A Fair Fight

written by

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It's too early to tell how Proposition F will unfold, but this landlord-attorney is optimistic about the measure's future.

Imagine coming home from a long day at work, seeing a densely worded piece of paper taped to your door with some daunting bold print, like "Three Day Notice To Cure or Quit" (legalese for "get out"), and frantically trying to figure out how to save your tenancy (and your home). You find some help along the way: a clinic helps you "answer" the lawsuit and properly respond to your landlord's questions. But eventually, you have to take time off work to show up to a Monday morning trial call, and life as you know it might turn on whether you can object to "hearsay" or "character" evidence when it comes up (something many lawyers aren't even very good at). With mounting pressure, your landlord offers you an "out" at the pre-trial settlement conference: you'll get a few more months in the apartment—maybe even for free—but then you have to leave your home of many years. Facing today's rental prices, you may have to leave your community or even the city as a result.

Whether or not our hypothetical tenant has done anything wrong, this process is stressful for tenants, and it jeopardizes the stability of rental housing—something San Francisco has a strong interest in maintaining. According to a 2014 report, up to 90% of San Francisco tenants facing evictions do so without attorneys. And this is a practice area where even licensed attorneys, unacquainted with its frequently changing nuances, are admonished by the Housing Court judge for making mistakes. For San Francisco, every eviction lawsuit is the potential loss of an affordable housing unit (i.e., one with an existing, below-market tenancy already in it).

Taking this problem head-on, voters said yes to Proposition F—"the No Eviction Without Representation Act of 2018"—by a margin of 55.74% to 44.26% last June. By the following June, the Mayor's Office of Housing and Community Development (MOHCD) must implement the new program.

Since 2012, when San Francisco first declared itself to be "the first right to civil counsel city," it funded a pilot program via contract with the San Francisco Bar Association to provide limited scope, pro bono representation for qualified tenants. Several groups and clinics have provided varying degrees of representation depending on a tenant's qualifications and needs.

MOHCD will be marshaling many of the same tools in the existing patchwork of city-subsidized unlawful detainer defense to implement what they refer to as the Tenant Right to Counsel (TRC) Program. After a competitive funding process, they selected the Eviction Defense Collaborative as the lead TRC partner, with AIDS Legal Referral Panel, Asian Americans Advancing Justice (Asian Law Caucus), Asian Pacific Islander Legal Outreach, Bay Area Legal Aid, Justice & Diversity Center of the Bar Association of San Francisco, La Raza Centro Legal, Legal Assistance to the Elderly, Open Door Legal, and the Tenderloin Housing Clinic all partnering to provide TRC legal services.

We're all curious to see what landlord-tenant law will look like in the TRC-era, but for years, the city has been contracting directly with the Tenderloin Housing Clinic to provide full scope representation for tenants facing non-fault evictions (like an owner move-in eviction or an Ellis Act withdrawal). This particular contract may provide some insight on what Prop. F will look like in practice.

The Tenderloin Housing Clinic contract has quotas for non-fault tenant defense, ostensibly to increase a tenant's time in possession and their receipt of payments to relocate (even though the termination notice period and "relocation assistance payments" are set by statute). Perhaps the city has focused on these particular evictions because the tenant has "no fault." (After all, OMI/Ellis-displaced tenants already go to the top of the list for the city's available affordable housing. And below market, rent-controlled units are "affordable housing"; the city will save every one of these it can keep.) Whatever the reason, the contract pays for attorneys to provide a "fair fight," but it's written in the language of obstruction and delay, designed to thwart these evictions, if possible, or at least make them longer and more expensive. The more costly and difficult this process is, the fewer people will try it in the future.

Proposition F will expand full scope legal defense to all residential tenants, regardless of income and regardless of merit (with an exception for tenants residing with the owner or a master tenant). And, if it obstructs and delays "fault-based" evictions too, it may seize the gears of our housing market. This business cycle saw the kind of surge in fault-based evictions that ushered in Eviction Protections 2.0 (the 2015 "Jane Kim Amendment"). These new rules heighten the standard for evicting tenants for conduct like nuisance and breach of lease. Tenants and tenant advocates praised the changes, blaming the upward eviction trend on avarice: landlords get market rate rents following fault-based evictions, so landlords would dress minor violations as fatal problems. Many landlords saw it differently: it can cost tens of thousands of dollars to litigate a simple eviction in this town, and after years of warning the tenant about hoarding or using fire egress as overflow storage, they could finally offset the legal fees needed to privately enforce the city's health and safety laws.

