

Including Late Fees May Render Eviction Notice Defective

In the recent decision of *Del Monte Properties v. Dolan*, the Superior Court's Appellate Division ruled that late fees in a notice of eviction were invalid liquidated damages, thereby rendering the notice defective, and causing the defendant Tenant to prevail at the unlawful detainer trial.

In *Del Monte*, the 3-day notice to pay rent or quit demanded rent in the correct amount of \$600, as well as a late fee in the amount of \$50, for a total of \$650.

The notice was based on a lease that contained a fairly common provision for charges for late payments and returned checks, as follows:

"6. Late charge; returned checks:

A. Tenant acknowledges either late payment of Rent or issuance of a returned check may cause Landlord to incur costs and expenses, the exact amount of which are extremely difficult and impractical to determine. These costs may include, but are not limited to, processing, enforcement and accounting expenses, and late charges imposed on Landlord. If any installment of Rent due from Tenant is not received by Landlord within 5 calendar days after the date due, or if a check is returned, Tenant shall pay to Landlord, respectively, an additional sum of \$50.00 as a Late Charge and \$25.00 as a NSF fee for the first returned check and \$35.00 as a NSF fee for each additional returned check, either or both of which shall be deemed additional Rent.

B. Landlord and Tenant agree that these charges represent a fair and reasonable estimate of the costs Landlord may incur by reason of Tenant's late or NSF payment. Any Late Charge or NSF fee due shall be paid with the current installment of Rent."

At the unlawful detainer trial, witnesses testified about the late fee, and the court found in favor of the Landlord. It ordered the lease forfeited, awarded possession of the premises to the Landlord, awarded damages for "past-due rent" of \$650, and holdover damages of \$140, for a total judgment of \$790.

On appeal, the Tenant argued:

1. The 3-day notice cannot support a judgment for unlawful detainer because it contained a demand for an invalid late fee which is prohibited by California Civil Code §1671; and
2. The late fee cannot be justified as liquidated damages because the losses caused by late payment of rent were not extremely difficult or impractical to determine, and Landlord failed to show that the amount of liquidated damages charged were the result of a reasonable endeavor to approximate those losses.

In considering the first argument, the Appellate Court considered late fees as liquidated damages, and recognized that the proponent of a liquidated damages provision in a

residential lease bears the burden of proving its validity under Civil Code §1671. While presumptively invalid, liquidated damages may be imposed when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage caused by a breach. (Civil Code §1671(d).)

The parties may agree upon an amount that shall be presumed to be the amount of damage sustained by a breach. (Civil Code §1671(d).)

However, Courts will look beyond the language of the contract to determine the actual circumstances of a liquidated damages clause. The parties agreement to an invalid liquidated damages clause does not insulate it from attack under Civil Code §1671.

The losses caused by the late payment of residential rent are limited to interest and administrative costs of collecting and accounting for the late rent. Landlord failed to prove that the actual losses caused by late payment of rent were extremely difficult or impracticable to determine. Moreover, an agreement of the parties to the term setting the amount is not enough.

At trial, Landlord testified about the types of losses caused by late payment of rent, but it was little more than a reference to the language of the lease. Landlord did not articulate specific facts showing why the circumstances of this case justify liquidated damages to compensate losses caused by late payment.

Because Landlord failed to meet its burden to show that the losses caused by late payment of rent were extremely difficult or impracticable to determine, liquidated damages were not justified under Civil Code §1671.

As a separate and independent basis for finding the eviction notice defective, Landlord failed to meet its burden to show that the late fee was the result of a reasonable endeavor to approximate actual losses caused by late payment of rent.

To be valid under Civil Code §1671, a liquidated damages clause must be the result of a reasonable endeavor to approximate actual losses caused by the breach that is being compensated. Setting the liquidated damages to a percentage of the contract price demonstrates a purpose other than compensating losses. Some analysis of actual losses is required prior to setting the amount. Post-hoc rationalization will be rejected.

Landlord did not show the late fee passes the reasonable endeavor test. First, Landlord admitted at trial that the \$50 late fee was set at a percentage of the contract price.

Second, Landlord admitted at trial that Landlord never attempted to calculate the amount of losses caused by the late payment of rent. If no effort was made to estimate the actual losses, then the resulting fee cannot approximate the losses.

A 3-day notice that overstates the amount of rent owed does not support an unlawful

detainer, and is fatal to an unlawful detainer complaint. The notice upon which the complaint was based was defective because it included an invalid late fee, and it can not support a judgment for unlawful detainer.

Therefore, the Tenant won round one of the dispute because of the late fee of \$50 in the 3-day notice.

LESSONS:

1. A provision in a residential lease for charging late fees will be given careful consideration by the Court, and it may be prudent to limit the claim for damages in a 3-day notice to the unpaid rent.
2. If a party insists on requesting late fees, it may be necessary to articulate specific facts showing why the circumstances of the case justify liquidated damages to compensate for losses caused by the late payment.
3. The Landlord should not lose sight of the main goal of an unlawful detainer action which is to restore possession to the Landlord, and including a demand for insignificant late fees in the 3-day notice is an unnecessary risk to the entire case.
4. A Tenant may be able to defeat the Landlord at trial if the 3-day notice was defective by including a late fee claim that cannot be supported, but as the Landlord can re-file the action based upon a corrected notice, a Tenant may benefit more by raising the issue to make a settlement.