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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MARK HARRIS, Plaintiff and Respondent, v. LOCKER, LLC, Defendant and Appellant.	A142641 (Alameda County Super. Ct. No. RG11-588790)

This is a wrongful eviction action, brought by respondent Mark Harris against appellant Locker, LLC (Locker). Following a five-day court trial, the court awarded Harris a total of $119,300 in damages. Locker appeals, making four arguments. We conclude that none of the arguments have merit, and we affirm.

BACKGROUND

Harris filed this action in propria persona. The first three paragraphs of his amended complaint, one styled "For Wrongful Eviction," set forth the general background of his claim:

"Plaintiff lived at 1915 Essex St., a single-family residence, in Berkeley, California, from February 2005 until LOCKER, LLC, the owner of record, evicted him, stating that Plaintiff's tenancy was subject to Berkeley Municipal Code (hereafter B.M.C.) 13.76. . . . The Complaint and Summons were dated September 29th, 2010, and peaceful possession was taken on May 5th, 2011. (See Exhibits 'A', 'B', 'C', and 'D'). Defendants' [*sic*] legal theory for the eviction was removal from the rental market by demolition. Defendants' [*sic*] signed and swore under penalty of perjury that 'the

landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.' - B.M.C. 13.76.130A.8

"It is a matter of public record that no permit was ever issued or even applied for. (See Exhibit 'F'). No demolition has been done in the 20 weeks since possession was taken. Plaintiff is informed and believes that no demolition was ever contemplated or will ever be done, and that the eviction was willfully false and in bad faith.

"B.M.C. 13.76.150B . . . states that 'If it is shown in the appropriate court that the event which the landlord claims as grounds to recover possession under 13.76.130A.8 is not initiated within two months after the tenant vacates the unit, or it is shown the landlords' [*sic*] claim was false or in bad faith, the tenant shall be entitled to regain possession and to actual damages. If the landlords' conduct was willful, the tenant shall be entitled to damages in an amount of $750 or three times the actual damages, whichever is greater.' Therefore Defendant had until July 15th, 2011 to begin demolition. . . ."

Harris further alleged that the Berkeley Municipal Code entitled him to regain his tenancy, unpaid "relocation assistance," and attorney fees. The final cause of action was for "mental anguish" resulting from the eviction. Four relevant exhibits were attached to Harris's complaint: Locker's unlawful detainer complaint; the entry of Harris's default; entry of judgment for Locker in the unlawful detainer action; and the writ of possession.

While that general background is accurate as far as it goes, this was not a simple, straightforward, run-of-the-mill landlord-tenant occupancy. To the contrary, the matter was complicated in many respects, not least of which was that Harris's occupancy was not pursuant to any agreement with Locker. Rather, Harris's relationship was with Ron Goldberg, who was the actual tenant of the property. And Goldberg's tenancy itself was the subject of controversy—and litigation. So, to put the matter in complete context, we briefly set forth some of that background, much of which is from the testimony of Winlock Miller (Miller), the managing member of Locker.

The overall property involved consists of two separate physical building structures, on which there are four separate street addresses, three on Adeline Street and the fourth, the property involved here, on Essex.

Miller was the owner of a company called Marmot Mountain Works, which began leasing commercial space in the property in 1976. The owners of the property were John and Rosemary Chase. Other businesses came to occupy the property over different periods including a printing company and a graphic arts studio. The Chases owned the property until 1998, when Locker purchased it.

In June 1994, the Chases entered into a lease agreement with Goldberg. As stated in the lease, Goldberg agreed to a five-year term at a total rent of $30,000. The lease identified the leased premises as "1915 Essex (upper rear unit) CONSISTING OF (5) ROOMS." Paragraph 5 of the lease limited Goldberg's use of the premises to "Sales." And the lease required the prior written consent of the landlord in order to assign or sublet any portion of the premises.

As noted, Locker purchased the property in 1998, prior to which its representatives made inspections of the property, and they testified at trial about what they did—and did not—see in the course of those inspections. But one of the things they did see was Goldberg's occupancy.

While Locker's brief vigorously asserts that Goldberg was not living in his space, the brief does acknowledge that there were "suspicions" that Goldberg was in fact living there. Nevertheless, the brief goes on, "it was only through the course of a commercial eviction against . . . Goldberg that it was discovered that both . . . Goldberg and . . . Harris claimed to be living at the Subject Premises."

