

1987

Investment v. Oliver : Amicus Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870501-CA
IN THE UTAH COURT OF APPEALS

P. H. INVESTMENT,

Plaintiff/Respondent,

vs.

CATHY OLIVER,

Defendant/Appellant.

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Case No. 870501-CA

BRIEF OF AMICUS CURIAE THE APARTMENT ASSOCIATION OF UTAH

Appeal from a decision of the Honorable Robert
C. Gibson, Fifth Circuit Court, Salt Lake Department,
Salt Lake County, entered November 10, 1987.

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IN THE UTAH COURT OF APPEALS

P. H. INVESTMENT,	:	
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I. STATEMENTS OF JURISDICTION, ISSUE AND CASE

Amicus Curiae incorporate herein, as if set forth in full, the statements of Jurisdiction, Issues, and Case contained in the Brief of Appellant.

II. SUMMARY OF ARGUMENTS

A. The court, although it may disagree with legislative inaction in this area, should defer resolution of this matter to that body.

B. Mechanisms are in place to help tenants with substandard housing problems.

C. If the court chooses to act on this matter the Texas law is an excellent model to refer to.

III. ARGUMENT

A. THIS MATTER IS IN THE PROVINCE OF THE LEGISLATURE

The Utah legislature has had several bills before it in the 1980's dealing with warranty of habitability. A 1984 bill co-drafted by the undersigned and modeled after the Texas law passed the Senate and failed by one vote in the House of Representatives. Other attempts have been less successful. Many of the concerns expressed at floor debates are the fear of (a) intruding on contractual arrangements between landlord and tenant; (b) that there are enough governmental agencies enforcing housing codes

to protect tenants and the legislature would simply be creating another level of bureaucracy; (c) that the law would be used as a device to withhold rent.

The major problems facing the court is that which faces a draftsman of legislation: what remedies to fashion that are fair and equitable to landlord and tenant. Appellant has proposed one remedy, that of rebate of rent. Landlords would offer other remedies or suggestions and others in the public may have other input.

The court would truly become the drafting party of legislation without giving the public the benefit of the legislative process and all that it entails (committee hearings, floor debate, the chance to contact their representative).

If the court attempts to take on this project, numerous problems will quickly arise. Will the court allow a rebate in rent for a damaged apartment where the damage was caused by the tenant? What type of conditions should merit relief to the tenant? Shouldn't some type of notice in fairness be given to the landlord before sanctions are imposed?

Additional questions arise as drafting is done. Will the court tap on the knowledge of experts in the industry by asking for additional information as a legislature would do?

In conclusion the job the court would be taking on would usurp proper process and legislative authority and would be a monumental job without a great deal more of input and study from the very public this law would affect.

B. MECHANISMS EXIST TO PROTECT THE TENANT

At present it takes one telephone call from a tenant and a Board of Health official or a building code inspector will visit the premises. These agencies issue warning letters, citations and if they feel there is a threat to health and to occupants, can close the building to occupancy. Nothing could penalize a landlord more than to have the means for his mortgage payment cut off. There is nothing to suggest that governmental agencies are not doing a vigorous and excellent job of enforcement in these areas.

Tenants have the remedy of asserting constructive eviction and of vacating the dwelling. If the court finds that the lease was breached and the premises were uninhabitable, the tenant is relieved from his obligations under the lease.

Another remedy for tenants is to file action against landlords for the diminution of the rental value of the premises. Tenants would assert that the contract

requires \$300.00 per month in rent but that the property is now only worth \$250.00 and that is what should be paid in the future.

The problem is not a need for new law, but to better educate landlords and tenants about current laws, rights and agencies available to help.

C. THE TEXAS LAW IS A GOOD MODEL

If the court chooses to attempt to set out guidelines, it is respectfully submitted that the Texas law in this area is the best and fairest in the country. A copy of the law and comments are attached in the addendum to this brief.

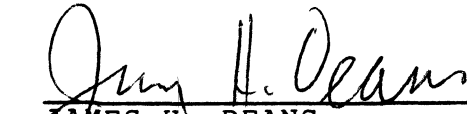
The law which was supported by the Texas Apartment Association and passed the legislature in a generally pro-landlord state is a good model for several reasons.

It does not allow the withholding of rent but gives the tenant several remedies to chose from. It imposes restrictions on the type of conditions that allow remedies to be sought. For example, the problem must be one that materially affects the physical health and safety of an ordinary tenant. The law provides a notice and cure period to the landlord. With some modifications to fit Utah conditions, this is a law landlords could live with.

IV. CONCLUSION

Appellant has proposed a remedy least palatable to landlords. A very simple question faces the court. Does it want to take on the role of legislative draftsman in this area of the law? If so, the undersigned hopes the court would seek to give guidelines in accordance with the Texas model.

