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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ANGELO MARKOULIS, **Plaintiff and Respondent,** **v.** **STUDIO MECHANICA, LLC,** **Defendant and Appellant.**	**A107908** **(San Francisco County Super. Ct. No. CGC-02-414312)**

Following denial of a motion for summary judgment filed by defendant Studio Mechanica, LLC (Studio), a court trial resulted in a judgment ordering Studio to pay contract damages for breach of a real property lease agreement. Studio contends that the action resulting in the judgment was barred under the doctrine of res judicata by an earlier small claims judgment that arose out of the same breach. We agree that the summary judgment motion should have been granted and reverse.

BACKGROUND

In support of its motion for summary judgment, Studio established the following undisputed facts.

Plaintiff Angelo Markoulis was the owner and landlord of a commercial property (premises) located in San Francisco that he leased to defendant Studio for a five-year, two-week term at a rent of $14,250 per month. Studio paid the rent for the first 13 months of the lease but thereafter breached the lease by failing to make further payments

when they became due. On December 4, 2001, Markoulis caused Studio Mechanica to be served with a three-day notice to pay $22,050 in past due rent, or to quit the premises (hereafter three-day notice). Studio did not pay the rent due by the December 7, 2001 deadline and instead quit the premises. Studio's right of possession to the premises terminated after expiration of the statutory notice period following effective service of the three-day notice. On January 29, 2002, Markoulis filed an action in small claims court, seeking to recover the jurisdictional maximum of $5,000 in "past due rent" for the premises. (*Markoulis v. Studio Mechanica* (Super. Ct. S.F. City and County, 2002, No. 794962.) On March 5, 2002, Markoulis obtained a judgment against Studio for $5,000, which is now final.

On November 1, 2002, Markoulis filed the instant lawsuit seeking past due rent and the present value of future rent. The rent due over the remaining term of the lease (November 2001 through October 2005) totaled $684,000. Studio moved for summary judgment, claiming that the instant action was barred by res judicata because Markoulis had initiated the small claims action in January 2002, after the termination of Studio's right to possession of the premises. The trial court (Judge Alvarado) denied the motion based on its determination that Markoulis was not compelled to seek damages for future rents in its small claims action and had limited that action to *past due rent* only.[1]

DISCUSSION

I. *Standard of Review*

We review summary judgment rulings de novo to determine whether the moving party has met its burden of persuasion that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When the defendant is the moving party, the defendant must show either (1) that the plaintiff cannot establish one or more elements of a cause of action, or (2) that there is a complete defense. If that

[1] When this case later proceeded to court trial (Judge Meeks), Studio reasserted the res judicata defense, however the trial court expressed its intention to accept Judge Alvarado's ruling on the res judicata issue and declined to review or reverse the prior ruling. Because of our resolution of the appeal of the summary judgment ruling, we need not address Studio's contention that this ruling was erroneous.

burden of production is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subds. (c) & (*o*)(2).) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. [Citation.]" (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.)

II. *The Small Claims Action Bars the Present Action*

Markoulis argued and the trial court concluded that the small claims action was brought pursuant to Civil Code section 1951.4,[2] for past due rent only, and the judgment received in that case did not bar the current claim filed under section 1951.2.[3] Sections

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[2] Civil Code section 1951.4 provides, in pertinent part:

"(a) The remedy described in this section is available only if the lease provides for this remedy. In addition to any other type of provision used in a lease to provide for the remedy described in this section, a provision in the lease in substantially the following form satisfies this subdivision:

"The lessor has the remedy described in California Civil Code Section 1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations).

"(b) Even though a lessee of real property has breached the lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all the lessor's rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease . . . ."

[3] Civil Code section 1951.2 provides, in pertinent part:

"(a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:

"(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

"(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;

1951.2 and 1951.4 are part of a comprehensive statutory framework, enacted by the Legislature in 1970, to encourage landlords to mitigate damages arising from tenant abandonment of leased premises by authorizing landlords to recover and relet such premises without giving up the right to later sue for the loss of the bargain memorialized in the lease that was abrogated by the former tenant. (See generally Recommendation: Real Property Leases (Nov. 1969) 9 Cal. Law Revision Com. Rep. (1969) pp. 157, 159-160; Comment, *Landlord-Tenant Legislation: Revising an Old Common Law Relationship* (1971) 2 Pacific L.J. 259, 264-265.) The statutory framework anticipates that possession of the leased premises may revert to the lessor at any point in time following a tenant breach of the lease, and is structured to allow the lessor to pursue the full benefit of the lease bargain from a defaulting tenant, but precludes the lessor from recovering twice for any aspect of the lessor's damages. (See, e.g., Civ. Code, §§ 1952, 1952.3; Code Civ. Proc., §§ 1174, 1179; and see Law Revision Com. Rep., p. 162.)

Markoulis's argument hinges on the availability of a remedy under Civil Code section 1951.4 at the time he filed the small claims action. If no such remedy was available, that action necessarily arose under section 1951.2 and bars the current lawsuit. Under section 1951.4, where the lease expressly provides for the remedy, the lessor may keep the lease in effect and bring successive actions for rent as it becomes due under the lease, "*so long as the lessor does not terminate the lessee's right to possession*." (Italics added.) Markoulis's admission that the lessee's right to possession had been terminated prior to the filing of the small claims action is, therefore, fatal to his case.[4]

"(3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and

"(4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom."

4 In his May 7, 2003 response to Studio's first set of requests for admission, specifically request for admission No. 5 ("[Studio's] tenancy in the [premises] terminated at the end of the day on December 7, 2001."), Markoulis stated: "[¶] . . . [Markoulis] admits that

Markoulis notes correctly that the admission "is plainly a conclusion of law," but argues incorrectly that an admission of law is not binding. Under Code of Civil Procedure section 2033, subdivision (a),[5] a party may, in writing, "request that any other party to the action admit . . . the truth of specified matters of fact, opinion relating to fact, or *application of law to fact*." (Italics added.) "Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action . . . ." (Code Civ. Proc., § 2033, subd. (n).) Thus, the admission establishes that section Civil Code 1951.4 was not an available remedy at the time of the filing of the small claims action, and that earlier action bars the current suit.

DISPOSITION

The judgment is reversed and the trial court is directed to enter an order granting Studio's motion for summary judgment and a judgment thereon. Appellant shall recover its costs on appeal.

[Studio's] right of possession to the [premises] terminated after expiration of the statutory notice period following effective service of a [three-day notice to pay rent or quit] on [Studio]. In all other respects, [Markoulis] denies this request." We express no opinion as to whether that admission is a correct statement of the law, but note that Markoulis never sought leave of the trial court to withdraw it pursuant to Code of Civil Procedure section 2033, subdivision (m).

[5] Since the trial of this case, Code of Civil Procedure section 2033 has been repealed, reenacted and renumbered, operative July 1, 2005.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.

(A107908)