

FILED

LOS ANGELES SUPERIOR COURT

APR 11 1995

Alan Hardey
BY ALAN HARDEY, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

10	THAO THI TRAN,) Superior Ct. No. BV 20445
11	Plaintiff and Respondent,) Municipal Court of the
12	v.) Pomona Judicial Dist.
13	JOSIE PEREZ,) No. 94C00676
14	Defendant and Appellant.) MEMORANDUM JUDGMENT
15)

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is ordered modified to reflect that defendant is the prevailing party and to award defendant attorney's fees and costs. The judgment is affirmed as modified; the matter is remanded for further proceedings consistent with this opinion. Defendant to recover costs on appeal.

Defendant appeals from the judgment of the trial court in this unlawful detainer action finding the rental unit to be 50 percent untenable, and awarding plaintiff one-half the amount of damages requested, plus restitution (stayed if defendant paid the damages within one week -- which defendant did) and ordering the rent to be one-half normal rent until the necessary repairs

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1 are completed. The trial court awarded \$0.00 as costs; attorney
2 fees were not mentioned in the judgment.

3 Following the entry of judgment, defendant motioned the
4 court to, inter alia, vacate or modify the judgment, contending
5 that defendant should have been deemed the prevailing party and
6 been awarded attorney fees and costs. The trial court did modify
7 the judgment to a certain degree, but refused to deem defendant
8 the prevailing party or award any attorney fees or costs to
9 defendant.

10 Defendant has appealed,¹ contending the trial court erred as
11 a matter of law in failing to deem defendant the prevailing party
12 and in failing to award defendant costs, including reasonable
13 attorney fees. We agree, and therefore reverse the trial court's
14 award to this extent.

15 Code of Civil Procedure² section 1174.2, subdivision (a)
16 governs the actions and ruling of the trial court in a situation
17 such as the case at bar, where a defendant in an unlawful
18 detainer proceeding raises the affirmative defense of breach of
19 the warranty of habitability. In such a case, "the court shall
20 determine whether a substantial breach of these obligations has
21

22 ¹Plaintiff contends in his appellate brief that because
23 there is no record of the trial court proceedings in this case
24 (see Cal. Rules of Court, rules 124, 126 and 127) that this court
25 is without jurisdiction to hear this appeal. However,
26 defendant's failure to compile a complete record does not divest
27 this court of jurisdiction, but only affects this court's ability
28 to determine evidentiary matters on appeal. The record in this
case is sufficient for this court to consider defendant's
contentions.

²All further statutory references will be to the Code of
Civil Procedure.

1 occurred." Subdivision (c) of section 1174.2 states that "[a]s
2 used in this section, 'substantial breach' means the failure of
3 the landlord to comply with applicable building and housing code
4 standards which materially affect health and safety."

5 Based on the trial court's judgment, it is clear that the
6 trial court determined that there was a "substantial breach" by
7 the landlord of his obligations to provide tenantable premises,
8 for in addition to the judgment stating that "the court finds a
9 50% condition of untenability," the trial court, in accordance
10 with that determination, attempted to tailor its judgment to the
11 mandates of section 1174.2, by: 1) determining the reasonable
12 rental value of the premises in its untenable state to the
13 date of trial (§ 1174.2, subd. (a)(1)); 2) allowing the tenant to
14 maintain possession of premises if the tenant timely paid the
15 accrued rent (§ 1174.2, subd. (a)(2)); 3) ordering the landlord
16 to make the necessary repairs (§ 1174.2, subd. (a)(3)); and 4)
17 ordering that the monthly rent be limited to the reasonable
18 rental value of the premises until the necessary repairs are
19 completed (§ 1174.2, subd. (a)(4)).

20 The trial court's judgment, however, did not conform with
21 all the requirements of section 1174.2; the omissions by the
22 trial court forms the basis of defendant's appeal. In addition
23 to the portions of section 1174.2 the trial court satisfied with
24 its judgment, the trial court was also required, to "adjudge the
25 tenant to be the prevailing party" (§ 1174.2, subd. (a)(2)) and
26 "award the tenant costs and attorneys' fees if provided by, and
27 pursuant to, any statute or the contract of the parties."
28 (§ 1174.2, subd. (a)(5) [emphasis added].) The trial court's

1 failure to adjudge defendant the prevailing party and award
2 defendant costs and attorney fees in this case is an error of law
3 which must be remedied on appeal.³

4 Plaintiff contends defendant cannot be awarded attorney fees
5 because, if plaintiff had been the prevailing party, plaintiff
6 could not have been awarded attorney fees. Plaintiff's argument
7 on this point is without merit, and is based on misstatements of
8 both the applicable law and the facts of this case.

9 First, section 1033 does not prohibit recovery by defendant
10 of attorney fees in this case. Second, contrary to plaintiff's
11 statement that "the three day notice in this action is barren of
12 any mention of attorney fees or costs," the three-day notice to
13 pay rent or quit, admitted into evidence as plaintiff's exhibit
14 2, plainly states that the tenant's failure to pay rent or quit
15 will result in the landlord filing an unlawful detainer action
16 "to recover possession of the premises plus court costs [and]
17 attorney fees. . . ."

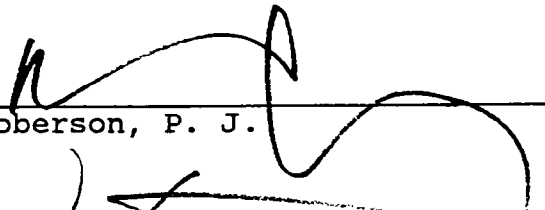
18 Additionally, plaintiff's protestations that he could not
19 collect attorney fees are exceedingly insincere, for the
20 complaint filed by plaintiff in this case requests that he be
21 awarded costs and attorney fees. The written rental agreement,
22 admitted into evidence as plaintiff's exhibit 1, provides in
23 paragraph (13) that the prevailing party "shall be awarded all of

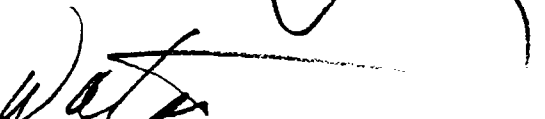
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25 ³The facts of this case are similar to those of Strickland
26 v. Becks (1979) 95 Cal.App.3d Supp. 18, in which this court
27 determined that a defendant who successfully opposed an unlawful
28 detainer action on the basis that the premises were untenable
and succeeded in maintaining possession and having the rental
value lowered 50 percent was the prevailing party for the
purposes of awarding costs and attorney fees.


1 the costs in connection therewith, including, but not by way of
 2 limitation, reasonable attorney's fees." Thus, contrary to
 3 plaintiff's contention on appeal, the record is clear that if
 4 plaintiff had been the prevailing party, plaintiff would have
 5 been awarded attorney fees.

6 Under the facts of this case, defendant should have been
 7 named the prevailing party, and pursuant to section 1174.2,
 8 subdivision (a)(5), defendant should have been awarded costs and
 9 attorney fees as provided for in the rental agreement. The trial
 10 court's failure to adjudge defendant the prevailing party and to
 11 award defendant costs and attorney fees require that the judgment
 12 be modified to reflect this, and the matter remanded to the trial
 13 court for a determination of the amount to be awarded defendant
 14 as costs and attorney fees.

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 17 We concur.


 Roberson, P. J.


 Watai, J.


 Mailano, J.

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