

1989

Jennifer Josephs v. Maximillian Gregoric : Brief of Appellant

Utah Court of Appeals

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Maximillian Gregoric; Pro Se.

Kenneth A. Bronston; Anderson & Holland; Attorney for Appellant.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 890080
IN THE COURT OF APPEALS OF THE STATE OF UTAH

JENNIFER JOSEPHS, :
Plaintiff/Appellant, :
vs. : Case No. 890080-CA
MAXIMILLIAN GREGORIC, : Priority No. 14
Defendant/Respondent. :

BRIEF OF APPELLANT

Appeal from Order of Judgment, entered by the Honorable Philip K. Palmer in the Third Judicial Circuit Court, State of Utah, Salt Lake County, Salt Lake Department following trial on December 5, 1988, awarding Appellant only partial damages and no attorney's fees or costs.

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623 East First South
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Attorney for Appellant

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Draper, UT 84020

Pro Se

F D

APR 20 1989

Utah Court of Appeals
Clerk of Court
1100 Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

| | | |
|-----------------------|---|--------------------|
| JENNIFER JOSEPHS, | : | |
| Plaintiff/Appellant, | : | |
| vs. | : | Case No. 890080-CA |
| MAXIMILLIAN GREGORIC, | : | Priority No. 14 |
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STATEMENT OF JURISDICTION

Plaintiff's cause of action against Defendant was tried on December 5, 1988 before the Honorable Philip K. Palmer in the Third Judicial Circuit Court, State of Utah, Salt Lake County, Salt Lake Department. The court issued its Memorandum of Decision on December 9, 1988 and signed Findings of Fact and Conclusions of Law and an Order of Judgment on January 13, 1989. Plaintiff, appellant herein, filed her Notice of Appeal and Undertaking on February 10, 1989. The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. Section 78-2a-3(d) (1953 as amended).

STATEMENT OF ISSUES

A. Was Respondent required to inform Appellant of infringements on Respondent's use of the premises prior to his abandonment thereof before a finding of constructive eviction could be made?

B. Was the court's award of one month's rent to Appellant a recognition that Respondent had breached the lease?

C. Did Respondent breach the lease by failing to give Appellant any written notice of his intention to vacate the premises?

D. Was Appellant entitled to damages and attorney's fees and costs for Respondent's breach of lease?

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JENNIFER JOSEPHS, :
Plaintiff/Appellant, :
vs. :
MAXIMILLIAN GREGORIC, : Case No. 890080-CA
Defendant/Respondent. :

STATEMENT OF THE CASE

On December 5, 1988 Appellant's cause of action for breach of lease claiming rent owing, damages, attorney's fees and costs was tried before the Honorable Philip K. Palmer, Third Judicial Circuit Court, State of Utah, Salt Lake County, Salt Lake Department. Respondent claimed that Appellant had breached the lease by denying him full and free use of the leased premises. Respondent also counterclaimed for the amount of his cleaning deposit because of Appellant's failure to comply with Utah Code Ann. Section 57-17-3 (1953 as amended) (Memorandum of Decision 41, hereinafter "Memo") (Addendum "A").

Upon hearing the matter, the trial court found that Appellant had constructively evicted Respondent, but that Respondent was required to mitigate Appellant's damages in the amount of one month's rent (\$630.00), and was further responsible for payment of a fuel bill (\$167.15) and the cleaning deposit (\$400.00, already in Appellant's possession), plus twelve (12%) percent interest on the unpaid judgment, all in the amount of

\$797.15. Respondent's counterclaim was dismissed. Neither party was awarded fees or costs, nor was Appellant awarded the cost of air fare in having to return to Utah to arrange to re-lease the premises (Memo 42, and 43).

Thereafter, Appellant filed this appeal.

The parties entered into a Lease-Rental Agreement (hereinafter "Lease" 4.5, Addendum "B") under which Respondent/Tenant was to pay to Appellant/Owner, through her agent Jerry Cox, Six Hundred (\$630.00) Dollars per month for a period of one year beginning October 1, 1986. The Lease further provided that upon tenant's failure to pay rent or to perform any term of the Lease, the owner might terminate the tenant's rights under the Lease and recover from him all damages incurred by reason of tenant's breach of the Lease. The Lease provided for termination upon sixty (60) days written notice, and placed Respondent on notice that Appellant and her guests would occasionally be occupying the Appellant/Landlord's apartment (a separate unit within the residence but with common entry). Also, the Lease provided that if the owner should prevail in any legal action to enforce the terms of the Lease or relating to the premises, the owner would be entitled to costs and reasonable attorney's fees.

The Respondent moved out of the premises at the end of April, 1987 (Transcript of Proceedings, hereinafter "TP"92, Addendum "C"). Appellant testified that she made demand upon Respondent for rent prior to commencing suit (TP 13 - Note:

Testimony excluded from record in error). In order to re-lease the premises Appellant had to refurnish ~~the~~ ^{the} ~~in the amount of~~ ^{in the amount of} One hundred fifty eight (\$158.00) Dollars (Memo 41, and Plaintiff's Trial Exhibit #4; Addendum "D"). Thereafter, Appellant retained an attorney to pursue this matter who pled his fee at trial in the amount of Eight hundred forty (\$840.00) Dollars (TP 99) (Addendum "C"). Said costs and fees were not disputed by Respondent at trial.

