

Question 6

Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease.

Donna and Perry signed a two-year lease that provided, in part: "Lessee may assign the leased premises only with the prior written consent of Lessor."

Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, "I'll just make sure not to run the water when you are in the shower."

Perry soon adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her. Perry replied: "Too bad; that's my diet now."

After constantly smelling the cheese for three weeks, Donna decided to move out and to assign the lease to a friend who was a wealthy historian.

Donna sought Perry's consent to assign the lease to her friend. Perry refused to consent, saying, "I've had bad experiences with historians, especially wealthy ones." Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs.

After two weeks of worrying about taking a shower for fear of being scalded and with the odor of cheese still pervasive, Donna stopped paying rent, returned the key, and moved out. At that time, there were twenty-two months remaining on the lease.

Perry has sued Donna for breach of the lease, seeking damages for past due rent and for prospective rent through the end of the lease term.

What defenses may Donna reasonably raise and how are they likely to fare? Discuss.

QUESTION 6

Answer A

As set forth below, Donna can raise the following defenses (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

1. Material Breach of Lease.

Tenancy for Fixed Term.

A fixed term tenancy is a pre-agreed term by the landlord and tenant.

Here, Donna and Perry signed a "two-year lease." As such, the term of the lease is fixed at two years.

Therefore, Donna is obligated to pay rent for the full two years of the lease, unless otherwise excused.

Duty to Repair.

Generally, a tenant has a duty to keep the premises in good order and repair, unless otherwise agreed to by the parties. The landlord, however, has a duty to repair common areas of use.

Here, there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. The leased premises is [sic] part of Perry's home. It is not a separate apartment, did not have separate plumbing or other utilities. Even if Donna wanted to fix the problem herself, she would have not have the ability to do so since she did not lease or control the areas of the home that were the source of the

problem. Perry controlled these items. The plumbing was, in essence, a common area under Perry's control.

Therefore, Perry, as landlord, had the duty to repair the plumbing issue and breached his duty to Donna by failing to repair it.

Duty re Nuisance.

A landlord owes a duty of quiet enjoyment to his tenant, including the abatement of nuisances to the extent within his control. A nuisance is something that would be offensive to a person of ordinary sensibilities.

Here, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. She was perfectly willing to assign the lease to her friend the wealthy historian - who would have been subjected to the same smell. A friend would not do this to a friend, unless she knew that the problem with the smell was due to her being ultra-sensitive to that particular cheese. As such, this ultra sensitivity does not arise to the level of being a nuisance.

Therefore, Perry did not breach his duty to Donna by failing to stop eating the cheese.

On the other hand, however, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior.

Therefore, Perry did breach his duty to Donna by deliberately running the water while she took a shower.

Duty to Pay Rent Despite Material Breach.

At common law, a tenant's duty to pay rent is not relieved by the landlord's material breach of lease. Modernly, a material breach of lease that goes to habitability relieves the tenant's obligation to pay rent.

Here, Perry breached the lease by failing to repair the plumbing. He further breached it by deliberately running the water each time she took a shower. Nevertheless, Donna still owed a duty to pay rent to Perry, despite the breach. Under modern statutes, however, Donna will likely be relieved of the obligation to pay rent because the breach went to her use, enjoyment, and habitability of the leased premises.

Conclusion re #1 Breach of Lease.

As such, Perry breached the lease by failing to repair the plumbing. Therefore, Donna can reasonably raise this as a defense and is likely to succeed.

2. Constructive Eviction.

A landlord owes a duty of quiet enjoyment to his tenant. In the event of (a) a substantial interference with the use and enjoyment of the premises, the tenant may (b) give notice to the landlord, and (c) leave the premises, thereby being excused from any further obligations under the lease.

Here, re (a) there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. What's more, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior. Not being able

to take a shower in your own apartment is a substantial interference with the use and enjoyment of the apartment.

Therefore, element (a) is met.

Here, re (b) Donna had notified Perry about the problem. At first he said he would simply not run water while she took a shower. However, in the end, he did so deliberately. As such, Perry had notice of the plumbing problem.

