a decrease in housing service under the Rent Ordinance as to any other tenant."

In the trial court, Kardosh argued that he was entitled to evict Hayes for violating the sublet provisions of the 2000 lease because the change in sublet terms was "required" by local law within the meaning of section 12.20 of the Rules. In Kardosh's view, the 1997 lease contained an absolute prohibition against subletting and the Rent Ordinance, as amended in 1999 (Rent Ord., § 237–90) (the Leno Amendment), does not permit such an absolute prohibition. As will be explained, the Leno Amendment was adopted in order to preclude landlords from evicting tenants for violating lease terms that completely prohibited all subletting. (*Danekas v. San Francisco Residential Rent Stabilization and Arbitration Bd.* (2001) 95 Cal.App.4th 638, 648–649 (*Danekas*).) Accordingly, Kardosh argued that local law required the lease to be changed to permit subletting.

***8** Hayes's position on appeal is that section 12.20 of the Rules permits eviction based upon a unilaterally imposed term of tenancy only if the *change* from the previously agreed upon term to the new term is authorized or required. Because he interprets the 1997 lease as permitting him to replace one or more of his three roommates without any requirement of preapproval by Kardosh, and views the Leno Amendment as demanding less restrictive terms concerning subletting, Hayes argues that neither the Rent Ordinance nor any other law authorized or required Kardosh to impose the more restrictive term requiring preapproval. The 1997 lease and evidence concerning its meaning was admissible and indeed essential, Hayes maintains, because without comparing the 1997 lease with the 2000 lease it would be impossible to determine whether the change in sublet terms was authorized or required by law (Rules, § 12.20).

Kardosh, by contrast, contends that the 1997 lease is irrelevant because it was completely superseded by the 2000 lease. He no longer argues that he was required by law to change the sublet provision but rather that section 12.20 of the Rules did not preclude him from evicting Hayes for violating that provision because the Leno Amendment allows a landlord to require preapproval of subtenants, meaning the preapproval term in the 2000 lease is "authorized" by the Rent Ordinance.

In determining whether Kardosh had a right to evict Hayes based on violation of the terms of the 2000 lease, the critical question is whether the phrase "change in the terms of a

tenancy" used in section 12.20 refers to the new term itself or to the *change* from the prior, agreed upon term to the new unilaterally imposed one. According to Kardosh, an eviction may be based upon violation of a unilaterally imposed term as long as the new term is permitted by the Rent Ordinance, and the only question in this case is whether the sublet provision of the 2000 lease is required or authorized by the Rent Ordinance, regardless of how that provision compared to the sublet provision of the 1997 lease. According to Hayes, it must be determined whether the Rent Ordinance authorizes or requires the particular *change* effected by imposition of the new term. Since this determination could only be made by comparing the terms of the two leases, violation of a given unilaterally imposed term might be a proper ground for eviction in one case but not in another, depending on the nature of the prior term it replaced.

"As in all cases of statutory interpretation, we begin with the language of the governing [enactment]." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 508.) Rules section 12.20 uses the phrase "change in the terms of the tenancy" in four places: (1) A tenant may not be evicted for violating a "covenant or obligation" that was not part of the original rental agreement "[n]otwithstanding any *change in the terms of a tenancy* pursuant to Civil Code Section 827" except in two circumstances; (2) The tenant may be evicted for violation of the new covenant or obligation if "the *change in the terms of the tenancy* is authorized by the Rent Ordinance or required by federal, state or local law" or (3) if "the *change in the terms of the tenancy* was accepted in writing by the tenant" after notice that the tenant is not required to accept "*such term*"; and (4) the landlord's inability to evict a tenant for violation of a unilaterally imposed "*change in the terms of a tenancy*" cannot be considered a decrease in housing service as to any other tenant.

The prefatory clause of Rules section 12.20 makes clear that the rule is concerned with the situations under which a tenant may be evicted for violating a unilaterally imposed "covenant or obligation." A "covenant or obligation" is obviously a "term" of the rental agreement,[8] and a tenant can violate only the term itself; there can be no violation of a "change in terms." Thus, subject to the stated exceptions, a tenant cannot be evicted for violating a unilaterally imposed term of the tenancy even though the new term has replaced the previous agreed-upon term by operation of Civil Code section 827. The second exception stated in Rules section 12.20 further demonstrates that the phrase "change in the terms of the tenancy" in fact refers to the *term* itself, not the *change*. Under that exception, a tenant may be evicted if "the change in the terms of the tenancy was accepted in writing by the tenant after receipt of written notice from the landlord that the tenant need not accept *such new term* as part of the rental agreement." "Such new term" necessarily refers back to "the change in the terms of the tenancy," communicating that the phrase "change in the terms of the tenancy" has the same meaning as "new term." In other words, the phrase "change in the terms of the tenancy" is simply a way of expressing "new term imposed after the inception of the tenancy." The provision would have precisely the same meaning if it referred to "new term" in place of "the change in the terms of the tenancy." The last sentence of section 12.20 reinforces the point that "change in the terms of the tenancy" means simply "new term." This sentence addresses a landlord's inability to evict a tenant who violates a unilaterally imposed "change in the terms of the tenancy"; again, since a tenant cannot violate a "change in terms," the violation is necessarily of the newly imposed term itself.[9]

***9** " '[A] "word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law." ' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 189, quoting *California Teachers Association v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 643.) It follows that the first exception under section 12.20 must be read as requiring that the unilaterally imposed "term" (or "covenant" or "obligation") a tenant is alleged to have violated be authorized by the Rent Ordinance, not that the *change* from the particular previous term to the newly imposed one was authorized.

