

1989

# Jennifer Josephs v. Maximilian Gregoric : Brief of Respondent

Utah Court of Appeals

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Maximillian Gregoric; Pro Se.

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

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

890080

DOCKET

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JENNIFER JOSEPHS,

Plaintiff/Appellant,

vs.

MAXIMILIAN GREGORIC,

Defendant/Respondent:

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Case No. 890080-CA

Priority No. 14

BRIEF OF RESPONDENT

Appeal from Order of Judgement, 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 partial damages and no attorney's fees or costs.

MAXIMILIAN GREGORIC  
915 East 12600 South  
Draper, UT 84020

Pro Se

KENNETH A. BRONSTON  
Anderson & Holland  
623 East First South  
P.O. Box 11643  
Salt Lake City, UT 84147

Attorney for Appellant

FILED

1989

Mary T. ...  
Clerk of the Court  
Utah Court of Appeals

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### SUMMARY OF ARGUMENT

It is the Respondent's argument that Appellant breached the lease through constructive eviction. Because of this constructive eviction, Respondent should not have to pay any future rent nor be liable for attorney's fees, costs and damages.

### ARGUMENT

Respondent and Appellant entered into a lease agreement October 1, 1986. From the beginning of the lease agreement, Appellant and her guests trespassed on Respondent's residence. This problem continued throughout the tenancy and the trial court recognized this as a constructive eviction.

Munic Meat Co. v. H. Gartenberg & Co., 51 Ill. App. 3d 413, 416, 9 Ill. Dec. 360, 366 N.E. 2d 617 states:

"It is not essential that there be an express intention of the landlord to compel a tenant to leave the demised premises or to deprive him of their beneficial enjoyment, since persons are presumed to intend the natural and probable consequence of their acts and, accordingly, acts or omissions of the landlord making it necessary for the tenant to move from the demised premises constitutes a constructive eviction."

Appellant argues that since there were no complaints by Respondent to Appellant regarding the continuing problems of Appellant's guests entering Respondent's residence, Appellant had no chance to rectify these problems. Respondent, therefore,

could not use constructive eviction as a defense. By referring to the Transcript of Proceedings, Addendum "A", (Pages 6, 15, 60, 61, 80, 81, 95, 96, 100), it is quite evident that Respondent did complain to Appellant about problems with Appellant's guests and Appellant acknowledged these complaints were made during the trial proceedings. Appellant also stated that she had made some effort to rectify these problems. Yet, problems of the same nature continued to arise. In Eskanos and Supperstein v. Irwin, 637 P.2d 403 (Colo. Ct. App. 1981), we see a similiar case where Irwin claimed constructive eviction due to, at times, intolerable noise levels. Initial complaints resulted in some effort to reduce noise, but problems of the same nature continued to exist after plaintiff claimed to have solved these problems. The court concluded that there was a constructive eviction.

In yet another case, Applegate v. Inland Real Estate Corporation, 441 N.E.2d 379 (Ill. App. Ct. 1982), under plaintiff's claim of constructive eviction, the court found that although plaintiff had made attempts to notify landlord of problems, but never did, the notice requirement was not a bar to recovery under the circumstances of the case. The reasoning behind this conclusion was that the:

"...problem was persistent if not permanent and that an opportunity for an attempt to cure would have availed the plaintiff little."

In the Respondent's case, the problem of lack of quiet enjoyment of residence persisted throughout the tenancy.

Appellant's continued lack of control over her guests and agents stemmed from her inherent belief that it was appropriate to trespass in her own house, even though it was rented to others. This is in direct conflict with the Entry and Inspection clause of the Lease-Rental Agreement, (Addendum "B"). The Entry and Inspection clause states that "Tenant shall permit Owner or Owner's agents to enter the premises at reasonable times and upon reasonable notice...". Appellant never notified Respondent that she and her friends would be entering the premises nor did they ensure that they were entering at "reasonable times".

#### CONCLUSION


Respondent requests that the court concur with the trial court's decision that a constructive eviction did exist, but that the trial court erred in finding Respondent liable for one month's rent (\$630.00) due to the well-settled principle of law concerning constructive eviction that 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). Respondent also requests that he not be liable for damages, costs and attorney's fees.