Therefore, element (b) is met.

Here, re (c) after two weeks with no shower, she turned stopped paying rent, returned the key and moved out.

Therefore, element (c) is met.

As such, elements (a), (b), and (c) are met. Therefore, Donna is relieved of her obligations under the lease through Perry's constructive eviction.

Conclusion re #2 Constructive Eviction.

Therefore, Donna can reasonably raise a defense of constructive eviction and is likely to succeed with this defense.

3. Breach of Warranty of Habitability.

A landlord of residential property, which includes commercial in California, owes a duty to his tenant to keep the premises fit for normal habitation. This duty is breached when the landlord fails to fix a condition that impacts the habitability of the premises or violates building codes.

Here, Donna was being scalded each time she took a shower. This started out being an unintentional problem, but grew into an intentional problem when Perry used the defect to intentionally annoy Donna. In the end, Donna was unable to take a shower at all for fear of being burned or scalded. The plumbing issue is likely a building code violation as well. Building codes typically set standards for the temperature of water coming from hot water heaters to avoid burning and scalding, as was happening here. Nevertheless, Perry refused to fix it.

Here, regarding the cheese, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. It does not go to the building code or other habitability issues.

Therefore, Perry breached his warranty of habitability to Donna by failing to fix the plumbing.

Remedies for breach of warranty of habitability.

When a breach of the warranty of habitability occurs, a tenant has several options; the tenant can (a) stay in the premises, deduct rent and repair the issue, (b) stay in the premises and abate rent until the issue is repaired, or (c) stop paying rent and move out.

Here, Donna chose option (c). She stopped paying rent, returned the keys and moved out. Therefore, she is relieved from any further obligation under the lease.

Conclusion re #3 Breach of Warranty of Habitability.

Therefore, Donna can reasonably raise a defense of breach of warranty of habitability and is likely to succeed with this defense.

4. Failure to Mitigate damages.

A landlord has a duty to mitigate his damages in the event of a breach by the tenant.

Here, Donna tried to find another solution for Perry. She wanted to move out and assign the lease to her wealthy historian friend. The lease required consent for this assignment, and Donna was seeking such consent. However, Perry decided he really did not want to live with a wealthy historian because of his prior bad experiences with them. Due to the nature of this [sic] leased premises, that it was a part of Perry's actual home that required the sharing of space, it is not necessarily unreasonable for Perry to be a little picky about this. Nevertheless, Perry did not even agree to meet with the wealthy historian. Being wealthy and [a] historian does not automatically place someone in an annoying class. Perry's prior experience was probably on a personal level with an individual and had nothing to do with him being a wealthy historian. Perry should have, at a minimum, met with the person, interviewed him, sought references, and otherwise done his due diligence before turning down the opportunity. By failing to do this, he failed to mitigate his damages.

Mitigation as limitation on damages.

A landlord has a duty to use reasonable efforts to re-let the premises. Damages will be reduced by an amount found [that] could have been reasonably avoided.

Here, no, after Donna has left the premises, Perry is under a continuing duty to mitigate his damages by using reasonable efforts to re-let the premises. He must advertise it and seek a reasonable replacement for Donna. Perry is not automatically entitled to full rent for the remaining 22 months without first trying to re let the premises. He already knows at least on [sic] prospective tenant — the wealthy historian — who would take Donna's place.

Therefore, Perry's award for damages, if any, will be reduced by the amount that is shown could have been avoided by mitigating his damages.

Conclusion re #4 Failure to Mitigate.

Therefore, Donna can reasonably raise a defense for failure to mitigate damages and is likely to succeed — at least in part — on this defense.

Overall Conclusion.

In conclusion, Donna can raise the following defenses: (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

QUESTION 6

Answer B

Statute of Frauds

A contract which cannot, by its terms, be completed or fully performed within one year must be in writing in order to be enforceable. Furthermore, a contract conveying an interest in land must be in writing in order to be enforceable. In order to satisfy the statute of frauds, a contract that comes within its purview must be signed by the party to be bound. Here, Donna and Perry have entered into an agreement to lease the second story of Perry's home for two years. Donna has "signed" the lease, meaning it must have been in writing, and she is the party to be bound. Therefore, the statute of frauds will not be an effective defense to enforcement of the contract against Donna.