There is an obvious explanation why Rules section 12.20 employs the phrase at issue. The first appearance of the phrase "change in the terms of the tenancy" is expressly tied to Civil Code section 827, the statute which authorizes a landlord to impose unilateral changes in the terms of a rental agreement and, in the present case, operated to make the 2000 lease supersede the 1997 one despite Hayes's refusal to sign it. As indicated above, Civil Code section 827 allows a landlord to "*change the terms of the lease*" in specified circumstances. The phrase used in section Rules 12.20 thus appears to track the language of the statute to which it refers (albeit with reference to "tenancy" rather than "lease"). The regulation addresses the circumstances in which a tenant may be evicted for violating a "covenant or obligation" unilaterally imposed by the landlord after the inception of the tenancy, such as

when the "change in the terms of [the] tenancy"—the new covenant or obligation—is authorized by Civil Code section 827.

The history of Rules section 12.20 confirms this explanation. As first adopted in November 1997, section 12.20 neither referred to Civil Code section 827 nor contained the phrase "change in the terms of the tenancy." Instead, the first sentence of section 12.20 provided, "For purposes of an eviction under Section 37.9(a)(2) of the Ordinance, a landlord shall not endeavor to recover possession of a rental unit because of the tenant's alleged violation of an obligation or covenant of the tenancy, if such obligation or covenant was unilaterally imposed by the landlord and not agreed to by the tenant and either was not included, or is not materially the same as an obligation or covenant in the rental agreement mutually agreed to by the parties."[10] (Rent Board Archives, What's Passed—Nov. 12, 1997 <http://sfrb.org/whats-passed–111297> [as of Apr. 18, 2017]; Rent Board minutes, Nov. 12, 1997 <http://sfrb.org/ftp/meetingarchive/index_764_ 56bc.html?page=764> [as of Apr. 18, 2017].) In 2011, section 12.20 was amended to its present form (except that it did not include the reference to changes in terms required by federal, state or local law), adding the reference to Civil Code section 827 and employing the phrase "change in the terms of the tenancy" as it currently appears. (Rent Board Archives, Rules and Regulations § 12.20 Effective Dec. 14, 2011.)

***10** Moreover, Hayes's interpretation of Rules section 12.20 would be unworkable in application. Determining whether a given term, covenant or obligation in a rental agreement is authorized by the Rent Ordinance will most often be a relatively straightforward task. But how is it to be determined whether the Rent Ordinance authorizes a particular *change* in terms? To "authorize" is to "give power or permission to (someone or something)" or to "give legal or official approval to or for (something)." (Merriam-Webster Dict. <http://www.merriam-webster.com/dictionary/authorize> [as of Apr. 18, 2017].) If both the prior and the newly imposed terms are permissible under the ordinance, is the change authorized? Some changes might benefit the landlord, others the tenant; the benefits and burdens of a particular change might operate differently in different factual situations. If the ordinance is silent on the subject, is the change authorized as long as it is not prohibited? Or must it be clear that the change is *affirmatively* authorized?

In Hayes's view, the answer is supplied by the Leno Amendment. Hayes argues that the Rent Ordinance does not authorize a change in sublet terms that makes it more difficult for a tenant to sublet than under the terms agreed upon at the beginning of the tenancy. Viewing the 1997 lease as having permitted him unfettered license to sublet to whomever he chose as long as he did not exceed the original number of occupants of the apartment, he argues that the 2000 lease, which required Kardosh's approval for any sublet (as well as other conditions) cannot be seen as authorized by the ordinance.

The Leno Amendment addressed a controversy over rental agreements containing absolute prohibitions against a sublet or assignment that had arisen due to the scarcity of affordable rental units in San Francisco, which left occupants of rental units unable to maintain affordability unless they could replace a departing cotenant. (*Danekas, supra,* 95 Cal.App.4th at p. 649.) Prior to the amendment, the Rent Board had issued a regulation to facilitate subletting, then faced an "unprecedented increase in the number of disputes at the Rent Board involving rental and lease agreements that contained absolute prohibitions against a sublet or assignment." (*Ibid.*) "The Leno amendment revised section 37.2, subdivision (g) of the Rent Ordinance by amending the definition of 'Housing Services' to include rights permitted to the tenant by agreement, express or implied, including the right to have a specific number of occupants in a unit, regardless of whether the agreement elsewhere prohibited subletting or assignment. The Leno Amendment also revised section 37.9, subdivision (a)(2) of the Rent Ordinance, to provide that, 'notwithstanding any lease provision to the contrary, the landlord shall not endeavor to recover possession of the rental unit as a result of subletting of the rental unit by the tenant if the landlord has unreasonably withheld the right to sublet' so long as the original tenant continues to reside in the rental unit and the sublet constitutes a one-for-one replacement of a departing fellow tenant." (*Danekas,* at p. 642.)

Additionally, under section 6.15A of the Rules, as amended after the Leno Amendment, when a lease includes an absolute prohibition against subletting and assignment, "[i]f the lease or rental agreement specifies a number of tenants to reside in a unit, or where the open and established behavior of the landlord and tenants has established that the tenancy includes more than one tenant ... then the replacement of one or more of the tenants by an equal number of tenants, subject to subsections (c) and (d) below, shall not constitute a breach of

the lease or rental agreement for purposes of termination of tenancy under Section 37.9(a)(2) of the Ordinance." Section 6.15A, subsection (c), of the Rules provides, "If the tenant makes an initial written request to the landlord for permission to sublease in accordance with Section 37.9(a)(2), and the landlord fails to respond in writing within fourteen (14) days of actual receipt of written notice, the subtenancy is deemed approved pursuant to Ordinance Section 37.9(a)(2)." Section 6.15A, subdivision (d), of the Rules provides, "The Tenant's inability to obtain the landlord's consent to subletting or assignment shall not constitute a breach of the lease or rental agreement for purposes of eviction under Section 37.9(a)(2), where the subletting or assignment is deemed approved pursuant to subsection (c) above or where the landlord has unreasonably withheld consent to the change."

