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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| CLARE BON VISO et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>JANISE CAREY,<br><br>Defendant and Respondent. | B291348<br><br>(Los Angeles County Super. Ct. No. BC661563) |

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Kralik, Judge. Affirmed.

Epport, Richman & Robbins, Christopher R. Nelson; Rodriguez Law and Steven L. Rodriguez, for Plaintiffs and Appellants.

Lowthorp Richards McMillan Miller & Templeman and Darin Marx, for Defendant and Respondent.

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Clare and William Bon Viso (collectively appellants) appeal from the dismissal of their retaliatory eviction and breach of contract case against Janise Carey (respondent). Appellants contend that the dismissal should be reversed because the trial court (1) improperly treated a motion to strike as a demurrer, and (2) misapplied the law when sustaining the demurrer. We affirm.

## FACTS

### The Operative Pleading

In their first amended complaint, appellants alleged that they leased a townhouse from respondent in 2013. On June 15, 2016, they renewed for a year. The lease specified that it would become a month-to-month tenancy at the end of the term absent notice to the contrary.[1] Appellants lived in the townhouse with their two children, both of whom were in elementary school. At the time, Clare Bon Viso (Clare)[2] was suffering from a neurological condition called trigeminal neuralgia and was permanently disabled.

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[1] Paragraph 22 of the lease provided: "After expiration of the contract period, this AGREEMENT is renewed by contract. If no notice is given it automatically renew[s] from month-to-month but may be terminated by either party giving to the other a thirty (30) day written notice of intention to terminate." Though this language is awkward, we conclude that it can only be interpreted to mean that absent notice to the contrary, the lease converted to a month-to-month lease after the end of the initial one-year lease term.

[2] Clare shares the same last name as her husband. For clarity, we refer to them, individually, by their first names. No disrespect is intended.

In July 2016, Kip Miles (Miles) moved into an adjacent townhouse that shared a common wall with appellants. Miles frequently slammed the doors in his townhouse and caused the walls in appellants' townhouse to shake. This exacerbated Clare's neurological condition and caused her to suffer severe headaches, nerve pain, stress and depression. Appellants wrote to Miles over 40 times and asked him to change his conduct. It continued. Next, they advised respondent as well as her homeowners association and its manager of the situation.

Miles continued to slam his doors.

In February 2017, Clare underwent surgery to treat her neurological condition, and William Bon Viso (William) notified respondent, the homeowners association and its manager of this fact. He expressed concern that Clare would be in pain while recovering and would have to tolerate unreasonable door slamming by Miles.

After receiving notice, respondent wrote to the manager: "I just wanted to let you know that I've offered my tenants the opportunity to end their lease right now [i]f this situation is so unbearable to them. As of this date, they have not taken me up on the offer, but I'm not planning on renewing their lease, which expires in June 2017."

On March 25, 2017, respondent sent appellants a 60-Day Notice To Vacate on June 15, 2017. Its purpose was to retaliate against appellants for complaining about the slamming doors and shaking walls.

Appellants sued respondent, the homeowners' association, the manager and Miles. As to respondent, appellants asserted two causes of action: one for retaliatory eviction, and the other for breach of contract.

**The Motion to Strike**

Respondent filed a motion to strike paragraphs 17 and 47 and portions of paragraph 22 as well as the retaliatory eviction and breach of contract causes of action. In opposition, appellants argued that it is improper to strike a whole cause of action, and further that each of the causes of action was legally sufficient as alleged.

The trial court opted to treat the motion to strike as a demurrer to the retaliatory eviction and breach of contract causes of action and sustained it without leave to amend.

This appeal followed.

## DISCUSSION

### I. Preliminary Considerations.

Appellants contend that it was improper for the trial court to deem the motion to strike to be a demurrer. We disagree.

"The proposition that a trial court may construe a motion bearing one label as a different type of motion is one that has existed for many decades. 'The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. . . .' [Citation.]" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193.) Even a reviewing court may look at form over substance. In *Bezaire v. Fidelity & Deposit Co.* (1970) 12 Cal.App.3d 888, 891, the reviewing court overlooked the procedural irregularity of the trial court granting a motion to strike a cause of action and considered the matter as though judgment had been entered after a successful demurrer. In *Pierson v. Sharp Memorial Hospital* (1989) 216 Cal.App.3d 340, 343, the reviewing court deemed an order granting a motion to strike a cause of action as an order granting a motion for judgment on the pleadings.

Given the state of the law, the trial court was authorized to look at form over substance and deem the motion to strike as a demurrer and then rule on it as such.

**II. Standard of Review.**

When conducting de novo review of an order sustaining a demurrer without leave to amend, we examine whether the pleading states a cause of action under any possible legal theory. In this process, we give the pleading a reasonable interpretation but do not assume the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.)

**III. Retaliatory Eviction.**

To prevail on their retaliatory eviction claim, appellants had to plead (1) that they were evicted, and (2) it was in retaliation for exercising their statutory rights under Civil Code section 1940 et. seq.[3] (§ 1942.5; *Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281.)

An eviction occurs "when a landlord takes direct action to physically expel the tenant from the premises." (*Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1152.) An unlawfully motivated notice of eviction supports a retaliatory eviction claim if it forces tenants to vacate their premises. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770; *Lindenberg v. MacDonald* (1950) 34 Cal.2d 678, 690.)