Valid Assignment

If Donna validly assigned the lease to her friend, then she would only be secondarily liable based on privity of contract with the original lessor, Perry. The original lessor must seek payment from a valid assignee before seeking payment from the assignor.

Lack of Privity of Estate

If the assignment from Donna to her friend is valid, then privity of estate is destroyed between Perry and Donna. However, privity of estate is not required if there is privity of contract between the landlord and previous tenant. Therefore, the lack of privity of estate will not protect Donna from a lawsuit following a valid assignment because, as the original lessee, she still has privity of contract with Perry.

Restriction on Alienation/Assignment

Restrictions on alienation of property are disfavored. As a consequence, lease clauses restricting a tenant's right to assign or sublease will be strictly construed. For example, a prohibition on assignment absent consent will not prohibit sublease without consent and vice versa. Here, the lease prohibits assignment without consent and would not bar sublease. However, Donna sought to assign her interest to her friend. The language is not controlling. The difference between assignment and sublease is whether the whole remainder of the term is conveyed to the new tenant. If the whole remainder of the lease term is conveyed, then the transfer is an assignment. If only part of the remaining term is conveyed, then the transfer is a sublease. Here, Donna sought an assignment.

Landlord's Unreasonable Refusal to Consent to Assignment

Under the terms of the lease, an assignment requires the landlord's prior written consent. Donna sought Perry's consent and he refused because he had "bad experiences with historians, especially wealthy ones." Donna may argue that Perry's refusal was unreasonable and that the assignment should be valid.

In residential leases of a single family dwelling, a landlord's refusal of consent need not be reasonable so long as it is not based on an unlawful form of discrimination--such as race. In commercial leases or residential leases for large apartment complexes, most jurisdictions require the landlord's refusal to be objectively reasonable, but not so with small residential leases such as the second story of Perry's home. Perry discriminated on the basis of Donna's friend's occupation and wealth which are not unlawful bases. Therefore, Perry's refusal is permissible and Donna will not be permitted to avoid liability by assigning her lease to her friend.

Implied Warranty of Habitability

Every residential lease contains an implied warranty of habitability which requires the leased premises to be fit for basic human dwelling. Housing code violations and serious problems such as lack of heat in a cold winter, lack of running water, flooding, etc. would constitute violations of the implied warranty of habitability. A tenant has several

options when the implied warranty of habitability has been violated. After giving the landlord reasonable notice, the tenant may repair the problem and deduct the cost from rent payments, may repair the problem and sue for the cost in damages, may remain in possession and sue for damages, or may move out and avoid liability for the remaining rent. Here, Donna wishes to move out which she may do if the alleged violation is sufficiently serious.

Stinky Cheese

The smell of Perry's cheese, though annoying and nauseating, is probably not enough to make the leased premises unfit for basic human dwelling. If Donna's nausea is so severe that the smell constitutes a health risk to her, then her claim would be significantly strong, but that does not appear to be the case here.

Hot Shower

The hot shower water definitely constitutes a safety hazard, but may not, by itself, be enough to make the premises unfit for basic human dwelling. This is a close call. In conclusion, Donna will probably not be successful on a claim for violation of the implied warranty of habitability. She has a strong claim for constructive eviction anyway.

Constructive Eviction

If, by a landlord's act or omission, a tenant is constructively evicted from premises, then the tenant is relieved of any obligation to pay rent. In order to satisfy the requirements for a constructive eviction, there must be (1) substantial interference with the tenant's use and enjoyment of the leased premises, (2) reasonable notice and time to fix or repair, and (3) tenant must vacate within a reasonable amount of time.

