Case No. A137608

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

JOHN MORIARTY

Plaintiff and Respondent,

v.

LARAMAR MANAGEMENT CORPORATION

Defendants and Appellants.

Appeal from an Order of the Superior Court for the County of San Francisco Denying Defendant's Special Motion to Strike
The Honorable Ronald E. Quidachay, Case No. CGC-12-520970

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

Dated: June 12, 2013

Law Offices of Eric L. Lifschitz

By: 

AARON H. DARSKY

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Party Represented:	Respondent John Moriarty

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court correctly ruled that Plaintiff's complaint ("Complaint," AA 6-27) does not arise from protected activity and denied Defendant's anti-SLAPP motion to strike. Plaintiff requests this Court affirm that ruling. Plaintiff was driven from his home due to uninhabitable conditions that Defendant/Appellant Laramar Management Corporation ("Laramar" or "Defendant") and its co-defendants ("Defendants") refused to remediate despite its promise and legal obligation to do so. Plaintiff sued Laramar on the basis of the uninhabitability of his home.

Contrary to Defendant's assertions, the Complaint is solely based upon factual allegations of habitability violations that caused Plaintiff to give up possession and eventually file suit. This is known as a "constructive eviction" and is the only type of "eviction" referred to in the Complaint. Defendant did not and cannot meet its burden to show that the claims in the Complaint arise from protected conduct. The allegations of the Complaint in no manner "expressly invoke the Unlawful Detainer Action and ensuing eviction as the factual basis for Plaintiff's claims against Laramar," as wishfully asserted by Defendant. (Appellants Opening Brief "AOB" p. 17.) Nowhere does the Complaint allege the filing of the unlawful detainer and Defendant must tacitly concede that the Complaint does not contain any allegations of protected conduct.

Defendant instead relies on two faulty arguments: (1) that a handful of paragraphs in the complaint must obliquely refer to an unlawful detainer which somehow taints all causes of action as arising out of protected activity, and (2) that Plaintiff's cause of action for violation of section 37.9 of the San Francisco Administrative Code Chapter 37 (the "Rent Ordinance") must be based in whole or part on an unlawful detainer default judgment that is nowhere referenced in the Complaint. Defendant cannot overcome its burden by seeking the Court to infer facts that are not pled for

the sole purpose of defeating Plaintiff's complaint. Defendant's appeal depends on fallacious reasoning that is contrary to established legal authority and common sense.

Defendant erroneously asserts that the subtitle of Plaintiff's last cause of action, "Wrongful Eviction" must arise from the filing of an unlawful detainer action and subsequent default judgment for alleged non-payment of rent. The law is clear that a claim must be based on allegations of protected conduct, such as the filing of an unlawful detainer action, to come within the purview of the anti-SLAPP statute. The mere filing of a complaint following an alleged protected act does not render the claim protected, even if triggered by that act. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) Further, it is established that wrongful endeavors to recover possession may be based on a range of conduct that does not necessarily include the filing of an unlawful detainer action, such as failure to repair habitability defects alleged here. Thus, there is no legal basis for Defendant's assertion that the filing/prosecution of an unlawful detainer forecloses any claim for wrongful eviction even when not based on the unlawful detainer.

The Complaint could not allege more clearly a **constructive eviction** based on the uninhabitability of the unit, which exacerbated Plaintiff's pre-existing lung condition and caused him to lose permanent possession when Defendants failed to repair his unit pursuant to its legal obligations.

The Court should sustain the trial court's ruling denying Defendant's special motion to strike. Alternatively, the Court should remand to the trial court because evidence produced by Defendant following the ruling on the motion further evidences Defendant's ouster of Plaintiff was not based on protected acts, and supports that Plaintiff's causes of action have merit.

II. ISSUES PRESENTED ON APPEAL

1. Whether Defendant can meet its burden that Plaintiff's habitability claims are based on protected activity when Plaintiff's complaint only alleges non-protected conduct.
2. If the Court extends the law to apply in this instance, whether the Court should remand to the trial court for findings of fact, especially due to the new evidence defendant produced supporting Plaintiff's claims.

III. STATEMENT OF FACTS

A. Procedural History

On August 24, 2012, Defendants were served with Plaintiff John Moriarty's complaint filed on May 21, 2012. (Register of Actions [AA 3].) On September 25, 2012, Defendant Laramar Management Corporation filed a special motion to strike and set for hearing on October 18, 2012, and proffered declarations of Joe Coleman, Michael Lehman and Anne Rollandi that were filed in opposition to the Motion to Set Aside Default and Default Judgment[1] in the companion case CUD-11-637181. (*Id*. [AA 3; and see AA 51:16-24, AA72-80].) Plaintiff timely filed his opposition on October 4, 2012, and requested leave to conduct discovery. (Id. [AA3].) The Court denied Defendant's motion to strike after hearing on November 29, 2012, and overruled "both parties objections." (Court Order [AA 255].) Plaintiff filed objections to Defendant's declarations, and requests this court to take judicial notice[2] of these objections[3].

[1] The Court denied the motion on the ground that Defendant failed to establish diligence in bringing the motion.
[2] See Plaintiff's Motion for Judicial Notice filed concurrently herewith.

Superior Court Judge Quidachay stated at the hearing on the motion: "The Court concludes that the Moving Parties failed to carry its burden to show that the Plaintiff's Complaint arises out of protected activity. We went through this Complaint in detail, trying to see how this might be protected activity. And the drafter—our conclusion was that – and when I say our research attorney – counsel and myself, and then I went through it in detail and concurred. The drafters of the Complaint did an excellent job in making sure that this basically is an action that arises – that arises out of alleged breach of warranty of habitability. And I couldn't find anything else in the complaint." (Hearing Transcript [AA 247:4-13].)

Plaintiff submitted correspondence with Defendants, a sworn statement, and verified photos of the defective conditions that forced him to vacate, which is substantial evidence that there is a possibility he will prevail on his claims. (Moriarty Decl., [AA 121-147].) On November 1, 2012, Defendant added new counsel, Christopher Nevis. (Register of Actions [AA 2].) Defendant responded to Plaintiff's discovery on January 11, 2013, as Laramar Urban Apartments Partners, erroneously sued as Laramar Management Corporation. Plaintiff believes that the January 11th discovery produced by Laramar strongly supports the probability of Plaintiff prevailing on his claims.

B. Statement Of The Case

1. Defendant's Failure to Abate Uninhabitable Conditions of Plaintiff's Unit

In 1994, Plaintiff moved into a rent-controlled one-bedroom unit at 2363 Van Ness Avenue, Apartment 104, San Francisco, California (the "Premises"), where he live until September 2010, when he temporarily

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[3] Titled "Defendant's Objections to Plaintiff's "Evidence" Proffered in Opposition to Defendant's Motion to Set Aside Default and Default Judgment.

vacated his unit for Defendants to conduct remediation of the substandard conditions, including in part, excessive dampness and water intrusion that resulted in the development of surface and airborne contaminants, which exacerbated his pre-existing lung condition and caused other ailments. (Declaration of John Moriarty ("Moriarty Decl.") ¶¶ 2, 5, 21 [AA 122, 125]; Complaint ¶¶ 16-25, 39-40, 44, 46, 53 [AA 8-9, 14].)

Plaintiff reported all of these conditions to Defendants on numerous occasions, and even submitted photographs depicting damage from water intrusion and the resulting surface contamination (airborne contamination cannot be photographed), and his efforts to mitigate, including in part, treating affected walls and ceilings with anti microbial solutions and then painting with anti-microbial paint. (Moriarty Decl. ¶¶ 5, 11,14, 17 [AA 122, 124, 130, 145-151, 157]; Complaint ¶¶ 38-39, 42, 44, 48-49 [AA 11:11-24, 12:6-11, 12:14-17, 14:3-10].) Plaintiff believed Defendants were conducting repairs and remediation in his unit based on their agreement, as evidenced by their inspections, coordinating with a professional remediation expert, and following posted notices to enter. (Moriarty Decl. ¶¶ 9, 10, 15 [AA 123:3-123:11, 124:14-16, 128, 153]; Complaint ¶¶ 26-28 [AA 9:28-10:7].) Defendants never told Plaintiff that they were not, and would not repair his unit as promised and legally required. (Moriarty Decl. ¶ 18 [AA 124:26-125:1].)

Despite having actual and constructive notice of the defective and untenantable conditions at the Premises, Defendants ignored their duty to remedy the conditions and, indeed, refused to make necessary repairs, which constitutes harassment under the Rent Ordinance. (Moriarty Decl. ¶¶ 5-19 [AA 122:6-125:12]; Complaint ¶¶ 22-37, 49 [AA 9:16-11:16, 14:5-10].) In sum, the Defendants engaged in a calculated scheme to allow and perpetuate uninhabitable conditions at the Premises for the purpose of ousting Plaintiff from his rent-controlled unit. (*Ibid*.) In or after June of

2011, Plaintiff learned that Defendants had chosen to permanently retain possession of the subject premises and thereafter refused to return possession to Plaintiff in violation of Plaintiff's rights. (Complaint ¶ 45 [AA 12:18-21]; Moriarty Decl. ¶19[4] [AA 125:2-12].)

