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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

6000 WOODMAN, LLC, Plaintiff and Respondent, v. KIRAKOS TOSUNYAN, Defendant and Appellant.	B261436 (Los Angeles County Super. Ct. No. BC549060)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed and remanded.

Neufeld Marks and Paul S. Marks for Defendant and Appellant.

Law Offices of Marc J. Schwartz and Marc J. Schwartz for Plaintiff and Respondent.

INTRODUCTION

6000 Woodman LLC (landlord) posted a 3-day notice to pay rent or quit (3-day notice) at the commercial property located at 6002 Woodman Avenue, and mailed a copy of the notice to the same address. The notice was intended to advise the tenant, Kirakos Tosunyan, of his failure to pay the full amount of rent due under the parties' lease and landlord's intent to terminate the tenancy unless Tosunyan paid the back rent. In the ensuing unlawful detainer proceeding, the trial court granted landlord's motion for summary judgment based in part upon its finding that landlord properly served the 3-day notice. We reverse the judgment because there is a triable issue of fact regarding the address of the leased premises and, consequently, the validity of the 3-day notice.

Because landlord is now in possession of the commercial property, further unlawful detainer proceedings are inappropriate. Accordingly, to the extent the parties wish to continue litigating this matter, the case must proceed as an ordinary civil case.

FACTS AND PROCEDURAL BACKGROUND

1. The Lease

On May 4, 2012, landlord and Tosunyan entered into a commercial lease. The portions of the lease relevant to the location of the premises are summarized below.

According to the fundamental lease provisions, the leased premises is "6000 Woodman Avenue, Valley Glen, California 91401: approximately three thousand two hundred (3,200) square feet of Floor Area (as defined in Article 1), plus a patio area as shown on Exhibit A of approximately 935 square feet." Article 1

of the lease provides, in pertinent part: "The premises demised and leased hereunder ('Premises') are located or to be located in a portion of the Building constructed or to be constructed as a part of the Project generally depicted on the 'Site Plan' attached hereto as Exhibit 'A.' " Exhibit A is a single page which states at the top: "Project site plan showing premises (see attached)." No site plan is attached to the copy of the lease included in the record on appeal. However, Exhibit C-3 to the lease contains a diagram of the leased premises. That diagram shows a single unit with stated square footage of 3,022 square feet and an adjacent patio area of 935 square feet. At the bottom of the page, Exhibit C-3 states "6000 Woodman Avenue, Valley Glen, CA."

Also pertinent here, the lease designates the address to be used by the parties for service of notices under the lease. Section 17.3 provides that "any notice to Tenant shall be given to Tenant at the address specified in Paragraph D" of the fundamental lease provisions. Although the fundamental lease provisions do not include a paragraph D, they do provide: "Tenant's Address for Notices (See Section 17.2 [*sic*]):
6000 Woodman Ave. Valley Glen, CA 91401."

2. Landlord's Notice to Pay or Quit

On June 6, 2014, landlord issued a 3-day notice to pay rent or quit. The notice referred to the premises located at "6002 Woodman Avenue, Van Nuys, CA 91401." The notice stated that Tosunyan failed to pay the full amount of rent due during the first half of 2014, and estimated the amount due as $44,995.26.

A registered process server attempted to serve Tosunyan personally at 6002 Woodman Avenue, but was unable to locate him there. Finding no person of suitable age at that address, the process server used the "nail and mail" method of service

authorized in unlawful detainer proceedings under Code of Civil Procedure section 1162, subdivision (b)(3).[1] The process server posted a copy of the 3-day notice in a conspicuous place on the property located at 6002 Woodman Avenue, and placed a copy of the notice in the mail to the same address.

3. The Unlawful Detainer Lawsuit; Motion to Quash

After Tosunyan failed to tender payment in response to the 3-day notice, landlord filed an unlawful detainer action against him. The complaint alleged Tosunyan was in possession of the property located at "6002 Woodman Avenue, Van Nuys, CA 91401," and that valid service of the 3-day notice was made at that address. The complaint attached copies of the lease agreement, the 3-day notice, and the proof of service from the registered process server.