(1) Substantial Interference

Meanness--"Too bad; that's my diet now"

As a landlord, Perry is very mean and refuses to express any concern for Donna's comfort. Just because a landlord is mean does not constitute substantial interference with a tenant's use or enjoyment of her property. Therefore, Perry's meanness will not be sufficient to satisfy the substantial interference requirement.

Landlord's Duty to Repair--Hot Shower

A landlord generally does not have a duty to repair defects in leased premises with several exceptions such as a duty to keep common areas reasonably safe and a duty to make safe furnished, short-term leased premises. If there is a risk of serious harm from a latent defect inside leased premises on a long-term lease, however, a landlord has a duty to repair the problem. The tenant must give the landlord notice of the problem. If the tenant gives notice and the landlord refuses or fails to repair the defect, then the landlord has violated his duty. Here, Donna faces a serious latent defect by virtue of the shower being so hot that it could seriously burn her. She notified Perry and Perry refused to repair. He took steps to avoid injury (at first) by "mak[ing] sure not to run the water when [Donna was] in the shower," but he did not repair the defect. This omission, in the presence of a duty to repair, may constitute a substantial interference provided that the risk of injury is sufficiently high.

Retaliation--Hot Shower

A landlord must not retaliate against tenant for complaints or requests made under the lease. Here, Donna merely sought Perry's consent to assign the lease to her friend. Perry refused and, thereafter, deliberately ran the water downstairs to make Donna's shower dangerously hot. This intentional, bad-faith retaliation for requesting to assign her lease to another constitutes substantial interference with Donna's use and enjoyment of the premises because it created a significant risk of injury to her.

Nuisance--Stinky Cheese

A private nuisance is any substantial interference with another person's use and enjoyment of property to which they have a right to possession. Whether an alleged nuisance constitutes substantial interference is an objective question. If the plaintiff is deemed ultra-sensitive, she will not recover because the interference is not objectively substantial even if it is substantial subjectively. Whether the stinky cheese is a substantial interference is a question of fact for the trier of fact at trial. Depending on the severity of the odor, a reasonable person may find that stinky cheese odor constitutes substantial interference. Therefore, Donna may satisfy the substantial interference requirement based on the stinky cheese as well as the retaliation.

(2) Notice

Donna gave Perry notice of the problems with the shower and the stinky cheese as evidenced by Perry's recognition of her complaints. Donna gave Perry a total of five weeks to resolve the problems about which she complained. Perry refused to resolve the issues. Therefore, the notice and time to repair requirements are satisfied.

(3) Vacate

Donna moved out of the premises and returned the keys in a timely manner.

Conclusion--Constructive Eviction Satisfied

Based on the foregoing, Donna has satisfied the requirements for constructive eviction and will not be liable for past due or future due rent for the remainder of the lease. She is not liable for past due rent because she stopped paying at or after the time the constructive eviction arose--namely, when Perry started retaliating after already refusing to repair the hot shower. She is not liable for future rent because she has been constructively evicted and moved out by that time.

Absence of Equitable Defenses

Perry may claim equitable defenses such as laches or unclean hands, but Donna moved out timely and did not have unclean hands. Rather she demonstrated good faith by giving notice and returning the keys and moving out in a peaceable fashion.

Duty to Mitigate/Avoidable Consequences

Even assuming that Donna moved out wrongfully, when a tenant wrongfully vacates premises, the landlord has three options (1) treat the tenant's vacation as a voluntary surrender and accept without demanding further rent, (2) re-let the premises [to] someone else as an act of mitigation and sue the tenant for the unpaid rent, (3) only in a minority of jurisdictions, ignore the tenant's act and sue for damages for past and future due rent. As a general/majority rule, and the rule reflected in the second option, a landlord must attempt to re-let premises in order to obtain damages that would otherwise be considered avoidable. Any damages that could reasonably have been avoided by mitigation will not be awarded to the landlord.

Here, Perry attempted to hold Donna liable for the entire twenty-two months remaining on the lease. None of those money damages are recoverable because Perry could reasonably have avoided those damages by leasing the premises to Donna's friend.

Conclusion

Donna has successful defenses based on constructive eviction and failure to mitigate damages.