LEGAL Q & A

The Name Game

written by VARIOUS AUTHORS

In just about every potential scenario, landlords are best protected by not acknowledging subtenants.

Q. When noticing my tenants of a rent increase, should I include the names of unauthorized subtenants?

A. Absolutely not. In 2018, we, the multi-family housing industry in California, spent upward of $70 million to defeat Proposition 10, a ballot initiative that would have repealed the Costa-Hawkins Rental Housing Act and further diminished the supply of new and affordable housing in our state. What also would have happened if Costa-Hawkins was repealed would be the continuation of locked-in rent controlled rental rates for subtenants who remained behind after the last original tenant no longer resided in the apartment. Now, thanks to our efforts, this vital law is preserved and owners may continue to impose a fair market rate increase when subtenants are left behind and the tenancy continues.

Under Costa-Hawkins, an owner may impose an unlimited rent increase upon subtenants once the last original lessee leaves unless the subtenants have, either by current or past ownership/management, been recognized and accepted as co-tenants. If such recognition and acceptance have occurred, the ability to adjust rent is likely forfeited. Ways to elevate subtenants into co-tenants include, but are not limited, to the following: (i) accepting rent or rent payments from the subtenant; (ii) entering into a lease, lease addendum, or subtenancy agreement with the subtenant; (iii) accepting and processing non-emergency repair requests from the subtenant; and (iv) relevant to this question, communicating with the subtenant, including identifying the subtenant in annual rent increase notices. If you, your predecessor, or your manager engage in any of the above-noted actions while the master tenant is living in the apartment, the critical right to impose a fair rent increase onto persons remaining behind once the last master tenant permanently departs is jeopardized if not entirely vitiated.

The Rent Board passed a regulation known as “6.14” some years ago to permit landlords to make subtenants into co-tenants without waiving the right to impose an unlimited rent increase when the master tenant leaves. This author believes that utilizing 6.14 is fraught with perils in that (i) you must ensure that a subtenant is served with a special notice within sixty days or so of the subtenant moving in, which is rarely known with certainty; (ii) 6.14 in the Rent Board’s eyes requires that a master tenant both physically and legally sever all ties to the rental unit before an unlimited rent increase can be imposed, which is a very difficult if not impossible dual standard to satisfy especially if the master tenant continues to pay rent for the apartment; and (iii) service of a 6.14 notices legally approves of the subtenancy, which may have adverse implications for certain eviction actions.

In sum, try to avoid communicating with subtenants. If they approach you, politely inform them that they are the tenants of the master tenant and, as such, communications, requests, and discussions concerning their housing should flow through that channel and not by way of you. As for rent increase notices, notices to enter, and other communications, the addressee should be relegated to the tenant on the lease agreement only. Yes, this makes management challenging and sometimes a bit uncomfortable, especially for buildings that are owner-occupied, but until our legislators come up with sensible rental housing policies we are forced into this state of awkwardness.

—Dave Wasserman

Q. How long does a landlord need to keep old leases and correspondence/documents after a tenant has terminated his lease and moved out?

A. A landlord has no general obligation to maintain records after a termination of a tenancy. However, keeping tenancy-related documents for at least four years will preserve them for most relevant claims.

Whether the documents should be retained or destroyed is a question of risk. Saving documents allows them to be referenced for recordkeeping purposes and may provide exculpatory evidence against a tenant's claim. On the other hand, archived documents could also be vulnerable to production in discovery, which could be expensive and burdensome.

Even if a landlord adopts a policy of routine destruction, a landlord should not destroy documents or other evidence that may be relevant to a known claim. Similarly, selectively retaining some correspondence while deleting others may raise suspicions, even if the contents of the destroyed documents are innocuous. Document destruction policy should be uniformly and consistently applied.

How long a landlord should keep records and documents pertaining to a specific claim depends on the nature of the claim. Tenant claims may take the form of "constructive" eviction, "wrongful" eviction, a breach of the rental contract, harassment, or some other violation of a local rent or eviction ordinance. Actions concerning so-called "personal injuries" or negligence are limited to two years after the fact, and actions premised on breach of the rental contract are limited to four years after the fact.

For tenants who believe they vacated pursuant to a wrongful owner move-in, San Francisco permits tenants to file an action up to five years after the fact. In that case, landlords should retain their documentation for a year longer.

