

2001

Lincoln Financial Corp. dba Chevy Chase Apartments v. Dorothy S. Ferrier : Brief of Appellant

Utah Supreme Court

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Pete N. Vlahos, Esq.; Attorney for Appellant.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LINCOLN FINANCIAL CORPORATION,
d/b/a CHEVY CHASE APARTMENTS,

Plaintiff and
Respondent,

vs.

DOROTHY S. FERRIER,

Defendant,
Cross Claimant,
and Appellant.

Case No. 14296

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County
Honorable Calvin Gould, Judge

Richard W. Brann, Esq.
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Ogden, Utah 84401

Attorney for Respondent

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FILED

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LINCOLN FINANCIAL CORPORATION,	/	
d/b/a CHEVY CHASE APARTMENTS,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	Case No. 14296
DOROTHY S. FERRIER,	/	
Defendant,	/	
Cross Claimant,	/	
and Appellant.	/	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action in Unlawful Detainer brought by the Respondent against the Appellant wherein the Respondent sought to obtain a Judgment in Unlawful Detainer in accordance with the provisions of Title 78, Chapter 36, Utah Code Annotated, as amended 1953, together with attorney's fees.

The Appellant filed an Answer alleging the affirmative defense of retaliatory eviction resulting from the Appellant's assertion of her constitutional rights provided under Article 1,

Section 1 and 15, of the Constitution of the State of Utah and as provided for under the Constitution of the United States in the First, Fifth, and Fourteenth Amendments.

The Counterclaim of the Appellant sets forth allegations of the wilful, wanton, and malicious acts of the Respondent against the person and property of the Appellant by the Respondent, seeking a denial by the Court to Respondent's action in Unlawful Detainer, upon the premise of the action being a retaliatory eviction because Appellant's assertion of her right to freedom of speech and her right to be free from harassment and enjoy freedom of association in her chosen place of abode.

DISPOSITION IN LOWER COURT

The Lower Court granted the Respondent's Motion for Summary Judgment on its action of Unlawful Detainer, awarded to the Respondent triple damages for Unlawful Detainer, even though there had been a prepayment of rental monies due and owing into the Court prior to time of trial, granted attorney fees and ordered that the Answer of the Appellant and her Counterclaim be stricken as a sham.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and final Order of the Lower Court, which denied to the Appellant the

right to a trial and hearing on her Counterclaim, a reversal of the Judgment of Unlawful Detainer for triple damages and the award of \$500.00 attorney's fees granted by the Lower Court to the Respondent.

STATEMENT OF FACTS

The Appellant resided with her daughter (R-5A) in an apartment complex known as Chevy Chase, wherein the Appellant paid \$175.00 a month as rental thereon. The Appellant rented the premises on December 2, 1974, paying rent in advance plus a \$50.00 deposit as a security deposit to guarantee compliance with all of the terms of a standard Monthly Rental Agreement used by apartment complexes generally (R-5A).

The premises were owned by an absentee financial corporation under a resident manager named Clarence Johnson. Appellant sought to circulate a Petition among the many residents of the apartment complex seeking to oust the manager, because of the conduct of the Respondent's manager in seeking to prevent tenants from conversing with each other, eavesdropping on tenants, prevent adult visitors to enter the premises of the Appellant, except upon hours set by the management; the committing of acts of vandalism as against the premises and property of the Appellant, damage to the motor vehicle of the Appellant, and

acts in violation of the sensibility of the Appellant by placing objects and materials in the entrance to the premises of the Appellant. The Appellant sets forth all of these various acts in the Counterclaim of the Appellant (R-9, R-12).

The Respondent brought an action of Unlawful Detainer against the Appellant for the purpose of preventing the Appellant from continuing the circulation of Petitions seeking the ouster of the manager. (R-10)

The Appellant filed an Answer and a verified Counterclaim, which was subscribed to under oath by the Appellant, which Answer and Counterclaim bore the typed signature of Attorney Pete N. Vlahos as Attorney for the Counterclaimant, Defendant and Appellant, (R-8 through R-12). The Appellant further filed with the Clerk of the Court tender of rent by tenant in submitting rent for the months of July and August, further setting forth that rent monies would continue to be deposited with the Clerk of the Court as they became due in accordance with the terms of the Rental Agreement for so long as the Counterclaimant would remain a tenant on said premise. The tender of rent by tenant was subscribed to by the Attorney for the Appellant (R-15).

