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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

HILARY VON GERLACH, Plaintiff and Appellant, v. FRG PLAZA LLC et al., Defendants and Respondents.	B284254 (Los Angeles County Super. Ct. No. LC104718)

APPEAL from judgments of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Reversed and remanded with directions as to Raintree; dismissing appeal as to FRG and Apartment Management.

Henry M. Lee Law Corporation and Henry M. Lee for Plaintiff and Appellant.

Veatch Carlson, Robert M. Mackey and Serena L. Nervez for Defendants and Appellants FRG Plaza, LLC and Apartment Management Consultants, LLC.

Safarian Choi & Bolstad and Bradley E. Jewett for Defendant Respondent Raintree Plaza Sherman Oaks, LLC.

Hilary Von Gerlach sued Raintree Plaza Sherman Oaks, LLC (Raintree) and FRG Plaza, LLC and Apartment Management Consultants, LLC (collectively FRG), the owners and manager of the apartment complex in which she had rented a unit, for breach of their written lease agreement and breach of express and implied warranties of habitability. Based primarily on information developed in a related lawsuit in which Von Gerlach had sued the same defendants for negligence and premises liability after she fell on a stairway in the complex, the trial court sustained without leave to amend Raintree's demurrer to Von Gerlach's complaint, granted without leave to amend FRG's motion for judgment on the pleadings and entered judgment in favor of Raintree and FRG. We reverse and remand with directions to permit Von Gerlach to file an amended complaint against Raintree. At the request of Von Gerlach, filed the day after oral argument, we dismiss her appeal against FRG.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Von Gerlach's Accident and Her Request for Accessible Parking*

From sometime in 2009 through March 2014 Von Gerlach leased and lived in a two-bedroom apartment at the Plaza at Sherman Oaks, a large multi-family residential apartment complex located at 4500 Woodman Avenue in Sherman Oaks. Von Gerlach has alleged she slipped and fell on November 9, 2012 while walking down the stairway that leads to and from her unit and, as a result, suffered serious injuries that limited her

ability to walk and to use her right hand. At that time FRG Plaza, LLC owned the apartment complex, and it was managed by Apartment Management Consultants, LLC. Raintree subsequently purchased the property.

Shortly after the accident Von Gerlach notified FRG of her injuries and requested accommodations, specifically including a handicap-accessible parking space. According to Von Gerlach, although she had a disabled person parking placard issued by the Department of Motor Vehicles (DMV), FRG denied her request, stating they did not have an available handicap parking place and parking places closer to the complex's elevators were reserved for tenants in one-bedroom apartments. Von Gerlach continued to request parking accommodations after Raintree purchased the Plaza at Sherman Oaks; those requests were also denied.

2. *Von Gerlach's Original Lawsuit*

On November 6, 2014 Von Gerlach, representing herself, sued FRG and Raintree for negligence and premises liability, using the Judicial Council's form pleading for personal injuries (Super. Ct. L.A. County, 2014, No. BC562965) (hereafter No. BC562965). On October 30, 2015 Von Gerlach, now represented by counsel, moved for leave to file a first amended complaint to include, in addition to her negligence and premises liability causes of action, causes of action for disability discrimination (failure to provide reasonable accommodation and failure to engage in an interactive process), violation of the Unruh Civil Rights Act, intentional infliction of emotional distress and breach of contract. The breach of contract claim, based on the parties' lease agreement, alleged FRG and Raintree had breached their affirmative duty to provide safe and habitable

premises by failing to maintain the apartment complex in a safe condition and failing to make reasonable accommodations for her disability.

Von Gerlach's motion was taken off calendar when the case was transferred from the Central District to the Northwest District. In March 2016 Von Gerlach filed a new motion for leave to file a slightly modified version of the first amended complaint, which did not include the Unruh Civil Rights Act claim, but otherwise was substantially the same proposed pleading. The court denied the motion on April 12, 2016, ruling the new claims did not relate back to Von Gerlach's original filing and, as a consequence, were barred by the applicable statutes of limitation.[1]

On June 23, 2016 Von Gerlach moved again for leave to file a first amended complaint. In this proposed pleading, in addition to her original causes of action for negligence and premises liability, Von Gerlach attempted to plead causes of action for breach of written lease and breach of express and implied warranties of habitability. The breach of lease cause of action identified paragraph 24 of the lease agreement, which requires

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[1] Although the parties have submitted several documents from No. BC562965 as part of the record on appeal, the April 12, 2016 ruling denying Von Gerlach's motion for leave to file a first amended complaint is not among them. Based on second-hand descriptions in the parties' appellate briefs, it appears the trial court ruled Von Gerlach's causes of action for disability discrimination and "building code violations" were governed by a two-year statute of limitations. Whether the trial court ruled a two-year statute of limitations also applied to Von Gerlach's cause of action for breach of a written contract is left unanswered.

the owners of the apartment complex to make reasonable accommodations for tenants with disabilities. The cause of action relating to the warranty of habitability alleged the owners had failed, among other things, to provide railings on both sides of the stairways and to maintain the stairways in good repair.