CERTIFICATE OF FILING AND SERVICE

I, Maximilian Gregoric, hereby certify that I hand delivered an original and seven copies of the foregoing Brief of Respondent to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84112 and that I hand delivered four copies of said Brief to Kenneth A. Bronston, Attorney for Plaintiff/Appellant, 623 East First South, Salt Lake City, UT 84147, this 19 day of May, 1989.

  
\_\_\_\_\_  
Maximilian Gregoric  
Pro Se



## ADDENDUM "A"

1 Shaston(?), who later got married also, had to find another  
2 residence to live in.

3 All of which--I think the location we were in was  
4 perfect for us and too bad it didn't work out. I think  
5 what Mrs. Josephs wanted was tenants there that would pay  
6 rent while she could redo her house and her yard and land-  
7 scaping, and still collect rent and, you know, have the  
8 benefit of getting her house redone. And I don't think--it  
9 wasn't, you know, that she would enter our place maliciously  
10 or anything like--you know, it was nothing like that, it  
11 was just--and we never--Julie complained several times about  
12 her guests around this home, but it just--it's something that  
13 we kept inside ourselves, you know, about her walking in.  
14 She'd say, well, do you have a cup of coffee or something,  
15 she'd use our kitchen in the beginning.

16 It just kinda built up and built up, and at that  
17 end of the period, near the end of March, we'd all decided  
18 that, you know, we could no longer live there.

19 THE COURT: Okay. Thank you.

20 Go ahead and call your first witness, Mr. Bronston.

21 MR. BRONSTON: I'd like to call Jennifer Josephs.

22 JENNIFER JOSEPHS,

23 the plaintiff in this matter, after having been first duly  
24 sworn, assumed the witness stand, and was examined and  
25 testified in her own behalf as follows:

1 stayed for, I believe, somewhere around five days, that was  
2 als--that was in January. And I believe, my friend,  
3 Patricia Shurts, stayed there for a few days, and that was in  
4 February. And that was all the guests that I recall staying  
5 there, and that was on three separate occasions.

6 Q Do you recall Julie calling you up in California  
7 to complain that your guests were leaving the front door  
8 unlocked, they'd put their garbage out for us to do their  
9 garbage--

10 A I recall her calling me and saying that the door  
11 was left unlocked, and I questioned my guests about that, and  
12 they said that in fact that the door had been left unlocked,  
13 because you had, in fact, had guests staying there and didn't  
14 have enough keys to go around for your house guests.

15 Q Did you give your guests permission to enter our  
16 premises?

17 A No. My guests were told strictly never to enter  
18 your premises.

19 Q Uh huh. And the washing machine and the dryer,  
20 was that in our premises, or was that--what did you consider  
21 that area?

22 A I don't know if we really discussed--I don't  
23 believe--I mean, it was my washer and dryer, and I was paying  
24 the water on it, and I don't really--I don't think I  
25 specifically them anything about the washer and dryer. I

1           Q     The lease says--  
2           A     --occupy my living room. No, it did not say  
3     that.  
4           Q     It's your recollection that the lease says that  
5     her guests will occupy her apartment?  
6           A     Her apartments. That's what it does say, yes.  
7           Q     I'd like to show the lease to you. Okay. Can  
8     you find on that lease anywhere where that restriction as to  
9     the guests is made?  
10          A     I'm sorry? What guests? Must--  
11                MR. GREGORIC: I object. What restriction?  
12                MR. BRONSTON: The restriction as to the location  
13     Miss Josephs and her guests must limit themselves.  
14                THE WITNESS: It says landlord and guests will  
15     occasionally occupying--will be occasionally occupying  
16     landlord's apartment.  
17                MR. BRONSTON: Uh huh (affirmative).  
18                THE WITNESS: As far as I know, the landlord's  
19     apartment is not the living room, kitchen, basement or  
20     toilet.  
21          Q     (By Mr. Bronston) Okay. But you said you didn't  
22     object--  
23          A     To using her apartment? No, not at all. That's  
24     fine.  
25          Q     And did you object to her visiting with you?