Relevant to the trial court's holding concerning constructive eviction, Respondent's failure to give notice under the lease, and Appellant's award are the following Findings of Fact (hereinafter "Findings") (Addendum "E")

5. Plaintiff and her guest's use of Defendant's portion of the premises was an unwelcome intrusion.

6. The Defendant was under a duty to notify Plaintiff in writing (60) days prior of his intention to leave the premises.

7. Defendant did not provide to Plaintiff the required (60) day written notice prior to his leaving the premises.

8. The Defendant never conveyed to Plaintiff how the actions of her guests were denying him full use of the premises.

9. As a result of Defendant's failure to notify Plaintiff that the actions of her guests were denying him full use of the premise,s Plaintiff was never able to correct said situation.

10. Plaintiff suffered the loss of two months rent

before she could re-lease the premises after Defendant left. (Findings 50).

Respondent and each and every one of his witnesses testified at trial that they never directly complained to Appellant that her uninvited entry upon Respondent's portion of the premises was unwelcome (TP 48, 55, 81, 102) (Addendum "C").

According to the Court's Conclusions of Law (hereinafter "Conclusions"):

1. That Plaintiff constructively breached the lease by not confining her use of the premises and that of her guest to that of the Landlord's apartment and by her and her guest's use of Defendant's portion of the premises.

2. Defendant failed to mitigate his damages by not informing Plaintiff of his intention to leave the premises (60) days prior to his leaving and never conveying to Plaintiff how the actions of her guests were denying him full use of the premises so as to permit her to correct the situation. (Conclusion 51).

SUMMARY OF ARGUMENT

The Respondent breached the Lease by abandoning the premises without required notice before the Lease's expiration and without further payment of rent. Respondent should not be relieved of the obligation to pay future rent, on account of constructive eviction because he never gave Appellant notice of alleged complaints concerning the premises. Respondent, on

account of his breach of the Lease, is also liable to Appellant for attorney's fees, costs and damages.

ARGUMENT

POINT I - RESPONDENT BREACHED THE LEASE, AND THE TRIAL COURT IMPLICITLY RECOGNIZED THAT BREACH IN SPITE OF ITS FINDING THAT A CONSTRUCTIVE EVICTION OF RESPONDENT HAD OCCURRED RELIEVING HIM OF THE DUTY TO PAY RENT.

Respondent entered into a Lease with Appellant wherein Respondent agreed to lease certain premises for one year beginning October 1, 1986. Respondent moved out at the end of April, 1987, and Appellant suffered the loss of two months rent before she could re-lease the premises as a result of Respondent's failure to give notice required by the Lease. None of the foregoing is disputed in the record.

The trial court did not expressly hold that the Respondent had breached the Lease, but rather determined that he was required to share in the loss of two months rent suffered by Appellant as a result of his leaving the premises before the expiration of the leasehold term. While the trial court's Memo is unclear as to its rationale for holding Respondent liable for one month's rent only, it would appear from the context in which the trial court discusses Respondent's failure to give Appellant notice of acts supporting the claim of constructive eviction that the trial court also found the Respondent's alleged verbal notice 30 days prior to his leaving a failure to perform under the Lease.

Further evidence that the trial court effectively determined a breach of the Lease, is its award of one month's rent in spite of its finding of a constructive eviction by Appellant. A well-settled principle of law concerning constructive eviction states:

"Where the tenant has rightfully abandoned the possession, he is not required to return, upon the landlord's removal of the cause of the constructive eviction, so as to render him liable for future rents."

49 Am. Jur. 2d Landlord and Tenant, Section 576 (1972) (citation omitted).

The trial court was evidently aware of the foregoing general principle in stating that as a result of Appellant's constructive breach of the Lease she could not complain about the Respondent's moving out (Memo 42). Clearly the trial court regarded Respondent's failure to give written notice 60 days prior to his leaving the premises as an independent act amounting to a breach for which Appellant was entitled to compensation.

Upon a finding of breach of Lease by Respondent, and apart from a finding that Appellant had constructively evicted Respondent from the premises, the trial court should have awarded Appellant the two months rent lost as a result of Respondent's surrender of the premises and lack of sufficient notice, attorney's fees, costs and damages (air fare of \$158.00) without offset since Respondent never pled for damages as a result of the alleged constructive eviction. See Petersen v. Hodges, 239 P.2d 180, 182 (Utah 1953) (stating rule that in an action to recover rent, attorney's fees may be awarded only if there is an

agreement to that effect); see also Thirteenth & Washington Sts. Corp. v. Neslen, 254 P.2d 847, 850 (Utah 1951) (stating that but for tenant's justified claim of constructive eviction, landlord would be entitled to recover rent for the period following tenant's vacating during which premises remained vacant. Only the trial court's finding of Appellant's constructive eviction precludes such recovery.

