

1989

Juanita Kenyon v. Steve Regan : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James H. Deans; Attorney for Appellant.

Bruce Plenk; Utah Legal Services; Attorney for Respondent.

Recommended Citation

Brief of Appellant, *Juanita Kenyon v. Steve Regan*, No. 890462 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2060

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

JTAAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

9106010A

IN THE UTAH COURT OF APPEALS

JUANITA KENYON,

Plaintiff/Respondent,

vs.

STEVE REGAN,

Defendant/Appellant.

:
:
:
:
:

Case No. 890462-CA

BRIEF OF APPELLANT

Appeal from a decision of the Honorable Eleanor S. Van Sciver
Third Circuit Court, Salt Lake Department, Salt Lake County, entered
June 26, 1989.

Bruce Plenk, #2613
Utah Legal Services, Inc.
124 South 400 East, 4th Floor
Salt Lake City, Utah 84111

Attorney for Respondent.

James H. Deans, #846
440 South 700 East - Suite #101
Salt Lake City, Utah 84102

Attorney for Appellant.

FILED

DEC 5 1989

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

TABLE OF CONTENTS

JURISDICTION AND NATURE OF PROCEEDING	1
ISSUE PRESENTED	1
DETERMINATIVE STATUTES AND RULES	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	4

ADDENDUM

Black's Law Dictionary Definition	Addendum 1
Findings of Fact and Conclusions of Law.	Addendum 2

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Brugger v. Fonoti</u> 645 P.2d 647 (Utah 1982)	3

OTHER AUTHORITIES

<u>Black's Law Dictionary, Fifth Edition</u>	3
--	---

IN THE UTAH COURT OF APPEALS

JUANITA KENYON,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 890462-CA
STEVE REGAN,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDING

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. 78-2a-3(2) (1) and 78-4-11. This is an appeal from a decision by the Honorable Eleanor S. Van Sciver of the Third Circuit Court in a landlord-tenant case.

ISSUE PRESENTED

May a court invoke the legal doctrine of constructive eviction and award a tenant a rent rebate while the tenant continues to live on the leased premises.

DETERMINATIVE STATUTES AND RULES

None.

STATEMENT OF THE CASE

This is a landlord-tenant dispute. Tenant claims leased premises were not maintained in a proper manner and is entitled to a rent rebate. Landlord counterclaimed for unpaid rent for the time tenant occupied the premises. The court based an award of rent rebate on the doctrine of constructive eviction.

The case was tried to the Honorable Eleanor S. VanSciver who granted Judgment to tenant against landlord in the amount of \$1,180.00 for a constructive eviction of tenant from December 1, 1987 through March 31, 1988. Landlord received an offset of \$440.00 for unpaid rent in June, July and August, 1987.

Testimony from tenant, Mountain Fuel and Board of Health personnel was given indicating violations of code during October 15, 1986 through March 31, 1988, the tenancy. Landlord made a few minor repairs to the plumbing but did not correct code violations during the tenancy.

The matter now comes before this court for determination of whether a court can invoke the legal doctrine of constructive eviction and award a rent rebate where the tenant does not vacate the premises.

SUMMARY OF ARGUMENT

It is a long-standing precedent that should not be overturned, that one of the elements of constructive eviction is that the tenant surrenders the leased premises to the landlord before a claim of constructive eviction can be made.

ARGUMENT

The trial court found that tenant occupied the leased premises from October 15, 1986 to approximately March 31, 1988 (paragraph 2 Findings of Fact). The court found that tenant was constructively evicted by landlord from and after December 1, 1987 through March 31, 1988 and awarded tenant a rent rebate for those months (paragraphs 8 and 9 Findings of Fact).

These two findings, when put together, are contradictory and an error in law by the lower court. A tenant is not constructively evicted who remains on the premises. The elements required by a person claiming constructive eviction is a) that landlord has breached his duty and allowed the premises to be rendered unfit or unsuitable for occupancy in whole or substantial part and, b) tenant elects to surrender the premises. (See Black's Law Dictionary definition of constructive eviction p. 284).

The Utah Supreme Court articulated this standard in Brugger v. Fonoti, Utah, 645 P.2d 647 specifically stating that to assert constructive eviction: "A tenant must, however, abandon the premises within a reasonable time after the alleged interference."

The record shows that tenant claims there were numerous defects at various times in her tenancy (Findings of Fact paragraph 3) and letters from the Board of Health were issued starting December 8, 1987 (Findings of Fact paragraph 5).

Landlord's claim for rent was not for periods of time after tenant vacated the premises and constructive eviction is not a valid defense or cause for an award to tenant under this set of facts.

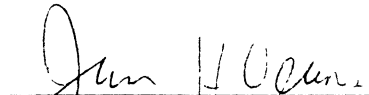
In this action, tenant was awarded a rent rebate for constructive eviction during the four months she continued to occupy the premises.

If this court upholds the lower court's definition of constructive eviction, the doctrine's meaning would be altered to eliminate a critical element that has always been required by courts in this state.

CONCLUSION

This court should enter a finding dismissing tenant's cause of action for constructive eviction, or in the alternative, uphold the long-standing definition of constructive eviction and remand the matter back to lower court with instructions to use such a definition in this action.

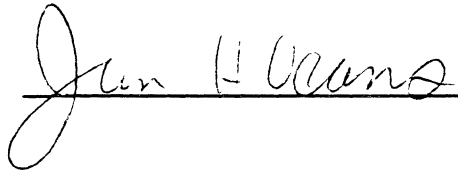
DATED this 5th day of December, 1989.



