

1998

Micheal V. Shields v. Maria Cristina Santana : Brief of Appellant

Utah Court of Appeals

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Maria Cristina Santana, P.C.; Appellant acting pro se.

David Mortensen; Attorney for Appellees.

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IN THE UTAH COURT OF APPEALS

MICHAEL V. SHIELDS,

Plaintiff/Appellee,

vs.

MARIA CRISTINA SANTANA,

Defendant/Appellant,

MARIA CRISTINA SANTANA,

Counterclaimant/Appellant,

vs.

MICHAEL V. SHIELDS, et al.,

Counterclaim Defendants/Appellees.

Case No. 981723-CA

Priority No.

APPELLANT'S OPENING BRIEF

This is an appeal from a final order entered November 2, 1998 by Judge Joseph C. Fratto of the Third District Court, Murray, Division, and a Judgment entered on August 24, 1997 by Judge Michael K. Burton of the Third District Court, Murray Division.

Maria Cristina Santana, P.C. (7300)
44 West Broadway, Suite 304
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Telephone 801) 363-5803
Appellant acting pro se

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Attorney for Appellees

of Appeals

1999

Darlene had been able to reach her by phone for several days, and since her car was in its usual place and had not been moved, they had become concerned for her health and safety. Kevin explained that he was just checking to see that she was all right. At no time did Kevin say he thought Santana was out of town.

13. Kevin and Darlene have no knowledge of this call as Pat Middleton did not tell them about any claim that Santana was feeling "stalked".
14. It is a further violation of Santana's lease agreement to change the top lock on her front door. At the time, Darlene and Kevin felt it was too minor a thing to pester Santana about because she was usually home to allow access to her apartment in case of an emergency. It is seriously doubtful that Santana lost a minute of sleep over the incident since after hearing Kevin's explanation she thanked Kevin for his concern.
15. Kevin Green was in Missouri during this transaction. Santana was present in the Green's apartment when Kevin's ex-wife Tina asked if she could send Darlene a fax. Darlene told Tina that she did not have a fax machine. Santana was aware of the personal nature of the fax and offered Darlene the use of her fax number. Santana had to provide Darlene with the fax number in order for the fax to be received at her apartment. Without that cooperation the fax could not have been received at Santana's apartment.
16. Santana reported to Darlene that she had not read the faxed letter once it was received as it was none of her concern. If Santana had read it as she claims she would know the letter makes no mention of the reason Kevin was in prison. Kevin and Darlene still have the fax which was received at Santana's apartment, dated April 2, 1997, which will show the extent to which Santana is willing to lie and slander others to cover her own actions.
17. The contents of the letter are a personal matter between Kevin and Darlene Green. 1) The method of delivery had never been of any consequence to them. 2) Santana lies when she claims the letter implies Kevin's guilt in ANY crime.
18. Santana did not live in fear of Kevin Green after the letter was faxed to her apartment. On more than one occasion following the arrival of the letter Santana invited Kevin into her apartment to do maintenance work and to attempt to justify her reasons for complaining about her neighbors. Kevin and Santana were alone in Santana's apartment each time, and each time Kevin left Santana's apartment, Santana thanked Kevin for his help.
19. Information given to Santana by her client Pat Middleton was on the one hand an effort by our daughter to hurt us because she mistakenly believes we had money to bail her out of the blackmail her attorney was putting to her, and on the other hand it was information kept confidential by Santana as Lawyer/Client privileged information. Neither Pat Middleton or Santana know the true details of any contact Darlene has had with public assistance agencies. Darlene was deemed to be 54% disabled by the court in California following a work related injury at K-Mart. The current personal injury suit stems from an automobile accident where Darlene was rear ended in Salt Lake City. Darlene never received a "large settlement" from the K-Mart injury, and Darlene is not expecting a "large

settlement" as a result of the ongoing personal injury suit. Darlene never offered to pay Pat Middleton's legal expenses for two reasons; 1) Darlene was never told there were going to be any legal fees, and 2) Darlene did not have, or expect to have any money to use for such a thing.

20. Santana is now disclosing this "confidential information" gained from her client Pat Middleton in order to justify her not paying her rent. Darlene has good days and bad days, and there are days when the work just has to be done. Santana fails to mention that Kevin does the vast majority of work Santana claims to have seen Darlene do once or twice.
21. Darlene and Kevin have had no interest in entering Santana's apartment without invitation or appointment. The June 19th notice was issued as a courtesy to all tenants. The inspections are part of the lease agreement and are necessary to prevent small problems from becoming large problems. Darlene and Kevin knew they could not enter Santana's apartment without her being there because it was no secret that Santana had changed the top lock on her front door.
22. At no time did Santana avoid Darlene or Kevin Green. We seriously doubt that Santana gave a second thought to our interest in her client files. During the month of June 1997, there was at least one court date for Pat Middleton's custody case and at least one meeting in our home to prepare for the court date.
23. Santana told Pat and Darlene that she needed the copies of the pleadings quickly because they had to be delivered by 5pm that day. Darlene and Pat rushed to get the copying done as Darlene had to have Pat home in Heber City also by 5pm. Upon returning with the copies they found Santana had left. Pat and Darlene could not wait for Santana to return and in an effort to secure the copies where Santana could get to them Darlene attempted to put them in Santana's apartment. Darlene had forgotten that Santana had changed the top lock, and once she realized she could not put the copies inside, Darlene had no choice but to leave them outside the door.
24. The paperwork Santana was asked to sign was the routine addendum's to the lease agreement which were missing from her file. Santana had signed these forms once, and while filing a maintenance form relating to a plugged toilet, it was discovered that the papers were missing. No threat of a law suit was ever mentioned. Santana was simply asked to sign the papers so her file would be complete. We apologized to her because we thought at the time that we had somehow lost the paperwork. No threat of eviction was ever mentioned.
25. When Santana returned the paperwork she made no mention of having any reservations about signing the papers. The papers were briefly checked to see that they had been signed, but no notice was made that she had put JUD next to her signature.
26. Michael Shields' identity was never kept a secret. In fact he had personally done work on the grounds and spoken with tenants. He has other business interests and asked not to be involved in the minor day to day events at Parkside. Mike's personal phone number was

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not given out because Mike did not have time to be receiving calls from tenants about leaky faucets and such. The letter Santana sent to Mike Shields contained no information as to the subject matter Santana wanted to discuss, so Mike ignored it.

27. After the court hearing Santana asked Darlene and Pat to come to her apartment. Santana's rent was already seven (7) days late without explanation and Darlene suspected Santana was going to now start asking Pat for money. Santana did exactly that and threatened to quit the custody case if Pat did not pay her. No mention was made during this meeting of any obligation Santana now claims Darlene had already made to her. Pat Middleton and Darlene both told Santana that they each had no money. Pat began to become frantic again and Darlene told her she would try and find a way to get some money to lend her. Darlene did not and has never claimed to Pat or Santana, or anyone else, that she has the ability to "take care of" someone's rent.
28. Darlene and Kevin Green were able to borrow money from a former son-in-law. The money was used by Darlene to take our daughter, Tina Robertson and her children back to their home in Texas, and \$300.00 was lent to Pat and her husband Dave Middleton. On July 16, 1997, Kevin informed Santana that he and Darlene would have \$300.00 to lend to Pat, and that this was all they could come up with. Kevin asked Santana when she would be able to come up with the remaining \$215.00 of her rent. Santana stated that she would not be able to raise the money for her rent. On July 18, 1997, Kevin cut out the middle man and deposited the \$300.00 in Santana's name. Kevin did it this way because it didn't make sense to drive to Heber City from Salt Lake, hand the \$300.00 to Pat and Dave Middleton, then give them a ride back to Salt Lake City so they could hand the money to Santana just to have her hand it back to Kevin. Kevin prepared a receipt for \$300.00 thinking Santana would need this to verify that Pat had paid her this amount. Kevin also filled out a "3 day Pay or Vacate" so Santana would know she was responsible for coming up with the remaining \$215.00 for her rent. Because Kevin believed they were all still on friendly terms at this time, he included a note with the receipt and 3 day notice suggesting that Santana ask for an advance from a client that Kevin knew Santana had just taken on.
29. Pat Middleton called and left a message telling Kevin she would be down the following day with \$215.00 for Santana's rent. Pat did not mention anything about evicting her attorney. We have the complete answering machine tape containing Pat Middleton's one and only message on this matter.
30. July 19, 20, 21 and 22, 1997, Kevin did not hear from either Pat or Santana. There was no mad rush to evict Santana and at this point the thought had not even come up. The 3 days had come and gone, and still we waited and made excuses to allow Santana time to come up with her rent. At no time on July 21, 1997, did Pat Middleton or Santana attempt to pay the \$215.00 owed on Santana's rent. On July 23, 1997, Kevin attended the child custody hearing in order to be supportive of his daughter during a trying time. The issue of Santana's rent did not come up until after the hearing was done. Pat and Kevin were one their way back to Parkside Apartments and Pat told Kevin that her husband Dave was getting paid that day and she hoped his check was not "messed up again" as they were planning to use Dave's check to pay Santana's remaining rent. Kevin even

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offered to drive to Heber City to pick the money up if need be. Neither Pat, Dave or Santana came by to pay the rent. Darlene and Kevin both attempted to call Pat on July 24, 25, 26 and 27, 1997, but Pat and Dave had their phone turned off. On July 28, 1997, Mike Shields asked Kevin if Santana had paid her rent. Kevin told Mike "No" and that he had not heard from Santana about the rent up to that point. The decision was then made to serve on Santana. That evening Pat called Kevin and explained that she had just received a check for \$215.00 from her Bishop made out to Santana. Kevin told Pat that it was too late, that Mike had decided that twenty-eight (28) days was more consideration than they could stand in light of the fact that other rent-paying tenants had moved out due to Santana's constant complaints.

31. On August 3, 1997, Santana left a letter in the maintenance mailbox addressed to Darlene. The letter can only be described as an attempt to slander and blackmail Darlene and Kevin into preventing the probable eviction proceedings against Santana. The information contained in the letter could have only been provided by Pat and Dave Middleton. When Dave came to Darlene and Kevin's door, Darlene handed Dave a copy of Santana's blackmail letter, told him to thank our daughter Pat and closed the door.
32. The eviction notice is just and proper.
33. N/A
34. Santana's knowledge of, or suspected knowledge of Kevin and Darlene's personal business is of no consequence in the decision to evict Santana.
35. Eviction proceedings were begun long before there was any knowledge of Pat providing information confidentially to her attorney about her mother, and before Santana began using this information to attempt to blackmail Kevin, Darlene and Mike Shields into stopping the eviction proceedings.
36. Santana's residency status at Parkside Apartments had nothing to do with Pat Middleton's child custody case. These are two separate and unrelated issues. The timing of Pat's court appearances and the filing to evict Santana was never considered as relevant to one another.
37. Darlene and Kevin had in fact attempted to prevent Santana's eviction by borrowing \$300.00 to lend to Pat Middleton for her to pay her attorney. That was all we could do and we did it for our daughter.
38. At no time did Darlene claim to Santana or to Pat Middleton that she had paid Santana's rent.
39. Santana was given more than an ample opportunity to pay her rent. The responsibility was hers alone and she failed to abide by her lease agreement.
40. Darlene and Kevin Green's conduct in this matter was more than fair. Santana was given a "3 day Pay or Vacate" on July 3, 1997, then again on July 18, 1997, warning Santana

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that her obligation to her lease agreement was her responsibility. An additional ten (10) days passed with no effort on Santana's part to pay her rent. Ten (10) more days passed before eviction proceedings began. Santana's rent was due July 1, 1997, and she received thirty-eight (38) days of warning to either pay her rent or prepare to move. This is not "outrageous conduct".

41. N/A

42. Santana did not pay her rent and had caused other rent-paying tenants to move out. This is the only cause for eviction.

43. Rent was not tendered by Pat Middleton on behalf of Santana. Pat had no money until receiving a check from her Bishop on July 28, 1997, a full ten (10) days after the last "3 day Pay or Vacate". Kevin Green did not refuse to accept money intended for Santana's rent until July 28, 1997.

44. There is no illegal Public Housing scheme at Parkside Apartments.

45. The remaining \$215.00 of Santana's rent was not offered until the evening of July 28, 1997. This was ten (10) after the last "3 day Pay or Vacate" was given to Santana.

46. There were no efforts on anyone's part to evict Santana without just cause.

47. Santana is the person in these proceedings who has acted intentionally, maliciously, in wanton and reckless disregard for the rights of Kevin and Darlene Green, as evidenced by the two (2) slanderous blackmail letters she wrote; one to Darlene and one to Mike Shields.

48. The only economic loss, mental anguish and emotional distress suffered by Santana to this point was caused by Santana entering into a conspiracy with Pat Middleton to defraud Kevin and Darlene Green and Mike Shields. This is evidenced by the illegal "Fee Agreement" signed by Pat Middleton and dated February 17, 1997.

49. N/A

50. Darlene Green did not verbally or otherwise agree to pay any portion of Santana's rent. Darlene told her daughter Pat Middleton that she would help Pat when and where she could. Darlene honored that promise many times by making long distance phone calls, paying for copies of legal briefs, delivering said briefs to the appropriate locations all over Salt Lake City, and by driving Pat to and from Heber City time and again for court appearances and meetings with her attorney Santana.

51. Neither Darlene or Kevin Green ever paid Santana \$150.00 in cash as Santana claims. On two separate occasions Pat and Dave Middleton requested a loan of \$150.00 from Kevin and Darlene Green. Pat and Dave told us these loans were to help them make their car payment and to help them with their other bills. At no time did either Pat or Dave Middleton mention that they had to pay Santana for legal fees. Darlene and Kevin Green

were told from the beginning that Santana was working on Pat's custody case "pro bono" The \$300.00 in July again was a loan to Pat and Dave Middleton, and was applied to Santana's rent because we knew at this time Santana had forced Pat and Dave to agree to pay her rent or she would quit the custody case.

- 52. Mike Shields had no knowledge of Darlene and Kevin Green lending any money to their daughter.
- 53. Santana signed a lease agreement that makes her responsible for paying her rent. The only other person who has agreed to pay Santana's rent is Pat Middleton.
- 54. N/A
- 55. Darlene did not verbally or otherwise agree to pay Santana's rent
- 56. Darlene did not verbally or otherwise agree to pay Santana's rent.
- 57. There was no direct or implied agreement for Darlene to pay Santana's rent so Santana was not damaged by Darlene.
- 58. N/A
- 59. Kevin Green attempted to enter Santana's apartment only after knocking and ringing the doorbell several times; and getting no response had a reasonable belief that Santana may have been in distress and unable to answer the door or telephone. Darlene Green attempted to secure important legal briefs in Santana's apartment and was unable to do so. The maintenance man, Leroy Copeland, forgot he could not use the pass key to enter apartment #36, but attempted to do so during apartment inspections. Leroy did go back and complete the inspection once Santana returned home and explained to Santana that he had unlocked the bottom lock that day
- 60. On April 21, 1997, Kevin Green did not enter Santana's apartment at all.
- 61. At no time did Kevin or Darlene Green intrude on Santana's privacy. Contact with Santana in her apartment was always by phone or by knocking at her door.
- 62. See #46
- 63. See #47
- 64. See #48
- 65. N/A
- 66. All contact with Santana was attempted during daylight hours at a reasonable time to expect she would be available for contact. Again, Santana volunteered her fax number to Darlene fully understanding the nature of the fax prior to it being sent.

67. The fact that Kevin Green had been in prison was never hidden from any tenant at Parkside Apartments. The fact that Kevin Green was found "Factually Innocent of all charges and allegations" was also not hidden. During the custody case for Pat Middleton, Kevin provided Santana with copies of the findings of "factual innocence". Santana has no question of Kevin's innocence. Santana is lying when she claims that the letter faxed to her apartment even mentioned the reason Kevin was in prison, let alone casts doubt on his innocence. We have the letter faxed to Santana, dated April 2, 1997.
68. The "foregoing acts" did not occur.
69. See #46
70. See #47
71. See #48
72. N/A
73. Not relevant to Santana's eviction and in fact not true.
74. Not relevant to Santana's eviction and in fact not true.
75. Managers are hired so owners can conduct their business without having to deal with petty every day problems. Santana had several other avenues to lodge complaints, if she ever had any, which she never used. She could have contacted the Housing Association or the B.B.B. if she really believed there was a problem the owner was accountable for.
76. No dishonest dealing with or violations of Counterclaim Plaintiff's rights ever occurred.
77. See #48
78. N/A
79. Eviction proceedings were undertaken because Santana did not pay her rent even after receiving a twenty-eight (28) days grace period, and because Santana had caused rent-paying tenants to move out.
80. At no time has any of these proceedings been intended to disrupt Santana's law practice or had anything to do with Santana's relationship with Pat Middleton.
81. Santana was notified that it is a violation of her lease agreement to run a business of any kind from her apartment. Santana had informed Darlene that she had moved her practice to a proper office and was not conducting business from her apartment any longer.
82. See #46
83. See #47

84. See #48

85. N/A

86. Kevin Green never "entered" Santana's apartment as she slept. Kevin unlocked the bottom lock after ringing the doorbell and knocking several times with no response. Kevin feared for Santana's safety and attempted to gain entry only to find out if Santana was all right.

87. There was never an unreasonable risk in allowing a proven innocent man to have an emergency pass key to apartments.

88. Santana never lodged a complaint of any kind claiming she was even a little worried about Kevin's presence. Santana's personal knowledge of the fact of Kevin's innocence makes these present claims unbelievable and slanderous.

89. See #46

90. See #47

91. See #48

DATED this 21 day of August, 1997.


Kevin L. Green


Darlene Green

SUBSCRIBED AND SWARN TO before me this 21 day of August, 1997.




NOTARY PUBLIC

LINDA I JONES
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXP. FEB. 1, 2000

Owner's Name: Michael V. Shields
Address: 2588 S. 900 E. #21 SLC, UT 84107
Telephone: 466-8996

COMPLAINT FOR
EVICTIION

CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT
5022 S. State Street, Murray, UT 84107

Michael V. Shields
Plaintiff (OWNER),

vs.

Maria Santana
Defendant (RENTER)

COMPLAINT FOR
EVICTIION
(Unlawful Detainer;
Default in Rent)

Case No. 970005271

THE OWNER states the following complaint against the RENTER:

1. The Plaintiff is the Owner of the premises at 2588 S. 900 E. #36 SLC, UT 84106. The premises were rented to the Renter under the lease or rental agreement. The Renter agreed to pay rent in the sum of \$ 515 Per month, beginning on the date of August 1, 1996. A security deposit of \$ 500 was also paid to the Owner. A copy of the Rental Agreement is attached as Exhibit "A".

2. The Renter has failed to pay rent in the amount of \$ 215 For the period of July 1 Through July 31.

3. A "3-day Notice to Pay Rent or Vacate" was served on the Renter on the date of July 18, 1997. A copy of that notice is attached as Exhibit "B".

4. The Renter did not vacate the premises after being served with the Notice, and is still in possession of the premises. Under these circumstances, the Owner has the right to recover possession of the premises through court action with court costs, treble damages, and attorney's fees, if applicable.

Therefore, the Owner asks the court to give judgement against the Renter as follows:

1. Ordering the Renter to move-out, and allowing the Owner to retake possession of the premises;
2. If necessary, ordering the Sherrif to forcibly evict the Renter, and turn over the

possession to the **Owner** (Order of Restitution);

3. Finding the amount of past-due rent due to the **Owner**, together with treble damages, court costs, and attorney's fees, if applicable.

Dated this 28th Day of July, 19 97.

X Michael V. Shultz
OWNER

Exhibits: A - Rental Agreement
B - 3-Day Notice

Refunded: 1,000.00
Balance: 0.00

TRUST DETAIL

Trust Description: Bail/Bond Refund
Recipient: MICHAEL SHIELDS
Amount Due: 1,000.00
Paid In: 1,000.00
Paid Out: 1,000.00

TRUST DETAIL

Trust Description: Other Trust
Recipient: MARIA SANTANA
Amount Due: 5.00
Paid In: 5.00
Paid Out: 5.00

TRUST DETAIL

Trust Description: Other Trust
Recipient: JOHN MANGUM
Amount Due: 168.80
Paid In: 168.80
Paid Out: 168.80

CASE NOTE

PROCEEDINGS

07-30-97 Filed: Complaint
07-30-97 Judge FRATTO assigned.
07-30-97 Fee Account created Total Due: 37.00 convert
07-30-97 COMPLAINT OK-2K Payment Received: 37.00 convert
07-30-97 Began tracking Return Date Review on 01/27/98 kimm
07-30-97 THREE DAY SUMMONS SIGNED-JUDGE MK BURTON. ellens
08-01-97 GAVE THREE DAY SUMMONS TO CONSTABLE "MAC" TO SERVE. ellens
08-05-97 FILED: OWNER'S MOTION TO SET AMOUNT FOR BOND. ellens
08-06-97 SIGNED ORDER SETTING BOND \$1000 - JCF vonamae
08-06-97 ISSUED: ALIAS 3 DAY SUMMONS gailj
08-11-97 FILED: DEF'S ANSWER AND VERIFIED COUNTERCLAIM; AFF. OF IMPECUN-ellens
08-11-97 IOSITY; NOTICE OF RECORDS DEPOSITION; AND THREE SUBPOENAS DUCES ellens
08-11-97 TECUM. ellens
08-13-97 Bail Account created Total Due: 1000.00 convert
08-13-97 Bail Posted Payment Received: 1,000.00 kimm
Note: OWNERS BOND
08-13-97 BAVE OWNER'S BOND TO CONSTABLE SINDT TO SERVE. ellens
08-19-97 FILED: ALIAS SUMMONS ON RETURN - SERVED 8-6-97 vonamae
08-19-97 FILED: OWNER'S BOND AND NOTICE TO RENTER ON RETURN - SERVED vonamae
08-19-97 8-15-97 vonamae

Maria Cristina Santana (7300)
Attorney and Acting Pro Se
PO Box 520493
Salt Lake City, Utah 84152
(801) 484-1449/ 485-5500

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

MICHAEL V. SHIELDS,

Plaintiff (Owner)

vs.

