

**ARTICLE:****“IF A TREE FALLS IN THE FOREST . . .”: IF A TENANT HAS YET TO BE EVICTED, DO THEY STILL POSSESS THE PREMISES?**

*By Jana Contreras\**

**I. Introduction**

“If a tree falls in the forest with no ears to hear does it make a sound?” While the answer to that riddle still remains elusive to many, a recent California court of appeal decision did succeed in answering another riddle: “If a tenant has yet to be formally evicted, but the lease is terminated, do they still lawfully possess the premises?” According to the court in *Multani v. Knight*,<sup>1</sup> the answer is “no.” Once a commercial tenant under a periodic tenancy fails to pay rent and is served with a three-day notice, the tenant becomes a “tenant at sufferance” with no lawful right to possession of the premises. The court then reasoned that because the tenant was not “lawfully” possessing the premises, the landlord could not be liable for damage to the tenant’s property that occurred *after* the tenant stopped paying rent and was served with a three-day notice to pay rent or quit, but *before* the tenant was formally evicted following the conclusion of the landlord’s unlawful detainer action. Although the *Multani* decision is heavily dependent on the specific facts of that case, it nonetheless raises a number of questions that could have significant implications for commercial tenants and landlords in the future.

**II. Multani v. Knight****A. Multani Factual Background**

Beginning in 1993, commercial tenant Dr. Salima Multani operated a medical clinic on premises located in Long Beach leased from landlord Evelyn Knight. The initial term was for five years, with rent due on or before the first of every month. In 1998, Dr. Multani and Knight entered into a second five-year lease. After the second lease expired in 2003, Dr. Multani continued to pay the agreed-upon rent on or before the first of every month, which payments were accepted. By operation of law, this resulted in the creation of a month-to-month tenancy under the same terms as the expired lease.<sup>2</sup>

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In May 2011, Dr. Multani began winding down her medical practice, and entered into an agreement with another doctor, Dr. Boniface Onubah, to purchase her practice for \$400,000, including her medical equipment, supplies, and patient records. By July 2011, Dr. Multani had stopped working entirely, and stopped paying rent. Finally, in early December 2011, having received no rent since June, Knight served Dr. Multani with a three-day notice to pay rent or quit. Dr. Multani failed to respond to the notice, and on December 9th Knight filed an unlawful detainer action against Dr. Multani.

Dr. Multani alleged that she and her staff closed the clinic in late December for the New Year's holiday. Her son testified that when he returned to the clinic on January 6th to reopen it, he discovered that sometime during the closure the sewer line on the premises had backed up and caused raw sewage to flow from the sinks, contaminating all of the medical equipment, supplies, and patient files for the clinic, rendering them unusable. Dr. Multani alleged that as a result of the sewage damage, the sale to Dr. Onubah could not be completed.<sup>3</sup>

In the meantime, Dr. Multani failed to respond to the unlawful detainer lawsuit filed by Knight earlier in December. Dr. Multani's default was entered, and judgment was entered in favor of Knight. Dr. Multani was formally evicted from the premises on May 17, 2012 after Knight obtained a writ of possession.<sup>4</sup>

More than a year and a half after she was evicted, Dr. Multani brought a lawsuit against Knight asserting conversion, breach of the covenant of quiet enjoyment, nuisance, and other legal theories, seeking damages resulting from the sewage spill that Dr. Multani claimed had prevented the sale of her clinic. Knight moved for summary judgement, claiming that that Dr. Multani could not prevail as a matter of law because she was "unlawfully" on the premises as of July 1, 2011 (when she stopped paying rent), and "illegally" on the premises as of December 9, 2011 (when the unlawful detainer action was filed).<sup>5</sup> With respect to Dr. Multani's conversion claim, Knight argued that the claim failed because after defaulting on the rent, Dr. Multani "abandoned" the property and did not try and recover the property she had left.<sup>6</sup>

In opposition, Dr. Multani argued that she retained all legal rights of possession up to the time she was formally evicted following the completion of the unlawful detainer process. With respect to her conversion claim, Dr. Multani argued that Knight's abandonment defense failed because the "conversion" occurred at the time of the sewage spill, and not after Dr. Multani was formally

evicted. Further, Knight had failed to demonstrate compliance with statutory notice requirements that apply when premises are vacated.<sup>7</sup>

The trial court agreed with Knight, granting Knight's motion for summary adjudication on the basis that Dr. Multani was not "lawfully" on the premises at the time of the alleged sewage spill. Dr. Multani appealed. On appeal, the court affirmed the trial court's granting of summary adjudication in favor of Knight.