The City Controller estimates that 3,500 tenants will benefit from Prop. F each year. If the point of litigation is to resolve conflicts on their merits, this certainly sounds "fair" for thousands of tenants. But the city will be using taxpayer dollars to pay full freight for tenant defense. (The Controller estimated Prop. F would require an additional $4.2 to 5.6 million on top of what the city is already funding. According to MOHCD, Mayor Breed worked with the Board of Supervisors to rebalance the city's budget to include $1.9 million in Fiscal Year 2018-2019 and $3.9 million in 2019-2020). When one side has no exposure to legal fees, this imbalance may unfairly distort the process.

For instance, in civil litigation, the time between filing a complaint and trying a case is filled with "motions" (asking the court to do something) and "discovery" (asking the other side for statements and documents). Because it is costly for an attorney to draft and implement these pre-trial tools, most litigants would only spend the time and money if it advanced the merits of the case (i.e., if it was not frivolous). That may not hold true if one side isn't paying for it.

And let's say our hypothetical tenant above faces the same choice between conceding the violation and fighting the eviction in the TRC-era. Before, our tenant worries about holding over after the termination of his tenancy, particularly because the cost of his occupancy is no longer limited by the Rent Ordinance (damages for "trespass" are measured by the detriment to the landlord and aren't limited to the sub-market rental rate). Now, he has a seasoned, free, full-scope tenant attorney who treats Housing Court like a second office, telling him he should be thinking about the value of his irreplaceable rent-controlled tenancy (let's say… a $1,100/month two-bedroom in Russian Hill) instead of a possible money judgment (that the landlord isn't likely to pursue anyway), and he should wager his risk to protect this valuable property right.

Before the tenant even has to weigh risk and reward, a new roster of staff attorneys has enthusiastically volleyed discovery requests, seeking to uncover the "real reason" for the eviction. Maybe it's the unpermitted work the tenant did in their living room to add another bedroom for an unauthorized subtenant or the unending late-night parties. But maybe it's "retaliation" for the tenant's request to repair the sink the month before or even the improper "dominant motive" of the landlord, given the inescapable economic fact that she can charge more money to a fresh tenant. And now, the city is spending millions so that a tenant can tell his free attorney that he wants his landlord to ask a jury to decide this question.

The costs associated with this outcome—whimsical for tenants but expensive for landlords—will inform the new "deal" at the pre-trial settlement conferences. In other words, it may be worth it for landlords to pay a materially breaching tenant every penny that they would otherwise pay their attorney, to avoid the cost of a jury trial and recover the rental unit as planned. And some tenants will fight at all costs, because they have no other choice but to protect the only home they can afford.

While this may sound bleak for landlords, I'm optimistic. Fault-based evictions shouldn't necessarily be "easy"; they should come at a time when the landlord has no choice but to litigate. The sixteen just causes for eviction aren't like ordering off of a menu. A landlord who seeks to terminate a tenancy should generally have a well-established paper trail, giving their tenant every opportunity to have avoided the lawsuit. When it is the landlord (not the tenant) who has no choice but to fight over the tenancy, the cause is truly "just" and even a staff attorney paid to indiscriminately fight for tenants will understand (and advise her client) that the relationship can't continue that way. (And well before Prop. F, landlords and tenants have found ways to enter stipulated settlements, keeping the tenant in their home, but giving them one last chance to reform their behavior and save their tenancy.)

With or without Prop. F, sometimes it takes a jury verdict to convince a party they're in the wrong. With or without Prop. F, successful negotiations will only come after attorneys have gathered the evidence to established their case. Optimal outcomes will assess the costs of litigation, will treat tenants with the dignity owed to anyone who is facing the loss of their home, and will take place, as they have in the past, between attorneys who know the practice area, who know the other players in it, and who have earned this experience while building the long-term personal relationships required to make fair deals in a hostile, adversarial environment. In the TRC-era, some landlords will have to pay an unreasonable amount in legal fees just to prove that their tenant was obviously wrong and their choice to evict was justified. And in the TRC-era, tenants will defend evictions more often, and their peers may decide they deserve to keep their home, when their "bad conduct" wasn't "that bad." The new game uses the old rules. Be consistent with your tenants, be aware of changing regulations, be responsible in enforcing the law, be the most reasonable person in the conflict, and hire a really good lawyer.

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