SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

APPELLATE DIVISION

THE SPORTS AND OPEN SPACE AUTHORITY OF THE CITY OF SANTA CLARA, Plaintiff and Respondent, v. D.E. RESTAURANTS, INC., Defendant and Appellant.	Case No. 18-AP-002411 Trial Ct. No. 17-CV-311968 OPINION

Defendant and appellant D.E. Restaurants, Inc. (Tenant) appeals from the unlawful detainer judgment entered against it and in favor of plaintiff and respondent The Sports and Open Space Authority of the City of Santa Clara (Landlord). The judgment was entered after the trial court granted Landlord's motion for summary judgment and denied that of Tenant as moot. Because we conclude there was a triable issue of material fact as to whether Landlord waived the 30-day notice to quit and termination of the month-to-month tenancy by the acceptance of rent for a period beyond the notice, we conclude the trial court erred by granting Landlord's summary judgment motion, and we reverse the judgment.

STATEMENT OF THE CASE

On June 19, 2017, Landlord filed an unlawful detainer complaint against Tenant. According to the allegations of the complaint, Landlord, a public agency, is the sublessor of real property located at 5151 Stars and Stripes Drive, Santa Clara, California. In 1986, Landlord and Tenant entered into a written agreement (Lease), whereby Tenant agreed to rent the property for a fixed term and pay $4,500 per month in rent. The Lease was later amended in writing on multiple occasions. On May 17, 2017, Landlord allegedly served Tenant with a 30-day notice to quit the premises and of termination of tenancy. The notice period was alleged to have expired on June 17, 2017, but Tenant did not quit the premises. Based on these allegations, Landlord sought to recover possession of the premises, damages, and reasonable attorney fees.

On June 29, 2017, Tenant filed an answer to the complaint, generally denying the allegations and alleging various affirmative defenses. As is relevant here, Tenant alleged that: (1) Landlord had waived, changed, or canceled the notice to quit; (2) Landlord had served it with the notice to quit or filed the complaint to retaliate against it; (3) Landlord had accepted rent from it to cover a period of time after the date the notice to quit had expired; and (4) it had a lease for a banquet facility, in addition to the Lease, and the leases "were tied together and continued for the same term." In its answer, Tenant also alleged its entitlement to reasonable attorney fees.

The next day, Landlord filed a motion for summary judgment. In its motion, Landlord argued that it was entitled to possession of the premises because the Lease between the parties had expired on April 30, 2017, and Tenant remained in possession thereafter. Landlord further argued that each of Tenant's affirmative defenses lacked merit. In support of its motion, Landlord submitted: the Lease and amendments; its meeting minutes; declarations by its counsel and Ruth Shikada, the economic development officer and assistant city manager for the City of Santa Clara; a banquet facility lease; a letter from Shikada to David Ebrahimi, the president of Tenant; emails between Tenant's counsel and its counsel; a notice of termination and proofs of service; Tenant's answer; and a second amended complaint filed by Tenant in a

OPINION

prior case between the parties (*D.E. Restaurants, Inc. v. The City of Santa Clara, et al.* (Santa Clara County Superior Court, Case No. 2015-1-CV-275606, the Prior Action).

On July 6, 2017, Tenant filed a written opposition to the motion. The opposition consisted of a single paragraph, which said that its answer had denied some of the allegations of the complaint and had alleged "defenses including that plaintiff accepted rent for a period beyond the alleged termination date (see Civil Code section 1945) and filed this case in retaliation for defendant's exercise of legal rights (including the rights to petition government for redress of grievances through a lawsuit ...)." The opposition further asserted that the accompanying declaration by Ebrahimi supported "those two defenses."

The next day, Landlord filed a reply, asserting that Tenant had "failed to meet its burden of production or persuasion on either affirmative defense ... ." Landlord also filed evidentiary objections to portions of Ebrahimi's declaration.

