2016 WL 3202723 (Cal.App. 1 Dist.) (Appellate Brief)
Court of Appeal, First District, California,
Division Three.

Kuo Hsuan CHANG, Plaintiff and Respondent,

v.

Manuel GARCIA, NELSON FUENTES, TOMAS GOMEZ, ODILIA LEAL MUNOZ and DOES 1-10, Defendants and Appellants.

No. A147271.
June 3, 2016.

Superior Court No. CUD-15-651045
Appeal from a Judgment of the San Francisco Superior Court Honorable Joseph M. Quinn, Judge

Appellants' Opening Brief

Joseph K. Barber, Esq., SBN 267259, Tenderloin Housing Clinic, Inc., 126 Hyde Street, 2nd Floor, San Francisco, CA 94102, Tel: (415) 771-9850, Fax: (415) 771-1287, Email: joseph@thclinic.org, for defendants/appellants Manuel Garcia, Nelson Fuentes, Tomas Gomez, and Odilia Leal Munoz.

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***1 I. INTRODUCTION**

This appeal is from the San Francisco Superior Court's ("the Trial Court") Order Entering Judgment in favor of Respondent Kuo Hsuan Chang ("Respondent) in an action for unlawful detainer brought pursuant to the Ellis Act, California Government Code section 7060 et seq., and San Francisco Rent Stabilization and Arbitration Ordinance ("Rent Ordinance") section 37.9(a)(13). (Vol. I at 0018-0022; Vol. III at 0641-0646.)[1] In the underlying action, Respondent sought possession of Appellants Manuel Garcia, Nelson Fuentes, Tomas Gomez, and Odilia Leal Munoz ("Appellants") unit, 1266A Hampshire Street (the "Premises"), pursuant to the Ellis Act and Rent Ordinance section 37.9(a)(13) on grounds that Respondent wishes to withdraw all rental units at 1266 Hampshire Street from rent or lease. (Vol. I at 0018-0022; Vol. III at 0641-0646.)

In his summary judgment motion, Respondent failed to provide admissible evidence of every element of his cause of action for unlawful detainer under the Ellis Act. Respondent (1) failed to provide admissible evidence that the Premises was actually withdrawn for rent and Appellants' tenancy terminated; and (2) Respondent failed to present any evidence on the element of damages. Further, Appellants' established a triable question of fact as to whether or not all owners of the Premises had properly signed the Notice of Intent to Withdraw as required by the Rent Ordinance and ***2** Ellis Act. Appellants also established an affirmative defense that Respondent had not paid the statutorily required relocation payments to all occupants of the Premises.

Despite Respondent's failure to provide admissible evidence on his claim, the questions of fact that exist, and Appellants' affirmative defense, on November 9, 2014 the trial court granted Respondent's motion for summary judgment. (Vol. V at 1304-1316.) In doing so, the Trial Court committed reversible error, misapplied the relevant law, inappropriately weighed the evidence in Respondent's favor, and ignored undisputed evidence in the Respondent's Complaint that he sought damages. The Court of Appeal should reverse the Trial Court's Order Granting Respondent's Summary Judgment Motion and should set aside the Trial Court's November 30, 2015 Judgment in favor of Respondent. (See Vol. V at 1304-1316; Vol. VI at 1473.)

II. STANDARD OF REVIEW

Summary judgment is properly granted where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. (California Code of Civil Procedure ("C.C.P.") § 437(c).) Because summary adjudication is a drastic measure that deprives the losing party of a trial on the merits, it may not be invoked unless there are no triable issues for a jury. (Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 304.) "[A]ny doubts regarding the propriety of granting the motion should be resolved in favor of the party opposing the motion." (Id. [citation omitted].)

***3** The moving party bears the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) He must demonstrate conclusively "that under no hypothesis is there a material fact that requires the process of trial..." (Villanueva v. City of Colton (2008) 160 Cal.App.4th 1188, 1194.) If he fails to satisfy this initial burden, then it is unnecessary to examine the opposing party's evidence and the motion must be denied. (Johnson, 143 Cal.App.4th at 305; Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95, 107.) Only if defendants satisfy their initial burden does the burden shifts to plaintiffs to show that there are triable issues of fact that preclude summary adjudication. (Aguilar, 25 Cal.4th at 826.)

Where the plaintiff seeks summary judgment, the burden is on plaintiff to produce admissible evidence on each element of his cause of action entitling him to judgment. (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287 (disapproved on other grounds in Aguilar, supra).) The pleadings establish the parameters of materiality in summary judgment, and summary judgment may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th

1242, 1252-1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74; Nativi v. Deutsche Bank Nat'l Trust Co. (2014) 223 Cal.App.4th 261, 290.)

The Appellate Court reviews the trial court's decision granting summary judgment de novo. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1021; ***4** Nielson v. Beck (2007) 157 Cal.App.4th 1041, 1048.) The Appellate Court neither defers to the trial court, nor is bound by the reasons for the summary judgment ruling; the Appellate Court only reviews the ruling of the trial court, not its rationale. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85, citations omitted.)

