5/7/69

Second Supplement to Memorandum 69-59

Subject: Study 50 - Leases (Senate Bill 101)

The Assembly Judiciary Committee approved Senate Bill 101 subject to the requirement that a provision be added to the bill that the lessee be given notice of the terms and conditions of any new lease of the property in any case where he has made a payment that he may be entitled to recover.

Attached as Exhibit I is a draft of such a provision and the related comment. When the draft is approved by the Commission, I will go over it with the Chairman of the Assembly Judiciary Committee and, when he is satisfied with it, all committee members will be provided with a copy. If no objections are received, the bill will be reported "do pass as amended."

Amendment 3 is requested by the California Land Title Association, was previously approved by the Commission, and is not a substantive change.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

AMENDMENT TO SB 101 AS AMENDED IN SENATE MARCH 3, 1969

AMENDMENT 1

In the line of the title of the printed bill as amended in Senate March 3, 1969, after "1951.6," insert:

1951.7,

AMENDMENT 2

On page 3, between lines 40 and 41, insert:

Sec. 5.5. Section 1951.7 is added to the Civil Code, to read:

1951.7. (a) As used in this section, "advance payment" means moneys paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or as the substantial equivalent of either of these.

(b) If the lessee has made an advance payment and the lease is terminated pursuant to Section 1951.2, the lessor shall send a written notice to the lessee if he relets the property. The notice shall be sent by first class mail to the last known address of the lessee not later than 30 days after the new lessee takes possession of the property.

(c) The notice shall state that the property has been relet, the name and address of the new lessee, and the terms and conditions of the reletting. Where the property is relet under a written lease, the lessor may comply with the requirement that the terms and conditions of the reletting be stated in the notice:

(1) By attaching a copy of the lease to the notice;

(2) If the lease has been recorded, by stating in the notice the date and place of recording, including the volume and page or

other identification of the record; or

(3) By stating in the notice that the lessee or his representative may examine and make copies of the lease at such reasonable times and places as are specified in the notice.

AMENDMENT 3

On page 4, line 23, after "Where" insert:

a lease or

Comment to Section 1951.7

Comment. Section 1951.7 does not in any way affect the right of the lessor to recover damages nor the right of a lessee to recover prepaid rent, a security deposit, or other similar advance payment. The section is included merely to provide a means whereby the lessee may obtain the information concerning the reletting of the property when his lease has been terminated under Section 1951.2.

Committee on Judiciary

February 27, 1969

Hon. Ed Reinecke, President of the Senate

Dear Mr. President: The Senate Committee on Judiciary has considered the following bill and made the following recommendation:

Senate Bill 101—"Amend and Do Pass as Amended"

The Committee herewith submits a report concerning this bill. The Committee believes that this report will prove helpful in determining legislative intent.

Respectfully submitted,

GRUNSKY, Chairman

Enclosure

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON SENATE BILL 101

In order to indicate more fully its intent with respect to Senate Bill 101, the Senate Committee on Judiciary makes the following report.

Except for the revised Comments set out below, the Comments contained under the various sections of Senate Bill 101 as set out in the *Recommendation of the California Law Revision Commission Relating to Real Property Leases* (October 1968) reflect the intent of the Senate Committee in approving Senate Bill 101.

The following revised Comments to Civil Code Sections 1951.2 and 1952 as proposed to be enacted by Senate Bill 101 also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill 101.

Civil Code Section 1951.2 (new)

Comment. Section 1951.2 states the measure of damages when the lessee breaches the lease and abandons the property or when his right to possession is terminated by the lessor because of a breach of the lease. As used in this section, "rent" includes "charges equivalent to rent." See Section 1951.

Nothing in Section 1951.2 affects the rules of law that determine when the lessor may terminate the lessee's right to possession. See generally 2 Witkin, Summary of California Law *Real Property* §§ 276–278 (1960). Thus, for example, the lessor's right to terminate the lessee's right to possession may be waived under certain circumstances. *Id.* at § 278. Likewise, nothing in Section 1951.2 affects any right the lessee may have to an offset against the damages otherwise recoverable under the section. For example, where the lessee has a claim based on the failure of the lessor to perform all of his obligations under the lease, Section 1951.2 does not affect the right of the lessee to have the amount he is entitled to recover from the lessor on such claim offset against the damages otherwise recoverable under the section.

