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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEPH DE CARLO et al.,

Plaintiffs and Respondents,

v.

ROLAND KOSSER,

Defendant and Appellant.

B237278

(Los Angeles County
Super. Ct. No. BC432876)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ernest M. Hiroshige, Judge. Affirmed in part and reversed in part.

The Durringer Law Group, Stephen C. Durringer, Eric J. Bautista for Defendant and Appellant.

Gordon & Gordon, Anthony B. Gordon, Edward M. Bialack for Plaintiffs and Respondents.

Roland Kossier appeals from the judgment entered against him and in favor of respondents Joseph De Carlo and Nancy Kanter, on respondents' complaint. We affirm the judgment, except that we find appellant's contentions concerning the award of attorney fees meritorious, and reverse that award.

Facts

This case concerns a security deposit on a residential lease.

Appellant rented a single family home to respondents. The lease began on July 15, 2005. Respondents put down a security deposit of \$16,990.

The lease period was two years, but was extended by agreement of the parties until August 15, 2009. Respondents stopped paying rent after July 15, believing that it would be "expedient" for appellant to use the security deposit to cover the rent. When appellant did not receive the rent, he served respondents with the applicable three-day notice, then filed an unlawful detainer action. The notice claimed, inter alia, that respondents had damaged the property.

On August 20, 2009 the unlawful detainer action was resolved by a stipulation. The parties agreed that respondents owed appellant \$10,500 for July rent, \$6,566 for August rent, and specified sums for appellant's attorney fees and costs, for a total of \$19,175. The parties also agreed to extend the tenancy until August 31.

The stipulation is on a printed form which includes the provision that "Any security deposit shall be handled pursuant to the California Civil Code. [Tenants] shall return the premises clean and undamaged, ordinary wear and tear excepted"

In a handwritten addendum, the stipulation also provides that "[appellant] agrees to account for the security deposit pursuant to the Civil Code. After making the permitted deductions, [appellant] agrees to reduce the judgment amount If [respondents] pay the remaining balance within 30 days of the security deposit accounting, [appellant] will vacate the judgment + dismiss the case with prejudice. Judgment is entered per CCP 415.46."

The stipulation was entered as a judgment on August 20, 2009. Respondents moved out on August 31.

Civil Code section 1950.5,¹ which governs security deposits, provides that before vacating the property, a tenant has the option of attending an inspection.² Because the three-day notice to quit which appellant served on respondents described property damage, respondents asked appellant for a final inspection, a request which was denied.

In September, appellant gave respondents a security deposit accounting statement which stated that respondents owed \$8,659 for cleaning and repair. In October, appellant gave respondents a revised accounting which increased the cleaning and repair charges to \$8,963.

Respondents moved to vacate the unlawful detainer judgment under the "mistake" prong of Code of Civil Procedure section 473, claiming that they had mistakenly believed that appellant would comply with section 1950.5. The unlawful detainer court denied the motion, finding, however, that a genuine dispute existed between landlord and tenant, that the dispute should be resolved on the merits, and that respondents could file a new action seeking damages.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

² Section 1950.5 subdivision (f)(1) provides that "Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord shall notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection. The requirements of this subdivision do not apply when the tenancy is terminated pursuant to subdivision (2), (3), or (4) of Section 1161 of the Code of Civil Procedure. At a reasonable time, but no earlier than two weeks before the termination or the end of lease date, the landlord, or an agent of the landlord, shall, upon the request of the tenant, make an initial inspection of the premises prior to any final inspection the landlord makes after the tenant has vacated the premises. The purpose of the initial inspection shall be to allow the tenant an opportunity to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security."

Respondents did not pay the unlawful detainer judgment, but in February 2010, filed this action.

In April 2010, appellant garnished Nancy Kanter's wages.

Respondents' complaint sought damages under section 1950.5, which provides, *inter alia*, that a landlord may claim against the security deposit only for amounts "reasonably necessary" for the repair of damages, and not for ordinary wear and tear. (§ 1950.5, subs. (b) & (e).) Respondents also sought damages under subdivision (l) of that section, which provides that "The bad faith claim or retention by a landlord . . . of the security or any portion thereof in violation of this section . . . , may subject the landlord . . . to statutory damages of up to twice the amount of the security, in addition to actual damages." The complaint also included common counts, on allegations that appellant collected too much when he garnished Kanter's wages, but those causes of action were later abandoned.

The case was tried to a jury, which heard evidence about the lease, the unlawful detainer action and its settlement, the condition of the house when respondents vacated, the accountings which appellant provided, and related matters. At the close of evidence, the court made several findings, as a matter of law, based on undisputed evidence and section 1950.5.