ARGUMENT

POINT I

AWARD OF ATTORNEY'S FEES IS ERROR.

The Court rendered a Judgment in the Respondent's

action in Unlawful Detainer granting a Motion for Summary Judgment to the Respondent, together with attorney's fees in the sum of \$500.00, and costs taxed in the sum of \$24.90.

The Court subscribed to the Findings of Fact and Conclusion of Law in its granting of Summary Judgment, alleging that:

Pursuant to the terms of paragraph three of said Rental Agreement and Title 78, Chapter 36, Section 3(2), Utah Code Annotated, 1953, the Plaintiff (Respondent) caused a notice to quit the said premises***, that by the terms of said Rental Agreement, particularly paragraph 9 thereof, the Plaintiff is entitled to recover its reasonable attorney's fees incurred herein, which the Court determines to be \$500.00, together with Plaintiff's taxable costs incurred herein. (R-26,R-27) (Emphasis added)

This Court held in Forrester vs. Cook, et al, 292 P.

206, October 11, 1930:

Although a contract between the parties to the action provided for the payment of attorney's fees, other costs, and damages for Unlawful Detainer, that an action brought for an Unlawful Detainer is not an action to enforce an agreement, and that the action is summary and limited and is one for recovery of possession of property and damages because of the unlawful detention. The law and not the contract fixes the measure of damages. No provision is made in the law for an attorney's fee in this sort of action.

This Court again had reason to reconsider the Forrester vs. Cook, et al, supra, decision in the case of Leone vs. Zuniga, 34 P.2d at page 703, and again reiterated the law as expounded in Forrester vs. Cook, stating that the rule as announced is

controlling and that attorney's fee may not properly be allowed in a suit for Unlawful Detainer.

Upon the Courts award of attorney's fees to the Respondent, Counsel for Appellant remonstrated to the Court:

MR. VLAHOS: Will the Court also entertain my submitting to the Court the Utah decision on attorney's fees, or does the Court desire that brought at a proper proceeding, or will the Court entertain it just by submitting the case to you.

THE COURT: I have awarded him attorney's fees.
(R-59)

It is submitted to the Court that there is no previous basis for the award of attorney's fee in an action of Unlawful Detainer as established by the law of this State or the decisions of this Court and also by the Courts of the State of California from which this Court acknowledged in the Forrester vs. Cook case, that the exact Statute of Unlawful Detainer was taken.

POINT II

TRIPLE DAMAGE SHOULD NOT BE ARBITRARILY AWARDED.

The Appellant was not delinquent in rent at the time of the giving of notice of termination of tenancy. The notice that was given on June 10, 1975, advised the Appellant that the occupancy of the Appellant would be terminated as of June 30, but did not set forth in the legal notice the year, only the

month and day for the termination of the tenancy; was not given for delinquency of rent; but for reasons which the Appellant has alleged in her Counterclaim and will be subsequently set forth herein in this Brief to the Court. (R-5A)

The Appellant at the time of filing an Answer and a Counterclaim alleged that rent had been tendered on July 1, 1975, and was refused by the Respondent, and further, that upon the filing of the Complaint, a tender of rent was made by the tenant paying rent for the months of July and August in the amount of \$350.00 to the Clerk of the Court by a Cashiers Check. The check was made payable to Dorothy Ferrier and endorsed in blank by her and deposited with the Clerk of the District Court. The tender further set forth that rent monies would continue to be deposited with the Clerk of the Court as same shall become due, in accordance with the terms of the Rental Agreement, for so long as the Counterclaimant shall remain a tenant on said premises. (R-15)

In Cole vs. Cole, 122 P.2d 201, 101 Ut. 355, the Court stated:

Generally where a tender is made which, if accepted, is intended to operate as payment of the debt, the tender, if rejected, must be kept good, which is ordinarily done by bringing or depositing the money into Court, since in case the tender is by check, the check is not payment unless expressly accepted as such.

In Hepburn & Dundas vs. Auld, 5 U.S. 321, the Court

stated:

Tender and refusal are equal to performance by party making tender.