***11** These provisions establish that "categorical prohibitions against subleasing are prohibited if they interfere with replacing departing tenants on a one-for-one basis." (*Danekas, supra,* 95 Cal.App.4th at p. 648.) "[T]he modification of section 37.9, subdivision (a)(2) of the Rent Ordinance bars an eviction where a tenant sublets, even if the lease precludes a sublet, if certain conditions are met: (1) the tenant requested in writing approval of the sublet; (2) the landlord unreasonably withheld 'the right to sublet'; (3) the tenant continues to reside in the unit; and (4) the sublet constitutes a one-for-one replacement of the departing tenant." (*Danekas,* at p. 648.)

Appellant is correct that these provisions were meant to protect tenants' rights to sublet, but this does not mean that a unilaterally imposed term of tenancy can only be "authorized" by the Rent Ordinance if the change from the prior term does not negatively affect the tenant's interests in the specific case. The Leno Amendment did not address leases that freely permitted subletting; its purpose was to remedy problems created by leases completely prohibiting sublets. (*Danekas, supra,* 95 Cal.App.4th at pp. 648–649.) Accordingly, as amended, the Rent Ordinance and Rules preclude landlords from preventing tenants' one-to-one replacement of departing cotenants under the specified circumstances. But the obvious corollary of these provisions is that a landlord *is* permitted to condition subletting on the landlord's reasonable approval of the replacement tenant.[11] The Rent Ordinance and Rules specify the conditions under which a tenant may be evicted for violation of a lease prohibiting subletting, and section 6.15B of the Rules sets forth the same conditions with respect to rental agreements that expressly require the landlord's consent for subletting, the essential points being that the tenant must request approval for a sublet in writing, the sublet must be a one-for-one replacement of a departing tenant, and the landlord may not unreasonably withhold consent.

While protecting tenants against absolute prohibitions against subletting, the provisions defining circumstances in which a landlord's denial of consent to subletting will *not* be considered unreasonable were obviously intended to protect landlords' interests in their investments and income, as well as public safety. Whether under a lease absolutely prohibiting subletting or one conditioning subletting upon the landlord's approval, specified conditions must be met to ensure the tenant's protection against eviction for subletting without the landlord's prior approval: The tenant must request approval in writing before the proposed subtenant's occupancy; the landlord, within five days of the request, may request completion of a standard application form or sufficient information to permit a typical background check; the landlord may request credit or income information if the proposed subtenant will be legally responsible for some or all of the rent; the proposed subtenant must provide the requested information within five days and must meet the "regular reasonable application standards" of the landlord; upon request, the proposed subtenant must agree in writing to be bound by the current rental agreement; absent good cause, the tenant must not have requested replacement of departing tenants more than once per existing tenant in the unit during the previous 12 months; and the request must be for one-to-one replacement of a departing tenant. (Rules, § 6.15A, subd. (d)(1), 6.15B, subd. (c)(1).) A landlord's denial of a request to sublet will not be considered unreasonable where the proposed subtenant would be legally obligated to pay rent and "the landlord can establish the proposed new tenant's or new subtenant's lack of creditworthiness;" the proposed subtenant has not complied within five days to the landlord's timely request to "complete the landlord's standard form application or provide sufficient information to allow the landlord to conduct a typical background check"; or, where landlord can establish that the proposed subtenant has "intentionally misrepresented significant facts" on the application or "provided significant misinformation" that "interferes with the landlord's ability to conduct a typical background check"; and where the landlord can establish that the proposed subtenant "presents a direct threat to the health, safety or security" of other residents of the property or physical structure of the property. (Rules, § 6.15B, subd. (d).)

***12** These provisions reflect an intent to protect tenants' interests without unduly undermining landlords' interests.[12]

It is too simplistic to say that the Rent Ordinance does not authorize any change in subletting provisions that imposes burdens not previously imposed upon the tenant. Lacking any standard to govern its application, appellant's interpretation of Rules section 12.20 would be unworkable in practice.

We conclude that section 12.20 permits eviction based upon a unilaterally imposed term of tenancy that is authorized by the Rent Ordinance or required by federal, state or local law (Rules, § 12.20, subd. (a)(1)) or accepted in writing by the tenant after notice from the landlord that the term need not be accepted (Rules, § 12.20, subd. (a)(2)). The question remains whether the sublet term relied upon to evict Hayes in this case was authorized by the Rent Ordinance. Kardosh maintains that it was, as the Rent Ordinance permits landlords to require preapproval before their tenants may sublet. Hayes argues that certain aspects of the sublet provision were impermissible under the Leno Amendment.

Hayes points first to a provision that he interprets as requiring all occupants to sign any request for the landlord to approve a proposed sublet. This requirement, he argues, would make him "hostage" to every roommate, any of whom could prevent the sublet by refusing to sign the request. As Hayes notes, the lease specifies in paragraph 1 that Kardosh is renting the premises to "John Hayes ("TENANTS"). Paragraph 13 requires a request for approval for a new occupant to be signed by "every Tenants." If read to mean that only Hayes, as the defined "tenants," was required to obtain preapproval, Hayes argues, the provision would permit Hayes's roommates, but not Hayes himself, to sublet *without* obtaining prior approval from Kardosh. Since this result would be "absurd," Hayes reasons that "tenants," in paragraph 13, must mean "occupants." He points to various other lease provisions that refer to "Tenants" but must be meant to apply to all occupants, such as those specifying obligations with respect to maintenance, alterations and damages to the premises.