III. FACTS AND PROCEDURAL HISTORY

Appellants are low-income, long-term tenants who have resided at 1266 Hampshire Street since 1974. (Vol. V at 1196-1198, 1297-1298, 1299-1300 Vol V at 1318:20-1319:2, 1321:20-28 & 1325:19-27.) Appellant Manuel Garcia is eighty-four years old. (Vol. V at 1196:22-24.) Respondent is one of several owners of 1266A Hampshire Street. (Vol. V at 1163.) The Premises is a four-unit building in the Mission District of San Francisco. (Vol. IV at 0931, 0992:10-14.) Appellant's rent is currently $973.06 per month. (Vol. IV at 0931.)

On August 16, 3013, Respondent served Appellants with a Notice of Termination of Tenancy ("Notice of Termination"). (Vol. IV at 0916-0925.) On August 22, 2013, a Notice of Intent to Withdraw Residential Units from the Rental Market ("Notice of Intent") was allegedly submitted to the Rent Board. (Vol. IV at 0927-0936.) On August 26, 2013, Respondent served Appellants with a copy of the Notice of Intent along with "a cover paragraph explaining its purpose". (Vol. IV at 0933-0934.)

After receiving the Notice of Termination, Appellant Manuel Garcia claimed a right to a one-year extension of the date of withdrawal based on his age on September 13, 2013. (Vol. IV at 0938-0939;.) On September 25, 2013 Respondent acknowledged Appellant's entitlement to an extension of the withdrawal date until August 22, 2014. (Vol. IV at 0941-0945.)

***5** On January 5, 2015, Respondent filed the underlying unlawful detainer action against Appellants, Chang v. Garcia, CUD-15-651045. (Vol I. at 0018-0023.) Respondent sought to recover possession pursuant to the Ellis Act, Gov. Code § 7060, et seq., and San Francisco Residential Rent Stabilization and Arbitration Ordinance (Rent Ordinance) § § 37.9(a)(13) on the grounds that Respondent wishes to withdraw all rental units at the Premises from rent or lease. (Id.) On June 8, 2015, Respondent filed the First Amended Complaint for Unlawful Detainer re-classifying the action as an unlimited matter based on his seeking damages in excess of $25,000. (Vol. III at 0641-0646.)

On October 9, 2015, Respondent filed a motion for summary judgment. (Vol. IV at 0866-0867.) On October 22, 2015, Appellants filed their opposition to Respondent's motion for summary judgment. (Vol. IV at 1076.)

In conjunction with his Motion for Summary Judgment, Respondent Kuo Hsuan Chang submitted a declaration that he had a bona fide intent to withdraw the Premises from the rental market. (Vol. IV at 0978-0980.) None of the other owners of the Premises submitted a similar declaration of their bona fide intent to withdraw the Premises from the rental market.

Oral argument was held on October 28, 2015, and on November 10, 2015 the Trial Court granted Respondent's motion for summary judgment. (Vol. V at 1304-1316.)

On November 30, 2015, the Trial Court entered Judgment in Respondent's favor. (Vol. VI at 1473.) The November 30, 2015 Judgment is a final judgment which grants Respondent possession of Appellants' unit ***6** at 1266A Hampshire Street. (Id.) On December 16, 2015, Appellants timely filed their notice of appeal. (Vol. VI at 1529.)

IV. ISSUES ON APPEAL

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The following issues are presented on Appeal:

(1) Did the Trial Court properly grant summary judgment when Respondent failed to shift the burden by providing admissible evidence on the element of damages in his unlawful detainer claim?

(2) Did the Trial Court properly grant summary judgment when Respondent failed to provide admissible evidence of the date of withdrawal of the Premises?

(3) Did the Appellants show there was a question of fact as to whether or not all owners of the Premises signed the Notice of Intent?

(4) Did the Trial Court properly grant summary judgment when Respondent failed to properly pay all occupants of the Premises the statutorily required relocation payments.

V. ARGUMENT

The purpose of the Ellis Act is to allow landlords who comply with its terms to go out of the residential rental business and evict their tenants by withdrawing all units from rent or lease. (City of Santa Monica v. Yarmark (1988) 203 Cal.App.3d 153, 165, emphasis added.) The Ellis Act states that a tenant may defend against an Ellis Act eviction on grounds that "the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter." (Gov. Code § 7060.6.) Thus, the Ellis Act expressly provides that a tenant may raise ***7** procedural non-compliance with both the Act itself and the Rent Ordinance as a defense to an Ellis Act eviction. (Id.)

The Ellis Act contains explicit boundaries, leaving areas for local control in a fashion consistent with its terms. (*Channing Properties v. City of Berkeley* (1992) 11 Cal.App.4th 88, 93.) Those areas include procedural requirements for withdrawal of the units from rent or lease, affirmative obligations on the part of the owner to protect tenants from abuse of the eviction process, and the application of restrictions to property withdrawn from rent or lease. Such requirements, obligations, and restrictions are contained in Rent Ordinance § 37.9A.

Further, the Ellis Act authorizes relevant municipalities to require landlords to comply with certain eviction control procedures before they withdraw their buildings from the rental market. (See Gov. Code § 7060.4(a); Rent Ordinance § § 37.9(a)(13) & 37.9A.) For example, San Francisco Rent Ordinance section 37.9(a)(13) mandates that an owner invoking the Ellis Act must "compl[y] in full with Rent Ordinance section 37.9A with respect to each such unit" at the premises. (Id. § 37.9(a)(13).)