POINT II - A TENANT CANNOT SURRENDER A
LEASEHOLD CLAIMING A CONSTRUCTIVE
EVICTION RELIEVING HIM OF A DUTY
TO PAY RENT WHERE HE HAS FAILED
TO GIVE THE LANDLORD NOTICE OF
COMPLAINTS CONSTITUTING HIS CLAIM
OF CONSTRUCTIVE EVICTION, THUS
DEPRIVING THE LANDLORD OF AN
OPPORTUNITY TO REMEDY THE PROBLEMS
COMPLAINED OF.

According to major treatise authority notice to the landlord that the premises are unfit or uninhabitable for tenant's purposes are required prior to a tenant's abandonment. See 49 Am. Jr. 2d Landlord and Tenant Section 840 (1970). Whenever courts have considered the issue of tenant's failure to give the landlord notice of the complaints comprising his claim of constructive eviction as a defense to the landlord's action for rent, those courts have uniformly held that such notice is a prerequisite to the tenant's claim of constructive eviction. See Applegate v. Inland Real Estate Corporation, 441 N.E. 2d 379, 383 (Ill. App. Ct. 1982); Erickson v. Elliott, 31 P.2d 506, 508 (Wash. 1934); Eskanos and Supperstein v. Irwin, 637 P.2d 403 (Colo. Ct. App. 1981); Kaplan v. McCabe, 532 So. 2d 1354 (Fla.

Dist. Ct. App. 1988); Middagh v. Stanal Sound Ltd., 382 N.W. 2d 303, 308 (Neb. 1986); and SGM Partnership v. Nelson, 705 P.2d 49, 52 (Hawaii Ct. App. 1985).

In Tietig v. Kusik, 279 So. 2d 890 (Fla. Dist. Ct. App. 1973) lessor-owner of a condominium unit brought suit against a lesser for rent due. The trial court granted Plaintiff's motion for a directed verdict and Defendant appealed. On appeal the District Court held that the Defendant was not entitled to abandon the premises on a theory of constructive eviction. There the constructive eviction was an alleged harassment by officers of the condominium depriving lessees of quiet possession and enjoyment of the premises. In denying appellant's relief the district court stated:

Second, and more important, "a tenant who alleges construction eviction by virtue of acts which fall short of actual eviction, are not patently immoral or illegal, are not expressly forbidden by the terms of the lease, and are susceptible to remedy, should and must give timely notice to the landlord of the objectionable act and demand rectification. Failing in this duty, the tenant cannot be heard to complain of the acts in defense to an action for rent." [Emphasis supplied] Richards v. Dodge, Fla. App. 1963, 150 So. 2d 477. The record reveals that defendant tenant did not transmit actual notice of his complaints to the plaintiff landlord, Mr. Kusik.

Id. at 891. The district court also found that the award of attorney's fees was clearly provided for in the lease and thereby properly awarded by the trial court. Id. at 891.

While the requirement of notice to the landlord of complaints supporting a claim of constructive eviction has not been expressly addressed in Utah the Notice requirement has at

least been impliedly recognized. In Thirteenth and Washington St. Corp. v. Neslen, 254 P 2d 847 (Utah 1953) the lessors of office space sued for rent owing following lessee's removal from the premises on the ground of constructive eviction. The trial court refused to grant lessors relief upon a finding of constructive eviction and the Supreme Court affirmed. In recognizing the validity of defendant's claim, the Court noted that repeated complaints were made and were followed by promises from the Plaintiff's agents that the conditions would be improved, all of which justified defendant's remaining in the premises long after Defendants had made the initial complaint See id. at 852.

In light of Respondent's failure to complain to Appellant about alleged breach of the Lease, allegedly committed by either Appellant or her guests, so as to permit Appellant to rectify those alleged problems, Respondent should not now be permitted to avoid its obligations under the Lease and under the law.


CONCLUSION

Appellant requests a determination by the Court that Respondent breached the lease and that the trial court committed prejudicial error in finding and concluding that Appellant had constructively evicted Respondent. Upon such determination Appellant request award of two months rent, damages, attorney's fees and costs.

CERTIFICATE OF FILING AND SERVICE

I, Kenneth A. Bronston, hereby certify that I hand-delivered

an original and seven copies of the foregoing Brief of Appellant
to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt
Lake City, Utah 84112 and that I mailed, by first-class, mail
four copies of said Brief to Maximillian Gregoric,
Defendant/Respondent, pro se at 915 East 12600 South, Draper,
Utah 84020, this 20th day of April, 1989.


Kenneth A. Bronston
Attorney for Plaintiff/Appellant

ADDENDUM "A"

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

| | | |
|-----------------------|---|------------------------|
| JENNIFER JOSEPHS, |) | |
| Plaintiff, |) | MEMORANDUM OF DECISION |
| vs. |) | CIVIL NO. 873012440 CV |
| MAXIMILLIAN GREGORIC, |) | |
| Defendant. |) | |

The above entitled matter was heard by the court on
December 5, 1988.

Plaintiff claims damages for breach of a lease agreement by
defendant. Defendant claims that plaintiff breached the lease
by denying him full and free use of the leased premises.
Defendant also counterclaims for the amount of his cleaning
deposit because of plaintiff's failure to comply with the
provision of Section 57-17-3 of the Utah Code.

