

1989

Juanita Kenyon v. Steve Regan : Brief of Respondent

Utah Court of Appeals

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James H. Deans; Attorney for Appellant.

Bruce Plenk; Utah Legal Services, Inc.; Attorneys for Respondent.

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IN THE UTAH COURT OF APPEALS

JUANITA KENYON,

Plaintiff/Respondent,

vs.

STEVE REGAN,

Defendant/Appellant.

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Case No. 890462-CA

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BRIEF OF RESPONDENT

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IN THE UTAH COURT OF APPEALS

JUANITA KENYON,

Plaintiff/Respondent,

vs.

STEVE REGAN,

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IN THE UTAH COURT OF APPEALS

JUANITA KENYON,

Plaintiff/Respondent,

vs.

STEVE REGAN,

Defendant/Appellant.

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Case No. 890462-CA

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDING

This Court has jurisdiction to hear this appeal pursuant to Utah Code §78-2a-3(2)(d) and §78-4-11.

ISSUES PRESENTED

1. Whether the trial court correctly found tenant to be entitled to a rent rebate after her landlord refused to remedy serious and repeated code violations at her rented residence.

2. Whether the trial court's finding of constructive eviction is clearly erroneous.

DETERMINATIVE STATUTES AND RULES

Salt Lake City-County Health Department Regulation #3 Housing.
(See Addendum for text).

STATEMENT OF THE CASE

This is an action for damages by a former tenant against her landlord. Tenant (Kenyon) rented a house from landlord (Regan) in Salt Lake City on October 15, 1986 and resided there until approximately March 31, 1988 (R.35, Tr.92). Throughout her tenancy, numerous problems existed with the premises. Tenant notified

landlord of these problems, however the vast majority of them remained unrepaired (R.36). Tenant contacted the Salt Lake City-County Health Department who inspected the premises in November, 1987 and notified landlord of numerous defects, most significant of which were a collapsed ceiling in the living room, an inoperative furnace, and numerous plumbing problems, all of which were ordered repaired (Exs.P-1 and 2, R.36, Tr.49-50). Landlord did not make the repairs despite five letters from the Health Department (Exs.P-5,P-6,P-7, R.36, Tr.52-56). Tenant vacated the premises on March 31, 1988 and later brought this action seeking a rebate for rent paid during the time the residence did not comply with applicable health codes.

The case was tried on April 26, 1989, before the Hon. Eleanor Van Sciver who awarded damages of \$1180 to tenant, offset by a judgment of \$440 to landlord on his counterclaim for unpaid rent. The trial court found that landlord was entitled to full rent for the period before he was notified of the code violations on December 8, 1987 but that his failure to repair the defects in the premises after notice constituted a constructive eviction of tenant and terminated her obligation to pay rent. Accordingly, tenant was awarded judgment representing the rental value of the premises during the months of December, 1987, and January, February and March, 1988 when the serious code violations remained unrepaired (R.36., Tr.135-36).

SUMMARY OF ARGUMENT

Landlord constructively evicted tenant by failing to make repairs ordered by the local health department to remedy serious code violations. The deteriorated condition of the premises rendered them unsuitable for habitation, at least in part.

The trial court properly found that tenant was entitled to a rent rebate for the period prior to her vacating but after health department notice of the defects to landlord.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT A CONSTRUCTIVE EVICTION OCCURRED HERE

Landlord appeals from a judgment finding that tenant was constructively evicted by landlord from and after December 1, 1987 through March 31, 1988 and awarding tenant a rent rebate for those months. Landlord attacks the trial court's finding of constructive eviction claiming that the evidence does not support this finding. Landlord's contentions should be rejected on both standard of review and substantive grounds.

A successful challenge to the correctness of a trial court's findings of fact requires an appellant to marshall all the evidence supporting the finding and then to demonstrate that the evidence is legally insufficient to support the findings, even viewing them in the light most favorable to the court below. Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896,899 (Utah 1989). The findings are then evaluated for legal sufficiency under the "clearly erroneous"

standard of Rule 52(a), Utah Rules of Civil Procedure. The finding will be overturned as lacking adequate evidentiary support only if that finding is against the great weight of the evidence. Reid, 776 P.2d at 899-90. And, of course, this court can affirm on any proper grounds, whether relied upon by the trial court or not. Buehner Block Co. v. UWC Assoc., 752 P.2d 892 (Utah 1988).

