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The Magazine of the Solo and Small Firm Section of the State Bar of California



BIG money



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Preventive Medicine

Background Checks on Employees, Contractors, and Tenants Are Essential

By Renée Orth

A recent \$12 million verdict against a California landlord and his property manager arising from the rape and murder of a tenant is a cogent reminder of the potential big money liability that accompanies property ownership.

In *Santos v. Scott Villa Apartments, and Francis Property Management* (Los Angeles Superior Court case number BC 355923), the mother of a murdered tenant of the Scott Villa Apartments sued the apartment complex and the property management company for negligence. The jury agreed that the defendants were negligent in hiring Eriberto Rodriguez – a felon and registered sex offender – to provide maintenance services for the complex, a job that gave him access to all apartments. The jury apportioned the liability 90 percent to the landlord and property management firm, and 10 percent to Rodriguez. (Although Rodriguez is currently serving a 12-year prison term for a string of burglaries in the complex and the sexual assault of a housekeeper at the site, he has not been charged in Santos' murder.) The defendants testified that they had not run a background check on Rodriguez, nor searched for his name in the California database of sex offenders.

The *Santos* verdict, and the tragic circumstances that gave rise to it, should inspire property owners and managers to refresh their understanding of their duties and reexamine the adequacy of their screening processes. The law provides two sources of liability for property owners and managers:

- 1) The duty to exercise reasonable care in the hiring of employees and contractors who are put in a position, by virtue of their employment, to do harm to tenants
- 2) The duty to exercise reasonable care in renting (and continuing to rent) to tenants who may pose a threat to others, both tenants and third-parties.

Given the obvious difficulties of establishing, as required for respondeat superior liability, that an intentional tort was committed in the course and scope of employment, the liability of a

property owner or manager for the acts of employees or contractors is generally based on a theory of primary negligence. California law on negligent hiring follows the rule set forth in the Restatement Second of Agency, section 213, which states that a principal is liable for harm caused by servants or agents if the principal was negligent or reckless in employing "improper persons ... in work involving risk of harm to others," supervising work, or permitting or failing to prevent "negligent or other tortious conduct by persons . . . upon premises or with instrumentalities under his control."

An employer's duty to exercise reasonable care in hiring is breached "when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in light of the particular work to be performed." *Federico v. Superior Court* (1997) 59 Cal. App. 4th 1207, 1214.

The implication of this rule, and the \$12 million *Santos* verdict, is clear: A background check, including a check of the sex offender database, on any employee or contractor who will be given access to the premises is not optional; it is essential. While a thorough background check is a good start, it is not enough. Rather, employers must take seriously any indication of cause for concern relating to the conduct of an employee or contractor.

Another potential liability trap for landlords and managers can result from renting to a tenant who poses a risk to others, both tenants and third parties. The key issue in determining liability for the tort of a tenant is foreseeability. *Barber v. Chang* (2006) 151 Cal. App. 4th 1456, 1464. Foreseeability is the central inquiry to both the *existence* of a duty of care, and the *scope* of any such duty. *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 678. The scope of a landlord's duty is determined by a "sliding-scale balancing formula." *Delgado v. Trax*

Big Money



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Another potential liability trap for landlords and managers can result from renting to a tenant who poses a risk to others, both tenants and third parties. The key issue in determining liability for the tort of a tenant is foreseeability. *Barber v. Chang* (2006) 151 Cal. App. 4th 1456, 1464. Foreseeability is the central inquiry to both the *existence* of a duty of care, and the *scope* of any such duty. *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 678. The scope of a landlord's duty is determined by a "sliding-scale balancing formula." *Delgado v. Trax*

Bar & Grill (2005) 36 Cal. 4th 224, 243. The formula "is determined ... by balancing the foreseeability of the harm against the burden to be imposed. [I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." *Id.* at ¶78-679 (internal quotations and citations omitted).

In the context of liability for the acts of tenants, the question of foreseeability will come down to whether the landlord knew, or should have known, of prior criminal acts or misconduct by the tenant that indicated a danger of harm existed. To satisfy the foreseeability requirement facts must establish a relationship between the past crimes or misconduct and the harm that occurred, *i.e.*, the crimes must be similar in nature.

While no California court has ruled that landlords, even in high-crime areas, are under a duty to perform a criminal background check on every prospective tenant, the relatively low cost of such checks, both in terms of expense and convenience, make the decision an easy one for owners seeking to limit both their liability and the hassle of dealing with problem tenants.

When a property owner is informed that a tenant is engaging in threatening behavior, the owner must take reasonable measures, or be prepared to face the consequences. In *Madhani v. Cooper*, (2003) 106 Cal. App. 4th 412, the plaintiff was bullied by another tenant. The plaintiff repeatedly informed the building managers of the misconduct, but the landlord did nothing. Following a brutal assault by the abusive tenant, plaintiff brought suit against her landlord on claims of negligence. The Court of Appeal reversed the trial court's award of summary judgment for the landlord, finding that a reasonable jury could find the landlord liable based on the facts presented. Among the measures the court suggested may have prevented the assault were eviction of the bullying tenant or the installation of security cameras.

Property owners' liability insurance often provides coverage for negligence actions arising

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from the torts of their employees, contractors and tenants. Because landlord liability for the torts of third parties is based on negligence, insurance policies that cover "accidents" and exclude intentional and criminal acts should cover claims against an owner for injuries caused by the criminal acts of others. Given the potential liability, it is essential that landlords and managers confirm their coverage for negligent hiring claims.

Property owners should follow these important guidelines if they chose to commission background checks on prospective employees, contractors, and tenants, in order to avoid running afoul of other legal requirements:

- Always get the prospective employee/contractor/tenant's permission before running a background check.
- Be consistent: checking into the background of some, but not all, applicants will expose a landlord to charges of discrimination. (Although it is permissible to have different policies for different premises, depending on the crime rate of the area.)
- Owners should have a clear policy concerning the type of misconduct and the proximity in time that will disqualify an applicant. The use of an established provider of screening services can help avoid claims of unfair discrimination by narrowing their search to relevant information.
- Remember, while it is permissible to reject an applicant for past misconduct, a landlord should be careful not to reject an applicant on the basis of criminal convictions (as opposed to the underlying crime), or arrests that did not lead to a conviction.
- Ensure compliance with the Fair Credit Report Act which, among other things, requires landlords to notify applicants when an adverse action (e.g., rejecting an application or requiring a co-signer) results from information provided in a screening report (whether or not it is a "credit report").

The Lesson for Big Money Clients

Property owners and managers can avoid legal headaches and administrative hassles by availing themselves of the advantages of the information age. The widespread availability of low-cost screening services makes the prudent path a convenient path as well. When it comes to background checks on prospective employees, contractors and tenants, a pound of prevention can save your clients **Big Money**.