Appendix # 2 to MHCA and Parham Comments on Proposed Stipulation Rule

Katz E-mail Dated 9/5/07

With Katz minority Report Objecting to Certain Rules but Not Objecting to Stipulation Rule

RE: Board of Governors Action on Rules of Procedure for Eviction Actions

Ellen Sue Katz <eskatz@qwest.net>

Tue 9/25/2007 9:59 AM

To:'Rosenbaum, David' <drosenbaum@omlaw.com>; tf.lttf@azbar.org <tf.lttf@azbar.org>;

Cc:'Dourlein, Kelly' <kdourlein@omlaw.com>;

Task Force Members.

I want to give a little more detail to the process before the Board of Governors. As you know, I submitted a minority report on 2 rules I believe restrict tenants' rights, rules 8e and 17d. I made a short presentation at the BOG meeting in June. Unfortunately, I was not told of the BOG's rules subcommittee meeting where the rules were discussed and voted on. I wish I had been there. I went to the general BOG meeting last Friday and made a short presentation about my 2 objections. There was a motion to send the rules up with the minority report but this failed 10 to 11. I was heartened that even though the rules committee supported the proposed rules, 10 members had their doubts about the 2 rules I objected to. I thank Leslie Hall for bringing up the motion. On to the Supreme Court!

Ellen.

From: tf.lttf-owner@webmail.azbar.org [mailto:tf.lttf-owner@webmail.azbar.org] **On Behalf Of** Rosenbaum, David
Sent: Friday, September 21, 2007 12:04 PM
To: tf.lttf@azbar.org
Cc: Dourlein, Kelly
Subject: Board of Governors Action on Rules of Procedure for Eviction Actions

Dear Landlord-Tenant Task Force members:

It is my pleasure to inform you that the State Bar Board of Governors voted unanimously at its meeting this morning to petition the Arizona Supreme Court for approval of the Task Force's proposed Rules of Procedure for Eviction Actions. Judges Hegyi and McMurry joined me at the meeting to make a presentation and answer questions. Guy was ill or he would have been there as well. Ellen Katz also attended and summarized her minority report. All three minority reports were addressed, and of course all were previously submitted to the Board.

Special thanks to Hugh and Guy for their leadership and hard work chairing the subcommittee, and to each of the subcommittee members for the many hours spent on this important and worthwhile project.

The petition will be filed within the next few months, before the Court's January 10 deadline. After the petition is submitted to the Supreme Court a public comment period will open, followed by a decision by the Court at its annual rules conference next September.

David

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OSBORN MALEDON

Minority Position on two rules by Ellen Katz.

Rule 8(e):

This rule is adapted from the Arizona Residential Landlord and Tenant Act ("ARLTA"), A.R.S. § 33-1365. There is no dispute over the first sentence that tracks the language of the statute. The second sentence would allow a court to dismiss a counterclaim if a tenant failed to pay the undisputed rent into court. This provision is not in the current statute. Under A.R.S. § 33-1365(a), a tenant who deposits undisputed rent into court may avail herself of the safe harbor provision. Under that provision, even if a tenant withheld more rent than the court found appropriate, judgment for possession would still be awarded to the tenant if: (1) the tenant posted the undisputed rent with the court; (2) the court found the tenant acted in good faith; and (3) the tenant satisfied the judgment for rent awarded to the landlord. Thus, a tenant who withheld half of their rent ($300) because of bad conditions in the apartment, and deposited the undisputed rent into court will get possession of the unit even if the court finds the tenant should have only withheld $150, if the court finds the tenant acted in good faith and the tenant pays the difference in rent owed.

The second sentence goes beyond the statute to allow the court to dismiss the counterclaim if the undisputed rent is not posted. The penalty in the statute for not depositing the undisputed rent is loss of the safe harbor, not dismissal of the counterclaim. Eviction cases move very quickly and continuance are for short periods (3 days in justice courts). If tenants are not allowed to bring and pursue counterclaims in eviction cases, they will not be brought. There is no reason for the second sentence in Rule 8e and I request that the full committee delete it.

Rule 17(d) – Appeals:

Under the Forcible Entry and Detainer Statute, A.R.S. § 12-1179, a tenant must post certain amounts of money to stay in the residential unit during the appeal. Specifically, to stay the writ of restitution (possession), the tenant must post the rent accruing since the judgment, plus costs and attorney's fees, and the periodic rent as it comes due during the appeal. A.R.S. § 12-1179(d). Rule 17(d) would change the current law in several respects when the appeal is from a finding of material and irreparable breach that involves underlying allegations of "violent conduct, crimes against children, criminal activity involving serious property damage or drug related activity." This rule:

(1) Authorizes the court to deny a tenant the statutory right to remain in their housing pending appeal, even if the rent bond is paid.