Landlord here simply has not demonstrated that the evidence does not support the findings. The trial court's finding of constructive eviction is one of fact, Krieger v. Elkins, 620 P.2d 370, 372 (Nev. 1980); American National Bank & Trust Co. v. Sound City, U.S.A., Inc., 385 N.E.2d 145 (Ill.App.1979), and thus subject to the "clearly erroneous" standard. The trial court's conclusion that tenant was entitled to a rent rebate is supported by the findings and together the findings and conclusions are "sufficiently detailed to reveal the trial court's reasoning process." Reid, 776 P.2d at 899. The evidence provides support for each of the findings and conclusions that the court entered (R.36-7).

The Reid case is instructive here because that case, recently decided by the Utah Supreme Court, was also a constructive eviction case. There the appellate court found that the appellant had not presented any evidence to establish a clearly erroneous finding of fact or an unsupported conclusion of law and upheld the trial court's determination regarding constructive eviction. This court should do likewise here.

Utah courts have developed the common law of constructive

eviction and have resolved some of the issues involved but others remain open. Constructive eviction is established "where a tenant's right of possession and enjoyment of the leased premises is interfered with by the landlord, or persons under his control, as to render the premises, or a part thereof, unsuitable for the purposes intended," Brugger v. Fonoti, 645 P.2d 647,648 (Utah 1982); Backman, Landlord-Tenant Law: A Perspective on Reform in Utah, 1981 Utah L.Rev. 727, 731-32 (hereinafter Backman). The landlord need not intend to evict the tenant, "it is enough that his acts or omissions make reasonably necessary the tenant's leaving." Deseret Federal Savings and Loan Assoc. v. U.S.F. & G Co., 714 P.2d 1143, 1146 (Utah 1986). Finally, the tenant must abandon the premises within a reasonable time after the landlord's interference begins or waive the right to claim constructive eviction. Thirteenth & Washington Sts. Corp. v. Neslen, 123 Utah 70, 254 P.2d 847, 852 (1953). Tenant vacated as soon as she could afford to given her limited income from her welfare check (Tr.101-2). When a constructive eviction occurs, the tenant is no longer obligated to pay rent. Backman at 731.

Here, the elements of constructive eviction are met. The numerous and serious code violations and landlord's failure, despite several notices from the Salt Lake City-County Health Department, to remedy them, show substantial interference sufficient to establish constructive eviction. "The failure to do some act or to adequately perform it, may render a building just as untenable as affirmative interference." Thirteenth &

Washington Sts., 254 P.2d at 850. The failure of a landlord to remedy problems concerning leaking roofs (Tr.96) and defective plumbing (Tr.95) has been found to constitute constructive eviction in other cases. See Sewell v. Hukill, 356 P.2d 39 (Mont.1960); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d.268 (1969). Here the roof leaked to the extent that the ceiling in tenant's living room collapsed, making it impossible to continue to use that part of the house. Numerous heating and plumbing problems persisted as well (Exs.P-1,P-2,P-5,P-6, and P-7, R.36, Tr.48-56, 92-100).

Here, tenant vacated the premises within a reasonable time, meeting the secondary requirement of constructive eviction theory. What constitutes a reasonable time varies with each situation and is a question of fact for the trial court to determine in light of all of the circumstances of the case. Reste Realty, 251 A.2d at 277; American National Bank, 385 N.E.2d at 146. There is no need to immediately vacate to claim constructive eviction. The Kentucky Court of Appeals put it this way:

The mere fact that the tenant continues to live for a while with a deteriorating condition does not in itself constitute a waiver. Where there is a continuing breach with cumulative effect, the tenant does not lose his right to claim constructive eviction because he does not leave the premises promptly after the creation of the first objectionable condition.

Cox v. Hardy, 371 S.W.2d 945,946 (Ky.App. 1963).

Here, tenant remained for several months because she believed that repairs might be made (Tr.94,97,101). The Utah Supreme Court, as well as other courts, have determined that waiting for repairs

is a reasonable basis for not vacating immediately. In Thirteenth & Washington Sts. 254 P.2d at 852, the Utah Supreme Court held that

the troubles as to most of the defects complained of continued practically through the length of defendant's occupation and that during both winters defendants had heating problems but did not move out until early summer. . . [R]epeated complaints were followed by promises from [Landlord] that the conditions would be improved . . . Defendants were justified in waiting to see if the promises would be fulfilled....

There the court found that tenants did not waive their right to claim constructive eviction by waiting approximately two years before moving from the premises. Here, Ms. Kenyon continued in possession of the premises for only four months after the repairs were first ordered.