A tender of rent having been made on July 1 and August 1, and the funds for the months of July and August for the monthly rent of \$175.00 having been paid into the Court, the loss or damages to the Respondent were a nullity, in that the Respondent could have collected rents for July and August when tendered. The Court has indicated in the Forrester vs. Cook case, supra, that the provision for damages in three times the amount of damages is highly penal and, therefore, is subject to strict construction. The Court stated that damages only may be trebled, and there has been no claim for waste to the premises, nor any other damages and there could have been no damages assessed by the Court by virtue of the tender of payment for July and August by the Appellant to the Respondent and the paying into the Court at time of suit of the monies due and owing for rent, and therefore, the Court erred in awarding triple the amount of rent proffered and refused by the Respondent.

The Court is advised that there was no discovery of any kind made in this action and that the filing of a Complaint and the filing of a verified Answer and Counterclaim is the only quality of evidence that was before the Court when the Court

awarded in addition to the July and August rental monies allegedly due for rent to September 10, which the Court tripled by its award.

The attention of the Court is called to the "testimony" of Counsel for the Respondent when he represented to the Court, that the tenant (Appellant) occupied the premises until September 10. Counsel alleges as a basis for his allegation, that the premises were not vacated until September 10 alleging as a basis that the keys have not allegedly been returned to the apartment manager, and further stated:

But we want the keys back. We want to be sure that we arn't set-up by going in there and finding some small items she has left behind. (R-64)

The Attorney for the Appellant stated to the Court that the Appellant "called me on the phone, that she was out last weekend". (R-47) The Counsel for the Appellant further testified, "My client in a phone call advised me that she notified the manager". (R-54)

Based upon the statements by both Counsel, the Court stated:

The Plaintiff is entitled to the Writ of Restitution and Judgment for the rent for July, August, and the first ten days of September. (R-54)

It is submitted to the Court that the testimony of neither Counsel is sufficient upon which to base a judgment as

an evidenciary fact as to when the premises were actually returned to the Respondent.

It was held in Pacific States Auxiliary Corporation vs. Farris, 5 P.2d 452, District Court of Appeals, California, November, 1931:

That such a determination may rest only upon legal evidence.

This principle of law was also set forth in Maher vs. Wilson, 139 Cal. 514, 73 P. 418, and in 26 CJ 862, wherein it states:

The power to fix the damages, compensatory or nominal, rests with the Trier of the Facts, but that body may rest its determination on legal evidence only.

It is submitted to this Honorable Court that there is no evidence whatsoever that is acceptable, that the return of the keys to the apartment was the first requisite to vacating the apartment, and secondly, that the testimony of either of the Counsel herein is an acceptable determination of the date of vacating of the premises, where both Counsel make opposite representations, and the representation made by Counsel for the Respondent, which is a declaration against the interest of the Respondent, states that the keys had not yet been returned and that was the basis of the allegation of continued occupancy of the apartment.

(R-64)

POINT III

THE SUBMISSION OF AN ANSWER AND A VERIFIED COUNTERCLAIM BY THE APPELLANT DID NOT CONSTITUTE A SHAM PLEADING.

The Court granted a Motion to strike the Answer and Counterclaim of the Appellant on the basis that the verified pleading of the Appellant, without the signature of the attorney thereto, constituted a sham pleading. (R-24) At the time that the attorney submitted the Answer and Counterclaim, which were verified and signed under oath by the Appellant, the attorney signed a pleading of a "Tender of Rent by Tenant" (R-15), and further, the attorney's typed block appeared on the face of the Answer and Counterclaim as Attorney for the Appellant.

This Court held in West Mountain Lime & Stone Company vs. Danley, 111 P. 647, that the requirement of the Code, requiring that the Complaint be subscribed by the party or his attorney, is sufficiently complied with if the Complaint is verified and such verification is signed and the authority cited is Harrison vs. Wright, 1 N.Y. St.P. 736; Barrett vs. Joslynn, 9 Misc. Reports 407, 29 N.Y.Supp. 1070; Railway vs. Bailey, 70 Oh. St. 88, 70 N.E. 900; State vs. Chadwick, 10 Ore. 423.