#### B. *Multani* Analysis Regarding the Rights Possessed By A Non-Paying Month-to-Month Tenant.

Before addressing Dr. Multani's specific arguments relating to each of her causes of action, the court of appeal first addressed what it considered the "most significant issue" in the case: the rights Dr. Multani possessed vis à vis the premises at the time of the alleged sewage spill.<sup>8</sup>

To address this issue, the court first noted that although Dr. Multani had previously been a tenant under a fixed term lease, by the time the sewage spill allegedly occurred, her tenancy had been converted to month-to-month. Ordinarily a month-to-month tenancy is terminated upon giving a 30-day notice. Although Dr. Multani did not give "formal" notice of termination, the court held that by failing to pay rent, Dr. Multani gave "implied" notice that she was terminating her month-to-month tenancy. "Thus, the implied month-to-month lease terminated when [Dr. Multani] failed to pay rent."<sup>9</sup>

Next, the court held that even if Dr. Multani's failure to pay rent did not formally "terminate" the lease, it was at least a material *breach* of the lease. As the court noted, when one party breaches a lease, the other can terminate for cause.<sup>10</sup> From this, the court reasoned that even if Dr. Multani's failure to pay rent did not in and of itself constitute a "notice" of termination, Knight's service of the three-day notice and unlawful detainer action "indisputably establishe[d] Knight's election to terminate the implied lease."<sup>11</sup>

Based on this logic, the court next reasoned that by remaining in possession of the premises without Knight's consent after "termination" of her month-to-month tenancy (which occurred, at the latest, when Knight initiated the unlawful detainer action), Dr. Multani became a holdover tenant or "tenant at sufferance," with mere "naked possession."<sup>12</sup>

Having concluded that the trial court was correct in holding that Dr. Multani's possession of the premises was "unlawful" at the time of alleged sew-

age spill, the court next turned to Dr. Multani's additional arguments specifically challenging the trial court's summary adjudication of her conversion, breach of covenant of quiet enjoyment, nuisance, and negligence/strict liability claims, rejecting each of them in turn on various other grounds.<sup>13</sup>

### III. Potential Implications of *Multani* Decision On Related Doctrines of Landlord Tenant Law

Although it is unclear whether it was even necessary for the court of appeal to affirm the trial court's holding that Dr. Multani did not "lawfully" possess the premises as the time the alleged spill—indeed, the court itself acknowledged that this holding was "not entirely dispositive"—the court appeared to give this holding significant import, calling the issue the "most significant issue in the case" and noting that it was an "important factor" in each of the court's summary adjudication rulings.<sup>14</sup> In light of the significance the court placed on this issue, it is useful to explore the potential ramifications this decision may have on seemingly conflicting statutes and legal doctrines.

#### A. Nonpayment as "Forfeiture" of Lease

As part of its holding that Dr. Multani was not "lawfully" in possession of the premises at the time of the sewage incident, the court first held that Dr. Multani had effectively given "notice" of termination as soon as she ceased paying rent after June.<sup>15</sup> Although not critical to the court's ultimate ruling, the court's suggestion that nonpayment of rent automatically terminates a lease and all rights of possession is seemingly contrary to well-established California law.