We are not convinced. The lease consistently refers to "Tenants" in the plural, and in certain places "Tenants(s)"; it never refers to "tenant" in the singular, even under the line for Hayes's signature, which is labelled "Tenants." The lease specifies that the "named Tenants is the only 'original' Tenants." The phrase " 'original' Tenants," which appears in paragraphs 10 ("Use/Occupancy") and 13 ("Assignment and Subletting") is clearly meant to assert Kardosh's right to raise rent for any lawful sublessee or assignee remaining in the apartment after the "original occupant or occupants" under the lease no longer reside there. (Civ. Code, § 1954.53; Rent Ord., § 37.3, subd. (d)(2)(A).)[16]

***13** The most obvious explanation for the lease's use of the plural "tenants" is that Kardosh uses the same form lease whether initially renting to a single person or to more than one person. In the latter case, paragraph 1 would include more than one name before the explanatory "(Tenants)," and each of the named "Tenants" would sign the lease. Hayes's suggestion that "Tenants" must mean "occupants" in order to assure all occupants of the apartment would be bound by the terms of the lease agreement is unfounded, as paragraph 13 requires a "new occupant" to sign an agreement stating that the "new occupant will abide by and perform all the obligations of this Agreement."

Moreover, the lease expressly distinguishes "Tenants" from other occupants. Paragraph 10 specifies that "Tenants" are permitted "guests" only for specified lengths of time. Paragraph 13 requires, among other things, that "Tenants" submit the written request, "signed by every Tenants," to have a "new person occupy the Premises," that the "prospective occupant" complete the owner's application, and that the "new occupant" sign the owner's standard form agreement for occupancy before occupying the premises. The provision goes on to restrict the amount of rent the "Original Tenants" may charge any "sub-Tenants(s)" in the event the owner "consents to any sub-tenancy." In light of these distinctions, the only reasonable interpretation of paragraph 13 is the original, named tenant (or tenants) must request preapproval for any sublet as specified. Had Kardosh rented to a couple or a group of roommates, presumably the rental agreement would specify all the individuals' names as "Tenants" and require each to sign any request for a sublet. In the circumstances of the present case, we understand the preapproval provision to require a written request signed by Hayes.

Hayes additionally points to the statement in paragraph 13 prohibiting assignment or subletting "without the prior written consent of Owner *which MAY be withheld*." Hayes views this as an assertion of an unqualified right to refuse a sublet request in violation of Rule 6.15A, subdivision (a). Rule 6.15A applies to leases containing an absolute prohibition against subletting and therefore does not apply to the 2000 lease at issue here. Rule 6.15B, which applies to leases requiring the landlord's consent for subletting, precludes eviction where the tenant requested one-for-one replacement of a departing tenant, subject to specified

conditions, and the landlord *unreasonably* denied the request. (Rule 6.15B, subd. (c)(1).) Under the Rent Ordinance and Rules, Kardosh was entitled to require preapproval for sublets subject to the specified conditions, including that any refusal of a proper request for one-for-one replacement of a departing tenant must be reasonable. " ' "As a general rule of construction, the parties are presumed to know and to have had in mind all applicable laws extant when an agreement is made. These existing laws are considered part of the contract just as if they were expressly referred to and incorporated." [Citation.]' " (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 189, quoting *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 281.) Accordingly, at least as applied to sublet requests, the provision that the owner's consent "MAY be withheld" must be read as permitting a *reasonable* refusal of consent.[17]

***14** In any event, Hayes's challenges to these aspects of the sublet provision in the 2000 lease are academic. The question in the present case is whether Rules section 12.20 permitted Hayes to be evicted for violating the "covenant or obligation" imposed by the 2000 lease that Kardosh alleged as the basis of the ejectment action. The claimed violation was subletting without Kardosh's prior written consent. There was no suggestion that Hayes violated the sublet terms by failing to request Kardosh's approval in the required manner, and Kardosh was not called upon to approve or reject any request; the asserted violation was that Hayes failed to request Kardosh's approval for sublets *at all*. It is undisputed that Hayes never requested Kardosh's consent to sublet any portion of the apartment, whether in accordance with the lease requirements for such a request or otherwise. Thus, the only relevant question is whether the Rent Ordinance authorized the lease term requiring Hayes to seek Kardosh's consent before subletting. To "authorize" is to "give power or permission to (someone or something)" or to "give legal or official approval to or for (something)." (Merriam-Webster Dict. <http://www.merriam-webster.com/dictionary/authorize> [as of Apr. 18, 2017].) As the Rent Ordinance contains various provisions concerning landlords' preapproval of subtenants, it is apparent that a term requiring the landlord's reasonable approval for replacement of a tenant or subtenant is "authorized" by the Rent Ordinance and therefore may be the basis of an eviction. The term Hayes was evicted for violating, insofar as it required Hayes to request Kardosh's approval before subletting rooms in the apartment, was authorized by the Rent Ordinance.[15] We make no determination as to whether other aspects of the sublet provision were authorized and enforceable by eviction.

Our conclusion that Rules section 12.20 requires us to determine whether the Rent Ordinance authorized the sublet preapproval *term* in the 2000 lease, not whether the *change* from the 1997 term to the 2000 term was authorized, makes it unnecessary for us to resolve the parties' disputes as to the interpretation or admissibility of the 1997 lease. No comparison between the leases is required; the 1997 lease was replaced by the 2000 one and was not relevant to the alleged violation of the 2000 lease.[16]

II.

Hayes additionally argues that the trial court erred in instructing the jury that he had the burden of proving that Kardosh's dominant motive for evicting Hayes was not one of the grounds stated in section 37.9, subdivision (a) of the Rent Ordinance. In Hayes's view, it was Kardosh's burden, in order to establish his right to evict Hayes, to prove that his dominant motive was the ground stated in the eviction notice.

Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The Rent Ordinance, in section 37.9, subdivision (a), after enumerating the grounds upon which a landlord may evict a tenant, provides that "[a] landlord shall not endeavor to recover possession of a rental unit unless at least one of the grounds enumerated in Section 37.9(a) ... is ... the landlord's dominant motive for recovering possession ...." (§ 37.9, subd. (c).) Consequently, Hayes maintains that it is the landlord's obligation to prove both the ground for eviction and that this ground was the landlord's dominant motive. Kardosh, by contrast, argues that dominant motive is a substantive defense, not part of the landlord's prima facie case to recover possession, making it the tenant's burden to prove the landlord's dominant motive was *not* a permissible ground for eviction.

***15** Hayes relies upon *Rental Housing Assn. of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741 (*Rental Housing*), which he describes as holding that under the "very closely related" Oakland Just Cause for Eviction Ordinance (Oakland Mun. Code, § 8.22.300 et seq. (Oakland Ordinance)), it is the landlord's burden to prove that the ground stated in the eviction notice was his

dominant motive. Appellant argues that although the Oakland ordinance at issue in *Rental Housing,* unlike San Francisco's, expressly imposed the burden of proof on the landlord, the San Francisco Rent Ordinance does the same thing by stating that a landlord cannot evict unless he shows just cause.

The dominant motive provision of the Oakland Ordinance, section 8.22.360.B.2, states, "[a] landlord shall not endeavor to recover possession of a rental unit unless at least one of the grounds enumerated in Subsection [8.22.360].A above is stated in the notice and that ground is the landlord's dominant motive for recovering possession and the landlord acts in good faith in seeking to recover possession." *Rental Housing* did not discuss this provision in connection with burdens of proof. Instead, the court upheld it against claims that it was preempted by the state unlawful detainer statute, holding that the requirements of good faith and proper motive were "substantive limitations on eviction" and, so, did not conflict with the "procedural purpose served by the unlawful detainer statutes." (*Rental Housing, supra,* 171 Cal.App.4th at p. 759.) The express burden of proof provision to which Hayes refers stated, "[t]he burden of proof shall be on the landlord in any eviction action to which this order is applicable to prove compliance with Section 6 [8.22.360] [setting forth the grounds for eviction]." (Oakland Ord., § 822.360.B.1.) *Rental Housing* rejected the argument that this provision improperly shifted the burden of proof in that a landlord's "just cause" for eviction was not an element of a cause of action for unlawful detainer but rather provided an affirmative defense based on the absence of just cause. (*Rental Housing,* at pp. 755-756.) The court held the provision was not preempted by Evidence Code section 500 because it "place[d] the burden of proof on the landlord, just as Evidence Code section 500 does, to show the 'existence or nonexistence [of facts] essential to the claim for relief' that the landlord asserts in an action for unlawful detainer." (*Rental Housing,* at pp. 755–756.)

In any event, Kardosh urges that *Rental Housing* is inapplicable to the present case because, at the time of trial, the San Francisco Rent Ordinance did not have an equivalent to the explicit burden of proof provision in the Oakland Ordinance. Moreover, Kardosh maintains that we can infer the San Francisco Rent Ordinance imposed the burden of proof of dominant motive on the tenant because after this case was tried, the Rent Ordinance was amended to add an express burden of proof provision. At the time of trial, section 37.9, subdivision (c) of the Rent Ordinance provided that "[a] landlord shall not endeavor to recover possession of a rental unit unless at least one of the grounds enumerated in Section 37.9(a) or (b) is the landlord's dominant motive for recovering possession ...." Pursuant to a 2015 amendment, this section now additionally provides, "In any action to recover possession of the rental unit under Section 37.9, the landlord must plead and prove that at least one of the grounds enumerated in Section 37.9(a) or (b) and also stated in the notice to vacate is the dominant motive for recovering possession. Tenants may rebut the allegation that any of the grounds stated in the notice to vacate is the dominant motive. (Ord. No. 171–15, File No. 150646, amended in committee Sept. 14, 2015 <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances15/o0171–15.pdf> [as of Apr. 18, 2017].)

***16** To Kardosh, the 2015 amendment confirms that the Rent Ordinance previously imposed the burden of proof of dominant motive on the tenant. This is not a necessary conclusion: " 'While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.' " (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 568, quoting *Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484.) The amendment could have reflected a perception that the Rent Ordinance needed clarification that the burden of proof on this issue was intended to be on the landlord.

We find it unnecessary to resolve whether the trial court was correct in viewing the Rent Ordinance, as it existed at the time of trial, as imposing on the tenant the burden of proving the landlord's dominant motive was an impermissible basis for eviction. As appellant recognizes, it is his burden on appeal to affirmatively demonstrate not only error but prejudice resulting from the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–802.) Based on our review of the record, even if we assume the jury was erroneously instructed that Hayes had to prove as a defense to eviction that Kardosh acted with an impermissible dominant motive, instead of being told that it was Kardosh's burden to prove he acted with the proper dominant motive, Hayes has not demonstrated that he was prejudiced by the error.

Instructional error ordinarily is considered prejudicial only when it appears probable that the improper instruction misled the jury and affected the verdict. *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.) " '[W]e must examine the evidence, the arguments, and other factors to determine whether it is

reasonably probable that instructions allowing application of an erroneous theory *actually* misled the jury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 581, fn. 11.) A 'reasonable probability' in this context "does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*' (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682.)

" 'We evaluate instructional errors by considering (1) the state of the evidence, particularly conflicts on critical issues; (2) the effect of other instructions; (3) the effect of counsel's argument, particularly whether the respondent's arguments to the jury may have contributed to the misleading effect of the instructional error; (4) any indication by the jury that it was misled; and (5) the closeness of the verdict.' " (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1249 (*Norman*), quoting *Daum v. SpineCare Medical group, Inc.* (1997) 52 Cal.App.4th 1285, 1313; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570–571.)