MARIA [CRISTINA] SANTANA,

Defendant (Renter)

MARIA CRISTINA SANTANA,

Defendant/Counterclaim Plaintiff,

vs.

MICHAEL V. SHIELDS,
DARLENE GREEN, KEVIN GREEN,
individuals; JUANITA INVESTMENT,
a limited partnership, and PARKSIDE
APARTMENTS, a division of
Juanita Investments.

Counterclaim Defendants.

DEFENDANT'S ANSWER
AND VERIFIED
COUNTERCLAIM

Case No. 970005271

Judge: Michael Burton

Pursuant to the Utah Rules of Civil Procedure, Defendant Maria Cristina Santana, acting in pro se, in answering the complaint of Plaintiff Michael V. Shields, admits, denies, avers and alleges as follows:

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ANSWER

1. In response to the allegations contained in paragraph 1 of the Plaintiff's complaint, the Defendant admits that she rented the premises at 2588 S. 900 E. #36, SLC, UT 84106 under a rental agreement. Defendant further admits that she agreed to pay rent beginning in August 1, 1996 and that a security deposit of \$500 was paid. Defendant denies that she agreed to pay rent for the months of February, March, April, May, June, or July 1997, along with subsequent months/pursuant to an agreement between Plaintiff's Agent and Apartment Manager, Darlene Green, who contracted under a fee agreement to pay or cancel rent in consideration of Defendant's legal representation of her daughter whom Defendant had never met at the time of the agreement.

2. In response to the allegations contained in paragraph 2 of the Plaintiff's complaint, the Defendant denies that she failed to pay \$215 in rent for July 1997; and asserts that Manager Darlene Green represented to Defendant and her own daughter, Patricia Middleton, whom Defendant represents in a separate action, that she had "taken care" of the rent on July 7, 1997 as per the contract mentioned above. Defendant further alleges that Darlene Green subsequently left town and had her husband Kevin Green inform them that she had only partially performed under the contract by paying \$300 of the rent on July 18, 1997. Patricia Middleton subsequently attempted to remedy her mother's breach by tendering payment of \$215 on July 21, 1997 and again July 23, 1997 to Kevin Green, but he refused to accept the money and told her "Mike" wanted to evict Defendant instead.

3. In response to the allegations contained in paragraph 3 of the Plaintiff's complaint, the Defendant denies that a 3 day Notice to Pay Rent or Vacate was properly served in that Kevin Green did not mail the notice as he certified, and that Kevin Green who was acting as manager is a party to the eviction and therefore served the notice in violation of U.C.A. 78-36-3 through 78-36-6.

4. In response to the allegations contained in paragraph 4 of the plaintiff's complaint, the Defendant admits she has not vacated the premises but denies every other allegation contained therein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of illegality in that plaintiff's agents, Darlene Green, the manager who signed the rental agreement, and Kevin Green, who served the 3 Day Notice, receive public housing vouchers which Plaintiff redeems and then pays monetary compensation to the Greens to act as managers in violation of U.C.A. 76-8-1201. This court should not reward Plaintiff's Public Assistance Fraud by enforcing or rendering the benefits of any pleading, right or contract connected to his relationship and fraudulent schemes with Darlene and Kevin Green.

Second Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' retaliation against Defendant for her knowledge and/or potential access to information concerning their fraudulent and criminal activities in connection with Public Assistance Fraud in violation of U.C.A. 76-8-1201.

Third Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' retaliation against Patricia Middleton, Darlene Green's daughter, by evicting her attorney, the Defendant, for telling the attorney about her mother's public assistance fraud during the course of their attorney-client relationship.

Fourth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' retaliation against Defendant because Darlene and Kevin Green were unable to search her apartment for evidence of this knowledge after Defendant changed

the lock on her door when she caught Kevin Green entering the apartment with a pass key one morning as she slept and he believed her to be out of town.

Fifth Affirmative Defense

Plaintiff's claims are barred by the doctrines of waiver, estoppel and laches in that he intentionally refuses to allow tenants to know his name or where he can be contacted which effectively prevented Defendant access to him and caused her to detrimentally rely solely on the representations of Darlene and Kevin Green.

Sixth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' fraudulent misrepresentations and material omissions to this Court which include but are not limited to the Plaintiff's representation that his address is 2588 South 900 East #21 which is, in fact, the address of managers Darlene and Kevin Green and not the residence of Plaintiff who actually resides at 4514 South Parkview Salt Lake City, Utah 84124. Upon information and belief, these misrepresentations are made to Welfare and Public Housing in order to conceal that Darlene and Kevin Green's utilities and telephone are in the name of Michael Shields and Parkside Apartments. This Court should not reward Plaintiff's brazen transfer of those misrepresentations unto this Court and should not award the relief sought.

Seventh Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' breach of contract and bad faith and breach of implied covenant of good faith and fair dealing.

Eighth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' acts, including fraudulent misrepresentations and material omissions, that constitute constructive fraud.

Ninth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff accepting payment of \$300 from his agent Darlene Green for Defendant's rent, in partial performance of the contract for legal services, and thereby ratifying the contract between his agent and Defendant. Plaintiff and his agents are indebted to Defendant under the fee agreement in excess of \$3,000 and she is entitled to an offset against the rent

Tenth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' negligent misrepresentations.

Eleventh Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of the fact Plaintiff's acted arbitrarily and capriciously in not accepting tender of rent three days after the 3 day Notice to Pay Rent or Vacate Plaintiff's claims are released, void or unenforceable as a result of plaintiff's failure to cooperate in Defendant's performance.

Twelfth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' abuse of power and violation of Defendant's rights in that Darlene and Kevin Green attempted and did, in fact, enter Defendant's apartment numerous times without Defendant's prior knowledge or permission

Thirteenth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' negligence and bad faith in employing Kevin Green, knowing he served 17 years in prison for rape and attempted murder, and giving him a pass key to Defendant's apartment; in providing no information on who tenants could contact when they had problems with the Greens; and in intentionally shielding himself from all responsibilities while accepting all the benefits of the rental leases.

Fourteenth Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of his agent, Darlene Green's, abuse of power in attempting to coerce Defendant to accept her breach of the fee agreement and continue representing her daughter without payment of legal fees or be evicted

Fifteen Affirmative Defense

Plaintiff's claims are released, void or unenforceable as a result of Plaintiff's and Plaintiff's agents' breach of implied covenant of quiet enjoyment and implied covenant of habitability

COUNTERCLAIM

JURISDICTION AND VENUE

1 The Counterclaim Plaintiff, Maria Santana, is an individual who is and was at all relevant times material to this counterclaim a resident of the State of Utah, residing in Salt Lake County

2 The Counterclaim Defendants, Michael V Shields, Darlene Green, Kevin Green, Juanita Investment and Parkside Apartments are indispensable parties to this action and are properly brought in pursuant to Rule 13 (a) & (g) of the Utah Rules of Civil Procedure

3 The Counterclaim Defendants, Michael V Shields, Darlene Green, and Kevin Green are individuals who are and were at all relevant times material to this counterclaim residents of the State of Utah, residing in Salt Lake County

4 The Counterclaim Defendants, Juanita Investment, is a Limited Partnership registered with the Division of Corporations in Salt Lake City, and Parkside Apartments is a division of Juanita Investment, whose principal places of business are and were in Salt Lake City at all relevant times material to this counterclaim

5 Venue is properly laid in the Third Judicial District Court in and for Salt Lake County, State of Utah, in accordance with Utah Code Ann Sec 78-13-14 (1953 as amended)

General Allegations

1. On July 12, 1996, Maria Santana (hereafter "Tenant Santana") moved into Parkside Apartments and entered a six month rental lease with manager Darlene Green (hereafter "Manager Green"). Five days later, Darlene Green delivered a release of liability agreement to Plaintiff which she refused to sign because she had already moved in and would not have rented the apartment had she known that signing away her rights was required. (See Exhibit A.)

2. Tenant Santana asked Manager Green several times during the tenancy for information about the actual owner because there was no reference to who he might be in any of the forms provided by Parkside Apartments. Manager Green told Tenant Santana that his name was "Mike" and that he did not want anything to do with tenants so she could not share his address or telephone number. Manager Green told Tenant Santana that she made all the decisions, could do anything she wanted at Parkside Apartments, was in charge of every aspect of managing the building and "Mike" would sell the property if she ever left.

3. Manager Darlene Green and her husband Kevin Green live at Parkside Apartments in the same complex as Tenant Santana. They live at the address which Owner Michael V. Shields claims in his eviction complaint is his address: 2588 South 900 East, # 21, SLC, UT. Tenant Santana has never met Michael V. Shields. He does not live there.

4. In January 1997, Manager Green asked Tenant Santana, who is an attorney, if she were willing to represent her daughter, whom Tenant Santana had never met, in a domestic civil action. Manager Green said her daughter had contacted lawyers and found none who would take her case without a large retainer up front. She told Tenant Santana that her daughter was in a desperate situation and that if she took her daughter's case without a retainer, she would "take care of the rent" during the course of the representation. She said she could do anything she wanted at Parkside Apartments.

5. In early February 1997, Tenant Santana, Manager Green and her daughter, Patricia Middleton met to discuss representation. They entered a fee agreement which included Manager Green's guarantee that Tenant Santana's \$515 rent would be "taken care of" during the representation and a standard hourly rate paid on a flexible schedule over a period of time. Manager Green said she would perform her part of the agreement but could not put it in writing because she was involved in a personal injury lawsuit. Tenant Santana drafted a fee agreement reflecting the terms of the agreement and Patricia Middleton signed and acknowledged that she had entered the agreement and witnessed her mother had entered the same agreement but could not sign because of her personal injury lawsuit." (See Exhibit B.)

6. Because the meeting between Manager Green, Patricia Middleton and Tenant Santana took place a few days after Tenant Santana had already paid rent for February, Manager Green gave Tenant Santana \$150 in cash toward her daughter's out of pocket costs in lieu of cancelling the rent already paid.

7. During February, March, April, May, June, July and August 1997, Tenant Santana represented Manager Green's daughter in six court hearings and approximately 150 billable hours. Those billable hours do not include time wasted when Manager Green knocked on Tenant Santana's door and called almost daily to discuss her daughter's case and offer advice and testimony.

8. Manager Green continued to disturb Tenant Santana's work despite repeated requests that she not knock because if she was home she was probably on the telephone with clients and lawyers and did not want them to hear the doorbell or knocking. Manager Green continued seeking her and knocking unabated even after Tenant Santana placed a note on the door. (See Exhibit C.)

9. Manager Green did not "take care of" the rent for February, March, April, May, June, July or August 1997, claiming each month that she was waiting for a check from California and a check from her personal injury suit that had not arrived and which

1. If the **RENTER** *does nothing* for three (3) days after he has been served with the Notice of Bond, the **OWNER** has the right under the law to have the sheriff forcibly move the **RENTER** and his property out of the premises. Therefore, if the **RENTER** does not intend to contest the action, he should consider vacating the premises voluntarily within the 3-day period.

2. If the eviction action is based only on non-payment of rent, the **RENTER** may *pay the back rent in full* to the **OWNER** within the three (3) days, along with any late fees and court costs, and this will reinstate the rental agreement. This means the **RENTER** may stay in the premises on the same arrangement as before the eviction lawsuit was filed. However, if the eviction is based on some other violation of the rental agreement, such as doing damage to the premises, then this remedy will not apply.

3. If the **RENTER** wants to keep possession of the premises, and does not agree with the **OWNER'S** complaint that he, the **RENTER**, violated the rental agreement, he can *keep possession by filing a counterbond* within three (3) days from the date he received the Notice. The procedure for filing this bond is to first fill out the form called "**RENTER'S MOTION TO SET AMOUNT FOR COUNTERBOND**," and submit it to the clerk. The clerk can tell you where to get forms. The judge will set an amount for the bond. He will base it on his estimate of the **OWNER'S** costs of suit and damages for being deprived of possession, in the event the **OWNER** wins the case. Any prepaid rent will be considered as a portion of the total amount of the counterbond.

After learning the amount, the **RENTER** may then file a counterbond with the clerk of the court, in one of the following ways:

Corporate Bond
Cash Bond

Property Bond
Certified Funds, Payable to Clerk

When this is done, the **RENTER** may keep possession of the premises until the trial. At that time the final decision will be made by the judge as to whether the **RENTER** must vacate.

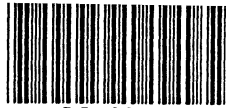
4. The **RENTER** may file a form *demanding a hearing* to be held during the 3-day period which began when he was served with the Notice to Renter. This may be done instead of posting a counterbond.

At the hearing the judge will decide who should have possession of the premises. If the judge decides in the **OWNER'S** favor, the sheriff will promptly be sent to evict the **RENTER**. If the judge decides to leave the **RENTER** in possession, but further questions remain to be decided in a later trial, he may require the **RENTER** to post a counterbond.

The 3-day period does not count Saturday or Sunday, or a legal holiday, or the day of service. For example, if the **RENTER** is served on Friday, March 6, he will have until 5:00 p.m. on Wednesday, March 11, to take action. (Civil Rule 6, U.R.C.P.)

The procedures described above are set out in Utah Code Annotated 78-36-8.5. If you have questions about how they apply to your case, you should consult an attorney.

The clerk or judge can explain court procedures, but cannot give legal advice.



D91696

AUG 14 1997

JUL 10 1997

Owner's Name: Michael V. Shields
 Address: 2588 S. 900 E. #21 SLC, UT 84106
 Telephone: 466-8996

OWNER'S BOND
NOTICE TO RENTER

CIRCUIT COURT, STATE OF UTAH
 SALT LAKE COUNTY, MURRAY DEPARTMENT
 5022 S. STATE STREET, MURRAY, UT 84107

Michael V. Shields
 Plaintiff (OWNER),

vs.

Maria Santana
 Defendant (RENTER)

OWNER'S BOND

NOTICE TO RENTER

Case No.
 970005271

FILED
 AUG 21 AM 7
 1997

This bond, or the corporate bond attached, represents security posted with the court to protect the RENTER for his damages, in the case the OWNER takes possession of the premises at this address: 2588 S. 900 E. #36 SLC, UT 84106 (Storerooms are included).

STATE OF UTAH

)

) ss.

County of Salt Lake

)

PROPERTY BOND

We, the undersigned, are residents of SALT LAKE County, State of Utah, and we each own real property in that county. We jointly and severally undertake the obligation of this bond in the sum of \$1000.00 Dollars, and we shall pay all costs and damages which may be awarded to the RENTER, not exceeding the sum undertaken. We state that each of us has a net worth (above debts and real property) more than the sum undertaken.

Date

Signature of Surety

Signature of Surety

Date

Signature of OWNER

Subscribed and sworn before me on this date: _____

Signature of Court Notary Public

DATE 8-15-97 TIME 1625
2588 S. 900 E. #136
 UPON Person
 SINDT CONSTABLE S.L. COUNTY, UTAH
 NEDDITY

CASH BOND

The OWNER has (check one) ___ Paid cash to, or ☒ Has certified funds payable to the clerk of this court in the sum of \$ 1000.00, to be held while this suit is pending, and to be used to pay any court costs and damages which may be awarded to the RENTER.

Dated this _____ Day of AUG 13 1997, 1997.



Clerk or Deputy Clerk


THIRD DISTRICT COURT
MURRAY

NOTICE TO RENTER

The OWNER has filed with the court a bond (copy is above or attached) which will permit him to take possession of the premises you are now occupying.

At this point you as RENTER have certain rights, or alternative courses of action, any of which must be accomplished within three (3) days from service of this notice, which may be summarized as follows:

1. Vacate the premises;
2. Pay the back rent, costs, and stay;
3. File a Counterbond;
4. Demand a hearing.

These alternatives are explained more fully on the attached page. You may also wish to consult an attorney to advise you.

Dated this 12th day of August, 1997.



PLAINTIFF (OWNER)

Apartment Association of Utah

NOTICE

To: Maria C. Santana
 Tenant in Possession
258 S 900 E #36
 Address
Salt Lake City
 City State Zip

You will please take notice that as of the 31st day of August, 1997, the end of the current rental period, your right to occupy the premises at the above address, which premises you now occupy as tenant of the undersigned, will be terminated and you are hereby required to vacate said premises on or before said date and deliver possession thereof to the undersigned or his duly-authorized agent.

In the event of your failure to vacate said premises within the period herein specified, you will be unlawfully detaining possession of said premises and in accordance with the provisions of Section 78-36-10, U.C.A. 1953, you will be liable for treble damages for such unlawful detainer and action will be commenced against you to evict you from said premises and to take judgment against you for any rent accrued and for damages of three times the rent for the period you were unlawfully detaining possession of said premises, the damage assessed by the court for unlawful detainer, together with court costs and attorney's fees.

Dated this 12th day of August, 1997

William Shields
 Owner or Managing Agent's Signature
258 S 900 E #36
 Address
Salt Lake City
 City State Zip

Municipal ordinances provide:

It shall be unlawful for any person upon vacating or removing from dwellings, store rooms, or any other building, to fail to remove all garbage, rubbish, and ashes from such building and premises and also the ground appertaining thereto, or to fail to place same in a thoroughly sanitary condition 24 hours after said premises shall be vacated.

RETURN OF SERVICE

I certify that service of this notice was completed in accordance with the provisions of Section 78-36-3 and Section 78-36-6, Utah Code Annotated, 1953, on (date) _____ at (place) _____ by _____

- ☐ delivering a copy to the tenant personally, OR
☐ sending a copy through certified or registered mail, addressed to the tenant at his place of residence, OR
☐ leaving a copy with _____ a person of suitable age and discretion at the tenant's residence or place of business, and by mailing a second copy to the tenant at said residence, or place of business. OR
☐ affixing a copy in a conspicuous place on the rented premises, after failing to find anyone there.

Signature of Server _____
 Subscribed and sworn to before me on this _____ day of _____ 19____
 residing at _____

Notary Public _____
 My commission expires _____

1277

IN THE THIRD DISTRICT COURT, DEPARTMENT II

STATE OF UTAH, MURRAY DEPARTMENT

-oOo-

MICHAEL V. SHIELDS,

Plaintiff,

-vs-

MARIA (CRISTINA) SANTANA,

Defendant.

Civil No. 970005271

Judge Michael Burton

TRANSCRIPT OF RULING
ON MOTION

-oOo-

Date:

August 25, 1997

A P P E A R A N C E S

For the Plaintiff:

JOHN K. MANGUM

Nielsen & Senior

60 East South Temple, Suite 1100

Salt Lake City, Utah 84111

Telephone: (801) 532-1900

For the Defendant:

JOSEPH F. ORIFICI

Attorney at Law

3269 South Main, Suite 270

Salt Lake City, Utah 84115

Telephone: (801) 485-5500

CERTIFIED COPY

INDEPENDENT REPORTING
& VIDEOGRAPHY

170 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2333



One Source Court Reporting

P R O C E E D I N G S

1
2 THE COURT: I think my initial reaction is: We are a
3 liberal, I guess, notice pleading state but there is this
4 issue of notice that ought to be followed.

5 MR. MANGUM: We understand.

6 THE COURT: And I think on the issue of this
7 restraining order and the quashing of the subpoenas,
8 Mr. Orifici makes a point, and I think I can't ignore it, that
9 they're not properly before me right now.

10 I think it is fair at this juncture, if the informa-
11 tion has not been divulged by these institutions, to grant an
12 order staying the implementation of the subpoenas until at
13 least September 20. And I just pick that day, it gives every-
14 body a chance to come in and talk about it if they want. So I
15 will order that, an order staying.

16 But on the issue of the ultimate quashing of the
17 subpoena or the restraining against Ms. Santana for acts that
18 some people think she may or may not have committed or will
19 commit, I don't think it's before me at this juncture. So
20 that's my ruling on that one. You can have an order that
21 allows you until September 20 but after that, if nothing's
22 been done, no resolution reached, they'll go ahead.

23 All right. To me then--I've answered some questions
24 and the question it really comes down to is: Does Ms. Santana
25 get to stay in the place or leave? The issues of damages

1 clearly, either on the counterclaim or on any claim by the
2 plaintiff here, ought to be reserved until a later date. But
3 I am going to order at this juncture that a writ of
4 restitution be issued on behalf of the plaintiff. And the
5 reason I do this is as follows.

6 Number one, I have no evidence that any rent beyond
7 the \$300 was ever tendered and so there's clearly no failure
8 to accept that tender of rent. So I find as a matter of fact
9 that she was \$215 behind in her July rent. I've already found
10 that she was properly served a three-day notice to pay or
11 quit. It's clear that she continues to possess the property
12 and she is in unlawful detainer and the plaintiff has supplied
13 the bond. She ought to be--and on that issue of possession,
14 it ought to go to the plaintiff.

15 I don't know if I need to be more specific, but on
16 this issue of habitability it's clear to me that no evidence
17 has been presented to me along the lines of what Utah
18 recognizes as a covenant of habitability that anything has
19 ever been done as regards Ms. Santana and her occupancy there
20 to say that these folks violated the covenant of habitability.

21 And I don't know if there are other issues that I
22 need to answer, but I'd like to do that if there are any that
23 you think, Mr. Mangum, ought to be answered today.