(2) Places the burden on the tenant to affirmatively request in writing that she/he wishes to remain in the unit pending appeal.

(3) Requires the court to review only the evidence in the record without a hearing and balance the interests of the tenant, other residents, the landlord and "the public at large" to decide if the writ should be stayed.

(4) Allows the court to impose conditions on the tenant remaining in the unit during appeal, including the exclusion of certain residents such as children or teenagers, from the unit pending appeal.

(5) Allows the court to hold a hearing for an emergency motion to lift the stay if the landlord claims the tenant breached the conditions of appeal.

Since this rule changes the current statute, that should be reason enough to delete it. An additional reason to delete this rule is the adverse effect it will have on vulnerable persons, such as victims of domestic violence. Tenant advocates state that landlords include very broad "crime free" lease provisions in leases that many advocates believe violate the ARLTA. These lease provisions make the tenant liable for any criminal activity on or near the premises that anyone a tenant knows commits. Tenant advocates also state that landlords routinely file "material and irreparable breach" cases to get into court quicker, reduce the time required to obtain possession of the unit and reduce the likelihood of an appeal.

Many landlords evict a victim of domestic violence for being the victim of a crime under the crime free lease provisions. As an example, a landlord files an eviction because a tenant was a victim of domestic violence; called the police; the abuser was arrested; and the landlord claims this abuse (criminal activity) violated the terms of the crime free lease provision. There could be property damage—the abuser punched a hole in the wall, or abuse to a child—he hit his child and the child had to go to the hospital. Under this provision, if the victim of abuse wanted to challenge her eviction and remain in her home, the court could order her to move. Or the court could order that the abuser remain away from the residential unit. If he returned, even against the wishes of the tenant-victim, the court could lift the stay of the writ pending the appeal. These cases are not uncommon. This rule will allow landlords to continue to misuse the immediate and irreparable breach and the crime free lease provisions.

I request that the full committee delete rule 17d in its entirety.

Restaino E-mail Dated 1/18/07

RE: L-T - latest draft

Restaino, Gary (USAAZ) <Gary.Restaino@usdoj.gov>

Thu 1/18/2007 9:57 AM

To: Hugh Hegyi - SUPCRTX <hegyih@superiorcourt.maricopa.gov>; lawguyaz1@cox.net <lawguyaz1@cox.net>; michaelparham@msn.com <michaelparham@msn.com>; jkastner@clsaz.org <jkastner@clsaz.org>; Gerald Williams - MCJCX <GeraldWilliams@mcjc.maricopa.gov>; Ron Myers - MCJCX <RonMyers@mcjc.maricopa.gov>; C.Steven McMurry - MCJCX <C.StevenMcMurry@mcjc.maricopa.gov>; todd.lang@azcleanelections.gov <todd.lang@azcleanelections.gov>; daniel.mcauliffe@azbar.org <daniel.mcauliffe@azbar.org>; eskatz@qwest.net <eskatz@qwest.net>; drosenbaum@omlaw.com <drosenbaum@omlaw.com>; Rachel Carrillo - MCJCX <RachelCarrillo@mcjc.maricopa.gov>;

Thanks Hugh. Here's my crack at 12d. In short, my proposal would not require the parties to appear before the court, but would limit damages and other relief to categories contained in the complaint, consistent with the limitations proposed in default and contested cases.

Proposed change: Add the following language after the stipulation disclaimer, which mirrors the new language in Rule 12a4 for defaults: "Notwithstanding the recitations in the stipulated judgment, the Court shall not award any amount for damages or categories of relief not specifically stated in the complaint. The amounts awarded in the judgment must be consistent with the amounts sought in the complaint, although the judgment may also include additional rent, late charges, fees and other amounts that have accrued since the filing of the complaint, if appropriate."

Rationale: I tried to look at this over a spectrum of proposed relief. On the one side, I think we can all agree that a stipulation that contains an unlawful promise (e.g., tenant promises to give landlord a kidney) or a clearly improper and/or unconscionable promise (e.g., reimbursement of taxable costs of $1,000) would not be enforced. On the other side, I would tend to agree that a stipulated judgment that provides the landlord with all the relief to which he would be entitled under the complaint may nonetheless provide some benefit to the tenant (more likely the intangible benefit of "getting this over with" but possibly a tangible benefit enabling the tenant to leave court earlier to get back to work) to justify its entry. It seems to me that a stipulated judgment that provides for additional relief that is permitted under the ARLTA yet not accounted for in the complaint is closer to the improper side of things, and, if permitted, would obviate the well-pleaded complaint provisions on which we have developed a general consensus.