Tosunyan filed a motion to quash service of summons, asserting the 3-day notice was defective because landlord failed to serve the notice at the address provided in the lease, namely, "6000 Woodman Avenue, Valley Glen, CA 94101." Further, Tosunyan argued, the lease prohibited landlord from serving the notice using the "nail and mail" method, and required instead that landlord serve him personally, by certified mail, or by using a courier such as Federal Express or United Parcel Service. Landlord opposed the motion to quash, arguing that Tosunyan's failure to pay rent over the course of more than six months constituted an uncured default which, under the terms of the lease, relieved landlord of the obligation to provide Tosunyan with any notice prior to filing the unlawful detainer complaint.

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[1] Further undesignated section references are to the Code of Civil Procedure.

Alternatively, landlord argued it validly served the 3-day notice in compliance with sections 1161 and 1162.

On July 3, 2014, the court denied the motion to quash. The basis of the court's ruling is not evident from the record before us. Tosunyan challenged the ruling by way of a petition for writ of mandate to this court, which petition was summarily denied.

4. Landlord's Motion for Summary Judgment

Landlord filed a motion for summary judgment, asserting that it fully satisfied all the statutory requirements for unlawful detainer. In response, Tosunyan asserted the 3-day notice was void because it failed to comply with the statutory service requirements and the lease's notice requirements. The court granted landlord's motion for summary judgment and, on November 17, 2014, entered judgment in favor of landlord. Tosunyan timely appeals.

CONTENTIONS

Tosunyan contends the court erred by granting landlord's motion for summary judgment because there is a factual dispute regarding the validity of the 3-day notice served by landlord. Specifically, Tosunyan contends the 3-day notice is void because landlord failed to serve the notice at the address specified in the lease, landlord failed to serve the notice using the method specified in the lease, and the notice failed to provide a reasonable estimate of rent owed.

DISCUSSION

1. Standard of review

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

2. The trial court erred by granting summary judgment in favor of landlord.

2.1. Background legal principles

Unlawful detainer is a summary proceeding to determine the right to possession of real property. Under section 1161, the basic elements of unlawful detainer for nonpayment of rent are: (1) the tenant is in possession of the premises; (2) that possession is without permission; (3) the tenant is in default for nonpayment of rent; (4) the tenant has been properly served with a written three-day notice; and (5) the default continues after the three-day notice period has elapsed. (§ 1161, subd. (2).)

"Generally, in order to take advantage of this summary remedy, the landlord must demonstrate strict compliance with the statutory notice requirements contained in section 1161 et seq., including providing the tenant with three days' written notice to pay rent or quit the premises. The notice to quit must be served personally or, if personal service is not possible, by substituted service. (See §§ 1161 [before pursuing unlawful detainer remedy, landlord must provide tenant with three days'

written notice to pay rent or quit premises as provided in § 1162], 1162 [notice to quit may be served by delivering copy to tenant personally or by substituted service at tenant's residence or usual place of business]; see also *WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 526 [requirements of §§ 1161 and 1162 ' " 'must be followed strictly, otherwise a landlord's remedy is an ordinary suit for breach of contract with all the delays that remedy normally involves and without restitution of the demised property' " ']." (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 749-750 (*Culver Center*).) Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained. (*Borsuk v. Appellate Division of the Superior Court* (2015) 242 Cal.App.4th 607, 611; see also *Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 ["A lessor must strictly comply with the statutorily mandated requirements for service of a three-day notice to pay rent or quit. [Citations.]"].)

2.2. There are triable issues of fact regarding the validity of the 3-day notice.

As noted, service of a valid 3-day notice to pay rent or quit is an essential, statutorily-required element of an unlawful detainer action. Tosunyan argues the 3-day notice was defective because (1) landlord served the notice at the incorrect address, (2) landlord's method of service was not authorized by the lease, and (3) the 3-day notice did not contain a reasonable estimate of the amount of rent owed. We conclude there is a triable issue of material fact concerning the address of the leased premises.