The court found that appellant failed to comply with statutory requirements (§ 1950.5, subs. (f) & (g)) concerning the accounting for the security deposit: his first accounting was timely (within 21 days of the day the tenants vacated) but did not include required documentation on the repairs. The second accounting was still deficient in that it failed to properly itemize specified deductions. The jury was instructed on these findings, and was instructed that "[a]s to the deductions that were improperly itemized, the entire deduction should be disallowed."

The court also found that as a matter of law, respondents had had a right to an initial inspection prior to vacating the premises. The court so instructed the jury.³

On special verdicts, the jury found that appellant had failed to comply with the law in his accounting of respondents' security deposit, that his failure to comply was in bad faith, and that \$16,245 of the security deposit should have been returned to respondents.

The court awarded respondents actual damages of \$12,140.84, calculated from the jury's finding, the sum which respondents owed appellant under the unlawful detainer judgment, and the sum which appellant realized through the garnishment. The court also awarded damages of \$25,485 (one and one-half times the security deposit) for appellant's bad faith retention of the security deposit.

Respondents moved for attorney fees pursuant to a fees clause in the lease, seeking \$107,217 in fees. The court awarded \$73,125 in attorney fees.

Discussion

1. The effect of the stipulated judgment

Appellant begins by arguing that the trial court erroneously found that the settlement in the unlawful detainer action was not a judgment, and erroneously found that a stipulated judgment can have no preclusive effect.

We cannot see that the court found either that the settlement agreement was not a judgment -- it clearly was -- or that the judgment could have no preclusive effect. The court did find that settlement agreement meant that the termination of the tenancy was not

³ The instruction specified that "The purpose of the initial inspection shall be to allow the tenant an opportunity to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security. [¶] This finding is based on the Court's reading of the Stipulated Settlement Agreement between the parties in the unlawful detainer action. . . . The Court reads the language in the Stipulated Settlement Agreement to mean that all protections for the tenants were reinstated, such as the demand for an 'initial inspection' about any repairs the landlord intends to make and deduct from the tenants' security deposit. There was no finding by the court but an agreement to settle. [¶] As to the above, the jurors are bound by this finding in evaluating the case."

due to a finding of unlawful detainer, but that is not the same as a finding that there was no judgment in the unlawful detainer, or that the judgment could have no preclusive effect.

Thus, we must reject appellant's argument the unlawful detainer judgment had a preclusive effect on the issue of respondents' right to a pre-vacancy inspection, and that the court erred when it found (and instructed the jury) that respondents had such a right. Appellant relies on Code of Civil Procedure section 1174, which concerns unlawful detainer proceedings, and provides that if, after trial, a tenant is found to have failed to perform under a lease, "the judgment shall also declare the forfeiture of that lease or agreement . . ." under specified circumstances. (Code Civ. Proc., § 1174, subd. (a).) Appellant reasons that, once the lease was forfeited, respondents had no right to an inspection, a right which follows the lease.

Appellant also relies on section 1950.5, subdivision (f)(1) which governs the inspection. Appellant cites that portion of the subdivision which reads, "The requirements of this subdivision do not apply when the tenancy is terminated pursuant to subdivision (2), (3), or (4) of Section 1161 of the Code of Civil Procedure," that is, through an unlawful detainer.

However, as the court found, the unlawful detainer judgment was not the result of a finding by the court, and the tenancy was not terminated pursuant to an unlawful detainer, but pursuant to a settlement agreement. There was thus no forfeiture of the lease. Moreover, the settlement agreement specifies that the provisions of the Civil Code will apply to the disposition of the security deposit. Nothing in the agreement exempts the inspection provision.

Also as to collateral estopped, appellant argues that the unlawful detainer judgment established that respondents owed him a total of \$17,066 in unpaid rent, an amount greater than the security deposit, that the judgment has preclusive effect, and that with the unlawful detainer settlement agreement, the parties agreed that the security deposit would be applied to unpaid rent and to damages.

We agree, at least, that the stipulated judgment established that respondents owed appellant \$17,066 in unpaid rent, and that this action could not change that. We do not, however, see that it did. The court's calculation of damages took into account amounts still owing under the unlawful detainer judgment.

For the same reason, we are not persuaded by appellant's substantial evidence argument, which is essentially an argument about the effect of the stipulated judgment. The argument is that because the amount respondents owed under the unlawful detainer agreement exceeded the amount of the security deposit, respondents could not recover in this action. As we have seen, however, the amount respondents recovered in this action was calculated from the amount which the jury found could properly be deducted from the security deposit, the amount collected from the garnishment, and the amount owed by respondents under the unlawful detainer judgment.