From: Hugh Hegyi - SUPCRTX [mailto:hegyih@superiorcourt.maricopa.gov]
Sent: Wednesday, January 17, 2007 10:01 PM
To: lawguyaz1@cox.net; Hugh Hegyi - SUPCRTX; michaelparham@msn.com; jkastner@clsaz.org; Restaino, Gary (USAAZ); Gerald Williams - MCJCX; Ron Myers - MCJCX; C.Steven McMurry - MCJCX; todd.lang@azcleanelections.gov; daniel.mcauliffe@azbar.org; eskatz@qwest.net; drosenbaum@omlaw.com; Rachel Carrillo - MCJCX
Subject: L-T - latest draft

Thanks to Judges McMurry and Carrillo for hosting our meeting this evening. Enclosed please find a copy of our latest draft of the rules that incorporates the changes and decisions we made today. Next Wednesday we'll meet again at CLS.

Hugh
602 506-7832

Lang and McMurry E-mails Dated 1/22/07

RE: L-T - latest draft

Todd Lang <todd.lang@azcleanelections.gov>

Mon 1/22/2007 2:43 PM

To: 'C.Steven McMurry - MCJCX' <C.StevenMcMurry@mcjc.maricopa.gov>; 'Restaino, Gary (USAAZ)' <Gary.Restaino@usdoj.gov>; 'michael parham' <michaelparham@msn.com>; 'Hugh Hegyi - SUPCRTX' <hegyih@superiorcourt.maricopa.gov>; lawguyaz1@cox.net <lawguyaz1@cox.net>; 'Gerald Williams - MCJCX' <GeraldWilliams@mcjc.maricopa.gov>; 'Ron Myers - MCJCX' <RonMyers@mcjc.maricopa.gov>; daniel.mcauliffe@azbar.org <daniel.mcauliffe@azbar.org>; eskatz@qwest.net <eskatz@qwest.net>; 'Rachel Carrillo - MCJCX' <RachelCarrillo@mcjc.maricopa.gov>; drosenbaum@omlaw.com <drosenbaum@omlaw.com>; 'Jeffrey Kastner' <jkastner@clsaz.org>;

That might be the time when you do step in and review the stip. When there are provisions that were not in the complaint. Then it may be appropriate to ask the tenant about his/her understanding of the agreement. This won't raise the time restraint concerns because I imagine that these extra side agreements are not that common. I like Gary's proposal.

From: C.Steven McMurry - MCJCX [mailto:C.StevenMcMurry@mcjc.maricopa.gov]
Sent: Monday, January 22, 2007 1:37 PM
To: Restaino, Gary (USAAZ); michael parham; Hugh Hegyi - SUPCRTX; lawguyaz1@cox.net; Gerald Williams - MCJCX; Ron Myers - MCJCX; todd.lang@azcleanelections.gov; daniel.mcauliffe@azbar.org; eskatz@qwest.net; Rachel Carrillo - MCJCX; drosenbaum@omlaw.com; Jeffrey Kastner
Subject: RE: L-T - latest draft

Colleagues,

I share Mike's concern for "the Nanny state" and Gary's concern for the lack of understanding by tenants of stipulations. We must achieve a compromise that addresses both concerns. I am close to, but not yet persuaded to accept, Gary's proposed compromise language. I take issue with this part of his rationale:

> "It seems to me that a stipulated judgment that provides for additional relief that is permitted under the ARLTA yet not accounted for in the complaint is closer to the improper side of things, and, if permitted, would obviate the well-pleaded complaint provisions on which we have developed a general consensus."

I remain a supporter of the well-pleaded complaint, but I don't think it's at risk here. Here's the sort of thing I contemplate: The landlord forgot to add the $40.00 for the broken front window to the complaint, but the tenant knows it's true and stipulates to it. This accommodation makes it easier for the landlord to wait a few more days beyond the five before seeking a writ. Why should I, as a judge, be keen to prevent these compromises?

Steve McMurry

-----Original Message-----
From: Restaino, Gary (USAAZ) [mailto:Gary.Restaino@usdoj.gov]
Sent: Sunday, January 21, 2007 2:07 PM
To: michael parham; Hugh Hegyi - SUPCRTX; lawguyaz1@cox.net; Gerald Williams - MCJCX; Ron Myers - MCJCX; C.Steven McMurry - MCJCX; todd.lang@azcleanelections.gov; daniel.mcauliffe@azbar.org; eskatz@qwest.net; Rachel Carrillo - MCJCX; drosenbaum@omlaw.com; Jeffrey Kastner
Subject: RE: L-T - latest draft

More observations: