BORNSTEIN LAW

BAY AREA REAL ESTATE ATTORNEYS

Habitability issues during and after the pandemic

Substandard conditions during the age of COVID-19 can tank the ability of owners to recover possession of the unit and/or recover rent debt on the other side of the pandemic.

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A special thanks to our colleague, attorney Mandana Arjmand, for relating her own experiences and imparting thoughts on this vexing subject.

Some background is in order - our discussion

After COVID-19 reared its ugly head, landlords were in a long state of ambiguity and limbo. Governor Newsom's edicts gave local municipalities the license to enact a patchwork of temporary eviction moratoriums that were routinely extended.

With the California legislature out of session, there was a big question mark as to what branch of government would establish clear and uniform landlording rules after emergency orders were declared.

When the Governor afforded unprecedented powers to the policymaking arm of the California judiciary, this panel improvised and issued their own guidelines on evictions. Facing litigation and cogent arguments against its edicts, the Judicial Council eventually came to its senses and conceded it is not the role of the judicial branch to write law. That is the onus of the legislative and executive branch, they stated in no uncertain terms.

Sacramento lawmakers and the Governor rose to the occasion by enacting Assembly Bill 3088, a bill we cover extensively here. Many cash-strapped owners who have suffered a loss of rental income look forward to the springtime of 2021 to transition out non paying tenants out of the rental unit.

Bornstein Law cautions landlords that it's entirely possible that on the other side of the pandemic, tenants who have not paid their rent and/or fulfilled other obligations under the lease, will claim that there were habitability issues in the rental unit that justifies the nonpayment of rent.

For many landlords, this is a Catch-22. Rental property owners need rental income in order to make necessary repairs and keep the property in habitable condition. What is to give? The impetus to this white paper.

California's implied warranty of habitability applies in every season.

There is **no** edict from **any** government agency in response to COVID-19 that alters the core responsibility of landlords to provide a safe, sanitary and secure rental unit.

With fear of contagion by landlords, tenants, and contractors alike, we have to prioritize maintenance requests. Now is not the time to make cosmetic improvements or rush to make non-essential repairs.

Instead, we have to compartmentalize between repairs that are critical and those that can wait.

Bare minimum requirements:

- ❖ Effective waterproofing and weather protection of roof and exterior walls.
- ❖ Well-maintained plumbing and gas facilities compliant with law in effect at the time of installation.
- ❖ Water supply compliant with applicable law that is capable of producing hot and cold running water.
- ❖ Well-maintained heating facilities compliant with applicable law at the time of installation.
- ❖ Well-maintained electrical lighting compliant with applicable law at the time of installation.
- ❖ Building, grounds and apparatuses kept sanitary and free from debris and vermin at the time of rent or lease.
- ❖ Sufficient number of receptacles for garbage
- ❖ Well-maintained floors, stairways, and railings.
- ❖ Locks conforming to code.

Key takeaways

- ➢ We fully expect that savvy tenants' attorneys will assert that the nonpayment of rent is justifiable because of inhabitable conditions that remained during the pandemic. Substandard conditions will quite plausibly be used as an affirmative defense in unlawful detainer actions.
- ➢ Please document all communications with tenants with regard to repair requests, complaints, and maintenance that was actually performed.

Wrongful eviction coverage

Bornstein Law has always advised rental property owners to obtain wrongful eviction insurance policies because typically, a standard homeowners policy does not anticipate lawsuits that can arise from disgruntled tenants who claim they have been improperly displaced. These tenants have an abundance of free legal counsel to air out their grievances, while landlords do not.

We feel the possibility of being sued is even greater come the springtime of 2021, when some landlords will hastily rush to evict a tenant without following proper protocols.

We are not talking about “self-help” eviction measures like shutting off utilities and so forth - this is an aberration and gives all landlords a bad name.

However, we can say with a certainty that without proper counsel, there will be missteps by over exuberant property owners who understandably want to regain control of their property, and this means a heightened risk for a lawsuit when corners are cut. With the assistance of a savvy tenants’ attorney, a renter who claims he or she has been improperly displaced can initiate a lawsuit, the likes of which are proliferating in the Bay Area and can easily carry the price tag of six figures.

What Bornstein Law wants you to do now is get the coverage, and be mindful of the property - do not allow it to atrophy. Make essential repairs as delineated above, and if the tenant obstructs access for maintenance personnel, document it. Claiming the unit is not in habitable condition is a favorite gambit of tenants’ attorneys, and we want to be able to tell a competing narrative.

Habitability issues can equate to service reductions

It is well established in rent-controlled jurisdictions that a reduction in housing services and amenities can quite possibly entitle tenants to a proportional reduction in rent.

When a tenant inks a lease, they have certain expectations. Though the list is not exhaustive, think:

- Repairs
- Replacement
- Maintenance
- Painting
- Light
- Heat
- Water
- Elevator service
- Laundry facilities and privileges
- Janitor service
- Refuse removal
- Furnishings
- Telephone
- Parking, and other privileges or facilities.

