

# **JULY 1999 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS**

## ***Real Property***

### **QUESTION**

Since the early 1960s, Artist has had a year-to-year lease of the third floor of a small loft building which, like most buildings in the area, has mixed commercial and light manufacturing uses. Artist has used her space, as other local craftspeople have used theirs, for both residential and studio purposes. She has enjoyed the serenity of her unit and the panoramic views of the distant hills and of the nearby park to which she has had easy access.

In July 1998, Landlord rented a lower floor of the building to Machinist, whose operations are extremely noisy. Artist's complaints about the noise to both Machinist and Landlord have been to no avail.

At about the same time, Developer began building a large office tower nearby which will block Artist's view when completed. The office building will provide needed employment for the community.

The State Power Department, a State governmental agency, has also begun construction of electric and communications lines for Developer's office building. For the next several years the State Power Department construction will block a path across an undeveloped lot which separates Artist's neighborhood from the park. The path has been regularly used for many years by Artist and other neighborhood residents because the only other access to the park is by a much longer circuitous street route.

1. What are Artist's rights and remedies, if any, against Landlord, Machinist and Developer? Discuss.
2. What are Artist's rights and remedies, if any, against the State Power Department for blocking the path? Discuss.

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### **ANSWER A**

#### **Artist vs. Landlord**

Artist has a periodic tenancy with landlord, which is a repeating estate that continues until valid notice is given by either party.

Landlord owes his tenant several duties, breach of which gives rise to a claim by tenant for damages.

#### **Warranty of Habitability**

Where property is being used for residential purposes, the landlord has a duty to make sure that such property is suitable for residence. Additionally, a minority of jurisdictions have extended this warranty to commercial spaces requiring the premises to be reasonably suited for commercial purposes.

Here, landlord probably knew that Artist used her space for both residential and studio purposes. Many other crafts persons in the area use their space as live-work space. In addition, this building had a loft. The facts give rise to notice of to the fact that the premises were being used as residential space.

As such, landlord's lease of the lower floor to Machinist breached the warranty of habitability because the loud noises produced by Machinist make the space unfit and unsuitable for residential purposes.

Where a tenant alleges breach of the warranty of habitability, she has the right to stay and sue for damages due to her loss of use.

Here, Artist can sue landlord for money damages. She will likely prevail if she can show that landlord knew or should have known that the premises were being used for residential purposes. (She may also assert for each of this warranty even if the landlord did not know of the residential use if the jurisdiction follows the minority view and finds that the lease to Machinist made her premises unsuitable for commercial purposes. This is a weak argument, however, because the noise probably does not diminish her ability to use the space for commercial purposes.)

#### **Warranty of Quiet Enjoyment**

A landlord also has a duty to permit the tenant to enjoy the premises. This warranty can be breached by total or partial physical eviction or by constructive eviction.

Here, Artist may argue that the action or landlord constructively evicted her because he leased the lower premises to Machinist and knew that such lease would make her premises unusable.

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A tenant has the right to seek damages for constructive eviction where she vacates in a reasonable time. Here Artist has not yet vacated. Indeed, the problem with the noise has been going on since 1998 - for an entire year.

Moreover, landlord will argue that he did not cause any loss of use but rather that the activity causing any "constructive eviction" is caused by Machinist who is a third party. This argument is weak because Machinist would not be on the lower floor if landlord had not leased the lower premises to Machinist in the first place.

In sum, Artist can sue landlord for breach of the warranty of habitability and get damages for her loss of use. Note that her damages will probably not be reduced for any failure to mitigate because she has been asking landlord and Machinist to stop the noise.

She may also have a claim for damages for constructive eviction measured by her loss of use. This is a tenuous argument because she has not vacated as is usually required by this doctrine.

### Artist vs. Machinist

Artist will seek an injunction and/or damages against Machinist based on nuisance.

### Nuisance

An action for private nuisance lies where defendant has substantially and unreasonably interfered with plaintiff's use and enjoyment of her property.

Here, Artist's claim is based on the extreme noise that Machinist's operations produce.

An interference is substantial if it is irritating, annoying or agitating. Here, the noise is loud. Although the amount of time the noise continues is not known, it is likely constant throughout the work day and may be even at night. As such, the noise is adequate to be considered a substantial interference.

