Too much privilege? SLAPP-happy landlords get a dressing down

Moriarty v. Laramar Management *is important because it reviews the cases that define protected activity and discusses its risks for abuse*

By Aaron H. Darsky and Laura R. Keenan

Within the last seven years, landlords have been equipped with two powerful weapons to shut down tenant lawsuits: the litigation privilege and the anti-SLAPP motion. These methods, used in tandem, create significant leverage over tenants with valid habitability (constructive eviction) causes of action. This has led to a call for reform in the legislature. At least one appellate court is acknowledging this abuse and rebuking the landlords who misuse the anti-SLAPP motion to strike.

In 1992, the California Legislature enacted the anti-SLAPP (Strategic Lawsuit Against Public Participation), Code of Civil Procedure (herein C.C.P.) section 425.16. The anti-SLAPP Statute is essentially a challenge to the veracity of a complaint where protected activity is involved. The statute allows a defendant to bring a special motion to strike within 60 days of service on the grounds that the complaint is based on one of four protected categories which include oral or written statements: 1) made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law; 2) made in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or any other official proceeding authorized by law; 3) made in a place open to the public or a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the exercise of free speech in connection with a public issue or issue of public interest. (C.C.P. 425.16(e)&(f).)

The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a "publication or broadcast" made as part of a "judicial proceeding" is privileged. The California Supreme and Appellate Courts use the

litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2). (*Feldman v. 1100 Parklane Associates* (2008) 160 Cal.App.4th 1467, 1479.)

If the conduct that forms the basis for the complaint or cause of action falls in one of the protected areas, then the burden shifts and the plaintiff is required to make an evidentiary showing on each element of each claim, demonstrating that the suit has merit. (C.C.P. 425.16(b)(1).) Most significantly, the anti-SLAPP statute permits an interlocutory appeal (and de novo review) of the trial court's ruling on the anti-SLAPP motion. (C.C.P 425.16(i).) A prevailing defendant is entitled to attorneys' fees; while a successful plaintiff is only entitled to fees if the motion is found to be frivolous. The anti-SLAPP statute was constructed to prevent government or powerful corporations with unlimited resources from bringing questionable defamation or interference suits to silence journalists, critics or whistleblowers.

Misuse of anti-SLAPP

These tools to protect the weak from the powerful have ironically evolved into a preferred method to crush or delay meritorious tenant claims against landlords. This strategy started when the Supreme Court in *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th, 1232 expressly expanded the "litigation privilege" to include eviction proceedings and the three-day notice process required before bringing an eviction. Once these actions became recognized as privileged, they became "protected conduct" as a "statement made before a judicial proceeding" under the anti-SLAPP Statute.

Action Apartment invalidated a portion of the Santa Monica Municipal Code that prohibited 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 Assn., Inc.*, 41 Cal.4th at 1238-1239.) The Supreme Court struck down the municipal code on the grounds that the litigation privilege applied to the filing of any eviction lawsuit, regardless of whether it had merit or not. (*Id.* at 1249-1250.)

Prior to this decision, California appellate courts upheld damages claims brought by tenants under local anti-eviction ordinances. For example, in San Francisco, when a landlord lost an eviction suit, the landlord was almost certainly in violation of San Francisco's Rent Ordinance prohibiting eviction without just cause. In *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1598, where the court stated that the San Francisco statute, similar to the Santa Monica statute, represents "a proper exercise of the concomitant power to set appropriate penalties for violations of those regulations."

Since *Action Apartment,* the litigation privilege has been extended to all parts of an eviction process. In *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, the court held that verbal pre-litigation threats by a landlord's self-identified "trouble shooter," who made several menacing comments, were protected by the litigation privilege as they were "communications in connection with an ongoing dispute and in anticipation of litigation." (*Id.* at 1481.)

In the landlord-tenant arena, the intent of the statute to provide protection for those speaking out on matters of public concern has been turned on its head. Wealthy and powerful landlords are now using the anti-SLAPP statute to crush solitary tenants with the special motion to strike and appeal the results when they lose, tying up a tenant's case for a year or more as the issue works its way through the appellate court.

The typical scenario

A tenant complains to the landlord about critical habitability defects such as mold, water intrusion, lack of heat, or vermin. The landlord fails to repair the defects properly. The tenant deducts the cost of repairs or withholds rent as a result, or temporarily vacates and stops paying rent while waiting for repairs to be made. The landlord then files an eviction lawsuit based on non-payment of rent. The eviction action settles for a stipulated move-out and no waiver of the tenant's right to sue over habitability, breach of lease, or personal injury claims. Next, the tenant sues, but in the recitation of facts in the tenant's complaint, the tenant mentions that the landlord filed an unlawful detainer and recovered possession of the apartment pursuant to a stipulated settlement. That complaint is then ripe for a successful anti-SLAPP motion to strike by the landlord's attorney. The eviction suit was the basis for recovery and is protected by the litigation privilege. The tenant's risk of paying the landlord's attorney fees causes the tenant to dismiss the lawsuit.

Not satisfied with this type of victory, landlord attorneys have been trying to expand the umbrella of "protected conduct" as broadly as possible and shut down a variety of tenant lawsuits by asserting protected conduct and moving to strike.