On July 11, 2017, Tenant filed its own counter motion for summary judgment on the complaint. In its motion, Tenant argued that "[a]ccepting rent for all of June canceled the May 17 30-day notice and/or created a new month-to-month tenancy." Tenant further argued that the 30-day notice to quit had been served and the unlawful detainer lawsuit filed in retaliation for its having filed the Prior Action against the City of Santa Clara. Tenant did not submit any evidence in support of its motion. Rather, it stated that the motion was "based on these moving papers, the complaint filed June 19, 2017, the answer filed June 29, 2017, the papers filed in support of plaintiff's motion for summary judgment on June 20, 2017 and July 7, 2017, the papers filed July 6 by defendant in opposition to plaintiff's motion for summary judgment and such other admissible evidence as is properly presented."

Landlord opposed Tenant's motion for summary judgment on July 14, 2017, which was three days before the hearing date. In its opposition, Landlord argued that it was entitled to possession of the premises because Tenant had remained in possession after expiration of the lease term. Landlord further argued that Tenant's affirmative defense based on Landlord's acceptance of rent for a period of time after the date the notice to quit had expired lacked merit. Landlord asserted that such a defense only applied to residential tenancies or when a landlord

sought forfeiture of the lease based on a breach of a lease covenant and, in any event, the Lease contained a non-waiver clause. Landlord also contended that Tenant's affirmative defense of retaliation lacked merit because it had properly objected to the relevant portions of Ebrahimi's declaration supporting that defense, it had a rational business motive for bringing the unlawful detainer action, and the public policies asserted by Tenant did not outweigh the state's interest in ensuring that unlawful detainer proceedings were truly summary.

The competing motions for summary judgment proceeded to hearing on July 19, 2017. After the argument, the trial court took the matters under submission.[1]

The court later issued a written order, granting Landlord's motion for summary judgment and deeming Tenant's motion for summary judgment moot as a result. In its order, the court noted, as a preliminary matter, that Tenant's presentation, both in opposition to Landlord's motion and in support of its own motion, was "anomalous." The court said that it would nevertheless consider all of the arguments advanced by Tenant in its motion in ruling on that of Landlord.

Turning to the merits of Landlord's motion, the court found that Landlord had met its initial burden of proving a right to possession and damages. The court determined that Landlord had demonstrated it was the lessor of the premises; the lease term expired on April 30, 2017; Tenant was not given permission to continue in possession beyond that date; Tenant continued in possession; a 30-day notice to quit was served on Tenant on May 17, 2017; and Tenant remained in possession.

With respect to Tenant's retaliatory eviction defense, the trial court sustained Landlord's objection to the relevant portions of Ebrahimi's declaration on the ground of lack of personal knowledge. As Ebrahimi's declaration was the only evidence of retaliatory motive offered by Tenant, the court determined there was no admissible evidence to prove this defense.

About the defense for acceptance of rent, the court began by noting that Tenant had "contend[ed] that [Landlord]'s acceptance of rent for June 2017, effectively canceled the notice

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[1] The record does not contain a reporter's transcript of the July 19, 2017 summary judgment hearing.

to quit and/or created a new month-to-month tenancy." The court found that the evidence demonstrated that the Lease had automatically terminated on April 30, 2017; it contained an express holdover provision providing for a month-to-month tenancy where the tenant holds over after the expiration of the lease term; Tenant did not vacate the premises at the end of the lease term; Landlord had served Tenant with a 30-day notice to quit on May 17, 2017, "stating the 'holdover month-to-month tenancy' is terminated and [Tenant] is required to quit and surrender the premises no later than" June 17, 2017; and, in late May or early June 2017, Tenant remitted and Landlord accepted a rent payment for the entire month of June 2017.

