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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

510PACIFICAVE,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

AMY REBECCA WEISS,

Real Party in Interest.

No. B289549

(Super. Ct. No. BC694882)  
(Mark V. Mooney, Judge)

ORIGINAL PROCEEDING; petition for writ of mandate. Petition granted; writ issued.

Robert Miller for Petitioner.

No appearance for Respondent.

Zargarpour Law Firm and Nader Zargarpour for Real Party in Interest.

Petitioner 510PacificAve, the fictitious name for the Lindeva Living Trust dated 8/20/03, Kim W. Lu, Trustee (Owner), seeks a writ of mandate directing the trial court to vacate its denial of Owner's peremptory challenge under Code of Civil Procedure<sup>1</sup> section 170.6. The trial court denied the challenge as untimely, finding that the instant lawsuit (the second action) was a continuation of an earlier-filed lawsuit (the first action) Owner had filed against one of the same defendants. We conclude the second action is not a continuation of the first action, and therefore Owner's challenge, which was filed less than a week after the second action was related to the first action and assigned to the same trial judge, was timely. Accordingly, we grant the petition and issue the writ of mandate.

## **BACKGROUND**

### *A. The First Action*

Owner rents and manages the apartment units in an eight-unit apartment building. Real Party in Interest Amy Rebecca Weiss is a tenant in that building. In July 2017, Owner filed a complaint (the first action) against Weiss, Julie M. Heldman, and "John Doe" alleging eight causes of action based upon allegations that Weiss and "John Doe" damaged two cameras that Owner had installed in common areas of the

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<sup>1</sup> Further undesignated statutory references are to the Code of Civil Procedure.

apartment building.<sup>2</sup> The complaint sought damages for intentional interference with lawful business or occupation, trespass, vandalism, breach of contract, and elder abuse,<sup>3</sup> as well as injunctive relief and ejectment. The case was assigned to Judge Mark V. Mooney, with case No. BC667829.

On January 9, 2018, Weiss filed a cross-complaint in the first action against Kim W. Lu, in her individual capacity and in her capacity as trustee of the Lindeva Living Trust dated 8/20/03 doing business as 510PacificAve. The cross-complaint alleged that Lu had engaged in serial harassment of Weiss through threats and menacing conduct.

The following specific conduct was alleged: (1) sending notices to tenants, including Weiss, that attempted to remove a grace period for paying rent and to charge Weiss for costs to repair the property, which Weiss contended constituted attempts to reduce or violate Weiss's rights under the lease and the Los Angeles Rent Stabilization Ordinance (the RSO); (2) installing 18 video surveillance cameras around the property, three of which are aimed at Weiss's windows and front door; (3) sending a notice to Weiss claiming she was responsible for damage to the property's roof and attempting to charge Weiss for its repair; (4) screaming at tenants who complained to Lu about the video cameras

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<sup>2</sup> The complaint alleges that Heldman, Weiss's mother, guaranteed the rental agreement, and that Weiss's rent was paid by Heldman as trustee of the Amy Weiss Living Trust.

<sup>3</sup> The complaint alleged that Owner -- presumably the trustee, Kim W. Lu -- is an elder under Welfare and Institutions Code section 15610.27.

and problems with the plumbing; (5) refusing to respond to Weiss's written request for repairs that needed to be made to her apartment, including the plumbing; (6) accusing Weiss of vandalism and threatening eviction; (7) refusing to take any action to end the unlawful short-term leasing of two units in the building, despite the disruption the short-term tenants caused to the other tenants of the building, including Weiss; (8) refusing to provide Weiss with surveillance footage for the camera pointed at the bicycle rack after Weiss's bicycle was stolen; (9) attempting to unilaterally change terms of the tenants' leases, including Weiss's lease, by amending the leases to prohibit advertising to lease or sublet the tenants' apartments and requiring any tenant who received funds resulting from an unauthorized sublease to disgorge those funds to Lu, and by attempting to insert a cap on attorney fees and costs allowed under the lease; and (10) taking action to terminate Weiss's tenancy in violation of the RSO, including by bringing an action to recover possession of Weiss's unit based upon facts that Lu has no reasonable cause to believe to be true.

