

# Kimball, Tirey & St. John LLP

## 2016 Court Developments and Decisions

January, 2016

### Legislation Affecting Litigation

**Civil Actions Travel Expenses & Interpreter Costs:** California Code of Civil Procedure 1033.5 was amended to provide that a prevailing party in litigation can recover travel expenses to attend depositions and certified or registered interpreter costs.

**Electronic Signatures:** Electronic signatures have been added to the list of defined terms used within the California Code of Civil Procedure. Electronic signatures have been defined as “*an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.*” This law paves the way for courts to use electronic signatures, by declaring that electronic signatures by a court or judicial officer will have the same effect as an original signature.

**Shriver Act:** Los Angeles, San Diego and Sacramento counties continue to be heavily impacted by the Sargent Shriver Civil Counsel Act (“Shriver Act”). The Shriver Act was signed into law in the fall of 2009 and gives low-income residents the right to an attorney in unlawful detainer actions. The implementation of the Act has resulted in a much larger number of attorneys representing tenants, increasing the amount of contested cases, as well as complicating these matters by serving discovery and demanding jury trials.

The Shriver Act is a pilot project which is set to terminate after six years (2017) unless extended by the Legislature prior to that time. During this trial period, the Judicial Council was tasked with conducting a study to demonstrate the effectiveness of the program. On or before January 31, 2016, the Judicial Council will report its findings to the Legislature and Governor. If the Legislature and the Governor find that the program has been effective in assisting defendants in unlawful detainer actions, the program could be made permanent and applicable to all unlawful detainer actions in California.

### Important Landlord/Tenant Law Appellate Decisions

**Borsuk v. Appellate Department of the Superior Court:** For the past thirty years, tenants have been able to exploit a judicially created loophole - known as a Delta Motion - to delay their evictions. The motion was named after the 1983 case of *Delta Imports, Inc. v. Municipal Court*. This case gave tenants the right to bring a special hybrid motion which acted both like a motion to quash (challenging the validity of the service of the eviction papers) and a demurrer (claiming that the eviction complaint does not state a valid cause of action) despite the fact that this procedure was not authorized by the unlawful detainer statute.

More recently, courts expanded the Delta motion to allow tenants to set pretrial evidentiary hearings on whether or not the landlord had properly served the notice to pay rent or quit. Thus, landlords were essentially forced to go to trial twice, once to prove they served the notice and then a second time to prove the rest of their case.

In 2015, this procedure was successfully challenged by a landlord in the case of *Borsuk v. Appellate Department of the Superior Court*. In its decision, the 2<sup>nd</sup> District Court of Appeals of California reevaluated the *Delta* decision and held that a motion to quash was not the proper vehicle under which to challenge service of a three-day notice (such as a three-day notice to pay rent or quit). Following the *Borsuk* case, trial courts are no longer required to hear so called Delta Motions. **Chris J. Evans of Kimball, Tirey & St. John LLP represented the landlord in this matter.**

***511 S. Park View, Inc. v. Tsantis***: Many landlords place provisions limiting attorney fee awards in their leases. These attorney fee caps protect both landlords and tenants from excessive attorney fee awards. This is especially important in today's unlawful detainer climate in which landlords continue to see an increase of jury trial demands.

In *511 S. Park View*, the trial court initially awarded the tenant over \$12,000 in attorney fees despite an attorney fee cap in the lease limiting the fees to \$750.00. The trial court held the fee cap was void against public policy.

This Appellate decision overturned the trial court's ruling, holding that contractual attorney fee caps are enforceable. This positive decision allows landlords to rely upon the attorney fee limits placed in their leases without fear that trial judges will ignore them. **KTS was one of the law firms representing the landlord on the appeal.**

***Olive Properties, L.P. v. Coolwaters Enterprises, Inc.***: In this Court of Appeals opinion, the court confirmed existing law finding that the tenant's failure to pay rent was not an act arising out of the tenant's right to free speech and petition.

In the underlying *Olive Properties* case, the landlord filed an unlawful detainer action against a commercial tenant based on a failure to pay rent. In response, the tenant filed an anti-SLAPP motion to strike the unlawful detainer complaint arguing that the unlawful detainer was filed as a result of a lawsuit which the tenant had previously filed against the landlord which alleged a diminution in value of the leased premises due to the impairment of available parking.

The Appellate Court rejected the tenant's contentions, holding that the unlawful detainer did not arise out of petitioning activity because it was solely and expressly based upon the tenant's non-payment of rent. The mere fact that the tenant's lawsuit was filed *prior to* the unlawful detainer did not mean that the unlawful detainer *arose out of* the tenant's lawsuit. This case was declarative of existing law and helps to preclude a tenant's filing of an anti-SLAPP motion which can substantially delay unlawful detainer proceedings. **Eli A. Gordon of Kimball, Tirey & St. John LLP represented the landlord Olive Properties, L.P. in this matter.**

## California Court Trends

**Notice Requirements:** Unlawful Detainer courts statewide continue to strictly scrutinize notices in unlawful detainer cases for compliance with the law. Errors often overlooked by onsite management when preparing notices can end up detrimentally impacting a case.