Defendants' refusal to restore and maintain habitable premises caused Plaintiff severe physical, mental and emotional injury, caused Plaintiff to pay excessive rent, and caused other economic losses. (Complaint ¶¶ 41-43, 53-55, 58-60 [AA 12:3-13, 14:19-15:115:22-16:1]; Moriarty Decl. ¶¶19, 21 [AA 125:2-12, 125:16-22].)

2. Laramar Management Corporation's Management of the Subject Premises

Substantial evidence establishes Laramar Management Corporation's ("Laramar's") management of the Premises. In or around July 22, 2010, Laramar SF Urban notified Mr. Moriarty it was taking over management of the property. (Moriarty Decl. ¶4 [AA 122:4-5].) This was eight months after a receiver was appointed to "take possession of and manage" the subject property, and granted permission to "employ the property management company, Laramar Communities, LLC" (Dowling Decl. ¶5, Ex. K, Order Appointing Receiver and Granting Preliminary Injunction dated 11/16/09 [AA 51:25-52:1, 86:12-14].) However, in June of 2011, Laramar Urban Specialty Partners held itself out as the property manager of the subject property.[5] (Dowling Decl. ¶ 2, [AA 50:26-51:4,

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[4] Plaintiff attested that his last communication to Defendants' agent about repairs and moving back into his unit was June 6, 2011. He "ensured he filed the instant lawsuit to (*sic*) before June 6, 2012 to ensure I retained all my legal rights and remedies under the San Francisco Rent Residential Ordinance and saw that my lawsuit was filed within 12 months of my belief that I would deprived the right and opportunity to return to possession of my rent controlled apartment." (Moriarty Decl., ¶¶18-20 [AA124:26-125:16].)

[5] Laramar Management Corporation served verified responses to discovery and identified Laramar Urban Apartments Partners as the proper party, and

53:24-28].) Thus, Laramar's own actions holding various entities out as responsible for the management of the Premises, establishes the unity of interest among the Defendants.

Furthermore, Laramar Management Corporation holds the California Real Estate Broker's License and does business as Laramar SF Urban Apartments.[6] A real estate brokers license is required for certain property management activities, including in part to lease, rent, and collect rents, when done for compensation or the expectation of compensation. (Bus. & Prof. Code, §10131.) Laramar Management Corporation is the only Defendant to hold a California Real Estate Broker's license, and is authorized to do business in California.

IV. LEGAL DISCUSSION

A. STANDARD OF REVIEW

"Review of an order granting or denying a motion to strike under section 425.16 is de novo. [citation]." (*Flatley v. Mauro* (2006) 39 Cal. 4th 299, 325-326.) Any evaluation of the second prong, determining Plaintiff's probability of prevailing, may be left to the trial court on remand because the trial court found that the complaint/acts did not arise from protected activity.[7] (*Tusynska v. Cunningham* (2011) 199 Cal.App.4th 257, 267.)

The Court considers the pleadings, and supporting and opposing affidavits, and accepts as true the evidence favorable to the plaintiff and

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admits to managing the property. Thus, any argument that Laramar did not manage the subject property is moot.

[6] See Ex. B to Plaintiff's Motion for Judicial Notice, filed concurrently herewith.

[7] Should the Court determine that Plaintiff needs further evidence to support his second prong burden, Plaintiff requests this Court remand to the trial court who is a better position to evaluate this prong, especially given the voluminous post motion evidence that Defendant produced in verified discovery responses. This evidence was not in the possession, custody or control of Plaintiff, and further supports that Plaintiff will prevail on his claims.

evaluates the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. (*Flatley v. Mauro, supra*, 39 Cal. 4th 299, 326.) The Court does not weigh credibility or compare the weight of the evidence. (*Ibid*.)

The general rule is that "if the trial court's decisions denying an anti-SLAPP motion is correct on any theory applicable to the case, the court may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion." (*Vivian v. Labrucherie* (2013) 214 Cal. App. 4th 267.)

The Court typically reviews the trial court's evidentiary rulings under the abuse of discretion standard. (*Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) In this case, the Court ruled that both parties' objections were overruled. (Court Order [AA 255:7].) If reviewed de novo, the Court needs to identify only sufficient admissible evidence that establishes minimal merit and the admissibility of any other evidence is immaterial. (*Siam v. Kizilbash* (2005) 130 Cal. App. 4th 1563, 1581.) The Court also has the option of remanding the matter to the trial court for a decision on the second prong of the two-part SLAPP analysis discussed below. Given that Defendants have, between the trial court's ruling and the filing of their appeal, produced 609 pages of responsive documents that support Plaintiff's claims, Plaintiff believes that should the Court have reservations about whether Plaintiff has met his burden under prong two of the SLAPP analysis, it would be best to remand to the trial court for a determination.

B. CODE OF CIVIL PROCEDURE SECTION 425.16 SPECIAL MOTION TO STRIKE

"Section 425.16 provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California

Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Civ. Proc. § 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law … ." (*Id*., subd. (e).)" (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 87-88.)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67.)

Furthermore, "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute–i.e., that arises from protected speech or petitioning

and lacks even minimal merit–is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten, supra*, 29 Cal. 4th at 89 (emphasis in original).)

1. Defendant's Burden (Prong One)

Defendant has the threshold burden of demonstrating that the action is one arising from protected activity. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at 76-77.) In considering whether the cause of action or claim arises from protected activity, the question is what is pled/alleged. (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942, citing *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548; *Schaffer v City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1004.) The form or label of plaintiff's cause of action is not determinative. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) "The mere fact that an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman, supra*, 29 Cal.4th at 76-77; and see *Navellier v. Slettern, supra*, at 89.)

Courts consider whether the cause of action is based on the defendant's protected free speech or petitioning activity. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at 79; *Navellier v. Sletten*, *supra,* 29 Cal. 4th at 89.) The protected activity must be the gravamen of the claim. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at 79.) Where the allegations of protected activity are only incidental to a cause of action based upon non-protected activity, the mention of protected activity does not give grounds for an anti-SLAPP motion. (*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal. App. 4th 1273,1283-85.)

2. Plaintiff's Burden if Defendant Meets Its Threshold Burden (Prong Two)

"Where a cause of action refers to both protected and unprotected activity, the Plaintiff may satisfy its obligation in the second prong by simply showing a probability of prevailing on any part of the cause of action." (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1212.) This Court recently articulated the applicable law in consideration of the evidence: "Looking at those affidavits, '[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.' [citations] That is the setting in which we determine whether plaintiff has met the required showing, a showing that is 'not high.' [Citations.] In the words of the Supreme Court, plaintiff needs to show only a 'minimum level of legal sufficiency and triability.' [Citations.] In the words of other courts, plaintiff needs to show only a case of 'minimal merit.' [citations]" (*Comstock v. Aber* (2012) 212 Cal. App. 4th 931, 947.)

V. LEGAL ANALYSIS

A. Defendant Failed to Meet its Prong One Burden

1. Plaintiff's Complaint is Clearly Based on Non-protected Activity

Defendant failed to meet its threshold burden to show that Plaintiff's causes of action arise from protected activity. Defendant tacitly concedes that the Complaint does not specifically allege the filing of an unlawful detainer, service of related three-day notice, or other protected activity, yet erroneously asserts that allegations of the Complaint "expressly invoke the Unlawful Detainer action" and thus, constitutes protected activity. (AOB pp. 16-17.) Defendant's assertion that allegations can invoke the unlawful detainer is nonsensical and lacks legal support. Defendant attempts an end-run around well-established law by insisting that its self-serving

interpretation of the meaning of terms should be applied over Plaintiff's express language and any reasonable inference to which Plaintiff is entitled.

It is well settled law in California that for a cause of action to arise from protected conduct, it must be based on Defendants protected acts. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra,* 29 Cal. 4th 53, and related cases.) Here, the Complaint is based on Defendants' failure to repair the uninhabitable conditions of Plaintiff's home that caused him to lose possession. (Complaint, e.g. ¶¶37-44 [AA 11:1412:17].) "[T]he mere fact that an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that "any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights."" (*City of Cotati v. Cashman, supra*, 29 Cal.4th 69 at 76-77, emph. original, citations omitted.)

Defendant does not, and cannot, cite to any authority to support its assertion that permanent loss of possession or failing to state just cause for the eviction must be the equivalent to an unlawful detainer action.[8] In fact, permanent loss of possession may be caused by a myriad of other conduct by the landlord or its agents, including in part: illegal harassment, including failure to repair (Rent Ordinance 37.9(f), 37.10B); illegal self-help by changing the locks (Civ. Code, § 789.3); illegal retention of possession after temporary eviction to conduct repairs (*Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1250-1251.) Plaintiff's claims here are based on constructive eviction due to Defendants' failure to repair the

[8] Although not argued here, Defendant's cite to *Salma v. Capon* (2008) 161Cal.App.4th1275, which cannot support its argument because in Salma, the court agreed that the allegation "filing of liens" meant the filing of notices of lis pendens and rescission (protected conduct) because these allegations were specifically alleged in the cross-complaint.

uninhabitable conditions affecting Plaintiff's health, and his loss of possession thereby. This Court agrees that wrongful endeavors to recover possession of a rental unit in violation of enumerated grounds for eviction in a rent ordinance, "[o]n their face, these provisions create liability for a range of conduct that does not necessarily include filing a lawsuit to recover possession (such as service of an eviction notice with no intent to proceed to litigation, or constructive eviction by failure to provide heat), or that arise from a landlord's conduct after recovery of possession."[9] (*Chacon v. Litke, supra,* 181 Cal.App.4th at 1257, citing *Rental Housing Association of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741.)