DATED this 26th day of April, 1989.



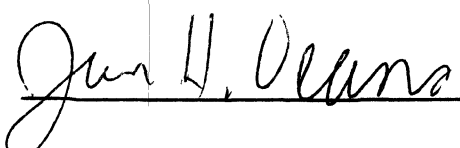
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 1989, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Brief of Amicus Curiae, to the following:

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Section 9. MINIMUM AGE.

Except where specifically exempted by the constitution or statutes of this state, a person 18 years of age or older has the legal capacity to enter into a binding written rental agreement or written security deposit agreement for residential property, and shall be bound by all the provisions of the Act.

Commentary on Section 9. Under this section, 18-year-olds are liable on leases they enter into, whether the lease agreement be oral or in writing. Under the case *Mitchell v. Higginbotham*, 38 S.W. 2d 390 (Tex. Civ. App. 1931, no writ hist.), if a tenant signs a lease when he is younger than 18, the lease will automatically become valid if he continues to occupy the premises for a reasonable period of time after reaching 18.

Article 5236f**Landlord's Duty to Maintain Habitable Premises**

(no amendments since original passage in 1979)

Section 1. DEFINITIONS. In this Act:

- (a) **"Landlord"** means the owner, lessor, or sublessor of a residential rental unit. A managing agent, leasing agent, or resident manager shall be considered the agent of the landlord for purposes of notice and other communications required or allowed under this Act. Otherwise, a managing agent, leasing agent, or resident manager shall be considered a landlord under this Act only if such agent purports to be the owner or lessor in the rental agreement.
- (b) **"Tenant"** means any person entitled under a rental agreement to occupy a residential rental unit to the exclusion of others.
- (c) **"Premises"** means a residential rental unit and the appurtenances, grounds, and facilities held out for the use of the tenants generally, and any other area or facility the use of which is provided to the tenant in the rental agreement.
- (d) **"Rental agreement"** means any agreement, written or oral, which establishes or modifies the terms, conditions, rules, regulations, or any other provisions regarding the use and occupancy of a residential rental unit, including any rental agreement as modified or changed pursuant to the provisions of Section 6(b) of this Act.
- (e) **"Normal wear and tear"** means that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises equipment or chattels by the tenant or members of his household, or his invitees or guests. Provided, however, "accident" shall not include breakage or malfunction due to age or deteriorated condition.

Commentary on Section 1(a). Under this section, the owner of the land is the one who must spend the money for repairs and bear the risk of statutory penalties and remedies. However, if a management company represents that it is the "owner" or "lessor" in the lease, then the statute makes the management company, as well as the owner of the property, liable for repair and remedies under the Act.

Commentary on Section 1(b). The word "tenant" includes all persons who are listed as "residents" or "tenants" in the lease. They are persons who signed the lease and who can be sued for nonpayment of rent. If there are multiple tenants, each might be entitled to his own statutory remedies of damages, civil penalties, etc. Mere occupiers or guests (persons who are not liable for the rent) are not considered "tenants."

Continued on page .

Commentary on Section 1(c). The landlord's duty to maintain habitability extends to the individual apartment units and to the common areas such as roofs, exterior walls, landscaped areas, swimming pools, laundry rooms, parking lots, etc.

Commentary on Section 1(d). This includes all residential leases, regardless of the term, the number of units, or the nature of ownership. It covers apartments, single family dwellings, duplexes, dormitories, and housing projects which are owned by individuals, partnerships, profit or nonprofit corporations, religious institutions, charities, housing authorities, public or private schools and universities, cities, counties, and the state government.

Commentary on Section 1(e). If the damage occurs through negligence or improper use, it is not normal wear and tear. If something wears out or breaks because of its age or normal use, the landlord must still repair it if the condition materially affects health or safety as set forth in Section 2 below.

Section 2. LANDLORD'S DUTY TO REPAIR CERTAIN CONDITIONS.

(a) The landlord shall have a duty upon actual notice as provided herein, to make a diligent effort^{*} to repair or remedy any condition which materially affects the physical health or safety of an ordinary tenant.

(b) The landlord shall not have a duty to repair or remedy any condition which is caused by the tenant or the tenant's family, guests, or invitees during the term of the rental agreement or any renewal or extension period. The foregoing shall not relieve the landlord from a duty to repair a condition which was caused by normal wear and tear and which also materially affects the physical health or safety of an ordinary tenant.

(c) This Act shall not require a landlord to furnish utilities from a utility company if, as a practical matter, the utility lines of the utility company are not reasonably available. This Act shall not require a landlord to furnish security guards for the premises. This Act shall not extend to breakages, malfunctions, or other conditions which do not materially affect the health or safety of an ordinary tenant.