The court opined that Civil Code section 1945 was inapplicable here, observing that it "concerns the issue of whether a tenant's continued possession after the expiration of a fixed term lease and the landlord's acceptance of rent thereafter operates as a month-to-month renewal on the same terms. [Citation.] Here, the lease contains an express holdover provision in the first instance providing for a month-to-month tenancy where the tenant holds over following the expiration of the lease term. [Landlord] does not otherwise contend a month-to-month tenancy did not arise by virtue of [Tenant] remaining in possession after the expiration of the lease term, and affirmatively characterized [Tenant's] tenancy as a 'holdover month-to-month tenancy' in the notice to quit. As such, section 1945 offers no meaningful guidance in resolving any question about whether [Landlord's] acceptance of rent covering the entire month of July impacts the viability of the unlawful detainer action."[2]

The court further opined that "[t]he salient issue in this case is whether the notice to quit was itself voided due to [Landlord's] acceptance of rent covering a brief period after the termination date specified in the notice." The court observed that there is authority addressing the effect of a tenant having paid and a landlord having accepted rent after the issuance of a notice to pay rent or quit arising from a breach of a lease covenant, but that this case did not arise from any breach or default of the terms of a tenancy. The court acknowledged *Highland Plastics, Inc. v. Enders* (1980) 109 Cal.App.3d Supp. 1, 11 (*Highland*), which held that the

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[2] Although the court's order said "July," this appears to be a typographical error as the record indicates it could only be June.

"[t]ender of rent and its acceptance by the landlord within the notice period probably results in an implied withdrawal of the landlord's notice to terminate the periodic tenancy provided the rent accepted is sufficient to cover a period beyond the 30-day period." But the court was not convinced that *Highland* controlled here because there, the tenant had tendered but the landlord had not accepted rent. The court concluded, "[Tenant] did not cite [*Highland*] or any other [case] addressing the question of whether [Landlord's] notice to quit was canceled or waived by the acceptance of rent, or otherwise engage in any meaningful analysis of the same. As such, and given the factual posture of the case, the Court finds [Tenant] fails to substantiate its defense."

The court accordingly granted Landlord's motion for summary judgment and later entered judgment in its favor. The judgment awarded Landlord possession of the premises, damages for unpaid rent in the amount of $15,090.90, and costs of suit, including reasonable attorney fees. Tenant timely appealed from the final judgment.

Landlord filed a motion for us as a reviewing court to take additional evidence and make findings under California Rules of Court, rule 8.252(b) and (c) and Code of Civil Procedure section 909. Tenant opposed the motion. We deferred ruling for our consideration of the merits of the appeal.

DISCUSSION

I. *Appellate Motion to Take Additional Evidence and Make Findings*

In its appellate motion, Landlord asks us to consider the declaration of Shikada, attached to its motion as Exhibit A, and find that Tenant vacated the premises on or about November 8, 2017.

California Rules of Court, rule 8.252(b) and (c), respectively, provide that "[a] party may move that the reviewing court make findings under Code of Civil Procedure section 909" and "[a] party may move that the reviewing court take evidence." That rule is set forth in division 1 of the California Rules of Court, which applies only to matters before the Courts of Appeal or the California Supreme Court. (Cal. Rules of Ct., rule 8.4.) Division 1 of the

California Rules of Court does not apply to the appellate division of the superior courts.[3] (Cal. Rules of Ct., rule 8.4(1).) Thus, California Rules of Court, rule 8.252 does not govern Landlord's motion.

Code of Civil Procedure section 909 provides that "[i]n all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues." (Code Civ. Proc., § 909.) This statute applies to unlawful detainer proceedings. (See Code Civ. Proc., §§ 1177 and 1178 ["The provisions of Part 2 of this code, relative to new trials and appeals[, i.e., Code Civ. Proc. §§ 307 to 1062.5], except insofar as they are inconsistent with the provisions of this chapter or with rules adopted by the Judicial Council, apply to [unlawful detainer proceedings]"].) Thus, Code of Civil Procedure section 909 governs Landlord's motion.

