

1995

# Housing Authority of Salt Lake City v. Louise Lopez Delgado : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HOUSING AUTHORITY OF  
SALT LAKE CITY,

Plaintiff/Appellant,  
vs.

LOUISE LOPEZ DELGADO,

Defendant/Appellee

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CASE NO. 950300 - CA

PRIORITY NO. 15

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BRIEF OF APPELLEE

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APPEAL FROM THE THIRD CIRCUIT COURT  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT  
HONORABLE STEPHEN HENRIOD, PRESIDING

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UTAH COURT OF APPEALS  
BRIEF

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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HOUSING AUTHORITY OF  
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HOUSING AUTHORITY OF  
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CASE NO. 950300 - CA

PRIORITY NO. 15

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BRIEF OF APPELLEE

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**STATEMENT OF JURISDICTION**

This court has jurisdiction over this appeal pursuant to Utah Code § 78-2a-3(2)(d), and §78-36-11.

**STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Did the trial court properly dismiss plaintiff's complaint for eviction after finding that Appellee Lopez ("Lopez") was substantially in compliance with her lease agreement?

Whether the evidence presented amounted to compliance with the agreement is a question of applying the facts to the agreement and the law and as such, the decision of the trial court should be given deference by this court. State v. Gordon, 886 P.2d 112 (Utah App. 1994).

### DETERMINATIVE STATUTORY PROVISIONS

The following statutes are controlling in this matter:

Utah Code §78-36-1 et seq.  
Utah Code §78-36-3(1)(c)  
42 USC §1437d(1)(4)  
24 CFR §966.4(1)(3)(i)(A)  
24 CFR §966.4(1)(3)(iii)

### STATEMENT OF THE CASE

#### A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

Housing Authority of Salt Lake City ("Housing") brought this action under Utah Code §78-36-1 et seq., the Utah unlawful detainer statute, in an attempt to evict Lopez. [R. 1-3, 31-33] Housing posted a bond pursuant to Utah Code §78-36-8.5. [R. 20-21, 27-30, 34-38] Lopez requested a hearing which was held on April 14, 1995 before the Honorable Stephen Henriod. [R. 39] Brief testimony was taken, argument presented and the case was dismissed by the court by order of April 26, 1995. [R. 40] Housing has appealed from that Order. [R. 43-44]

#### B. STATEMENT OF FACTS

1. Lopez and Housing entered into a residential lease on or about September 1, 1992, which was renewed on a yearly basis, most recently on September 1, 1994. [R. 4-13]
2. This tenancy is governed by the federal public housing statutes and regulations, 42 USC §1437 and 24 CFR §966 et seq. [R. 57]
3. Lopez and Housing entered into an agreement in December of 1994 to settle a debt for unpaid rent, maintenance charges and damages to the premises caused by one of Lopez' children. Lopez



agreed to pay \$20.96 each month for twelve months in addition to her rental amount of \$37.00. [R. 25, 57]

4. Housing has required all tenants to make their rental payments into a locked box in the Housing office. Tenants are unable to receive an immediate receipt for their payment. [R. 62- 63]

5. On February 4, 1995 Lopez purchased a money order in the amount of \$57.00 from Smith's Food King. [Ex. 6, R. 79]

6. That same day, Lopez and her daughter deposited the money order in the locked box at the housing authority. [R. 79-80]

7. Housing claimed to have not received Lopez' money order. [R. 60-61]

8. On February 10, 1995, Housing served Lopez with a 14-day notice to pay rent or vacate demanding payment of rent owing, late charges, and the balance owing on the agreement. [R. 14-17, 60-61]

9. Housing demanded by letter [Ex. 7, R. 65, 80, 83-84] that Lopez trace the money order and indicated that the housing authority would not commence legal action until the trace was completed. [R.65]

10. Lopez put a tracer on the money order. [R. 84]

11. The trace of the money order showed that it had not been cashed or recovered. Lopez was willing to pay this money to Housing. [R. 80-81]

#### SUMMARY OF THE ARGUMENT

The trial court correctly ruled that Lopez paid all but \$.96 of her rent, that she was substantially in compliance with her lease and was therefore not subject to eviction for nonpayment. The

court's decision to dismiss the eviction action should be affirmed.

### ARGUMENT

#### **I. THE DECISION IN THIS CASE MAY BE UPHELD ON ANY PROPER GROUND**

This appeal stems from an order entered at a hearing held at Lopez' request after she was served with a possession bond pursuant to Utah Code §78-36-8.5. [R. 40-41, 49-90] A brief hearing was held, which included the testimony of two witnesses and argument from counsel. [R. 40, 49-90] The court then dismissed plaintiff's complaint, acting pursuant to Utah Code § 78-36-8.5 (4), finding that all issues between the parties could be adjudicated without further court proceedings. The court entered a brief order dismissing the complaint on April 26, 1995. [R. 40-41] While more detailed findings of fact and conclusions of law would be useful to this court, the decision of the trial court is amply supported by a variety of grounds, any one of which may be the basis for upholding the trial court's decision. Since this court can affirm on any reasonable basis, Kenyon v. Regan, 826 P.2d 140, 142 (Utah App. 1992), the lower court's decision should be affirmed.