The Court further held:

In any event, such a defect must be objected to timely and specifically or it will be deemed waived. If such an objection is made, however, the Court will always permit the party to cure the defect

by subscribing the Complaint. (Emphasis added)

The record shows that the Attorney for the Appellant repeatedly offered to subscribe to the Complaint, if the Court deemed it to be necessary, at the time of the hearing on the Motion to Strike (R-47), and further cited to the Court the West Mountain Lime & Stone Company vs. Danley, supra, as authority to the Court. (R-47, R-50)

Counsel for Respondent stated to the Court, that if a party to an action can answer to a Complaint or sign a Counterclaim:

Then we are in a spot as far as judiciary and the legal system goes, because from henceforth on, any layman can practice law without a license to practice before the Supreme Court of Utah.

It is submitted to this Court, that the case here was before the District Court, not before the Supreme Court, and secondly, that it has been known for parties who are Defendants in an action to file their own Answer and even at times to file a Counterclaim, let alone a verified pleading.

The chaotic condition predicted for Utah if such were the case is not supported by the law of the State of California, wherein it is set forth in Title 6, Section 446, of the California Code under Verification of Pleadings:

Every pleading (except in Justice Courts when the pleadings are oral) shall be subscribed by the party or his attorney. (Emphasis added)

The California Code further provides:

Where a pleading is verified, it shall be by the Affidavit of a party, unless the parties are absent from the County where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other persons verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he shall set forth in the Affidavit the reason why it is not made by one of the parties.

It is submitted to the Court that the State of California is not in a chaotic condition because of this Rule.

It is further submitted to this Court, that reference to the West Mountain Lime & Stone Company vs. Danley was made in the case of Christensen vs. Johnson, 61 P.2d 597, (1936), this Court stated that the law as announced in the West Mountain Lime & Stone Company case is in accord with the references made in Corpus Juris.

The Federal Rules of Civil Procedure under Rule 11 provide the identical language as in the Utah Rule, and it has been held in a number of cases, that:

The final disposition of a suit, as by dismissal of the action for Plaintiff's failure to comply with Rule 11 or the entry of a Judgment by Default against the Defendant for his noncompliance, is an ultimate sanction provided by the terms of the Rule, but which naturally should be invoked rarely, and certainly not for minor infractions.

Bareco Oil Company vs. Alexander, Northern District, Iowa, 1940, 33 F.Supp. 32; Universal Laboratories, Inc., vs.

Vivaudou, Inc., Southern District of New York, 1944, 8 Fr.Serv.
11.51.

In Harris vs. Municipal Court of City and County of Denver, et al, 134 P.2d 1055, Supreme Court of Colorado, May, 1951, was an action for violation in the Municipal Court of the City and County of Denver for violation of a municipal ordinance and was a civil proceedings instituted in a Court not of record, and the proceedings therein were governed by the laws and rules pertaining to civil procedure. There was a failure to sign the Complaint charging violation and the Court held:

There is no proof of wilful failure or refusal and no prejudice could be claimed by the Defendants if the Plaintiff were given leave to sign the pleading heretofore served.

In Holley Coal Company vs. Globe Indemnity Company, 4th Cir., 186 F.2d 291, the Court said:

That an unsigned pleading is not invalid.

In DeMontis vs. Potomac Electric Company, D.C. 1 F.R.D. 119, the Court stated:

If, then, we are to follow our repeatedly declared rule, that this is a civil action, governed by the Rules of Civil Procedure, we must hold that the failure to sign the Complaint was not jurisdictional, but is subject to correction upon being called to the attention of the Court.

It is, therefore, submitted to the Court, that the filing of the verified pleading by the Appellant and the continued offer

of Counsel to the Court of the willingness to subscribe to the pleadings if the Court deemed it necessary was not such a pleading as to constitute a sham pleading resulting in the striking of both the Answer and the Counterclaim of the Appellant, specifically in light of the fact that the Court itself found:

Well, I think the situation is that a person may represent himself, I don't think there is any question about that. But I think when he has Counsel, Counsel has to sign the pleadings. Now whether or not that's cured of it at this late date or not, I don't know. I believe, though, that there are paragraphs in the Counterclaim which may state a cause of action. (R-58)

POINT IV

RETALIATORY EVICTION IS A VALID DEFENSE IN AN ACTION OF UNLAWFUL DETAINER.