Plaintiff presented evidence that defendant had breached
the lease by leaving without the required 60 days written
notice. Plaintiff also claims damages for cleaning expenses,
for a heat bill which defendant was obligated to pay under the
agreement, and for air fare for her to return to arrange to
re-lease the premises.

Defendant presented evidence that plaintiff had constructively breached the lease by not confining her use of the premises and that of her guests to the landlord's apartment as provided for in the lease. Defendant and his witnesses who were co-occupants of the premises at the time of the lease, testified that plaintiff's guests often trespassed upon defendant's portion of the premises, using the washing facilities, the kitchen and bathroom and turning up the heat. Both Chris Rogers and Julie Gregoric claimed that this unwelcome intrusion by plaintiff's guests, and indeed by plaintiff herself on occasion, interfered with their full enjoyment of the premises and caused them to move out.

From this evidence which the court finds persuasive and which was not rebutted by plaintiff, the court finds that plaintiff was in constructive breach of the lease agreement, and cannot now complain about defendant moving out. However, the court also finds that under the doctrine of mitigation of damages, the defendant must share in the damages suffered by plaintiff. He claims he verbally notified her 30 days prior to leaving of the problems and his intentions. The court believes the better evidence is that defendant never conveyed to plaintiff how the actions of her guests were denying him full use of the premises, so she was never able to correct the situation.

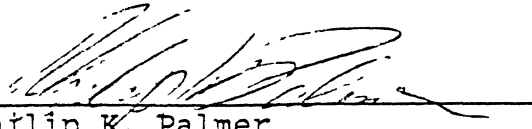
Plaintiff suffered the loss of two month's rent before she could re-lease the premises after defendant left, and defendant must share in that loss. The court also finds that defendant is responsible for the heat bill in the amount of \$167.15 and must reimburse plaintiff for that. The court also finds that plaintiff is entitled to keep and apply defendant's \$400 security and cleaning deposit to the cleaning of the premises required from his occupancy.

Judgment is therefore granted on the complaint in favor of plaintiff for \$630 representing defendant's share of the damages for lost rent, and for \$167.15 for heating costs, for a total judgment of \$797.15 to bear interest at the rate of 12% from the date hereof.

On defendant's counterclaim for return of the cleaning deposit plus penalty, the court finds for the plaintiff on the grounds that there was no evidence that defendant notified plaintiff where the deposit could be sent as required by the statute.

Each party will bear its own costs; no attorney fees awarded. Attorney for plaintiff will please prepare the appropriate order of judgment.

Dated this 9th day of December, 1988.


Philip K. Palmer
Third Circuit Court Judge

ADDENDUM "B"

LEASE-RENTAL AGREEMENT AND DEPOSIT RECEIPT

(1)

FROM MAXIMILIAN GREGORIC

of \$ 1,630.00 (One Thousand Six Hundred Thirty Dollars) hereinafter referred to as Tenant

by _____ as a deposit which, upon acceptance of this rental agreement, shall belong to
r of the premises, hereinafter referred to as Owner and shall be applied as follows:

| | RECEIVED | PAYABLE PRIOR TO OCCUPANCY |
|---|--------------------|----------------------------|
| the period from <u>October 1, 1986</u> to <u>October 31, 1986</u> | \$ <u>600.00</u> | \$ _____ |
| month's rent | \$ <u>630.00</u> | \$ _____ |
| deposit | \$ <u>200.00</u> | \$ _____ |
| visit | \$ _____ | \$ _____ |
| charge (WINDOWS AND WALLS) | \$ <u>100.00</u> | \$ _____ |
| PET DEPOSIT | \$ <u>100.00</u> | \$ _____ |
| | \$ <u>1,630.00</u> | \$ _____ |

In the event that this agreement is not accepted by the Owner or his authorized agent, within _____ days, the total deposit received shall be refunded.
it hereby offers to rent from the Owner the premises situated in the City of SALT LAKE, County of SALT LAKE
UTAH described as 2680 EAST FORT UNION BOULEVARD, consisting of HOUSE/DUPLEX

following TERMS and CONDITIONS:

The term hereof shall commence on October 1, 1986, and continue (check one of the two following alternatives)
(i) September 30, 1987.

(ii) a month-to-month basis thereafter, until either party shall terminate the same by giving the other party 60 days written notice delivered by certified mail.

Rent shall be \$ 630.00 per month, payable in advance, upon the 1ST day of each calendar month to Owner or

authorized agent, at the following address: DEPOSIT - F.I.B. - HILLSIDE PLAZA Acct #2812526 80418
at other places as may be designated by Owner from time to time. In the event rent is not paid within five (5) days after due date, Tenant agrees to pay a late fee of \$10.00. Tenant agrees further to pay \$5.00 for each dishonored bank check. LATE FEE \$50 AFTER 10 DAYS.

PLE OCCUPANCY: It is expressly understood that this agreement is between the Owner and each signatory individually and severally. In the event of default by any signatory each and every remaining signatory shall be responsible for timely payment of rent and all other provisions of this agreement.