Once again, the outbreak of COVID-19 does not inhibit the tenant from going in front of the rent board and making their case that the rent should be lowered because he or she has been deprived of services embedded in the lease. It's important to note that the landlord cannot sever certain services without a "just cause," because they are so crucial.

For landlords and property managers who want to temporarily restrict certain services or amenities in the interest of health and safety of residents, please contact an attorney first to evaluate the repercussions.

As for maintenance, we revert back to our earlier point that we need to compartmentalize between those repair requests that are essential, and requests that do not impact habitability.

As a sidebar, other things being equal, Bornstein Law does not want you to lower the base rent, but to document and carry rent debt.

For example:

Rent is $1,000
Tenant pays $750

Our advice might be to accept the $750 and make it clear that the remaining balance of $250 is deferred, not waived. We want to make it clear that we are not lowering the base rent. Any permissible future rent increases will be pegged on this base rent.

Failure to gain access

Civil code 1954 spells out the permissible reasons a landlord can enter the premises:

- In the case of an emergency;
- To make necessary or agreed on repairs, decorations, alterations, or improvements;
- To supply necessary or agreed services;
- To show the dwelling unit to prospective or actual purchasers, mortgagees, residents, workers, or contractors;
- To make an inspection pursuant to subdivision (f) of Section 1950.5 of the California Civil Code, if requested by the tenant;
- To repair, test, and/or maintain smoke or carbon monoxide detectors as allowed by Health and Safety Code Section 13113.7 and 13260;
- To inspect a waterbed for compliance with the installation requirements of Civil Code 1940.5;
- When the resident has abandoned or surrendered the premises; or
- Pursuant to a court order

Unlike Ralph Furley and Stanley Roper from the endeared Three's Company sitcom, however, the landlord cannot show up unannounced and catch the tenant in an embarrassing moment - proper notice must be given.

Even with proper notice, however, many tenants will refuse to grant access to the rental unit and go through great lengths to conceal something. While this would ordinarily be a "just cause" reason to evict, we do not recommend proceeding with an unlawful detainer on these grounds during a pandemic. One, the courts are congested. Two, tenants may have legitimate fears of contagion.

> **Instead, we want you to document all correspondence and attempts to gain access to the unit so you have evidence if a dispute arises.**

Tenant's argument	**Landlord's argument**
Landlord failed to maintain the unit in habitable condition. Rent is not owed. Access denied for fear of getting infected by a repairman.	Several attempts were made to gain access to effectuate repairs, informed tenant that proper protocols like PPE and cleaning would be followed.

So what we have in law are competing narratives. If the tenant asserts that the unit was not in liveable condition, we want to provide a competing narrative that the tenant obstructed attempts to bring the unit up to liveable condition. It may ultimately be up to a judge to decide which argument prevails.

Recovering rent debt

Habitability issues can also impede the landlord's ability to recover rent debt in small claims court or Superior Court. Under Assembly Bill 3088, tenants with a COVID-related financial hardship generally have until January 31, 2021 to pay at least 25% of total rent debt that has accrued. The remaining balance of the rent owed is then converted into consumer debt recoverable in civil court.

Two-pronged strategy to recovering rent debt, but habitability issues may be present issues

If a tenant owes rent accrued during the pandemic, and also owes post-COVID rent, our offices can simultaneously file a 3-day notice to pay rent or quit and a civil action to recover rent debt. This gives us the best leverage to capture all of the debt or an opportunity to enter into a discussion about a tenant buyout agreement.

> **If there are habitability issues that haunt the landlord, one strategy might be waiving 75% of the rent due and demand the 25% of total rent owed the tenant is obligated to pay under law to avoid a nonpayment of rent eviction action.**

Using tenant buyout agreements to preempt any habitability concerns

Our office has always been strong proponents of tenant buyout agreements, and these negotiated agreements can be even more attractive when there are conditions in and around the rental property that can be deemed inhabitable.

We know that typically, when there is a voluntary vacancy, rents can be raised and a vacant building will sell for more than a building that is tenant-occupied. With an ethical, compliant and enforceable buyout agreement, owners can avoid any claims down the road that the unit was not habitable.

A vacant unit also presents a unique opportunity for the owner to renovate and bring the unit up to habitable condition. We know that except for health and safety issues, tenants cannot be transitioned out of the unit for the landlord to make repairs. So when a tenant agrees to voluntarily vacate in exchange for compensation, a rent waiver, or return of the security deposit can be ideal when there are inhabitable conditions, and especially when the tenant is not paying rent.

Parting thoughts

Imagine the unthinkable. Tenants who have not been paying rent for months on end during COVID-19 could conceivably get away with nonpayment long after the pandemic ends when he or she or a savvy tenants' attorney claims there were inhabitable conditions in the unit.

> **The landlord's obligation to keep the rental unit in habitable condition is immutable. Landlords should not be lackadaisical about making repairs when tenants have not been paying rent and understand that the unit must be kept habitable irrespective of payment status.**

Bornstein Law wants you to think smartly and strategically about this and hopefully, we have given you some considerations. Certainly, this is no substitute for a one-on-one consultation and we invite you to reach out to our offices.