For example, landlord attorneys have unsuccessfully tried to expand application of the anti-SLAPP statute in order to encompass Ellis Act (Gov. Code, § 7060-7060.7) and fraudulent owner move-in evictions. The Ellis Act allows owners to evict tenants in eviction-controlled jurisdictions if the owner takes the rental property off the market. In *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 160, the landlords alleged that the filing and serving of an Ellis Act notice and notice to vacate constituted protected petitioning or free speech activity when the tenants sought declaratory relief to determine the landlords' right to invoke the Ellis Act. The court held that the declaratory relief sought was not subject to an anti-SLAPP motion as the tenant's suit was not based on the landlords' filing and serving of an Ellis Act eviction, but rather on the

tenant's contention that the landlords were not entitled to invoke or rely on the Ellis Act to evict them. (*Id.* at 162.)

Shortly after Marlin came *Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1284, where the defendant landlord evicted a long-term tenant in an eviction-controlled jurisdiction order to free the unit for occupancy by the landlord's daughter. Sadly, the daughter never moved in. The tenant filed suit for fraud, unlawful eviction and failure to pay relocation expenses. (*Id.* at 1284.) Defendant alleged that the suit was based on the protected conduct of an owner move-in eviction. The court held that this was again overreaching of the anti-SLAPP Statute: Plaintiff Clark's complaint was not premised on Mazgani's protected activities of initiating or prosecuting the owner move-in eviction, but on Mazgani's fraudulent removal of the apartment from the rental market, stating that the termination of a "tenancy or removing a property from the rental market are not activities taken in furtherance if the constitutional rights or petition or free speech." (*Id.* at 1286-1287.)

Returning to the scenario above, let us change the facts slightly: What happens when the tenant moves out due to habitability defects, there is an unlawful detainer filed, possession is returned to the owner by stipulated settlement or default, the tenant files suit, but the complaint only alleges that the tenant moved out because the landlord refused to properly fix the rental unit and make it habitable? There is no reference to any unlawful detainer in the complaint, even though one was filed. All causes-of-action elements are pled sufficiently.

Is that fact pattern susceptible to an anti-SLAPP motion?

The simple answer is, of course it should not be susceptible. If the four corners of the complaint do not allege protected conduct, then there is no basis to allege that the complaint would be subject to the anti-SLAPP Statute because no reference to privileged conduct exists in the complaint.

But what if defendants bring an anti-SLAPP motion regardless? Defendants can lose at the trial court and appeal immediately, and stay litigation until the busy appellate courts decide the appeal. In the meantime, the landlord forces the tenant attorney (often a contingency fee attorney representing a displaced low or middle income renter) to fight an appeal and perhaps even a petition to the Supreme Court before plaintiff's simple habitability case receives a trial date!

It was this precise fact pattern that raised the hackles of the appellate court in *Moriarty v. Laramar Management Corporation* (2014) 224 Cal.App.4th 125. The landlord in *Moriarty* went beyond anything imagined by the anti-SLAPP Statute by filing an anti-SLAPP motion that asked the court to infer facts not alleged in a complaint. In *Moriarty*, Defendant Laramar Management Corporation's appeal of its anti-SLAPP motion to strike was "without merit" because it argued that plaintiff's complaint was based on the unlawful detainer action and default judgment that occurred but was not referenced in the complaint. The only type of "eviction" referenced in the complaint was "constructive eviction" based on the uninhabitable conditions of the unit, which exacerbated plaintiff's existing lung condition and caused him to lose permanent possession when defendants failed to repair his unit.

The trial court denied the anti-SLAPP motion, stating, "The drafters of the Complaint did an excellent job in making sure that this basically is an action that arises – that arises out of the alleged breach of warranty of habitability. And I couldn't find anything else in the complaint." (Hearing Transcript [AA 247:4-13].) Despite this guidance, defendant appealed the trial court's decision. Defendant clung to the notion that all of plaintiff's claims were based on protected conduct because many months after plaintiff moved out, defendant obtained a default judgment in an eviction for non-payment of rent. During oral arguments, the appellate justices admonished defendant's counsel for bringing a meritless appeal. Justice Richman stated, "I will give you credit, Mr. Johnson. You sit up here about as blissful as humanly possible to imagine. Because, I'll tell you, you're lucky that we didn't ask why this isn't a frivolous appeal on our own motion." (Oral Argument Transcript, p. 25:12-15.) Despite both the trial and appellate courts' crystal clear finding that "plaintiff's lawsuit is not based on privileged activity," Defendant ignored the facts and filed a petition for review to the California Supreme Court, which was also denied. (*Moriarty*, 224 Cal.App.4th at 125.)

Moriarty is an important decision because it reviews the cases that define protected activity and discusses its risks for abuse. It is very critical of the appellant/defendants for filing an appeal with no merit and clearly unsupported by law. It signals that the expansive view of the litigation privilege and the unfettered use of the anti-SLAPP motion has reached its limit. *Moriarty* is the first landlord/tenant anti-SLAPP opinion that expressly opines that landlords are using their deep pockets for improper motives in bringing anti-SLAPP motions and subsequent appeals when they lose. Justice Richman in *Moriarty* stated he "was very concerned about the appealability of a losing defendant and what they could do with deep pockets and delay cases and frustrate the system...." (Oral Argument Transcript, p. 14:13-15:1.) As tenant rights' attorneys, we hope that judges throughout the state will take note of *Moriarty* by being more critical of landlords and their attorneys who abuse the anti-SLAPP process. In the meantime, the prudent attorney must be very careful to keep out specific language regarding any part of an eviction action in a complaint.

[Note: the *Moriarty* oral argument transcript and sound file can be found at www.franklinstreetlaw.com]


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