UTILITIES: Tenant shall be responsible for the payment of all utilities and services, except: SEWER, WATER AND GARBAGE shall be paid by Owner.

The premises shall be used as a residence with no more than 4 adults and NO children, and for no other purpose, without the prior written consent of the Owner. Occupancy by guests staying over 15 days will be considered to be in violation of this provision.

No pets shall be brought on the premises without the prior written consent of the Owner. \$100 deposit - extra.

HOUSE RULES: In the event that the premises are a portion of a building containing more than one unit, Tenant agrees to abide by any and all house rules, whether posted before or after the execution hereof, including, but not limited to, rules with respect to noise, odors, disposal of refuse, pets, parking, and use of common areas shall not have a waterbed on the premises without prior written consent of the Owner.

ORDINANCES AND STATUTES: Tenant shall comply with all statutes, ordinances and requirements of all municipal, state and Federal authorities now in force, and hereafter be in force, pertaining to the use of the premises.

ASSIGNMENT AND SUBLETTING: Tenant shall not assign this agreement or sublet any portion of the premises without prior written consent of the Owner.

INVENTORY, REPAIRS OR ALTERATIONS: Tenant acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Owner shall give Tenant a written inventory of furniture and furnishings on the premises and Tenant shall be deemed to have possession of all said furniture and furnishings. Tenant shall maintain and repair, unless he objects thereto in writing within five days after receipt of such inventory. Tenant shall, at his own expense, and at all times, keep the premises in a clean and sanitary manner including all equipment, appliances, furniture and furnishings therein and shall surrender the same, at termination, in as good condition as received, normal wear and tear excepted. Tenant shall be responsible for all repairs required for exposed plumbing or electrical wiring and damages caused by his negligence and that of his family or invitees or guests. Tenant shall not paint, paper or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Tenant shall irrigate and maintain lawns, shrubs and trees, and keep the same clear of weeds if such grounds are a part of the premises and are exclusively for the use of the Tenant.

INSPECTION: Tenant shall permit Owner or Owner's agents to enter the premises at reasonable times and upon reasonable notice for the purpose of inspecting the premises or showing the same to prospective tenants or purchasers, or for making necessary repairs. JERRY COX - 942-5605

LIABILITY: Owner shall not be liable for any damage or injury to Tenant, or any other person, or to any property, occurring on the premises, or any part thereof, or in common areas thereof, and Tenant agrees to hold Owner harmless from any claims for damages no matter how caused.

DELIVERY: If Owner is unable to deliver possession of the premises at the commencement hereof, Owner shall not be liable for any damage caused thereby and this agreement shall be void or voidable, but Tenant shall

pay rent within _____ day

FAULT: Any failure by Tenant to pay rent when

premises is hereby subject to a lien in favor of the Owner in the event of a default by Tenant, or any other person, as it becomes due, or (b) at any time thereafter, including the cost of recovering possession, of the amount by which

SECURITY: The security deposit shall be applied to the Security Deposit Refunds:

ORNEYS FEES:

or shall be en

IVER: No

or's right

FICES:

ess,

15,

S. Bedt
137-551-263

NK NO. 117 © OEM PTO. CO.

designated Owner accepts the foregoing offer and agrees to rent the herein described premises on the terms and conditions herein specified. The Owner agrees _____, the Agent in this transaction

I \$ _____ DOLLARS
as rendered and authorizes Agent to deduct said sum from the deposit received from Lessee. This agreement shall not limit the rights of Agent provided for in
or other agreement which may be in effect between Lessor and Agent.

..... Owner's Authorized Agent DATED: January 1965 Ownr
..... Address Ownr
..... Phone Address Phone

Fixed length of occupancy

| | | | | | |
|------------------------|--|-------------------------------|---------|-------------------------|----------------------|
| MAXIMILIAN GREGORIC | | Date of Birth | 7-22 61 | Social Security No. | 126-50-4382 |
| | | | | Drivers Lic. No. | NY |
| | | | | Expir. Date | 1990 |
| of Spouse | | | | Social Security No. | 618189528090:4855-61 |
| | | | | Drivers Lic. No. | |
| | | | | Expir. Date | |
| Address | | 87 SO. OXFORD ST, BROOKLYN NY | | Res. Phone | 718-625-4196 |
| ng at present address | | Landlord or Agent | | Bus. Phone 718-875-125 | |
| ng at previous address | | Landlord or Agent | | Phone | |
| Status: Single | | Married | | Divorced | |
| Status: Single | | Married | | Widowed | |
| Relationships: | | CHRIS ROGERS (23) | | SHASTEN BITARD (23) | |
| Ages: | | JULIE MCGARRY (25) | | DOG | |
| Year | | 1953 | | Model RABBIT | |
| Color | | RED | | License No. FBA201 (ND) | |
| BINNEVILLE 1961 | | BLACK | | OCCUPATION | |
| TA LANDCRUISER | | | | WS7378 (UT) | |

| | PRESENT OCCUPATION * | PRIOR OCCUPATION * | SPOUSE'S OCCUPATION |
|----------------------|------------------------------------|--------------------|---------------------|
| Position | LANDLORD / CARPENTER | | |
| Employed, d.b.a. | | | |
| Address | 37 So. OXFORD ST BROOKLYN NY 11217 | | |
| Phone | 718-875-1253 | | |
| Business | | | |
| held | | | |
| nd Title of Superior | | | |
| ig | | | |
| / Gross Income | | | |

or self employed less than two years
information on prior occupation.

ference

CREDIT REFERENCE

AL BANK

225

THE FOREGOING, and/or may terminate a

ADDENDUM "C"

1 MR. GREGORIC: Objection,, hearsay.

2 THE WITNESS: And I can produce that--and I can
3 produce that person in court--I can produce a statement from
4 him stating that he asked me if the house was available, that
5 he was asked to leave, the man said--he's a manager up at
6 Snowbird at the Stake Pit.