24 So it's just a simple answer. The plaintiff can have
25 the property back, a writ of restitution can issue, that all

1 damages are reserved on each side and no other orders are
2 going to issue except this stay on the quashing of the
3 subpoena.

4 MR. MANGUM: Understood, Your Honor. I do have a--

5 THE COURT: Do you have any other issues that--

6 MR. MANGUM: --form of order for writ of rest--

7 THE COURT: Do you have any other issues that you
8 think I need to answer?

9 MR. MANGUM: Not at this point.

10 THE COURT: Mr. Orifici, is there something I missed
11 on your end--

12 MR. ORIFICI: No, Your Honor.

13 THE COURT: --that I need to answer right now? All
14 right. So, you've got something to sign?

15 MR. MANGUM: An order of restitution of the premises.

16 THE COURT: If I may get a look at it.

17 MR. MANGUM: If I could just verify, Your Honor. I
18 did have to make an interlineation on Point 1. I had the
19 wrong unit number specified there. And does your copy read
20 Unit 36 or Unit 21?

21 THE COURT: It does not.

22 MR. MANGUM: It should say 36, not Unit 21.

23 THE COURT: Okay.

24 MR. MANGUM: That's my mistake and I apologize.

25 THE COURT: All right. Well, do you plan to serve

1 her today?

2 MR. SHIELDS: Please.

3 MR. MANGUM: We would like her to be served here in
4 open court.

5 THE COURT: Okay. So, I mean, this issue of when I'm
6 going to order her out, she has three days from today.

7 MR. SHIELDS: Thank you.

8 THE COURT: So I guess we should make it conform.
9 Restore possession thereafter to the plaintiff on the--let's
10 see. Well, Ms. Santana, they're going to serve you today on
11 this order of restitution.

12 MS. SANTANA: That's fine. I accept.

13 THE COURT: And we're at 5:30 and today's the 25th,
14 so--let's see, you get 26, 27 and 28, so by the 29th day of
15 August at 5:30 p.m. That, by my calculation, is three days
16 from today, not counting today's date as the date of service--
17 it being the day of service.

18 And then, Ms. Santana, you folks have the right to
19 appeal, obviously, and the right to contest the order if it's
20 done within three days of the order and, of course, the right
21 to appeal pursuant to the statute.

22 MR. MANGUM: Your Honor, a point of clarification.
23 Three business days, if we understand it, from today, being
24 the 25th, would be the 28th. Have we miscounted?

25 THE COURT: Well, I've got it the 26th, 27th and

1 28th, three to leave. Oh, yeah, okay. The 28th.

2 MR. MANGUM: Thank you.

3 THE COURT: All right. So it's the 28th. All right.

4 Do you have a copy of this for them?

5 MR. MANGUM: I do. And if I could get that
6 conformed.

7 THE COURT: Anything else, Mr. Orifici? Any
8 questions you might have?

9 MR. ORIFICI: None that I can think of, Your Honor.
10 The only thing I would like to do is just request a tape
11 transcript.

12 THE COURT: Carolyn, how is that done? Now on the
13 transcript, we give you the tape and then you--we make a copy
14 of the tape and then you just work out the transcription part.

15 (Discussion about obtaining tape.)

16 MR. ORIFICI: We appreciate your time and considera-
17 tion, Your Honor.

18 THE COURT: No problem. Thank you both.

19 MR. MANGUM: Thank you, Your Honor, for your
20 attention to this matter.

21 THE COURT: Everything else is reserved for and at a
22 later date.

23 (This ends the requested portion of this hearing.)

24 * * *

25 * * *

C E R T I F I C A T E

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

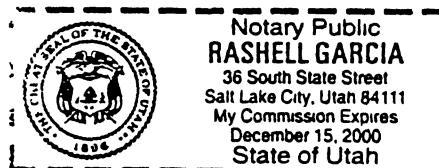
I, Rashell Garcia, a Certified Shorthand Reporter and
Notary Public within and for the County of Salt Lake, State of
Utah, do hereby certify:

That the foregoing tape-recorded proceedings were trans-
cribed into typewriting under my direction and supervision and
that the foregoing pages contain a true and correct transcrip-
tion of said proceedings to the best of my ability to do so.

IN WITNESS WHEREOF, I have hereunto subscribed by name and
affixed my seal this 19th day of January 1998.



RASHELL GARCIA, C.S.R.
License No. 144



08-27-97 FILED: MOTION FOR PROTECTIVE ORDER vona
08-27-97 FILED: ORDER OF RESTITUTION W/NOTICE OF ACCEPTANCE OF SERVICE vona
08-27-97 FROM JOSEPH F ORIFICE vona
08-27-97 FILED: AFFOF MICHAEL V SHIELDS vona
08-27-97 FILED: AFF OF VAN HALE vona
08-27-97 FILED: MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER vona
08-27-97 FILED; AFF IN SUPPORT OF MOTION FOR NEW TRIAL MOTION FOR 10 DAY vona
08-27-97 STAY OF WRIT AND OBJECTION TO QUASHING SUBPOENA DUCES vona
08-27-97 FILED: DEFT MOTIO FOR NEW TRIAL vona
08-27-97 NOTE: PER CONVERSATION WITH MR MCDONALD, MR MANGUM AND JUDGE mary
08-27-97 BURTON, ENDORSE CHECK FOR \$168.80 OVER TO MR MANGUM mary
09-02-97 FILED: PLA'S MOTION TO DISM. COUNTERCLAIMS W/O NOTICE, AND MEMO elle
09-02-97 OF POINTS AND AUTHORITIES SUPPORTING MOTION TO DISM. COUNTER- elle
09-02-97 CLAIMS. elle
09-02-97 FILED: DEF'S MOTION FOR ATTYS. FEES AND OBJECTION TO MOTION FOR elle
09-02-97 PROTECTIVE ORDER AND QUASHING OF SUBPOENA DUCES TECUM W/O NOTICE elle
09-02-97 AND MEMO IN SUPPORT OF MOTION FOR ATTYS. FEES AND OBJECTION TO elle
09-02-97 MOTION FOR PROTECTIVE ORDER AND QUASHING OF SUBPOENA DUCES TECUM elle
09-02-97 FILED: PLA'S MOTION TO RELEASE BOND. elle
09-03-97 Ended tracking of Partial Payments lind
09-05-97 ISS: WRIT RESTITUTION vona
09-05-97 PLEASE SEND BOND TO MICHAEL SHIELDS, P.O. BOX 17543, SLC, UT gail
09-05-97 84117 gail
09-05-97 FILED: PLA'S OBJECTION TO FORM OF DEF'S PROPOSED ORDER STAYING elle
09-05-97 WRIT OF RESTITUTION FOR TEN DAYS. elle
09-08-97 ENTERED: ORDER STAYING WRIT OF RESTIT. SIGNED JUDGE MK BURTON. elle
09-08-97 ENTERED: ORDER RELEASING BOND (TO PLA) SIGNED JUDGE MK BURTON. elle
09-09-97 Began tracking Partial Payments Review on 09/10/97 elle
09-09-97 FILED: PLA'S MEMO OPPOSING DEF SANTANA'S MOTION FOR NEW TRIAL. elle
09-09-97 FILED: PLA'S MEMO OPPOSING MO. OF DEF FOR ATTY. FEES AND elle
09-09-97 RESPONDING TO DEF'S OBJECTION TO PLA'S MO. FOR PROTECTIVE ORDER elle
09-09-97 AND QUASHING OF SUBPOENA DUCES TECUM. elle
09-10-97 Bail Refunded Payment Received: 1,000.00 lind
Note: Refund of bail
09-10-97 Trust Account created Total Due: 1000.00 lind
09-10-97 Ended tracking of Partial Payments lind
09-19-97 FILED: STIPULATION FOR ORDER CONTINUING STAY OF SUBPOENAS DUCES elle
09-19-97 TECUM AND RECORDS DEPOSITION. elle
09-19-97 ENTERED: ORDER CONTINUING STAY OF SUBPOENA DUCES TECUM AND elle
09-19-97 RECORDS DEPOSITION SIGNED JUDGE MK BURTON. elle
09-19-97 *** PER JUDGE MK BURTON: CASE TO BE SET FOR MOTIONS HEARING. ** elle
09-23-97 HEARING scheduled on October 24, 1997 at 01:30 PM in Room 103
with Judge BURTON. elle
10-24-97 FILED: DEF'S REQUEST FOR CONT. elle
10-24-97 MKB/LJV (TAPE 97 579/CT 450) PLAINTIFF PRESENT WITHOUT lind
10-24-97 COUNSEL. DEFT NOT PRESENT. COURT ORDERED CASE CONTINUED. lind
10-27-97 Fee Account created Total Due: 0.00 conve
10-27-97 MISCELLANEOUS FEE Payment Received: 5.00 holly
Note: TAPE

John K. Mangum, USB No. 2072
NIELSEN & SENIOR, P.C.
 60 East South Temple, Suite 1100
 Salt Lake City, Utah 84111
 Telephone: (801) 532-1900
 Facsimile: (801) 532-1913

**Attorneys for Plaintiff and Counterclaim Defendants Michael V. Shields,
Juanita Investment and Parkside Apartments**

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

MICHAEL V. SHIELDS,

Plaintiff (Owner),

VS.

MARIA SANTANA,

Defendant (Renter).

MARIA CRISTINA SANTANA,

Defendant/Counterclaim Plaintiff,

VS.

MICHAEL V. SHIELDS, DARLENE GREEN, KEVIN GREEN, individuals, JUANITA INVESTMENT, a limited partnership and PARKSIDE APARTMENTS, a division of Juanita Investments,

Counterclaim Defendants.

JUDGMENT FOR PLAINTIFF AGAINST DEFENDANT

Civil No. 970005271

Judge Michael Burton

At the end of a hearing held August 25, 1997, where Plaintiff and Defendant were each represented by legal counsel, the Court entered an Order of Restitution in favor of Plaintiff requiring Defendant Santana to remove herself from the subject premises no later than 5:30 p.m. on August 28, 1997. No determination was then made concerning whether Plaintiff was entitled to damages or as to the amount thereof. Subsequently, that Order of Restitution was stayed temporarily but was otherwise affirmed by Order entered September 8, 1997.

Upon proper notice, a follow-up hearing was held October 31, 1997, at which Plaintiff and Counterclaim Defendants Michael V. Shields, Juanita Investments and Parkside Apartments were represented by John K. Mangum of Nielsen & Senior, and Defendant represented herself *pro se*, to address all motions then pending and to determine if Plaintiff was then entitled to damages and, if so, the amount thereof. Having reviewed all of the memoranda and other submissions made, having heard and considered the arguments of the parties, for good cause shown,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED AS FOLLOWS:

1. The Counterclaims previously asserted by Defendant Santana, insofar as they are asserted against Michael V. Shields, Juanita Investments and Parkside Apartments, are hereby dismissed, with prejudice, for failure to state a claim upon which relief can be granted.

2. **IT IS FURTHER ORDERED** that the motions of Defendant Santana dated August 27, 1997 for new trial and for attorney fees are hereby denied.

3. **IT IS FURTHER ORDERED** that the following identified subpoenas are hereby quashed and declared void and unenforceable:

a. That certain Subpoena Duces Tecum issued in this action by Defendant and Counterclaim Plaintiff Maria Christina Santana, dated August 10, 1997, originally made returnable

on August 29, 1997, and directed to and served on August 11, 1997 upon First Security Bank, 1095 East 2100 South, Salt Lake City, Utah 84106;

b. That certain Subpoena Duces Tecum issued in this action by Defendant and Counterclaim Plaintiff Maria Christina Santana, dated August 10, 1997, originally made returnable on August 29, 1997, and directed to and served on August 11, 1997 upon US Bank and/or West One Bank, 2243 East 2100 South, Salt Lake City, Utah 84109;

c. That certain Subpoena Duces Tecum issued in this action by Defendant and Counterclaim Plaintiff Maria Christina Santana, dated August 10, 1997, originally made returnable on August 29, 1997, and directed to and served on August 11, 1997 upon Key Bank, 3135 South 1300 East, Salt Lake City, Utah 84106.

4. Having resolved all issues between Defendant Santana and Plaintiff Shields in favor of Plaintiff Shields, and finding no reason for delay in entering judgment in Plaintiff's favor, it is expressly directed, pursuant to Rule 54(b), Utah Rules of Civil Procedure, that

JUDGMENT IS HEREBY RENDERED IN FAVOR OF PLAINTIFF MICHAEL SHIELDS AGAINST DEFENDANT SANTANA, for each of the following sums:

<u>Amount</u>	<u>Description</u>
\$51.48	Unpaid rent at the rate of \$17.16 per day for July 19, 20 and 21, 1997.
\$1,956.24	Treble damages for unlawful detainer for 38 days beginning July 22, 1997 through August 28, 1997, at \$51.48/day.
\$294.52	For unpaid portion of what should have been treble damage amount for the 9 day period, at \$51.48/day, from August 29, 1997 through September 6, 1997, less

credit for \$168.80 accepted by Court for
amount tendered late on August 27, 1997.

\$84.00

Court costs of Plaintiff to date of judgment.

\$ _____.

For attorney fees and other costs of
Plaintiff's legal counsel in obtaining
judgment.

\$ _____.

Prejudgment interest at statutory rate of
10% per annum on the amounts above for
unpaid rent and treble damages from the
last date of each such period through date
of judgment.

\$ _____.

TOTAL of Sums above

plus

Post-judgment interest at the statutory rate
of 7.45% per annum on the judgment stated
above until paid.

DATED this _____ day of October, 1997.

BY THE COURT:

Honorable Michael Burton
District Court Judge

John K. Mangum, USB No. 2072
NIELSEN & SENIOR, P.C.
 60 East South Temple, Suite 1100
 Salt Lake City, Utah 84111
 Telephone: (801) 532-1900
 Facsimile: (801) 532-1913

Attorneys for Plaintiff/Counterclaim Defendant Michael V. Shields

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

MICHAEL V. SHIELDS,

Plaintiff (Owner),

VS.

MARIA SANTANA,

Defendant (Renter).

**AFFIDAVIT ON ATTORNEY
FEES FROM JOHN K. MANGUM**

Civil No. 970005271

MARIA SANTANA,

Defendant/Counterclaim Plaintiff,

VS.

Judge Michael Burton

MICHAEL V. SHIELDS, DARLENE GREEN, KEVIN GREEN, individuals, JUANITA INVESTMENT, a limited partnership and PARKSIDE APARTMENTS, a division of Juanita Investments,

Counterclaim Defendants.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, JOHN K. MANGUM, first being duly sworn upon oath, depose and state as follows:

1. I am an attorney admitted to the Utah State Bar in 1980 and have been continuously licensed to practice law in this state since then. I have been a shareholder at the law firm of Nielsen & Senior since 1985. Much of my practice focuses on complex civil litigation, including significant experience in real property matters and complex landlord tenant issues. My normal billing rate is \$140.00 per hour, which rate is normal and reasonable in this community for an attorney of my experience and time practicing law.

2. With assistance from an associate and a paralegal, after I was brought into this case by another senior shareholder at Nielsen & Senior who has previously provided legal counsel to Plaintiff Shields on mostly non-litigated matters, I have provided representation in this action to Plaintiff Michael V. Shields and to Counterclaim Defendants Michael V. Shields, Juanita Investments, and Parkside Apartments.

3. This unlawful detainer action has been unusually complex due to the number and nature of affirmative defenses and counterclaims asserted by Defendant Maria Cristina Santana, which are set forth in an Answer and Counterclaim running 24 pages. Defendant Santana has also been involved as a party defendant in a significant number of court proceedings in this county, including an action brought by a prior landlord against her, which has required additional time to review and investigate as part of the preparation of a reasonable response to the affirmative defenses and counterclaims asserted.

4. Mr. Neil Sabin, my partner who handled the initial intake work on this case as a result of his prior work for Plaintiff Shields, has been admitted to the Utah State Bar since 1970 and his normal billing rate is \$160.00 per hour, which is reasonable in this community for a person of his experience.

5. My associate at Nielsen & Senior, Scott Ellsworth, has devoted time to legal research and preparing an argument and memo supporting Plaintiff's application for a protective order on quashing the subpoena duces tecum issued by Defendant Santana and in other tasks to help me prepare for hearings in this action. Mr. Ellsworth has been admitted as a licensed member of the Utah State Bar since October, 1996, and his time is billed at the normal and customary rate of \$75.00 per hour, which is reasonable for a person of his experience.


6. In addition, a long-time paralegal at Nielsen & Senior, Mr. Rodney K. Dean, has invested time in checking court files, other documents, obtaining documents from Defendant Santana's Chapter 7 bankruptcy filing in late January, 1997, and in delivering an affidavit for signature by Mr. Van Hale. Mr. Dean's time is billed at the normal and customary rate of \$60.00 per hour, which is appropriate and reasonable for a person of his experience of more than 20 years as a paralegal.

7. Excluding time after September 20, 1997, to consult with clients, prepare the papers submitted herewith, and to finish preparation for and travel to and attend the scheduled hearing set for October 31, 1997, and any time which may be necessary thereafter, the law firm of Nielsen & Senior has billed \$9,492.75 in attorney fees on this case, and \$321.07 in costs incurred, all itemized in the attached invoices, which are true and correct copies of those sent to Plaintiff. Also, an


additional \$4.80 for photocopies made on September 19, 1997, but not picked up by the firm accounting system until September 22, 1997, and \$174.00 for Westlaw research charges incurred in late August 1997 but not billed to Nielsen & Senior until early October, are also being billed to Plaintiff Shields. Thus, the total through September 20, 1997 is \$9,992.62 for fees and costs on this case by Nielsen & Senior. Given the complexities of this matter, these changes are reasonable for the work done, which has all been occasioned by the Answer and Counterclaim of Defendant Santana, as this firm was not hired until after Plaintiff Shields had been served with that Answer and Counterclaim.

8. Prior to coming to Nielsen & Senior, Mr. Shields also incurred and paid a fee of \$165.00 for legal consultation with an attorney at another firm whose advice Plaintiff Shields sought after receiving Defendant Santana's Answer and Counterclaim herein, as is evidenced by the receipt attached hereto.

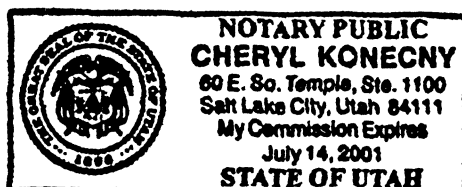
DATED this 28th day of October, 1997.


John K. Mangum

SUBSCRIBED AND SWORN to before me this 28th day of October, 1997.


NOTARY PUBLIC
Residing at: Davis County Utah

My Commission Expires:



27-97	HEARING scheduled on October 31, 1997 at 11:00 AM in Room 103 with Judge BURTON.		ellens
28-97	MISCELLANEOUS FEE	Payment Reversal: -5.00	tamrav
	Note: ENTERED AS CASH WAS A CHECK		
28-97	Fee Account created	Total Due: 0.00	convert
28-97	MISCELLANEOUS FEE	Payment Received: 5.00	tamrav
	Note: TAPE		
29-97	FILED: SUBPOENA DUCES TECUM .		ellens
29-97	FILED: NOTICE TO SUBMIT FOR ARGUMENT AND DECISION AND NOTICE OF		ellens
29-97	HEARING ON ALL PENDING MOTIONS, AND AFF. ON ATTY. FEES FROM		ellens
29-97	JOHN K. MANGUM.		ellens
30-97	ISSUED SUBPOENA DUCES TECUM TIMES 3		kimm
31-97	FILED: DEF'S MOTION TO DISM. PLA'S COMPLAINT W/O NOTICE; AND		ellens
31-97	MEMO IN SUPPORT OF DEF'S MOTION TO DISM. PLA'S COMPLAINT.		ellens
31-97	MKB/LJV (TAPE 97 592/CT 1510) PLAINTIFF PRESENT WITH		lindav
31-97	JOHN K. MANGUM, COUNSEL. MARIA C.SANTANA REPRESENTING HERSELF.		lindav
31-97	COURT TAKES THE OPPORTUNITY TO APOLOGIZE TO MICHAEL V. SHIELDS		lindav
31-97	CONCERNING HEARING THAT WAS SET ON OCT. 24, 1997 AND CONTINUED		lindav
31-97	BEFORE COURT THAT DAY. BECAUSE MR. SHIELDS WAS PRESENT AND		lindav
31-97	MADE STATEMENTS TO COURT, CASE IS TAINTED. (1660) MR. MANGUM		lindav
31-97	OPPOSITION TO CHANGING JUDGES AND ANOTHER CONTINUANCE.		lindav
31-97	(1710) COURT CLARIFIES. THERE WAS NO HEARING ON FRIDAY, CASE		lindav
31-97	HAD BEEN PREVIOUSLY CONTINUED. (1900) DEFT OBJECTION TO NEW		lindav
31-97	MOTIONS FILED BY DEFT. THEY SHOULD HAVE BEEN FILED 6 WEEKS		lindav
31-97	AGO. (1950) MR. SHIELDS STATEMENT. HE WILL FORGET ATTORNEY		lindav
31-97	FEES IF ISSUE OF RENT CAN BE SOLVED TODAY. (2020) DEFT		lindav
31-97	OBJECTS AND REQUESTS JUDGE RECUSE HIMSELF. (2190) MR. MANGUM		lindav
31-97	RESPONSE TO OBJECTION. (2280) COURT RECUSES HIMSELF. THERE		lindav
31-97	IS NO BASIS FOR A NEW TRIAL AS TO WHETHER DEFT SHOULD HAVE		lindav
31-97	BEEN OUT OF APARTMENT. MOTION FOR NEW TRIAL DENIED. (2440)		lindav
31-97	COURT ORDERS NO NEED FOR WRITEN ORDER. COURT ORDERED CASE		lindav
31-97	ASSIGNED TO JUDGE FRATTO.		lindav
31-97	COURT TO NOTIFY PARTIES OF NEW COURT DATE.		lindav
2-97	FILED: PLA MEMORANDUM OF POINTS AND AUTHORITIES OPPOSING MOTION		vonamae
2-97	OF DEFT SANTANA TO DISMISS PLAINTIFF'S COMPLAINT		vonamae
7-97	FILED: PLA SHIELDS COPY OF TRIAL NOTICE RETURNED FROM 2588 SO		vonamae
7-97	--		vonamae
10-97	ISSUED TWO SUBPOENA'S TO MICHAEL SHIELDS, AND LINDA BAINES		kimm
10-97	HOUSING ATHORATY OF SALT LAKE		kimm
10-97	FILED: MOTION FOR CONTINUANCE		vonamae
10-97	FILED: AFF OF DEFT MARIA C SANTANA IN SUPPORT OF CONTINUANCE		vonamae
10-97	FILED: DEEFT'S RESPONSE TO PLAINTIFF'S MEMORANDUM OPPOSING		vonamae
10-97	DEFENDANTS MOTION TO DISMISS		vonamae
10-97	FILED: AFFIDAVIT OF WITNESS TODD KASTELER		vonamae
18-97	MAILED: NOTICE OF HEARINGS AND SCHEDULING ORDER		vonamae
18-97	1-5-98 @ 1:30 P.M. HEARING ON PLAINTIFF MOTION TO QUASH SUBPOENA		vonamae
18-97	1-12-09 DEADLINE FOR DISCOVERY CUTOFF		vonamae
18-97	1-20-98 ALL MOTIONS TO BE FILED BY THIS DATE		vonamae
18-97	1-22-98 @ 8:30 A.M. HARING ON ALL PENDING MOTIONS		vonamae

damages which may result to the defendant if the suit has been improperly instituted. The bond shall be payable to the clerk of the court for the benefit of the defendant for all costs and damages actually adjudged against the plaintiff. The plaintiff shall notify the defendant that he has filed a possession bond. This notice shall be served in the same manner as service of summons and shall inform the defendant of all of the alternative remedies and procedures under Subsection (2).