If a tenant vacates on their own, without any argument, negotiation, or notice pending, the odds of any residual claims by the tenant against the landlord are generally fairly small. However, if a tenant moves out under a cloud of protest, such as after a series of noise or nuisance complaints, or a lease dispute, or after a rent board hearing or other overt legal action, it would be wise to be on-guard for follow-up claims. Landlords can further protect themselves by obtaining a release of claims from their tenants. Consult with an attorney for advice on how to negotiate a release of claims.

—Matthew Quiring

Q. A tenant with "all utilities included" in his lease agreement has been charging his electric vehicle in the garage/common area. I'm not sure how long I've been paying for this. Am I stuck footing the bill to charge his car?

A. One of the toughest things about the Rent Ordinance is it assumes landlords will perfectly predict the future, and it prevents common sense course-corrections when they don't. (These days, the Tesla Roadster is an indigenous species in San Francisco, but it may not have existed when you signed this lease, so you wouldn't have anticipated this problem.)

At the commencement of a tenancy, landlords can bargain for leases containing the terms they want, so long as the tenant agrees and the terms don't violate public policy, e.g., tenants cannot waive the warranty of habitability. (Of course, negotiating lease terms can be intimidating, so we recommend the SFAA standard lease to be on the safe side going forward.)

During the tenancy, however, a landlord can generally only alter terms if the tenant agrees in writing, after being told she is waiving her rights under Rule 12.20 (a Rent Board rule that prevents a landlord's unilateral changes to existing leases). By contrast, any efforts to take away the existing rights your tenant enjoys could be seen as a reduction in "housing services" entitling your tenant to a reduction in rent.

Because your lease includes “all utilities,” we can assume that your payment of utilities every month is one of your tenant’s “housing services”—an accessory to the apartment itself. You cannot “sever” housing services without the same “just cause” required to terminate a tenancy. However, you didn’t agree to pay at the pump: presumably, your tenant’s unit is separately metered for electricity (what you pay for), and a reasonable reading of “utilities included” would refer to apartment use only.

A few years ago, California enacted statewide law requiring landlords to allow tenants to install charging stations for electric vehicles (with conditions). Fortunately in your case, it does not apply to a “dwelling that is subject to the residential rent control ordinance of a public entity.” Your tenant is taking advantage of you by using common area electricity to fuel her car.

Worse, while some charging stations use a standard 110v plug, many need to be hard-wired to a conduit, and this requires an electrical permit. If your tenant did electrical work, they either performed it without a permit or got a permit without the building owner’s approval—either should provoke a three-day notice to quit.

Assuming no dangling, sparking wires from a rogue installation—you might approach this in line with our state and local goals in advancing the use of clean and renewable energy: confront your tenant about the unauthorized installation and the inappropriate use of common area electricity, but use the conversation to negotiate clear language (in a rule 12.20-compliant lease amendment) that “all utilities” does not include “free gas,” and have your tenant compensate you for the additional housing services.

—Justin A. Goodman

Q. Can I use the same lease for a single family home that I use for tenancies in a building with 20+ units?

A. Using a multi-unit lease agreement for a single family house rental is not recommended. In a large apartment building, the tenant has exclusive right to only his unit and not the rest of the building. There is generally common areas that are shared with other tenants both inside the building, such as elevators, hallways and foyers as well as outside areas and parking. Detailed house rules may be necessary to advise tenants and resolve any problems between them. Large apartment complexes sometimes do not have separate meters or heating systems requiring utilities to be calculated by the landlord or included in the basic rent.

In contrast, a single family house is usually rented as a single tenancy with exclusive rights to all portions of the property. In most cases, the tenant is responsible for maintaining the house including, for example, upkeep of the backyard or keeping appliances in good repair. Tenants in a house are also expected to pay for utilities and generally have the utility accounts placed in their names.

A proper lease agreement is especially important should a dispute or problem arise between the landlord and the tenant. It is in your interest and a wise investment to spend the time to have a proper agreement prepared for the property being rented.

—Frank Kim

The information contained in this article is general in nature. Consult the advice of an attorney for any specific problem. David Wasserman is with Wasserman-Stern Law Offices and can be reached at 415-567-9600. Matthew P. Quiring is with Fried & Williams LLP and can be reached at 510-625-0100. Justin A. Goodman is with Zacks, Freedman & Patterson, P.C. and can be reached at 415-956-8100. Frank Kim is with Eviction Assistance and can be reached at 415-752-6070.