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Courts split on whether breach of lease can be SLAPPed

By Timothy D. Reuben

How do you know what the gravamen of a complaint is for purposes of the anti-SLAPP statute (CCP Section 425.16)? And when can a landlord who properly evicts a tenant, who then sues for breach of contract, strike that lawsuit because a notice of termination and an unlawful detainer action are protected activities under the First Amendment? These are the questions that Justice Walter Croskey of the 2nd District Court of Appeal struggled with in reversing Los Angeles County Superior Court Judge Richard E. Rico in *Ulkarim v. Westfield LLC*, 2014 DJDAR 9251 (July 14, 2014).

Plaintiff-tenant Monira Ulkarim leased retail space in Westfield's Valencia shopping center to sell mobile phones and accessories. The lease provided Westfield the right to terminate the lease at will on seven days' notice. After about five months, Westfield served a notice of termination on Ulkarim, stating that Westfield was terminating the lease; however, Ulkarim refused to relinquish the space and instead sued Westfield, claiming that because Westfield wanted the space to be taken over by a competitor, Westfield could not terminate the lease under the at-will termination provision. Ulkarim contended that Westfield was guilty of breach of contract, unfair competition, interference with business advantage, and other claims, because Westfield terminated the lease so as to replace her with a competitor who could take advantage of the customers and good will she had built up.

Westfield quickly filed an unlawful detainer action and successfully obtained a judgment awarding Westfield possession of the premises and declaring the lease terminated. Westfield then filed an anti-SLAPP motion to strike Ulkarim's complaint based on the fact that the notice of termination (an obvious and necessary prerequisite to the unlawful detainer action) was a protected activity. Rico granted the motion and struck the complaint, reasoning that the notice of termination was clearly a protected activity under the anti-SLAPP statute and that each cause of action was based in part on Westfield's service of that notice. Moreover, he ruled that the litigation privilege was a complete defense to the causes of action against Westfield. Westfield was awarded attorney fees.

So why did Croskey, joined by Justices Joan Dempsey Klein and Richard Aldrich, reverse? Croskey points out: "The question here is whether each count alleged ... arises from Westfield's service of the notice or termination or filing of the unlawful detainer complaint." The opinion acknowledges that "[f]iling an unlawful detainer complaint is protected activity under the anti-SLAPP statute, as is service of a notice of termination preceding an unlawful detainer complaint" (citations omitted); however, the panel decided that the breach of contract cause of action was not "based on" the notice of termination; rather, the claim was based on "the decision to terminate." Other counts also arose from that decision to terminate, plus such things as notifying vendors that plaintiff would be vacating and other acts that occurred "in connection with the termination of her tenancy."

Huh? The notice was the act of terminating — indeed the very conduct that caused the termination. Without it there could be no breach of contract — Ulkarim would still have possession. But Croskey concluded that the notice was not the gravamen but only a "triggering" act. Apparently a "triggering" act (whatever that is) is not the same as the gravamen — here the gravamen was found to be the decision to terminate, not the act of actually terminating through the notice.

This really makes little sense. A breach of contract action typically does not even require proof of state of mind, but if it does for some reason, then it certainly is only one piece of the evidence that would support the basis for the claim. Another obvious element is the act of termination — here, the notice itself. The same is true of unfair competition — it is the act that is evaluated, not necessarily the intent. Interference claims require an act of interference. And similarly, while a fraud claim (which was not pleaded here) does require proof of state of mind, it also requires proof of a fraudulent statement (i.e., an act) — both would seem to be part of the gravamen of a claim.

To the panel's credit, the opinion does describe numerous prior cases that have struggled with this issue of the gravamen in a landlord-tenant dispute, both supporting and opposing the *Ulkarim* analysis. After a review of the cases, Croskey writes: "We find it exceedingly difficult to reconcile the holdings ... that the causes of action arose from the protected activity of filing or serving papers in connection with the termination of a tenancy or an eviction, rather than from the underlying decision to terminate the tenancy or evict the tenants, with the holdings ... that the causes of action arose from the underlying decision to terminate the tenancy or evict the tenants, rather than from the protected activity of filing or serving papers."

Obviously, determining the gravamen of a claim can be a challenge — particularly when a complaint may include multiple contentions, some of which may be based on protected conduct and others which may not. And in the context of a lease termination followed by an unlawful detainer action (as well as any matter involving litigation as part of the underlying facts of a claim), the appellate courts clearly want to limit what is SLAPPable. Otherwise, every lawsuit brought by a tenant after a lease termination could arguably be subject to the anti-SLAPP statute (although arguably that would not be a bad thing!). But in Ulkarim, Croskey is dicing this issue too finely and based on his analysis, many otherwise properly SLAPPable suits could arguably become no longer subject to the anti-SLAPP statute since the protected activity might be deemed only a "triggering" act. Now, who is to say what is a triggering event versus a gravamen, particularly since the opinion provides no clear guidance? Is this another example where "you just know it when you see it"?

Hopefully, the state Supreme Court will take up this issue that the appellate courts disagree on, since as Croskey points out, there is clearly a divergence in how appellate decisions address this situation. The better approach is to subject these cases to the anti-SLAPP statute, and if the tenant can show a prima facie case of liability, the matter can proceed and the motion will be denied based on the second prong. But to separate the act of terminating a lease (by way of a notice of termination) from the decision to terminate the lease simply cuts too fine a distinction.

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