Turning to the merits of the motion, Landlord contends that Shikada's declaration shows that Tenant is no longer in possession of the property and, "[t]hus, even if [Tenant's] appeal had merit ..., remanding the action for further proceedings would not afford any effectual relief because the only issue that can be decided in an unlawful detainer action is the right to

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[3] Instead, division 2 of the California Rules of Court applies to appeals, writ proceedings, motions, applications, and petitions in the appellate division of the superior court. (Cal. Rules of Ct., rule 8.800(a).) Division 2 does not contain a rule analogous to California Rules of Court, rule 8.252(b) and (c), allowing a party to move that the reviewing court take evidence or make findings under Code of Civil Procedure section 909.

possession." Landlord asserts that "because possession is no longer at issue, there is no actual controversy between [the parties] that can be resolved in an unlawful detainer action" and the appeal should be dismissed as moot.

We first observe that Landlord does not address in its motion whether this is a case in which trial by jury is not a matter of right or trial by jury has been waived. (See Code Civ. Proc., § 909].) We note that the right to a jury trial in unlawful detainer actions is guaranteed by Code of Civil Procedure section 1171 (see also *Department of Transportation v. Kerrigan* (1984) 153 Cal.App.3d Supp. 41, 44) and that the right to a jury trial can be waived only by the means listed in Code of Civil Procedure section 631. (*Heim v. Houston* (1976) 60 Cal.App.3d 770, 773; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524; see *Grafton Partners v. Super. Ct.* (2005) 36 Cal.4th 944, 955.)

Assuming for the sake of argument that trial by jury was waived here, a reviewing court should exercise the discretion to take evidence and make findings of fact under Code of Civil Procedure section 909 only sparingly and with caution. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 (*Zeth*); *Tupman v. Haberkern* (1929) 208 Cal. 256, 269-270 (*Tupman*); see also *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1213 [power created by § 909 is discretionary].) Absent exceptional circumstances, no such findings should be made. (*Zeth, supra,* 31 Cal.4th at pp. 405, 414, fn. 5; *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1034.)

"Even when exceptional circumstances exist, appellate courts still are not to exercise their authority to make factual findings except where to do so will result in the litigation's termination … ." (*Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 605; *Monsan Homes v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830; *Tupman, supra,* 208 Cal. at pp. 269-270.) For example, "[a]lthough appellate courts are generally reluctant to take evidence, they should do so when it shows that events occurring after judgment and notice of appeal have rendered the appeal moot." (*Long v. Hultberg* (1972) 27 Cal.App.3d 606, 608; see also *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 ["courts have not hesitated to consider postjudgment events … when subsequent events have

caused issues to become moot [citation]"]; see also *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 232-233 (*Millbrae*).)

Here, the proffered evidence does not compel the conclusion that the appeal is moot. The evidence purports to show that Tenant is no longer in possession of the premises. But it is well established that where, as here, a tenant has lost possession of the property because of an unlawful detainer judgment, the appeal is not rendered moot by the tenant's relinquishment of possession of property pending appeal. (*Kruger v. Reyes* (2014) 232 Cal.App.4th Supp. 10, 15 (*Kruger*); *Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1840 (*Cinnamon*); *Old National Fin. Servs. v. Seibert* (1987) 194 Cal.App.3d 460, 468 (*Old National*).) We accordingly decline to take evidence and make findings of fact on appeal, and we deny Landlord's motion. (See *Millbrae, supra,* 262 Cal.App.2d at p. 233.)

II. *Substantive Issues on Appeal*

Tenant contends the trial court erred because there were triable issues of material fact as to whether (1) Landlord's acceptance of rent for the entire month of June 2017 waived or cancelled the 30-day notice to quit the premises and termination of tenancy; and (2) Landlord served the notice to quit or filed the unlawful detainer lawsuit in retaliation for Tenant's prosecution of the Prior Action.