Moreover, as an unlawful detainer action is a summary proceeding terminating the occupant's right to possession, plaintiff must strictly comply with the relevant statutory provisions. (*Horton-Howard v. Payton* (1919) 44 Cal.App. 108, 112.) It is well-settled that strict compliance with the prescribed notice conditions is a prerequisite to invoking the summary procedures of unlawful detainer. (*Parsons v. Superior Court* (2007) 149 Cal.App.4th Supp. 1, 6; *Saberi v. Bakhtiari* (1985) 169 Cal.App.3d 509, 516 n.6.) Because unlawful detainer affords the defendant few procedural ***8** entitlements, plaintiffs must clearly bring themselves within the purview of the unlawful detainer statute. (*Smith v. Municipal Court* (1988) 202 Cal.App.3d 685, 689, *citing Markham v. Fraluck* (1934) 2 Cal.2d 221, 227, *citing Baugh v. Consumers Association Ltd.* (1966) 241 Cal.App.2d 672, 674-675.) This strict compliance also applies in an unlawful detainer brought under the *Ellis Act.* (See *Naylor v. Superior Court* (2015) 236 Cal.App.4th Supp. 1, 8 ("notice provisions must be strictly complied with" in Ellis Act eviction).)

A. Respondent Failed to Produce Admissible Evidence on Summary Judgment that Shifted the Evidentiary Burden.

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On his motion for summary judgment, Respondent had the initial burden to produce admissible evidence on each element of his cause of action for unlawful detainer establishing that he is entitled to judgment as a matter of law. (C.C.P. § 437c(p)(1).) Only if Respondent met this burden would the burden shift to Appellants to show that a triable issue of one or more material facts exist as to that cause of action or a defense thereto. (C.C.P. § 437c(p)(1).) Respondent was required to meet this burden through admissible evidence on each element of his cause of action entitling him to judgment. (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal. 4th 1282, 1287 (disapproved on other grounds, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.App.4th 826).

In reviewing a ruling on a motion for summary judgment, an appellate court (1) "identif[ies] the issues framed by the pleadings," (2) "determine[s] whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's ***9** favor," and (3) "[w]hen a summary judgment motion prima facie justifies a judgment,... determine[s] whether the opposition demonstrates the existence of a triable, material factual issue." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.) Here, Respondent failed to provide any evidence establishing an undisputed fact as to amount of damages, if any. Instead, he stated that he would not seek damages in his moving papers. However, the First Amended Complaint is the operative pleading, and it sought damages in the amount of $83.33 per day. (Vol. III at 0645:10-18.) As stated, Respondent went as far as to have the matter re-classified as unlimited because he was seeking damages in excess of $25,000.

1. Respondent Failed to Establish the Element of Damages.

In Respondent's Summary Judgment Motion, he failed to provide undisputed material facts on the issue of damages. Respondent's Complaint, and Respondent's First Amended Complaint for Unlawful Detainer both sought damages in the amount of $83.33 per day. (Vol. I at 0022: 7-14; Vol. III at 0645:10-18.) In his Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, or in the Alternative, For Summary Adjudication ("MPA"), and nowhere else, Respondent stated that "for purposes of this motion only, plaintiff does not seek unlawful detainer damages at this time, requesting judgment for restitution of the Premises only. (*See e.g., Northrop Corp. v. Chaparral Energy, Inc.* (1985) 168 Cal. App. 3d 725, 729-730.)" (Vol. IV at 0964:10- ***10** 13.) Respondent made no motion to amend his Complaint to eliminate his damages claim, nor did he dismiss his damages claim.

In his Reply Brief, Respondent clarifies that he is waiving damages for the purposes of summary judgment only, and sought to recover possession alone through the unlawful detainer proceeding. (Vol. V at 1209:3-7.) If Respondent only wanted possession and decided not to seek damages, then he should have amended his complaint just as he did to have the case classified as unlimited. As stated in the First Amended Complaint, damages are an element of Respondent's prima face case for unlawful detainer, and he provided no supporting admissible evidence to establish damages.

Appellant's reliance on *Northrop Corp. v. Chaparral Energy, Inc., supra,* was misplaced. In *Northrop Corp.,* the landlord Northrop and the tenant Chaparral Energy disputed whether a commercial lease term permitted either party to terminate the lease on 30 days' notice prior to the expiration of the five-year term. Northrop terminated the lease by providing such notice, and Chaparral Energy brought a civil action for declaratory relief and breach of contract. Northrop cross-complained against Chaparral in the action, claiming it had been damaged in the amount of $500,000 by not being able to fully utilize its entire property. Northrop also brought a separate action for unlawful detainer. (*Id,* at 727.)

Northrop filed motions for summary judgment in the declaratory relief and unlawful detainer cases. The trial court first addressed the issue of contract interpretation in the declaratory relief case and ruled for Northrop, leaving the cross-complaint for damages as the only claim ***11** remaining in that case. When the summary judgment motion in the unlawful detainer came for hearing, Northrop requested the court to grant summary judgment only on the issue of possession, and to reserve, to the trial of the related cross-complaint, any determination of Northrop's right to rent and reasonable rental value. (*Id.* at 728.) The trial court in the unlawful detainer entered an order that "Plaintiff Northrop Corporation shall recover from defendant Chaparral Energy, Inc. possession of the premises.... 4. Plaintiff shall take nothing by way of its Complaint on its claims for rent and other monetary damages;..." (*Id.* at 728-729.)