(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fee, and other costs, including attorney's fees, as provided in the rental agreement.

(b) The defendant may remain in possession if he executes and files a counter bond in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action. The form of the bond is at the defendant's option. The bond shall be payable to the clerk of the court. The defendant shall file the bond prior to the expiration of three days from the date he is served with notice of the filing of plaintiff's possession bond. The court shall approve the bond in an amount that is the probable amount of costs of suit and actual damages that may result to the plaintiff if the defendant has improperly withheld possession. The court shall consider prepaid rent to the owner as a portion of the defendant's total bond.

(c) The defendant, upon demand, shall be granted a hearing to be held prior to the expiration of three days from the date the defendant is served with notice of the filing of plaintiff's possession bond.

(3) If the defendant does not elect and comply with a remedy under Subsection (2) within the required time, the plaintiff, upon ex parte motion, shall be granted an order of restitution. The constable of the precinct or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff promptly.

(4) If the defendant demands a hearing under Subsection (2)(c), and if the court rules after the hearing that the plaintiff is entitled to possession of the property, the constable or sheriff shall promptly return possession of the property to the plaintiff. If at the hearing the court allows the defendant to remain in possession and further issues remain to be adjudicated between the parties, the court shall require the defendant to post a bond as required in Subsection (2)(b). If at the hearing the court rules that all issues between the parties can be adjudicated without further court proceedings, the court shall, upon adjudicating those issues, enter judgment on the merits.

1987

78-36-9. Proof required of plaintiff — Defense.

On the trial of any proceeding for any forcible entry or forcible detainer the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, had been in the quiet possession thereof for the space of one whole year continuously next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

1953

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78-36-10.5. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;

(d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and

(e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

1994

78-36-10.5. Order of restitution — Service — Enforcement — Disposition of personal property — Hearing.

(1) Each order of restitution shall:

(a) direct the defendant to vacate the premises, remove his personal property, and restore possession of the premises to the plaintiff, or be forcibly removed by a sheriff or constable; and

(b) advise the defendant of the time limit set by the court for the defendant to vacate the premises, which shall be three business days following service of the order, unless the court determines that a longer or shorter period is appropriate under the circumstances.

(2) (a) A copy of the order of restitution and a form for the defendant to request a hearing as listed on the form shall be served in accordance with Section 78-36-6 by a person authorized to serve process pursuant to Section 78-27-58. If personal service is impossible or impracticable, service may be made by:

(i) mailing a copy of the order and the form to the defendant's last-known address and posting a copy of the order and the form at a conspicuous place on the premises; or

(ii) mailing a copy of the order and the form to the commercial tenant defendant's last-known place of business and posting a copy of the order and the form at a conspicuous place on the business premises.

(b) A request for hearing by the defendant may not stay enforcement of the restitution order unless:

(i) the defendant furnishes a corporate bond, cash bond, certified funds, or a property bond to the clerk of the court in an amount approved by the court according to the formula set forth in Subsection 78-36-8.5(2)(b); and

(ii) the court orders that the restitution order be stayed.

John K. Mangum, USB No. 2072
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913

Attorneys for Plaintiff/Counterclaim Defendant Michael V. Shields

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

MICHAEL V. SHIELDS,)	
)	
Plaintiff (Owner),)	
)	
vs.)	ORDER OF RESTITUTION OF PREMISES
)	
MARIA SANTANA,)	Civil No. 970005271
)	
Defendant (Renter).)	
)	
)	
MARIA SANTANA,)	Judge Michael Burton
)	
Defendant/Counterclaim Plaintiff,)	
)	
vs.)	
)	
MICHAEL V. SHIELDS, DARLENE)	
GREEN, KEVIN GREEN, individuals,)	
JUANITA INVESTMENT, a limited)	
partnership and PARKSIDE)	
APARTMENTS, a division of Juanita)	
Investments,)	
)	
Counterclaim Defendants.)	

Pursuant to a hearing held on Monday, August 25, 1997 at 2:30 p.m., before the Honorable Michael Burton, pursuant to proper notice and request of Defendant Maria Cristina Santana for such hearing under section 78-36-8.5(2)(c) of the Utah Code, Plaintiff having previously posted a possession bond and Defendant Santana having failed to post any counter bond and having failed to pay accrued and unpaid rent, late fees, and filing costs and attorneys fees, at which hearing Plaintiff Michael V. Shields appeared in person and through his attorney John K. Mangum of Nielsen & Senior, and the Counterclaim Defendants having also appeared in person, and having determined, that it is appropriate to enter this Order of Restitution, now, therefore,

IT IS HEREBY ORDERED as follows:

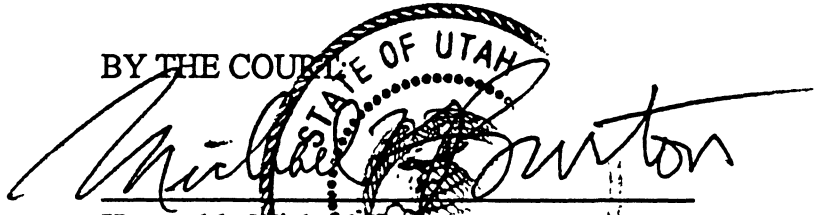
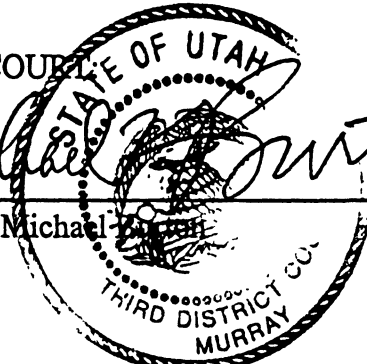
1. Defendant Maria Cristina Santana is directed to vacate the premises she has been occupying at Unit ~~24~~ ^{# 36 MAB} of the Parkside Apartments, 2588 South 900 East Salt Lake City, Utah, to remove only her personal property from said premises, and to promptly restore possession of those premises to Plaintiff Michael V. Shields within the time frame set forth below, or be forcibly removed by a Sheriff or a Constable;

2. Defendant Maria Cristina Santana is hereby advised that the deadline for her to vacate the described premises, remove her personal property therefrom, and restore possession thereof to Plaintiff, is the 28 ^{MAB} day of August, 1997, by no later than the hour of 5:30 p.m., or in the event that Defendant Santana is served this Order other than at the hearing described above, not later than 9:00 p.m. three (3) business days following service of this Order; and

3. Only in the event that Defendant Santana was not present at the hearing described above at which she had opportunity to address the terms of this Order, Defendant Maria Cristina Santana is advised of her right to contest the terms of this Order of Restitution or the manner of its

enforcement if proper request for the same is made before the time set forth above for Defendant Maria Cristina Santana to take the action there specified. A form for requesting such a hearing accompanies this Order in the event that Defendant has not already had the opportunity to address these matters at the hearing held August 25, 1997.

DATED this 25 day of August, 1997.

BY THE COURT OF UTAH

Honorable Michael J. Smith


FILED
98 NOV -2 PM 5:01
FEDERAL DISTRICT COURT
MURRAY DEPT.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

Civil No. 970005271

Judge Joseph C. Fratto, Jr.

Counterclaim Defendants.

Pursuant to a hearing held on Monday, September 21, 1998 at 10:30 a.m., before the Honorable Joseph Fratto, on proper advance notice, concerning Plaintiff's motion for summary judgment, Plaintiff having previously been awarded an Order of Restitution of the subject premises earlier leased to Defendant Santana, and for good cause shown, the Court then finding no merit sufficient to withstand judgment for Plaintiff based on any of the affirmative defenses or the one remaining counterclaim of Defendant Santana against Plaintiff Shields, and

Pursuant to a further hearing held on Monday, November 2, 1998 at 10:00 a.m., before the Honorable Joseph Fratto, on proper advance notice, concerning Defendant's objections to Plaintiff's proposed form of judgment previously served, after briefing from both Plaintiff and Defendant and review of the Affidavit of Michael V. Shields addressing damages, including court costs, which fulfills the requirements of the provisions of Rule 54(d) of the Utah Rules of Civil Procedure, and the Affidavits of John K. Mangum on Attorneys Fees, at which hearing the issue of the proper amount of attorney fees and other damage items sought to be awarded to Plaintiff was adequately presented and argued, and for good cause shown, finding no merit sufficient to reduce the claims of Plaintiff for attorney fees and other elements of damages to any amount less than that shown below, now, therefor,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

1. All counterclaims of Defendant Santana against Plaintiff Shields and against third-party Defendants Juanita Investment and Parkside Apartments are hereby dismissed, with prejudice.
2. Plaintiff Michael V. Shields is hereby granted summary judgment on his claim of unpaid rent and unlawful detainer against Defendant Maria Cristina Santana for her occupancy of

the premises located at Unit 36, Parkside Apartments, 2588 South 900 East Salt Lake City, Utah, from the 18th day of July, 1997, through the 6th day of September, 1997.

3. Plaintiff is awarded judgment for unpaid rent in the sum of \$ 48.87 for the period from the 18th day of July, 1997, through the 21st day of July, 1997.

4. Plaintiff is awarded further damages for 47 days of unlawful detainer by Defendant Santana after the 21st day of July, 1997 through September 6, 1997, at the rate of \$16.6129 per day of unlawful detainer (based on a reasonable rental value of \$515.00 per month for time the premises were occupied by Defendant Santana and withheld from the market during this period of unlawful detainer, divided by the 31 days per month in each of July and August of 1997), which unlawful detainer amounts are all to be trebled pursuant to the provisions of Section 78-36-10(3) of the Utah Code, less credits of \$168.80 and \$400.00 for amounts previously paid, leaving net trebled damages in the sum of \$1,773.62, not including the prior unpaid rent of \$48.87 specified above.

5. Plaintiff is further awarded judgment against Defendant Maria Cristina Santana for \$ 74.00 in filing fees and other costs of Court.

6. Plaintiff is awarded prejudgment interest at the statutory rate of 10% per annum as specified in section 15-1-1(2) of the Utah Code for the period from July 22, 1997, through the date of entry of this judgment, on only the unpaid rent of \$ 48.87. Said prejudgment interest at the rate of \$ 0.01339 per day for the 469 days through November 2, 1998 is \$ 6.28 , plus \$ 0.01339 for each day thereafter until judgement is entered.

7. Plaintiff, as the prevailing party both in prosecuting the claims of the Complaint and in defending against the affirmative defenses and counterclaims and other discovery and procedural filings of Defendant Santana in this action, is further awarded judgment against Defendant Maria

Cristina Santana for attorneys fees and costs incurred by Plaintiff to his attorneys at Nielsen & Senior for legal work actually performed by Nielsen & Senior through November 2, 1998 in the sum of \$ 31,465.29, which work was reasonably necessary to adequately prosecute this action to judgment and was billed at rates consistent with rates customarily charged in this community for similar services, all of which fees and costs are authorized pursuant to the provisions of section 10 of the Uniform Residential Rental Agreement promulgated and approved by the Apartment Association of Utah which was signed and otherwise accepted and agreed to by Defendant Santana, and pursuant to section 78-36-10(3) of the Utah Code.

8. Judgment in favor of Plaintiff for the total sum of \$ 33,368.06 through November 2, 1998, plus any later-accruing ~~Plaintiff's~~ judgment interest, shall all bear interest from and after the date that this judgment is entered at the rate of 7.468 % per annum as provided under the provisions of section 15-1-4 of the Utah Code, until all such sums are fully paid.

9. As required under the provisions of Rule 4-504 of the Utah Code of Judicial Administration, the social security number of Judgment Debtor Maria Cristina Santana, previously also known as Maria Cristina Martinez, is 266-59-1141 and her current or last known residential address is 44 West Broadway, Suite 304, Salt Lake City, Utah 84101.

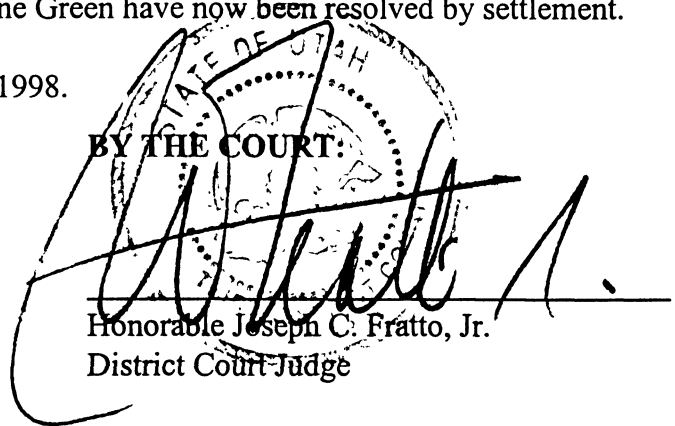
10. And it is further ordered that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by Affidavit.

11. This judgment, now final between these parties named herein, shall be entered and may be enforced immediately and execution thereon shall be issued immediately after entry of this Judgment, pursuant to the provisions of section 78-36-10(4) of the Utah Code, and of Rule 54(b) of

the Utah Rules of Civil Procedure, as all claims and counterclaims between Plaintiff Shields and Defendant Santana, including the "counterclaims" of Defendant Santana against third-party Defendants Juanita Investment and Parkside Apartments, have now been fully resolved, there being no just reason for delay in entering this judgment, as all remaining "counterclaims" of Defendant Santana against third-parties Kevin and Darlene Green have now been resolved by settlement.

DATED this 2nd day of November, 1998.

BY THE COURT:



Honorable Joseph C. Fratto, Jr.
District Court Judge

Maria Cristina Santana (7300)
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106
(801) 363-5803/ 485-5500

FILED
SEP 28 11 24
MURRAY DEPT.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

MICHAEL V. SHIELDS,	:	
	:	DEFENDANT'S OBJECTION
Plaintiff,	:	TO PLAINTIFF'S PROPOSED
vs.	:	JUDGMENT ON ACTION FOR
MARIA [CRISTINA] SANTANA,	:	UNPAID RENT, UNLAWFUL
Defendant.	:	DETAINER AND AFFIDAVITS
MARIA CRISTINA SANTANA,	:	OF JOHN MANGUM AND
	:	MICHAEL SHIELDS
Defendant/Counterclaim Plaintiff,	:	
vs.	:	Civil No. 97-000-5271
	:	Judge: Joseph Fratto
MICHAEL V. SHIELDS,	:	
DARLENE GREEN, KEVIN GREEN,	:	
individuals; JUANITA INVESTMENT	:	
a limited partnership, and PARKSIDE	:	
APARTMENTS, a division of	:	
Juanita Investments.	:	
Counterclaim Defendants.	:	

Maria Cristina Santana objects to Plaintiff's Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and the Supporting Affidavits of John Mangum and Michael Shields, on the following grounds:

MATERIAL FACTS

1. Defendant Santana moved into Parkside Apartments and began paying rent on July 12, 1996. Seven weeks later on September 7, 1996, Darlene Green presented Defendant with the lease agreement. (Exhibit A)

2. Darlene Green signed on behalf of the "owner," and Defendant signed on behalf of herself. (Exhibit A) Plaintiff Shields had no personal involvement in the

signing of the lease and did not meet or speak to Defendant until one year later when the eviction controversy occurred.

3. In July 1997, Defendant's rent was late, and Kevin Green served her a 3 Day Notice to Pay Rent or Quit. On July 28, 1997, Kevin Green represented to Pat Middleton and Defendant that Plaintiff "Mike" was unwillingly to accept rent because it was "too late" and "had decided 28 days was more consideration than they could stand." (Exhibit B, paragraphs 30, 43, 45)

4. On July 28, 1997, Plaintiff filed a Complaint for Eviction as a pro se litigant. (Exhibit C) On September 5, 1997, Plaintiff filed a Motion to Set Amount of Bond as a pro se litigant. (Exhibit D)

5. On August 8, 1997, Defendant served her Answer and Counterclaim upon Plaintiff and Kevin and Darlene Green. The counterclaim does not request enforcement of any term of the lease agreement. (Exhibit E)

6. On August 11, 1997, Defendant met Plaintiff Michael Shields for the first time when he approached her outside her apartment and waived the counterclaims at her. Plaintiff gave Defendant an ultimatum of paying the rent, dismissing her counterclaim and moving in exchange for not being evicted by the court. Defendant declined the threat. (See Defendant's Affidavit in Support of Objection to Judgment.)

7. On August 12, 1997, Plaintiff, acting pro se, executed and served upon Defendant two contradictory documents: (1) A Notice of Bond including a "Notice of Tenant's Rights" containing notice that Defendant had the right to chose to pay the rent and have the complaint dismissed and be reinstated in the lease. (Exhibit F); and (2) A Notice of Non-Renewal stating that Defendant's lease would not be renewed. (Exhibit G)

8. On August 24, 1997, a hearing on the eviction was held, and John Mangum made an appearance as counsel for Plaintiff who had acted pro se. No appearance of counsel had been filed prior to counsel's appearance in person at the hearing.

9. Judge Burton found Plaintiff was in unlawful detainer because rent had not been paid, but declined to reach any issues as to damages. (Exhibit H)

10. On August 27, 1997, Judge Burton allowed Defendant to remain in the apartment until September 7, 1997 by paying rent for those additional days in the amount of \$168.80. Defendant paid the amount. (Exhibit I)

11. On October 24, 1997, Judge Burton granted continuance of a hearing due to Defendant's illness. The continuance provoked an angry exchange between Plaintiff and Judge Burton. In the process, Plaintiff made derogatory ex parte comments about Defendant.

12. On October 29, 1997, Plaintiff filed a Notice to Submit for Decision and Affidavit of Attorneys Fees From John Mangum requesting attorneys fees for the eviction and requesting no attorneys fees for the pending counterclaims. (Exhibit J)^h~~k~~)

13. On October 31, 1997, the parties appeared before Judge Burton and Defendant was informed by the judge about the ex parte communication. Judge Burton stated that the case was tainted because of the nature of the comments made by Plaintiff. (Exhibit ~~J~~)^h

14. Plaintiff requested Judge Burton nonetheless enter a judgment on unpaid rent and stated that he **"will forget attorney fees if issue of rent can be solved today."** (Exhibit ~~J~~)^h

15. Judge Burton expressed his inclination to recuse himself unless Defendant had no objection. Defendant expressed her objection, and Judge Burton recused himself. (Exhibit ~~J~~)^h

16. The proposed judgment, in the form of John Mangum's Affidavit on Attorneys Fees, remained on file and was never again noticed up for hearing. On September 21, 1998, Plaintiff presented a new proposed judgment for the first time claiming that a term in the lease agreement allows recovery for attorneys fees incurred in defending against the counterclaims. (See Affidavit of Michael Shields)

ARGUMENT

I. PLAINTIFF WAS ON RECORD AS A PRO SE LITIGANT UNTIL AUGUST 25, 1997 THEREBY PRECLUDING ATTORNEYS FEES PRIOR TO APPEARANCE OF COUNSEL.

Plaintiff Shields undertook to represent himself "pro se" and filed the eviction Complaint, Motion to Set Bond, and Notice of Bond as a pro se litigant. (Exhibits C, D & F) Plaintiff now requests attorneys fees for work done "behind the scenes" by lawyers while he was on the record as a pro se litigant. The general rule is that "pro se litigants should not recover attorney fees for successful litigation." *Smith v. Bachelor*, 832 P.2d 467, 473 (Utah 1991). No exception has been recognized for pro se litigants who claim to receive behind the scenes advice from counsel.