JAMES H. DEANS
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this 5th day of December, 1989, I had delivered four true and correct copies of the foregoing Brief of Appellant to Bruce Plenk, attorney for Respondent, 124 South 400 East, Suite 400, Salt Lake City, Utah 84111.



As to constructive Bailment; Breaking; Contempt; Conversion; Delivery; Escape; Fraud; Larceny; Seisen; and Treason, see those titles.

Constructive adverse possession. Type of adverse possession which, under certain statutes, is characterized by payment of taxes under color of right, as distinguished from actual adverse possession in which the adverse claimant is in actual possession.

Constructive assent. An assent or consent imputed to a party from a construction or interpretation of his conduct; as distinguished from one which he actually expresses.

Constructive authority. Authority inferred or assumed to have been given because of the grant of some other antecedent authority.

Constructive breaking into a house. A breaking made out by construction of law. As where a burglar gains an entry into a house by threats, fraud, or conspiracy.

Constructive condition. Conditions in contracts which are neither expressed nor implied by the words of the contract but are imposed by law to meet the ends of justice. Restatement of Contracts, § 252. The cooperation of the parties to a contract is a constructive condition. In negotiable instruments, a promise or order otherwise unconditional is not made conditional by the fact that the instrument is subject to a constructive condition. U.C.C. § 3-105(1).

Constructive contract. A species of contracts which arise, not from the intent of the parties, but from the operation of law to avoid an injustice. These are sometimes referred to as quasi contracts or contracts implied in law as contrasted with contracts implied in fact which are real contracts expressing the intent of the parties by conduct rather than by words. *Power-Matics Inc. v. Ligotti*, 79 N.J.Super. 294, 191 A.2d 483, 489. An obligation created by law for reasons of justice without regard to expressions of assent by either words or acts. *Power-Matics, Inc. v. Ligotti*, 79 N.J.Super. 294, 191 A.2d 483, 489. See also **Contract (Quasi contract)**.

Constructive desertion. Occurs when one spouse, through misconduct, forces the other to abandon the marital abode. *Grollman v. Grollman*, D.C.App., 220 A.2d 330, 332. If a spouse is forced to leave the home because of the other's conduct, the former has been constructively deserted.

Constructive dividend. If a stockholder has an unqualified right to a dividend, such a dividend is called constructive for tax purposes though he does not actually receive it because it is subject to his demand and the corporation has set it aside for this purpose. *Clark v. C. I. R.*, C.A.9, 266 F.2d 698.

Constructive eviction. Such arises when landlord, while not actually depriving tenant of possession, has done or suffered some act by which premises are rendered untenable. *Net Realty Holding Trust v. Nelson*, 33 Conn.Sup. 22, 358 A.2d 365, 367. Any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased amounts to a constructive eviction, if the tenant so elects and

surrenders his possession. For example, if a tenant vacates the rental property because of the absence of heat or water, he has been constructively evicted.

As the term is used with reference to breach of the covenants of warranty and of quiet enjoyment, it means the inability of the purchaser to obtain possession by reason of a paramount outstanding title.

Constructive filing. The filing of a document with a person who is the only one available to receive it, though he is not the designated person to receive it, is a constructive filing. *People v. Spencer*, 193 Cal.App.2d 13, 13 Cal.Rptr. 881, 883.

Constructive force. As regards robbery, a taking by force is the gist of the crime, but the force may be either actual or constructive. Constructive force is anything which produces fear sufficient to suspend the power of resistance and prevent the free exercise of the will. Actual force is applied to the body; constructive is by threatening words or gestures and operates on the mind.

Constructive fraud. Exists where conduct, though not actually fraudulent, has all actual consequences and all legal effects of actual fraud. *Agair Inc. v. Shaef-fer*, 232 Cal.App.2d 513, 42 Cal.Rptr. 883, 886. Breach of legal or equitable duty which, irrespective of moral guilt, is declared by law to be fraudulent because of its tendency to deceive others or violate confidence. *Daves v. Lawyers Sur. Corp.*, Tex.Civ. App., 459 S.W.2d 655, 657. See also **Fraud**.

Constructive intent. Exists where one should have reasonably expected or anticipated a particular result; e.g. when one does an act which is wilful and wanton resulting in injury to another, it can be said that he constructively intended the harm. *Ballew v. Asheville & E. T. R. Co.*, 186 N.C. 704, 120 S.E. 334.

Constructive knowledge. If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact; e.g. matters of public record. *Attoe v. State Farm Mutual Auto. Ins. Co.*, 36 Wis.2d 539, 153 N.W.2d 575, 579. See also **Constructive notice**.

Constructive loss. One resulting from such injuries to the property, without its destruction, as render it valueless to the assured or prevent its restoration to the original condition except at a cost exceeding its value. See also **Constructive total loss**.

Constructive malice. That type of malice which the law infers from the doing of an evil act; sometimes known as implied malice.

Constructive notice. Such notice as is implied or imputed by law, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing.

Constructive ownership. See **Attribution**.

Constructive payment. If one charges himself with a payment and the payee has a right to demand it, it can be considered a constructive as contrasted with an actual payment; e.g. a check which is mailed in

UTAH LEGAL SERVICES, INC.
Attorneys for Plaintiff
BY: BRUCE PLENK, #2613
124 South 400 East, 4th Floor
Salt Lake City, Utah 84111
Telephone: (801) 328-8891

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

JUANITA KENYON,
Plaintiff,

vs.

STEVE REGAN,
Defendant.

*
*
*
*
*
*
*
*
*
*
*

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.

Addendum 2

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 _____ day of _____, 1989.

/S/

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]