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The Current Challenge to Measure EE and What it Means to You

On November 5, 2002, residents of the City of Oakland approved by a narrow margin an initiative designated as Alameda County Measure EE. Disingenuously promoted as protecting seniors and children, Measure EE is actually a tenant wish list of assorted draconian protections, which seriously undermine the management of residential real property. Of course, Measure EE's provisions are not limited in their application to seniors and children, but apply to virtually all Oakland renters. This article is designed to inform the reader of the basic provisions of Measure EE, its effect on landlords, and some of its legal infirmities. Armed with this information, the reader will understand what is at stake as the action wends its way through the courts. This article in no way purports to contain an exhaustive analysis of all portions of Measure EE or all of its infirmities.

Prior to the enactment of Measure EE, Oakland had what was known as a "weak" rent control scheme, which, while regulating rents, did not control evictions. Under Measure EE, a landlord may seek possession of a rental unit only upon for a limited number of specifically authorized reasons and must comply with procedural requirements, many of which appear mainly designed to complicate and/or unduly interfere with the eviction process. Moreover, in order to further discourage landlords from the exercise of their property rights under state law, the initiative subjects them to liability for compensatory, treble and punitive damages, together with their tenants' costs and attorney fees, whenever they are unsuccessful in recovering possession of a rental unit. The lessor's good faith in seeking possession of the rental unit appears to be immaterial to the liability imposed by the initiative.

On January 31, 2003, our office filed an action on behalf of two owners of residential rental property in Oakland and

the Rental Housing Association of Northern Alameda County challenging the constitutionality of Measure EE entitled *Kim, et al. v. City of Oakland, et al.* Due to the variety and breadth of the legal challenges being made, *Kim* will likely be the most important California case involving rent control in 25 years. *Kim* is of interest not only to Oakland property owners and managers, but owners and managers of rent controlled properties in other jurisdictions because of the similarities between Measure EE and rent control schemes in other jurisdictions.

The Eviction Measures

Under Measure EE, a landlord has no right to possession of a leased residential rental unit absent a tenant's voluntary surrender of the premises or the existence of one of the following grounds stated in the Measure: (1) nonpayment of rent; (2) violation of a material term of the tenancy; (3) the tenant's refusal, after a written request by the lessor to do so, to execute a written lease extension or renewal for a further term of like duration and under terms which are materially the same as under the prior agreement; (4) the tenant has willfully caused substantial damages beyond normal wear and tear and, after written notice, has continued damaging the premises, or has refused to repair the damage or pay the reasonable costs of repair; (5) the tenant continues, following written notice to cease, to be so disorderly as to destroy the peace and quiet of other tenants; (6) the tenant has used the premises for an illegal purpose, including the manufacture, sale, or use of illegal drugs; (7) the tenant has, after written notice to cease, continued to deny the landlord access to the premises; (8) the landlord seeks possession in good faith and without ulterior motive, for his or her own occupancy or for

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the occupancy of certain family members; (9) the landlord seeks to remove the property from the residential rental market; or (10) the landlord seeks temporary possession to perform substantial improvements to the unit to comply with code provisions affecting health and safety.

Unfortunately, more than existence of one or more of the above-stated grounds is required. The landlord must also be acting in “good faith” (whatever that may mean) and the stated ground must be the landlord’s “dominant motive” in seeking possession. The “dominant motive” defense and “good faith” requirements operate to require a trial of the action by making it difficult for a landlord to prevail on a summary judgment motion. One of the challenges raised by *Kim* is that these requirements unconstitutionally act in derogation of state law, which authorizes evictions on specified grounds without these additional requirements.

Measure EE also imposes a series of procedural hurdles to eviction, some of which are hyper-technical, and all of which appear calculated to make the eviction process more difficult, expensive, and less certain in result. For example, under state law, the landlord must only serve a three-day notice to cure or quit if a tenant commits a curable breach of a lease provision. However, under Measure EE, landlords must first serve a notice advising the tenant of the breach before any service of the three-day notice to cure or quit required by state law. Consequently, Measure EE requires that tenants be provided with *two* opportunities to cure before an eviction action may be commenced. This requirement lacks any rational basis and was imposed solely to make it more difficult for landlords to evict tenants who do not comply with their lease obligations. Similarly, Measure EE requires landlords to serve a notice to cure on tenants who have committed offenses, which are simply non-curable under both common sense and state law. The *Kim* plaintiffs are challenging all of Measure EE’s procedural hurdles based upon a California Supreme Court case holding that state law fully occupies the field of procedural requirements for eviction, thereby rendering local procedural requirements unconstitutional.

Under Measure EE, owners who obtain possession of a rental unit for their own use or for their relatives must offer to the displaced tenant any other available units in the building at the same rent as the unit from which they are displaced. Similarly, Measure EE prohibits landlords from removing their properties from the rental market under the state Ellis Act unless the landlord does so in good faith, without ulterior reasons and with honest intent. Both of these requirements are being challenged in *Kim* as being unconstitutional due to conflict with superceding state law.

Provisions Creating Tenant Damage Actions

Measure EE states that “A tenant who prevails in an action

brought by a landlord for possession of the premises shall be entitled to bring an action against the landlord and shall be entitled to recover actual and punitive damages, costs, and reasonable attorney’s fees.” This provision applies even if the landlord acted in good faith. For example, even if a tenant prevails solely due to a technical error in the lessor’s pre-lawsuit notice, the tenant will have a cause of action against the landlord under the aforementioned provision of Measure EE. Moreover, landlords who wrongfully endeavor recover possession or recover possession of a rental unit in violation of other portions of the Ordinance are subject to liability for not less than three times actual damages (including damages for mental or emotional distress), and whatever other relief the court deems appropriate. Still another portion of Measure EE provides that “[a]ny violation of the provisions of this ordinance or application thereof shall entitle the aggrieved tenant to actual and punitive damages according to proof and costs and attorneys fees.” Significantly, Measure EE’s punitive provisions do not apply only to property owners. Anyone assisting a landlord may be personally liable including property managers, attorneys, investigators, and the like.

We believe that these egregious provisions are unconstitutional for several reasons. They violate property owners’ First Amendment right to government redress, which includes the right to sue, because they are obviously intended to discourage lessors from exercising their right to sue and penalize them even where the lessors’ actions are brought in good faith. These provisions also appear to violate the statutory “litigation privilege” under which bringing a lawsuit or engaging in pre-lawsuit activity undertaken with “some relation” to a possible lawsuit is protected absent a showing of a lack of probable cause and malice. Additionally, the punitive damages provisions are in conflict with state law, which allows the recovery of punitive damages only where a party acts maliciously, fraudulently, or oppressively.

Conclusion

We are confident that a substantial portion of Measure EE will be declared unconstitutional. For the reasons noted above, the stakes are very high and the result will deeply impact lessors and property managers in Oakland and all other rent control jurisdictions. You can follow the progress of this challenge by contacting us at (415) 928-7300 or by checking our website at www.srosenthallaw.com. □

The Law Office of Steven S. Rosenthal is a San Francisco law firm, which has represented residential and commercial property owners for over twenty-five years in a variety of different capacities and matters. In addition to Kim v. City of Oakland, the office has successfully represented landlords and real estate professionals in a number of other trial and appellate cases, which have significantly affected the real estate industry.

The information contained in this article is not intended as legal advice. Always consult an attorney if you have a particular problem or question.