It may be appropriate in some circumstances to award attorneys fees for work performed prior to commencement of an action where no one was on the record representing anyone. But in a case such as this, where Plaintiff was on the record pro se, the rule must apply. Finding otherwise opens the door for pro se litigants, particularly attorneys who regularly represent themselves, to circumvent the rule by claiming that legal assistance provided by associates qualifies although contrary to the rule's intent.

Plaintiff maintained his pro se status until the afternoon of August 25, 1997 when John Mangum made an appearance on his behalf. Fees requested for work done by any lawyer, including preparation for the hearing, prior to the appearance by counsel at the hearing while Plaintiff was on the record pro se are unrecoverable.

II. PLAINTIFF IS NOT ENTITLED TO ATTORNEYS FEES IN DEFENDING COUNTERCLAIMS BECAUSE THE LEASE TERM IS AMBIGUOUS AND CONTRARY TO THE PARTIES' INTENT.

The rule pertaining to allocation of attorneys fees is that "a party is...entitled only to those fees resulting from its *principal cause of action* for which there is a contractual (or statutory) obligation for attorney fees." *Utah Farm Production Credit Association v. Cox*, 627 P.2d 62, 66 (Utah 1981). Plaintiff Shields, however, argues that he is entitled to

attorneys fees for having to defend the counterclaims and cites an ambiguous term in the rental agreement that was signed without meaningful choice almost two months after moving into the apartment. (See Defendant's Affidavit Supporting Objection to Proposed Judgment.)

"If legal action is taken by either party to enforce this Agreement, or to enforce any rights arising out of breach of this Agreement or to evict,...,the prevailing party shall be entitled to costs incurred in connection with such action, including a reasonable attorney's fee and collection costs, with or without suit." (Exhibit A & D)

A. Ambiguity is construed against the drafter/lessor:

Reasonable analysis of the term leads to the conclusion that several interpretations are possible. What does, "If legal action is *taken...with or without suit*" mean? Does "*taken*" narrowly mean *commencing* legal action, or does it broadly include *defending* against legal action? Does it include counterclaims that do not initiate a law suit but simply expand the parameters of the controversy? Does the term clearly and unambiguous include countersuits filed in response to a complaint? If the term "if legal action is *taken*" means "if legal action is initiated" then attorneys fees are not included for counterclaims. If the term means, "if you respond by countersuit to legal action" then attorneys fees for counterclaims would be included.

What does, "to enforce *rights arising out of breach* the agreement" mean? Does it narrowly mean causes of action pertaining to *contract* breach or does it broadly include causes of action such as *negligence* that do not depend on the rental agreement? If the counterclaims never mention the rental agreement, and never mention a right arising out of any breach of the rental agreement, as is the case in Defendant's counterclaims, how can they be included? If the court dismisses counterclaims by finding the defendant has no actionable rights, are those precluded from an award of attorneys fees because they were never "*rights*" that could arise "*out of breach of the agreement*?"

How can legal action be taken "*with or without suit?*" Does a demand letter stating a claim constitute legal action without suit and give rise to attorneys fees if the landlord consults a lawyer and denies the claim? How does a party "*prevail*" "*without suit*" when there is no decision maker to decide who prevails? If the landlord consults an attorney prior to serving a three day notice to pay rent, is the tenant liable for attorneys fees in addition to rent? If the tenant received the three day notice to pay rent on the 3rd day of the month, would he be in breach on the 5th for paying rent but refusing to pay attorneys fees incurred in Plaintiff's consultation with counsel?

Obviously, the term is ambiguous because it can be reasonably interpreted in several different ways. "Contract language is considered ambiguous if the words used to express the meaning and intention of the parties are 'insufficient' in a sense that the contract may be understood to reach two or more plausible meanings." *Crowther v. Carter*, 767 P.2d 129 (Utah App. 1989).

The Court must construe the ambiguous terms in favor of Defendant who does not believe the term is broad enough to encompass, and did not contemplate, paying attorneys fees for counterclaims she might bring on an action for eviction. "Any ambiguity in a lease shall be construed against the lessor" *Edwards & Daniels Architects*, 865 P.2d 1382 (Utah App. 1993) citing *Stevensen v. Bird*, 636 P.2d 1029, 1031, *Powerine Co. v. Rusell's Inc.*, 103 135 P.2d 906, 913 (Utah 1943). "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement Second of Contracts 206 (1981) as quoted in *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah 1996). "Interpretation of a contract is a matter of law if based upon the wording of the contract. If the contract is incomplete or ambiguous, interpretation of the contract is a question of fact, based upon the intention of the parties as shown by extrinsic evidence." *Kimball v. Campbell*, 669 P.2d 714, 716 (Utah 1985).

i. The intent of the parties did not include counterclaims:

The fact that the lease was signed September 7, 1997 despite living in the apartment since July 12, 1997 supports that Defendant's intention in signing was simply to not be forced out after incurring the time and monetary expense of moving into the apartment almost two months prior to being presented the lease. The facts simply do not give rise to the inference that any meaningful bargaining could have taken place or that Defendant intended to agree to liability for attorneys fees should she countersue on an eviction. More importantly, Plaintiff has never discussed the terms of the lease with Defendant, did not meet Defendant until almost a year later, and cannot testify as to her intent when she signed because it was Darlene Green who presented the lease to Defendant and signed on behalf of Plaintiff as an agent of the owner. As a result, Plaintiff cannot offer any basis for an argument that the terms of the lease were the intent of the parties..

The lease is an adhesion contract because it was "prepared in a standardized form and presented on a take-it-or-leave-it basis to one occupying a disadvantaged bargaining position." *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983). Courts have long refused to enforce contract terms arising from this sort of procedural unconscionability. *Resource Management Co., v. Weston Ranch*, 706 P.2d 1028 (Utah 1985); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

Defendant certainly never intended that counterclaims be covered under the term. As the court looks to the intent of the parties, Plaintiff Shields' own actions further support that the term was not understood or intended as entitling him to attorneys fees for defending the counterclaims: 1) Plaintiff filed a proposed judgment and Affidavit of Attorneys Fees on October 29, 1997, before the counterclaims were tried, as though he believed he was entitled to attorneys fees only for the eviction and not the pending counterclaims. (Exhibit J & K) Unfortunately for Plaintiff, on October 31, 1997, the day he sought the judgment Judge Burton informed him that he was recusing himself because

of the nature of the ex parte communications they had and would not consider the issue.

2) Plaintiff responded to Judge Burton by making a statement in open court, recorded on the docket, that "he will forget attorney fees if the issue of rent can be solved today." (Exhibit L) The statement was an appeal to Judge Burton to enter judgment on the rent despite the Judge's inclination to recuse himself.

Certainly, Plaintiff would not have made such an appeal had he believed that he would be entitled to additional attorneys fees in defending the remaining counterclaims which had not been tried. Moreover, Defendant would have accepted entry of a judgment on those terms rather than risk the potential of additional attorneys fees in the future on the pending counterclaims. The fact is that attorneys fees for counterclaims was never intended or considered by either party.

Since making that statement, however, Plaintiff apparently reconsidered the lease term and decided not to notice the proposed judgment for decision, despite it being filed almost a year ago, so that he might request attorneys fees on the counterclaims as well.

That first proposed judgment and affidavit of attorneys fees of October 1997 never mentioned the lease term on attorneys fees that is now at issue. It is reasonable to infer from these facts that with the passage of time, the new meaning evolved to include attorneys fees for defending counterclaims, not from the intent of the parties but from careful study of the term by legal counsel.

Defendant interprets the term to mean, the same as Plaintiff originally believed, that if one party initiates a legal action and does not prevail, it is liable for attorneys fees incurred in defending the action. Consistent with Plaintiff's original interpretation, Defendant does not believe that filing counterclaims, which by their very nature are counter-responses to a complaint, fall within the meaning of "if legal action is *taken*" and did not intend to agree to those terms. Defendant further believes that "*rights arising out of breach of the agreement*" presupposes causes of action directly alleging a breach of some term within the four corners of the writing and excludes any other causes of action.

III. EQUITABLE ESTOPPEL PRECLUDES PLAINTIFF FROM RECOVERING TREBLE DAMAGES AND ATTORNEYS FEES BECAUSE HE GAVE NOTICE OF INTENT TO DENY DEFENDANT'S RIGHT TO REINSTATEMENT UNDER U.C.A. 78-36-8.5(2)(a).

Plaintiff Shields seeks to benefit from U.C.A. 78-36-1 et seq. In actions for unlawful detainer, however, "statutes provide severe remedy and must be strictly complied with before cause of action thereon may be maintained." *Van Zyverden v. Farrar*, 393 P.2d 468, 470 (Utah 1964). Judge Burton declined to reach the issue of damages and simply found that possession rightly belonged to Plaintiff because Defendant had not paid the rent due. (Exhibit H) While Plaintiff was entitled to possession, he is not entitled to treble damages or attorneys fees under the doctrine of equitable estoppel because he did not comply with provisions of the statute, and acted to prevent Defendant from being reinstated in the lease.

"(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fees, and other costs, including attorney's fees, as provided in the rental agreement." U.C.A. 78-36-8.5(2)(a). (Exhibit M)

On July 28, 1997, Plaintiff told Kevin Green, who conveyed the message to Defendant, not to accept rent payment because it was "too late" to prevent eviction. On August 11, 1997, Plaintiff gave Defendant the ultimatum of paying rent, dismissing her counterclaims and moving to avoid being thrown out by the court. On August 12, 1997, Plaintiff executed the Notice of Bond together with the Notice of Rights of Tenants which notified Defendant she had the right to do exactly what Plaintiff had been denying---the right to pay the rent and stay in the apartment. (Exhibit F) By no coincidence on that same day, in what appeared a deliberate attempt to preempt the three days to pay and be

reinstated, Plaintiff served a Notice of Non Renewal stating that Defendant's lease would be terminated and she must move within 18 days. (Exhibit G)

Defendant's lease does not allow for termination upon 18 days notice but requires 30 days notice. "If the tenancy reverts to a month to month tenancy, written notice of termination must be given by either party at least 30 days before the end of the month" (Exhibit A) Defendant reasonably interpreted the Notice of Non Renewal served on the same day as a device by Plaintiff to circumvent Defendant's right to elect reinstatement. In a case analogous to this one, *Monter v. Kratzers Speciality Bread Co.*, the Court held, "The landlord cannot prevent the tenant from paying the judgment and regaining his rights under the unexpired lease by the device of failing to have the amount of rent due included in the judgment." 504 P.2d 40, 42, (Utah 1972). At the time Plaintiff served the Notice of Tenant's Rights, the amount owed was minimal as Plaintiff was acting pro se and the unpaid rent amounted to less than one month.

Plaintiff's actions concerning the Notice of Non Renewal occurred after the Answer was filed, but Defendant had already raised the issue of estoppel in her Answer & Counterclaim based on Plaintiff's refusal to accept rent. (Exhibit E)

"[Equitable estoppel requires] three essential core elements: 1) a party's statement, admission, act, or failure to act that is inconsistent with a latter asserted claim; 2) reasonable action or inaction by a second party, taken on the basis of the first party's statement, admission, act, or failure to act; 3) injury to the second party resulting from allowing the first party to repudiate it's statement, admission, act, or failure to act." *Mendez v. State of Utah*, 813 P.2d 1234, 1236 (Utah App. 1991); *Ceco Corp. v. Concrete Specialists*, 772 P.2d 967, 969-70 (Utah 1989)

Plaintiff expressed to Kevin Green and Defendant, both verbally, and implicitly by serving Notice of Non Renewal, that he would not reinstate Defendant even if she paid rent. Defendant was sufficiently clear on Plaintiff's intent not to allow her to stay no matter what she did. Defendant reasonably relied upon Plaintiff's representations and elected the alternative remedy of requesting a hearing rather than risk that payment of rent

would nonetheless result in another action for eviction pursuant to the Notice of Non Renewal. Plaintiff now seeks to repudiate his actions in blocking Defendant's right to pay and be reinstated. Defendant will suffer injury if Plaintiff is allowed to repudiate his actions and recover treble damages and attorneys fees under the statute when he made clear his intent to obtain the statute's benefits but block Defendant's rights under the same statute.

Plaintiff's representation that Defendant's right to pay and be reinstated could be nullified by the Notice of Non Renewal need not be intentional for equitable estoppel to apply. "Negligent false representation is sufficient to invoke equitable estoppel." *Barnard v. Barnard*, 700 P.2d 1113, 1115 (Utah 1985) ""Equitable estoppel...is a doctrine of Equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss." *J.P. Koch, Inc., J.C. Penny Co., Inc.* (Utah 1975). A trial court's finding that equitable estoppel is inapplicable is reviewed for correctness. *Holland v. Career Services*, 856 P.2d 678, 682 (Utah App. 1993) In contrast, the appellate court "will not overturn application of equitable estoppel absent abuse of discretion." *State of Utah v. Irizarry*, 893 P.2d 1107, 1108 (Utah App. 1995)

IV. PLAINTIFF'S REQUEST FOR ATTORNEYS FEES IS SO UNREASONABLE IT BEARS NO RELATIONSHIP TO A RECOVERABLE AMOUNT.

A. Reasonable fees.

Plaintiff Shields has requested this Court altruistically award him \$28,031.92 plus pre-judgment interest on a complaint alleging \$215 in unpaid rent. In other words, he seeks 135 times the original amount owed, and includes in the fees such frivolous matters as time spent a) consulting "State Farm" about insurance coverage under his policy, and updating the insurance company on case developments; b) lawyers working behind the scenes while Plaintiff was on the record as a "pro se" litigant; c) interviewing Defendant's former classmates and clients; d) reviewing Defendant's bankruptcy pleadings and name

change; e) researching and drafting restraining orders and affidavits that Judge Burton refused to hear in August 1997; f) investigating an individual who was mistakenly assumed to be Defendant and preparing the false allegation that Defendant had been convicted of assault; g) re-investigating the false allegation once Defendant demonstrated the allegation was false and the person targeted in their investigation was not Defendant; h) preparing and attending a hearing wherein Judge Burton recused himself because of Plaintiff's actions in October 1997; i) drafting the former proposed judgment, \$40 in faxes associated with that pleading, which Judge Burton refused to hear because of the ex parte communication that occurred days earlier; j) work generated and/or scrapped because of Judge Burton's recusal, and numerous other similar charges. (See Affidavit of John Mangum)

A more blatant disregard for "reasonableness" can scarcely be imagined. The number of charges and fees requested by Plaintiff that are not reasonably related to the eviction, work that was wasteful and irrelevant, is infinitesimal. Plaintiff fails to allocate which fees are recoverable and requests the Court award an amount no court could award on a \$215 eviction without abusing discretion. A party who fails to allocate attorney fees between those which are recoverable, and those which are not, may forfeit the award entirely, at the trial court's discretion. *Utah Farm Production* at 66; *Selvae v. J.J. Johnson Assoc.*, 910 P.2d 1252, 1266 (Utah App. 1996).

B. Prejudgment interest.

As previously noted, Plaintiff filed a proposed judgment once the eviction process was concluded on September 7, 1997 and sought a decision in October 1997. The unlawful detainer statute allows judgment to be entered prior to the conclusion of any counterclaims. "In all cases, the judgment may be issued and enforced immediately." U.C.A. 78-36-10(4). (Exhibit M) Three things precluded entry of judgment on the eviction in October 1997 and all were within Plaintiff's control. 1) Plaintiff's ex parte communication resulted in Judge Burton's recusal, and he declined to decide the issue; 2)

The recusal derailed the case from normal course; and 3) Plaintiff decided to postpone judgment on the eviction for more than a year.

This Court should not penalize Defendant by awarding prejudgment interest when Plaintiff had a proposed judgment on file and deliberately postponed the issue at his leisure for more than a year after eviction. Should this Court be inclined to award any attorneys fees, Defendant requests an evidentiary hearing and that Plaintiff demonstrate why those charges and others are recoverable.

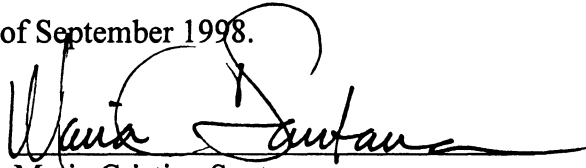
CONCLUSION

For all of the foregoing reasons, Plaintiff cannot recover attorneys fees while he was on the record as a pro se litigant. Plaintiff cannot recover attorneys fees arising from defense of the counterclaims because neither party intended the lease's ambiguous term on attorneys fees to apply to counterclaims, and the ambiguity must be construed against the drafter. Remaining attorneys fees and treble damages pursuant to U.C.A. 78-36-1 et seq are precluded by estoppel because Plaintiff should not benefit from the statute when he failed to strictly comply with its terms by notifying Defendant via a "Notice of Non-Renewal," served simultaneously with the Notice of Right to Reinstatement, that he would circumvent her right to be reinstated. Prejudgment interest would be inequitable and should not be awarded because a proposed judgment was filed and judgment would have been entered in October 1997 but for Plaintiff's actions resulting in Judge Burton's recusal; and Plaintiff's subsequent decision to postpone entry of the judgment for a year after eviction.

The most this Court should award Plaintiff is unpaid rent that Defendant has never refused to pay. Defendant paid \$168.00 for rent from August 28th to September 7, 1997 to remain an extra ten days per Judge Burton's order. The remaining unpaid rent includes the \$215 alleged in the complaint for July; and \$464.36 not paid in August, together with a \$37.00 court filing fee. From that total of \$716.36, Defendant should be credited her

\$400 security deposit, which Plaintiff admits in his affidavit should be credited to her, bringing the amount owed to **\$316.36**.

Respectfully submitted this 28 day of September 1998.

A handwritten signature in black ink, appearing to read "Maria Santana", written in a cursive style.

Maria Cristina Santana
Defendant/ Counterclaim Plaintiff

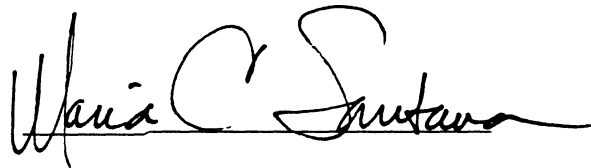
CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of September, 1998, I caused to be served, by US Mail, a true and correct copy of the foregoing upon:

John Mangum
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111

David Mortensen
PO Box 672
Provo, Utah 84603

Darlene and Kevin Green
10765 Old Highway 54
Holts Summit, Mo 65043

A handwritten signature in black ink, appearing to read "Maria C. Santana", written over a horizontal line.



**Apartment Association of Utah
UNIFORM RESIDENTIAL RENTAL AGREEMENT**

RECEIVED FROM Maria Santana, lessee, hereinafter

referred to as Resident, the sum of \$ _____ DOLLARS evidenced by
☐ Cash, ☐ Check, ☒ Other, as a deposit which, upon acceptance of this rental agreement, shall belong to the Lessor of the premises, hereinafter referred to as Owner, and shall be applied as follows:

	Received	Payable Prior to Occupancy
Rent for the period from <u>July 12</u> to <u>July 31 1996</u> : \$ <u>340.</u>	\$ <u>340.</u>	\$ <u>—</u>
(Pro-rate to end of month) <u>advance Aug.</u> month's rent \$ <u>515.</u>	\$ <u>515.</u>	\$ <u>—</u>
Security Deposit \$ <u>500.</u>	\$ <u>500.</u>	\$ <u>—</u>
Refundable Portion \$ <u>400.</u>		
Non Refundable Portion \$ <u>100.</u>		
Other <u>none.</u>	\$ <u>0.</u>	\$ <u>0.</u>
(specify, i.e., Pet, etc.)		
Refundable Portion \$ <u>0.</u>		
Non Refundable Portion \$ <u>0.</u>		
TOTAL: \$ <u>1355.</u>		

If this agreement is not accepted by the Owner or his agent, within 5 days, the total deposit received shall be refunded. Resident agrees to rent from the Owner the premises situated in the City of Salt Lake County of Utah.
State of Utah, located at 2588 So 900 E Apt. No. 36 consisting of 2 bdrm 1 bath upon the following TERMS and CONDITIONS.

TERM OF AGREEMENT: The term of this agreement shall commence on Aug. 1, 1996 and end on January 30, 1997 unless terminated sooner as herein provided. This agreement will automatically renew on a month-to-month basis unless written notice of termination is given by either party at least thirty (30) days before the end of the initial lease term. If the tenancy reverts to a month to month tenancy, written notice of termination must be given by either party at least 30 days before the end of the month.

RENT: Rent shall be \$ 515. per month, payable in advance upon the 1st day of each calendar month to Owner or his authorized agent, at the following address 2588 So 900 E # 21.
If rent is not paid within five (5) days after due date, Resident agrees to pay a late charge of \$20.00. In the event of a dishonored rent check, Resident agrees to, within twenty-four (24) hours of a dishonor, replace said check with certified funds and pay a \$15.00 dishonored check fee. If check is dishonored, the Owner may require Renter to make all future payments with cash or cashier's check, and Owner will provide receipt for all such payments.

SECURITY DEPOSIT: The Security Deposit set forth above shall secure the performance of Resident's obligations. Refund of Security Deposit is dependent upon Resident fulfilling ALL of the following conditions:

1. Resident has provided a written thirty (30) day notice to Owner prior to the date of termination or expiration.
2. Resident has no other monies due.
3. Resident has thoroughly cleaned the premises, appliances, and fixtures. The Owner will deduct from the security deposit all reasonable charges to accomplish cleaning or repair from damage over normal wear and tear.
4. All individuals using or occupying the premises have surrendered the premises to Owner, and all keys to the premises, mailbox or storage rooms are turned in to the Owner.
5. Resident supplies the Owner with a forwarding address, in writing, in order to send security deposit.