The Court of Appeal modified the judgment, stating:
Northrop contends that it had the right to limit its unlawful detainer judgment to the issue of possession and to reserve to the pending related action the issues of rent and rental value damages. It contends the trial court erred by failing to include in the judgment the suggested language explicitly deferring determination of the damage issues, and that the court further erred by including the statement that plaintiff take nothing by way of rent or money damages. *Northrop contends that such statement erroneously implied that the court determined the issues adversely to Northrop, and Northrop fears that Chaparral may attempt to raise this judgment as a bar to rent damages in the related case based on principles of res judicata or collateral estoppel. We agree and therefore we modify the judgment accordingly.*

(Id. at 729 (emphasis added.)

Northrop Corp. is distinguishable because there, the plaintiff had a pending cross-complaint for damages in a "related action" between the ***12** parties, and the Court's ruling on the summary judgment motion in the unlawful detainer "erroneously implied" that the court in the unlawful detainer had ruled against it on the issue of holdover damages. This ruling could be used as res judicata against Northrop in the pending related damages action.

Here, there is no pending damages action, and nothing in Respondent's First Amended Complaint indicates that damages would be reserved for some other action. This is a residential unlawful detainer under the Ellis Act where the landlord is certifying that he will exit the rental business for at least five years (Govt. Code § 7060.2(b)), and constraints against re-rental have been recorded on the property. (Govt. Code § § 7060.3, 7060.4(b); Rent Ordinance § 37.9A(f)(6).) It is far-fetched that the landlord would reserve a claim for damages for loss of reasonable rental value to another lawsuit that has not even been filed while simultaneously stating he will not rent again in the future. Nevertheless, unlike the plaintiff in *Northrop, Respondent's pleading did not reserve this issue, and at the time of filing for summary judgment, damages were an element of his prima facie case.*

Appellant's supporting evidence on summary judgment provided no evidence whatsoever of the holdover damages of $83.33 per day stated in the First Amended Complaint. Respondents attempted to ascertain how Plaintiff arrived at the damages claim in their Special Interrogatories Nos. 17-20. (Vol V at 1171:18-1172:2.) However, Appellant claimed questions regarding the damage calculation were an invasion of privacy and the information protected by attorney-client privilege and work product. (Vol. ***13** V at 1180:20-1181:20) Respondent therefore produced a factually devoid response to discovery on the issue of damages.

Given Respondent's unwillingness to disclose any information on the issue of damages in discovery, the amount of unlawful detainer damages was in question at the time the summary judgment was made. Respondent failed to produce any evidence of unlawful detainer damages, and only chose not to seek them as part of the summary judgment motion because the amount of damages was a clear question of fact which would have defeated the motion.

Moreover, there are legal constraints on the amount a landlord may charge as rent on a unit properly withdrawn from the rental market. (Rent Ordinance § 37.9A(a); Govt. Code § 7060.2(a) & (b).) Government Code Section 7060.2(a), as implemented by Rent Ordinance Section 37.9A(a)(1), provides that when a Notice of Intent to Withdraw is filed, the rental rate for any subsequent rental of that unit shall be set at the lawful rent in effect at the time such Notice of Intent is filed. The constraint on the amount of rent that can be charged lasts for a period of five years after the rental unit is withdrawn. (Govt. Code § 7060.2(a); Rent Ordinance § 37.9A(a)(1)(A)(ii).)

Appellant's rent at the time of withdrawal was $973.06 per month. (Vol. IV at 0931.) Yet Respondent pled damages in the amount of $83.33 per day, or $2,500 per month. Respondent even filed a First Amended Complaint re-classifying the action as an unlimited matter because he was seeking damages in excess of $25,000 based upon the market rent for the unit. (Vol. III at 0641-0646.).)

***14** Further, Respondent could not re-rent the Premises without satisfying requirements to offer the units back to the tenants at their rent-controlled rent first. Rent Ordinance Section 37.9A(c)(2) in relevant part provides that "...if a the unit is offered for rent or lease within 10 years of withdrawal, the owner shall notify the Rent Board in writing of the intention to re-rent the unit..." (Rent Ordinance Section 37.9A(c)(2).) Respondent did not submit any evidence that he had notified the Rent Board of any intention to re-rent the Premises, and thus was legally precluded from doing so.

Thus, Respondent cannot properly claim the fair market rental value is an amount that is more than the lawful rent at the time he filed the Notice of Intent. Respondent cannot consistently have withdrawn all units at the Premises from rent or lease pursuant to the Rent Ordinance, and been able to obtain a fair market value for the rental of the units that does not reflect the restrictions on the units' rents. Therefore there was a triable issue of fact as to the fair market rental value of the premises, and summary judgment should have been denied.

2. Respondent Failed to Present Admissible Evidence of the Date the Notice of Termination Expired.

A landlord has no cause of action for unlawful detainer until the tenancy has terminated on expiration of the notice. (C.C.P. § 1161; *Highland Plastics v. Enders* (1980) 109 Cal.App.3d Supp. 1, 7. ("The tenancy is not terminated on the giving of the notice but on expiration of the notice period. There is no cause of action until after the tenancy has been terminated." (citations omitted).) Respondent failed to present any ***15** *admissible* evidence in support of his motion for summary judgement to establish the date that either the Notice of Termination allegedly expired, or the date that the unlawful detainer allegedly began. Absent such evidence, plaintiffs cannot prevail in an unlawful detainer action.