Likewise, the Montana Supreme Court held in Sewell that "If the condition causing the eviction is something which can be remedied by the landlord, then the tenant should not be said to have waived his rights by remaining in possession until the landlord has had a chance to make repairs." 356 P.2d. at 42. See also Annotation, Constructive Eviction, 91 ALR2d 638 at 654 (1963). If landlord had made the repairs ordered by the health department in a timely fashion, tenant's claim would be defeated. Brugger, 645 P.2d.at 648. Here, however, most of the required repairs were never made at all (Tr.55,96,114, Ex. P-7).

POINT II

THE TRIAL COURT WAS CORRECT IN AWARDING JUDGMENT TO PLAINTIFF

Landlord has argued that the trial court improperly awarded tenant a rent rebate for the four months she continued to occupy the premises. Brief of Appellant at 3. Procedurally, this action by the trial court is correct and under standards of review discussed above, this court should affirm.

There are also sound public policy reasons and case precedent from New York state for awarding tenant damages in the form of a rent rebate in circumstances like those here. The courts have utilized a theory of partial constructive eviction without abandonment to reach this result. In East Haven Associates Inc. v. Gurian, 64 Misc.2d 276, 313 N.Y.S.2d 927, 931 (N.Y.C. Civil Ct. 1970), the air conditioner leaked water and an incinerator spewed ash on the terrace of an apartment. The tenants remained in possession for seventeen months but were deprived of the use of the terrace. The court found that a partial constructive eviction occurred when the family ceased to use the terrace and that "from the time of the partial eviction, the defendant had the right to stop paying rent." The court explained its decision as follows:

The very idea of requiring families to abandon their homes before they can defend against actions for rent is a baffling one in an era in which decent housing is so hard to get, particularly for those who are poor and without resources. It makes no sense at all to say that if part of an apartment has been rendered uninhabitable, a family must move from the entire dwelling before it can seek justice and fair dealing.

Several earlier decisions had adopted this rationale. "[T]he tenant is not required to pay rent, even for the part he retains and uses, when he has been constructively evicted from the other part." Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195, 197 (Bronx Mun. Ct. 1946). See also Goldberg v. Cosmopolitan National Bank of Chicago, 33 Ill. App. 2d 83, 178 N.E.2d 647 (Ill.App. 1961).

In a commercial context, the New Mexico Supreme Court found a partial constructive eviction without the need to vacate and awarded tenant a partial rent offset where a restaurant/bar was deprived of the use of the second floor of the premises but continued to use the first floor. The court held that rent owed should be offset by the extent of the diminished facilities. Dennison v. Marlowe, 106 N.M.433, 744 P.2d 906, 910 (1987); after remand, affirming offset, 108 N.M. 524, 775 P.2d 726 (1989). A similar result, involving a percentage rent abatement on a theory of partial constructive eviction without abandonment in a residential setting was reached in Minjak Co. v. Randolph, 140 A.D.2d 245, 528 N.Y.S.2d 554,557(N.Y.App.Div.1988). This court should affirm the trial court's similar analysis here.

CONCLUSION

Appellant has failed to raise any procedural or substantive basis for reversing the trial court's decision. The finding of constructive eviction is not clearly erroneous and is supported by the overwhelming weight of the evidence. Likewise, the trial

court's decision awarding a rent rebate is sound. This court should affirm the trial court decision.

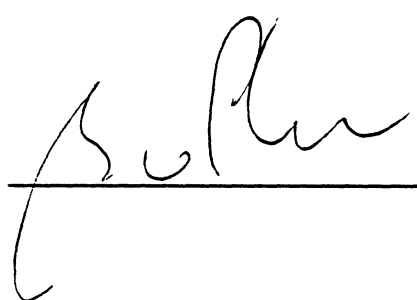
DATED this 30th day of January, 1990.

UTAH LEGAL SERVICES, INC.
Attorneys for Respondent


BY: BRUCE PLENK

CERTIFICATE OF MAILING

I do hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent to: James H. Deans, Attorney for Appellant, 440 South 700 East, Suite #101, Salt Lake City, Utah 84102 on this 30th day of January, 1990, postage prepaid.



SALT LAKE CITY-COUNTY HEALTH DEPARTMENT

HEALTH REGULATIONS

#3

HOUSING

Adopted by the Salt Lake City-County
Board of Health

June 4, 1981

5.0 RESPONSIBILITIES OF OWNERS AND OCCUPANTS.

The division of responsibility between owners and occupants for maintenance, sanitation, and repair of dwellings or dwelling units shall be as follows. Any person violating any duty imposed by these regulations shall be liable for that violation(s) even though an obligation also may be imposed on others and even though a contract has imposed on others the duty of complying with these regulations.