RESIDENT SHALL NOT HAVE THE RIGHT TO APPLY SECURITY DEPOSIT IN PAYMENT OF LAST MONTH'S RENT.

MULTIPLE OCCUPANCY: It is expressly understood that this agreement is between the Owner and all signatories, jointly and severally. In the event of default each and every signatory shall be responsible for timely payment of rent and all other provisions of this agreement.

UTILITIES: Resident shall be responsible for the following utilities and services: ☐ Water, ☐ Sewer, ☒ Gas, ☒ Electricity, ☒ Other Cable, phone

USE: The premises shall be used as a residence by the undersigned adults and 0 children, and for no other purpose without the prior written consent of the Owner. Occupancy by guests staying over 7 days will be considered to be in violation of this provision unless prior written consent is given by the Owner.

INVENTORY: The following furnishings and inventory are part of this agreement. Carpet grey, garbage disposal, ref., stove, blinds

TERMS AND CONDITIONS (see reverse side for additional terms and conditions): all apply

ENTIRE AGREEMENT: This form constitutes the entire agreement made between the parties and may be modified only by a writing signed by both parties. The following exhibits, if any, have been made a part of this agreement:

☒ Application to Rent ☒ Inspection List ☐ House Rules ☐ Pet Lease ☐ Other Addendum to lease & House rules
Date 11/27/96 Sept 7, 1996

The undersigned Owner accepts this agreement, has read and does hereby agree to abide by the house rules.

The undersigned Resident acknowledges receipt of a copy hereof; accepts this agreement, and has read and does hereby agree to abide by house rules.

Parkside Apts 12-16
2588 So 900 E # 21 Address
Maria Santana Resident
266-59-1142 Social Security No.

2. **HOUSE RULES:** Resident, guests and other occupants agree to abide by all house rules which are attached and are hereby made a part of this agreement, including but not limited to rules with respect to noise, odors, disposal of refuse, pets, parking, and use of common areas. Resident understands that all guests and occupants are bound by this agreement.

3. **ORDINANCES AND STATUTES:** Resident shall comply with all laws, health codes, and regulations of all municipal, state and federal authorities.

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

5. **MAINTENANCE, REPAIRS OR ALTERATIONS:** Resident accepts the premises as being in good order and repair, unless otherwise indicated in writing. Resident shall, at his own expense, maintain 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. Resident shall be responsible for all repairs required for damages caused by his negligence and that of his guests, or other occupants. Resident shall not paint, or otherwise redecorate or make alterations to the premises without the prior written consent of the Owner. Resident will not remove Owner's fixtures, furniture and/or furnishings from the apartment, for any purpose. When Resident moves in, Owner shall furnish light bulbs of prescribed wattage for apartments' sockets, thereafter, light bulbs will be replaced at Resident's expense.

6. **ENTRY AND INSPECTION:** Resident 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 Residents or purchasers or for making necessary repairs. In case of emergency no notice need be given.

7. **POSSESSION:** If Owner is unable to deliver possession of the premises as agreed, Owner shall not be liable for any damage caused. Resident may terminate this agreement if possession is not delivered as agreed above.

8. **TRANSFER:** Resident shall be released from the obligations of this lease if Resident receives a job transfer of 25 miles or more and furnishes owner with the following: (a) Provides a certified copy of military transfer orders or a statement in the form of an affidavit sworn to before a notary public from employer evidencing such transfer. (b) 30 day written notice of termination. (c) All rents and charges paid through the date of termination.

9. **EARLY TERMINATION:** If for any reason other than those set forth in paragraph 8 above, you desire to terminate the Lease at any time after the first 120 days of the term but prior to the end of said term, the following is required: (a) 30 days written notice of termination. (b) All rents and charges paid through the date of termination. (c) Payment of an amount equal to one and one-half months rent as a termination fee. (d) Premises shall be in good clean condition with no damage, ordinary wear & tear excepted. (e) Comply with all other applicable terms and conditions of this lease.

10. **ATTORNEY'S FEES:** If legal action is taken by either party to enforce this agreement, or to enforce any rights arising out of the breach of this agreement or to evict Resident, guests, or other occupants, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee and collection costs, with or without suit.

11. **WAIVER:** No failure of Owner to enforce any part of this agreement shall be deemed as a waiver, nor shall any acceptance of a partial payment of rent be deemed a waiver of Owner's right to full amount.

12. **NOTICES:** All notices shall be given in accordance with state laws. Where requirements are not spelled out by law, notice may be given by mailing the same, postage prepaid, to Resident at the premises or to Owner at the address shown below or at such other places as may be designated.

13. **REIMBURSEMENT BY RESIDENT:** Resident agrees to reimburse Owner promptly for the replacement cost of any loss, property damage, or cost of repairs or service (including plumbing trouble) caused by negligence or improper use by Resident, his agents, family or guests. Resident shall be responsible for damage from windows or doors left open. Such reimbursement is due when Owner makes demand. Owner's failure to demand damage reimbursements, late payment charges, returned check charges or other sums due by Resident, shall not be deemed a waiver and Owner may demand same at any time, including after move-out.

14. **OWNER SHALL NOT BE LIABLE:** Owner shall not be liable for any damages or losses to person or property caused by other residents or other persons. Owner shall not be liable for personal injury or damage or loss of Resident's personal property (furniture, jewelry, clothing, etc.) from theft, vandalism, fire, water, rain, hail, smoke, explosions, sonic booms or other causes whatsoever, unless the same is due to the negligence of Owner. Owner strongly recommends that Resident secure insurance to protect himself against the above occurrences. Owner or his agents will not render any services such as moving automobiles, handling of furniture, cleaning, delivering packages, or any other service not contemplated in this contract.

15. **REPAIRS AND MALFUNCTIONS:** RESIDENT AGREES TO REQUEST ALL REPAIRS AND SERVICES IN WRITING TO MANAGER, except in extreme emergency when telephone calls will be accepted. In case of malfunction of equipment or utilities, or damage by fire, water, or other cause, Resident shall notify Manager immediately, and Owner shall act with due diligence in making repairs and RENT SHALL NOT ABATE DURING SUCH PERIOD. If the damaged premises are unfit for occupancy, Owner shall within reasonable time in writing inform Resident whether he intends to terminate the contract or repair said premises. If Owner elects to repair the premises, said repairs shall be undertaken with due diligence. If terminated, rent will be prorated and the balance refunded along with the deposit(s), less lawful deductions.

16. **DEFAULT BY OWNER:** Owner agrees to (a) keep all areas of the property in a reasonably clean condition; (b) properly maintain water, heating, plumbing, electrical service and/or air conditioning equipment, if provided; (c) abide by applicable state and local laws regarding repair; (d) make reasonable repairs, subject to Resident's obligation to pay for damages caused by Resident, or other occupants.

17. **DEFAULT BY RESIDENT:** Owner may, upon written notice, terminate Resident's right to occupancy if any of the following conditions occur:

1. Resident fails to pay rent or other lawful charges when due.
2. Resident fails to reimburse Owner for damages, repairs or plumbing service costs when due.
3. Resident, guests or other occupants violate this contract, Owner's rules and regulations, or applicable state and local laws.
4. Resident abandons the apartment.
5. Resident, guests, or other occupants threaten or assault or use abusive or offensive language against other resident, or any agent, employee, or representative of Owner.

18. **RENT INCREASE CLAUSE:** Due to increase in utilities, taxes, insurance, and other operating expenses, Owner may increase the monthly rental in lease upon 30 days written notice to resident. In no event may the rent be increased more than 10% during the initial term of the lease.

19. **ABANDONMENT:** Abandonment shall have occurred if, (1) without notifying the Owner, Resident is absent from the premises for 15 days while rent is due and Resident's possessions remain in the apartment, or (2) without notifying the Owner, Resident is absent for 1 day while rent is due and Resident's possessions have been removed from the apartment. If Resident abandons apartment, Owner may re take apartment and attempt to rent it at fair market value. Resident shall be liable for the entire rent due for the remainder of the term, or the cost of re-renting the apartment, including rent lost, the cost of restoring the apartment to the condition at the time it was rented, and reasonable fees for re-renting the apartment. If Resident has left personal property in the apartment, Owner may remove it and store it and attempt to give Resident notice of this action. Resident may obtain property by paying moving and storage costs. If Resident fails to claim property within 30 days of notice, Owner may make a reasonable effort to sell the property at its fair market value and apply the proceeds toward any amount the Resident may owe. Any money remaining after such action shall be disposed of in accordance with UCA-78-44-11.

20. **TIME:** Time is of the essence for this agreement.

The following pages are the responses and supporting documents from Kevin and Darlene Green to the counterclaim made by: Maria Cristina Santana

In Case No. 97005271

Judge Micheal Burton

Maria Cristina Santana

Vs.

Michael V. Sheilds, Kevin Green, and Darlene Green, Juanita Investment, and Parkside Apartments.

1279

Judge: Michael Burton

ANSWER TO SANTANA'S COUNTERCLAIM

22 '97 11:

The followir
Kevin and D
Santana

Maria Cristin

Michael V. St
Apartments.

1. Santana received the required paperwork a few days late because she was in such a hurry to move in. Santana did in fact sign all the papers, however, they were later discovered to be missing. Another copy was provided to Santana which she claimed she lost. A third copy was delivered to her which she signed and returned.
2. The practice at Parkside was that the manager would work things out with tenants. Santana never gave any indication she had a valid reason to speak with Mike Shields. If Santana had a serious enough complaint, she could have gone to the Housing Association or the Better Business Bureau to contact Mike Shields. It is a ridiculous claim that Darlene said she had all decision making power, or that ownership of Parkside hinged on her being there.
3. Business mail for Parkside Apartments arrived at this address. Parkside Apartments is a business address for Mike Shields and not claimed as his residence.
4. In January 1997, Darlene asked Santana if she knew of an attorney her daughter Pat Middleton could speak with about her child custody case. Santana asked Darlene to have Pat come and see her so they could discuss the case. Santana is lying when she claims Darlene offered to "take care of the rent" in exchange for legal work. Darlene never represented herself to Santana as anything other than a parent seeking information that would help her daughter where the custody case was concerned. Darlene never claimed to anyone at any time that she could do as she pleased at Parkside.
5. In February 1997, Pat Middleton and Santana met in Santana's apartment to discuss Pat's case. Pat had no money to pay an attorney and Darlene had no money to lend to Pat for an attorney. Santana agreed to take Pat's case "pro bono" and that was all Darlene or Kevin Green were told about the agreement between Santana and Pat Middleton. Darlene never agreed to enter into a "Fee Agreement" with Pat or Santana. Such a fee agreement would have been stupid as Pat had already found several attorneys who would take the case for \$2,000.00 up front.
6. At no time ever was \$150.00 in cash, or any other amount of money given to Santana by Darlene or Kevin Green. On two occasions, Pat and Dave Middleton borrowed \$150.00 from Kevin Green claiming they were behind on their car payment and other bills.
7. During the seven (7) months mentioned here, there were several court appearances but there were no "billable hours" as the only agreement we were told of was a "pro bono" contract between Pat Middleton and Santana. During these months all discussions with Darlene of Pat's child custody case were at the request of Santana or Pat.

1231

1229

8. After several complaints from Santana's neighbors that Santana was harassing them about noise, we finally learned that Santana was conducting her law practice from her apartment. Santana was immediately reminded that per her lease agreement no "business" could be run from her apartment. Santana soon informed Darlene that she had joined a Law Firm and would not conduct her law practice from her apartment any longer. In July 1997, Santana put a sign on her door which we understood was intended to keep salesmen away.
9. No "check from California" has been expected by Kevin or Darlene Green. Santana's knowledge of Darlene's personal injury suit comes from Pat Middleton who only knows that the suit is proceeding. No settlement from that suit has even been expected this calendar year. Santana paid her own rent because she never had any expectations of payment from Pat Middleton or Darlene and Kevin Green.
10. (Several errors here) It was the winter of 96, not 97, and the topic of the program did not include a discussion of a conviction for rape as Kevin was not even tried for rape, let alone convicted. Kevin has been declared "factually innocent of all charges and allegations", and was released from prison on June 20, 1996. Santana was provided this information in connection with Pat Middleton's custody case because it was thought that Pat's ex-husband would try to use Kevin's past to confuse the court on the custody issue of Pat's kids. Prior to the airing of the Maury Povich show there was already very little contact between Kevin and Santana, but Santana actually increased that contact after the show was aired by agreeing to take Pat Middleton's custody case.
11. Santana had never informed Pat Middleton or Darlene Green that she did not wish to discuss Pat's case on certain days of the week. Pat had called Santana several times over several days and could get no response from Santana. Pat called Darlene to ask if Darlene could contact Santana. Pat was concerned because Santana was not returning her calls and feared that Santana may have quit on her. Darlene also called Santana several times and was unable to get a response from her. This was unusual behavior from Santana to date.
12. As a result of Pat and Darlene not being able to reach Santana by phone for several days, Darlene and Kevin became sincerely concerned for Santana's health and/or safety. As managers we also had some measure of responsibility to check on tenants when there were legitimate questions about their safety. After all the failed attempts to reach Santana by phone Darlene asked Kevin to go to Santana's apartment and check on her. Santana's car was parked in its usual place and had been there for several days. Neither Kevin or Darlene could remember seeing Santana outside her apartment for several days and had noted that the car had not been moved during that time either. Kevin went to Santana's door and rang the doorbell. After waiting several moments Kevin knocked on the door. After waiting several moments Kevin rang the doorbell again, and then knocked on the door again. There was no response from inside the apartment. Kevin then used his pass key to unlock the bottom lock on the front door. At that moment Santana called out from inside the apartment saying "What's going on!" Kevin made no further attempts to unlock the door or enter the apartment. Santana unlocked the top lock and opened the door an inch or so to hear Kevin's explanation. Kevin told Santana that since neither Pat or

PARTIES TO THE PROCEEDINGS

The following are parties to the proceedings:

1. Plaintiff/Countrclaim Defendant/Appellee Michael v. Shields;
2. Defendant/Counterclaimant/Appellant Maria Cristina Santana;
3. Counterclaim Defendant/Appellee Juanita Investments;
4. Counterclaim Defendant/Appellee Parkside Apartments;
5. Counterclaim Defendant Darlene Green, who is not an Appellee in this action because the claims brought by Appellant were settled;
6. Counterclaim Defendant Kevin Green, who is not an Appellee in this action because the claims brought by Appellant were settled.

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Utah Constitution, Article VIII, § 5.

JURISDICTION OF THE COURT

This is an appeal from the District Court involving an unlawful detainer action and this Court has jurisdiction pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(j) as the case was transferred to the Court of Appeals from the Supreme Court.

ISSUES PRESENTED FOR REVIEW

1. Does the Penalty Imposed on Appellee by Utah Code Annotated § 42-2-10 Remove Jurisdiction from the District Court from Hearing Appellee's Complaint?

This issue involves questions of law. Conclusions of Law are reviewed for correctness. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App. 1991); *Pendeleton v. Pendeleton*, 918 P.2d 159, 160 (Utah App. 1996); *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990) (hereafter "Standard of Review").

Preservation of issue: Appellant filed a Rule 60(b) Motion for Relief from Judgment arguing that the penalty imposed by § 42-2-10 required the trial court to set aside judgment in favor of Appellee because the statute barred Appellee from maintaining an action in any court of the state as a sanction for failure to comply with the registration requirements of the statute. (R. 1440-1457; 1463-1488.)

2. Did Judge Fratto Err in Denying Appellant's Rule 60(b) Motion for Relief from Judgment Entered on Appellee's Complaint Based on Utah Code Annotated § 42-2-10?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: Appellant filed a Rule 60(b) Motion for Relief from Judgment arguing that the penalty imposed by § 42-2-10 required the trial court to set aside judgment in favor of Appellee because the statute barred Appellee from

maintaining an action in any court of the state as a sanction for failure to comply with the registration requirements of the statute. (R. 1440-1457; 1463-1488.)

3. Did Judge Fratto Err in Granting Summary Judgment on Nothing More than a Proposed Order where no Motion, Affidavits or Statement of Undisputed Material Facts was filed as required under Rule 56?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: Appellant filed an Answer to Appellee's Complaint for eviction raising numerous affirmative defenses relative to damages. (R. 6-33.) Judge Burton reserved all issues except the issue of unpaid rent for a later time. (R. 1278-1285.) After the case was transferred to Judge Fratto, Appellee filed a proposed order on damages (R. 1203-1205) and Appellant filed an "Objection to Plaintiff's Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields" and "Affidavit Supporting Defendant's Objection to Plaintiff's Proposed Judgment" setting forth specific material facts supporting Appellant's affirmative defenses and legal doctrines precluding entry of judgment in favor of Appellee. (R. 1206-1306.)

4. Did Judge Fratto Err when he failed to require Appellee to Demonstrate Strict Adherence to the Unlawful Detainer Statute Prior to Awarding Damages and Attorneys Fees under Utah Code Annotated § 76-36-1 et. seq.?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: After Appellee filed a proposed order on damages without the benefit of an evidentiary hearing on damages, Appellant filed an "Objection to

Plaintiff's Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields" and "Affidavit Supporting Defendant's Objection to Plaintiff's Proposed Judgment" setting forth specific material facts supporting Appellant's arguments that Appellee did not strictly comply with the statute and affirmatively acted to deprive Appellant's rights under the statute. (R. 1206-1306.)

5. Did Judge Fratto Err when he failed to apply the Doctrines of Equitable Estoppel and Procedural Unconscionability as to the issue of Damages and Attorneys Fees for Unlawful Detainer?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: As stated above, Appellant filed an "Objection to Plaintiff's Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields" and "Affidavit Supporting Defendant's Objection to Plaintiff's Proposed Judgment" setting forth specific material facts supporting Appellant's arguments that Appellee did not strictly comply with the statute and that his actions attempting to deprive Appellant of her rights under the statute gave rise to the defense of equitable estoppel as to damages. (R. 1206-1306.)

6. Did Judge Fratto Err when he Awarded Attorneys Fees Without Allocating Recoverable and Unrecoverable Fees?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: As stated above, Appellant filed an "Objection to Plaintiff's Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields" and argued that the Court must allocate between recoverable and unrecoverable fees. (R. 1206-1306; 1317-1322; 1347-1358.)

7. Did Judge Joseph C. Fratto Err when he Awarded Attorneys Fees for Work Done by Counsel Behind the Scenes while Appellee was on the Record Pro Se?

This issue involves questions of law subject to the standard of review stated with respect to the first issue, *supra*.

Preservation of issue: As stated above, Appellant filed an “Objection to Plaintiff’s Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields” and “Affidavit Supporting Defendant’s Objection to Plaintiff’s Proposed Judgment” and argued that the Court must not award attorneys fees for work done by counsel behind the scenes while Appellee was on the record as a pro se litigant. (R 1206-1306.)

8. Was Judge Joseph C. Fratto's Award of Attorneys Fees Reasonable?

This issue involves mixed questions of fact and law. Conclusions of Law are reviewed for correctness. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App. 1991); *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996); *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990). Findings of Fact are reviewed under the “clearly erroneous standard of review such that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” *Howell v. Howell, supra*. The Appellate Court defers to the trial court’s factual findings unless they are shown to be clearly erroneous. *Pendleton v. Pendleton, supra*. The Appellant must demonstrate that they trial Court’s Findings of Fact are so lacking in support as to be against the clear weight of the evidence thus making them clearly erroneous. *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah App. 1994).

Preservation of issue: As stated above, Appellant filed an “Objection to Plaintiff’s Proposed Judgment on Action for Unpaid Rent, Unlawful Detainer and Affidavits of John Mangum and Michael Shields” and requested a hearing on the issue of attorneys fees and argued to the Court that the amount requested was unreasonable. (R. 1206-1306.)

DETERMINATIVE AUTHORITIES

A. The interpretation of Utah Code Annotated § 42-2-5 and § 42-2-10 would be determinative of the appeal or of central importance to the appeal. The statute reads in pertinent part:

§ 42-2-5. Certificate of assumed and of true name--Contents--Execution--Filing—Notice

(1) Every person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth:

(a) the name under which the business is, or is to be carried on, conducted, or transacted, and the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business; and

(b) the location of the principal place of business, and the street address of the person.

(2) The certificate shall be executed by the person owning, and the person carrying on, conducting, or transacting the business, and shall be filed not later than 30 days after the time of commencing to carry on, conduct, or transact the business.”

§ 42-2-10. Penalties

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) **shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state...**” (Utah Code Annotated § 42-2-5 and 42-210.) (Emphasis added.)

B. The interpretation of Utah Code Annotated § 78-36-8.5(2)(a) would also be determinative of the appeal or of central importance to the appeal. That provision reads:

(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fee, and other costs, including attorney's fees, as provided in the rental agreement. (Utah Code Annotated § 78-36-8.5(2)(a).) (Emphasis added.)

STATEMENT OF THE CASE

The Court will notice that no transcript of the proceedings has been prepared. The reason for this is threefold: 1) Only one evidentiary hearing was held in this case, before Judge Michael K. Burton, after which he ordered restitution of the premises and reserved all issues on payment of rent, defenses and damages. That hearing and subsequent order are not at issue in this appeal so the transcript is unnecessary. 2) More than a year later, after the case was transferred to Judge Joseph C. Fratto, Judge Fratto entered summary judgment on the issue of damages that Judge Burton had reserved for a future time. Judge Fratto entered summary judgment without the benefit of a transcript of the hearing and without taking any additional evidence. As a consequence, Judge Fratto was in the dark as to the proceedings, the evidence, the defenses or issues that may or may not have been presented at said hearing, and it is therefore unnecessary at this stage to prepare a transcript of a hearing that he never considered. The absence of the

transcript emphasizes to this Court that Judge Fratto was a much in the dark about the hearing before Judge Burton as this Court must be without benefit of the transcript, and that Judge Fratto's entry of summary judgment was entirely lacking in evidentiary support. 3) Because no other evidentiary hearing was held in this case, there is no testimony or evidence for the Court to review. This Court need not review oral argument because the issues presented on appeal pivot upon the argument that Judge Fratto improperly failed to take evidence in the case and entered orders without evidentiary foundation. The pleadings and Judge Fratto's orders are self explanatory as the sum total of all evidence he considered in the case.