The only evidence Respondent offered regarding when the Notice of Termination expired, or the alleged unlawful detainer began are conclusory statements in the Declaration of Kuo Hsuan Chang. Plaintiff's Separate Statement of Undisputed Material Facts cites Kuo Hsuan Chang's Declaration which states that "The date of withdrawal of the Premises from the residential rental market and thereby the date that the Defendants' tenancy ended was August 22, 2014. Defendants did not vacate the Premises by August 22, 2014. (Vol IV at 0979:19-22.) This is the only evidence that Respondent cites as evidence that Appellants failed to vacate, and that August 22, 2014 was the date of withdrawal of the Premises from the residential rental market.

Respondent Chang's declaration does not establish any foundation for Mr. Chang to have personal knowledge that the Premises were withdrawn from the rental market on August 22, 2014. In fact, his Declaration suggests that he has very little understanding of when the proper withdrawal date for the Premises would be. In paragraph 2 of his Declaration, Respondent states that the "other owners of the Property are listed in *the* Notice of Intent to Withdraw Residential Units from the Rental Market, which were completed in April 2013 and August 2013 and also signed by all the owners." (Vol. IV at 0978:22-28, emphasis added.) Respondent refers to "the Notice of Intent," but then states that the Notice ***16** of Intent "were completed in April 2013 and August 2013, suggesting that he either believes one Notice of Intent was completed in two parts or that the single Notice of Intent was completed on two different dates. (*Id.*) While the Declarations of Respondent's attorneys and paralegals show that two Notices of Intent were filed, with the subsequent Notice of Intent superseding the prior May Notice of Intent, nothing in Respondent's Declaration suggests that he knew the difference between the two dates of April 2013 and August 2013. Nor is there evidence that Respondent Chang understood the purported withdrawal date was based on an August 22, 2013 filing of the Notice of Intent, and not the May Notice of Intent.

Respondent's Declaration does not even establish that he has knowledge if and when the Notices of Intent were filed. The August 2013 Notice of Intent, shows that Respondent signed the document on August 17, 2013. [Vol. IV at 0932.] It appears from Respondent's Request for Judicial Notice, which attaches an uncertified copy of the August 2013 Notice of Intent as Exhibit 3, that the Notice of Intent was indeed filed with the Rent Board on August 22, 2013, but nothing demonstrates how it would be within Respondent's personal knowledge that the legal withdrawal date was August 22, 2014.

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Respondent Chang's Declaration improperly testifies to a legal conclusion, that August 22, 2014 was the day the Premises was withdrawn from the rental market. Respondent does not state that he filed the Notice of Intent, nor does he state when it was filed, and nothing qualifies him to state when the date of withdrawal is. Respondent's failure to offer any ***17** admissible evidence on this element of their cause of action precluded summary judgment.

The conclusory form allegation that Respondent "has personal knowledge" is insufficient if the facts stated are not matters as to which the declarant would presumably have knowledge. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 753-54.)

The other declarations submitted by Respondent's counsel fail to establish when the notice of termination of tenancy expired. Under the Ellis Act and Rent Ordinance, the Notice expired at the end of the one year extended withdrawal period. (Govt. Code § 7060.4(b); Rent Ordinance § 37.9A(f)(4).) However, there are no declarations submitted that anyone filed the Notice of Intent with the Rent Board on August 22, 2013. The Declaration of Lauren Maples states that she served the Rent Ordinance § 37.9A(f)(5) notice on the tenants, not that she filed the Notice of Intent with the Rent Board. (Vol. IV at 1033:7-1034:4.) Therefore, Respondent has failed to establish by admissible evidence when the tenancy terminated and summary judgment should have been denied.

B. A Question of Fact Exists As To Whether All Owners of Record Signed the Notice of Intent.

1. Rent Ordinance § 37.9A(f)(1) Requires that All Owners Sign the Notice of Intent.

Rent Ordinance § 37.9A(f)(1), as authorized by Gov. Code § 7060.4(a), requires that "any owner who intends to withdraw from rent or lease any rental unit shall notify the Rent Board in writing of said intention," and requires that the Notice of Intent "shall be signed by all owners of record of the property under penalty of perjury and shall include ***18** a certification that actions have been initiated as required by law to terminate existing tenancies through service of a Notice of Termination of Tenancy." (*Id.*) Thus, Rent Ordinance § 37.9A(f)(1) requires Respondent and all other owners of the Premises to sign the Notice of Intent owner's declaration, which was included in the Complaint at page 6 of Exhibit 3 to the Complaint (labeled "page 3 of 3"). (Vol. I at 0075; Vol. III at 0698; Vol. IV at 0932 and 1021.) As Respondent's counsel admitted at oral argument, the failure of all owners of the Premises to sign the Notice of Intent would create a complete defense for Appellants. [Reporter's Transcript ("RT") 18:2-4.]

2. Respondent's Own Documents and Discovery Responses Create a Question of Fact as to Whether All Owners Signed the Notice of Intent.