In opposing the motion both FRG and Raintree noted paragraph 24 of the lease states reasonable accommodations will be made to individuals with disabilities "upon request and with appropriate verification from your health care provider," but Von Gerlach conceded in her deposition testimony she had never provided a physician's note to confirm her disability.

The court on September 9, 2016 denied the motion to amend, ruling the proposed breach of lease cause of action "is contrary to the established facts of the case, that it would result in what could be called a sham pleading." The court explained it was referring to Von Gerlach's deposition testimony when it identified what it called "the accepted and agreed upon facts, uncontested facts." As to the cause of action for breach of the implied warranty of habitability, the court also denied the motion to amend, faulting Von Gerlach for her delay in asserting the claim, noting it would not add anything to the damage claims previously made in the lawsuit, and finding FRG and Raintree would be prejudiced by allowing the new cause of action because they had already filed motions for summary judgment.

3. *Von Gerlach's Second Lawsuit* (t*he Case at Bar*)

On October 6, 2016 Von Gerlach filed a new complaint against FRG and Raintree (Super. Ct. L.A. County, 2016, No. LC104718), alleging causes of action for breach of written lease agreement and breach of express and implied warranties of

habitability.[2] In the "factual allegations" section of the complaint, Von Gerlach described her fall while on the apartment complex's stairs and the resulting injuries, the subject of the earlier lawsuit. Von Gerlach expressly alleged, after the fall, she provided written documentation to management of the apartment complex of her injuries, disabilities and need for accommodation in compliance with her lease agreement and had requested reasonable accommodations including a handicap or more accessible parking space, for which she had a DMV parking placard, and which would allow her to use her building's elevator, rather than the stairs. The building managers summarily denied her request and refused to discuss the matter with her. As a proximate result of the breach of lease agreement, Von Gerlach further alleged, she could not continue to reside at the Plaza at Sherman Oaks. Instead, she was required to live in her own house, which she had previously rented out, thereby losing a stream of rental income.

Her breach of warranty of habitability cause of action alleged multiple accidents had occurred on the stairways at the apartment complex because of the failure to install a handrail on both sides of the stairways, to provide adequate lighting in the stairwells and to maintain the stairways in good repair. Damages alleged included "payment of rent which should be refunded due to the breaches herein."

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[2] The case was assigned to the same department as Von Gerlach's prior lawsuit. Judge Frank J. Johnson denied Von Gerlach's motion to disqualify for prejudice (peremptory challenge) pursuant to Code of Civil Procedure section 170.6, finding the new lawsuit was, in effect, a continuation of the original action. The two cases were deemed related.

4. *Raintree's Demurrer; FRG's Motion for Judgment on the Pleadings*

On December 16, 2016 Raintree demurred to the complaint, arguing the court had previously ruled Von Gerlach's cause of action for breach of the lease was a "sham pleading" and her cause of action for breach of the warranty of habitability did not identify any valid damages arising from the alleged code violations or otherwise. On February 8, 2017 the trial court sustained Raintree's demurrer without leave to amend. In its order filed February 23, 2017, as prepared and presented by counsel for Raintree, the court stated, "Plaintiff's First Cause of Action for Breach of Written Lease Agreement was previously considered and dismissed in the Related Action based on the undisputed evidence of the case, and Plaintiff is therefore precluded from bringing the same claim in this action. Further, Plaintiff failed to allege or provide any evidence that any medical provider provided Raintree with any form of verification that Plaintiff was disabled or suffered from a handicap, despite the obvious need for Plaintiff to do so to survive demurrer. Further, the First Cause of Action is defective because the Lease Agreement is not attached to the Complaint."

As to the second cause of action, the written order stated Von Gerlach's pleading "contains no allegation that Raintree was in violation of any building code that was material to Plaintiff's health and/or safety. Further, there is no allegation of any new injury. Further, this Court previously determined, based on the evidence of the case in the Related Action, that the alleged code violations proffered as the basis for this claim are time barred."