Maybe that was when it was first discovered, maybe not. But one thing is clear: at that time—late 2009 or early 2010—Locker learned that Harris was living in the premises. Specifically:

In late 2009, Locker filed an unlawful detainer action against Goldberg. Goldberg's response claimed that he was a residential tenant entitled to the protections of Berkeley Municipal Code section 13.76.010 et seq., the Rent Stabilization and Eviction

for Good Cause Ordinance. In connection with that unlawful detainer case, Locker's representatives made a site inspection, and learned—according to Locker, on the first day of trial of the unlawful detainer case—that Harris also claimed to be a residential tenant at the property. Presented with Goldberg's claim of residential tenancy rights, Locker dismissed the unlawful detainer action.

Another unlawful detainer action would soon follow.

On July 27, 2010, Locker served Goldberg and Harris with a 60 day notice of termination of tenancy ("60 Day Notice") under section 13.73.130(A)(8) of the Berkeley Municipal Code. The notice claimed that Locker had good cause as required by the rent ordinance because Locker "seeks in good faith . . . to remove the rental unit from the market by demolition," having "obtained all necessary permits" to do so.

Neither Goldberg nor Harris vacated the premises, so on September 29, 2010, Locker filed an action for unlawful detainer against them: *Locker, LLC v. Goldberg, et al.*, Alameda County Superior Court, Limited Jurisdiction, case No. BG-10-539120. Harris failed to respond, a request for entry of default was served, and on April 1, 2011, the court issued a default judgment for possession of the premises against Harris. A writ of possession was issued against Harris on April 3, which was enforced by the Alameda County Sheriff's Department on May 5. Harris was out of the premises, much of his personal property left behind.

This case followed, filed on August 3, 2011, Harris's claim for wrongful eviction alleging a violation of the Berkeley Rent Ordinance.

On September 8, 2011, Locker filed its answer to the complaint, and thereafter answers to amended complaints. Locker also filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16, which was denied by the trial court, a denial affirmed by us. (*Harris v. Locker LLC* (June 4, 2013, A135824) [nonpub. opn.].)

The case returned to the trial court, and proceeded to a court trial in April 2014, in connection with which the parties filed extensive trial briefs. Trial began on April 11, and testimony was taken over five days, concluding on April 24. Following closing arguments, the matter was submitted.

On May 2, 2014, the trial court filed its statement of decision, finding for Harris. The statement of decision was thorough and comprehensive, and began its analysis with the trial court's view on "credibility," saying this:

"The court viewed the testimony of Mr. Harris and Mr. Miller with considerable suspicion as to its veracity. Not only do Mr. Miller and Mr. Harris have the bias that they are directly impacted by this judgment, but, more importantly, each has clearly been false in sworn testimony. Mr. Harris was clearly false in his deposition with regard to the rent he paid his sister after he was evicted, and Mr. Miller was clearly false when, inter alia, he testified that his idea of the common word 'demolition' meant the same as 'converting' or 'changing' a land use. From the point of view of a trier of fact who distrusts the testimony of both principal witnesses, the task of determining the truth is made more difficult.

"With regard to the liability facts, the task of the court was made easier because the court did not need to rely on the parties' testimony. The documentary evidence is clear and unambiguous and the parties do not disagree that the defendant did not demolish the unit or the building within two months after plaintiff was evicted or at any other time since then. (And, this is true even if one were to adopt the defendant's utterly unfounded definition of the word 'demolition.') There is no dispute with regard to the Notice or to its contents. There is no dispute that the defendant did not seek any permits from the City to complete either a demolition or a conversion from one type of use to another. There is no dispute that the defendant sold the property shortly after the defendant had an enforceable agreement to evict Mr. Goldberg, the sole remaining tenant in the unit. While the court distrusts Mr. Harris' testimony with regard to the existence of specific items of personal property left in the unit at the time of the eviction, the parties agree that Mr. Harris took very little with him when he was evicted, and moreover, his testimony was never controverted.

"With regard to the facts relating to damages, the court relied heavily on the unchallenged testimony of the real estate appraiser and evaluated the lack of habitability from facts that were largely uncontested. Mr. Harris testified to the value of the personal

property remaining in the unit at the time of eviction and while the court distrusted his testimony in other regards, the valuations seemed reasonable and were wholly uncontroverted."

The court then went on with its analysis of the evidence, beginning with "Liability":

"On July 27, 2010, Defendant served a 60 day notice to Plaintiff that his tenancy was terminated after 60 days. There followed on September 29, 2010, a complaint in Unlawful Detainer that defendant filed against the plaintiff which contained, inter alia, the following:

"1. A statement that Locker, LLC had served a Notice Terminating Tenancy on July 27, 2010 which terminated Mark Harris' tenancy on September 27, 2010.