An interference is unreasonable if the utility of defendant's activities does not outweigh plaintiff's rights to use and enjoy her property. Here, Machinist's use is likely unreasonable because the area is used for light manufacturing and commercial use. The fact that Machinist's activities create such noise suggest that it is involved in heavy manufacturing as opposed to light. In addition, depending on what Machinist is manufacturing may also be determinative on the unreasonableness of the use. Machinist's use is sufficiently unreasonable to satisfy this point of the test.

### Remedies for Nuisance

#### Damages

Artist may be able to get damages for the loss of value of her property if she is unable to get equitable relief in the form of an injunction.

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Injunction

In order to get injunctive relief to stop the nuisance, Artist must show several things:

a. Inadequate Remedy at Law

Artist's remedy at law (damages) maybe inadequate because the damages will not make her whole. She is suffering continuous and irreparable injury due to the continuous nature of Machinist's activity. Her remedy at law is inadequate.

b. Property Right

Traditionally courts have required a property right to enforce an injunction. Artist has a lease which is a property right sufficient for equitable relief.

c. Feasibility

An injunctive order is feasible here because the court can grant a negative injunction which would require that Machinist stop making noise. Moreover, such an order would not require excessive suspension by the court because Artist can police the injunction and seek enforcement by civil contempt.

d. Balancing of Interests

The court will balance the interests of plaintiff and Machinists. Here, Artist had a right to use her land without interference from Machinist.

Nevertheless, the court will look to the utility of Machinist's use, as well as the number of people it employs and other elements of the broad impact of defendant's activities. Here it is likely that Machinist does not employ many people because it is only located on one floor of a small building. Hence, permitting injunctive relief will not have too broad of an effect.

e. Defenses

Machinist will claim that Artist waited too long to assert her claim (laches) find is therefore barred from relief.

Here, laches would probably be inapplicable because Artist was trying to get Machinist to stop making the noise informally.

Abatement by Self-Help

Artist can also seek to abate this nuisance by self-help. This would be difficult to do without risking a claim against her by Machinist.

Artist v. Developer

Artist will seek an injunction against Developer for nuisance as well. (Note that Artist may try to seek an easement for view and light, but those are generally not recognized by the court.)

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### Nuisance

Developer's use is a substantial interference because it blocks the view of plaintiff. Nevertheless, it may not be an unreasonable use because Developer's land was likely zoned for an office building and it will provide employment to the community. It is unclear if the conditions in the neighborhood have changed. If they have, this is more evidence of the reasonableness and utility of Developer's use.

### Injunction

As stated above, Developer's use will have a continuing and irreparable effect on plaintiff's property. As such, the damages or remedy at law is inadequate.

The Lease is a property right.

An injunction here may be feasible because the court could order Developer to cease building the office tower.

Nevertheless, injunctive relief will likely not be granted because the utility of Developer's use will tip the balance in its favor. Here, developer will be providing needed employment and a tax base to the community. As such, the balance favors developers and an injunction will not be granted.

### Damages

Damages may be awarded for Artists loss of use or the diminution in value of her loft due to the reduced view.

### Artist vs. State Department

Artist will seek to have an injunction granted against State Department based on a prescriptive easement to use the land or damages based on a taking of private property for public use.

### Easement

The requirements are: an adverse use that is open and obvious without the owner's permission for the statutory period (usually 20 years).

Here, it is unclear whose land is being used but Artist and the neighbors may claim that their continued use since the 1960's was open and obvious by the used path. Further, they will argue that they used the land without the owner's permission.

Artist's easement, if it was ever created, can be terminated by condemnation. Here, State Department will argue that installation of the power lines is condemnation that terminates any easement, if any, there were.

Additionally, if the vacant land is owned by the government in the first place, there can be no easement by prescription or adverse possession.

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### Taking

Artist will also claim that she is owed damages for the taking of private property for public use without just compensation.

Here, it is unclear if it was private property and even if it was, the owner, not the users thereof would receive the compensation.

There should be no damages or injunction awarded.

### **ANSWER B**

Question 1:

#### Landlord:

Tenant's Interest: Artist has a year-to-year lease on property. The lease may be for residential use if the landlord knew that the tenant was using the premises as not only a work studio, but also a dwelling.

Landlord's Duties: In all leases the landlord has a duty to give possession of the premises of the tenant. In all leases there is an implied warranty of quiet enjoyment. In residential leases only. Here is also an implied warranty of habitability.