This Court has essentially found that a wrongful eviction does not necessarily include filing an unlawful detainer action, and thus, Defendant's argument that the title of Plaintiff's last cause of action[10], "Wrongful Eviction," refers to the unpled Unlawful Detainer, fails. The failure to state just cause for an eviction under Rent Ordinance §37.9, under the law means that Plaintiff lost possession not on the basis of one of the 16 enumerated legal bases for eviction. Since failure to pay rent is one of the basis for a legal eviction and was apparently the grounds for Defendants' unlawful detainer action, then it logically follows that Plaintiff's claims are not based on an unlawful detainer default for failure to pay rent. Thus, Defendant's assertion is meritless and Defendant fails to meet its burden to show that the action arises from protected conduct.

In addition, the title of a cause of action is not determinative of the application of section 425.16. (*Jarrow Formulas, Inc. v. LaMarche, supra*,

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[9] The Oakland Rent ordinance provisions cited are similar to that of the San Francisco Rent Ordinance.

[10] Defendant incorrectly stated this last cause of action is "penultimate," which is defined as next to the last.

31 Cal.4th at 734-735). Defendant agrees with this statement of the law, as set forth in their brief on page 14, but erroneously argues to the contrary. Further, the relief sought does not show the action arose from protected conduct. (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal. App.4th 154, 162 (held "the SLAPP statute does not apply where it is the prayer for an injunction which arises from an act in furtherance of a person's right of petition or free speech.")

It is also settled law that the mere filing of an unlawful detainer cannot establish that Plaintiff's claims are based on protected activity. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at 78.) It is similarly unavailing that an unlawful detainer lurks in the background. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 478 ("The additional fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a property dispute into a SLAPP suit.") Recovering possession is not in itself a protected activity. "Terminating a tenancy or removing a property from the rental market are **not** activities taken in furtherance of the constitutional rights of petition or free speech." (*Marlin v. Aimco Venezia, LLC* (2007) 154 Cal. App.4th 154, 160-161, emphasis added (finding "[plaintiffs'] suit is not based on defendants' filing and serving of a notice required under the Ellis Act, it is based on the [plaintiffs'] contention "defendants are not entitled to invoke or rely upon the Ellis Act to evict plaintiffs from their home."").) Thus, it follows that a wrongful endeavor to recover possession that is not based on the filing of an unlawful detainer is not protected conduct.

Here, the allegations in Plaintiff's complaint make clear that his claims are based on uninhabitability caused by Defendants failure to repair, which caused him to lose possession of his home. (Complaint [AA 6-27].) The facts of Plaintiff's Complaint are: "Plaintiff was forced to vacate the Subject Premises for Defendants to conduct remediation of the substandard

conditions at the subject premises, which developed due to Defendants negligence, as alleged herein." (Complaint ¶22 [AA 9:10-16].) Defendants agreed to remediate, but failed to. (Complaint ¶¶23-44 [AA 9:17-12:18].) "In or after June of 2011, Plaintiff learned that Defendants had chosen to permanently retain possession of the subject premises and thereafter refused to return possession to Plaintiff in violation of Plaintiff's rights." (Complaint ¶45 [AA 12:18-21].) Defendants wrongful conduct that caused Plaintiff to lose possession and incur other damages. (Complaint ¶¶46-61 [AA 12:19-16:7].)

Defendants last-grasp argument is that the inclusive language in one paragraph in the facts section of Plaintiff's Complaint, which "Defendants . . . endeavored to recover possession of the Subject Premises in bad faith through unlawful harassment and other means, including but not limited to the following actions. . . . " (AOB pg. 16.) Plaintiff's complaint specifically alleges Defendants bad faith conduct in recovering possession, none of which is filing an unlawful detainer action, and it is not proper to infer that "other means" must mean unlawful detainer.[11]

Moreover, the law does not convey protected status to any cause of action for wrongful eviction, but rather, California courts have found wrongful eviction claims to be protected when based on specific allegations of the filing and/or prosecution of an unlawful detainer or notice of termination. (See *Wallace v. McCubbin*, *supra*,196 Cal.App.4th at p. 1177 ("Wallace") ("Wu filed a complaint for unlawful detainer"); *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1475 ("Feldman") (specifically alleged "Park Lane filed an unlawful detainer complaint against Levis"); *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 279 ("*Birkner*") (the complaint alleged the landlord "served a 60-day notice

[11] Defendants newly produced documents shows that Defendants in fact had the locks changed, which amounts to illegal self-help.

to terminate tenancy (the termination notice), pursuant to Rent Ordinance section 37.9(a)(8).")

Here, Plaintiff does not allege the filing or prosecution of the unlawful detainer, but specifically alleges uninhabitability caused him to lose possession (which as set forth above is also a basis for wrongful eviction, and in fact is the only proper inference here due to the specific allegations that his claims are based on uninhabitability.)

Defendant concedes that Plaintiff alleges non-protected acts, including habitability issues, and fails to show that Plaintiff's claim arises from protected conduct, as set forth above. (e.g. AOB pp. 2, 17 and 33.) Thus, Defendant's arguments that all causes of action are mixed causes of action because the allegations of the wrongful eviction cause of action are "fundamental to all of Plaintiff's claims" is meritless.

2. Defendant's Contention that Certain Paragraphs of the Complaint Refer to an Unlawful Detainer Action is Meritless

As it has been established that Plaintiff's claims are not based on protected activity, it should be unnecessary to address each of Defendants fallacious arguments as to specific paragraphs of the Complaint. Nevertheless, in an abundance of caution, Plaintiff will address these misrepresentations.

Defendant's argument that Plaintiff's Complaint contains a "laundry list [of bad actions] that includes the filing and prosecution of an Unlawful Detainer Action that resulted in Plaintiff's eviction," is reliant on its misrepresentations of fact. Defendant erroneously claims that the allegations in Complaint paragraphs 45, 55, 56(e), 70, 129 and 130, include the unlawful detainer action (as if the trial court would have overlooked such allegations had they been alleged). (AA 12:18-20, 14:27-15:15, 17:20-22, 25:24-26:3.) Defendant cannot carry the day by contending that these paragraphs that clearly reference the constructive eviction in September

2010 show that the Complaint is based on an unpled unlawful detainer default judgment from July 2011. Defendant's deceptive presentation of these paragraphs, standing alone and out of context, does not transform the well-pled constructive eviction laboriously detailed in the Complaint into protected conduct.

Defendant attempts to effect this subterfuge by omitting context. With respect to paragraph 45, Defendant includes in its brief that Plaintiff learned Defendants "did not intend to repair or abate his unit in or around June 2011," and extraneously adds "[t]he unlawful detainer action was filed June 2, 2011," seemingly to suggest that Plaintiff must have had notice on or around that date, despite evidence establishing Plaintiff had no notice until the end of July, and the writ of possession scheduled an eviction for August 10, 2011. (AOB 24; AA 69, 183:25-184:25.) Defendants ignore that Plaintiff's Rent Ordinance causes of action have a one-year statute of limitations period, and Plaintiff pled the time he learned that he would not recover possession accordingly. (Code Civ. Proc., § 340, subd. (a).) Plaintiff attested that his last communication to Defendants' agent about repairs and moving back into his unit was June 6, 2011. He "ensured he filed the instant lawsuit to (*sic*) before June 6, 2012 to ensure I retained all my legal rights and remedies under the San Francisco Rent Residential Ordinance and saw that my lawsuit was filed within 12 months of my belief that I would deprived the right and opportunity to return to possession of my rent controlled apartment." (Moriarty Decl., ¶¶18-19 [AA 125:9-16].) Paragraph 45 is nothing more than the pleading of a triggering event that starts the statute of limitations.

Defendant next points to paragraph 55 -- which follows more than a page of descriptions of the habitability defects that forced Plaintiff from his unit – that alleges the aforementioned defects caused him to lose permanent possession. (AA 14:27-15:1.) This is clearly not a reference to an unlawful

detainer. Paragraph 56(e) alleges that Defendants refused to return possession to Plaintiff after repairing the Premises, which is not privileged conduct, as noted in *Chacon v. Litke* (2010) 181 Cal.App.4th 1234. (AA 15:2-15.) Paragraph 70 alleges that recovery by maintaining habitability defects is prohibited by statute and violates Rent Ordinance §37.9 (as it is not an enumerated method to recover possession) and expressly references Defendants' failure to provide relocation benefits when Plaintiff vacated due to habitability defects. Paragraph 70 clearly refers to acts that occurred in or around September 2010, when Plaintiff was constructively evicted. Thus, the allegations are based on non-protected conduct.