Subdivisions (a) and (b). Under paragraph (1) of subdivision (*a*), the lessor is entitled to recover the unpaid rent which had been earned at the time the lease terminated. Pursuant to subdivision (b), interest must be added to such rent at such lawful rate as may be specified in the lease or, if none is specified, at the legal rate of seven percent. Interest accrues on each unpaid rental installment from the time it becomes due until the time of award, *i.e.*, the entry of judgment or the

similar point of determination if the matter is determined by a tribunal other than a court.

A similar computation is made under paragraph (2) of subdivision (a) except that the lessee may prove that a certain amount of rental loss could have been reasonably avoided. The lessor is entitled to interest only on the amount by which each rental installment exceeds the amount of avoidable rental loss for that rent period.

The lump sum award of future rentals under paragraph (3) of subdivision (a) is discounted pursuant to subdivision (b) to reflect prepayment. The amount by which each future rental installment exceeds the amount of avoidable rental loss for that rent period is discounted from the due date under the lease to the time of award at the discount rate of the Federal Reserve Bank of San Francisco plus one percent. Judicial notice can be taken of this rate pursuant to Evidence Code Section 452(h).

In determining the amount recoverable under paragraphs (2) and (3) of subdivision (a), the lessee is entitled to have offset against the unpaid rent not merely all sums the lessor has received or will receive by virtue of a reletting of the property which has actually been accomplished but also all sums that the lessee can *prove* the lessor could have obtained or could obtain by acting reasonably in reletting the property.

The general principles that govern mitigation of damages apply in determining what constitutes a "rental loss that the lessee proves" could be "reasonably avoided." These principles were summarized in *Green v. Smith*, 261 Adv. Cal. App. 423, 427–428, 67 Cal. Rptr. 796, 799–800 (1968):

> A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures. . . . The frequent statement of the principle in the terms of a "duty" imposed on the injured party has been criticized on the theory that a breach of the "duty" does not give rise to a correlative right of action. . . . It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part. . . .
>
> The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . "If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen." . . . The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. . . . It is sufficient if he acts reasonably and with due diligence, in good faith. [Citations omitted.]

Paragraph (4) of subdivision (a) makes clear that the measure of the lessor's recoverable damages is not limited to damages for the loss of past and future rentals. This paragraph adopts language used in Civil Code Section 3300 and provides, in substance, that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. For example, to the extent that he would not have had to incur such expenses had the lessee performed his obligations under the lease, the lessor is entitled to recover his reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make in preparing the property for reletting, and in reletting the property. Other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee would include damages for the lessee's breach of specific covenants of the lease—for example, a promise to maintain or improve the premises or to restore the premises upon termination of the lease. Attorney's fees may be recovered only if they are recoverable under Section 1951.6.

If the lessee proves that the amount of rent that could reasonably be obtained by reletting after termination exceeds the amount of rent reserved in the lease, such excess is offset against the damages otherwise recoverable under paragraph (4) of subdivision (a). Subject to this exemption, however, the lease having been terminated, the lessee no longer has an interest in the property, and the lessor is not accountable for any excess rents obtained through reletting.

The basic measure of damages provided in Section 1951.2 is essentially the same as that formerly set forth in Civil Code Section 3308. The measure of damages under Section 3308 was applicable, however, only when the lease so provided and the lessor chose to invoke that remedy. Except as provided in Section 1951.4, the measure of damages under Section 1951.2 is applicable to all cases in which a lessor seeks damages upon breach and abandonment by the lessee or upon termination of the lease because of the lessee's breach of the lease. Moreover, Section 1951.2 makes clear that the lessee has the burden of proving the amount he is entitled to have offset against the unpaid rent, while Section 3308 was silent as to the burden of proof. In this respect, the rule stated is similar to that now applied in actions for breach of employment contracts. See discussion in *Erler v. Five Points Motors, Inc.*, 249 Cal. App.2d 560, 57 Cal Rptr 516 (1967).