Appellant emphasizes that the *Norman* court viewed the 9–3 jury verdict in that case—the same vote count as in the present case—as "*strongly*" supporting its conclusion that it was reasonably probable the verdict would have been more favorable in the absence of the instructional error. There, in a case of elder abuse and wrongful death against a licensed skilled nursing facility, the trial court erred in failing to give a requested jury instruction on negligence per se that would have allowed the jury to presume negligence if it found the facility violated certain regulations. The court found the error prejudicial because there was conflicting evidence on the critical issue of neglect, other instructions did not cure or minimize the effect of omitting the instruction, the failure to give the instruction precluded the plaintiff's counsel from arguing that the violations were presumed to constitute negligence and relieved the facility's counsel of the burden of arguing the presumption had been rebutted, and the closeness of a special verdict on the question whether the decedent was subjected to abuse or neglect suggested the omission of the instruction was a significant factor in finding the facility was not negligent. (*Norman, supra,* 707 Cal.App.4th at pp. 1251–1253.) The court noted that the omission of the instruction "naturally and probably affected [the plaintiff's] ability to place her full case before the jury." (*Id.* at p. 1253.)

***17** In contrast to the special verdict in *Norman,* the general verdict in the present case makes it impossible to know what specific issue or issues jurors disagreed upon in reaching their verdict. Appellant assumes it "could only" have been the question of dominant motive, asserting this was "by far" the main issue the jury decided. This is not apparent from our review of the record. A great deal of attention was paid to this issue at trial, but a great deal was also devoted to the question whether Kardosh waived his right to enforce the sublet preapproval provision. Whereas the special verdict in *Norman* made clear that the jurors disagreed upon the issue the omitted instruction would have addressed, here we have no way of knowing whether the jurors were divided on the issue of dominant motive.

Moreover, as *Norman* explained, the erroneous refusal to give the jury instruction in that case "naturally and probably affected [the plaintiff's] ability to place her full case before the jury." The same is not true in the case before us. Nothing prevented Hayes from presenting whatever evidence he had to establish that Kardosh's dominant motive was other than what Kardosh professed.

Hayes argues that the evidence on the issue of dominant motive was conflicting and that there was a "tremendous amount of testimony from Kardosh that would have supported a verdict that the subletting was not his dominant motive"—in fact, he asserts there was "barely" substantial evidence to support the jury's verdict. He provides little by way of example, however, and no citations to the record.

Hayes argues that a reasonable jury easily could have believed testimony from Kardosh that his real motive for the eviction was Hayes's overcharging his roommates. Our review of the record reveals no such testimony. Hayes's attorney, on cross-examination, repeatedly attempted to elicit Kardosh's testimony that his primary reason for evicting Hayes was Hayes's overcharging his roommates, and Kardosh acknowledged that he felt the overcharging was unfair, it was a violation of the lease and it was an "important" reason for the eviction, but Kardosh consistently denied this was his main reason for evicting Hayes.

Hayes's attorney expressed skepticism about Kardosh's testimony by directly asking Kardosh to admit that his true concern was with the overcharging and that he was unwilling to admit this because he knew the jury would be instructed that the overcharging was not a valid basis for eviction; and by attempting to undermine Kardosh's claim that he was primarily concerned with Hayes's violation of the sublet provision through questions suggesting that Kardosh could have allowed Hayes's to cure the violation of the sublet

preapproval requirement, that Kardosh did not enforce the sublet provision against other tenants in his buildings and that Kardosh never attempted to find out who was actually living in the apartment. Kardosh deflected these points. He testified that Hayes violated a number of provisions of the lease and that "[a]ll the reasons are important"; when pressed to acknowledge that the single most important reason was the overcharging, he responded, "Absolutely not. The most important reason is he's in violation of the terms of his lease." Acknowledging that overcharging the roommates was a violation of the lease, Kardosh testified, "Correct. It's in the lease. He's not supposed to overcharge his roommates. He did, but it's in violation, but it's not the main factor of why I'm evicting him. I'm evicting him because of the main terms of the lease, where he's to notify me, get my written consent every time he has a new roommate so I can do the due diligence of checking that credit worthiness and their references of the new roommate, to make sure that the new roommate is well aware of the fact that if the master [tenant] leaves, the roommate is not entitled to the below market rate. To make sure that the roommate understands and is aware of the rent that Mr. Hayes is paying me, so between all the roommates, they can figure out what the share fair rent for each one to pay. This is the most important thing."

***18** The only specific testimony Hayes points to is from a deposition in a prior eviction action, in which Kardosh stated that he had four equally important reasons for evicting Hayes: Hayes's failure to get approval for sublets, overcharging roommates, changing locks without permission and converting the dining room into a bedroom. This testimony, Hayes asserts, demonstrated that violation of the sublet provision was only 25 percent of Kardosh's motive and therefore not his dominant motive, creating a substantial conflict in the evidence. Confronted with the deposition testimony at trial, Kardosh stated, "I said what I said at the time" and insisted he was not "changing" his testimony or "retracting" what he said at the deposition but only "making it clearer."

The instruction on dominant intent directed the jury that "[i]n order to establish a defense based on dominant motive," Hayes "ha[d] the burden of proving by a preponderance of evidence" that Kardosh's dominant motive was not that Hayes "violated a term of the lease." The jury was instructed that in order to establish that Hayes no longer had a right to occupy the premises because he "failed to perform a requirement under his rental agreement," Kardosh "must prove all of" seven points. The enumerated points make clear that the requirement Kardosh was required to prove Hayes violated was the subletting term.