This doctrine comes into focus in the instant matter before the Court as set forth in the Counterclaim of the Appellant herein, wherein the facts as have been previously stated show, that the tenant resided with her daughter in the Chevy Chase Apartments (R-8, -9), a large non-slum apartment complex (R-4,-6), and even though not delinquent in rent was served with a Notice of Unlawful Detainer (R-5), and as set forth in the Counterclaim of the Appellant (R-9), alleges that the Appellant was being evicted from the premises because of her refusal to allow the manager of the apartment house to infringe upon her First Amendment

rights of freedom of speech in circulating a Petition among other tenants of the apartment complex; seeking removal of the manager as resulting from the constant harassment of the manager; by eavesdropping; preventing adult visitors to enter upon the premises of the Counterclaimant (the Appellant), except at hours set by the Respondent; and that the Respondent caused acts of vandalism to occur as against the premises and property of the appellant; and by acts in violation of the sensibility of the Appellant by placing objects and materials on the entrance to the premises of the Counterclaimant.

Inasmuch as the Rules of Pleading under the Utah Rules of Civil Procedure require merely a basic setting forth of elements of a case, the development of the exact type, quality, and quantity of the interference by the Respondent with the life and the right of the Appellant to live peacefully in her own home and have the freedoms that one would expect from residing in a non-slum apartment unit paying \$175.00 a month for rent, would have been developed by Discovery and trial.

The Appellant further alleged that the conduct of the Respondent was malicious, wanton, and wilful, and done for the purpose of harassing and intimidating the Appellant, and that as a direct and proximate result of the wilful, wanton, and malicious acts of the Respondent, the Appellant suffered mental anguish and anxiety, and feared for the safety of herself and her minor

child, and that the conduct of the Respondent was outrageous, intolerable, and in violation of the standards of the community by reason of the aforesaid conduct.

While a large number of the newly developed cases generally evolve around the objection of tenants to the habitability of the premises, or the overcharging of rents, and are actionable generally for those specific reasons, by reason of specific statutes, there is a large body of cases developing and already adjudicated which evolve around the violation of the First, Fifth, and Fourteenth Amendments and constitutional rights of the individual, and in the State of Utah, would evolve around and about the same rights guaranteed under the Constitution of the State of Utah, which are parallel to these Amendments to the United States Constitution.

It is the position of the Appellant, that the action for Unlawful Detainer herein sought under a statute enacted by the State is a right not found at Common Law, namely the act of Unlawful Detainer, amounts to State action which abridges the Appellant's right of freedom of speech and assembly and the right to petition the government for redress of grievances, all of which are protected by the First Amendment of the United States Constitution and by the comparable Utah constitutional provision.

Edwards vs. Habib, United States Court of Appeals, 397

F.2d 687, 1968, with Cert. denied by United States Supreme Court at 393 U.S. 1016. This was an action by a landlord for possession of the dwelling house rented on a month-to-month lease. A Judgment of the Lower Court in favor of the landlord was reversed in the Circuit Court of Appeals, where the Court held that while the landlord might evict for any legal reason or for no reason at all, that he was not free to evict a tenant in retaliation for tenant's report of housing code violations to the authorities.

The defense of retaliatory eviction to a summary proceeding, such as an action of Unlawful Detainer, was not available at Common Law, but neither was an action of Unlawful Detainer, which is strictly a statutory law enacted by this State, and as the Court has also ruled, such a law must be strictly interpreted and followed as stated in Forrester vs. Cook, supra.

The State of Utah has adopted the Common Law, but the judiciary, if not kept abreast of the needs and requirements of the changing times and conditions, will indeed be out of step with the modern concept of the relation of individuals and institutions to each other.

In Gallagher vs. St. Raymonds R. C. Church, 21 N.Y.2d 554, the Court stated:

We recognize that the Common Law of this State is not an anachronism, but is a living law which responds to the surging reality of changed conditions.

At Common Law, the only legal remedy available to a landlord was an action in ejectment, which was a drawn out and expensive proceeding, which enabled the landlord to regain his property, and the enactment of an action of Unlawful Detainer was to enable the landlord to so regain his property quickly and inexpensively.

It was held in Flewellin vs. Lent, 91 App.Div. 430, (New York State) the Court held that because summary eviction proceeding is in derogation of the Common Law, it must be strictly construed against the landlord.

It is, therefore, seen that the essence of the defenses available to a tenant is the right to possession of the demised premises and that the defense of retaliatory eviction is not based on the tenant's right to possession, per se, but rather seeks to deny possession to the landlord because of his tainted motive in evicting the tenant.