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While essentially the entire notice (whether it be a notice to pay rent or quit, notice to perform covenant or quit, notice to terminate tenancy, etc.) is open to judicial scrutiny, we have seen a pattern in some courts to focus in on specific aspects of the notice.

- **Service of the Notice:** Many courts in the state are requiring the person who served the notice to testify at trial (even if service of the notice was not raised in the defendant's response). Moreover, a number of judges are requiring testimony to confirm that a personal service of the notice was attempted. The witness must attest that they personally knocked on the door and received no response before posting the notice. If they failed to do so, the landlord will not prevail at trial.
- **Defendant Names:** Courts are looking carefully at the names of the defendants listed on notices. Some courts will only enter judgment against the defendants named on the notice (even if additional defendants are included in the unlawful detainer if they were omitted from the underlying notice).

**Settlement Negotiations:** We continue to see increased pressure from the local courts to settle unlawful detainer cases prior to trial. In most courts after the parties have "checked in", the judge will send them out of the courtroom and require them to attempt to settle the matter before returning. With the above in mind, plaintiffs should expect that as part of the trial procedure, the court or judge will require some attempt at settlement prior to proceeding with trial.

**Stipulations for Judgment:** When the plaintiff and the defendant in an unlawful detainer agreement have settled the case, they typically enter into a "Stipulated Judgment" which contains the agreed upon terms. If they fail to comply, the judgment can be entered once the judge sees the Declaration of Noncompliance. Some courts, in an effort to preserve what they view as a defendant's right to a notice or hearing prior to terminating his or her tenancy, will no longer enter a stipulated judgment with just the declaration; they also require an ex-parte notice or hearing. Further, when a defendant is "pro-per" (not represented by counsel), some courts will not consider a voicemail as telephonic notice and, if the defendant cannot be reached over the phone, will require notice be served via overnight delivery or mail. A number of courts also refuse to enforce stipulation provisions which require payment of future rent (such as provisions to "continue to pay rent when due" or "keep rent current").

**Eviction Delays:** Unlawful Detainer actions also continue to be delayed as a result of the state budget cuts and subsequent court consolidations and closures, impacting the ability of the clerks and judiciary to process evictions in a timely manner. In addition, the ease of use of the internet gives defendants a resource to discover ways to stall their evictions. One major way is to contest the case which can add weeks or months to the process.

In 2015, the number of contested cases increased by 3% overall statewide. Los Angeles had the highest increase with 5% followed by the San Francisco Bay Area and Sacramento with 4%. San Diego County had a 2% increase in contested cases while Orange County and the Inland Empire experienced a 1% increase. The following are the percentages of unlawful detainer cases so far in 2015 that were contested by county:

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San Diego County: 30%  
Los Angeles County: 38%  
Orange County: 24%  
Inland Empire: 24%  
Sacramento: 27%  
San Francisco Bay Area: 27%

The good news is that the overall number of unlawful detainers (evictions) filed statewide is declining. This is mainly because as California's economy recovers, the number of unlawful detainers filed following foreclosures drops dramatically. The overall strengthening of California's economy also appears to be the main reason unlawful detainer actions based upon non-payment of rent are also on the decline.

**Collections:** Collections from unlawful detainer and other judgments as well as non-judgment collections are steadily increasing as the economy strengthens. However, cases alleging violations of The Federal Debt Collection Practice Act (FDCPA) and its state equivalent are on the rise in California and throughout the nation. Ambiguities in state and federal debt collection laws establish fertile grounds for lawsuits guided by legal theories and interpretation to be ultimately decided upon by the courts.

**ADA Litigation:** Litigation alleging ADA (Americans with Disabilities Act) violations have focused more heavily on multifamily properties and less on commercial business establishments in the last two years.

**Fair Housing Litigation:** Fair housing litigation may increase in federal courts due to the recent Supreme Court decision allowing the disparate impact theory to serve as a basis for a fair housing violation. In California, the Department of Fair Employment and Housing (DFEH) must file a lawsuit in Superior Court if it wishes to pursue an alleged violation of fair housing laws if they make a determination from an investigation that there is probable cause to believe a violation of law exists. Before filing such a lawsuit, DFEH is required by law to attempt mediation but at this stage both the Department and the Complaining party know how the Department is likely proceeding and are less flexible in mediation to resolve a case. If mediation is unsuccessful, then the DFEH may proceed to file a lawsuit. If the DFEH prevails in a lawsuit, they are entitled to seek to recover their attorneys' fees and court costs (including all costs associated with litigation such as discovery costs and expert witness fees).

In addition, we believe the Legal Department at DFEH will be looking to pursue litigation based on "pattern and practice" violations. This means that during the course of investigating a complaint, they may demand to look at policies and procedures for all properties that a company owns or manages in California to see if there are any discriminatory patterns or practices.

*For information regarding new legislation for 2016, please refer to our 2016 Legislative Update which can be found on our website [www.kts-law.com](http://www.kts-law.com).*

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