★ **Commentary on Section 2(a).** This is the core of the statute. The landlord's duty is clear and specific, unlike the judicial standard which it replaced. The statute repealed Kamarath v. Bennett, 568 S.W. 2d 658 (Tex. 1978) in which the Supreme Court said that under the common law, landlords must keep the premises "free from conditions which are unsafe, unsanitary, or otherwise unfit for living." The Supreme Court decision was repealed and replaced by Section 14 of the statute.

The statutory standard is *not* an absolute duty to complete the repairs or to do so within a rigid time frame. Instead, it imposes the duty to make a diligent effort, i.e., to take reasonable steps to repair and to not delay or procrastinate in attempting to make the repairs. The condition must be material and not trivial or insignificant. It must affect the physical health or safety of the tenant; and therefore, claims of mental suffering or anguish are not covered. Conditions or breakdowns which merely cause inconvenience or discomfort, without materially affecting the health or safety, are *not* covered by the statute. Lastly, the standard is that of an ordinary tenant rather than the standard that would be required for a hypochondriac or a person with extraordinary health problems or needs.

Commentary on Section 2(b). If the condition was due to the fault of the tenant or his guests or occupants, the landlord has no duty to repair. However, if something wears out or is broken through normal use, the landlord does have the duty to repair since such conditions are considered "normal wear and tear." See Section 1(e).

Commentary on Section 2(c). If water, sewer, or electricity are in the city street in front of a dwelling, the landlord will probably have a duty to hook up with such utilities. However, if such utilities are not in the street in front of a lot, the owner not normally be required to extend the approach mains from down the street to in front of his lot. Similarly, if a house is located in the country where water, sewer, or electric lines are not economically feasible, the owner is not guilty of violating the statute for not furnishing public utilities. Whether or not he would be required to furnish water or septic tanks or electricity in rural areas would vary from case to case depending on the reasonability of cost and availability.

Section 3. LANDLORD'S FAILURE TO REPAIR: PREREQUISITES FOR STATUTORY REMEDIES.

The tenant shall be entitled to all of the rights and remedies set forth in this Act if all of the following have occurred:

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not

- (a) the tenant has given notice to the person or place where rent is normally paid, specifying the condition. Written notice may be required only if such requirement is contained in a written rental agreement;
- (b) the tenant was not delinquent in payment of rent under the rental agreement, as defined in Section 1(d), or any portion thereof at the time of notice of the condition to the landlord;
- (c) the condition materially affects the physical health or safety of an ordinary tenant;
- (d) the landlord has failed to make a diligent effort to repair or remedy the condition;
- (e) the landlord has had a reasonable time, after receipt of notice as provided above, to repair or remedy the condition, considering the nature of the problem and the reasonable availability of material, labor, and utilities from a utility company.

In any judicial action for enforcement of rights and remedies which are conditioned on the above requirements, the tenant shall have the burden of proof. Provided, however, the landlord shall have the burden to prove that the landlord made a diligent effort to repair and that a reasonable time for repair did not elapse if the landlord fails to provide a written explanation of the reasons for delay within five days after receipt of written demand from the tenant for such explanation.

Commentary on Section 3. The prerequisites listed in §3 are *absolutely necessary* for the non-judicial (self-help) and the judicial (courthouse) remedies under the statute.

Commentary on Section 3(a). Under this subsection, the initial repair notice by the tenant to the landlord can be either oral or written. However, the statute allows the landlord to require that the repair notice be in writing if such requirement is contained in a written lease. The provision in the lease which requires written repair notice does not have to be underlined or in bold print. Paragraph 11 of the TAA lease contains such requirement for written repair notice.

***Commentary on Section 3(b).** Very simply, if the tenant pays his rent, he can make his complaint and start his statutory remedies. If he doesn't pay his rent, he can't take the first step toward triggering the statute.

Commentary on Section 3(c). Conditions or breakdowns which merely cause inconvenience or discomfort, without having a material effect on health or safety, are not covered by the statute.

Commentary on Section 3(d). The test is not whether the landlord failed to repair, but rather whether the landlord was trying diligently to get the repairs made.

Commentary on Section 3(e). A “reasonable time” for repair must elapse before the landlord is in violation of the Act. How long a “reasonable time” can be will vary, depending on the availability of labor, materials, and utilities. All of these can be affected by manufacturing backlogs on parts, transportation strikes and delays, natural catastrophes such as hail storms, hurricanes, tornadoes, floods, etc.

Section 4. FIRE OR CASUALTY LOSS.

(a) Where the condition is the result of an insured casualty loss such as fire, smoke, hail, explosion, or similar cause, the time period for repair shall not commence until insurance proceeds are received by the landlord.