The Court should also notice that Appellant has abandoned the counterclaim issues in this appeal. Therefore, the only remaining Appellee is Michael V. Shields who initiated the lawsuit as Plaintiff.

A. Nature of the Case. The case involves an action for unlawful detainer and counterclaims related to tenancy in a residential apartment.

B. Course of Proceedings: On August 24, 1997, Judge Michael K. Burton held an evidentiary hearing and heard testimony on the issue of unpaid rent. He entered an order of restitution of the premises based on unpaid rent, but expressly reserved all issues on damages for unpaid rent and the counterclaims to a future time. (R. 1278-1285.)

The case was subsequently transferred to Judge Joseph Fratto as a result of an angry ex parte communication on the part of Appellee and Judge Burton. (R 251)

During the course of a year, Judge Fratto proceeded to dismiss the majority of counterclaims under Rule 12 and Rule 56 of the Utah Rules of Civil Procedure. (R 657-

658; 1036-1037.) Judge Fratto heard no testimony on any issue and testimony taken before Judge Burton was not provided to, nor considered by, Judge Fratto as no transcript was available or entered into evidence.

Once the final counterclaim was dismissed, Appellee filed a proposed order for summary judgment on the issue of damages for unpaid rent and unlawful detainer. (R. 1203-1205.) No motion for summary judgment, no affidavits and no transcript of the hearing before Judge Burton indicating the issues that had been heard or the evidence presented was filed with Judge Fratto in connection with the proposed judgment for summary judgment. Appellee and his counsel simply filed affidavits stating the costs and fees incurred. **The Court should note that a Motion for Summary Judgment on the last remaining counterclaim was filed by Appellee but said motion did not mention judgment on unpaid rent or unlawful detainer. It simply sought summary judgment on the remaining counterclaim.** (R. 835-995.) **No separate motion for summary judgment on unpaid rent and unlawful detainer was ever filed.** Appellant immediately filed an objection and affidavit stating numerous grounds and defenses Judge Fratto must consider prior to entering summary judgment in favor of Appellee based on the proposed judgment and affidavit of fees and requesting a hearing on the issue of damages. (R. 1206-1306.)

On September 11, 1998, Judge Fratto held a hearing for oral argument on the proposed order and Appellant's objection and granted summary judgment on the issue of damages despite no motion for summary judgment, no affidavits in support of summary judgment, no transcript of the evidentiary hearing before Judge Burton and no other evidence being before the Court. Judge Fratto held no evidentiary hearing and had no

benefit of a transcript of the proceedings before Judge Burton other than a partial transcript wherein Judge Burton expressly reserved the issue of damages for a future time stating, “So it’s a simple answer. The plaintiff can have the property back, a writ of restitution can issue, that all damages are reserved on each side and no other orders are going to issue except this stay on the quashing of the subpoena.” (R. 1278-1285.) and which did not contain testimony or the substance of the issues presented at the hearing. (R. 1278-1285.)

Judge Fratto simply accepted arguments by counsel for Appellee, having no transcript, having no affidavit of uncontested issues, and in the absence of Appellee who was not even present in the court. Appellant’s objection had raised numerous issues of contested facts related to the issue of damages in affidavit, memorandum and as well as in oral argument. In contrast, Appellee failed to present a motion for summary judgment, affidavits in support thereof, or a mere statement of undisputed material facts that would support summary judgment. Appellee did not even claim in his pleadings that the issue of damages had been heard and decided by Judge Burton. Appellee did not respond to Appellant’s factual disputes by affidavit or direct testimony.

Judge Fratto granted summary judgment, nonetheless, based entirely on oral argument by Appellee’s counsel without conducting an evidentiary hearing, reviewing the hearing transcript, or any affidavit submitted by Appellee and signed the order November 2, 1997. (R. 1410-1421.) Nothing in the record indicates that Judge Fratto had any knowledge of the content of testimony taken before Judge Burton, who did not take testimony on damages and had expressly reserved the issue, because no such transcript exists. Judge Fratto appears to have assumed that Judge Burton’s hearing

covered all the issues relative to Appellee's complaint for eviction including damages and defenses to damages, although the order of restitution issued by Judge Burton is silent on the issue of damages and the partial transcript does not reveal whether he heard any issue other than whether service should be quashed and whether rent had been paid.

Several days after entry of Judge Fratto's final judgment, Appellant discovered that Appellee, in his individual capacity, was not the owner of the property at the time of the lease nor at commencement of the action and that Parkside Apartments, the only lessor named on the lease, was not registered as an assumed name with the State of Utah, Division of Corporations are required under the law. Appellant filed a Rule 60(b) Motion for Relief from Judgment entered in favor of Appellee invoking the provisions of Utah Code Annotated 42-2-10 which proscribe that a person doing business under an assumed name not in compliance with the registration requirements of the statute cannot bring an action in any court of the state. (R. 1440-1457.) Judge Fratto denied the motion. (R. 1535.)

C. Statement of Facts.

1. Appellant moved into Parkside Apartments and began paying rent on July 12, 1996. Seven weeks later on September 7, 1996, apartment manager Darlene Green presented Appellant with a lease agreement. (R 1206-1207; 1210-1211.) Manager Darlene Green signed on behalf of the "owner," and Appellant signed on behalf of herself. (R. 1226.)

2. On July 28, 1997 Appellee filed a Complaint for Eviction and unpaid rent against Appellant as a pro se litigant based on a lease in which he was not a named party

on the theory that he is the owner of Parkside Apartments. (R. 1-5.) On September 5, 1997, Appellee filed a Motion to Set Amount of Bond as a pro se litigant. (R. 61-65.)

3. The lease which is the subject of the Complaint for eviction names the owner and contracting party as “Parkside Apartments,” an entity which Appellant discovered after entry of final judgment is an assumed name not registered with the Division of Corporations. (R. 1440-1457.) Appellee’s name does not appear and was not revealed on any document provided to Appellant as part of her tenancy. (R. 1206-1207; 1210-1211; 1226.)

4. On August 8, 1997, Appellant served her Answer and Counterclaim upon Appellee and other counterclaim defendants.

5. On August 12, 1997, Appellee acting pro se, executed and served upon Appellant two contradictory documents: (1) A Notice of Bond including a “Notice of Tenant’s Rights” containing notice that Defendant had the right to chose to pay the rent and have the complaint dismissed and be reinstated in the lease (R. 61-62); and (2) A Notice of Non-Renewal stating that Appellant’s lease would not be renewed and she must move in less than 30 days as provided for in the lease. (R. 1277.)

6. On August 24, 1997, a hearing on the eviction was held, and counsel John Mangum made an appearance as counsel for Appellee who had acted pro se. No appearance of counsel had been filed prior to counsel’s appearance in person at the hearing.

7. Judge Michael K. Burton found that Appellee was entitled to restitution of the premises because rent had not been paid but declined to reach any issues as to damages, defenses or the counterclaims. (R. 1278-1285.)

8. On October 24, 1997, Judge Burton granted a continuance of a hearing due to Appellant's illness. The continuance provoked an angry exchange between Appellee and Judge Burton.

9. On October 31, 1997, the parties appeared before Judge Burton and Appellant was informed by the judge of the ex parte communication. Judge Burton stated that the case was tainted because of the nature of the comments made by Appellee.

10. Judge Burton recused himself and transferred the case to Judge Joseph C. Fratto.

11. Judge Joseph C. Fratto proceeded over the course of more than a year to hear motions and argument on Appellant's counterclaims and eventually dismissed all counterclaims. (R. 657-658; 835-995.) Judge Fratto held no evidentiary hearings, took no evidence and was not privy to the testimony or evidence taken in the proceeding before Judge Burton.

12. On September 21, 1998, Appellee filed a proposed judgment seeking summary judgment on treble damages, attorneys fees and costs. The proposed judgment was accompanied by affidavits of Appellee and his counsel setting forth the amount of costs and damages incurred. No motion for summary judgment, no memorandum, no affidavits in support thereof and no statement of undisputed material facts accompanied the proposed order. (R. 1203-1205.)

13. On or about September 28, 1998, Appellant filed an "Objection to Proposed Judgment on Action for Unlawful Detainer and Affidavits of John Mangum and Michael Shields" alleging that the facts gave rise to several defenses including equitable estoppel and procedural unconscionability and that the issue of damages had been

reserved by Judge Burton until a future time and required an evidentiary hearing. (R 1206-1306.)

14. On November 2, 1998, Judge Fratto held a hearing and heard oral argument on the proposed order for summary judgment and Appellant's objection. Judge Fratto took no testimony and entered no findings that any facts were undisputed. Judge Fratto did not enter any findings of fact or conclusions of law as to Appellant's objections and defenses but simply granted summary judgment in favor of Appellee. (R. 1410-1421.)

15. On or about November 9, 1998, Appellant filed a Rule 60(b) Motion for Relief from Judgment setting forth that Appellee was barred from maintaining an action in any court of the state under Utah Code Annotated § 42-2-10 because he conducted business under the assumed name Parkside Apartments without registering the name. Judge Fratto denied the Rule 60(b) Motion for Relief from Judgment. (R. 1440-1457; 1535.)

SUMMARY OF ARGUMENT

I.

Judgment on Appellee's Complaint must be set aside because the District Court had no jurisdiction to hear Appellee's complaint because Appellee is barred from maintaining an action in any court of the state while conducting business under an unregistered assumed name pursuant to Utah Code Annotated § 42-2-10. Appellee brought his Complaint for eviction in his individual name on a lease naming Parkside Apartments as the lessor. Appellant filed a Rule 60(b) Motion for Relief from Judgment entered in favor of Appellee on his Complaint and invoked the penalty imposed by Utah

Code Annotated § 42-2-10. Appellee did not dispute that Parkside Apartments was not registered as an assumed name.

The District Courts are granted jurisdiction by the Utah Constitution and by Statute. In the present controversy, jurisdiction over the claims of any person conducting business under an assumed name not registered with the Division of Corporations is removed from all courts in the state pursuant to Utah Code Annotated § 42-2-10.

II.

The trial court was bound to set aside judgment in favor of Appellee on his Complaint because the judgment was void as a penalty provided by Utah Code Annotated § 42-2-10 inasmuch as Appellee was prohibited from maintaining an action in any court of the state.

III.

The trial court committed error in granting summary judgment on the issue of damages for unlawful detainer and unpaid rent inasmuch as it completely ignored summary judgment standards and the requirements of Rule 56. No motion for summary judgment was filed, no affidavits in support of undisputed facts, no statement of undisputed facts and no testimony was introduced. Appellant opposed the proposed judgment and raised numerous issues of fact that gave rise to equitable defenses, which facts were not disputed by Appellee. The trial court did not view the facts in a light most favorable to Appellant as required under the law and blindly granted summary judgment based entirely on oral argument and a proposed order accompanied by affidavits regarding costs and fees—entirely ignoring Appellant’s objections and factual disputes.

IV.

Inasmuch as Appellant demonstrated that Appellee had served her a Notice of Tenant's Rights stating that she now had the right to pay the rent and be reinstated in the lease at the same time he served a Notice of Non-Renewal which cancelled out her right to reinstatement, and further alleged that Appellee had thereby intentionally deprived her of the right afforded her under the unlawful detainer statute, the trial court was bound to require Appellee to demonstrate strict adherence under the statute before awarding him the benefits of the statute and entering judgment in his favor.

V.

The evidence as demonstrated by the lease itself shows that Appellant moved into the apartment seven weeks before signing the rental lease. Appellant alleged by affidavit that she was not presented a lease until after moving into the apartment seven weeks later. No counter-affidavits or testimony was introduced by Appellee to dispute those facts.

The trial court should have either taken testimony on the issue of procedural unconscionability or accepted Appellant's undisputed factual allegations. In the absence of a factual dispute, the trial court erred as a matter of law in not invoking the doctrine of procedural unconscionability as to the lease agreement presented seven weeks after moving into the apartment and in granting attorneys fees under the lease to Appellee.

Further, as Appellant has previously stated, because Appellee served her a Notice of Tenant's Rights stating that she now had the right to pay the rent and be reinstated in the lease at the same time he served a Notice of Non-Renewal which cancelled out her right to reinstatement, and Appellant further alleged that Appellee had thereby intentionally deprived her of the right afforded her under the unlawful detainer statute,

the trial court was bound to apply the doctrine of equitable estoppel and deny Appellee the benefits of the statute while he deprived Appellant her rights under the statute.

VI.

The trial court arbitrarily awarded all attorneys fees and costs requested by Appellee without allocating between recoverable and unrecoverable fees despite Appellant's objection that the court must distinguish fees that are recoverable and from fees that are not recoverable based on the success and/or purpose of the work performed. The trial court committed error in not holding an evidentiary hearing on the attorneys fees, not making a distinction between fees incurred on successful motions and responses and fees incurred on unsuccessful ones. The trial court improperly awarded attorneys fees for matters where Appellee did not prevail and for attorneys fees during a time when Appellee was on the record as a pro se litigant.

The trial courts award of attorneys fees in the amount of \$31,465.29 on a complaint for \$215 of unpaid rent is exorbitant and unreasonable where no bad faith was found on the part of Appellant and no findings of reasonableness of fees was made.

ARGUMENT

I.

THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER APPELLEE'S COMPLAINT AND JUDGMENT MUST BE VACATED BECAUSE JURISDICTION WAS REMOVED UNDER U.C.A. § 42-2-10 AS A SANCTION FOR CONDUCTING BUSINESS UNDER AN UNREGISTERED ASSUMED NAME.

Subject matter jurisdiction goes to the question of the court's power to hear and decide the case. If a court does not have such power, it may not hear the case, even with the consent of the parties. *Barnard v. Wassermann*, 855 P.2d 243 (Utah 1993). The

jurisdictional competence of the trial court may be summarized as follows: “The district court shall have original subject matter jurisdiction in all matters except as limited by this constitution or by statute...” Utah Const. Art. VIII, 5. “The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution **and not prohibited by law.**” Utah Code Annotated 78-3-4(1) (Emphasis added.).

For reasons that will be explained *infra*, the subject matter of Appellee’s Complaint falls within the exception noted in U.C.A. 78-3-4(1), which grants the Court “original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution **and not prohibited by law.**” (Emphasis added.).

Appellant’s challenge to the trial court’s subject matter jurisdiction is based on Appellee’s violation of Utah Code Annotated 42-2-5(1)(a)&(b), which reads:

Every person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted or transacted as an individual, association, partnership, corporation, or otherwise, shall filed with the Division of Corporations and Commercial Code a certificate setting forth:

(a) the name under which the business is, or is to be carried on, conducted, or transacted, and the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business;

(b) the location of the principal place of business, and the street address of the person. (Emphasis added.)

The penalty for not registering the name by filing the certificate is that the persons conducting business under the assumed name, not just the assumed name itself but the persons hiding behind the assumed name, cannot maintain any action arising from business conducted under the assumed name:

42-2-10. Penalties

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state... (Emphasis added.)

Appellee's assumed name, Parkside Apartments appears as the only owner on the lease. (R. 1-5) Appellee's Complaint against Appellant apparently relies solely on the claim that it is the real party in interest behind the lessor whose name appears on the lease as "Parkside Apartments."—although Appellee has failed to allege that the lessor named on the lease is its assumed name.

Parkside Apartments was not registered with the Division of Corporations on November 2, 1998 when Appellee was granted summary judgment on his complaint for eviction and damages. (R. 1440-1457.) This fact has never been disputed by Appellee. Certification of the assumed name is a precondition for Appellee to bring suit on the lease that names Parkside Apartments as the "lessor" or the contracting party in interest. If Appellant acquired standing to sue on a lease that does not name him, it must stem from the fact that the named lessor is merely Appellee's assumed name—which the Court has apparently accepted by entering judgment in his favor. By conducting business as Parkside Apartments, without filing the certificate with the State's Division of Corporations, Appellee committed a clear violation of the statute.

The issue before this Court is whether subject matter jurisdiction existed for the district court to hear and/or enter judgment on Appellee's Complaint despite his violation of Utah Code Annotated 42-2-5 and the accompanying penalty provided in Utah Code

Annotated 42-2-10. Appellant maintains that no subject matter jurisdiction exists precisely because it is “prohibited by law” as a “penalty.” (Utah Code Annotated 78-3-4(1) (district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution **and not prohibited by law.**”) (Emphasis added.))

Ordinarily, statutes that give rise to causes of action expressly grant jurisdiction to particular courts. This statute, however, instead of granting jurisdiction, expressly removes jurisdiction from “**any of the courts of this state.**” Utah Code Annotated 42-2-10(1). The statute deals directly with the courts as much as it does the person in non-compliance.

Moreover, the language in *Blodgett v. Zion's First National Bank*, 752 P.2d 901 (Utah App. 1988), the controlling case on this issue, which states that “access to the courts [is denied]” reasonably implies that the court, which only has jurisdiction expressly granted, is without jurisdiction to hear the subject matter of any claim made by one whose access has been barred as a sanction and penalty:

We acknowledge that Utah Code Annotated Section 42-2-10 (1981) mandates that any persons who conduct business under an assumed name cannot sue, prosecute, or maintain any action in any of the courts unless they comply with the name registration statutes...[T]he only **sanction** for this non-compliance with the assumed name is **denying [plaintiff] access to the courts.** (Emphasis added.)

Blodgett at 905. See *Wall Inv. Co. v. Garden State Distributing*, 593 P.2d 542, 544 (Utah 1979).

The statute plainly refers to this inaccessibility to the courts as a “penalty.” The Court of Appeals views the penalty as a “sanction.” More importantly, the plain language of the statute bars the Court itself from hearing any action brought by a person in violation of the statute, thereby removing jurisdiction over this particular action which

is “prohibited by law.” See Utah Code Annotated 78-3-4(1) (Emphasis added.) If the sanction and penalty is that access to the courts is denied, it logically follows that the court cannot remove the penalty and grant access that is prohibited by law. As such, jurisdiction has been removed from the district court over claims arising from an unregistered assumed name.

II.

THE TRIAL COURT SHOULD HAVE VACATED JUDGMENT ON APPELLEE’S COMPLAINT BECAUSE IT IS LEGALLY VOID PURSUANT TO U.C.A. § 42-2-10.

“Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed. Without jurisdiction over the subject matter alleged in plaintiff’s claims, the court was without authority to proceed or enter any adjudication on the merits of the claims.” *Transworld Systems Inc. v. Robinson*, 796 P.2d 409 (Utah App. 1990). If Appellee’s claims were barred as a “penalty” and “sanction,” the Court had no authority over his claims and any judgment is void.

Appellee’s Complaint for eviction was brought and maintained entirely on the basis that Appellant allegedly breached the lease agreement entered with the assumed name Parkside Apartments. (R. 1-5.) The entity known as Parkside Apartments and the person conducting business under the assumed name “Parkside Apartments” cannot maintain an action in any court in the state. Therefore, while the Court has general jurisdiction over the type of action brought by Appellee, the Court does not have authority or jurisdiction over the subject matter in this particular action because Appellee is barred from bringing the action, and jurisdiction over this specific action is removed from the courts of the state by statute.

“Judgment is void when entered by a court that lacks subject matter jurisdiction over the controversy, and must be set aside.” *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337 (Utah App. 1991); *Thompson v. Jackson*, 743 P.2d 1230 (Utah App. 1987). The *Van Der Stappen* case provides guidance on the issue of when a judgment is considered void. The case involved a motion to set aside a divorce decree on grounds that the court lacked subject matter jurisdiction because the marriage was void pursuant to statute in that one of the parties was still married to her first husband when she subsequently married the appellant. The Court of Appeals reversed the lower court’s denial of the Rule 60(b) Motion for Relief from Judgment and found that since the marriage was void, the court lacked subject matter jurisdiction when it entered the divorce decree and it too was void and must be set aside. The lower court had subject matter jurisdiction over divorces *but not that specific divorce* because the marriage itself was precluded by statute.

In the present case, the trial court has jurisdiction over evictions *but not this eviction* because Appellant is precluded by statute from maintaining this action. The judgment entered against Appellee is void because the lease is unenforceable by Appellee against Appellant under Utah Code Annotated 42-2-10(1) which precludes Appellee from enforcing any rights arising from business conducted under the assumed name in any court of the state. Inasmuch as Appellee’s right to sue under the lease was barred as a sanction, there was no subject matter jurisdiction over the lease or controversy and the judgment is therefore void. “Subject matter jurisdiction cannot be conferred upon a court by consent or waiver, and a judgment can be attacked for lack of subject matter jurisdiction as any time.” *Van Der Stappen* at 1337.

III.

THE TRIAL COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT ON NOTHING MORE THAN A PROPOSED ORDER WHERE NO MOTION, AFFIDAVITS, OR STATEMENT OF UNDISPUTED FACTS OR TESTIMONY WERE PRESENTED.

Summary Judgment is governed by Rule 56 of the Utah Rules of Civil Procedure

which states:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof...

(c) Motion and Proceedings Thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 4-501 of the Code of Judicial Administration states in pertinent part:

(2) Motions for Summary Judgment.

