SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 22 | Issue 3

1971

Recent Case: Landlord and Tenant - Retaliatory Rent Increase as an Equitable Defense in an Unlawful Detainer Action [*Schweiger v. Superior Court*, 3 Cal. 3d 507, 476 P.2d 97, 90 Ca. Rptr. 729 (1970)]

Case Western Reserve University Law Review

a state would have to provide notice and a hearing before lending its coercive powers to a complaining landlord. At such a hearing, the tenant will be able to contest the validity of the landlord's claim for rent.[12] If the *Santiago* rule is extended to those states, it is likely that some will abolish the distraint remedy altogether and rely solely on post-judgment collection proceedings to avoid bearing the administrative expense of such hearings. Tenants will benefit from such an extention regardless of what course these states take because their personal belongings will no longer be exposed to sale based upon an invalid claim.

LANDLORD AND TENANT — RETALIATORY RENT INCREASE AS AN EQUITABLE DEFENSE IN AN UNLAWFUL DETAINER ACTION

Schweiger v. Superior Court,
3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

The tenant had occupied an apartment for 4 years under a month-to-month tenancy. During this period his rent had increased from $60 to $75 per month. The apartment became dilapidated, and pursuant to section 1941 of the California Civil Code (Code),[1] which requires lessors to keep leased property in tenable condition, the tenant requested that the landlord make repairs. The landlord refused and increased the tenant's rent from $75 to $125 per month.[2] The average rental for a unit in the building was between $70 and $75 per month, and no apartment in the building rented for more than $90 per month. When a lessor fails to make requested repairs within a reasonable time, Code section 1942[3] permits the lessee to make them himself, where the cost does not exceed 1 month's rent, and deduct the cost from his rent. The tenant repaired the delapidations, deducted the cost from his old rent of $75, and paid the balance to the landlord. The landlord commenced an action in the small claims court for restitution of the premises and for the balance of the increased rent. Judgment was rendered for the landlord, and the tenant appealed to the superior court for a trial de novo, seeking to assert the defense that the retaliatory rent increase violated public policy. The superior court ruled against the submis-

[12] In *Santiago*, the court's findings indicated that at least one of the tenants had a valid defense to the landlord's claim for rent. 319 F. Supp. at 288-90.

sion of such a defense, but it certified the case to the court of appeals to determine whether a tenant could defend an unlawful detainer action on the ground that his landlord increased the rent and began an eviction action against him because he had asserted his statutory right to demand repairs. The court of appeals refused to transfer the case, and the tenant applied to the Supreme Court of California for a writ of mandate to compel the superior court to hear his defense. The supreme court granted the writ and stated that if the tenant could factually establish the retaliatory motive of his landlord in instituting the rent increase or eviction action, such proof would bar the tenant's eviction.

Traditionally a landlord could terminate a month-to-month tenancy at will; the tenant could not question his motive[4] or attack his reasons.[5] Recently, however, in *Edwards v. Habib*,[6] the Court of Appeals for the District of Columbia Circuit imposed a limitation on the traditional power of a landlord to evict. In *Edwards*, a landlord attempted to evict a tenant for reporting housing code violations.

---

[1] CAL. CIV. CODE § 1941 (West 1954) 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 dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine.

Section 1929 of the Code provides: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

[2] *See* CAL. CIV. PRO. CODE § 1161 (West Supp. 1971). The *Schweiger* court stated that section 1161 implies that a landlord under a month-to-month tenancy has the unrestricted power to raise the rent for his property to any level and to evict tenants unable or unwilling to pay. The relevant provisions of section 1161 are as follows:

> A tenant of real property, for a term less than life . . . is guilty of unlawful detainer:
>
> . . . .
>
> 2. When he continues in possession, in person or by subtenant, without the permission of his landlord . . . after default in the payment of rent, pursuant to the lease or agreement under which the property is held . . . .

[3] CAL. CIV. CODE § 1942 (West 1954), *as amended*, (West Supp. 1971). Section 1942 provides:

> If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

[4] *E.g.*, DeWolfe v. McAllister, 229 Mass. 410, 412, 118 N.E. 885, 887 (1918); Wormwood v. Alton Bay Camp Meeting Ass'n, 87 N.H. 136, 175 A. 233 (1934).

[5] *E.g.*, Gabriel v. Borowy, 324 Mass. 231, 234, 85 N.E.2d 435, 438 (1959); *see* Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274 (1924).

[6] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

The court held that although the landlord could evict for any legal reason or for no reason at all, he could not evict in retaliation for the tenant's report of housing code violations to the authorities. The court reasoned that to permit a landlord to evict for such a reason would subvert the policy of the housing codes to improve substandard housing.

The conflict in *Schweiger* was between the unlimited power of the landlord to raise the rent,[7] and the policy to improve substandard housing underlying the statutory self-help remedies.[8] Before *Schweiger*, California courts recognized an equitable limitation on the powers of landlords only when the tenant's defense was constitutionally based.[9] The *Schweiger* court reasoned that the failure to recognize a reasonable limitation on the punitive power of landlords would completely frustrate the public policy expressed in the tenant self-help statutes. The effectiveness of statutory self-help remedies depends entirely upon the tenant's initiative. Housing code violations like those in *Edwards*, however, are revealed not only by tenants reporting them, but also through independent investigation by government housing inspectors. Therefore, it was even more compelling that the defense be permitted in *Schweiger* than in *Edwards*.

The dissent's position in *Schweiger* was that problems of retaliatory rent increases and evictions should be left to the legislature because it has the function of deciding important questions of public policy. The dissent noted that the legislature had acted to provide a statutory solution to the problems of retaliatory evictions and rent increases through the adoption of Code section 1942.5,[10] which was

---

[7] *See* note 2 *supra*.