Based upon this purported conduct, Weiss alleged causes of action for violation of Civil Code section 1940.2, invasion of privacy, breach of the covenant of quiet enjoyment, nuisance, injunction against civil harassment, and intentional infliction of emotional distress. She sought civil penalties, damages (including punitive damages), and injunctive relief.

Owner filed a special motion to strike the cross-complaint under the anti-SLAPP statute, section 425.16.<sup>4</sup> Owner argued in that motion that it could send a notice of increase of rent as a matter of right, regardless of the RSO.

B. *The Second Action*

On February 21, 2018 -- six weeks after Weiss filed her cross-complaint in the first action -- Owner filed the instant action (the second action) against Weiss. The complaint in the second action alleges that on February 8, 2018,<sup>5</sup> Owner discovered that a person named Filip Osowski had been occupying Weiss's unit for more than 14 cumulative days without Owner's consent, as required under the written lease. Owner sent Weiss a notice of change of terms of tenancy, advising Weiss that she was in breach of the lease and that Owner was increasing the rent by 25 percent, as expressly allowed under

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<sup>4</sup> None of the papers related to the special motion to strike is attached as an exhibit to the petition or the return to the petition; our discussion is based upon the trial court's discussion of the motion and the opposition to it in the court's June 8, 2018 ruling declining to vacate its order denying Owner's section 170.6 challenge.

<sup>5</sup> We note there are typographical errors in the complaint, where the complaint refers to these dates as occurring in 2017 rather than 2018; the documents attached to the complaint make clear that the correct year is 2018.

paragraph 6 of the lease.<sup>6</sup> Weiss's attorney responded that Weiss would not pay any increased rent because she believed the increase was restricted by the RSO.

The complaint alleges there is an actual controversy between the parties in that Owner contends the rent increase is governed by the terms of the lease and is not governed or restricted by any law or ordinance, while Weiss contends that the rent increase is governed and/or restricted by a city ordinance and that she may refuse to pay the rent increase without breaching the lease. Owner asks for a judgment declaring that Weiss is subject to the notice of change of terms increasing the rent as alleged in the complaint.

The second action, case No. BC694882, was assigned to Judge Richard E. Rico. It appears that Weiss filed a notice of related cases (although there is no such document attached as an exhibit to the petition), and Judge Mooney found that the second action and the first action were related. The second action was assigned to Judge Mooney for all purposes on April 5, 2018. On April 11, 2018, Owner filed a challenge to Judge Mooney in the second action. Judge Mooney found

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<sup>6</sup> Paragraph 6 of the lease states, in relevant part: "6. OCCUPANTS: Guest(s) staying over 14 days cumulative or longer during any 12-month period, without the OWNER'S written consent, shall be considered a breach of this agreement. ONLY the following listed individuals . . . AND NO OTHERS shall occupy the subject apartment for more than 14 days unless the expressed written consent of OWNER is obtained in advance: Amy Weiss. RESIDENT shall pay additional rent at the rate of \$100.00 per month or 25% (or the amount allowed under rent control) of the current monthly rent, whichever amount is greater, for the period of time that each additional guest in excess of the above named shall occupy the premises."

that the second action was a continuation of the first action and denied the challenge.

C. *The Petition and Alternative Writ*

Owner filed the instant petition for writ of mandate, prohibition, or alternative relief a week later. We issued an alternative writ directing court to, after notice and hearing, either vacate its order denying the challenge and enter new order granting the challenge, or in the alternative, show cause why a peremptory writ of mandate ordering it to do so should not issue. We also stayed further proceedings in the second action.

As directed, the trial court held a hearing and invited briefing from the parties regarding whether its order should be vacated. On June 8, 2018, the trial court issued its ruling, declining to vacate its order, finding once again that the second action was a continuation of the first action.