(a) Memorandum in Support of a Motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in Opposition to a Motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if

applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Despite these longstanding rules of procedure, the trial court granted summary judgment on Appellee's complaint based on a proposed order that was simply filed together with affidavits setting forth the amount costs and fees incurred, but not setting forth any undisputed facts upon which summary judgment must be entered as a matter of law. (R. 1143-1179;1194-1199;1203-1205.) No motion for summary judgment was filed and no evidence was introduced to indicate that all the issues had been resolved in favor of Appellee at the hearing before Judge Burton more than a year earlier. As previously explained *supra*, Judge Fratto was completely in the dark as to the issues reached and testimony rendered at the hearing before Judge Burton. No transcript exists of the testimony or the hearing, except for a five page excerpt provided by Appellee which clearly indicates that Judge Burton reserved all issues other than the issue of restitution of premises for a future time. Nothing in the record indicates that said hearing fully reached all the issues related to Appellee's complaint or Appellant's answer and defenses. On the contrary, the record indicates clearly that Judge Burton stated,

“Does Ms. Santana get to stay in the place or leave? The issues of damages clearly, either on the counterclaim or on any claim by the plaintiff here, ought to be reserved until a later date. But I am going to order at this juncture that a writ of restitution be issued on behalf of the plaintiff....So it's a simple answer. The plaintiff can have the property back, a writ of restitution can issue, that all damages are reserved on each side and no other orders are going to issue except this stay on the quashing of the subpoena.” (R. 1278-1285.)

Clearly Judge Fratto had no additional evidence as to the facts, defenses or testimony presented at the hearing before Judge Burton and could not have based his

entry of summary judgment on said hearing. Judge Fratto blindly granted summary judgment simply because Appellee stealthily filed a proposed order for damages on unpaid rent and unlawful detainer before any of the issues pertaining to damages could be properly adjudicated.

“A trial court may properly grant summary judgment or directed verdict only when reasonable minds could not differ on the facts to be determined from the evidence presented.” *Olympus Hill Shopping Center, LTd v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah App. 1994); *Heslop v. Bank of Utah*, 839 P.2d 828, 838 (Utah 1992); *West One Trust Co. v. Morrison*, 861 P.2d 1058, 1060 (Utah App. 1993). “The trial court must access those facts in a light most favorable to the party opposing the motions and must conclude, as a matter of law, that they do not support the claim presented.” *Olympus Hill* citing *Heslop*, 839 P.2d at 838.

Appellant filed an affidavit and Objection to the proposed order requesting a hearing and setting forth disputed facts that supported her defenses as set forth in her Answer to Appellee's complaint. (R. 6-33.) Nothing in the court record indicates that Appellant's defenses to **contract and damages** were intended by Judge Burton to be heard at the summary proceeding held on August 24, 1997 which only determined whether rent had been paid and a writ of restitution should issue. (R. 1278-1285.) Nothing in the record indicates a waiver of said defenses or that an opportunity to have the defenses heard was afforded.

IV.

**EQUITABLE ESTOPPEL PRECLUDED APPELLEE FROM
RECOVERING TREBLE DAMAGES AND ATTORNEYS FEES
BECAUSE HE GAVE NOTICE OF INTENT TO DENY**

APPELLANT’S RIGHT TO REINSTATEMENT UNDER U.C.A. § 78-36-8.5(2)(a).

Appellee filed a Complaint and sought to benefit from Utah Code Annotated § 78-36-1 et seq. In actions for unlawful detainer, however, “statutes provide severe remedy and must be strictly complied with before cause of action thereon may be maintained.” *Van Zyverden v. Farrar*, 393 P.2d 468, 470 (Utah 1964).

Appellant demonstrated that Appellee had served her a Notice of Tenant’s Rights stating that she now had the right to pay the rent and be reinstated in the lease at the same time he served a Notice of Non-Renewal which cancelled out her right to reinstatement, and further alleged that Appellee had thereby intentionally deprived her of the right afforded her under the unlawful detainer statute. (R 1277. **See Addendum** page 1277.) Appellee did not dispute those facts. Therefore, the trial court was bound to require Appellee to demonstrate strict adherence under the statute before awarding him the benefits of the statute and entering judgment in his favor on November 2, 1998. (R.1410-1421.)

Judge Burton declined to reach the issue of damages and simply found at the August 24, 1997 hearing that possession rightly belonged to Appellee because Appellant had not paid the rent due. (R 1278-1285) While Plaintiff was entitled to possession, he was not entitled to treble damages or attorneys fees under the doctrine of equitable estoppel because he did not comply with the provisions of the statute, and acted to prevent Appellant from being reinstated in the lease as required under Utah Code Annotated § 78-36-8.5 (2)(a).

(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fee, and other costs, including attorney's fees, as provided in the rental agreement. (Emphasis added.)

On August 12, 1997, Appellee executed the Notice of Bond together with the Notice of Rights of Tenants which notified Appellant she had the right to pay the accrued rent and be reinstated in the lease. By no coincidence on that same day, in what appeared a deliberate attempt to preempt the three days to pay and be reinstated. Appellee served a Notice of Non-Renewal stating that Appellant's lease would not be renewed and she must move within 18 days. (R 1277. **See Addendum** page 1277.)...) Appellant's lease did not allow for termination upon 18 days notice but required 30 days notice. "If the tenancy reverts to a month to month tenancy, written notice of termination must be given by either party at least 30 days before the end of the month." (R. 1-5.) Appellant reasonably interpreted the Notice of Non-Renewal served on the same day as a device by Appellee to circumvent Appellant's right to elect reinstatement. In a case analogous to this one, *Monter v. Kratzers Specialty Bread Co.*, the Court held, "The landlord cannot prevent the tenant from paying the judgment and regaining his rights under the unexpired lease by the device of failing to have the amount of rent due included in the judgment." 504 P.2d 40, 42 (Utah 1972). At the time Appellee served the Notice of Tenant's Rights, the amount owed was minimal as Plaintiff was acting pro se and the unpaid rent amounted to less than one month. (R 1-5.)

"[Equitable estoppel requires] requires three essential core elements: 1) a party's statement, admission, act, or failure to act that is inconsistent with a later asserted claim; 2) reasonable action or inaction by a second party, taken on the basis of the first party's statement, admission,

act, or failure to act; 3) injury to the second party resulting from allowing the first party to repudiate its statement, admission, act, or failure to act.” *Mendez v. State of Utah*, 813 P.2d 1234, 1236 (Utah App. 1991); *Ceco Corp. v. Concrete Specialists*, 772 P.2d 967, 969-70 (Utah 1989).

Appellant was sufficiently clear on Appellee’s intent not to allow her to stay no matter what she did. Appellant reasonably relied upon Appellee’s representations and elected the alternative remedy of requesting a hearing rather than risk that payment of rent would nonetheless result in another action for eviction pursuant to the Notice of Non-Renewal. The trial court should not have allowed Appellee to repudiate his actions in blocking Appellant’s right to pay and be reinstated. Appellant suffered injury because the trial court allowed Appellee to repudiate his actions and recover treble damages and attorneys fees under the statute when he made clear his intent to obtain the statute’s benefits but block Appellant’s rights under the same statute.

“Equitable estoppel...is a doctrine of Equity to prevent on party from deluding or inducing another into a position where he will unjustly suffer loss.” *J.P. Koch, Inc., v. J.C. Penny Co., Inc.*, (Utah 1975). A trial court’s finding that equitable estoppel is inapplicable is reviewed for correctness. *Holland v. Career Services*, 856 P.2d 678, 682 (Utah App. 1993). The trial court had a duty to consider Appellant’s claims for equitable estoppel and entirely failed to enter any findings or conclusions as to the inapplicability of the doctrine despite Appellee’s failure to dispute the facts.

V.

THE FACTS SUGGEST PROCEDURAL UNCONSCIONABILITY AND THE TRIAL COURT FAILED TO VIEW THE FACTS IN A LIGHT MOST FAVORABLE TO APPELLANT.

The evidence as demonstrated by the lease itself shows that Appellant moved into the apartment seven weeks before signing the rental lease. (R. 1206-1207; 1210-1211;

1226.) Appellant alleged by affidavit that she was not presented a lease until after moving into the apartment seven weeks later. (R. 1206-1207; 1210-1211.) No counter-affidavits or testimony was introduced by Appellee to dispute those facts.

Before entering summary judgment and ignoring Appellant's objections and factual allegations supporting procedural unconscionability, the trial court should have either taken testimony on the issue or accepted Appellant's undisputed factual allegations as precluding summary judgment. The lease was an adhesion contract because it was "prepared in a standardized form and presented on a take-it-or-leave-it basis to one occupying a disadvantaged bargaining position." *System Concepts, Inc. v. Dixon*, 669 P.2d 421 (Utah 1983). Courts have long refused to enforce contract terms arising from this sort of procedural unconscionability. *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028 (Utah 1985); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

Inasmuch as the lease was presented seven weeks after moving into the apartment, the trial court erred in not viewing the facts in the light most favorable to Appellant on the issue and in blindly granting attorneys fees under the lease to Appellee. *Heslop*, 839 P.2d at 838.

VI.

THE TRIAL COURT ENTERED NO FACTUAL FINDINGS ON THE AWARD OF ATTORNEYS FEES AND DID NOT DISTINGUISH BETWEEN RECOVERABLE AND NON RECOVERABLE FEES.

"An award of attorney fees must be based on the evidence and supported by findings of fact." *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992). One who seeks an award of attorney fees, therefore, has the burden of producing evidence to

buttress the requested award. See *Cottonwood* at 268; *Hal Taylor Assoc. v. Unionamerica, Inc.*, 657 P.2d 743, 750-51 (Utah 1982). When the evidence presented is insufficient, an award of attorney fees cannot stand. See *Dixie State Bank*, 764 P.2d at 989. In this regard, we have mandated that a party seeking fees must allocate its fee request according to its underlying claims. See *Cottonwood Mall*, 830 P.2d at 269-70. Indeed, the party must categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." *Id.* at 269-70; see also *Valcarce v. Fitzgerald*, 961 P.2d 305, 317 (Utah 1998) (petition for rehearing pending). Claims must also be categorized according to the various opposing parties. See *Turtle Management*, 645 P.2d at 671. *Footte v. Clark*, 962 P.2d 52, 55 (Utah 1998).

VII.

THE AWARD OF ATTORNEYS FEES WAS EXORBITANT AND UNREASONABLE IN THE ABSENCE OF BAD FAITH ON THE PART OF APPELLANT.

Appellee filed his Complaint for eviction claiming \$215 in unpaid rent. The trial court awarded \$ 31,465.29 in attorneys fees or 146 times the amount of damages requested. No factual findings of bad faith or even reasonableness were made by the trial court to justify such an exorbitant award of attorneys fees. "Whether attorney fees are recoverable is a question of law." See *Selvae v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257 (Utah Ct.App.1996). By reason of Appellant's objections and defenses of equitable estoppel and procedural unconscionability, the trial court should not have awarded

attorneys fees in the absence of evidence from Appellee disputing the facts that gave rise to said defenses.

The trial court failed to properly categorize the fee request or detail the factors it considered in computing the award. “Whether the trial court's findings of fact in awarding attorney fees are sufficient is a question of law which we review for correctness.” *Endrody v. Endrody*, 914 P.2d 1166, 1169 (Utah Ct.App.1996). This is not a case where the trial court awarded \$31,465.29 in attorneys fees and explained how it arrived at this amount. The trial court simply signed Appellee’s proposed order vaguely stating,

“Plaintiff as the prevailing party both in prosecuting the claims of the Complaint and in defending against the affirmative defenses and counterclaims and other discovery and procedural filings of Defendant in this action, is further awarded judgment against Defendant for attorney fees and costs incurred by Plaintiff to his attorneys at Nielson & Senior for legal work actually performed by Nielson & Senior through November 2, 1998 in the sum of \$31, 465. 29 which work was reasonably necessary to adequately prosecute this action to judgment and was billed at rates consistent with rates customarily charged in this community for similar services, all of which fees and costs are authorized pursuant to the provisions of Sections 10 of the Uniform Residential Rental Agreement promulgated and approved by the Apartment Association of Utah which was signed and otherwise accepted and agreed to by Defendant and pursuant to section 78-36-10(3) of the Utah Code.” (R. 1410-1421.)

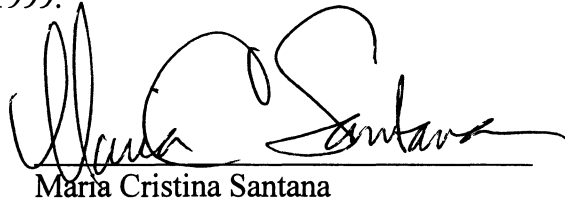
More importantly, the trial court entered no Findings of Fact and therefore the judgment is so lacking in support as to be against the clear weight of the evidence thus making it clearly erroneous. The trial court altogether failed to ascertain facts upon which Appellee was entitled to attorneys fees because it did not review the testimony of the hearing before Judge Burton on the order of restitution (as no transcript existed) and did not hold an evidentiary hearing on Appellant’s defenses, objections and factual allegations contained in the Answer to Appellee’s complaint. Judge Fratto simply

assumed that Judge Burton had considered all the issues and assumed that damages on the unlawful detainer were a matter of course and that Appellee's filing of a proposed judgment was proper without any evidence or factual support for summary judgment on the issue of damages or on the issue of Appellant's affirmative defenses as contained in her Answer and Objection to Proposed Order. (R. 6-33; 1206-1306.)

CONCLUSION

The evidence before the court clearly establishes that the legal conclusions made by the trial court are incorrect and unsupported by adequate factual findings and were so lacking in support as to be against the clear weight of the evidence making them clearly erroneous. Accordingly, the judgment dated November 2, 1998 should be reversed.

DATED this 20 day of Dec 1999.



Maria Cristina Santana

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of Dec 1999, I caused to be served by US mail a true and correct copy of the foregoing upon:

David Mortensen
48 North University Avenue
PO Box 657
Provo, Utah 84603



IN THE UTAH COURT OF APPEALS

MICHAEL V. SHIELDS,

Plaintiff/Appellee,

vs.

MARIA CRISTINA SANTANA,

Defendant/Appellant,

MARIA CRISTINA SANTANA,

Counterclaimant/Appellant,

vs.

MICHAEL V. SHIELDS, et al.,

Counterclaim Defendants/Appellees.

**ADDENDUM TO APPELLANT'S
OPENING BRIEF**

Case No. 981723-CA

Priority No.

INDEX TO ADDENDUM

Judge Burton's partial transcript of August 24, 1997 hearing reserving all issues on damages for future time.	(R.1278-1285)
Order of restitution	(R. 152-154)
Judgment For Plaintiff on Action for Unpaid Rent and Unlawful Detainer	(R.1410-1414)
Objection to Proposed Judgment with exhibits.	(R.1210-1301)

IN THE THIRD DISTRICT COURT, DEPARTMENT II

STATE OF UTAH, MURRAY DEPARTMENT

-oOo-

MICHAEL V. SHIELDS,

Plaintiff,

-vs-

MARIA (CRISTINA) SANTANA,

Defendant.

:
:
: Civil No. 970005271
:
: Judge Michael Burton
:
:
:
:
: TRANSCRIPT OF RULING
:
: ON MOTION
:

-oOo-

Date:

August 25, 1997

A P P E A R A N C E S

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CERTIFIED COPY

INDEPENDENT REPORTING
& VIDEOGRAPHY

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801-522-2222



P R O C E E D I N G S

1
2 THE COURT: I think my initial reaction is: We are a
3 liberal, I guess, notice pleading state but there is this
4 issue of notice that ought to be followed.

5 MR. MANGUM: We understand.

6 THE COURT: And I think on the issue of this
7 restraining order and the quashing of the subpoenas,
8 Mr. Orifici makes a point, and I think I can't ignore it, that
9 they're not properly before me right now.

10 I think it is fair at this juncture, if the informa-
11 tion has not been divulged by these institutions, to grant an
12 order staying the implementation of the subpoenas until at
13 least September 20. And I just pick that day, it gives every-
14 body a chance to come in and talk about it if they want. So I
15 will order that, an order staying.

16 But on the issue of the ultimate quashing of the
17 subpoena or the restraining against Ms. Santana for acts that
18 some people think she may or may not have committed or will
19 commit, I don't think it's before me at this juncture. So
20 that's my ruling on that one. You can have an order that
21 allows you until September 20 but after that, if nothing's
22 been done, no resolution reached, they'll go ahead.

23 All right. To me then--I've answered some questions
24 and the question it really comes down to is: Does Ms. Santana
25 get to stay in the place or leave? The issues of damages

1 clearly, either on the counterclaim or on any claim by the
2 plaintiff here, ought to be reserved until a later date. But
3 I am going to order at this juncture that a writ of
4 restitution be issued on behalf of the plaintiff. And the
5 reason I do this is as follows.

6 Number one, I have no evidence that any rent beyond
7 the \$300 was ever tendered and so there's clearly no failure
8 to accept that tender of rent. So I find as a matter of fact
9 that she was \$215 behind in her July rent. I've already found
10 that she was properly served a three-day notice to pay or
11 quit. It's clear that she continues to possess the property
12 and she is in unlawful detainer and the plaintiff has supplied
13 the bond. She ought to be--and on that issue of possession,
14 it ought to go to the plaintiff.

15 I don't know if I need to be more specific, but on
16 this issue of habitability it's clear to me that no evidence
17 has been presented to me along the lines of what Utah
18 recognizes as a covenant of habitability that anything has
19 ever been done as regards Ms. Santana and her occupancy there
20 to say that these folks violated the covenant of habitability.

21 And I don't know if there are other issues that I
22 need to answer, but I'd like to do that if there are any that
23 you think, Mr. Mangum, ought to be answered today.

24 So it's just a simple answer. The plaintiff can have
25 the property back, a writ of restitution can issue, that all

1 damages are reserved on each side and no other orders are
2 going to issue except this stay on the quashing of the
3 subpoena.

4 MR. MANGUM: Understood, Your Honor. I do have a--

5 THE COURT: Do you have any other issues that--

6 MR. MANGUM: --form of order for writ of rest--

7 THE COURT: Do you have any other issues that you
8 think I need to answer?

9 MR. MANGUM: Not at this point.

10 THE COURT: Mr. Orifici, is there something I missed
11 on your end--

12 MR. ORIFICI: No, Your Honor.

13 THE COURT: --that I need to answer right now? All
14 right. So, you've got something to sign?

15 MR. MANGUM: An order of restitution of the premises.

16 THE COURT: If I may get a look at it.

17 MR. MANGUM: If I could just verify, Your Honor. I
18 did have to make an interlineation on Point 1. I had the
19 wrong unit number specified there. And does your copy read
20 Unit 36 or Unit 21?

21 THE COURT: It does not.

22 MR. MANGUM: It should say 36, not Unit 21.

23 THE COURT: Okay.

24 MR. MANGUM: That's my mistake and I apologize.

25 THE COURT: All right. Well, do you plan to serve

1 her today?

2 MR. SHIELDS: Please.

3 MR. MANGUM: We would like her to be served here in
4 open court.

5 THE COURT: Okay. So, I mean, this issue of when I'm
6 going to order her out, she has three days from today.

7 MR. SHIELDS: Thank you.

8 THE COURT: So I guess we should make it conform.
9 Restore possession thereafter to the plaintiff on the--let's
10 see. Well, Ms. Santana, they're going to serve you today on
11 this order of restitution.

12 MS. SANTANA: That's fine. I accept.

13 THE COURT: And we're at 5:30 and today's the 25th,
14 so--let's see, you get 26, 27 and 28, so by the 29th day of
15 August at 5:30 p.m. That, by my calculation, is three days
16 from today, not counting today's date as the date of service--
17 it being the day of service.

18 And then, Ms. Santana, you folks have the right to
19 appeal, obviously, and the right to contest the order if it's
20 done within three days of the order and, of course, the right
21 to appeal pursuant to the statute.

22 MR. MANGUM: Your Honor, a point of clarification.
23 Three business days, if we understand it, from today, being
24 the 25th, would be the 28th. Have we miscounted?

25 THE COURT: Well, I've got it the 26th, 27th and

1 28th, three to leave. Oh, yeah, okay. The 28th.

2 MR. MANGUM: Thank you.

3 THE COURT: All right. So it's the 28th. All right.

4 Do you have a copy of this for them?

5 MR. MANGUM: I do. And if I could get that

6 conformed.

7 THE COURT: Anything else, Mr. Orifici? Any

8 questions you might have?

9 MR. ORIFICI: None that I can think of, Your Honor.

10 The only thing I would like to do is just request a tape

11 transcript.

12 THE COURT: Carolyn, how is that done? Now on the

13 transcript, we give you the tape and then you--we make a copy

14 of the tape and then you just work out the transcription part.

15 (Discussion about obtaining tape.)

16 MR. ORIFICI: We appreciate your time and considera-

17 tion, Your Honor.

18 THE COURT: No problem. Thank you both.

19 MR. MANGUM: Thank you, Your Honor, for your

20 attention to this matter.

21 THE COURT: Everything else is reserved for and at a

22 later date.

23 (This ends the requested portion of this hearing.)

24 * * *

25 * * *

C E R T I F I C A T E

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Rashell Garcia, a Certified Shorthand Reporter and
Notary Public within and for the County of Salt Lake, State of
Utah, do hereby certify:

That the foregoing tape-recorded proceedings were trans-
cribed into typewriting under my direction and supervision and
that the foregoing pages contain a true and correct transcrip-
tion of said proceedings to the best of my ability to do so.

IN WITNESS WHEREOF, I have hereunto subscribed by name and
affixed my seal this 19th day of January 1998.



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