1           A     Yes. I did.

2           Q     Didn't you state earlier that you wish you had  
3 objected, but you hadn't?

4           A     I wish I had verbally objected, because that could  
5 be used in Court. I can't say now that I told her to get out  
6 of my kitchen. I wish I had. I did not.

7           Q     So, you never made it known to her that her presence  
8 was unwanted?

9           A     No. I made it known to her that her guests'  
10 presence was unwelcome in my kitchen, bathroom, et cetera.

11          Q     And the guests that you referred to was Jay; is  
12 that correct?

13          A     No. It was Jay and it was a couple people, I  
14 don't know where they were from, but they came into the  
15 living room to turn up the heat.

16          Q     Okay.

17          A     While we were sitting there watching television.

18          Q     Uh huh (affirmative). Did your guests ever touch  
19 the thermostat?

20          A     Probably not, no. We don't like our house to be  
21 very warm, as we ski all day and we're used to the cold.  
22 They would put on a sweater.

23          Q     You know that your guests never touched the  
24 thermostat?

25          A     I don't know that, no.

1 Q (By Mr. Bronston) Was she required to give you  
2 written notice concerning her appearance?

3 A Entry and inspection. Tenant shall permit owner  
4 and owner's agents to enter the premises at reasonable times  
5 and upon reasonable notice for the purpose of inspecting the  
6 premises or showing the same to prospective tenants or  
7 purchasers or for making necessary repairs.

8 Never did I get anything--

9 Q No reference to a writing?

10 A Fine. You need oral, neither.

11 Q And you didn't deliver written notice to her within  
12 30--within 60 days, as provided by the lease?

13 A I did not.

14 Q When you--when you say you contacted her as to  
15 your leaving the premises? Where was she--where did you call  
16 her?

17 A I believe I called her in Beverly Hills.

18 Q Okay.

19 A I don't have the incredible memory she has, though.

20 Q Okay. Now, at what point did you ever complain to  
21 her as to the conditions you were living under, as you  
22 described them?

23 A As how?

24 Q Did you ever complain to her about the conditions  
25 that you described as unliveable?

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    unpleasurable, 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 me not to do it.

2 MR. GREGORIC: I object to that last statement,  
3 your Honor.

4 THE WITNESS: Strike it from the record.

5 Q (By Mr. Gregoric) It would seem to me--well, do  
6 you recall--oh, never mind.

7 MR. GREGORIC: That's all I have.

8 THE COURT: Miss Josephs, did the defendant ever  
9 complain to you about your guests using his portion of the  
10 premises?

11 THE WITNESS: Well, of course, the situation with  
12 Mr. Jay Naykevaus, that was a very bad situation, and when  
13 they complained to me, I took care of that right away. And  
14 that--I mean, that was a bad sit--

15 MR. GREGORIC: Your Honor, I think I also said it  
16 was the other guests--

17 THE WITNESS: He was not a guest, he was working  
18 for me, and he was not supposed to be staying there.

19 MR. GREGORIC: We actually called her in L.A. and  
20 complained about her guests. She had attested to that, too,  
21 earlier in the trial, here.

22 THE WITNESS: I think the Judge is asking me  
23 questions.

24 MR. GREGORIC: So, we have, yes, complained.

25 THE COURT: Don't interrupt, sir.



1 MR. GREGORIC: Okay.

2 THE COURT: Did he call you and--

3 THE WITNESS: Yeah. They notified me when--

4 THE COURT: But that was about this guy that had

5 taken your car, huh?

6 THE WITNESS: Yeah, and they did--they told me

7 about that the people had left the house unlocked that one

8 time, when--it was Dr. and Mrs. Soble were there, and they

9 complained that--

10 THE COURT: Did they complain about your guests

11 using the washing facilities?

12 THE WITNESS: No, they never said anything about

13 the washing--if they'd have told me that the guests used the

14 washer and dryer, I would have told them not to use it. The

15 only thing they did is they said that these people had left

16 the house unlocked, and when I asked them about it, they

17 said that they had guests there, themselves, and that they

18 had themselves left the house unlocked, and they found it

19 unlocked.