"2. A statement that all the facts stated in the notice are true.

"3. A statement that 'Defendant's tenancy is subject to Berkeley's' Rent Control ordinance.

"The sixty day notice that Locker, LLC served on Mark Harris in July of 2010 is found at Exhibit 'H.' It states the 'just cause to terminate a tenancy' as follows: 'The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition.'

"The court finds that such statement was false. The landlord never had any intention to demolish the building or any unit of the building. Mr. Miller, the managing director of Locker, LLC, testified that he never had any intention to demolish the building and that his definition of 'demolition' was to change the then current use from residential to commercial. He testified that he intended to demolish the residential use of the premises by converting it back to commercial use. Mr. Miller further testified that he had 'obtained all necessary permits' to complete the 'demolition' as no permits were necessary for the demolition he had in mind.

"The root of the work 'demolition' comes from demolish. 'Demolish' according to Merriam Webster means 'to destroy' or 'to forcefully tear down or take apart (a structure).'

"The Berkeley Municipal Code ('BMC') requires that 'no dwelling unit or units may be eliminated or demolished except as authorized by the provisions of this chapter' (BMC 23C.08.010). The requirements of eliminating a residential unit include obtaining the required permit (BMC 23C.08.030), and the requirements for the demolition of a dwelling unit include a permit (BMC 23C.08.020).

"It is abundantly clear that the defendant was intentionally untruthful in the Notice to Terminate (Exhibit 'H'). The defendant had neither a 'good faith' intention to 'recover possession of the rental unit in order to remove the rental unit from the market by demolition,' a requirement of BMC 13.76.130A(8), nor had defendant 'obtained all necessary permits from the City of Berkeley' to demolish the residential unit occupied by plaintiff.[]

"Based on the above, the court finds a willful and bad faith violation of BMC Section 13.76.130(A)(8).

"Plaintiff also seeks damages for the loss of the plaintiff's personal property after the defendant took possession of the premises following plaintiff's eviction by the Sheriff. Section 1174(e), (f), (g), (h), (i), (j), (k), (l), and (m) prescribe a landlord's responsibility when there is personal property remaining on the premises from where the Sheriff has evicted a tenant. Subpart (g) requires that a 'landlord shall store the personal property in a place of safekeeping until it is either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i). Subdivision (h) of CCP § 1174 does not apply in this case. Subdivision (i) of CCP § 1174 is directly on point; it requires the landlord to dispose of the personal property in the manner mandated by Civil Code § 1988. Civil Code § 1988 requires a public auction after notice is published which adequately describes the items to be auctioned.

"Locker, LLC totally failed in its responsibility to comply with the above requirements. While Locker stood ready to release the personal property to the plaintiff,

it failed to store the property in a place of safekeeping, failed to inventory the property, failed to publish notice of a sale of the property in a newspaper of general circulation and failed to sell it at auction if it went unclaimed. Instead, the property was left in an unlocked room of the rental apartment which remained occupied by a person vilified by both plaintiff and defendant. Plaintiff's personal property disappeared in its entirety and defendant has no idea what became of it."

After that comprehensive analysis, the court concluded with its analysis of damages, to make the following award:

"The total damages based on the wrongful eviction are 1) emotional distress: $12,000.00 and 2) rental advantage loss $24,650.00, or a total of $36,650.00.

"Because the wrongful eviction was willful and in bad faith, that amount must be trebled leading to a total award for the wrongful eviction of $109,950.00.

"The loss associated with the defendant's failure to properly safeguard the plaintiff's personal property that came into defendant's possession at the time of eviction is an amount for which there is no contrary evidence. That amount is $9,350.00.

"Total judgment will be awarded to plaintiff and against defendant in the sum of $119,300.00 plus costs of suit."

Both Locker and Harris filed motions for new trial. Both motions were denied. Meanwhile, judgment was entered, from which Locker took a timely appeal.

DISCUSSION

Locker makes four arguments on appeal: (1) the trial court erred in ruling that permits were required under Berkeley Municipal Code section 23C08.10; (2) the trial court erred in ruling that permits were required to physically alter the premise; (3) Locker's 60 day notice was not "intentionally or unintentionally false"; and (4) the trial court erred in failing to apply the issue and claim preclusive effect of the unlawful detainer action. We will discuss them in turn.

Before doing so, however, we begin with a few observations about Locker's brief, observations we make in light of settled principles of appellate review, many of which we collected and confirmed in *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507.