Several States have adopted legislation, recognize the retaliatory eviction as a defense, and they are California, Illinois, New Jersey, Rhode Island, Maine, and Minnesota. Prior to the adoption of the legislation in California, it was held in Schweiger vs. Superior Court of Alameda County, 90 Cal.Reptr. 729, 476 P.2d 97, (Nov., 1970):

The judicial recognition of the defense of retaliatory eviction has been well documented in a number

of cases, which will be cited herein, and include Edwards vs. Habib, supra; Dickhut vs. Norton, 45 Wis.2d 389.

The Court further stated in Schweiger, supra:

If we deny the tenants defense against retaliatory eviction in an action for Unlawful Detainer, we lend the exercise of judicial process to aid landlords in punishing tenants with the audacity to exercise their statutory rights.

Thomas Oil, Inc. vs. Onsgaard, 215 N.W.2d 793, (1974), states:

Defendant made a claim, that a corporation is a corporation for the purposes of Fourteenth Amendment and that judicial action may be "State action" for the purposes of the Fourteenth Amendment, and further stated: "No State shall ** deny to any person within its jurisdiction the equal protection of the laws".

Frampton vs. Central Indiana Gas Company, 297 N.E.2d 425, Indiana, 1973. This was an action for retaliatory discharge to an employee for filing a Workmens Compensation Complaint and the Court held that such conduct is wrongful, and an unconscionable act, and is actionable in a Court of law. The Court further held that generally an employee at will may be discharged without cause, but there is an exception when the employee is discharged solely for exercising a statutory right. And the Court stated: In order for the goals of Workmens Compensation Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being

subject to reprisal. If employers are permitted to penalize employees for filing Workmens Compensation Claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation - opting, instead, to continue their employment without incident. The end result is that the employer is effectively relieved of his obligation under the Workmens Compensation Act. The Court further stated that this holding was analogous to a dispossession of a tenant for retaliatory eviction in reporting code violations to a public agency as set forth in Edwards vs. Habib, supra.

In Aweeka vs. Bonds, 20 Cal.App.3rd 278, 97 Cal.Rpt. 650, (1971), it was stated that a landlord's retaliatory eviction is the basis of an affirmative cause of action.

In E&E Newman, Inc. vs. Hallock, 281 Atlantic Reporter 2d 544, Superior Court of New Jersey, (1971)., the landlord sued the tenant for possession on the basis of nonpayment of rent. The tenant was active in seeking improvements in the apartment which he rented, and registered a Complaint with the Board of Health and Plumbing Inspector, and also sought the help of a voluntary organization whose purpose was to aid people with tenancy and welfare problems.

The landlord gave the tenant notice of increase of rent from \$70.00 to \$200.00 a month, even though the other nine tenants in the building did not receive such a notice.

An action to evict for nonpayment of rent was brought by the landlord against the tenant.

Subsequent to the occurrence of the action, the State enacted a statute for the protection of tenants in comparable situations and the Court could not invoke the statute, but the Court did find that the eviction by the landlord was a reprisal for the conduct of the tenant, and the Court stated:

That a landlord should not be permitted to evict a tenant or to raise his rent, as a reprisal for the tenant's exercise of a constitutionally protected right.

The Court quoted from the case of Engler vs. Capital Management Corporation, 112 N.J. Super. 445, 271 A.2d 615, (1970), wherein the Court reasoned that to countenance such retaliation would be to violate the Fourteenth Amendment, in that the tenant's right to freedom of speech and assembly would be unduly impaired.

In Engler vs. Capital Management Corporation, supra, the tenant brought suit for injunction to restrain the landlord from refusing to renew leases at the expiration of their respective terms. The basis of the landlord's action being to refuse to renew tenant's leases because of tenant's activities in connection with a tenant's association. The Court held that an essential

purpose of any tenant's association must be to safeguard its members by reporting, if necessary, pressing complaints to remedy housing conditions which impair their health and safety. Such a purpose and the initiative to carry it out are constitutionally protected within freedom of speech and in furtherance of the legislative objectives and health codes, building codes, and related legislation.

In Hosey vs. Club Van Cortlandt, 299 F.Supp. 501, (S.D.N.Y. 1969), the Court stated:

An eviction ordered by a State Court in an action begun to retaliate against a tenant for exercising his rights of speech and assembly, to remedy building and health code violations in his building would be a violation of the Fourteenth Amendment.