In order to find a reasonable probability that the jury would have found for Hayes if it had been instructed that Kardosh had the burden of proving his dominant motive in the eviction was the violation of the sublet provision, we would have to conclude that a jury so instructed would have credited the statement from Kardosh's deposition, and the suggestions made in Hayes's attorney's questions, over Kardosh's actual testimony at trial. The jurors were instructed that it was their job to evaluate the credibility of the witnesses and provided with guidelines to use in doing so, including how the witness looked, acted, and spoke while testifying and whether the witness had any reason to say something that was not true. While they were instructed that attorneys' questions were not evidence, they could not have escaped Hayes's attorney's efforts to establish that Kardosh did not really care about the subletting and was evicting Hayes because he was angry about Hayes overcharging his roommates. They were instructed that such overcharging was not a ground for eviction. Having heard Hayes's attorney's explicitly accuse Kardosh of refusing to admit that the overcharging was his main concern because he knew the jury would not evict on this basis, the jurors could not have failed to understand that Kardosh might be falsely claiming a different dominant motive for this reason. Nevertheless, at least nine jurors concluded Kardosh was testifying truthfully on this point. The *only* evidence that directly conflicted with Kardosh's testimony that the sublet violation was his primary concern was his testimony in the prior deposition that his various reasons for evicting Hayes were equally important. Taken literally, that testimony did not support the theory advanced in Hayes's counsel's questions—that Kardosh's dominant motive was the overcharging—any more than it supported violation of the sublet provision as dominant motive: It only suggested the absence of *any* dominant motive. Taken more loosely, and considered against the totality of Kardosh's trial testimony and his specific explanation of why the sublet violation was particularly important, the deposition testimony could also be understood as consistent with Kardosh's assertion that all the violations were important, but the sublet violation was the *most* important.

As Hayes has not included counsels' arguments to the jury in the record on appeal, we cannot look to them as we normally would to see whether the burden of proof was mentioned or emphasized. We know only the state of the evidence just described, and the fact that the jury was told Kardosh had to

prove that Hayes violated the sublet provision, while Hayes, as a defense, had to prove by a preponderance of the evidence that violation of the sublet term was not Kardosh's dominant motive for the eviction. Resolution of the dominant motive issue was entirely dependent upon the jury's evaluation of Kardosh's credibility. Appellant has demonstrated no basis upon which we could find a reasonable likelihood that a juror who concluded Kardosh was credible when instructed that it was Hayes's burden to establish that Kardosh's dominant motive was *not* the violation of the sublet provision would have rejected Kardosh's testimony if instructed instead that Kardosh had to prove his dominant motive *was* the sublet violation.

DISPOSITION

***19** The judgment is affirmed.

Each party shall bear his own costs on appeal.

We concur:

Stewart, J.

Miller, J.

All Citations

Not Reported in Cal.Rptr., 2017 WL 1382566

Footnotes

1 Hayes testified that he thought he should have a contract in writing because he was “working for” Kardosh. In a letter to Kardosh dated March 2, 2000, he stated that he would continue his weekly maintenance work and subtract $40 per month from the total rent, with the agreement to remain in effect until further notice from Kardosh. Appellant signed, and a handwritten note dated March 13, 2000, added, “accepted and approved” and was signed by Kardosh. Kardosh testified that he did not regard appellant as his employee; his weekly dealing with the garbage collection and occasional sweeping the stairs was “to accommodate him so he can pay his rent.”

2 Hayes testified that he would call Kardosh if something in the apartment needed repair or replacement, and Kardosh would send someone over. During the year preceding the March 22 three-day notice, Hayes had called the maintenance manager at least three times, and the regular repairman, Leo, had come to the apartment. In March 2013, Hayes had helped Leo put in a new water heater; on other occasions, the bathroom floor and toilets were replaced. Two or three years before the eviction began, Hayes told the manager that the heater was broken but that they did not need it fixed because no one had complained and everyone had space heaters in their rooms. He did not think it was his responsibility as master tenant to provide heat. Asked what was wrong with the heater, Hayes said he thought it was just turned off and denied that he had turned it off.

3 According to Kardosh, he offered to pay Oloudille for her time and expenses if she was called for a deposition or to be a witness at trial and Fulks suggested, “How about $4,000?” Kardosh intended that in exchange for the compensation he offered, he would receive a release of claims. Oloudille testified that she signed a declaration at Kardosh's request and that Fulks sent him documents proving Oloudille was living in the apartment and also took pictures of the apartment at Kardosh's request.

4 Hayes testified that he complained to the building inspector about two things: wood floors splintering and a mold problem in the bathroom. The inspector issued a 15–item list to Kardosh, having found all but two of the conditions on his own.

5 Nabil Safi, the maintenance manager for 772 Pine Street, testified that in March 2013, he observed that the heater and thermostat were turned off; the heater worked after they were turned on. Hayes had never complained to Safi about the heater and the workman had not been in the unit in the preceding five years because Hayes had never called.

6 Hayes's attorney introduced deposition testimony from a prior eviction action in which Kardosh had acknowledged that four reasons he had given for evicting Hayes (changing locks without permission, converting the dining room into a bedroom, changing roommates without authorization or notification, overcharging his roommates for rent) were “equally important.”

7 The trial court ruled as follows: “The lease, which I find legally it was required by a change of the law. And so the [Civil Code section] 827 change that's produced the 2000 lease, effectuated a change in local law, the rent ordinance, and that set the terms for subletting which were laid out in that lease. [¶] The evidentiary questions are going to be whether or not after the date of the effective 2000 lease the parties ... made other agreements or did actions which would lead to have a subletting prohibition.” The court further ruled that “there's going to be no evidence submitted regarding the 1997 lease” and “any evidence that, for example, in the party's understanding or the way that they behave would be related only to and should be relevant only to the 2000 lease and anything that would affect.” The court denied Hayes's attorney's request for a stay of trial to enable him to file a writ petition.