Subdivision (c). Under former law, attempts by a lessor to mitigate damages sometimes resulted in an unintended acceptance of the lessees' surrender and consequently in loss of the lessor's right to future rentals. See *Dorcich v. Time Oil Co.*, 103 Cal. App.2d 677, 230 P.2d 10 (1951). One of the purposes of Section 1951.2 is to require mitigation by the lessor, and subdivision (c) is included to insure that efforts by the lessor to mitigate do not result in a waiver of his right to damages under Section 1951.2.

Subdivision (d). The determination of the lessor's liability for injury or damage for which he is entitled to indemnification from the lessee may be subsequent to a termination of the lease, even though the cause of action arose prior to termination. Subdivision (d) makes clear that, in such a case, the right to indemnification is unaffected by the subsequent termination.

Effect on other remedies. Section 1951.2 is not a comprehensive statement of the lessor's remedies. When the lessee breaches the lease and abandons the property or the lessor terminates the lessee's right to possession because of the lessee's breach, the lessor may simply rescind or cancel the lease without seeking affirmative relief under the section. Where the lessee is still in possession but has breached the lease, the lessor may regard the lease as continuing in force and seek damages for the detriment caused by the breach, resorting to a subsequent action if a further breach occurs. In addition, Section 1951.4 permits the parties to provide an alternative remedy in the lease—recovery of rent as it becomes due. See also Section 1951.5 (liquidated damages) and Section 1951.8 (equitable relief).

One result of the enactment of Section 1951.2 is that, unless the parties have otherwise agreed, the lessor is excused from further performance of his obligations after the lease terminates. In this respect the enactment of Section 1951.2 changes the result in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 155 P.2d 24 (1944).

Statute of limitations. The statute of limitations for an action under Section 1951.2 is four years from the date of termination in the case of a written lease and two years in the case of a lease not in writing. See Code of Civil Procedure Sections 337.2 and 339.5.

Civil Code Section 1952 (new)

Comment. Section 1952 is designed to clarify the relationship between Sections 1951–1951.8 and the chapter of the Code of Civil Procedure relating to actions for unlawful detainer, forcible entry, and forcible detainer. The actions provided for in the Code of Civil Procedure chapter are designed to provide a summary method of recovering possession of property.

Subdivision (b) provides that the fact that a lessor has recovered possession of the property by an unlawful detainer action does not preclude him from bringing a separate action to secure the relief to which he is entitled under Sections 1951.2, 1951.5, 1951.6, and 1951.8. Some of the incidental damages to which the lessor is entitled may be recovered in either the unlawful detainer action or in an action to recover the damages specified in Sections 1951.2, 1951.5, and 1951.6. Under Section 1952, such damages may be recovered in either action, but the lessor is entitled to but one determination of the merits of a claim for damages for any particular detriment.

Under subdivision (c), however, when the lessor has evicted the lessee under the unlawful detainer provisions, he cannot proceed under the provisions of Section 1951.4; *i.e.*, a lessor cannot evict the tenant and refuse to mitigate damages. In effect, the lessor is put to an election of remedies in such a case. Under some circumstances, the court may order that execution upon the judgment in an unlawful detainer proceeding not to be issued until five days after the entry of the judgment; if the lessor is paid the amount to which he is found to be entitled within such time, the judgment is satisfied and the tenant is restored to his estate. In such case, since the lessor never obtains possession of the property, his right to the remedy provided by Section 1951.4 is not affected by the proceeding. If the court grants relief from

forfeiture and restores the lessee to his estate as authorized by Code of Civil Procedure Section 1179, the lease—including any provision giving the lessor the remedy provided in Section 1951.4—continues in effect.

MOTION TO PRINT

Senator Grunsky moved that 50 extra copies of the Senate Journal of March 3, 1969, containing a report concerning Senate Bill 101, be printed.

Motion carried unanimously.