

You've been SLAPPED

Q&A

ASK AN ATTORNEY

Q. *Is the 17-day inspection period under the C.A.R. standard form purchase contract, RPA-CA, really a "free look" permitting a buyer to cancel for any reason whatsoever?*

A. Not really. Under California law, in every contract there is an implied covenant of good faith and fair dealing. This implied covenant is mutually binding on each of the contracting parties to prevent them from doing anything that would interfere with the right of the other party to receive the benefits under the contract that the parties reasonably contemplated when they entered into the agreement.

Thus, the buyer has an obligation to act in good faith. The 17-day inspection period gives the buyer the opportunity to inspect the property as well as the neighborhood conditions. Should the buyer discover a problem with the property that cannot be (or won't be) repaired by the seller, then the buyer may cancel in good faith. However, a court ultimately makes the determination of whether the buyer was, in fact, acting in good faith.

A SLAPP suit—a Strategic Lawsuit Against Public Participation—typically occurs when a large corporation, such as a developer, sues an individual or organization in an attempt to intimidate the individual or organization into dropping protests against certain corporate actions such as unpopular developments. Even though the SLAPP suit ultimately may not be successful in court, nevertheless the action is successful in the sense that people will refrain from speaking out on issues of public concern because they cannot afford to be sued and defend themselves in court. Defending a SLAPP suit is expensive even if the defendant wins.

Smacking Down a SLAPP

In 1993, California passed an "anti-SLAPP" law—California Code of Civil Procedure Sections 425.16 through 425.18. This law allows a judge to decide at the outset of the lawsuit whether the SLAPP has a "probability" of winning. If the judge decides that it doesn't, the SLAPP is dismissed and the SLAPP target wins the legal defense costs and attorneys' fees. Since then, the courts have dismissed many lawsuits under the anti-SLAPP law. However, the courts must follow a two-prong test: First, the court must determine if the action is, in fact, a SLAPP suit—that requires determining whether protected expressive activity (U.S. or state constitutional "right of petition or free speech") triggered the lawsuit. Second, the court must determine if the plaintiff has

"established a probability that he or she will prevail on the claim." The plaintiff must, at the outset, provide sufficient evidence indicating the likelihood of eventually prevailing at trial.

In *Birkner v. Lam* (2007), the 1st District Court of Appeal held that a landlord's service of a notice to terminate a tenancy and his refusal to rescind the notice when the tenants claimed that they were protected under the rent control law were, in fact, acts in furtherance of the landlord's protected free speech or petitioning under the anti-SLAPP law (prong one of the law). The appellate court then remanded the case back to the trial court to rule on the evidentiary issues and to determine whether the tenants were likely to prevail on their claim (prong two of the law).

Lam owned an apartment building subject to the San Francisco Residential Rent Stabilization and Arbitration Ordinance. Birkner rented an apartment in Lam's building on a month-to-month tenancy. In January 2006, Lam gave Birkner a 60-Day Notice of Termination of Tenancy in order to allow his mother to move into the ground floor apartment. Lam's mother used a walker and had been living in an apartment that required her to climb 38 stairs to reach her unit. However, on February 2, 2006, Lam's mother died. On February 13, 2006, Lam's attorney wrote Birkner's attorney informing him of the mother's death and rescinding the termination notice. Nevertheless, Birkner pursued a lawsuit against Lam claiming wrongful

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eviction by violation of a rent ordinance, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress.

Under the applicable San Francisco ordinance, a landlord may terminate a tenancy to allow a relative to occupy the unit under certain conditions. However, a landlord may not do so if the landlord receives notice that the tenant is at least 60 years old or is disabled and has been residing in the unit for 10 years or more (among other additional exemptions). In those situations, the tenant is deemed to have “protected status.” Despite having protected status, a landlord may still prevail if there is only one unit available or all the other units are rented by tenants with protected status and the landlord’s relative is also at least 60 years old.

The appellate court, in summarizing prior case law, indicated that the constitutional right to petition includes the basic act of filing litigation or otherwise seeking administrative action. Thus, the prosecution of an unlawful detainer action is protected activity under the anti-SLAPP statutes. Although giving a notice to terminate a tenancy and the act of removing a property from the rental market are not activities taken in furtherance of the constitutional rights of petition or free speech, “if the termination notice is a legal prerequisite for bringing an unlawful detainer action, as it is in this case, service of such a notice does constitute activity in furtherance of the constitutionally protected right to petition.”

The significance of the anti-SLAPP statutes to landlords, like Lam, is that should the trial court ultimately determine that the tenants cannot show their likelihood of prevailing at trial, the case is dismissed at the outset and the tenants must pay the landlord’s costs and attorneys’ fees. ♦

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