The appellant there, like Locker here, filed a brief that set forth the facts favorable to her, as though the trial court's comprehensive fact-based statement of decision did not exist. Such conduct, we said, was "not to be condoned," and went on to describe why:

"California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief shall '[p]rovide a summary of the significant facts. . . .' And the leading California appellate practice guide instructs about this: 'Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias, and likewise as to the applicable law. [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly "undo" an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case!' (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 9:27, p. 9–8 [rev. # 1, 2010], italics omitted.) [Locker's] brief . . . ignores such instruction.

"[Locker's] brief also ignores the precept that all evidence must be viewed most favorably to [Harris] and in support of the order. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925–926; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) This precept is equally applicable here, where [the trial court] issued a statement of decision: 'Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.' (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

"What [Locker] attempts here is merely to reargue the 'facts' as [it] would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that [it] is not to 'merely reassert [its] position at . . . trial.' (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687; accord, *Albaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 773.) In sum, [Locker's] brief manifests a treatment of the record that disregards the most fundamental rules of appellate review. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 365, pp.

421–423, and § 368, pp. 425–426.) As Justice Mosk well put it, such 'factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.' (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398–399.)" (*In re Marriage of Davenport, supra,* 194 Cal.App.4th at pp. 1531.)

Not only does Locker's brief violate the above principles, as Harris points out "[a]lmost none of [Locker's] brief is relevant to any serious issue in the case." To sum it all up, most of the "facts" in Locker's brief are irrelevant to the issues here; and to the extent the "facts" are relevant, they are inappropriately set forth in the light favorable to Locker.

Against that background, we analyze the arguments made by Locker, addressing the first two arguments together.

Permits Were Required

Locker first argues that the trial court erred in holding that permits were required under the rent ordinance. The argument cites a section of the Berkeley Municipal Code referring to "commercial uses of a property," refers to testimony from a city planner that a variance had issued changing the use to "commercial," cites to selective testimony about a "kitchen torn out," and asserts that "The Decision misconstrues the applicable building and housing codes in regards to what constitutes a 'dwelling unit.' " The argument goes on that the trial court's ruling that Locker was "required to obtain a Use Permit under BMC 23C.08.010 is incorrect," concluding as follows: "This provision is inapplicable since the Subject Premises, following issuance of the change of use Variance, was no longer considered a dwelling unit by the City of Berkeley. No permits were required to either restore the premises to its lawful commercial use (since this permission had already been granted by the City of Berkeley) and the Subject Premises was not considered and is still not considered a residential dwelling unit by the City of Berkeley."

Locker's second argument is similar. This argument asserts that "the trial court erred in ruling that permits were required to physically alter the subject premises," an

argument that runs as follows: "The uncontroverted evidence presented at trial was that the physical attributes that made the subject unit a 'dwelling unit'—including a permanent kitchen, had previously been removed by Mr. Goldberg prior to service of the 60 Day Notice. . . . [¶] No physical aspects of a dwelling unit remained at the time of the vacancy of Mr. Ron Goldberg. In other words, everything that would make the space a 'dwelling unit' had been torn out—no functioning kitchen, no heat, no hot water, no kitchen countertop—by the time of recovery of the subject premises by [Locker]." In short, that the unit was not a dwelling unit.

The arguments fail, for several reasons.

To begin with, the arguments ignore that Locker *stipulated* that because Goldberg and Harris "were living there, [the premises were] conditionally subject to the rent ordinance."

The arguments also fail in light of the Berkeley Municipal Code, which defines a dwelling unit as follows: "**Dwelling Unit:** A building or portion of a building designed for, or occupied exclusively by, persons living as one (1) household." (BMC, § 23F.04.010.) The same chapter then states: "No Dwelling Unit or units may be eliminated or demolished except as authorized by the provisions of this chapter." (*Id.*, § 23C.08.010.) And Use means: "The purpose for which land or premises or a building thereon is designed, arranged or intended or for which it is or may be occupied or maintained." A use permit is needed to eliminate a dwelling unit. (*Id.* § 23C.08.30(A) and 23C.08.020.)

The arguments also fail because they ignore some facts, including the significant fact that Locker's listing advertising the property for sale advertised that the property has a "four-room apartment upstairs." The argument also ignores the express testimony from Harris about what Locker's agent Tom Purcell must have seen when he visited the property on the many occasions he was there to deal with various problems. In Harris's words, it was "open and obvious . . . . [that people were living there, because of] the bathroom that we both use and the kitchen that we both used. . . ."