In *Haydell v. Silva*, a restaurant lease provided that it was lawful for the landlord to "re-enter the premises and remove all persons therefrom" in the event "any rent shall be due and unpaid."<sup>16</sup> The restaurant owner failed to pay rent for April, and on May 1st, the landlord padlocked the premises and forcibly re-took possession. On appeal, the court reversed judgment for the landlord, holding that the tenant's failure to pay rent "does not *ipso facto* work a forfeiture of the leasehold." Instead, it "merely gives the lessor the right to terminate the lease in the manner provided by law, that is, by proceeding in accordance with Civil Code section 791 and Code of Civil Procedure section 1161(2)."<sup>17</sup> As the court stated in *Lamey v. Masciotra*, "[r]egardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process."<sup>18</sup>

*Haydell* is factually distinguishable from *Multani* in that *Multani* involved a

month-to-month lease, the landlord *did* serve a three-day notice and an unlawful detainer complaint, and the landlord damages did not relate to landlord “forcible” re-entry. Nonetheless, the court’s holding in *Multani* is still difficult to reconcile with the basic premise of *Haydell*: that a tenant remains in “possession” until the landlord serves statutory three-day notice *and* obtains writ of possession following successful prosecution of an action in unlawful detainer.

The *Multani* courts suggestion that a tenant’s “right” to possession automatically terminates upon breach of the lease by nonpayment of rent also ignores the fact that “termination” of the lease and recovery of possession is just one of several remedies available to the landlord for a tenant’s breach. When a tenant breaches a lease, the landlord could alternatively elect to: (1) waive the breach and keep the lease in effect;<sup>19</sup> or (2) permit the tenant to remain in possession and sue to collect damages.<sup>20</sup> Had the landlord in *Multani* elected either of those remedies, it is doubtful that the court would have held that Dr. Multani’s “lawful” right to possession and corresponding right to sue for damages terminated immediately upon her breach. In essence, the *Multani* decision effectively places a tenant’s right to recover damages after a breach entirely in the landlord’s control and discretion.

## B. Tenancy at Sufferance

In addition to its suggestion that a tenant’s nonpayment of rent constitutes a “notice” or “election” to terminate, the *Multani* court’s finding that Dr. Multani was merely a “holdover tenant” or “tenant at sufferance” and had but “naked possession” at the time of the spill also has potential ramifications. As support for this ruling, the court cited *Aviel v. Ng*,<sup>21</sup> for the proposition that “a tenant under a subordinated lease who remains in the possession after the foreclosure sale does so as a holdover tenant (tenant at sufferance).”<sup>22</sup>

Unlike *Multani*, the issue in *Aviel* was not that the tenant failed to pay rent, but rather that the tenant’s lease was subordinated to a deed of trust executed by the original landlord. After the beneficiary of the deed of trust acquired the leased premises, it filed an unlawful detainer action against tenants, who operated a restaurant on the premises. When the property was sold to new owners, the beneficiary converted the action into an action for reimbursement of reasonable rental value. Tenants cross-claimed, asserting that the trustee’s sale did not cause extinguishment of the lease, and asserting claims for breach of contract, wrongful eviction, intentional infliction of emotional distress, conver-

sion, termination of utility services, and others. On appeal, tenants challenged the trial court's award of summary adjudication for the beneficiary on tenants' claims for wrongful eviction and specific performance, as well as the award of reasonable rental value to the beneficiary for the period after the lease was extinguished and before tenants relinquished possession.<sup>23</sup>

The court of appeal affirmed. After holding that the lease was extinguished as a result of the trustee's sale, the court next turned to the issue of the trial court's award of damages to the beneficiary for the "reasonable rental value" of the premises. In rejecting tenants' claim that the rent and utilities should be determined based on the terms of the prior lease, the court cited the rule that a "tenant under a subordinated lease who remains in possession after the foreclosure sale does so as a holdover tenant (tenant at sufferance). [Citations]. There is no contractual relationship between a holdover tenant and the landlord; the tenant has but "naked possession."<sup>24</sup> Similarly, in *Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency*, the court of appeal held that a tenant at "sufferance" was not entitled to moving expenses based on a contractual landlord-tenant relationship, noting that "[s]ince the possession of the tenant at sufferance is wrongful, the owner may elect to regard the tenant as a trespasser."<sup>25</sup>

Although *Peter Kiewit* and similar cases have held that "the possession of the tenant at sufferance is wrongful" for the purposes of enforcing *contractual* remedies, none of the them specifically held that tenants at "sufferance" do not "lawfully" possess the premises for purposes of recovering tort damages, as the *Multani* court suggests. In fact, the court in *Aviel* did award the tenants in that case damages on their conversion claim relating to restaurant equipment, which portion of the judgment was not appealed.<sup>26</sup> Although the facts of tenants' conversion claim, and in particular the timing of the alleged "conversion," do not appear in the *Aviel* decision, the mere fact that such an award was made at all appears to be at odds with the *Multani* court's suggestion that tenants at "sufferance" are not "lawfully" in possession of the premises for purposes of stating a claim for conversion or other torts.