A Motion for Summary Judgment, or for Summary Adjudication must be supported by evidence by a party moving for it. (*Regents of the University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1044). Such evidence may consist of declarations, admissions by the opposing party, evidence obtained through discovery, or matters judicially noticed. (Code of Civil Procedure Section 437c(b)(1)).

In the instant case, Respondent's Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment claimed that the Notice of Intent was "signed by all owners of record under penalty of perjury..." (Vol. IV at 0996:1-5.) The evidence to support this statement is the actual Notice of Intent (Vol. IV at 1021) and the Declaration of Kuo Hsuan Chang. (Vol. IV at 0978:22-0979:2.) However, information produced by Respondent in his discovery responses and ***19** production of documents shows that Chiao C. Yuan was an owner of the Premises whom did not sign the Notice of Intent.

Appellants served written discovery including Form Interrogatories-Unlawful Detainer, Requests for Production of Documents, and Special Interrogatories on Respondent on July 1, 2015. (Vol. V at 1140-1146, 1155-1161, and 1169-1173.) Form Interrogatory 70.3 asked Respondent to state if he shared ownership in the Premises, and to identify each owner of the Premises. (Vol. V at 1141.) Respondent's reply to Form Interrogatory 70.3 identified "Kuo Hsuan Chang, Chiao C. Yuan, Steve Hsiu

Hung Chang, Jennifer L. Chang, Hsiui Chaai Mike Chang, Marie T. Chang, and Kathy Liu" as owners of the Premises. (Vol. V at 1149:22-25.)

Appellants' Document Request No. 11 requests "[a]ll deeds, deeds of trust, loan documents, or other WRITINGS..." (Vol. V. at 1158:9-11.) The only deed for the Premises that Respondent produced was a Grant Deed recorded on December 3, 2008, Bates-stamped KC000020, and listing as grantees Kuo Hsuan Chang, Chiao C. Yuan, Steve Hsiu Hung, Jenifer L. Chang, Hsiu Chaai Mike Chang, Marie T. Chang, and Kathy Liu. (Vol. V at 1163.)

According to both the only grant deed produced in discovery, and Respondent's answers to Appellants' form interrogatories, the owners of the Premises are Kuo Hsuan Chang, Chiao C. Yuan, Steve Hsiu Hung, Jenifer L. Chang, Hsiu Chaai Mike Chang, Marie T. Chang, and Kathy Liu. (Vol. V at 1149:22-26, and 1163.) However, the Notice of Intent is not signed by Chiao C. Yuan, an owner of the Premises according to the Grant Deed and Respondent's discovery responses. (Vol. I at 0075; Vol. III at ***20** 698; Vol. IV at 0932 and 1021.) Thus, the Notice of Intent is not "signed by all owners of record of the property" as required by Rent Ordinance § 37.9A(f)(1), and Respondent has not properly complied with the Rent Ordinance § 37.9A(f)(1).

3. The Evidence Produced By Respondent on Reply Does Not Support a Ruling For Summary Judgment.

In their Opposition to Summary Judgment, Appellants pointed out that the Notice of Intent had not been signed by all owners of record. (Vol. IV at 1078:18-22.) Appellants' Response to Respondent's Separate Statement of Material Facts disputed the fact that the "Withdrawal Notice was signed by all owners of record under penalty of perjury and included a certification that actions have been initiated to terminate tenancies" on the grounds that the Notice of Withdrawal did not contain the signature of owner Chiao C. Yuan. (Vol. V at 1100:11-18.)

Appellants' Separate Statement of Additional Undisputed Material Facts in Opposition to Plaintiff's Motion for Summary Judgment stated that the owners of record for the Premises were Kuo Hsuan Chang, Chiao C. Yuan, Steve Hsiu Hung, Jenifer L. Chang, Hsiu Chaai Mike Chang, Marie T. Chang, and Kathy Liu. (Vol. V at 1108:18-22, and 1108:27-1109:7.) In support of this statement, Appellants provided Respondent's own interrogatory responses and a copy of a Grant Deed produced by Respondent in discovery, both showing Chiao C. Yuan as owners of record. (Vol. V at 1149:22-25, and 1163.) By providing this evidence directly contradictory evidence, Appellants created a question of material fact as to ***21** whether all owners of record had indeed signed the Notice of Intent, an element of Respondent's prima facie case.

In reply to Appellants' Opposition and submission of contradictory evidence, Respondent submitted newly amended Form Interrogatory responses. (Vol. V at 1218-1225.) These amended responses were verified and served on October 23, 2015, after Appellants' Opposition and supporting evidence had been filed and served on Respondent. (Vol. V at 1223-1224.) The newly amended interrogatory responses conveniently stated that the owners of the Premises were Kuo Hsuan Chang, Steve Hsiu Hung, Jenifer L. Chang, Hsiu Chaai Mike Chang, Marie T. Chang, and Kathy Liu, omitting Chiao C. Yuan. (Vol. V at 1219:22-25.)

At the same time that he provided amended Interrogatory Responses, Respondent provided a supplemental declaration which purported to attach an Interspousal Transfer Grant Deed dated July 20, 2009. (Vol. V at 1226-1229.) Allegedly the Interspousal Grant Deed transferred Chiao C. Yuan's interest in the Premises to Respondent prior to the filing of the Notice of Intent. The Interspousal Grant Deed attached to Respondent's declaration was not a certified copy, nor did Respondent make a proper request that the Court take judicial of the Deed.