III. *Standard of Review*

The propriety of granting a summary judgment motion in an unlawful detainer action is subject to the same test as in general civil actions. (See Code Civ. Proc., § 1170.7 [summary judgment/summary adjudication in unlawful detainer actions "shall be granted on the same basis as a motion under Section 437c"].)

"Summary judgment provides 'courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.' [Citation.] A summary judgment motion 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] 'The pleadings determine the issues to be addressed by a summary judgment motion [citation] and the declarations filed in connection

with such motion "must be directed to the issues raised by the pleadings." ' [Citation.]" (*Lona v. Citibank* (2011) 202 Cal.App.4th 89, 100 (*Lona*).)

An appellate court reviews an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. (*Lona*, *supra,* 202 Cal.App.4th at p. 101.) In undertaking an independent review, the reviewing court applies the same three-step analysis as the trial court. (*Lona, supra,* 202 Cal.App.4th at p. 101.) First, the court identifies the issues framed by the pleadings. (*Ibid.*) Next, the court determines whether the moving party has established facts justifying judgment in its favor. (*Ibid.*) Finally, if the moving party has carried its initial burden, the court decides whether the opposing party demonstrated the existence of a triable issue of material fact. (*Ibid.*) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The appellate court does not defer to the trial court's ruling and is not bound by the reasons for its summary judgment ruling; the appellate court reviews the ruling of the trial court, not its rationale. (*Lona, supra,* 202 Cal.App.4th at p. 101.)

IV. *Analysis*

A. *Mootness*

Landlord argues that the appeal is moot because possession is no longer at issue. (See *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 747 [in an unlawful detainer, the sole issue before the court is the right to possession].)

We reject this claim. As previously explained, it is well established that where, as here, a tenant has lost possession of the property because of an unlawful detainer judgment, the appeal is not rendered moot by the tenant's relinquishment of possession of property pending appeal. (*Kruger, supra,* 232 Cal.App.4th Supp. at p. 15; *Cinnamon, supra,* 24 Cal.App.4th at p. 1840; *Old National, supra,* 194 Cal.App.3d at p. 468.)

We therefore turn to the merits of the appeal.

B. *Acceptance-of-Rent Defense*

Tenant contends the trial court erred because there is a triable issue of material fact as to whether Landlord's acceptance of rent for the entire month of June 2017 waived or cancelled the 30-day notice to quit the premises and termination of the tenancy. The contention is that the affirmative defense of waiver based on an acceptance of rent set forth in Judicial Council of California Civil Jury Instructions (CACI) No. 4324 applies here because the 30-day notice set the termination date as June 17, 2017; in late May or early June 2017, Landlord accepted rent for the entire month of June 2017; and there is no evidence that Landlord gave actual notice that its acceptance of rent would not waive or cancel the 30-day notice.

"A waiver is an intentional relinquishment of a known right." (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 532 (*Salton*); *Thriftimart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 (*Thriftimart*) ["[w]aiver is a matter of intent"].) Generally, waiver is a question of fact for the trier of fact. (*Black v. Arnold Best Co.* (1954) 124 Cal.App.2d 378, 384-85; *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 ["[g]enerally, the determination of waiver is a question of fact, and the court's finding, if supported by evidence, is binding on the appellate court"].) Conduct manifesting an intention to waive, such as acceptance of benefits under a lease, can support a finding of implied waiver. (*Salton, supra,* 256 Cal.App.2d at pp. 532-533.) The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60.)