5.1 Occupying or Letting of Unfit Dwelling or Dwelling Unit Unlawful.

No owner, occupant, lessee, or other person shall occupy, let to another person, or permit occupancy of any dwelling or dwelling unit unless it and the premises are safe, clean, sanitary, in good repair, fit for human occupancy, and in compliance with these regulations and all other appropriate legal requirements.

5.2 Failure to Maintain Dwelling or Dwelling Unit Unlawful.

No owner, manager, or lessee of any dwelling or dwelling unit shall permit or allow any floors, floor coverings, ceilings, doors, or walls of any dwelling or dwelling unit to become dirty, foul, or in a state of disrepair. If the said areas are dirty, foul, or in a state of disrepair and cannot be reasonably cleaned, the Director may require the owner to refinish, repaint, or repair. If circumstances indicate the said undesirable conditions have been unreasonably caused by the occupant, the Director may require the occupant to comply with the provisions of this paragraph.

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

JUANITA KENYON,

Plaintiff,

vs.

STEVE REGAN,

Defendant.

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JUDGMENT AND ORDER

Civil No. 88-3008585

Judge Eleanor S. Van Sciver

ORDER

This matter came on for trial on April 26, 1989, before the Honorable Eleanor S. Van Sciver, Judge of the above court. Plaintiff was present and represented by Bruce Plenk of Utah Legal Services, Inc. Defendant was present and represented himself. The court heard testimony from the Defendant, Tim Adams, Bob Brewer, Trevor Burborough, Alvin Rodriguez and the Plaintiff and received a number of exhibits. The Court now enters the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendant rented residential property located at 370 Edith Ave, Salt Lake City, Utah to Plaintiff on or about October 15, 1986.

2. Plaintiff occupied the premises from October 15, 1986 to approximately March 31, 1988.

Kenyon vs. Regan
Judgment and Order

3. Plaintiff advised Defendant of numerous defects in the premises at various times throughout her tenancy.

4. The most serious of these problems were related to a leaky roof, falling ceiling plaster, and various plumbing problems.

5. Defendant was notified by the Salt Lake City-County Health Department in letters dated November 18 and December 8, 1987 and January 15, March 3, and March 30, 1988 that numerous violations of Health Department Regulations #3, Housing existed at the premises and must be repaired.

6. Other than a few minor repairs to the plumbing, Defendant failed to correct the code violations during Plaintiff's tenancy.

7. Plaintiff failed to pay rent to Defendant for the months of June, July and August, 1987 in the total amount of \$490.00 but overpaid rent in the amount of \$50.00 in September, 1987. Defendant is entitled to judgment on his counterclaim in the amount of \$440.00.

8. By failing to repair the serious defects in the premises which violated the health codes, Defendant constructively evicted Plaintiff from and after December 1, 1987 through March 31, 1988.

9. Plaintiff is entitled to judgment in the amount of \$1180.00 representing the rental value of the premises during the months of December, 1987, and January, February, and March, 1988 when serious code violations existed.

Kenyon vs. Regan
Judgment and Order

10. All other claims by both parties are dismissed.

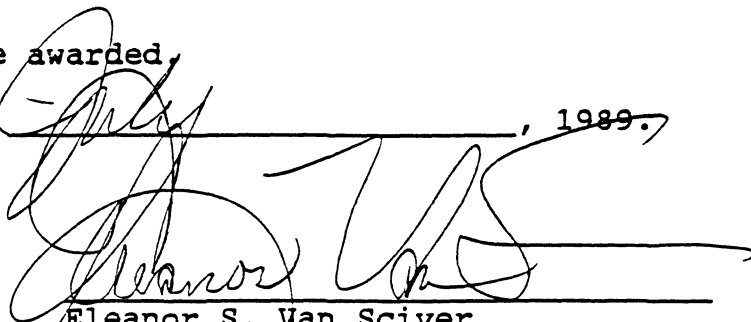
From the above Findings of Fact and Conclusions of Law, the Court now enters the following

JUDGMENT

1. Plaintiff is awarded judgment against Defendant in the amount of \$1180.00 offset by Defendant's judgment on his counterclaim of \$440.00 for a total judgment in favor of Plaintiff of \$740.00.

2. No attorney fees are awarded.

DATED this 27 day of July, 1989.


Eleanor S. Van Sciver
Circuit Court Judge

Kenyon vs. Regan
Judgment and Order

CERTIFICATE OF MAILING

I do hereby certify that I mailed a true and correct copy of the foregoing Judgment and Order to: Steve Regan, 3031 Morningside Drive, Salt Lake City, Utah 84124 on this 2nd day of June, 1989, postage prepaid.

Barbara Baker

[A:KENYON.JUD. BP5]