2. Jury instructions

Appellant contends that under the court's instructions, when the jury determined the amount of the security deposit which "should have been returned to . . ." respondents, the jury did not take into account the money which respondents owed to appellant pursuant to the unlawful detainer judgment.

That is so, but it is not error. The jury was not being asked to determine the amount appellant would pay respondents, or respondents would pay appellant, but instead was asked to determine only one part of that calculation, the amount of the security deposit which could be withheld under the law. That was a proper subject for a special verdict.

Appellant also makes an argument concerning the jury's finding that he acted in bad faith. The argument is based, first, on the instruction concerning his failure to comply with the requirements of the law with regard to the accounting. The court found, and instructed the jury, that appellant failed to comply with specified portions of that law. Then, in instructing on bad faith, the court instructed the jury that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its

enforcement. This means that each party will not do *anything* to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract." (Appellant's italics.) Appellant argues that "had the jury not been misled to believe that the unpaid rent and damages set forth in the UD Judgment did not have to be factored in, the jury would not have found Appellant liable for bad faith retention of the Security Deposit."

Appellant was free to introduce evidence that he withheld the security deposit because respondents owed him money under the unlawful detainer judgment. The difficulty is that at the critical time, he told respondents that he was withholding at least some of the money because respondents had damaged the property.

Further, this argument omits the fact that the jury received an additional instruction on bad faith, that the law provides that "the bad faith claim or retention by a landlord of the security or any portion thereof that are not reasonably necessary for the purposes of repair of damages to the premises, exclusive of ordinary wear and tear or the cleaning of the premises . . . necessary to return the premises to the same level of cleanliness it was in at the beginning of the tenancy may subject the landlord to statutory damages of up to twice the amount of the security" This instruction defined good faith, as "(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage," and also defined bad faith.

Appellant also argues that the court erred by failing to instruct the jury under *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, which held that "a landlord who in good faith fails to comply with the requirements of this statute may nevertheless recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding." (*Id.* at p. 741.) We do not see that such an instruction was requested, or that it is applicable,

because it concerns a landlord who fails to comply with the statutory requirements in good faith. Here, the jury found bad faith.

3. Separate Action/Equity

Here, appellant argues that respondents were not entitled to file this action, which appellant deems an action for setoff, or an action concerning partial satisfaction of a judgment. He argues that despite the ruling by the unlawful detainer court on respondents' motion to vacate that judgment, "respondents should have filed a motion for acknowledgement of partial satisfaction of judgment in the court of the UD Action when such dispute arose." We cannot see that appellant raised this argument in the trial court, and thus may not further consider it. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

Under this heading, appellant also argues that the doctrine of unclean hands bars this action, contending that in the settlement of the unlawful detainer, respondents admitted they caused some damage, contending that \$336 of the amount respondents agreed to pay cannot be accounted for otherwise. We see no such concession. The settlement agreement obligated respondents to pay \$19,175, the sum of specified amounts for past rent, appellant's attorney fees, and appellant's costs. There is no unaccounted for sum.

4. The fees award

Appellant opposed respondents' motion for fees on the ground, inter alia, that the lease did not allow an award of fees to a party which has commenced an action without first attempting mediation.

In paragraph 38, the lease provides that "In any action or proceeding arising out of this Agreement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorney fees and costs, except as provided in paragraph 37A." Paragraph 37A provides that ". . . Landlord and Tenant agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to court action. . . . If, for any dispute or claim to which this paragraph applies, any party

commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees."

It is apparent from the record that respondents did not attempt to mediate before commencing this action, and we thus agree that they were not entitled to fees.

On this issue, the trial court noted that the lease also provides that an unlawful detainer action is excluded from the mediation requirement, and found that the unique history of the case meant that it fell into that exception, in that "the whole genesis of this litigation was a dispute about the settlement of the unlawful detainer action," and that "it became part of the unlawful detainer action."

We simply cannot agree. This lawsuit was not part of the unlawful detainer case, but was a separate lawsuit on the lease, and was subject to the mediation requirement. Indeed, even under the trial court's logic, no fees should have been awarded. If this was not a suit on the lease, it was a suit on the settlement agreement, and the settlement agreement did not provide for an award of fees.

Disposition

The judgment is affirmed, except that it is reversed insofar as it awards attorney fees. Each party to bear its own costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.