Finally, Defendant asserts the language in Plaintiff's Rent Ordinance §37.9 cause of action, paragraphs 129 and 130, which allege that Defendants recovered possession of the Premises and that they did not have just cause to "evict her." [*sic*], also support their erroneous contention that this includes the unlawful detainer. (AA 25:24-18, 26:1-3.) Typographical error aside, when read in context, the cause of action is based on Defendant's failure to pay relocation benefits because Plaintiff vacated due to substandard conditions and that Plaintiff in fact did not receive those benefits. (Complaint ¶¶131-133 [AA 27:4-10].)

In addition, Defendant misrepresents the specific allegations of the Complaint, asserting that Plaintiff's claims for breach of warranty are "based on the claim that Defendants allegedly did not remedy the conditions in the premises, but instead elected to pursue an eviction action." (AOB p. 22.) Nowhere in Plaintiff's complaint is there an allegation that Defendants elected to pursue an eviction.

Defendant's assertion that a few sentences within the Complaint **must** refer to the unpled unlawful detainer is nonsensical and lacks legal support. Defendant is arguing that its tortured interpretation of these terms should be applied over the plain language of the Complaint. Appellant

essentially requests that this Court formulate a standard that looks beyond what is pled and speculate about events not pled solely to benefit Defendant. There is no basis in law to do so. These terms are subject to other meanings that constitute unprotected conduct that in fact form the basis of Plaintiff's claims.

3. Plaintiff's Claims are Actionable and not Precluded by the Litigation Privilege

Defendant's argument that the litigation privilege bars Plaintiff's claims is meritless because Plaintiff's claims are based on uninhabitability and not the filing of an unlawful detainer action for non-payment of rent and serving a three-day notice.[12] (AOB p. 33.) Rent Ordinance section 37.10B specifically sets forth actions by landlords and their agents that constitute harassment, which harassment can also form the basis of wrongful eviction claims under Rent Ordinance section 37.9, and in fact form the basis of Plaintiff's claims.

Defendant concedes there are no specific allegations concerning the filing of the unlawful detainer in the Complaint, and offers no support for its' proposition that the privilege applies on these facts. In fact, Defendant only relies on cases where express allegations of protected conduct existed.

For example, in *Action Apartment Association v. City of Santa Monica* (2007) 41 Cal.4th 1232, Santa Monica's rent ordinance included as actionable harassment claim against a "landlord who maliciously serves a notice of eviction or brings any action to recover possession of a rental unit

[12] Defendant generally refers to these actions as "eviction proceedings" in an apparent effort to persuade the court that the term eviction must mean unlawful detainer, but it merely means recover possession, whether wrongfully or legally. (Rent Ordinance §37.9) Documents produced by Defendant since their special motion to strike was denied evidence that Defendant exercised self-help in retaining possession of the Premises before June 2011.

without a reasonable factual or legal basis," which is preempted by the litigation privilege. (*Action Apartment* at p. 1251 (The court also found that a three-day notice is "only privileged when it relates to litigation that is contemplated in good faith and under serious consideration," and requires a factual test to determine whether it is preempted.).)

In *Feldman,* the complaint was "based upon the filing of the unlawful detainer, service of the three-day notice, and Hawkins's statements in connection with the threatened unlawful detainer. These activities are not merely cited as evidence of wrongdoing or activities "triggering" the filing of an action that arises out of some other independent activity. These are the challenged activities and the bases for all causes of action." (*Feldman v. 1100 Park Lane Associates, supra,* 160 Cal.App.4th at 1483.)

Birkner involved a complaint by tenants alleging wrongful eviction in violation of the Rent Ordinance, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress. The sole basis for liability in each of the causes of action was the service of a termination notice, pursuant to the Rent Ordinance, and the landlord's refusal to rescind it after the tenants informed him they constituted a protected household because of their age or disability and length of tenancy. (*Birkner v. Lam*, *supra,* 156 Cal.App.4th at p. 278.) Because the basis for liability in *Birkner* was the service of the termination notice pursuant to the rent ordinance and the refusal to rescind it, "the complaint indisputably arose from 'activity protected under the anti-SLAPP statute.'[citations]." (*Id*. at 283.)

Here, Defendant argues that Plaintiff's handful of references to being wrongfully "evicted" due to a constructive eviction must mean the unpled unlawful detainer. Even if this were true, (and it is not), Defendants have described a mere triggering event for notice to Plaintiff. This is not a basis to find Plaintiff's causes of action are based on an unlawful detainer

default judgment. Also, Defendant conflates Plaintiff's Rent Ordinance §37.9 claim based on constructive eviction with the one in *Birkner* based on alleged protected conduct. In an effort to extend preemption of claims based on the filing of an unlawful detainer to all of Plaintiff's harassment claims, Defendant massacres its analogy of this case to the reasoning in *Action Apartment* finding preemption of the Santa Monica Rent Ordinance provision allowing suit for the malicious filing of an unlawful detainer, in part because it did not mirror the malicious prosecution exception to the litigation privilege. The Court's finding **does not** extend to **any term** of a rent ordinance that "purports to create liability for conduct that is otherwise privileged." (AOB p. 36.) Nor does *Action Apartment* invalidate a "wrongful eviction or harassment claim brought under local law." (AOB p. 36, utterly misconstruing the court's dicta in footnote 6 of the opinion that merely responded to the dissent.)

This Court agrees that the litigation privilege does not preempt claims under a rent ordinance for wrongful endeavors to recover possession of a rental unit in violation of enumerated grounds for eviction in a rent ordinance "[o]n their face, these provisions create liability for a range of conduct that does not necessarily include filing a lawsuit to recover possession (such as service of an eviction notice with no intent to proceed to litigation, **or constructive eviction** by failure to provide heat), or that arise from a landlord's conduct after recovery of possession." [13] (*Chacon v. Litke, supra,* 181 Cal.App.4th at 1257 (emphasis added), citing *Rental Housing Association of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741.) In *Chacon*, this court found that the landlord's "conduct in refusing to allow the Chacons to reoccupy the premises after their temporary eviction . .. was the type of "independent,

[13] The Oakland Rent Ordinance provisions cited are similar to that of the San Francisco Rent Ordinance.

non-communicative, wrongful act" that is clearly unprotected by the privilege." (*Chacon v. Litke, supra*, 181 Cal.App.4th at 1257.) This case is like *Chacon* in that Plaintiff temporarily vacated his uninhabitable unit for Defendants to conduct repairs[14], but was based on an agreement of the parties, rather than pursuant to Rent Ordinance section 37.9(a)(11).

Similarly, Defendant's reliance on *Bisno v. Douglass Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534 ("*Bisno*"), is misplaced, and misleading. In *Bisno,* the Plaintiff tenant filed a complaint for malicious prosecution and wrongful eviction, among other claims, that "alleged that the unlawful detainer action was just the last step in a campaign of harassment." (*Bisno v. Douglass Emmett Realty Fund 1988*, 174 Cal.App.4th at 1541.) In *Bisno*, the plaintiff also testified at trial that his wrongful eviction claim was based on the filing of an unlawful detainer, but argued on appeal that it did not fall within the ambit of *Action Apartment*, and therefore was not preempted, because it had all of the elements of malicious prosecution. In rejecting Plaintiff's argument, the *Bisno* Court said: "We reject Bisno's reliance on this dicta, if for no other reason than that although Santa Monica Municipal Code section 4.56.020, subdivision (i)(1) and malicious prosecution claims share some common elements, C.A. sections 1806[15] and 1809 include none of the elements of a malicious prosecution case of action. They require only that a landlord either brought an unlawful detainer action when the tenant had not committed certain proscribed acts, or the landlord demanded excess rent . . .We find the reasoning of *Action Apartment* compelling and conclude that the C.A.

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[14] Complaint ¶43, AA12:11-13.

[15] Plaintiff's wrongful eviction claim was based on C.A. section 1806, which "provides that landlords shall not take actions to terminate a tenancy, including, but not limited to, ". . . serving any notice to quit or other eviction notice or bringing any action to recover possession . . .of a controlled rental unit unless" certain conditions exist." (p 1550)

section 1806 claim was barred by the litigation privilege to the extent it was based on Emmett's unlawful detainer action." (*Id*. at 1552.)

While wrongful eviction causes of action may be preempted when based on an unlawful detainer, Plaintiff's claims are based on the failure to repair substandard condition (constructive eviction), which is evident in the allegations of the Complaint. Thus, Plaintiff's claims are not preempted.

Defendant is dead wrong in stating that "Santa Monica Charter Amendment provisions . . . were found to be preempted in *Bisno"*. (AOB pg. 37.) The only thing preempted in *Bisno* was Plaintiff's wrongful eviction cause of action because it was based on the filing of an unlawful detainer. (*Bisno v. Douglass Emmett Realty Fund 1988, supra,*174 Cal.App.4th 1552.) It was the *Bisno* Court that rejected reliance on dicta in *Action Apartment*, where the court noted that the ordinance did not include the element of a favorable termination that is found in malicious prosecution claims. Accordingly, the court declined to address the issue whether a similar ordinance that included that element would be excepted from the litigation privilege." (*Id*. at pp. 1551-1552.)