### C. Abandonment of property

Among Dr. Multani's claims against Knight was her assertion of a "conversion" claim relating to destruction of the medical clinic's equipment, supplies, and patient files resulting from the alleged sewage spill in late December 2011/early January 2012. The trial court had found that Knight was entitled to sum-

mary adjudication on this claim based on Dr. Multani's "abandonment" of her property, which the trial court held was established by Dr. Multani's testimony that she had the only keys to the property and could have retrieved her property at any time between June 2011 (when she stopped paying rent) and May 2012 (when she was finally evicted).<sup>27</sup> Ultimately the court affirmed the trial court's ruling on this claim on other grounds, including that there was no evidence that Knight was negligent in failing to prevent the spill.<sup>28</sup>

Although the *Multani* court did not specifically affirm the trial court's finding that Dr. Multani "abandoned" her property by failing to remove it once she stopped paying rent, neither did the court reject it. As Dr. Multani argued on appeal, the trial court's ruling is seemingly at odds with the requirement that landlords give notice before disposing of a tenant's personal property that remains after a "tenancy has terminated and the premises have been vacated by the tenant."<sup>29</sup>

The trial court's ruling on abandonment is also seemingly at odds with established case law, which generally holds that abandonment is accomplished by the tenant vacating the premises with an intent not to perform the future obligations of the lease, and requires both an intention to abandon, and an affirmative act by which that intent is carried into effect.<sup>30</sup> In *Riner v. Vernon*, for example, the court held that even voluntary relinquishment of the tenant's key was insufficient to establish abandonment where the tenant left all of his belongings in the premises and gave no one permission to move them.<sup>31</sup> In *Multani*, on the other hand, the trial court appeared to hold that mere failure to "retrieve" personal property after not paying rent was sufficient evidence of an "intent" to abandon.<sup>32</sup>

In light of the court's affirmation of the trial court's finding that Dr. Multani's tenancy was "unlawful" once she ceased paying rent, its silence on these issues creates uncertainty for the rights of future tenants to assert claims relating to the destruction or wrongful retention of personal property if a tenant ceases paying rent. In particular, the ruling potentially limits liability for landlords even where they fail to provide the requisite statutory notices.<sup>33</sup> Among other things, the court in *Multani* failed to mention any of the specific statutory provisions governing abandonment of leasehold premises and abandonment of personal property,<sup>34</sup> although in the context of commercial leases the abandonment statutes do not preclude other common law grounds for abandonment<sup>35</sup> and the notification provisions concerning tenant personal property are stated to be

“optional,” at least in some respects.<sup>36</sup> Given the court’s unqualified conclusion that the lease had been terminated and the tenant’s personal property abandoned as a matter of law, it is surprising that the court did not address the implication of these other potentially applicable statutory notice and abandonment procedures.

### Conclusion

The practical implications of the court’s holding in *Multani* have yet to be seen. Although the court’s ruling on Dr. Multani’s individual causes of action was limited to the specific—and admittedly “bad”—facts of the case, its affirmation of the trial court’s ruling that Dr. Multani no longer “lawfully” possessed the premises as soon as she ceased paying rent could seemingly be extended in other contexts as well. For example, although the court’s holding was made in the context of a month-to-month tenancy, depending on the lease terms, its reasoning could apply equally to fixed term tenancies as well. Given the special statutory notices and care required for the safekeeping of a *residential* tenant’s personal property, however, it seems unlikely that courts will extend this holding to that context.

Although the court’s holding that non-paying “holdover” tenants cannot recover from the property owner in tort appears to be an outlier limited to the specific factual circumstances of that case, landlords will no doubt seek to apply this holding to other contexts in order to limit their liability for damage to breaching tenant’s personal property. Whether other courts will agree with the *Multani* court’s holding on this issue remains to be seen.

### **ENDNOTES:**

<sup>1</sup>*Multani v. Knight*, 23 Cal. App. 5th 837, 233 Cal. Rptr. 3d 537 (2d Dist. 2018).