8 A covenant is a “mutual agreement between two or more persons to do or refrain from doing certain acts; a compact, contract, bargain.” (Oxford Eng. Dict. <http:// www.oed.com/view/Entry/43328? rskey=aDeT4y&result=1&isAdvanced=false#eid> [as of Apr. 18, 2017].) An obligation is “an act or course of action to which a person is morally or legally bound; what one is bound to do; a duty, commitment.” (Oxford Eng. Dict. <http:// www.oed.com/view/Entry/129688?redirectedFrom=obligation#eid> [as of Apr. 18, 2017].)

“An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.” (Civ. Code, § 1427.)

9 Although not called upon to address the specific issue presented here, the sole published case construing Rules section 12.20 described it as prohibiting a landlord “from evicting a tenant for violating a unilaterally imposed term of the tenancy unless it is authorized by the Rent Ordinance, required by law, or agreed to by the tenant.” (*Foster v. Britton* (2015) 242 Cal.App.4th 920, 936.) *Foster* upheld the validity of section 12.20 against claims that it was preempted by Civil Code section 827 and that the Rent Board exceeded its authority in adopting it. (*Foster*, at p. 924.)

10 The full text provided, “For purposes of an eviction under Section 37.9(a)(2) of the Ordinance, a landlord shall not endeavor to recover possession of a rental unit because of the tenant's alleged violation of an obligation or covenant of the tenancy, if such obligation or covenant was unilaterally imposed by the landlord and not agreed to by the tenant and either was not included, or is not materially the same as an obligation or covenant in the rental agreement mutually agreed to by the parties. The foregoing shall not apply to: (1) changes in obligations or covenants that are not material; (2) changes in material obligations or covenants required by law or to protect the health, safety and quiet enjoyment of the occupants of the building or adjoining properties; or (3) material changes that have resulted in a substantial decrease in housing services with respect to garage, storage space, or access to common areas for which a commensurate rent reduction has been provided to the landlord; and (4) rent increases or other changes in the terms of a tenancy authorized under the Rent Ordinance and Rules and Regulations.” (Minutes of Rent Board meeting, November 12, 1997 <http://sfrb.org/ ftp/ meetingarchive/index_764_56bc.html?page=764> [as of Apr. 18, 2017].)

11 Both parties have requested judicial notice of various documents related to the Leno Amendment. Hayes asks us to judicially notice two “explanations” that appear on the website of the San Francisco Rent Stabilization and Arbitration Board, one concerning the Leno Amendment in a section entitled “ ‘What's New?’ ” and the other concerning subletting and replacement of roommates, in a section entitled “Topic No. 151: Subletting and Replacement of Roommates.” Kardosh seeks judicial notice of section 37.9 of the Rent Ordinance; sections 12.20 and 6.15 through 6.15C of the Rules; the initially proposed language, subsequent modification, final text and Executive Summary of the Office of the Legislative Analyst for the Leno Amendment; and legislative materials pertaining to the dominant motive issue in evictions. Kardosh's motion was unopposed and we have previously granted it. Kardosh opposes Hayes's motion. The items Hayes asks us to judicially notice do no more than summarize the provisions of the Rent Ordinance and Rules. They do not assist us in interpreting the relevant provisions and we deny the request for judicial notice for that reason.

12 This is consistent with the Rent Ordinance generally. As originally enacted, the Rent Ordinance recited that the Rent Board was created “in order to safeguard tenants from excessive rent increases and, at the same time, to assure landlords fair and adequate rents consistent with Federal Anti-Inflation Guidelines.” (Rent Ord., § 37.1, subd. (b)(6).)

16 Under Civil Code section 1954.53, subdivision (a), a landlord is entitled to establish the initial rental rate at the inception of a tenancy (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237) and also to increase the rent to a lawful sublessee or assignee who did not reside at the premises prior to January 1, 1996, “[i]f the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no

longer permanently reside there." (Civ. Code, § 1954.53, subd. (d)(2).) The Rent Ordinance is consistent with this statute. (Rent Ord., § 37.3, subd. (d)(2)(A).)

14 As Kardosh notes, paragraph 13 addressed assignment of the rental agreement and subletting of the entire premises as well as subletting a portion of the premises. The reasonableness requirement we have been discussing applies specifically to the one-for-one replacement of roommates that was the subject of the Leno Amendment.

15 In a petition for rehearing, Hayes argues that our decision renders the second exception described in section 12.20 of the Rules and, indeed, the entire rule, irrelevant. His argument is based on the mistaken premise that we have interpreted "authorized" as used in Rules section 12.20 as meaning "not prohibited." Not so. The application of Rules section 12.20 to a lease term as to which the Rent Ordinance is silent is not before us in this case. As we have tried to make clear, a lease term requiring the landlord's reasonable preapproval of a subtenant is "authorized" because the Rent Ordinance and Rules expressly contemplate such terms and define the allowable parameters for them.

16 As earlier indicated, the trial court found the sublet provisions of the 2000 lease were "required by a change of the law," explaining that the "[Civil Code section] 827 change that's produced the 2000 lease, effectuated a change in local law, the rent ordinance." This phrasing suggests the court adopted Kardosh's interpretation of the 1997 lease. The change in terms could be "required by a change of law" and "effectuate[ ] a change in local law," only if, as Kardosh argued below, the original lease absolutely prohibited subletting and therefore had to be changed to comply with the Leno Amendment. The trial court at an earlier point in the proceedings had appeared to accept Hayes's view that in light of the handwritten notations referring to "Hayes and 3 roommates" and payment by "one check," the 1997 lease could only be read as permitting Hayes, as the master tenant, to have three subtenants. Hayes devotes the majority of his briefs on appeal to argument in support of this interpretation, which is necessary to his argument that the Rent Ordinance did not authorize Kardosh changing his lease from allowing unrestricted subletting to allowing subletting only subject to prior approval and other conditions. Kardosh does not address the proper interpretation of the 1997 lease on appeal, relying only upon the argument that the 1997 lease was irrelevant.

End of Document