The Rent Ordinance here is dissimilar to the Santa Monica rent ordinance at issue in *Action Apartment* and *Bisno* because it does not prohibit bringing any action to recover possession, serving notices or filing actions. It merely provides that civil proceeding for damages may be brought "[w]henever a landlord wrongfully endeavors to recover possession or recovers possession of a rental unit." (Rent Ordinance 37.9(f).) The portion of the Santa Monica rent ordinance that was found to be preempted contained specific prohibitions on the landlord's malicious service of notices and actions for possession. "At issue in the instant case is Santa Monica Municipal Code section 4.56.020, subdivision (i)(1) (hereafter section 4.56.020(i)(1)), which prohibits a landlord from maliciously serving a notice of eviction or bringing any action to recover possession of a rental

unit without a reasonable factual or legal basis." (*Action Apartment Association v. City of Santa Monica* (2007) 41 Cal.4th at 1238-1239.) The litigation privilege was found to only preempt the provision about bringing an action, and not as to serving notice, which requires a factual test to determine whether it is preempted. (*Id.* at 1252.) Thus, it is entirely distinguishable.

The lack of preemption based on privilege does not change by considering the Rent Board Rules and Regulations, which are not incorporated into the Rent Ordinance. The Rent Ordinance sets forth the bases for lawful eviction, and states that non-enumerated bases and harassment based recovery of possession are actionable. (Rent Ordinance §37.9(f).) Also, the title of a cause of action is not determinative of the application of Civ. Code section 425.16. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735.) Thus, the title of Plaintiff's 37.9 cause of action is not determinative.

Plaintiff's Complaint does not allege an unlawful detainer or the service of a 3-day notice as a basis for his claims, nor do these acts form the basis of his claims, which are in fact based on uninhabitability. Thus, Plaintiff's claims are actionable.

B. PLAINTIFF'S CLAIMS ARE ACTIONABLE BECAUSE COLLATERAL ESTOPPEL AND RES JUDICATA ARE INAPPLICABLE

"Collateral estoppel precludes parties from litigating an issue previously determined in another cause of action between them or their privities. As a prerequisite for asserting this doctrine, it must be shown that the issue was, in fact, litigated and decided in the prior action." A second prerequisite is that the issue must have been necessary to the prior judgment." (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal. App.4th 1375, 1379-1380, citations omitted; See *Pelletier v. Alameda*

Yacht Harbor (1986) 188 Cal.App.3d 1551; and See *Vella v. Hudgins* (1977) 20 Cal.3d 251, 255.) Defendants failed to meet their burden of establishing Plaintiff's claims are precluded by the Clerk's entry of default judgment on the unlawful detainer claim. (*Vella v. Hudgins, supra,* 20 Cal.3d at 257; *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1100; *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1171.)

A clerk's default judgment in an unlawful detainer is limited to possession. Unlawful detainer proceedings are "summary in character; that, ordinarily, only claims bearing directly upon the right of immediate possession are cognizable. (*Vella v. Hudgins*, *supra,* 20 Cal.3d at 255, citations omitted.) A clerk's default judgment in an unlawful detainer action does not bar claims that were not "fully and fairly litigated in an adversary hearing." (*Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551; and See *Vella v. Hudgins, supra,* 20 Cal.3d at 255.) Claims of breach of warranty of habitability have limited preclusive effect even when found to have been litigated and determined. (*Landeros v. Pankey* (1995) 39 Cal. App.4th 1167, 1169-1174.)

Recognizing the insurmountable limits of the preclusive effects of a clerk's default judgment in an unlawful detainer, Defendant erroneously makes the novel argument that all issues were decided because their unlawful detainer complaint alleged that Laramar "complied with all applicable requirements of the Rent Ordinance." (AOB p. 38.) This argument fails because the issue was not litigated and decided -- the only applicable requirement of the Rent Ordinance is that the action rests on one of the enumerated basis of eviction, and Defendant alleged non-payment of rent, section 37.9(a)(1). (¶6 [AA 54].)

Defendant actually only relies on authority that supports Plaintiff's position that issues must have been necessary, litigated and decided, evidenced as follows:

Marin v. General Finance Co. (1966) 239 Cal.App.2d 438, 443, also supports that issues decided in a default judgment requires a hearing on the merits; there the default judgment was a Court judgment with "evidence having been introduced in open session of this Court." [In the present case, there was no evidence presented in open court. Laramar had the option to move for a default judgment by the court, and the declaration may have established other issues, but did not.]

English v. English makes clear that adjudication requires full and fair hearing "in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein" (*English v. English* (1937) 9 Cal.2d 358, 363-364—res judicata did not bar claims that could have been raised defenses to a prior contract action because they were "neither pleaded nor determined.")

Four Star Elec. Inc. similarly requires issues to be litigated and decided: "a prerequisite for asserting [collateral estoppel], it must be shown that the issue was, in fact, litigated and decided in the prior action." (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal. App.4th 1375, 1379.)

The other issues Defendant contends were established -- rent owed and Moriarty was in possession -- similarly fail because they were not litigated and decided, nor necessary for the default judgment. Moriarty's possession of the Premises was not litigated nor decided, and thus, was not established in the clerk's default judgment. "A default judgment in unlawful detainers award possession of the premises to plaintiff." (Friedman, et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2012) ¶8:512, p. 8-185, citing Code Civ. Proc. § 1169.) Here, the clerk's default by judgment only shows that Laramar (Plaintiff) is entitled to possession of the premises. (AA 60-61.) The clerk's default does not establish that "[Moriarty] was in possession of the premises."

Any amount of rent owed was not litigated or decided. The default judgment cannot award any other relief, such as back-rent, damages, costs, attorney's fees and/or any other authorized relief. Plaintiff must file a

separate application with the court following the default judgment of possession. (Id. at ¶8:513, p. 8-186; Code Civ. Proc. §1169.) Defendant offers no evidence that it did so, so there was no determination that "Moriarty owed at least $6,800." (AOB p. 39.)

Defendant's reliance upon *Freeze v. Salot* (1954) 122 Cal.App.2d 561, is misplaced, as this case is distinguishable. In *Vella*, the Court acknowledged that Code of Civil Procedure section 1161a extends the summary nature of unlawful detainer proceedings to include purchases of property. (*Vella*, *supra*, 20 Cal.3d at 255.) Section 1161a provides for a narrow and sharply focused examination of title. (*Ibid*.) Therefore, to this limited extent, title may be litigated in an unlawful detainer. (*Ibid*.) In *Freeze*, the plaintiff brought suit, alleging irregularity with the trustee sale, which was the foundation for a previous unlawful detainer action default judgment. (*Freeze*, *supra*, 122 Cal.App.2d at 563.) In line with its acknowledgment of the title exception to unlawful detainers, the *Vella* Court cited *Freeze* as an example of where "subsequent fraud or quiet title suits founded upon allegations of irregularity in a trustee's sale are barred by the prior unlawful detainer judgment." (*Vella, supra*, 20 Cal.3d at 256.) Here, the title exception to unlawful detainers is not at issue.

Neither collateral estoppel nor res judicata bars Plaintiff's claims.

C. ANY EVALUATION OF THE SECOND PRONG SHOULD BE LEFT TO THE TRIAL COURT ON REMAND

Assuming *arguendo* Defendant could meet its burden to show that any of Plaintiff's causes of action arose from protected activity, any evaluation of the second prong should be left to the trial court. The trial court found that the complaint did not arise from protected activity, and did not evaluate the second prong, so this Court may remand for determination. (*Tusynska v. Cunningham, supra*, 199 Cal.App.4th at 267.) The trial court did not rule on Plaintiff's request for leave to conduct discovery that was

stayed on the filing of the special motion to strike. (Civ. Proc., § 425.16 subd. (g).) However, following denial of their motion, Defendants responded to discovery and produced documents that further support Plaintiff's claims.

D. THE PROBABILITY THAT PLAINTIFF WILL PREVAIL ON HIS CLAIMS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The probability Plaintiff will prevail on his claims is supported by substantial evidence. Defendant concedes that Plaintiff's causes of action are based on non-protected activity – unhabitabilty-- in part. (AOB at 2, 21, 33.) Plaintiff need only show a probability of prevailing on any part of the cause of action. (*Wallace v. McCubbin*, *supra*,196 Cal.App.4th at1212; *Mann v. Quality Old Time Service, Inc*. (2004) 120 Cal.App.4th 90, 100, 106; *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 816.) Because Plaintiff's claims are in fact based on the uninhabitability of the Premises, Plaintiff can show that substantial evidence supports his claims, far more than the "minimal merit" needed.

At the time that Defendant filed this motion in the lower court, no discovery had been conducted, and Plaintiff relied on declarations and documentary evidence to support his claims. Defendant's contention that Plaintiff's evidence is inadmissible lacks merit. Defendant failed to provide details of its objections that the trial court overruled, as further discussed below, and the Court may for efficiency "begin with a search for admissible evidence." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1581.)

1. **Plaintiff's Evidence is Admissible and the Court Properly Overruled Defendant's Objections**

The trial court properly overruled Defendant's vague and overbroad objections to Plaintiff's evidence at the insistence of Defendant's counsel.