(b) If the rental premises are as a practical matter totally unusable for residential purposes after a casualty loss, and if the casualty loss is not due to the negligence or fault of the tenant or the tenant's family, guests, or invitees, either landlord or tenant may terminate the rental agreement at any time prior to completion of repairs by giving written notice to the other. In such event, the tenant shall only be entitled to a pro rata refund of rent from date of move-out and refund of any security deposit as required by law.

(c) If the rental premises are partially unusable for residential purposes after a casualty loss, and if the casualty loss is not due to the negligence or fault of the tenant or the tenant's family, guests, or invitees, a tenant occupying the premises shall have a right of partial rent reduction only upon application by the tenant to the county or district court; provided, however, a landlord and tenant may agree otherwise in the written rental agreement. Any partial rent reduction shall be in relation to the extent of unusability of the premises due to the casualty.

Commentary on Section 4(a). In an extensive loss, the average landlord relies on his insurance proceeds to fund the repairs . . . just like the average tenant relies on his insurance proceeds to fund the repairs for his wrecked automobile. Even in small fires or flooding, the landlord may have to leave the situation “as is” until the insurance company has had time to make its inspections, obtain competitive bids from different contractors, and negotiate a settlement with the owner.

Commentary on Section 4(b). Either party can terminate the lease if the apartment is “totally unusable” as a practical matter. “Total unusability” does not occur when only part of a dwelling is destroyed and the remainder can still serve as effective shelter. This is true even though it may be inconvenient for the tenant during the repair period. Total unusability must be for a long enough period of time to justify termination “as a practical matter.”

Commentary on Section 4(c). The phrase “partial unusability” includes casualty losses where (1) only part of the premises are unusable or (2) the entire premises are unusable for only a short period of time . . . for example, where heavy rains cause flooding and high water for a day or two. The statute imposes the risk of these temporary situations on the landlord; but the statute also allows the risk of inconvenience to be borne by the tenant by contractual agreement of the parties, as in the case of Paragraph 11 of the TAA lease. Contractual provisions to this effect do not have to be underlined or in bold print.

Section 5. NONJUDICIAL REMEDY FOR THE TENANT.

(a) The tenant shall have the right to terminate the rental agreement if:

(1) all the events in Section 3(a), (b), (c), (d), and (e) have occurred; and

(2) after the lapse of a reasonable time for repair as set forth in Section 3(e), the tenant has given the landlord written notice that the tenant will terminate the rental agreement unless the condition is repaired or remedied within seven days.

) In the event of termination of the rental agreement by the tenant under this section and delivery of possession to the landlord, the tenant shall be entitled to a pro rata refund of rent from determination or move-out (whichever occurs later) and a refund of any security deposit as required by law. Termination of the rental agreement by the tenant shall preclude the remedies of Section 5(a) and (b) of this Act.

Commentary on Section 5(a)(1). The tenant cannot terminate the lease if the requirement in the checklist in Section 3 of the statute has not been met.

Commentary on Section 5(a)(2). This subsection forces communication between the parties and helps minimize habitability problems. The notice procedure makes it less risky for a tenant to unilaterally terminate the lease, and it prevents the landlord from being "blindsided" by a tenant moving out without giving the landlord an opportunity to explain the legitimate reasons for repair delays. The net effect of this provision is that there must be a lapse of reasonable time for repair *plus* the lapse of seven additional days. If the landlord can complete the repair before the lapse of this "second chance" period, the tenant does not have a statutory right to terminate the lease.

Commentary on Section 5(b). If the tenant terminates the lease under Section 5, the tenant does not lose his remedy for actual damages, civil penalties, or attorneys fees. But the tenant does lose any right to force repair or abate the rent after he has moved out.

Section 6. JUDICIAL REMEDIES FOR THE TENANT.

The tenant shall have the right to recover judgment for any one or more of the remedies as set forth below, provided that all of the events in Section 3(a), (b), (c), (d), and (e) have occurred and that the tenant has given the landlord written notice that the tenant will file suit under this Act unless the condition is repaired or remedied within seven days:

- (1) a court order directing the landlord to take reasonable action to repair or remedy the condition which materially affects the physical health or safety of an ordinary tenant;
- (2) a court order for a partial rent reduction in proportion to the reduction in rental value due to the condition in question until the condition is repaired or remedied;
- (3) a court order imposing a civil penalty against the landlord in the amount of one month's rent plus \$100;
- (4) a court order awarding actual damages to the tenant; and
- (5) a court order assessing against the landlord court costs and attorney's fees pursuant to Section 60 hereof; provided, however, nothing in this Act shall authorize the recovery of attorney's fees for a cause of action for damages of any kind or nature relating to or arising out of personal injuries.