On April 14, 2017 FRG, which had answered the complaint on March 27, 2017, moved for judgment on the pleadings,

presenting essentially the same arguments as had Raintree in support of its successful demurrer. With her opposition Von Gerlach reiterated she had presented FRG with a disabled person parking placard issued by the DMV and requested judicial notice of a blank application for such a placard, which includes space for the individual's health care provider to confirm the applicant's disability and need for accessible parking. Von Gerlach also argued uninhabitable conditions at the apartment complex had caused her fall.

The court granted the motion, finding that "the same issues have been raised previously in this and related case BC562965. The Breach of Contract (1st) cause of action suffers from the same defects as addressed previously. The plaintiff failed to provide documentation from her physician to support her claim, as required by the lease. As to the habitability issue, no causation is alleged by the plaintiff. Regarding the handicap parking space, defendants would not be obligated to evict another qualified tenant from the space just because plaintiff wants it."

CONTENTIONS

In a four-page opening brief that can best be described as minimalist, Von Gerlach contends the trial court erred in evaluating the merits of her causes of action for breach of contract and breach of the implied warranty of habitability by relying on matters beyond the pleadings and not properly subject to judicial notice and abused its discretion by denying her leave to amend the complaint to cure any deficiencies in the allegations in support of her claims.[3]

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[3] To the extent Von Gerlach's brief may not fully comply with California Rules of Court, rules 8.204(a)(1)(B) & (C) and

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726; see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) We determine

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8.204(a)(2)(C), we exercise our discretion to disregard any defects. (Cal. Rules of Court, rule 8.204(e)(2)(C) [court has discretion to disregard deficiencies in briefs]; see *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 622.)

whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Ivanoff v. Bank of America, N.A.*, *supra*, 9 Cal.App.5th at p. 726.)

2. *The Trial Court Erred in Dismissing Von Gerlach's Cause of Action for Breach of Lease Agreement Without Leave To Amend*

"[T]he elements . . . for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Von Gerlach's complaint alleged each of these four elements: (1) the existence of a written lease agreement to rent an apartment at the Plaza at Sherman Oaks between Von Gerlach, on the one hand, and FRG, and thereafter Raintree, on the other hand; (2) Von Gerlach's payment of rent and fulfillment of all other obligations required by the lease; (3) FRG's, and thereafter Raintree's, breach of the requirement set forth in paragraph 24 of the lease to provide reasonable accommodations for her disability after Von Gerlach provided written documentation of her injuries; and (4) damages to Von Gerlach in the form of lost income (from renting her own home) and additional expenses because the failure to provide needed accommodations forced her to move from the Plaza at Sherman Oaks.

None of the reasons proffered by the trial court justifies its orders dismissing this facially sufficient cause of action without

leave to amend. First, whatever the propriety of the trial court's exercise of its discretion in denying Von Gerlach's motion for leave to amend in No. BC562965 based on Von Gerlach's deposition testimony—an issue not before us—that decision was not a "dismissal" of the breach of contract cause of action on the merits, as recited in the February 23, 2017 order sustaining Raintree's demurrer, which would have precluded Von Gerlach from bringing her contract claim in a new lawsuit. Nor does Von Gerlach's deposition testimony in her original action indicate she has advanced a "sham pleading" in this case.

To be sure, Von Gerlach acknowledged she did not provide a physician's letter to FRG or Raintree when requesting accommodations, including a handicap parking place. But paragraph 24 of the lease specifies that the landlord would provide reasonable accommodations for individuals with disabilities "upon request and with appropriate verification from your health care provider." Von Gerlach explains a disabled person parking placard from the DMV requires a medical provider's certification of disability and contends demonstrating she had such a placard constituted "appropriate verification" within the meaning of the lease language, which does not unambiguously require a doctor's note verifying a tenant's disability be given directly to the landlord. Although Von Gerlach's position as to the manner in which she satisfied paragraph 24's verification requirement should be more clearly set forth in an amended pleading, her explanation amply satisfies her obligation to clarify any purported contradiction between the allegations in her pleading and her deposition testimony in the slip-and-fall litigation. (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 344 ["'The sham pleading

doctrine is not "'intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correct of ambiguous facts.'" [Citation.] Instead, it is intended to enable courts "'to prevent an abuse of process.'" [Citation.]' [Citations.] Plaintiffs therefore may avoid the effect of the sham pleading doctrine by alleging an explanation for the conflicts between the pleadings"]; see also *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426 ["the party who made the pleadings must be allowed to explain the changes"].)