(AA 250:22-251:7.) Defendant failed to provide specific details of its objections in its brief, but rather discussed broadly some examples of the purported objectionable evidence. These baseless, repetitive, vague and overbroad objections fail to even specifically "quote or set forth the objectionable statement or material" such that it is unclear to which statements the objection applies. (California Rules of Court, rule 3.1354(b)(3).) This is apparent in Defendant's first example of Plaintiff's testimony in ¶5 of his declaration, wherein he attests to the uninhabitability of his unit, the effect on his health and that he sent a certified letter outlining the same to Defendants. (AOB p. 26.) Defendant objected in part on the grounds of improper opinion – Plaintiff sending a letter certainly does not require an expert opinion, nor does Plaintiff's testimony based on personal knowledge. (*Ibid*.)

There is also no merit to Defendant's assertion of dissatisfaction that each of Plaintiff's declarations are consistent, and are consistent with the allegations in the Complaint. (AOB at pp. 26, 29.) The mere fact that Plaintiff's declaration was nearly identical to his declarations filed six months prior does not destroy its probative value. If it did, than Defendant must admit that the declarations it proffered in the subject motion --Joe Coleman, Michael Leman, and Anne Rollandi -- lack probative value because they are the exact declarations filed April 26, 2012 in opposition to Moriarty's motion to set aside the default. (proffered declarations [AA 72-80].)

Defendant's assertion that Plaintiff's declarations are inadmissible in their entirety is also meritless. The trial court did not abuse its discretion by overruling Defendant's objections. Defendant insisted at the hearing that the court rule on its objections, and the court correctly overruled Defendant's objections. (Hearing Transcript [AA 250:22-251:7].) Plaintiff attests to the uninhabitable conditions of his unit, how these conditions

exacerbated his lung condition and other effects, and Defendants actions/failures to act in response to his complaints, which have probative value, are relevant, based on Plaintiff's personal knowledge or are exceptions to the hearsay rule.

The entirety of Plaintiff's declaration was not in fact objected to, as several paragraphs were not objected to, so Defendant has conceded the admissibility of those portions. The remainder of Defendant's objections were properly overruled. Although Defendant failed to provide sufficient detail in its objections, Plaintiff will respond to the apparent overarching examples of asserted objections to evidence that may categorized as follows: a.) Plaintiff's complaints about the uninhabitable conditions of his unit (AOB pp. 26-27); b.) communications among the parties about Defendants' agreement to repair the uninhabitable Premises (AOB p. 26); and, c.) Plaintiff's testimony concerning his personal health (AOB pp. 26-27.)

a.) Plaintiff's complaints about the uninhabitable conditions of his unit

Plaintiff observed the uninhabitable conditions of his unit with his own senses, and thus, is based on personal knowledge, as is the fact that these conditions caused the exacerbation of his pre-existing lung condition. (Evid. Code §§ 702, 800, 801.) The certified letter Plaintiff sent to Laramar is relevant to his claims that require he establish knowledge of conditions or agreement to repair, and is based on his personal knowledge. (Evid. Code § 350.) The evidence proffered by Plaintiff of Defendants' agreement to make his unit habitable while he lived elsewhere (as they are obliged to do under the law) is admissible per Evidence Code, sect. 356; Defendant proffered testimony of Joe Coleman and Michael Lehman "contrary" to Plaintiff's testimony that there was an agreement, which is misleading if the totality of the evidence related to the agreement is not considered (AA 72,

76.) "In applying Ev C § 356 (where part of act, declaration, conversation, or writing is given in evidence by one party, whole may be inquired into by adverse party), the courts do not draw narrow lines around the exact subject of inquiry. In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence." (*People v. Zapien* (1993) 4 Cal 4th 929, rehearing denied (1993, Cal) 1993 Cal LEXIS 2443, cert den (1993) 510 US 919.) Thus, Plaintiff's evidence establishing the uninhabitability of his home is admissible.

b.) Communications among the parties concerning Defendants' agreement to repair the substandard Premises

Communications among the parties all relate to Defendants' agreement to comply with its legal obligations to repair his uninhabitable unit, and a proper foundation for these communications is laid in Plaintiff's declaration. Defendant's statements are admissible as statements of a party opponent. (Evid. Code, § 1220.) These statements are also admissible to clarify misleading testimony proffered by Defendant under Evidence Code section 356, as set forth supra.

c.) Plaintiff's testimony concerning his health.

Plaintiff's health condition is clearly within his personal knowledge, and is proper opinion of a layperson. (Evid. Code, §§ 702, 800, 801.) Plaintiff attests to his pre-existing lung condition, that he is under medical care for his condition, the effect of the habitability defects he photographed on his health, and his energy level due to his condition. (Moriarty Decl., ¶ 21, AA 125:16-21.) Thus, this evidence is admissible.

2. **Plaintiff Provided Substantial Evidence Sufficient to Show a Probability Prevail on Any Part of the Cause of Action**

Plaintiff need only show a probability of prevailing on any part of the cause of action. (*Wallace v. McCubbin*, *supra*, 196 Cal.App.4th at 1212.) Ample evidence supports Defendant Laramar Management Corporation's management of the subject property and/or that there is a unity of interest among the defendants, as set forth above. In addition, Defendant erroneously relies on *Wallace* and *Ludwig* for the proposition that Laramar can assert its anti-SLAPP rights, but these cases actually stand for the proposition that a defendant may claim protection under the anti-SLAPP statute even though he only supported, assisted, exhorted, or motivated another person who actually performed the act. (AOB p. 1, fn2.) (*Wallace v. McCubbin, supra,* 196 Cal.App.4th at 1184; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 16-18.) Thus, Defendant effectively concedes that it supported, assisted, exhorted, or motivated another person who actually performed the purported protected act. Therefore, Laramar's liability for the habitability defects at Premises and for wrongful endeavor to recover the Premises is established.

Plaintiff supported its allegations of uninhabitability with his declarations, attaching correspondence[16] with Defendants and/or their agents, and photographs of the condition of his unit after significant attempts to remedy the condition himself. (Moriarty Decl., Exs. A-G, ¶¶ 10-17, AA 123-124.)

[16] This certified letter was produced by Defendants after the ruling on the motion to strike. So, Defendant's tepid assertion that this initial letter does not substantiate his claims is unavailing. (AOB p. 28.) Whether Plaintiff retained a copy of the certified letter that Defendants clearly received is irrelevant as to Defendants' notice.

3. Plaintiff's Substantial Evidence Supporting His Probability To Prevail on his Claims is not Defeated by Defendant's Proffered Evidence

Plaintiff's substantial evidence supporting his probability to prevail on his claims is not defeated by Defendant's proffered evidence which is inadmissible, as well as insubstantial, conclusory, self-serving an uncorroborated. Although Defendant correctly does not argue that its proffered evidence can defeat Plaintiff's substantial evidence, Defendant does mention of a portion of proffered evidence as an aside in a footnote in its brief. (AOB p. 29, fn 7.) Defendant's proffered the declarations of Joe Coleman, Anne Rollandi, and Michael Lehman that were filed in Moriarty's Motion to Set Aside the Default Judgment, which are all inadmissible. Plaintiff filed written objections, and the trial court ruled on both parties objections to evidence. (Court Order [AA 255].) The trial court erred in overruling Plaintiff's objections[17] to these declarations.

Defendant only mentions as an aside one portion of Mr. Coleman's declaration in a footnote in its brief that seemingly is an assertion to contradict that Plaintiff's unit was uninhabitable, so Plaintiff will limit his arguments to those objections to Mr. Coleman's declaration only for the purpose of brevity and not as a waiver of other objections. The footnote in Defendant's brief states in relevant part: "declaration of Joe Coleman, Regional Manager for LUSP, stating that the Premises were inspected in response to Moriarty's claims, and were found to be "perfectly habitable." [AA72-73.] " (AOB 29, fn 7.) Notwithstanding the falsity of this testimony, which Defendants own document production belies, Plaintiff objected to Mr. Coleman's testimony on the grounds that it lacks foundation, is speculative, and is hearsay, and should be stricken in its

[17] See Motion for Judicial Notice, Ex. A, ("Moriarty's Objections").

entirety. (Evid. Code, §§ 702(a), 350, 1200.) Further, Mr. Coleman's declaration is self-serving and uncorroborated.

Mr. Coleman lacks personal knowledge of the alleged habitable conditions because someone else purportedly was sent to inspect, and any findings of that person constitute inadmissible hearsay. (Moriarty's Objection, 5:20-23.) Mr. Coleman does not attest to how he acquired knowledge of an inspection, nor proffers corroborating evidence such as an inspection report. Further, he does not proffer testimony as to the expertise of the person who purportedly inspected. Fundamentally, his declaration lacks foundation because Mr. Coleman attested that he is a regional manager employed by [Laramar], but he does not attest to the duration of his employment with Laramar, or whether he was in fact employed by Laramar during the relevant times. (*Id*. 5:8-13.) The only proper inference is that he was employed by Larmar on the date he executed his declaration, April 25, 2012. (*Id*.)