Commentary on Section 6. In this section, the tenant's courthouse remedies are greater than those under the common law. On the other hand, the statute prohibits several unfair remedies that might be asserted by tenants . . . like withholding rent or claiming non-habitability as a defense to eviction. The tenant cannot file a habitability lawsuit if any requirement in the checklist in Section 3 of the statute has not been met. The seven day notice provision makes it less risky for a tenant to file a lawsuit without first giving the landlord an opportunity to explain any legitimate reasons for repair delays. The net effect of the above statutory provision is that there must be a lapse of a reasonable time for repair plus the lapse of seven additional days. If the landlord can complete the repair before the lapse of this "second chance" period, the tenant cannot sue the landlord for violation of the statute.

Commentary on Section 6(a). This is a remedy not found in the common law. If the landlord is not careful, he will not only be forced by the court to repair, he will also have to pay the tenant's attorney's fees as well as his own attorney's fees under Section 6(e). Thus, the statute has a significant preventative effect, short of the courthouse. Court orders forcing repairs are only available in county or district courts, and not in JP courts. See Section 16 of the statute.

Commentary on Section 6(b). The remedy of partial rent reduction was nonexistent under common law; or at least it was very unclear. This remedy can only be obtained in county or district court, and not in JP court. See Section 16.

Commentary on Section 6(c). A civil penalty of one month's rent and \$100 is available to the tenant before or after he moves out. This remedy was not available under common law. In the case of multiple tenants, it is possible that each tenant may have his own lawsuit; so the landlord may have a greater exposure when there are multiple tenants. However, the more logical interpretation is that multiple tenants will be limited to a joint recovery.

Commentary on Section 6(d). The remedy of actual damages was available under common law, and it is retained under the statute. The remedy usually extends to (1) property damages, (2) out-of-pocket expenses, and (3) the difference in the rental value of the premises, with and without the condition being repaired.

Commentary on Section 6(e). This remedy of attorney's fees was not available under the common law doctrine of implied warranty of habitability. Attorney's fees are granted to the "prevailing party" under Section 10.

Section 7. RETALIATION BY LANDLORD.

a) A landlord shall not, within six months from the date of the tenant's repair notice, do any of the following acts in retaliation for the tenant's notice to repair or exercise of remedies for nonrepair of condition which materially affects the health and safety of the ordinary tenant: (1) filing an eviction proceeding on grounds other than those set forth in Section 7(b) below, (2) depriving the tenant of the use of the premises except where authorized by law, (3) decreasing services to the tenant, or (4) giving the tenant notice of termination of the rental agreement or notice of rent increase, which is effective within six months from the date of such notice. The landlord shall have a defense to a cause of action for retaliation by proving that the landlord's actions were not for purposes of retaliation.

b) The following shall not constitute retaliation and shall constitute valid grounds for eviction in any event:

- (1) where the tenant was delinquent in rent as of the time of the landlord's written notice to vacate or as of the time of the filing of the eviction lawsuit;
- (2) where property damage to the premises was intentionally caused by the tenant or the tenant's family, guests, or invitees;
- (3) where the tenant or the tenant's family, guest, or invitee has threatened, by word or conduct, the personal safety of the landlord, the landlord's employees or other tenants;
- (4) where the tenant has materially breached the rental agreement; provided, however, material breach for purposes of this subsection shall not include holding over except as provided below;
- (5) where the tenant has held over after the tenant has given notice of termination of the rental agreement or notice of intent to vacate;
- (6) where the tenant has held over after the landlord has given notice of termination of the rental agreement at the end of the rental term, and the landlord's termination notice was prior to receipt of actual notice to repair from the tenant; or

(7) where the tenant has held over and the landlord's notice of termination was motivated by a good faith belief that the tenant or the tenant's family, guests, or invitees may: adversely affect the quiet enjoyment by other tenants or neighbors, or (ii) materially affect the health or safety of the landlord, other tenants, or neighbors, or (iii) cause damage to property of the landlord, other tenants, or neighbors.

* (c) The following shall ~~not~~ constitute retaliation under this Act unless prohibited by previous court order under Section 6 hereof: (1) increases in rent pursuant to an escalation clause for utilities, taxes, or insurance in a written rental agreement, and (2) increases in rent or reduction in service which are part of a pattern of rental increases or service reductions for an entire multiunit project.

(d) If the landlord has retaliated against the tenant in violation of this section, the tenant shall be entitled to recover from the landlord the following: (1) a court order imposing against the landlord a civil penalty of one month's rent plus \$100, (2) a court order against the landlord awarding the tenant reasonable moving costs, and (3) a court order assessing against the landlord court costs and attorney's fees pursuant to Section 10 hereof.