7 THE COURT: He's objected, ma'am, so don't
8 volunteer any more statements.

9 THE WITNESS: I'm sorry.

10 Q (By Mr. Bronston) How did Mr. Gregoric actually
11 give you notice?

12 A Standing in my hallway, as I was getting on an air--
13 as I was walking--as I had my suitcases in my hand and I was
14 walking out the door, he said, to me, Jennifer, I hate to
15 tell you, I--no, I wouldn't say that--'cause that conversation
16 I remember, 'cause I was floored. He said, Jennifer, I've
17 got to tell you something, he said I'm sorry, I lied about
18 depositing the rent, because I wanted to use up my last rent
19 that was--my last month's rent that was on deposit, and
20 we're moving out in four days. I'm really sorry, but I
21 bought a house.

22 Q Did you say all of that was word-for-word, but
23 it's really close.

24 Q Did you--

25 A That conversation is really--that conversation,

1 also have my own telephone in my apartment, for the use of
2 myself and any guests that ever did stay there.

3 Q Now, the reason--

4 (Tape turned off. Remainder of direct examination
5 not recorded.)

6 THE WITNESS: But I don't remember, exactly..

7 CROSS-EXAMINATION

8 BY MR. GREGORIC:

9 Q Do you recall asking me to drive Jay wherever he
10 wanted in your stolen car?

11 A I don't recall that., I'm--I mean, it's possible.
12 I don't really recall that.

13 Q Did you--then what, the police hauled him away,
14 or--

15 A I remember you said, he's here, what should we do,
16 and something to the effect, 'cause that conver--I remember
17 just--I remember I told you to call the police. I think you
18 said that Julie wanted to call the police, and you didn't
19 think that--that you didn't think that we should, and could
20 we try and work it out, and I said, no, I think we should
21 call the police; he stole my car, he's broken into the
22 house, he's illegally occupying that, he's trespassing and
23 he's stolen my car, he's not being reasonable. Call the
24 police. I know I told you to call the police.

25 Q Did you make a stolen car report?

1 to two months' rent following Mr. Gregoric's leaving the
2 premises, that the fuel bill belonged to the premises at the
3 time that he was in residence there, with accompanying \$167
4 bill, that attorney's fees are appropriate in the case,
5 that the cleaning bill is appropriate and that Miss Josephs'
6 costs in having to appear on this are provided for in the
7 lease, including her air flight out here for which she would
8 have been--there would have been no other reason for her to
9 appear here other than to re-rent this place at that time.

10 I think under those circumstances, it's appropriate
11 that she be awarded everything that she has sought in the
12 complaint, and which in fact does not include everything
13 which she might have pled for.

14 THE COURT: Do you want to make any proffer of
15 attorney's fees, in case I decided to award them?

16 MR. BRONSTON: Yes. Through today, I reckon that
17 our attorney's fees are in the amount of \$840, that being 14
18 hours at \$60 per hour. Court will note that we have appeared
19 here on a motion to compel, and the discovery has been
20 conducted, so there have been other appearances and also a
21 pretrial hearing, plus costs, which I don't have but
22 (inaudible)

23 THE COURT: All right. Thank you.

24 Okay. Mr. Gregoric, you may argue your case.

25 MR. GREGORIC: I just would like to state that I

1 Q Uh huh (affirmative). But you heard Miss Josephs
2 testify that on each occasion that she appeared, she spoke
3 to Mr. Gregoric?

4 A Uh huh (affirmative).

5 Q You are no doubt well acquainted with the house
6 itself?

7 A Yes. I am.

8 Q Did Miss Josephs, you say that she frequently
9 appeared without notice; did she live in your apartment?

10 A No, but she used our apartment quite frequently to
11 either cook her food or have coffee or whatever.

12 Q And did you object to that?

13 A No, not at the time.

14 Q Did you ever object to her, directly?

15 A No, I never did, directly.

16 Q Would you say that she resided primarily in her
17 own apartment?

18 A Primarily, yes.

19 Q What percentage of the space was her apartment
20 with respect to the entire house, would you say?

21 A A quarter of it, maybe.

22 Q Right?

23 A It's not a large apartment, it's very small
24 compared to the size of the house.

25 Q Now, with respect to your repairs that were

1 A Jay very often did; he would walk in and out at
2 will.

3 Q Okay.

4 A And so did Jerry Cox, and some guests.

5 Q Do you recall Jennifer Josephs coming in and
6 trying to sit down for coffee, or cooking her--

7 A Yes, I do. And I know I didn't object, and now,
8 in the light of things, I should have, and I should have
9 gotten it in writing; but I would be sitting at the breakfast
10 table, she'd come in, have a cup of coffee and sit down and
11 talk to us, like it was her apartment.