The conflict between property and civil rights arose in the case of Marsh vs. Alabama, 326 U.S. 501, 66 Sup.Ct. 276 (1946), wherein the question presented was whether a State can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of management. Justice Black in writing the decision for the Supreme Court made the following statement at page 509, wherein he stated:

When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by

the First Amendment "lies at the foundation of free government by free men", and we must in all cases "waive the circumstances and *** appraise the * reasons * in support of the regulation * of the rights". Schneider vs. State, 308 U.S. 147, 161, 60 Sup.Ct. 146. In our view, the circumstances, that the property rights to the premises for the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the States permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute.

In Edwards vs. Habib, the Court restated the thoughts of Justice Black as set forth in the Marsh vs. State of Alabama, *supra*, case.

In McElhaney, Retaliatory Evictions, Landlords and Tenants Reform, 29 Md. Law Review 193, (1969), the author stated:

Even though perpetual tenancies would not result, it is plain that prohibiting retaliatory eviction limits the landlord freedom to deal with his property as he chooses. The same may be said of zoning regulations, building codes, health and safety laws, or 60-day wait to evict a tenant who is not in default, and many other rules. Completely unfettered property has probably always been a myth. So long as the invasion of a landlord's property rights is moderate, only carried to the extent reasonably necessary to give effect to the competing legitimate interest of tenants, there should be no doubt of its constitutionality. In this respect, a Judge made prohibition against retaliatory eviction is no more an invasion of a landlord's interest than is a statute.

It is submitted that retaliatory eviction can be classified as "State action" if the analogy of some leading cases already

well established are considered.

In the leading case of Shelley vs. Kraemer, 334 U.S. 1, 68 Sup.Ct. 836, there was a judicial enforcement of the Private Property Agreement containing a racially restrictive covenant, and the Court found it to be State action in violation of the Equal Protection Clause of the Fourteenth Amendment, even though no Statute was involved.

In New York Times Company vs. Sullivan, 376 U.S. 254, 84 Sup.Ct. 710, (1964), the Supreme Court held that a newspaper's First Amendment rights were abridged by the State Court's award of a libel Judgment against it. Despite the fact, that the suit was one between private individuals, the United States Supreme Court found that the action of the Alabama Court, in finding the Times liable in damages for libeling the public figure was State action within the meaning of the Fourteenth Amendment. The Court, in this case, stating:

Although this is a civil lawsuit between private parties, the Alabama Courts have applied a State Rule of Law which petitioners claim to oppose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is Common Law only, though supplemented by Statute. The test is not the form in which State power has been applied, but whatever the form, whether such power has in fact been exercised***.

In Abstract Investment Company vs. Hutchinson, 204 C.A.2d 242, an action brought against the Defendant, who was occupying

the premises under a month-to-month tenancy, and the Defendant was served by the Plaintiff-landlord with a notice to quit, following which the Plaintiff brought an Unlawful Detainer proceedings. The attention of the Court is called to the fact, that the California Statute in Unlawful Detainer is the identical statute of Utah, in that Utah adopted the California Statute for its own as this Court stated in Forrester vs. Cook, supra.

The defense of the Defendant was that his tenancy was being terminated solely because he was a negro, which the Trial Court refused to admit into evidence and which the Appellate Court reversed, holding that the Plaintiff was seeking State judicial action to evict the Defendant because of his race, and that under the Shelley case, supra, such action is contrary to the Fourteenth Amendment, and the Court has power to look beyond the allegations of the Complaint to inquire into the constitutional issue, and further, that in an Unlawful Detainer proceedings, no challenge as to title or Cross Complaint are permitted, but equitable defenses have been allowed, and the defense of unconstitutional discrimination is permissible wherein the Court quoted from 204 Cal.App.2d 249, and stating:

His defense is a constitutional defense based upon a broad equitable principle. Certainly the interest in preserving the summary nature of an action cannot out-weigh the interest of doing substantial justice.

In the instant matter before the Court can we state that a person residing in a non-slum complex and seeks merely

to assert constitutional rights of free speech, to be free from harassment and protected by the Due Process Clause of the Utah and United States Constitution, and who is not a minority person, has any less rights merely because of that fact.