In the context of unlawful detainer actions, the issue of waiver usually arises when the landlord accepts rent from the tenant after the breach of a lease condition, apart from the payment of rent. (See, e.g., *Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435 (*Kern*); *Bedford Inv. Co. v. Folb* (1947) 79 Cal.App.2d 363; *Thriftimart, supra,* 123 Cal.App.3d 751.) In such cases, the acceptance of rent by the landlord from the tenant, after the breach of a lease condition, with full knowledge of all the facts, constitutes a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of the breach. (See *Kern, supra,* 214 Cal. at pp. 441-442.) But waiver will not be found even though the lessor

received payment of rent when (1) the lessor rejects or returns the rent payment; (2) the lease contains a provision that acceptance of rent after knowledge of the lessee's alleged wrongful conduct does not affect the lessor's right to evict the lessee; or (3) the lessor clearly and continuously objects to the lessee's alleged conduct. (See CACI No. 4324; see also *EDC Associates Ltd v. Gutierrez* (1984) 153 Cal.App.3d 167, 171; *Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342-343.)

The issue of waiver also arises in unlawful detainer cases brought under Code of Civil Procedure section 1161 for the possession of commercial real property after default in the payment of rent. In such cases, Code of Civil Procedure section 1161.1, subdivision (c) provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. *However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property.*" (Italics added.)

There does not appear to be any case law directly addressing whether a landlord's acceptance of rent for a period beyond the 30-day period set forth in a notice to quit and terminate a month-to-month tenancy constitutes a waiver or cancellation of the notice, precluding the landlord from declaring a forfeiture of the tenancy by reason of the notice. But *Highland* comes close. In *Highland*, a landlord brought an unlawful detainer action to recover possession of real property from his month-to-month tenant who had not vacated after service of the 30-day notice of termination under Civil Code section 1946. (*Highland, supra,* 109 Cal.App.3d Supp. at pp. 5-6.) Judgment was entered in the landlord's favor. (*Ibid.*)

On appeal, the tenant argued that the landlord had waived the right to proceed in the unlawful detainer action because it had accepted rent during the 30-day notice period.

(*Highland, supra,* 109 Cal.App.3d Supp. at p. 5.) The reviewing court opined, "Tender of rent and its acceptance by the landlord within the notice period probably results in an implied withdrawal of the landlord's notice to terminate the periodic tenancy provided the rent accepted is sufficient to cover a period beyond the 30-day period. The mere tender of the rent does not, however, result in a waiver. In order for there to be a waiver, the landlord must accept the rent and the rent accepted must be an amount sufficient to cover the rent period beyond the period specified in the termination notice." (*Id.* at p. 11.) In *Highland*, the landlord held the tenant's checks for rent covering a period of time beyond the 30-day notice to quit. (*Ibid.*) But the landlord presented evidence of various attempts on its part to return the rent checks to the tenant. (*Ibid.*) And the landlord never cashed the checks and kept them because it had experienced difficulty in returning them to the tenant. (*Ibid.*) The checks were eventually returned to the tenant by the landlord slipping them under the tenant's door during the notice period. (*Ibid.*) The appellate court held that this evidence was sufficient to support the trial court's implied finding that there was no acceptance of the tendered rent during the notice period. (*Id.* at pp. 11-12.) The court concluded that, "[i]f the rent was not accepted by the landlord, there was no waiver of [the landlord's] termination of [the tenant's] month-to-month tenancy nor was there an implied withdrawal of the notice of termination." (*Ibid.*)

Thus, it appears that a landlord's acceptance of rent covering a period of time beyond the 30-day notice period set forth in a notice to quit and terminate a month-to-month tenancy may constitute a waiver of the notice, precluding the landlord from declaring a forfeiture of the tenancy by reason of the notice.

Here, the undisputed material facts before the trial court established that the term of the Lease expired on April 30, 2017. The Lease contained an express holdover provision, which provided that "[s]hould [Tenant] hold over the use of the Restaurant after this Agreement has been terminated in any manner, such holding over shall be deemed merely a tenancy from month to month and at a rental to be fixed by [Landlord], payable monthly in advance, but otherwise on the same terms and conditions as herein set forth." When the lease automatically terminated on April 30, 2017, Tenant remained in possession of the premises. Thus, under the

terms of the Lease, Tenant's continued possession was deemed a month-to-month tenancy. (See *Spaulding v. Yovino-Young* (1947) 30 Cal.2d 138, 141-142 [the continued occupancy of property after termination of a fixed-term lease regulated by holdover provision of lease].) Then, on May 17, 2017, Landlord served Tenant with a 30-day notice of termination of tenancy. (See Civ. Code, § 1946 ["as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination"].) The notice stated, "[Tenant's] holdover month-to-month tenancy of the … premises is hereby terminated as of June 17, 2017 and [Tenant is] hereby required to quit and surrender possession of the premises to [Landlord] no later than June 17, 2017."