12 Q Did this--did this grow on you, or--

13 A Yes. It became worse and worse and--until it was
14 no longer acceptable.

15 Q Uh huh (affirmative).

16 A To be paying \$600 a month rent and have other
17 people cooking on your stove and sitting at your kitchen
18 table.

19 Q Did you feel that things might get better in
20 the summer?

21 A No. I didn't. Because she said she was going to
22 be putting air conditioning in and she would be there to
23 operate it; therefore, she'd be there every day all the time,
24 and so we were a little concerned about that, because if she
25 was only there three times during the winter, and she was

1 A I--I believe by my actions, and not words, that
2 she was aware that we were getting--that things weren't
3 working out.

4 Q And you've never delivered written notice as to
5 those complaints?

6 A No.

7 Q And I believe your testimony was that the effort
8 to locate a new place at that time was too great, correct?

9 A Anything could be done. I think it's difficult at
10 the--during the ski seas--especially the beginning of the ski
11 season, when the majority of our problems were taking place,
12 and--well, go on.

13 Q Did you ever enter Miss Josephs' apartment on any
14 occasion, ever?

15 A Yes. I was invited.

16 Q You were invited in. Now, with respect to your
17 leaving the premises--

18 A And let me just clarify that last statement. When
19 I did enter her apartment, it was for business purposes,
20 in terms of the lease agreement, payment of checks or, you
21 know, the dog, or whatever; it dealt with business, not on a
22 pleasurable basis. I mean, you know, not that it was
23 displeasurable, but as a social--

24 Q You say you were paid for the work that you
25 initially contracted for with her, is that correct, on the--

1 after she'd called us several times, we decided that it was--
2 I mean, we think we're right, but we'll try and pay. Her
3 address was on the lease, there is no excuse not to resubmit
4 it, but at the end, she was like, if you don't pay this bill,
5 I'm going to sue you and take you to Court. And it ended up,
6 fine, well, I'll see you in Court then.

7 And I wasn't--I never had any--it was never my
8 idea to live there seasonally as--you know, six months, as
9 she contends. I think our jobs and our record prove that
10 we've been here, we were here before then, and we have been
11 year-round employees in Utah, and yet I do have other real
12 estate holdings. My mother manages most of them in New
13 York, probably like Jennifer is in Beverly Hills, but, you
14 know, once I decided to get married, in the spring about
15 when all of this was coming to a head, too, we said, forget
16 it, we'll just go buy a house and we won't have to deal
17 with this. And it just, I--well, I kinda never really object
18 to something until it really gets out of hand, and that's
19 probably my fault, and otherwise, if I'd thought this would
20 go to Court and everything else, I probably would have
21 objected to her, and I probably should have left right away,
22

23
24 And it was our mistake, I guess, to stay as long as
25 we did.

ADDENDUM "D"

4

| ISSUED BY DELTA AIR LINES, INC. | | PASSENGER TICKET AND BAGGAGE CHECK | | ORIGIN/DESTINATION | | | | | | | |
|---|----------------------|--|--------|--|--------|-------|--------|---------------------------|------------------|-----------------|-------|
| ENDORSEMENTS (CARBON) NO REFUND OR CHANGE | | SUBJECT TO CONDITIONS OF CONTRACT ON PASSENGER'S COUPON PASSENGER'S COUPON | | BOOKING REFERENCE 006 4852 754 047 | | | | | | | |
| NAME OF PASSENGER JOSEPHS/JENNIFER | | DATE OF ISSUE LHAUS3E38 | | ISSUED IN EXCHANGE FOR | | | | | | | |
| NOT TRANSFERABLE | | DATE AND PLACE OF ORIGINAL ISSUE 154906187 | | DATE AND PLACE OF ISSUE | | | | | | | |
| TOUR CODE | | CONJUNCTION TICKET(S) | | DATE AND PLACE OF ISSUE | | | | | | | |
| X/O | NOT GOOD FOR PASSAGE | CARRIER | FLIGHT | CLASS | DATE | TIME | STATUS | FARE BASIS/TKT DESIGNATOR | NOT VALID BEFORE | NOT VALID AFTER | ALLOW |
| | FROM LOS ANGELES | DL | 1784 | M | 25 JUN | 755A | OK | MXE7NR | | | |
| | TO SALT LAKE CITY | DL | 1783 | M | 09 JUL | 1011A | OK | MXE7NR | 28 JUN | | |
| | TO LOS ANGELES | | | | | | | | | | |
| | TO VOID | | | | | | | | | | |
| | TO VOID | | | | | | | | | | |
| BAGGAGE (PCR CHECKED) | | UNCK | PCR | UNCK | PCR | UNCK | PCR | UNCK | PCR | UNCK | PCR |
| FARE | | USD 146.30 25 JUN LAX DL SLC 73.15 MXE7NR | | | | | | | | | |
| TAX | | US 11.70 DL LAX 73.15 MXE7NR | | | | | | | | | |
| TAX | | USD 148.30 END | | | | | | | | | |
| TOTAL | | USD 158.00 | | | | | | | | | |
| ROUTE CODE | | FOR ISSUING OFFICE ONLY | | | | | | | | | |
| EQUIV FARE PC | | | | | | | | | | | |