<sup>2</sup>*Id.* at 841.

<sup>3</sup>*Id.* at 841.

<sup>4</sup>*Id.* at 842.

<sup>5</sup>*Id.* at 842.

<sup>6</sup>*Id.* at 842.

<sup>7</sup>*Id.* at 844.

<sup>8</sup>*Id.* at 850.

<sup>9</sup>*Id.* at 851.



<sup>10</sup>*Id.* at 851, citing *B. L. Metcalf General Contractor, Inc. v. Earl Erne Inc.*, 212 Cal. App. 2d 689, 693, 28 Cal. Rptr. 382 (4th Dist. 1963), and *Wood, Curtis & Co. v. Scurich*, 5 Cal. App. 252, 254, 90 P. 51 (1st Dist. 1907).

<sup>11</sup>*Multani v. Knight*, 233 Cal. App. 5th at 852.

<sup>12</sup>*Id.* at 852, citing *Aviel v. Ng*, 161 Cal. App. 4th 809, 820, 74 Cal. Rptr. 3d 200 (1st Dist. 2008).

<sup>13</sup>*Id.* at 852-856.

<sup>14</sup>*Id.* at 850.

<sup>15</sup>*Id.* at 851.

<sup>16</sup>*Patek & Co. v. Vineberg*, 210 Cal. App. 2d 20, 23, 26 Cal. Rptr. 293 (2d Dist. 1962).

<sup>17</sup>*Id.* at 23. See also *Lamey v. Masciotra*, 273 Cal. App. 2d 709, 78 Cal. Rptr. 344 (2d Dist. 1969).

<sup>18</sup>*Lamey v. Masciotra*, 273 Cal. App. 2d 709, 714-715, 78 Cal. Rptr. 344, 348 (2d Dist. 1969).

<sup>19</sup>*Bank of America Nat. Trust & Savings Ass'n v. Moore*, 18 Cal. App. 2d 522, 526-528, 64 P.2d 460 (2d Dist. 1937).

<sup>20</sup>Civ. Code, § 1951.4.

<sup>21</sup>*Aviel v. Ng*, 161 Cal. App. 4th 809, 820, 74 Cal. Rptr. 3d 200 (1st Dist. 2008).

<sup>22</sup>*Multani v. Knight*, 233 Cal. App. 5th at 852, citing *Aviel*, 161 Cal. App. 4th at 820.

<sup>23</sup>*Aviel v. Ng*, 161 Cal. App. 4th at 815.

<sup>24</sup>*Id.* at 820.

<sup>25</sup>*Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency*, 178 Cal. App. 3d 435, 445, 223 Cal. Rptr. 728 (1st Dist. 1986). See also *Kaufman v. Goldman*, 195 Cal. App. 4th 734, 740, 124 Cal. Rptr. 3d 555 (1st Dist. 2011).

<sup>26</sup>*Aviel v. Ng*, 161 Cal. App. 4th at 815.

<sup>27</sup>*Multani v. Knight*, 23 Cal. App. 5th at 847.

<sup>28</sup>*Id.* at 853-853.

<sup>29</sup>*Id.* at 852-853 and n.12; Civ. Code, § 1993.03.

<sup>30</sup>*Pickens v. Johnson*, 107 Cal. App. 2d 778, 787, 238 P.2d 40 (3d Dist. 1951).

<sup>31</sup>*Riner v. Vernon*, 132 Cal. App. 178, 22 P.2d 255 (3d Dist. 1933).

<sup>32</sup>*Multani v. Knight*, 23 Cal. App. 5th at 847.

<sup>33</sup>E.g., Code Civ. Proc., § 1161, subds. (2), (3), (4) (three-day notice); Code Civ. Proc., § 1166a (writ of possession); Civ. Code, § 1946 (notice regarding reclaiming abandoned personal property).

<sup>34</sup>See Civ. Code, §§ 1946, 1951.3, 1951.4; Code Civ. Proc., § 1174, subd. (a).

<sup>35</sup>Civ Code, § 1951.3, subd. (f).

<sup>36</sup>Civ. Code, § 1993.02, subd. (a).