[8] *See* CAL. CIV. CODE §§ 1941-42 (West 1954), *as amended*, (West Supp. 1971); notes 1, 3 *supra*.

[9] In Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962), the court held that a tenant defending an unlawful detainer action was entitled to prove that he was being evicted solely because of his race and that such proof would bar his eviction. The court reasoned that judicial enforcement of a discriminatory eviction would be state action in violation of the equal protection clause.

[10] CAL. CIV. CODE § 1942.5 (West Supp. 1971). Section 1942.5 provides:

> (a) If the lessor has as his dominant purpose retaliation against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate governmental agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services, within 60 days:
>
> (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942; or
>
> (2) After the date upon which the lessee, in good faith, has filed a written complaint, with an appropriate governmental agency, of which the lessor

to become effective less than 2 weeks after *Schweiger* was decided. Thus, the dissent reasoned that the court should address itself to the application of this legislation in future cases rather than create by judicial decree a new defense to actions for unlawful detainer. The majority, probably because the new legislation would not apply to Mr. Schweiger's case, was not persuaded by this reasoning. The majority may, however, have been influenced by a desire to provide a precedent that would be at least persuasive authority in other jurisdictions.[11]

Schweiger is significant to landlord-tenant law for three reasons. First, *Schweiger* affords a tenant protection when faced with landlord retaliation by means other than direct eviction. Second, *Schweiger* extends the application of the policy to improve substan-

---

has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

(3) After the date of an inspection or issuance of a citation, resulting from a written complaint described in paragraph (2) of which the lessor did not have notice; or

(4) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

In each instance, the 60-day period shall run from the latest applicable date referred to in paragraphs (1) to (4), inclusive.

(b) A lessee may not invoke the provisions of this section more than once in any 12-month period.

(c) Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his rights under any lease or agreement or any law pertaining to the hiring of property or his right to do any of the acts described in subdivision (a) for any lawful cause. Any waiver by a lessee of his rights under this section shall be void as contrary to public policy.

(d) Notwithstanding the provisions of subdivisions (a) to (c), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a). If such statement be controverted, the lessor shall establish its truth at the trial or other hearing.

[11] There is a third possible explanation for the majority's disregard of section 1942.5. Section 1942.5 clearly places the burden of proving an absence of retaliatory intent on the landlord if he tries to evict the tenant or raise the rent within 60 days after the tenant complains about the condition of the dwelling. Under a perfectly legitimate interpretation of that section, however, the landlord could legally evict the tenant or raise the rent after the 60 day period for an admitted retaliatory reason. If the courts interpret section 1942.5 in this manner, it will merely provide a complaining tenant with 60 days to find a new place to live. After that time he can be openly evicted for having exercised his statutory rights. Even though *Schweiger* places the burden of proof of retaliatory intent on the tenant, it gives a complaining tenant more protection than section 1942.5. Under *Schweiger*, once a tenant proves a retaliatory motive, the landlord will be unable to evict him or raise his rent until the landlord can establish the absence of such a motive.

dard housing. *Edwards* declared this policy to be the basis of a housing code. *Schweiger* extends the application of this policy to tenant self-help statutes. Under *Schweiger*, a tenant is free from landlord retailiation not only when he reports housing code violations, but also when he exercises any other statutory rights designed to help him improve his housing. Third, *Schweiger* decides an issue left open in *Edwards* by placing the burden of proving retaliatory intent on the tenant.[12]

Placement of the burden of proof of retaliatory intent on the tenant is inconsistent with the public policy, relied on in *Schweiger* and *Edwards*, to enable tenants to receive the full benefit of housing statutes.[13] Because the landlord is in the better position to inform the court of the reasons for his actions, it would have been more logical for the *Schweiger* court to place the burden of proving nonretaliation on the landlord. A third approach for allocating the burden of proof places it by reference to when the alleged retaliatory conduct takes place. For example, the Model Residential Landlord Tenant Code prohibits rent increases and evictions within 6 months after a tenant has requested authorized repairs or complained of housing code violations, unless the landlord can establish a nonretaliatory motive.[14] The recently enacted California Civil Code section 1942.5 adopts this approach and establishes 2 months as the time period for the shifting of the burden.[15]

Schweiger is the logical extention of *Edwards*, and is necessary to make the latter decision meaningful. Protection from retaliatory eviction is of little value to a tenant whose rent is doubled because he requested repairs or reported a housing code violation. The state legislatures, however, are the proper bodies to act in this area. That they have thus far failed to adequately recognize the plight of the low and moderate income tenant in today's society is exemplified by the reasoning of both *Schweiger* and *Edwards*. Both courts based their holdings on the need to avoid frustration of the policy of

---

[12] *See* Dickut v. Norton, 45 Wis. 2d 389, 399, 173 N.W.2d 297, 302 (1970), where the Supreme Court of Wisconsin, in allowing a defense of retaliatory eviction under facts similar to those in *Edwards*, expressly placed on the tenant the burden of proving retaliatory intent by clear and convincing evidence.

[13] *See* Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670, 682 (1966); Note, *Landlord and Tenants — Retaliatory Evictions*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193, 205 (1967); Note, *Retaliatiory Eviction — Is California Lagging Behind*, 18 HASTINGS L.J. 700, 705 (1967).

[14] MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407 (1969).

[15] CAL. CIV. CODE § 1942.5 (West Supp. 1971); *see* note 10 *supra*. *See also* note 11 *supra*.

existing housing legislation. Hopefully, more legislatures will begin to realize that the common law in the landlord tenant area must be *completely* replaced by legislation in order to adequately protect tenants and make decisions like *Edwards* and *Schweiger* unnecessary.