FORM OF PAYMENT

4024 0046 7464 4907

11/28/86 07/87*CV
JENNIFER L JOSEPHS
7

ADDENDUM "E"

KENNETH A. BRONSTON #4470
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

7/11 sent
cent
Gregoric & Palmer
jm

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

| | | |
|-----------------------|---|------------------------|
| JENNIFER JOSEPHS, |) | FINDINGS OF FACT AND |
| |) | CONCLUSIONS OF LAW |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| MAXIMILLIAN GREGORIC, |) | Civil No. 873012440 CV |
| |) | |
| Defendant. |) | |

The above entitled matter came on for trial on the December 5, 1988 before the Honorable Philip K. Palmer. The Plaintiff appeared in person and was represented by her counsel, Kenneth A. Bronston and the Defendant appeared pro se. The Court having considered the pleadings and papers of file, having heard the testimony of witnesses introduced on behalf of the parties, and being otherwise fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff's Complaint alleges damages for breach of a lease agreement with Defendant, including damages for two months lost rent while Plaintiff sought another tenant, cleaning expenses, a heat bill which Defendant was obligated to pay under the agreement, for air fare for Plaintiff's return to arrange to re-lease the premises, and for attorney's fees.

2. Defendant claimed that Plaintiff breached the lease by denying him full and free use of the leased premises; and further that Defendant is entitled to the return of his cleaning

deposit because of Plaintiff failure to comply with the provision of Section 57-17-3 of Utah Code Annotated (1953).

3. Plaintiff and her guests did not confine their use of the premises to the Landlord's apartment as provided for in the lease.

4. Plaintiff's guest often trespassed upon Defendant's portion of the premises, using the washing facilities, the kitchen and bathroom, and turning up the heat.

5. Plaintiff and her guest's use of Defendant's portion of the premises was an unwelcome intrusion.

6. The Defendant was under a duty to notify Plaintiff in writing (60) days prior of his intention to leave the premises.

7. Defendant did not provide to Plaintiff the required (60) day written notice prior to his leaving the premises.

8. The Defendant never conveyed to Plaintiff how the actions of her guests were denying him full use of the premises.

9. As a result of Defendant's failure to notify Plaintiff that the actions of her guests were denying him full use of the premises, Plaintiff was never able to correct said situation.

10. Plaintiff suffered the loss of two months rent before she could re-lease the premises after Defendant left.

11. The Defendant is responsible for the heat bill in the amount of \$167.15.

12. The Plaintiff is entitled to keep and apply Defendant's \$400.00 security and cleaning deposit to the cleaning of the premises required from his occupancy.

13. Plaintiff should be granted judgment on the Complaint in the amount of \$630.00 representing Defendant's share

of the damages for lost rent, and for \$167.15 for heating costs, for a total judgment of \$797.15 to bear interest at the rate of 12% from the date hereof.

14. Defendant never notified Plaintiff where his security and cleaning deposit could be sent as required by statute.

15. Defendant's counterclaim for return of cleaning and security deposit should be dismissed.

16. Each Party should bear it's own costs and no attorney's fees should be awarded.

From the foregoing Findings of Fact the Court now makes and enters it's:

CONCLUSIONS OF LAW

The Court concludes:

1. That Plaintiff constructively breached the lease by not confining her use of the premises and that of her guest to that of the Landlord's apartment and by her and her guest's use of Defendant's portion of the premises.

2. Defendant failed to mitigate his damages by not informing Plaintiff of his intention to leave the premises (60) days prior to his leaving and never conveying to Plaintiff how the actions of her guests were denying him full use of the premises so as to permit her to correct the situation.

3. Judgment should be granted on the Complaint in favor of Plaintiff for \$630.00 representing Defendant's share of the damages of lost rent, and for \$167.15 for heating costs for a total Judgment of \$797.15 to bear interest at the rate of 12% of the date hereof. Also, Plaintiff is entitled to keep and apply Defendant's \$400.00 security and cleaning deposit to the cleaning of the premises.

4. The Defendant's counterclaim should be dismissed with prejudice.

5. Each Party should bear it's own costs and no attorney's fees should be awarded.

DATED this 13 day of January 1989.

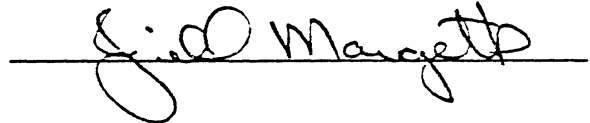
BY THE COURT


PHILIP K. PALMER
THIRD CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 11th day of January 1989 I mailed a true and correct copy of Plaintiff's Findings of Fact and Conclusions of Law postage prepaid, to the following:

Maximillian Gregoric
915 East 12600 South
Draper, Utah 84020



code:jjosfact