Where possession of commercial property is at issue, section 1162, subdivision (b)(3), authorizes the "nail and mail"

method of service if other methods of service fail. That section provides, "[i]f, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then [notice may be served] by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated." Here, there is some uncertainty as to whether the notice was posted "at the rental property," and mailed to "the address where the property is situated." Specifically, the proof of service shows landlord's 3-day notice was posted at and mailed to "6002 Woodman Avenue Van Nuys, CA 91401." But, as Tosunyan points out, the lease agreement states the rented premises is located at 6000 Woodman Avenue—not 6002 Woodman Avenue. Tosunyan does not admit he received the notice.

Landlord offers two responses. First, landlord asserts there is no discrepancy between the proof of service and the lease because "the handwritten notes on the Lease confirm the correct address as 6002 Woodman Ave." However, the record does not support landlord's contention. It appears that the typed lease agreement originally stated the premises was located at 6004 Woodman Avenue. However, a handwritten interlineation changed the address to read 6000 Woodman Avenue. The record does not indicate who made the interlineations, but it is apparent that the address, as modified, reads 6000 Woodman Avenue—not 6002 Woodman Avenue.

Second, landlord attempts to reconcile the address of the leased premises as follows: "[Landlord] owns the shopping center located at 6000 Woodman Avenue, Van Nuys, California 91401 (the 'Center'), which contains the subject premises having a

separate address of 6002 Woodman Avenue, Van Nuys, California (the 'Premises')." It appears the court accepted landlord's explanation, as the order granting summary judgment in favor of landlord states the parties had a valid lease agreement for the property located at 6002 Woodman Avenue, and landlord properly served the 3-day notice at that address. We see no evidence in the record to support this conclusion.

The court's summary judgment order cites two pieces of evidence in support of its finding that Tosunyan leased the premises at 6002 Woodman Avenue: landlord's motion for summary judgment, and the declaration of Marc Schwartz, attorney for landlord. Neither of these items supports the court's factual finding. First, the motion for summary judgment is argument, not evidence. Moreover, the motion does not discuss the discrepancy between the address listed in the lease and the address listed on the proof of service. Second, the attorney declaration submitted in support of the motion contains no reference to the location of the leased premises.

Landlord directs us to several portions of the appellate record to support its assertion that the leased premises is located at 6002 Woodman Avenue. However, none of the sources identified by landlord establish that fact.

In light of the discrepancy between the lease and the proof of service, and the absence of evidence clarifying the discrepancy, there is a triable issue of material fact concerning the validity of the 3-day notice.[2] Accordingly, the trial court erred in granting landlord's motion for summary judgment.

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[2] We also reject landlord's contention that it was not required to provide Tosunyan with *any* notice before initiating an unlawful detainer action. Although Section 13.2 of the lease provides that a

3. Proceedings on remand

At oral argument, counsel for both parties stipulated that Tosunyan surrendered possession of the property to landlord. We requested and received supplemental letter briefs from the parties on the issue of mootness. (Gov. Code, § 68081.) We conclude the appeal is not moot because the erroneous judgment of possession may have some collateral effect on future proceedings between these parties concerning the commercial lease. In addition, because we reverse the judgment entered in favor of landlord, Tosunyan is entitled to seek restitutionary relief in the trial court on remand.[3] (See *Shubert v. Bates* (1947) 30 Cal.2d 785, 789; *Munoz v. MacMillan* (2001) 195 Cal.App.4th 648, 657-658.) With that limited exception, however, further unlawful detainer proceedings are inappropriate because possession of the property has been restored to landlord. (See *Nork v. Pacific Coast Medical Enterprises, Inc.* (1977) 73 Cal.App.3d 410, 413 [where issue of possession becomes moot, an action in unlawful detainer is no longer appropriate].) Accordingly, if the parties wish to litigate any other issues following our remand, the case must proceed as an ordinary civil case. (See Civ. Code, § 1952.3.)

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notice of default compliant with the lease is sufficient for unlawful detainer purposes, it does not eliminate the statutory notice requirement altogether.

[3] We express no opinion as to whether Tosunyan is entitled to any restitutionary relief; we simply remind the court that he must be given the opportunity to seek such relief on remand.

DISPOSITION

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion. Appellant to recover his costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.