Plaintiff's other objections were that Mr. Coleman lacks personal knowledge as to the agreements made by Laramar in the fall of 2010, set forth in paragraphs 3 and 4 at page 1 line 17 to page 2, line 10, and he fails to state what he did to acquire such knowledge. (*Id.* at 5:14-19.) Thus, Mr. Coleman's opinion is purely speculative and is inadmissible. Further, it is inadmissible hearsay, as Mr. Coleman did not have any communications with Mr. Moriarty regarding an agreement to repair. Mr. Coleman also lacks personal knowledge of Lararmar's demand that Moriarty pay back rent, paragraph 5, page 2, lines 11-15, and is intentionally vague as to time so as to mislead the court into thinking any such demand was contemporaneous, but is belied by the fact that Laramar service of a Three-Day Notice 10/28/10, and rescission thereafter, followed by Laramar's inspections one or more times. (*Id*. 5:24-6:2.)

Even if admissible, the testimony of Mr. Coleman of another person's purported findings that the unit was not uninhabitable is insubstantial, conclusory, self-serving and not corroborated.

Plaintiff's documentary evidence of the two notices to enter the unit of November 11, 2010, and March 4, 2011, support that Defendants appeared to be honoring their agreement to repair the uninhabitable conditions. (Moriarty Decl., ¶ 10, 15 [AA 123:12-13, 124:14-15, 128, 153].) The only proper inference to be drawn from the totality of the evidence that during the times of these notices, Defendants never told Plaintiff they found the unit to be habitable, nor did they demand he pay rent. (Moriarty Decl., ¶ 18 [AA 124:26-125:1].)

Plaintiff's required showing is not to prove the totality of his case, but to show probability of prevailing on any part of a cause of action. It is disingenuous of Defendant to assert that Plaintiff had months to prepare his case before it was filed, when discovery is not permitted, nor is it permitted without leave of Court when a motion to strike is filed. Thus, Plaintiff provided the extensive evidence in his possession that establishes his ability to prevail on his claims. Further, Plaintiff moved the Court to permit discovery, which was not ruled on because the court denied Defendant's motion on the first prong finding there is no protected conduct. Since that time, Defendants have responded to discovery that further supports Plaintiff's habitability claims, which evidence makes this appeal frivolous.

4. **Plaintiff's Substantial Evidence Demonstrates Probability to Prevail on His Claims**

Based upon the evidence presented above via the declaration of Plaintiff, and the exhibits attached thereto, it is clear that Plaintiff has sufficiently established the requisite probability of success for the causes of action in his Complaint. Each specific cause of action is addressed below.

a. First Cause of Action for Harassment—Violation of SF Administrative Code §37.10

Section 37.10B of the San Francisco Administrative Code (hereinafter the "Rent Ordinance"), explicitly prohibits landlords and their agents, contractors, subcontractors and employees from engaging in a wide variety of harassing conduct in bad faith. See Section 37.10B(a) of Rent Ordinance.

Section 37.10B(c)(5) of the Rent Ordinance provides that: "Any person who violates or aids or incites another person to violate the provisions of this Section is liable for each and every such offense for money damages of not less than three times actual damages suffered by an aggrieved party (including damages for mental or emotional distress), or for statutory damages in the sum of one thousand dollars, whichever is greater, and whatever other relief the court deems appropriate."

Plaintiff has provided an abundance of facts under penalty of perjury that demonstrate Defendants continually, negligently, and in bad faith failed to exercise ordinary care in the ownership and management of the Premises by not complying with applicable housing and health and safety codes, willfully violating Section 37.10B(a)(1) and (2) of the Rent Ordinance. (Moriarty Decl., and exhibits [AA 121-157].) Plaintiff John Moriarty attests that the "[d]ue to years of unabated water intrusion into my unit, airborne and surface contaminants began to develop, which created unsanitary and unhealthful environment that was beyond my ability to remedy" (Moriarty Decl., ¶5 [AA 122]); Plaintiff notified Defendants via certified letter of the inhabitability and his preexisting lung condition (*Id*., ¶¶ 5-6 [AA 122:6-12]); Plaintiff was forced to temporarily vacate his home September 2010 (*Id*. ¶¶ 5, 12 [AA 122-123]); Plaintiff performed extensive work at his personal expense in an effort to remedy the problem in his unit,

including in part "patched, sealed and painted with numerous coats of mold remediation paint," caulked windows, and replaced/refinished water damaged flooring. (*Id*., [AA 130].) Laramar agreed to rescind the October 28, 2010 demand to pay rent (*Id*., ¶ 8 [AA 122:24-123:2]); Plaintiff met a Laramar technician at his home who saw the visible contamination – coming through the several coats of mold resistant paint -- and coordinated a professional remediation expert for an inspection (*Id*., ¶ 9 [AA 123:3-9].) Defendants provided notice to enter to "exhibit the dwelling unit to workmen or contractors."[18] (*Id*., ¶ 10 [AA 123:10-12].) Over the next six months, after extensive discussions with Defendants counsel, providing additional documentation of the conditions of his unit, Defendants additional entry into his unit and no additional demands to pay rent, Plaintiff understood Defendants were repairing his unit as agreed. (*Id.* ¶¶11-18 [AA 122:13-125:1].) Management's agent then ceased responding to Plaintiff's requests for status of repairs of his unit, and he understood Defendants did not intend to honor their agreement to repair. (*Id*., ¶ 19 [AA 125:2-12].)

Uninhabitability of Plaintiff's unit is supported by the conclusions of the California Department of Public Health established in response to Health and Safety Code, section 26100 et. seq.[19]

Thus, the evidence shows that Defendant continued violating Section 37.10B of the Rent Ordinance by failing to remediate as promised. As set forth above, Plaintiff's claim is not barred by the default judgment obtained in the unlawful detainer action. The evidence establishes Plaintiff met his

[18] Internal documents produced by Defendants after the ruling on this motion supports Plaintiff's testimony that "a professional remediation expert in Oakland" inspected his unit and that it was not habitable.
[19] See Ex. C to Plaintiff's Motion for Judicial Notice.

burden meet his burden of showing minimal merit for and the motion should be denied.

b. Plaintiff can Show Probability of Success of Prevailing on Cause of Action for Negligent Violation of Statutory Duty – 2nd Cause of Action

To establish negligence per se on the basis of a statutory violation, Plaintiff must prove that (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect. (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526, internal citations omitted; see Evid. Code, § 669; California Civil Jury Instructions 418.)

Plaintiff alleged that Defendants violated Civ. Code 1941, which provides that a lessor must maintain a building in a condition fit for Plaintiff has provided an abundance of facts under penalty of perjury that demonstrate Defendant's negligent violations of its' Civil Code 1941 duty.

c. Plaintiff can Show a Probability of Success of Prevailing on his Claim of Breach of the Implied Warranty of Habitability – 3rd Cause of Action

A residential landlord violates the implied warranty of habitability when he or she fails to provide and maintain a residential premises suitable for human habitation. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 637.) Plaintiff has provided an abundance of facts under penalty of perjury, as set forth above, that demonstrate Defendant's numerous and egregious violations of the implied warranty of habitability.

d. Plaintiff can Show Probability of Success of Prevailing on the Cause of Action for Breach of Statutory Warranty of

Habitability – 4th Cause of Action

Civil Code section 1941.1 provides eight affirmative standards/ characteristics required to render a dwelling habitable. These characteristics include, among other things: effective weatherproofing and weather protection of the roof, exterior walls, windows and doors; plumbing and gas facilities that conform to state and local law at the time of installation, maintained in good working order. (See Civ. Code § 1941.1.) If the unit substantially lacks any of these characteristics, it is deemed untenantable and, therefore, in violation of the landlord's duty to render and maintain a residential building fit for human habitation. (*Ibid*.) As set forth above, the record establishes Defendant failed to maintain a habitable unit, and accordingly breached its statutory warranty of habitability.

e. Plaintiff can Show Probability of Success of Prevailing on Negligence Claim-- 5th Cause of Action

Each of Plaintiff's causes of action, including the cause of action for negligence, arise from Defendant's breach of various duties owed to Plaintiff by virtue of the landlord-tenant relationship between the parties. In order to prevail on a claim for negligence, a plaintiff must show: (1) the defendant's legal duty of care toward the plaintiff; (2) the defendant's breach of duty—the negligent act or omission; (3) injury to the plaintiff as a result of the breach—proximate or legal cause; and (4) damage to the plaintiff. (*Quelimane v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26.) Plaintiffs can show each of these elements.

f. Plaintiff's Evidence Regarding Duties Owed by Defendant

Plaintiff can show that Defendant owed a duty to him to provide and maintain the Subject Premises in a condition fit for human habitation. Plaintiff resided at the Subject Premises for many years. It is undisputed that Defendant managed the Subject Premises during the end of Plaintiff's

tenancy. By virtue of his tenancy at the Subject Premises, Defendant owed Plaintiff a duty to render and maintain the Subject Premises in a habitable condition. (See *Green v. Superior Court, supra,* 10 Cal.3d at 62 Civ. Code § 1941, *et seq*.)

g. Plaintiff's Evidence Demonstrating Defendant's Breaches of Its Duties

Plaintiffs have substantial evidence showing that Defendant breached its duty to provide and maintain the Subject Premises in a habitable condition, as set forth above.

i). Plaintiffs Can Show Injury Caused by Defendant' Breaches of Duties

Plaintiff's injuries include, but are not limited to, significant physical, mental and emotional injury as a result of the untenantable conditions of the Subject Premises. While living in the squalid conditions of the Subject Premises, Plaintiff began to suffer significant physical health problems. These problems included respiratory ailments, shortness of breath, wheezing, coughing, allergies, eye irritation, interrupted sleep, general discomfort and fatigue. (Moriarty Decl., ¶ 21 [AA125].) He also began to suffer from embarrassment, humiliation, discomfort, exacerbation and annoyance, and extreme emotional distress. (*Id*.)