Commentary on Section 7(a). In a nutshell, if the tenant gives notice of a needed repair and the landlord does any one of the things listed, retaliation is presumed; and then the landlord has the burden of proving that he did not do it for purposes of retaliation. *However*, there are many exceptions to this rule under §7(b) which protect the landlord in legitimate situations. The landlord can file eviction suits without fear of claims of retaliation if the landlord falls into any one of the seven exceptions set forth in §7(b). The statutory lockout for nonpayment of rent under Article 5236c is still legal since it is "authorized by law" within the meaning of Section 7(a)(2). This section removes the confusion which was created by the case of *Sims v. Century Kiest Apartments*, 567 S.W. 2d 526 (Tex. Civ. App. 1978, no writ hist.).

Commentary on Section 7(b). The above list has a dual purpose: (1) it outlines what is definitely not retaliation, and (2) it sets in concrete the landlord's right of eviction under the listed circumstances.

Commentary on Section 7(b)(1). Under the common law, it was not clear whether the landlord had a right to continue an eviction proceeding if he accepted rent after he gave notice to vacate or after he filed suit. The statute makes it clear that acceptance of rent under these circumstances will not stop the landlord's right of eviction. If the tenant pays part (but not all) of the rent prior to the landlord's notice to vacate, the landlord has not waived his right of eviction because the tenant is still "delinquent in rent" under Section 7(b)(1). It is equally certain that if the landlord accepts all of the delinquent rent prior to giving notice to vacate, the landlord has waived his right of eviction for that particular delinquency.

Commentary on Section 7(b)(2). Intentional property damage by the tenant or his guests or occupants, can be grounds for eviction.

Commentary on Section 7(b)(3). This subsection allows eviction where there has been a serious threat of physical violence by the tenant or his guests or occupants. It covers threats not only to the landlord, but also to the landlord's employees and other tenants. This helps the landlord in his common law duty to maintain quiet enjoyment for all of the other tenants in the complex.

Commentary on Section 7(b)(4). This subsection allows eviction where the tenant has substantially violated the rules and regulations or other provisions of the lease. Minor or insignificant breaches would not qualify.

Commentary on Section 7(b)(5) and (6). Eviction is definitely allowed if the tenant holds over under the above circumstances. "Holding over" means staying beyond the end of the lease term or renewal or extension period. It does not refer to staying after receiving a notice to vacate for nonpayment of rent or for other breaches of lease.

Commentary on Section 7(b)(7). If the landlord chooses not to renew or extend the lease because he believes in good faith that any of the above events may occur, then he cannot be accused of retaliation and he still has the right to evict at the end of the lease term or renewal or extension. The landlord does *not* have to prove that (i), (ii), or (iii) will *probably* occur . . . instead, he only needs to show an honest belief that it may occur in his opinion.

Commentary on Section 7(c). If the landlord is in the process of raising everyone's rent when their leases expire, or if the landlord has a contractual right to raise the rent under an escalation clause in the lease, the landlord cannot be found guilty of retaliation.

Commentary on Section 7(d). These penalties were not available for retaliation under the common law.



Section 8. RETALIATION BY THE TENANT.

The landlord shall be entitled to recover from the tenant a civil penalty of one month's rent plus \$100 and attorney's fees as defined in Section 10 hereof if the tenant has, after written notice by the landlord to the tenant of the penalties of this section, withheld payment of any portion of the rent due the landlord in retaliation for an alleged failure by the landlord to repair or remedy a condition of the premises complained of by the tenant. Written notice by the landlord may be in person, by mail, or by delivery to the rental premises.

Commentary on Section 8. This makes it illegal for a tenant to withhold rent in order to compel repairs or in order to protest nonrepairs. The rationale is that rent strikes are too drastic a remedy and that the determination of whether something is habitable or uninhabitable usually involves too much emotionalism and disagreement when the parties try to decide it for themselves. Also, without this provision, many tenants would falsely claim nonhabitability in an eviction suit simply because they didn't have the money to pay the rent. The legislature has stated that the only proper resolution of habitability controversies is by lease termination or by courthouse remedies as set forth in the statute. The mere threat of the penalties and remedies of the Act will make the Act self-enforcing 90% of the time.

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If the tenant withholds rent for nonrepair, the landlord definitely has a right of eviction *plus* contractual remedies *plus* actual damages *plus* the statutory remedy of a civil penalty of one month's rent and \$100 *plus* attorney's fees. Depending upon how the courts construe this new statute, it is possible that in an apartment with multiple tenants, the landlord might have such cause of action against each tenant if all or any part of the rent was withheld because of nonrepair. In order to recover civil penalties and attorney's fees, the landlord has to first give the written notice called for in this section. A sample form for such notice is contained on page 42 of the Redbook.

Section 9. FORCIBLE ENTRY AND DETAINER SUITS.