Absent notice to the contrary, the year lease would have converted to a month-to-month lease in mid-June 2017. Based on reasonable inference from the allegations, appellants vacated the

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[3] All further statutory references are to the Civil Code unless otherwise indicated.

townhouse only because respondent served them with the 60-Day Notice To Vacate. Thus, they were evicted.

The question remains whether appellants sufficiently alleged that respondent sent the 60-Day Notice To Vacate to retaliate against them for exercising their statutory rights. Appellants contend that their complaints about Miles implicated sections 1941 and 1941.1.

Section 1941 requires a lessor to put a building into a condition fit for occupation. Section 1941.1, subdivision (a) provides that a dwelling is untenantable under section 1941 if it is a residential unit described in Health and Safety Code section 17920.3. That statute declares a building or any portion of it, including a dwelling unit, a substandard building if it is one "in which there exists" a nuisance, or in which there is "[i]nadequate structural resistance to horizontal forces." (Health & Saf. Code, § 17920.3, subds. (c) & (o).)

A nuisance is anything that is "injurious to health, . . . or is . . . offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property[.]" (§ 3479.) Appellants argue that because excessive and inappropriate noise may in certain cases qualify as a private nuisance (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 264), they sufficiently alleged that there was a nuisance in the townhouse. This argument cannot be accepted. As alleged, Miles caused the noise and shaking, not respondent. Miles is not a nuisance in the townhome; rather, he is an external force. Consequently, the townhome is not a dwelling unit "in which there exists" a nuisance.

In their reply, appellants argue that the nuisance existed in the townhouse because that is where they experienced the noise

and vibrations. They cite no law nor engage in statutory interpretation of Health and Safety Code section 17920.3, subdivision (c) to support the view that a nuisance exists inside a dwelling for purposes of that statute if it is caused externally by forces beyond the control of the owner of the dwelling but is experienced internally.

Next, appellants contend that their complaints about Miles causing their walls to shake indicated that they had inadequate structural resistance to horizontal forces. This contention lacks potency for several reasons. They have not interpreted Health and Safety Code section 17920.3, subdivision (o) to establish that a shared wall is one with inadequate structural resistance to horizontal forces if it shakes when a door is slammed. Further, appellants did not allege that such a defect existed or that they complained about it.

The trial court properly sustained respondent's demurrer to the retaliatory eviction cause of action.

**IV. Breach of Contract.**

To sue for breach of contract, appellants had to allege a contract, breach of the contract, causation and damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Appellants maintain that they sufficiently alleged that respondent breached the covenant of quiet enjoyment and the covenant of habitability.

Absent language to the contrary, "'every lease contains an implied covenant of quiet enjoyment. [Citations.] . . . [I]t insulates the tenant against any act or omission on the part of the landlord, or anyone claiming under him, which interferes with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy. [Citations.]' [Citations.]"

(*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 291–292 (*Nativi*).)

Leases also contain an implied warranty of habitability. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 631.)

Appellants contend that if respondent engaged in retaliatory eviction, then respondent breached the covenant of quiet enjoyment. In addition, they contend that if a nuisance existed in the townhouse, then respondent breached the implied warranty of habitability. As we have already explained, there was no retaliatory eviction, and there was no nuisance in the townhouse. Notably, appellants cannot establish the *Nativi* elements because the noise and wall shaking were caused by Miles, not respondent.

The trial court properly sustained the demurrer to the breach of contract cause of action.

**V. Request for Leave to Amend.**

Appellants contend that they should be allowed to amend their pleading. We cannot agree.

"If the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility amendment could cure the defect, a trial court abuses its discretion by denying leave to amend." (*JPMorgan Chase Bank, N.A. v. Ward* (2019) 33 Cal.App.5th 678.) A reviewing court can reverse and allow leave to amend even if the issue was not raised in the trial court. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.)

Appellants maintain that they can allege that respondent discriminated against Clare based on her neurological condition in violation of section 52, subdivision (a) in the Unruh Civil Rights Act. Section 52, subdivision (a), however, merely

authorizes an action for damages for discrimination in violation of other statutes. In their opening brief, appellants failed to identify a provision in the Unruh Civil Rights Act that respondent violated. In their reply brief, they argue that the basis for their claim would be their eviction from the townhouse because they complained about the pain and suffering that "the nuisance and/or structural inadequacy [in the townhouse] was causing to Clare[]." Once again, they cite no supporting law. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

Alternatively, appellants posit that they can allege facts to support their existing causes of action because "it is possible that the slamming of the door by [Miles] is occurring because of a structural problem with [the townhouse] that causes every closure of the door in his adjoining unit to result in a violent vibration of [the townhouse], rendering it unsuitable for habitability. [Appellants] further maintain that their eviction was motivated by their complaints to [respondent] regarding the violent shaking of the [townhouse]. . . . Miles is likely to raise the soundness of the structure as a defense, and [appellants] should be permitted, at a minimum, to plead this alternative theory . . . against [respondent][] in the event that such a defense proves to be correct."

The mere suggestion that it is possible that the townhouse has a structural problem is not sufficient. Appellants are engaging in speculation, and we are aware of no law establishing that a facially speculative theory is sufficient to allow a plaintiff to amend his or her pleading.

## DISPOSITION

The judgment is affirmed. Respondent shall recover the costs of this appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