Were all that not enough, Locker acknowledged in its trial brief that the premises had a residential use, the brief concluding as follows: "Finally, to the extent that Plaintiff actually bases his claims on the conduct of Defendant following the eviction, Defendant did in fact remove the subject premises from unpermitted and unauthorized residential use by removal of both Plaintiff (through the eviction process) and Goldberg, through settlement of Defendant's unlawful detainer claims. As of October 2012, possession of the subject premises was restored to Defendant and the premises was removed from residential use."

Substantial Evidence Supports the Conclusion that the Notice to Terminate Was Intentionally False

As quoted above, Locker's 60 day notice stated, "The landlord, after having obtained all necessary permits from the City of Berkeley, seeks in good faith to recover possession of the rental unit, in order to remove the rental unit from the market by demolition."

The statement of decision stated that "The Court finds that such statement was false. The landlord never had any intention to demolish the building or any unit of the building." And the decision went on, "[i]t is abundantly clear that the defendant was intentionally untruthful in the Notice to Terminate (Exhibit 'H'). The defendant had neither a 'good faith' intention to 'recover possession of the rental unit in order to remove the rental unit from the market by demolition,' a requirement of BMC 13.76.130A(8)."

Locker argues that the 60 Day Notice was "not intentionally or unintentionally false." The argument proceeds, yet again, on a myopic reading of the record, focusing only on what might be called the favorable-to-Locker interpretation of everything. This quotation from Locker's brief is illustrative: "Appellant intended to use the stated ground for eviction to restore the space where the Subject Premises was located to commercial use. [Citation.] Appellant had no intent to demolish the entire building where the Subject Premises was located. [Citation.] [¶] Appellant did not obtain any additional permits for the Subject Premises as part of the eviction process. [Citation.] Appellant believed that a permit would not be necessary to convert the space back to commercial

after review of the situation. [Citation.] Appellant also believed that the Subject Premises would revert to its sole lawful use—as commercial office space—without further physical modifications. [Citation.] [¶] Appellant intended to rent the space where the Subject Premises was located as commercial office space [citation]. Appellant had no intent to rent t [*sic*] any portion of the Subject Premises for residential purposes [citation]."

From this reading of the record, Locker concludes this way: "The Decision imposes treble damage liability for what the Court considers to be an incorrect legal interpretation. Appellant's interpretation of the Berkeley Rent Ordinance provision at issue in this case, in relation to the zoning history of the Subject Premises and the physical attributes present at the Subject Premises at the time of service of the 60 Day Notice, was reasonable and therefore cannot form the basis for a finding of willful or bad faith wrongdoing. [¶] In essence, the Court is holding Mr. Miller, a layperson, at fault for making a purported legal error. Mr. Miller's belief that removal of the kitchen and cessation of residential use constituted demolition under the applicable Berkeley Municipal Code provision was a sensible and reasonable interpretation of Appellant's rights and obligations."

Utterly ignored is the actual testimony of Miller, testimony that can only be described as fantastic. Testimony such as this:

"Q [Attorney for Harris]: And . . . you did understand . . . that you were evicting Mr. Harris on the basis of your claim that you were going to demolish the premises; is that right?

"A: That's correct.

"Q: What does 'demolish' mean to you?

"A: 'Demolish' means to me to place the premises back into—or into the same situation as the premises were before—from a—from a commercial point of view as they were before.

"Q: Okay. And you knew that wasn't going to happen as long as Mr. Goldberg lived there, correct?

"A: I knew that we had had continuous problems with getting Goldberg out of there and that it would take removing Goldberg, who was tending to reside there, in order to accomplish that.

"Q: Okay. So the answer to my question is yes, you knew you weren't going to demolish it as long as Goldberg lived there, yes?

"A: I don't know what demolish means. If demolish means coming and tearing the roof off and all that kind of stuff—I'm not sure what demolish means.

"THE COURT: Where did you get your understanding of what demolish means as a word?

"THE WITNESS: I think of demolishing as making something such that there's no evidence of what it used to be like or whatever. And 'demolish' is a major, dramatic term.

"THE COURT: All right. What word would you use to describe when there's a building situated on a piece of property and they put explosives all around the walls, blow it up and the whole thing falls down?

"THE WITNESS: I would think that would be demolish.

"THE COURT: Thank you, and why—

"THE WITNESS: I did not intend to do that to the building."