The landlord's failure to repair or remedy a condition pursuant to the provisions of Sections 2 and 3 of this Act shall not be a defense to eviction; however, retaliation by the landlord pursuant to Section 7 of this Act shall be a defense to eviction and shall entitle the tenant to all other remedies set forth in Section 7.

Commentary on Section 9. Under the common law, it was not clear whether "nonhabitability" could be asserted as a defense to eviction. Under the statute, it definitely *cannot* be a defense. On the other hand, retaliation can be asserted as a defense to eviction, except in the situations listed in Section 7(b).

Section 10. ATTORNEYS' FEES.

Any party who prevails in a lawsuit brought under this Act shall be entitled to recover from the other party reasonable attorneys' fees, together with costs of court. Attorneys' fees, as referred to in this Act, shall mean attorneys' fees in relation to work reasonably expended.

Commentary on Section 10. Under the common law, the tenant had no right to recover attorney's fees in suing the landlord on an implied warranty of habitability. Nor did the landlord have the right to recover his attorney's fees if he successfully defended the lawsuit.

The statute adopts a fair rule which gives attorney's fees to the winner, i.e., the "prevailing party." This will cause both sides to pause and reflect before they haul out and sue or defend a suit in an unmeritorious case. The provisions stating that attorney's fees must be "reasonable" mean that attorneys are to be compensated (1) at a reasonable hourly rate and (2) only for doing work that is reasonable under the circumstances. An attorney cannot unjustifiably run up high attorney's fees by interrogatories, depositions, dilatory defense motions, etc., which are clearly unnecessary.

Section 11. HARASSMENT.

Any tenant or landlord who files or prosecutes a lawsuit under this Act in bad faith or for purpose of harassment shall be liable to the defendant for a civil penalty of one month's rent plus \$100 and attorney's fees as defined in Section 10 hereof.

Commentary on Section 11. This section will hopefully have some preventative effect against frivolous lawsuits.

Section 12. CLOSING OF THE RENTAL PREMISES.

(a) Notwithstanding any provision of this Act, the landlord may at any time give written notice by certified mail return receipt requested, to the tenant and to the local health officer and to the local building inspector, if there is one, stating: (1) that the landlord is terminating the rental agreement as soon as legally possible, and (2) that when the tenant moves out, the landlord will immediately either demolish the rental unit or refrain from further use of the rental unit for residential purposes. Reoccupancy and reconnection of utilities shall be allowed only pursuant to Section 12(b) below.

(b) After such notice is received by the tenant and after the tenant moves out, the local health officer and/or building inspector shall not permit further occupancy or utility service by separate meter to the rental unit until such official certifies that there is no condition, known to said official, which materially affects the physical health or safety of an ordinary tenant. The landlord shall not allow reoccupancy or reconnection of utilities by separate meter within six months after the tenant moves out. Nothing herein shall be construed as prohibiting occupancy of other apartments. Nothing in this Act shall be construed as prohibiting occupancy of or utility service by master meter or individual meter to other rental units in an apartment complex which have not been closed down by the landlord pursuant to Section 12(a) of this Act.

(c) If such notice of closing of the rental unit occurs prior to the tenant's repair notice to the landlord, the remedies of this Act shall not apply.

(d) If such notice of closing of the rental unit occurs after the tenant's repair notice to the landlord but before a reasonable time has elapsed for repair by the landlord, only the remedies of Sections 6(c), (d), and (e) and Sections 12(f) and (g) shall apply.

(e) If such notice of closing of the rental unit occurs after the tenant's repair notice to the landlord and after a reasonable time has elapsed for repair by the landlord, only the remedies of Section 6(c), (d), and (e) and Section 12(f) and (g) shall apply.

(f) In the event a tenant moves out on or before the ending of the rental term after receiving notice as referred to in Section 12(d) and (e) above, the landlord shall pay to the tenant reasonable moving expenses actually incurred and the landlord shall make a pro rata return of rent from date of move-out and a return of any security deposit as required by law.

(g) Violation by the landlord of Section 12(b) or (f) shall entitle the tenant to recover a penalty of one month's rent plus \$100 and attorney's fees as defined in Section 10 hereof.

Commentary on Section 12. This part of the Act preserves for the landlord the much needed right to (1) close down the property permanently without repairing it, or (2) close it down for at least six months for extensive renovation or repair. If the landlord wishes to relet the premises after the six months period, he will have to obtain a new certificate of occupancy. This section recognizes that the statute should not be applicable if the property has become economically obsolescent. For example, if a house were renting for \$40 per month and had bad roof leaks which were "materially affecting the physical health or safety of the tenants," it would be unfair to make the landlord put on a new roof if the new roof cost \$4,000. This would necessarily raise the rent to \$80 or \$90 and would cause the property to be out of reach for the tenant who would rent it. All properties, sooner or later, reach the point where it is more economical to shut them down; and the statute gives the landlord this right. If the landlord closes down before receiving repair complaints from the tenant, there is no penalty. But as the landlord waits longer and longer, the penalties increase.

on 13. **WAIVER.**

provisions of this Act may not be waived except where the rental agreement is in writing and waiver is underlined or in bold print in the written rental agreement or in a separate written addendum. Such waiver must be specific and must list with clarity what duties are being waived. A waiver must be made knowingly, voluntarily, and for consideration.