Von Gerlach's interpretation of the relevant contract language, reasonable on its face, is certainly not so unreasonable as to justify denying her leave to amend her complaint to plead it more clearly and more fully. (See *Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 862 [the party "moving for a demurrer based on [contract] language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint. [Citation.] To meet this burden, [the defendant] is required to demonstrate that the [contract] language supporting its position is so clear that parol evidence would be inadmissible to refute it. [Citation.] Absent this showing, the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial"]; *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 470 ["[t]he motion for judgment on the pleadings can be granted only if the instrument incorporated by reference conclusively negates the express allegation in the pleading, and except in the extraordinary case, conclusive negation is unlikely because of the inevitable prospect that parol evidence may lead to

an interpretation of the contract consistent with the pleading's express allegation"].)[4]

The trial court also sustained Raintree's demurrer on the ground the lease agreement was not attached to the complaint. In its respondent's brief Raintree, which had advanced this argument in the trial court, asserts it is "based on the well-established authority that if an action is 'based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference,'" quoting a 1985 decision from Division Three of this court, *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 459. Although this was indeed the rule, as we also held in *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307, several years after our decision in *Harris* the Supreme Court modified this seemingly inflexible requirement, holding, "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction*

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[4] Discovery may reveal, for example, that FRG or Raintree has accepted proof of a DMV disabled person parking placard as an adequate basis to provide other tenants at the Plaza at Sherman Oaks with a handicap parking place. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393-394 [a party's predispute, post-contracting conduct is powerful evidence of the party's intent and understanding of the contract at the time it entered into the agreement].) Indeed, the fact that defendants apparently responded to Von Gerlach's request for a handicap parking place by telling her none was available suggests they did not consider her request insufficiently documented until it became an issue in litigation.

Protective Services, Inc. v. TIG Specialty Ins. Co. (2002) 29 Cal.4th 189, 198-199.)

Whether Von Gerlach adequately pleaded the legal effect of paragraph 24 of the lease agreement could be disputed. However, since we are remanding with directions to grant Von Gerlach leave to amend her cause of action for breach of the lease agreement, to avoid any doubt on this point, with her amended complaint Von Gerlach should either set forth in full the text of paragraph 24 or attach a copy of the lease agreement as an exhibit to the amended complaint.[5]

3. *The Trial Court Erred in Dismissing Von Gerlach's Cause of Action for Breach of the Implied Warranty of Habitability Without Leave To Amend*

The elements of a claim to recover damages based on a breach of the implied warranty of habitability are: (1) the existence of a material defective condition affecting the premises' habitability; (2) notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition;

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[5] In granting FRG's motion for judgment on the pleadings, in addition to the lack of documentation from her physician, the trial court stated Von Gerlach had not "alleged any causation from that failure to accommodate and the actual injury which is alleged to have occurred." However, the complaint adequately alleges Von Gerlach incurred additional expenses and lost potential income from renting her home because she was forced to relocate from the apartment to that house after the landlord failed to accommodate her disability. That Von Gerlach moved home when her then-existing tenant's lease expired does not in any way preclude proof that, had Raintree accommodated her disability as required by the lease agreement, Von Gerlach would have continued to live at the Plaza at Sherman Oaks and rented her home to a new tenant.

(3) the landlord was given a reasonable time to correct the deficiency; and (4) resulting damages. (*Erlach v. Sierra Asset Servicing*, *LLC* (2014) 226 Cal.App.4th 1281, 1297.) "The implied warranty of habitability recognizes 'the realities of the modern urban landlord-tenant relationship' and imposes upon the landlord the obligation to maintain leased dwellings in a habitable condition throughout the term of the lease." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1204.) "The implied warranty of habitability . . . gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable." (*Id.* at pp. 1205-1206.)

Von Gerlach's complaint, citing generally to Civil Code section 1941.1,[6] alleged FRG and Raintree failed to maintain the Plaza at Sherman Oaks in a habitable condition, including by

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[6] Civil Code section 1941 provides, "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidation thereof, which render it untenantable . . . ."

Civil Code section 1941.1, subdivision (a), provides, "A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics . . ." and lists nine categories of housing-related features.

failing to install handrails and maintaining both sides of the property's stairways and handrails in good repair; failing to illuminate the stairways; failing to provide any covering of the stairs to prevent them from becoming wet due to rain or otherwise remedying the dangerous conditions that existed when the surface of the stairs became wet; and installing inadequately spaced stairs. In addition, FRG and Raintree failed to keep "[p]roperty areas clean and free of debris and filth." She alleged FRG and Raintree had notice of these defects because multiple accidents had occurred at various stairways at the Plaza at Sherman Oaks. As damages, Von Gerlach alleged, in part, "payment of rent which should be refunded due to the breaches herein." These allegations are sufficient to state a cause of action for breach of the warranty of habitability.