Not only did Miller admit that he had no intention to demolish, Purcell, who worked for Locker and who oversaw the property, confirmed it. That is, on the day Harris was evicted, he told Purcell, "[Y]ou only have two months to start demolition" and then asked when "are you planning to start the demolition?" Purcell "laughed and laughed," and said "there's not going to be any demolition."

The trial court found Locker's managing member Miller "clearly false in sworn testimony." The court also found the statement in the eviction notice was false, as in it Locker falsely stated it had obtained all necessary permits and that it "seeks in good faith" to recover possession by removing the unit "from the market by demolition" as defendant "never had any intention to demolish the building or any unit of the building." Those findings are amply supported.

The Unlawful Detainer Case Has No Claim Preclusion Effect

Locker's last argument is that "the trial court erred in failing to apply the issue and claim preclusive effect of the default judgment in the underlying unlawful detainer action," arguing that collateral estoppel applies. The argument has no merit.

To begin with, there is a real issue, unaddressed by Locker, whether a default judgment can ever have a collateral estoppel effect. As Witkin explains the law, "Although a judgment by default will bar a new action on the same cause (supra, § 372), the Restatement position is that it is not effective as a collateral estoppel. No issues are actually litigated and, as a practical matter, the defendant may reasonably elect to allow judgment to go against him or her without contest for a small demand, even though the defendant has a good defense that he or she would assert if the demand were larger. [Citations.] [¶] The California cases do not present a clear picture; some apply the collateral estoppel doctrine (see infra, §§ 449, 451), other do not (see infra, § 450)." (7 Witkin, Cal. Proc. (5th ed. 2008) Judgment, § 448, pp. 1104–1105).

But assuming the doctrine could apply, it would not apply here, as illustrated by *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551. There, the trial court granted summary adjudication and dismissed a cause of action for retaliatory eviction based on the collateral estoppel effect of a stipulated judgment in an unlawful detainer case. Plaintiff appealed, and our colleagues in Division Five reversed, in language strikingly applicable here:

"The Pelletiers also contend correctly that the court erred in granting summary adjudication and dismissing the cause of action for retaliatory eviction based on collateral estoppel effect of the stipulated judgment in the unlawful detainer proceeding.

"Because an unlawful detainer action is a summary procedure involving only claims bearing directly upon the right of immediate possession, a judgment in unlawful detainer has very limited res judicata effect. Legal and equitable claims—such as questions of title and affirmative defenses—are not conclusively established unless they were fully and fairly litigated in an adversary hearing. [Citation.] Here, the unlawful detainer action was resolved by stipulated judgment which made no mention of a

relinquishment by the Pelletiers of claims arising from a retaliatory eviction. The retaliation defense was not fully and fairly litigated in an adversary hearing, and thus was not conclusively established. [Citation.] The court erred in dismissing the cause of action for retaliatory eviction." (*Pelletier v. Alameda Yacht Harbor, supra,* 188 Cal.App.3d at p. 1557.)

Zimmerman v. Stotter (1984) 160 Cal.App.3d 1067 is similar. There, a tenant who had been ousted from a rent-controlled unit filed an action against the landlord alleging wrongful eviction, abuse of process, intentional infliction of emotional distress, and violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.). The landlord had obtained an unlawful detainer judgment against the tenant based on the landlord's contention that she desired the unit for use by her son and mother. Approximately one year after the tenant's eviction, the unit was placed back on the rental market at a substantially higher rent, without the landlord's mother and son having ever occupied it. (*Zimmerman v. Stotter, supra,* at p. 1067)

The trial court granted summary judgment on the ground the action was barred by res judicata, in light of the judgment in the unlawful detainer action. The Court of Appeal reversed, holding that while any claim of right to possession, and thus the Unruh Act claim, could not be relitigated, the other claims could: "By the same token, however, appellant's remaining causes of action, for wrongful eviction,[] abuse of process, and intentional infliction of emotional distress, which relate to respondent's action pursuant to the issuance of the writ of possession, are not barred from relitigation. It is not the right, but the abuse of that right, which appellant seeks to litigate. Thus, the primary right at stake, while tangentially related, remains distinct from that of the right of possession adjudicated in the unlawful detainer proceeding." (*Zimmerman v. Stotter, supra,* 160 Cal.App.3d at pp. 1074–1075.) Also see *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1171–1173 [stipulated judgment in unlawful detainer case not collateral estoppel on tenants' claim for breach of warranty of habitability].

DISPOSITION

The judgment is affirmed. Harris shall recover his costs on appeal.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

A142641; *Mark Harris v. Locker, LLC*