Proximate cause is a question of fact and, as such, not properly disposed of on a motion to strike. (*Hoyem v. Manhattan Beach City School Dist*. (1978) 22 Cal.3d 508, 520.) Plaintiff's evidence of his injuries coupled with his allegations regarding the proximate cause of those injuries are sufficient to sustain his claim for negligence at this early stage.

h. Plaintiff can Show Probability of Success of Prevailing on the Claim of Nuisance – 6th Cause of Action

In order to sustain a cause of action for nuisance, Plaintiff must

prove: 1) Plaintiffs had an "interest" (ownership, control, leasehold) in the land; 2) Defendants substantially interfered with Plaintiff's use and enjoyment of the land; i.e. that it caused Plaintiffs to suffer substantial actual damage; and 3) Defendant's interference with Plaintiff's protected interest in the land was unreasonable. (*San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893, 938 (internal citations omitted); *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1154.) California law has long held that habitability violations may form the basis for a cause of action for nuisance. (*Stoiber v. Honeychuck* (1980) 101 Calp.App.3d 903.)

Plaintiff has provided significant evidence showing he had an interest in the Subject Premises, Defendant substantially and unreasonably interfered with Plaintiff's use and enjoyment of the Subject Premises (by violating the warranty of habitability), and that these violations caused Plaintiff to suffer substantial and actual damage (in the form of his resultant health problems), as set forth above.

i. Plaintiff can Show Probability of Success of Prevailing on his claim for Breach of the Covenant of Quiet Enjoyment – 7th Cause of Action

A cause of action for breach of the covenant of quiet enjoyment lies where the act(s) or omission(s) of the landlord, or by someone claiming under the landlord, substantially interfere with a tenant's right to use and enjoy the property. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589; Civ. Code § 1927.) Allegations of a landlord's failure to fulfill the obligation to provide a habitable premises, "to repair or to replace an essential structure or to provide a necessary service," are sufficient to plead a cause of action for breach of the covenant of quiet enjoyment. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846.)

Plaintiff has presented sufficient evidence demonstrating that Defendant breached the covenant of quiet enjoyment by its many and wanton habitability violations, as set forth above.

j. Plaintiff can Show Probability of Success of Prevailing on his Claim for Intentional Infliction of Emotional Distress – 8th Cause of Action

To prove intentional infliction of emotional distress, Plaintiff must show: 1) outrageous conduct by Defendants- the landlord or property manager extreme and outrageous conduct in refusing to make necessary repairs was committed with the intention of causing or reckless disregard of the probability of causing emotional distress; 2) Defendant's intention of causing or reckless disregard of the probability of causing emotional distress; 3) Plaintiff's suffering severe or extreme emotional distress; and 4) Defendant's outrageous conduct actually and proximately caused Plaintiff's emotional distress. (*Stoiber v. Honeychuck*, *supra,* 101 Cal.App.3d 903, 921; *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1068-1069.) Plaintiffs can demonstrate each of these elements.

Defendant's outrageous conduct is demonstrated by its failure to repair and remedy the severely dilapidated and extremely decrepit conditions of the Subject Premises. Defendant's failure to repair or remedy these conditions, despite having notice of them, is far beyond the pale of acceptable property management conduct and clearly demonstrates Defendant's reckless disregard for the emotional distress caused by Plaintiff living in untenantable conditions that made him sick. As a result of these conditions, Plaintiff suffered extreme and/or severe emotional distress including embarrassment, humiliation, discomfort, exacerbation and annoyance. (Moriarty Decl., ¶ 21 [AA 125:16-21].)

Plaintiff's evidence regarding his cause of action for intentional infliction of emotional distress more than meets the "minimal merit"

required by the second prong of the anti-SLAPP statute. Therefore Defendant's Special Motion to Strike should be denied.

k. Plaintiff can Show Probability of Success of Prevailing on his Claim for Unlawful Business Practices – 9th Cause of Action

Under section 17200, unlawful conduct is that which is committed pursuant to business activity and is at the same time forbidden by law. (See *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 383; *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 880-81 ("The 'unlawful' practices prohibited by . . . [B&P] section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement. As our Supreme Court put it, section 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 et seq." (internal citations omitted)).)

Plaintiff's evidence abundantly demonstrates Defendant's failure to render and maintain a habitable premises in violation of duties imposed by common law, statutes and local ordinances, and Defendant's motion should be denied.

l. Plaintiff can Show Probability of Success of Prevailing on his Claim for Negligent Misrepresentation -- 10th Cause of Action

"Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962, internal citation omitted; and see *Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173-174.)

"Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696, internal citations omitted.)

Plaintiff has provided significant evidence showing Defendant represented that they would repair his uninhabitable unit, but failed to do so, as set forth above. Plaintiff temporarily vacated and waited for Defendant to repair his unit. (Moriarty Decl., ¶¶5-17[AA 122:6- 24:24].) He reasonably relied upon these representations that they would repair his unit, which was to his detriment. The repairs were never done. (Id., ¶ 19 [AA 125:2-12].) Therefore, Plaintiff alleges that the representations of Defendant were made with the intent to induce reliance and were made without reasonable grounds for Defendant to believe they were true. For these reasons, Plaintiff has more than met his burden of showing minimal merit for his cause of action for negligent misrepresentation.

m. Plaintiff can Show Probability of Success of Prevailing on his Claim of Violation of SF Rent Ordinance, section 37.9 – 11th Cause of Action

Sections 37.9, et seq. of the Rent Ordinance prescribe the limited circumstances were a landlord can seek to recover possession of a residential unit. As shown by the evidence in this case, Defendant constructively sought to regain possession of the Subject Premises by abrogating their duties to maintain the property as set forth in state law and the lease agreement. (*Green v. Superior Court*, *supra*,10 Cal.3d at 625, fn. 10 ("If the landlord's acts or omissions affect the tenant's use of the property and compel the tenant to vacate, there is a constructive eviction.").) Further, as Plaintiff alleges in his Complaint, Defendant and the other Defendants engaged in a calculated scheme to allow and perpetuate uninhabitable conditions at Subject Premises for the purpose of chasing Plaintiff from the rent-controlled unit where the monthly rent was

below market value, so that Defendants could re-rent the unit to new tenants at market-rate. This is exactly the type of landlord bad faith that is prohibited by section 37.9 of the Rent Ordinance.

The evidence submitted by Plaintiff is more than adequate to meet his burden of demonstrating a probability of success on his cause of action for violation of the Rent Ordinance.

Defendant has failed to meet Prong 2 of the test set forth under *Navellier*, *City of Cotati* and *Equilon Enterprises, LLC* because Plaintiff has presented evidence that establishes a probability of success on each of his causes of action, and therefore is another basis to affirm the denial of Defendant's Special Motion to Strike pursuant to Code of Civil Procedure section 425.16.

VI. CONCLUSION

For all the reasons set forth herein, the Superior Court's order denying Laramar's motion to strike should be affirmed and fees and costs for opposing this appeal awarded to Plaintiff. If awarded, Plaintiff will file a separate declaration detailing his fees and costs.

Dated: June 12, 2013 LAW OFFICES OF ERIC L. LIFSCHITZ

By: 

Aaron H. Darsky
Attorney for Respondent

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c))

The text of this brief consists of 13,906 words as counted by the Microsoft Word word processing program used to generate this brief.

Dated: June 11, 2013 LAW OFFICES OF ERIC L. LIFSCHITZ

By: 

Aaron H. Darsky
Attorney for Respondent

CERTIFICATE OF SERVICE
Moriarty v. Laramar Management Corporation, et al.
Court of Appeal-First Appellate District-Division Two
Appeal No. A137608

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 345 Franklin Street, San Francisco, CA 94102.

On June 12, 2013, I served the following document:

RESPONDENT'S BRIEF

On all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Curtis F. Dowling Dowling & Marquez, LLP 703 Market Street, Suite 1610 San Francisco, CA 94103 ***Counsel for Laramar Management Corporation and 2363 Van Ness Ave, LLC***	Michael K. Johnson William F. Horsey Lewis Brisbois Bisgaard and Smith 333 Bush Street, Suite 1100 San Francisco, CA 94104 ***Attorneys for Laramar Management Corporation and 2363 Van Ness Ave, LLC***
Clerk of the Court CALIFORNIA SUPREME COURT 350 McAllister Street San Francisco, CA 94102-7303 ***Via Electronic Service***	Hon. Ronald E. Quidachay c/o Clerk of the Court SAN FRANCISCO COUNTY SUPERIOR COURT 400 McAllister Street San Francisco, CA 94102

__XX__ **MAIL (C.C.P. §§ 1013a, 2015.5)**: I caused such envelope to be deposited in the mail, with postage thereon fully prepaid, addressed to the addressee(s) designated.

I swear under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Dated: June 12, 2013

Michael Kaye