Appellants disputed the factual assertions in the Amended Interrogatories and Respondent's Declaration, and provided evidentiary objections to both. (Objections to Declaration, Vol V. at 1294, Objections to Interrogatories, Vol. V at 1295:1-10.) Appellants' also offered objections to the supplemental evidence at oral argument (See CT 18:22-25; 19:19-20:9.)

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***22 a. Respondent's Amended Interrogatory Responses Should Not Have Been Weighed as Evidence Over Appellants' Evidence.**

In ruling on a Motion for Summary Judgment, the Court must "consider all of the evidence" and all of the "inferences" reasonably drawn therefrom (CCP Section 437c), and must view the evidence and the inferences "in the light most favorable to the opposing party." *(Aguilar v. Atlantic Richfield Company* (2001) 25 Cal. 4th 826, 843; *see Regland v. US National Ass'n* (2012) 209 Cal.App. 4th 182, 199).

The Court's sole function on a Motion for Summary Judgment is issue-finding, not issue-determination. The Court must simply determine from the evidence submitted whether there is a "triable issue as to any material fact." *(CCP Section 437c; see Zavala v. Arce* (1997) 58 Cal.App.4th 9.15, 926; *Binder v. Aetna Life Insurance Co.* (1999) 75 Cal.App.4th 832, 839). In the present case, the Trial Court went beyond "fact finding," As his Order Granting Plaintiff's Motion for Summary Judgment shows, his Honor weighed the evidence as if this was a full trial on the merits. If there is a single issue or material fact, the Motion must be denied. If not, the Motion must be granted. *(Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3rd 237, 240).

At the very least, Respondent's conflicting Form Interrogatory responses create a question of material fact. They are in direct conflict, and the Amended responses do not simply erase the prior inconsistent responses, otherwise litigants would be free to amend their discovery responses whenever they like to negate any questions of fact which they raised. In reviewing the evidence presented in bringing and opposing a summary judgment motion, the Court strictly construes the moving party's ***23** evidence and liberally construes the opposing party's evidence. (*Herberg v. California Inst. Of the Arts* (2002) 101 CA4th 142, 148.) Here, the Trial Court noted Appellants' evidence, but then accepted the amended responses as remedying the question of fact: "On July 9, 2015 and in response to form interrogatory 70.3, Plaintiff stated that he 'share[d] ownership' in the Property with, among others, Chia [sic] C. Yuan, his spouse...On reply, Plaintiff submitted an amended answer to form interrogatory 70.3, verified on October 23, 2015 that omits Yuan as an owner...He also submitted an Interspousal Transfer Grant Deed, executed on July 6, 2009 and recorded on July 20, 2009, by which Yuan grants her interest in the Property to Plaintiff Chang... 'Since 2009,' Chang explains, '[Yuan] has not had any ownership interest in 1266-1268 Hampshire Street.'...Yuan was 'mistakenly' identified as an owner of the Property in the July 2015 form interrogatory response..."

(Vol. V at 1309:20-1310:9.)

Having noted the two different responses, the Trial Court, without further explanation, simply adopts Respondent's assertion that Yuan was "mistakenly" identified as an owner of the Property in the earlier Interrogatory response. There is no indication anywhere in the record or from the Court as to why the omission was more likely than not a mistake. The Trial Court simply accepted Respondent's assertion that the response was a mistake, and gave no consideration to the prior inconsistent statement itself. The Trial Court thus clearly did not view the evidence "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal. 4th 826, 843; *see Regland v. US National Ass'n* (2012) 209 Cal.App. 4th 182, 199). The Trial Court was prohibited from ***24** weighing the evidence, and the two assertions that Yuan both is and isn't an owner of the Premises contained in the two responses to Form Interrogatory 70.3 should have been resolved in favor of Appellants.

b. Respondent's Declaration Regarding Transfer of the Premises and Interspousal Grant Deed Were Inadmissible.

The Trial Court overruled Appellants' objections to Respondent's declaration and the 2009 Interspousal Transfer Deed. [Vol. V at 1310:22-25 (footnote 5.)] The Trial Court further held that "there is no triable issue of fact whether Yuan was an owner of record in 2013. The 2009 Interspousal Transfer Grant Deed, which is recorded, is evidence that Yuan was not a record owner in 2013 and had no beneficial interest in 2013." (Vol. V at 1311:10-12.)

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The Interspousal Grant Deed should not have been considered as evidence in the first place. It is well established that where materials are properly incorporated by reference into an affidavit, they must conform to the rules of evidence. (*Dugar v. Happy Tiger Records, Inc.,* 41 Cal. App. 3d 811, 815, *citing Miller & Lux v. Bank of America,* 212 Cal.App.2d 719, 725; Family Service Agency of Santa Barbara v. Ames, 166 Cal.App.2d 344; Schlesser v. Keck, 138 Cal.App.2d 663, 669 - 670; 4 Witkin, Calif.Proc., (1971) Proceedings Without Trial, s 185, p. 2835.)