Commentary on Section 13. Under the common law of *Kamarath v. Bennett*, the Supreme Court indicated that habitability could be waived; but there were no clear limitations on when it could be waived. The statute specifies and limits the circumstances where waiver is legal. Waiver will be allowed *only* if *all* of the following things occur.

. . . the waiver must be in a written lease. There can be no waiver in oral rental agreements.

. . . the waiver provision must be underlined, in bold print, or in a separate written addendum. Without such highlighting, the waiver is void.

. . . the waiver must contain a specific and clear list of what duties the landlord is *not* going to perform. The tenant does not necessarily have to agree to perform those duties; but it must be clear that the landlord is not going to perform them. The duties must be listed with reasonable clarity from a common sense viewpoint.

. . . the waiver must be made by the tenant "knowingly, voluntarily, and for consideration." The word "knowingly" generally means that he understands the English language (or the language used in the lease) and that he knows what he is doing or signing. The word "voluntarily" generally means that the waiver will be void if the tenant signs the waiver under "duress" from the landlord. [Lastly, the phrase "for consideration" generally means that, as a practical matter, waiver was a factor in the setting of the rent.] This does not mean that magic words have to be spoken. The landlord does not have to say, "Your rent is lower because I'm not going to make certain repairs." It does not require negotiation over the amount of the rent. If the tenant is on notice of the specific duties being waived at the time he signs the lease, and if all of the other statutory requirements in Section 13 are met, the waiver should be valid.

The TAA lease contract does not contain a general waiver of habitability. On the contrary, Paragraph 15 has always required the owner to (1) keep the property clean, (2) properly maintain all equipment, (3) comply with all laws, and (4) make all reasonable repairs.

Section 14. OTHER RIGHTS.

The duties of the landlord and remedies of the tenant as set forth in this Act shall apply in lieu of ~~existing common law and statutory law regarding the landlord's warranties or duties of maintenance, repair, security, habitability, and nonretaliation, and the tenant's remedies for violation hereof.~~ Otherwise, nothing in this Act shall serve to affect or diminish any other rights of the landlord or tenant under contract, statute, or common law which are consistent with the purposes of this Act or any right the landlord or tenant may have to bring actions for personal injury or property damage under the laws of this state. Nothing in this Act shall be construed as imposing obligations on the landlord or tenant other than those expressly stated herein.

Commentary on Section 14. Under this section, the common law regarding habitability and retaliation was repealed and replaced by the statute. Also under this section, the Deceptive Trade Practices Act became no longer applicable to habitability disputes. The landlord's duties and the tenant's remedies regarding habitability and retaliation are controlled strictly by this Act.

Section 15. LAWS IN CONFLICT.

All laws in conflict or inconsistent herewith are hereby repealed to the extent of such conflict or inconsistency.

Commentary on Section 15. This is a general repealer clause so that no other statute is left on the books which might conflict with the habitability statute.

Section 16. JURISDICTION AND VENUE ACTIONS UNDER THIS ACT.

The repair-order and rent-abatement remedies contained in Section 6(a) and (b) of this Act shall be available only in the county and district courts of this state. Venue for all actions under this Act shall be in the county where the premises are located.

Commentary on Section 16. Even though the JP courts do not have jurisdiction under this Act to order repairs or to abate rents, the JPs do have jurisdiction to hear habitability complaints in suits for damages, civil penalties, and/or attorney's fees under Section 6. *However*, these suits cannot be combined in an eviction suit since Rule 746 of the Texas Rules of Civil Procedure declares that the *sole* issue in an eviction suit is the "right of possession." The only exceptions are that: (1) rent may be sued for under Rule 738 and (2) retaliation may be asserted as a defensive issue under Section 8 of Article 5236f.

Section 17. EFFECTIVE DATE.

This Act shall take effect on September 1, 1979, and shall apply only to residential rental agreements executed or entered into, renewed, or extended after that date.

* **Commentary on Section 17.** On leases signed before September 1, 1979, the common law of Kamarath v. Bennett applies during the entire original lease term. If such lease is automatically renewed after September 1 or if the parties mutually agree on a new expiration date after September 1, the lease automatically comes under the habitability statute.