The relative position of the landlord and tenant was set forth in the observation made by the Court in the case of Schweiger vs. Superior Court of Alameda County, supra, wherein the Court summarized its relationship by stating:

Few Appellate Courts in the United States have considered the availability of a defense against retaliatory eviction. As in many aspects of landlord-tenant law, Appellant precedent is sparse because of the economic factor; the tenants involved are often unable to afford Appeals or are without direct appellate access in the cases arising in Small Claims Courts.

The attitude of the Courts towards an action of Unlawful Detainer was summarized by the Court in Knight vs. Black, 19 Cal.App. 518, 126 P. 512, wherein the Court speaking of the remedy of Unlawful Detainer, said:

***Although the remedy provided by the law *** is summary in principle and process, nevertheless the very nature of the action, involving, as it does, a forfeiture, appeals to the equity side of the Court, and in turn requires "a full examination of all of the equities involved to the end that exact justice be done.

In the instant matter before this Court, it is submitted that the right of the Appellant herein, wherein the Appellant

sought no economic benefit by her assertion of a right to continued tenancy under the facts of attempted eviction for exercise of Appellant's rights of free speech by a revengeful landlord and wherein the good faith of the Appellant was evidenced by payment into Court and tender at all times of all funds due to the landlord, with no demand being made for any claim of non-habitability of premises, but premised and based only on the Appellant's exercise of the right of full citizenship, should not be considered and deemed so inconsequential as to vest her with any less right to "substantial justice" as was decreed by the Court in the case of Abstract Investment Company vs. Hutchinson, 204 Cal.App.2d 242, 22 Cal.Rptr. 309, (1962), and that the Appellant had the same right not to be deprived of home and shelter because of her exercise of her constitutional right to petition, which is such a broad equitable principle as is deserving of protection, by reason of the constitutional safeguards provided for in Article I, Sections 1 and 15, of the Constitution of the State of Utah and in the First, Fifth, and Fourteenth Amendments of the United States Constitution.

CONCLUSION

It is submitted to this Honorable Court, that the Lower Court erred in awarding attorney's fees to the Respondent in an action of Unlawful Detainer; that the good faith tender

of monthly rent by the Appellant to the Respondent and the refusal of the Respondent to accept the rent; and the payment by the Appellant into Court of the rental tendered, together with the Appellant's reasonable belief, that her eviction could not be enforced where the only basis of the attempted eviction was the Appellant's exercise of her constitutional rights, did not warrant the legal imposition of triple damages.

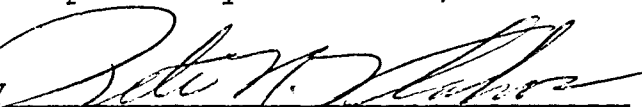
The finding by the Court, without any legal evidence available to the Court, that the Appellant was in occupancy of the premises from September 1 to September 10, together with a triple penalty for such period, was not a proper Finding of Fact.

The striking of the Answer of the Appellant and the Counterclaim as a sham pleadings by the Court, without accepting the offer of Appellant's Counsel to subscribe to the pleadings, was an abuse of discretion of the Court.

It is further submitted, that while a landlord may evict for any cause, that an eviction which is revengeful and is a retaliatory eviction, is in violation of the constitutional rights of the tenant, namely the Appellant herein, and that the Judgment of the Lower Court should be reversed, reinstating the Answer and Counterclaim of the Appellant, together with a finding by this Court of the right of the Appellant to assert her allegations of a constitutional defense as against an action of Unlawful

Detainer, and the rights of the Appellant to Counterclaim or a separate cause of action to adjudicate allegations of the Appellant's injuries allegedly inflicted by the Respondent.

Respectfully submitted,

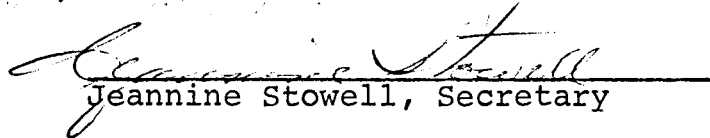
By 

PETE N. VLAHOS

Attorney for Appellant

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Richard W. Brann, Esq., 406 Kiesel Building, Ogden, Utah 84401, on this 4 day of November, 1975.


Jeannine Stowell, Secretary

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