

"An occasional series examining the history of litigation over the Ellis Act, Retaliation Defense, and SLAPP Statute in San Francisco"

By James B. Kraus

What a long, strange trip it's been. Those lines, from the Grateful Dead song "Truckin'", are very apropos for those of us who've been doing Ellis Act evictions from the very beginning, or rather, since 1998, when the City unintentionally began encouraging Ellis Act evictions. In 1998, the voters imposed strict limitations on owner move in evictions, most important, only allowing one eviction per building. As a result, owners that wanted to occupy more than one unit were required to invoke the Ellis Act (which requires the eviction of all tenants in the building) instead of owner move-in evictions (which would allow some tenants to remain in the building).

The tenants' big weapon in defending evictions has always been retaliatory eviction. Often, it is a contrived defense – "I made a face at my landlord last month" or "I reported a weakened handrail to DBI three years ago". Sometimes, though, landlords really do hate their tenants, and want to get rid of them at all costs. In other words, it gives tenants leverage in settlement, especially where you have a sympathetic tenant and an obnoxious owner.

In 1998, our client, an elderly black woman who had served as a WAC in WWII, wanted to Ellis her duplex on Guerrero Street. She lived in the upstairs unit and had a well-behaved couple as her tenants. She was a very principled woman who had worked all her life. She didn't ask for handouts. However, in 1994, San Francisco stuck her two-unit building under rent control with Proposition I, which eliminated the exemption for owner-occupied buildings with 2-4 units. When an attempt to scale back rent control failed in 1998, she decided to take action and hired Andrew M. Zacks to invoke the Ellis Act for her.

Her tenants decided to stay put and fight their eviction. The tenants asserted retaliation as a defense – even though there was no evidence to support that defense. We concluded that the idea of retaliation as a defense to an Ellis Act eviction was absurd. If you want to stop renting your property to everybody, who has the right to force you? I had done a lot of research on the concept, and it seemed that if retaliation could be a defense, then the only people in America who did not have the right to go out of business were landlords.

Fortunately, the San Francisco Superior Court Judges – at least at first – agreed with us. We filed a motion for summary judgment, arguing that the judge should rule in favor of the landlord without holding a jury trial. The motion was heard by Judge Ronald Quidachay, who ruled that retaliation is not a defense to an Ellis Act eviction.

The tenants appealed to the Appellate Division of the Superior Court. The day before Thanksgiving, 1999, the appellate court issued an opinion holding that as a matter of law, the retaliation defense is incompatible with the purpose of the Ellis Act. That was a happy Thanksgiving indeed.

But, that was not the end of the battle. We will come back to this client's story in a later news letter. As it turns out, the Appellate Division had decided not to publish its opinion (only published opinions are binding in subsequent cases) and the Superior Court Judges would soon change their minds and rule that retaliation *was* a defense.

In the next news letter, you will hear the rest of the story, which includes our victory of this issue at the California Supreme Court.