Furthermore, Tenant presented evidence—Ebrahimi's declaration and the check attached thereto—demonstrating that Landlord received and accepted rent for the entire month of June 2017.[4] In other words, Tenant presented admissible evidence that Landlord had accepted rent for a period of time beyond the 30-day notice period set forth in the May 17, 2017 notice. This evidence was sufficient to raise a triable issue of material fact as to whether Landlord waived its termination of the month-to-month tenancy.

Notably, Landlord contends that its acceptance of rent did not constitute a waiver of the 30-day notice because the non-waiver clause in the Lease constituted actual notice that acceptance of rent did not constitute a waiver of any rights, including any right it had to recover possession of the property. The relevant portion of the non-waiver clause states, "No delay, failure or omission of [Landlord] to re-enter the Restaurant or to exercise any right, power or privilege, or option, arising from any default, nor any subsequent acceptance of rent then or thereafter accrued shall impair any such right, power, privilege or option or be construed a waiver of any such default or relinquishment thereof, or acquiescence therein … ." The clause, as drafted, informs Tenant that the acceptance of rent will not impair any right, power, privilege, or option arising from *any default* or be construed a waiver of *any default.* This case does not

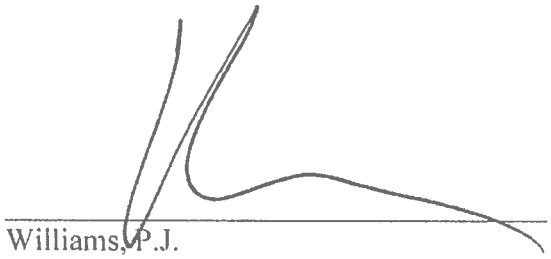
[4] Landlord did not object to Ebrahimi's declaration, or its attachment, to the extent it addressed Landlord's acceptance of rent for the month of June 2017.

arise from any breach or default of the terms of the Lease. Thus, the non-waiver clause did not provide Tenant with actual notice that acceptance of rent would not constitute a waiver of Landlord's notice of termination of the month-to-month tenancy.

Because Tenant raised a triable issue of material fact with respect to its affirmative defense based on Landlord's acceptance of rent, the trial court erred when it granted Landlord's motion for summary judgment.[5]

DISPOSITION

The judgment is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion. Tenant is the prevailing party entitled to costs on appeal. (Cal. Rules of Ct., rule 8.891(a)(1).)



Williams, P.J.

WE CONCUR.

Lie, J.

Nishigaya, J.

[5] As the issue regarding Landlord's acceptance of rent is dispositive of the appeal, we need not address Tenant's additional claim based on its affirmative defense of retaliation.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED
APR 17 2019
Clerk of the Court
Superior Court of CA County of Santa Clara
BY R. ARAGON DEPUTY

FILE COPY

RE: **Sports & Open Space Authority of City of Santa Clara vs D.E. Restaurants, Inc.**
Case Number: **18AP002411**

PROOF OF SERVICE

Opinion After Oral Argument was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on April 17, 2019. CLERK OF THE COURT, by Rachel Aragon, Deputy.

cc: San Jose Facility - Civil Santa Clara County Superior Court 191 N First ST San Jose CA 95113
Albert Tong 1901 Harrison St Suite 900 Oakland CA 94612
Gary B Wesley 707 Continental Circle Suite 424 Mountain View CA 94040