Here, Respondent submitted the Interspousal Transfer Deed as part of his Supplemental Declaration in Support of Plaintiff's Motion for Summary Judgment. (Vol. V at 1227:7-10 and 1229-1232.) The copy of the Interspousal deed was not authenticated in any way except by Respondent stating

***25** "Chiao C. Yuan is my wife and she transferred her interest in 1266-1268 Hampshire Street to me in 2009. Since 2009, Chiao C. Yuan has not had any ownership interest in 1266-1268 Hampshire Street. Attached as Exhibit A is a true and correct copy of the Interspousal Transfer Grant Deed signed by my wife, Chaio C. Yuan, and recorded with the County Assessor-Recorder."

(Vol. V at 1227:7-10.)

Appellants timely objected to this statement as hearsay and lacking foundation. (Vol. V at 1294.) Appellants objected to the Interspousal Grant Deed as hearsay, not being properly authenticated, and there being no foundation for Respondent to verify it as a copy. (Vol. V at 1295:1-10.) foundation for Respondent does not thus lay any foundation or authenticate the deed being offered into evidence. The only foundation that Respondent states in his Declaration is that he is an owner of the Premises. (Vol. V at 1227:4-6.) His statement that Yuan transferred her interest in the Premises is a legal conclusion because he does not actually state the facts that would add up to a legal transfer, such as intention by the transferor, delivery, and acceptance. (Civil Code Section 1054; *See Podd v. Anderson*(1963) 215 Cal. App. 2d 660, at 664, "Delivery is, of course, a question of fact.")

Averments in a movant's affidavits which depend upon written documents are incompetent and cannot be considered unless there are annexed thereto the original documents or certified or authenticated copies of such instruments, or excuse for nonproduction thereof is shown." *Angelus Chevrolet v. State of California,* (1981)115 Cal. App. 3d 995, 1001, citing (*Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal.App.2d 719, 725, 28 Cal.Rptr. 401. Emphasis added.) The Interspousal Grant Deed ***26** was not authenticated, and therefore was inadmissible as an attachment to Respondent's Declaration.

It was abuse of discretion to admit Chang's declaration and Interspousal deed, but more importantly the Trial did not properly consider Appellants' evidence, obtained from Respondent through discovery. The Trial Court instead admitted Respondent's inadmissible Grant Deed and made a determination of fact that Respondent's amended interrogatories and Declaration are more credible. The Trial Court should have denied the motion based on the question of fact regarding whether all owners signed the Notice of Intent.

C. Respondent Failed to Provide First-Half Relocation Payments to All Occupants.

Rent Ordinance § 37.9A(e)(3) states in pertinent part:
"(3) On or After February 20, 2005..., relocation payments shall be paid to the tenants as follows:

(A) Subject to subsections 37.9A(e)(3)(B) (C) and (D) below, each tenant shall be entitled to receive $4,500.00, one-half of which shall be paid at the time of the service of the notice of termination of tenancy, and one-half of which shall be paid when the tenant vacates the unit;"

(Rent Ordinance § 37.9A(e)(3).)

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In the instant case, Respondent served Defendants with the Notice of Termination along with the first-half relocation payments via certified mail on August 16, 2013. (Vol. IV at 0916-0925.) However, Respondent failed to actually pay the statutorily required relocation payments at the time of service of the Notice of Termination. The checks attached to the Notice of Termination are not addressed to Tomas Gomez or Odilia Leal Munoz, they are made out to "Manuel Garcia on behalf of Thomas (last ***27** name unknown)" and "Manuel Garcia on behalf of Odilia (last name unknown)". (Vol. IV at 0921.) Tomas Gomez and Odilia Leal Munoz were never issued first-half relocation payments which they are statutorily entitled to. Their checks were only made out to Manuel Garcia, and Respondent thus failed to comply with Rent Ordinance § 37.9A(e)(3).

At the Trial Court, Respondent argued he complied or substantially complied with Rent Ordinance § 37.9A(e)(3)(A) because he served the relocation checks with the Notice of Termination, and did not know the names of Tomas Gomez and Odilia Leal Munoz. It should be noted, however, that Respondent was given a second chance to issue these relocation payments to the proper parties. Even though Respondent cancelled his April 2013 Notice of Termination (Vol IV at 0878-0890), and served a new Notice of Termination in August of 2013, Respondent did not use those four months to ascertain the proper names of the tenants at the Premises. Both Notices of Termination include checks made out to Manuel Garcia on behalf of Thomas last name unknown and Odilia last name unknown. (Vol. IV at 0885-0886, and 0921.)

All persons displaced by reason of the withdrawal require relocation payments, and the cost of relocation is proportionally increased by the number of members of the household regardless of whether they are signatories to the rental agreement. Appellants Tomas Gomez and Odilia Leal Munoz will certainly incur moving costs if they have to vacate, but their checks have been issued to Manuel Garcia and not to them. Respondent thus failed to comply with Rent Ordinance § 37.9A(e)(3)(A) by not paying "each tenant" with the statutorily mandated relocation payments.

***28 VI. CONCLUSION**

For the foregoing reasons, Appellants Manuel Garcia, Nelson Fuentes, Tomas Gomez, and Odilia Leal Munoz respectfully request that this Court reverse the trial court's Order Granting Respondent's Summary Judgment Motion and should set aside the trial court's November 30, 2015 Judgment in favor of Respondent.

Footnotes

1 Pursuant to California Rules of Court ("C.R.C."), Rule 8.883(a)(1)(B), all citations to the record on appeal include the volume and page number where the cited matter appears. Appellants also include line numbers when possible.

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