Quiet Enjoyment: The landlord has impliedly covenanted that Artist will not be disturbed in her use and possession of the land. Tenant's possession has not been physically interrupted, so she cannot have a claim for total or partial conviction under this covenant. Artist's best argument is that the disruption caused by the Machinist has led to her constructive eviction.

Constructive Eviction: Artist's constructive eviction occurs where the landlord causes an unreasonable disruption in the premises so that the tenant can no longer use the premises and the tenant must, in fact, leave the premises within a reasonable time. In this case tenant could argue that although the landlord himself is not making the noise, he let the premises to manufacturers and thus his actions caused the disruption of her possession. This element is satisfied. Tenant must also show that the disruption was so severe as to deprive her of use and possession. Clearly the noise, if severe, would deprive of the use as a dwelling. But if the landlord was unaware of that use and the lease was only for studio purposes, the tenant may have a more difficult case. Finally the tenant must actually vacate the premises within a reasonable time. The tenant has remained upon that premises for a year since the disruption began and she thus has no claim for a constructive eviction.

Habitability: If the land is for residential purposes, the warranty of habitability is implied. The standards of this warranty are tied to the housing codes. Thus, if the housing codes address noise level and the Machinist violates this, the landlord would be in violation.

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Remedy 1: For breach of implied warranty of habitability the tenant has extensive remedies. Tenant may terminate the lease and leave the premises. In some instances she could remain and withhold rent, but in this case she cannot repair the problem. She may withhold rent until the landlord fixes the problem. Or, she may abate rent to the fair market value with the noise level.

Machinist: Tenant may have an action for nuisance against the Machinist.

Private Nuisance: Activities on the Machinist's own property may be a nuisance to the tenant's premises if they substantially and unreasonably interfere with the tenant's use and enjoyment of her property.

In this case, the noise level may substantially and unreasonably interfere. The court will consider the zoning ordinances, although not dispositive. The zoning in this area is likely to be commercial and industrial and not residential. That ought to balance in Machinist's favor. Particularly because it seems that the Artist is the party whose use of the premises is inconsistent with the surrounding area. Thus, although the noise level may cause a substantial interference, it is unlikely to be found to be unreasonable. But if it does find a nuisance, there are several remedies.

### Remedies

Damages: The Machinist may have to pay for the harm to Artist. If the nuisance is permanent, she may receive the decrease in fair market value. Artist is likely to have difficulty with this remedy because the Artist has only a year-to-year tenancy and thus a measure of the permanent decrease in the FMV would grant her a windfall. The better measure of damage may be harm caused to Artist already measured by the difference between fair market value with the nuisance and actual rent.

### Injunction

Inadequate Remedy at Law: Courts will enjoin an activity only when legal remedies are inadequate. In this case, a court may consider that damages are inadequate because tenant would be required to bring multiple suits to get damages every few years.

Property: At common law, courts only granted injunction when there was a property interest, but that restraint is no longer followed. Thus, tenant's interest in the lease should be sufficient.

Feasible: A negative injunction prohibiting the noise level would be easy for court to enforce. This, element balances toward granting injunction.

Balance: In nuisance cases the court will balance the hardships of the party with a thumb on the scale to plaintiff. Even with the balance favoring her, Artist will have a difficult time surmounting this factor. Tenant's interest is only a lease. Moreover, tenant can

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easily move to a residential community to escape the noise and Machinist has no where else to go.

Defenses: Machinist has no equitable defenses against activity.

Defendant court is unlikely to grant injunction because the balance weighs toward Machinist.

Developer: tenant may argue that she has a negative easement against Developer. The negative easement is for light and air. Such easements are not implied at law and cannot be gained by prescription thus tenant has no claim against developers.

Question 2:

Power

Easement: Plaintiff may argue that she has an easement by prescription across the path.

Running of Statute of Limitations: The statute of limitations is likely to have run for prescriptive easements since Artist has been there for 30 plus years.

Open and Obvious: Artist did not hide her use.

Continuous: Artist's regular walking to the park may satisfy.

Exclusive: Cannot satisfy because other used as well on a regular basis.

Hostile: Artist did not have permission. Artist may get a prescriptive easement if court finds that her use was exclusive and continuous enough, but unlikely. If so, Artist has a claim against State. State likely to exercise eminent domain and condemn the easement but Artist entitled to compensation.