## **DISCUSSION**

“Section 170.6 permits a party to disqualify a judge for prejudice based upon a sworn affidavit without having to establish the fact of prejudice. [Citation.] If the motion is timely and filed in proper form, the trial court must accept it without further inquiry, and the disqualification is effective immediately. [Citation.] ‘As a remedial statute, section 170.6 is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the

statute absolutely forbids it.’ [Citation.]” (*Bravo v. Superior Court* (2007) 149 Cal.App.4th 1489, 1493.)

In a civil case, a section 170.6 challenge must be made within 15 days after notice of an assignment to a judge for all purposes. (§ 170.6, subd. (a)(2).) Where a second lawsuit is filed after the commencement of a related lawsuit, a section 170.6 challenge cannot be made if the second lawsuit is a continuation of the first lawsuit. (*Jacobs v. Superior Court* (1959) 53 Cal.2d 187, 190.) As the Supreme Court explained: “The question here is whether the motion was timely. Although the statute does not expressly so provide, it follows that, since the motion must be made before the trial has commenced, it cannot be entertained as to subsequent hearings which are a part or a continuation of the original proceedings.” (*Ibid.*) “A subsequent proceeding is a continuation of an earlier action rather than a separate and independent action if it involves “substantially the same issues” and “matters necessarily relevant and material to the issues involved in the [original] action.”” (*City of Hanford v. Superior Court* (1989) 208 Cal.App.3d 580, 589, quoting *McClenny v. Superior Court* (1964) 60 Cal.2d 677, 684.)

In the present case, the trial court found that the second action was a continuation of the first action because both actions “involve the same parties, the same facts, and the same legal issue to be determined by the court. The paramount question to be decided (as framed by the pleadings in both cases) is whether [Owner’s] notice of rent increase is a violation of the [RSO]. This is an issue that is material and relevant to the determination of the original action. The [second action] involves



the same issue that [Owner] raised in response to the cross-complaint, i.e., [Owner's] right to increase [Weiss's] rent notwithstanding [Weiss's] assertion that any increase would be in violation of the RSO.”

We disagree that, under that applicable legal standard, the second action is a continuation of the first. While the trial court is correct that both the cross-complaint in the first action and the complaint in the second action involve Owner's attempts to impose increases in the rent Weiss is required to pay, the basis for the rent increases in the first action is different from the basis for the increase in the second action, and thus raises different issues regarding the RSO. The attempted rent increases alleged in the cross-complaint in the first action involved charges for costs to repair the property and/or damage for which Owner asserted Weiss was responsible. In contrast, the attempted rent increase alleged in the second action involved an increase, allowed under the terms of the lease, for having an unauthorized additional occupant in the unit.

The fact that, in both actions, the trial court will be required to interpret some portion of the RSO does not mean that the second action is a continuation of the first action. In the first action, the court and/or finder of fact will have to determine (1) the circumstances under which a landlord/owner is permitted to pass on the cost of repairs to tenants in the form of rent increases; (2) whether Owner satisfied any requirements imposed by the RSO for passing on those costs; and, perhaps, (3) the validity of those costs. None of those issues is present in the second action. Instead, the issues to be resolved in the second action are (1) whether it is permissible under the RSO for a

landlord/owner to include and/or enforce a lease term that imposes a rent increase for having an unauthorized additional occupant; and (2) if so, whether Owner satisfied any requirements or conditions under the RSO for imposing such an increase.

In short, the legal and factual issues raised in the second action are distinct from the legal and factual issues raised in the first action. The resolution of one will have no bearing on the resolution of the other. Thus, we conclude that the current action -- the second action -- is not a continuation of the first action, and therefore Owner's section 170.6 challenge was timely.

### **DISPOSITION**

Let a peremptory writ of mandate issue directing respondent superior court to vacate its order denying 510PacificAve's peremptory challenge in case No. BC694882 and to enter a new order granting the challenge. The stay is dissolved. 510PacificAve shall recover its costs in this writ proceeding.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.