20 THE COURT: Okay. Thank you. You can step down.

21 Any other rebuttal, Mr. Bronston?

22 MR. BRONSTON: No, your Honor.

23 THE COURT: All right. Anything you'd like to

24 have anybody testify on what is called surrebuttal,

25 Mr. Gregoric?

1 never had an intention of moving into her residence with the  
2 idea of buying a place to live; I mean, that would be absurd,  
3 I would have just bought it there on the spot. We--

4 THE COURT: Was it for sale?

5 MR. GREGORIC: What? Her place?

6 THE COURT: Her place.

7 MR. GREGORIC: No, no, not her place. I mean, her--  
8 her allegation is that when I came to move there, that I was  
9 going to--I had the intention of eventually buying a place.

10 THE COURT: Oh, I see.

11 MR. GREGORIC: Leaving in the spring, and I claim  
12 that that is not my intention, I didn't know I was going to  
13 marry Julie.

14 We complained bitterly to her about, in the first  
15 instance with Jay, and I realize that was early on in the  
16 contract, and you know, that--well, I mean, it was, you know,  
17 it was a tough thing to deal with. Julie complained fairly  
18 bitterly about the guests and she was really P.O.ed about  
19 that, and so were the other two residents, Chris and Shaston.

20 We never, after that, made any verbal or written  
21 complaint to her, but we--our actions did not--I mean, they  
22 were not friendly towards her, and she knew that we were  
23 having trouble, and--I mean with her, and in fact, in the  
24 very end, I mean it was almost--she was sitting out in the  
25 back yard with us, and it was just coming--you could tell

## ADDENDUM "B"

# LEASE-RENTAL AGREEMENT AND DEPOSIT RECEIPT

RECEIVED FROM MAXIMILIAN GREGORIC

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

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

	RECEIVED	PAYABLE PRIOR TO OCCUPANCY
for 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>	\$
security deposit	\$ <u>200.00</u>	\$
Deposit	\$	\$
cleaning charge (WINDOWS AND WALLS)	\$ <u>100.00</u>	\$
PET DEPOSIT	\$ <u>100.00</u>	\$
AL	\$ <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. Tenant hereby offers to rent from the Owner the premises situated in the City of SALT LAKE County of SALT LAKE State of UTAH described as 2680 EAST FORT UNION BOULEVARD, consisting of HOUSE/DUPLEX

on the following TERMS and CONDITIONS:

TERM: The term hereof shall commence on October 1, 1986, and continue (check one of the two following alternatives) 60 days until September 30, 1987.

☒ on a month-to-month basis thereafter, until either party shall terminate the same by giving the other party \_\_\_\_\_ days written notice delivered by certified mail.

IT: 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. If such 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

MULTIPLE 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 which shall be paid by Owner.

USE: The premises shall be used as a residence with no more than 4 adults and NO children, and for no other use, 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.

PETS: 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 established 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. Tenant 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, or which may 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.

MAINTENANCE, REPAIRS OR ALTERATIONS: Tenant acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Owner may from time to time 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 in good condition 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 maintain the premises in a clean and sanitary manner including all equipment, appliances, furniture and furnishings therein and shall surrender the same, at termination of the lease, 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 any surrounding grounds, including lawns and shrubbery, 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.

ENTRY AND 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 to the premises, or in common areas thereof, and Tenant agrees to hold Owner harmless.

SEIZURE: If Owner is unable to deliver possession of the premises to Tenant, this agreement shall be void or voidable, but Tenant shall not be liable for any damage to the premises.

RENT: Rent shall be paid within \_\_\_\_\_ days.

DEFAULT: Any failure by Tenant to pay rent when due shall constitute a default.

LIEN: The premises are hereby subject to a lien in favor of the Owner in the event of a default by Tenant, and the Owner shall be entitled to the amount by which the rent is in arrears, including the cost of recovering the same, of the amount by which the rent is in arrears.

SECURITY: The security deposit shall be applied to the portions of said deposit to apply the Security Deposit.

REFUNDS: The security deposit shall be refunded to the Tenant upon termination of the lease.

TERMINATION: The lease shall be terminated upon the expiration of the term hereof.

ENTIRE AGREEMENT: This lease constitutes the entire agreement between the parties.

SIGNATURE: \_\_\_\_\_