The orders dismissing this cause of action recited as grounds Von Gerlach's failure to identify any violation of a building code that was material to her health or safety or to allege any "new injury" caused by the breach of the warranty of habitability. The court also apparently ruled the cause of action was barred by the applicable (but uncited) statute of limitations. None of these reasons is sufficient.

a. *Von Gerlach alleged code violations as the basis for her cause of action for breach of the warranty of habitability*

At least some of the problems at the apartment complex identified by Von Gerlach in her complaint fall well within Civil Code section 1941.1, subdivisions (a)(8), which provides, "[a] dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics . . . : [¶] . . . [¶] (8) Floors, stairways, and railings maintained in good repair," and (a)(6),

which requires that the building, grounds and all other areas under the control of the landlord be "kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin." (See *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn. 10 ["'while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach'"; "[m]oreover, particular statutory or regulatory requirements, other than those set forth in California Civil Code section 1941.1, may or may not relate to habitability"].) The materiality of the specific defects alleged by Von Gerlach, or that may be alleged in an amended pleading, is not appropriately determined on demurrer. (Cf. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 ["materiality is generally a question of fact"].)

b. *Von Gerlach alleged damages attributable to breach of the warranty of habitability*

Breach of a landlord's implied warranty of habitability entitles a tenant to "a rebate of excessive rent," that is, sums collected above the fair rental value of the premises in their distressed condition, as well as "damages for annoyance, discomfort, and emotional distress." (*Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1169; see *Erlach v. Sierra Asset Servicing, LLC*, *supra*, 226 Cal.App.4th at pp. 1297-1298 [the amount of rent the landlord should refund may be "calculated by the difference between the rent paid while the premises were uninhabitable and the rent that 'would have been reasonable, taking into account the extent to which the rental value of the property was reduced by virtue of the existence of the defect'"; "the difference between the fair rental value of the premises had

they been in the condition warranted and their fair rental value with the uninhabitable condition"; or "the rent paid by the tenant multiplied by the percentage of the premises rendered unusable due to the uninhabitable condition"].) Von Gerlach's allegation that her rent should be refunded as a result of the breaches of the warranty of habitability sufficiently identified this "new injury"—injury separate from the injuries suffered as a result of her slip and fall on the apartment complex's stairs—and adequately pleaded the causal relationship between the breach of the warranty of habitability and this item of damage. Von Gerlach also alleged she has endured "great mental and physical pain and suffering" as a result of the breach of the warranty. It is not clear, however, whether that allegation refers to the pain and suffering caused by the slip and fall or is a separate allegation of injury due to the continuing breaches of the warranty of habitability she has pleaded. Von Gerlach should be granted leave to amend this cause of action to clarify her claim of damage as it relates to this cause of action.

c. *The cause of action, as alleged, is not time-barred*

The final ground for dismissing this claim, that somehow it is time-barred, is difficult to comprehend. As pleaded, Von Gerlach's cause of action for breach of the warranty of habitability is predicated on her written lease agreement and, therefore, is "on the contract" (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1169) and subject to a four-year statute of limitations. (Code Civ. Proc, § 337, subd. (a).) Accordingly, this claim, filed on October 6, 2016 and based on conditions at the Plaza at Sherman Oaks immediately preceding her fall in November 2012 through the end of her tenancy in March 2014, is timely.

Although we cannot confirm it from the record on appeal, we accept that the court, in denying Von Gerlach's motion for leave to amend in No. BC562965 in April 2016, stated that "the alleged code violations proffered as the basis for the claim are time barred." Whatever the court may have meant, however, that ruling does not preclude the contract-based claim for breach of the warranty of habitability in the instant case. Because it was Raintree's burden to establish this affirmative defense based on facts contained on the face of the complaint or properly subject to judicial notice, the demurrer was improperly sustained on this ground. (See *Ivanoff v. Bank of America, N.A.*, *supra*, 9 Cal.App.5th at p. 726; *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183.)

DISPOSITION

The judgment in favor of Raintree is reversed. The matter is remanded with directions to the trial court to vacate its order sustaining Raintree's demurrer without leave to amend and to enter a new order granting Von Gerlach leave to file a first amended complaint. Von Gerlach's appeal of the judgment in favor of FRG is dismissed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.