In State v. Gordon, 886 P.2d 112, 115, (Utah App. 1994), this court quoted State v. Pena, 869 P.2d 932, 937 (Utah 1994) in holding that "[t]rial courts are generally afforded some degree of discretion in applying a legal standard to a given set of facts" and "[s]uch discretion allows the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal."

This Court should affirm here either on the ground articulated

by the trial court, substantial compliance with the lease, or on the other grounds addressed in this brief, namely non-compliance by the plaintiff with federal regulations and state law concerning notice, or on any other ground. See Embassy Group v. Hatch, 865 P.2d 1366, 1370 (Utah App. 1993).

II.           **THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S  
COMPLAINT ON THE GROUNDS THAT LOPEZ WAS  
SUBSTANTIALLY IN COMPLIANCE WITH HER LEASE  
AGREEMENT**

**POINT A**

**THE COURT PROPERLY AVOIDED DECREETING FORFEITURE  
OF THE LEASE**

The court avoided decreeing forfeiture of Lopez's subsidized lease by finding that Lopez was in substantial compliance with the lease agreement.

In U-Beva Mines v. Toledo Mining Company, 471 P.2d 867, 869 (Utah 1970), a case where the appellant argued that the court had erred in not voiding the lease for lessee's non-payment of taxes, the Supreme Court concluded that "in equity [Toledo] is relieved from any departure here, on the grounds that the defection was so minor as to invoke the offices of equity, and that at law substantial compliance with the contract, under the circumstances, would purge an erstwhile default under a general accepted policy against forfeiture. . . ." (Emphasis added)

The Supreme Court relied on the equitable grounds of substantial compliance, and general policy grounds against the forfeiture of a lease, in upholding the lease in U-Beva, and the trial court used much the same reasoning in dismissing this eviction action.

A policy against forfeiture is well established in Utah contract law. In 1946 the Utah Supreme Court stated that "Forfeitures are not favored, and in interpreting an agreement, every reasonable presumption should be indulged against an intention to allow a forfeiture." Green v. Palfreyman, 166 P.2d 215, 219 (Utah 1946). Recent Utah Supreme Court cases apply contract law to residential leases. Wade v. Jobe, 818 P.2d 1006, 1010 (Utah 1991). The policy against forfeiture should be applied to residential leases as well.

Plaintiff is apparently arguing that the court could not, under any circumstances, rule that a tenant was substantially in compliance with a lease agreement. The trial court disagreed, as did the Utah Supreme Court in U-Beva, and as have courts in other states, particularly where the eviction action involves tenants participating in a federal housing program.

In Acorn I, Ltd. v. Jones, No. 426956 (Cal. Mun. Ct., Oakland, June 25, 1985), 19 CLEARINGHOUSE REV. 660 (No. 39,631, Oct. 1985 (Attached at Addendum 4-1)) the plaintiff, a federally subsidized multifamily housing project, served an eviction notice that demanded payment of \$2 unpaid rent. The court ruled that a \$2 default in rent did not constitute material noncompliance with the rental agreement and that it would be unfair to evict a tenant for this amount.

42 USC §1437d(1)(4) provides that housing agencies must utilize leases which require that the agency may not terminate the tenancy except for serious or repeated violations of the terms or

conditions of the lease or for other good cause. The lease between the parties complies with that requirement.

[R. 8 (Paragraph 16)] The trial court properly found that Lopez did not commit serious or repeated violations of the lease, and therefore properly refused to forfeit the lease agreement between the parties.

This court should follow this authority in holding that the trial court had the discretion to rule that a tenant who was substantially in compliance with her lease should not be evicted.

#### POINT B

#### **LOPEZ IS ENTITLED TO SPECIAL PROTECTION AND CONSIDERATION AS A PARTICIPANT IN A FEDERALLY SUBSIDIZED HOUSING PROGRAM**

Lopez and Housing are participants in a rental agreement that is federally subsidized, governed by federal regulations, and continuing indefinitely until terminated for good cause. The U.S. Supreme Court has held that a tenant in such a program has a property interest protected by the U.S. Constitution and has recognized that such a tenant is entitled to remain in that program for life, or until good cause for eviction is shown. See Swann v. Gastonia Housing Authority, 502 F.Supp. 362, 365 (1980), citing Board of Regents v. Roth, 408 U.S. 564 (1972). The tenancy is thus substantially more significant than the usual term for years in Utah.

This situation led the Court of Appeals of Ohio to rule that equitable interests must be weighed in consideration of subsidized

housing terminations. The court stated "[g]enerally, courts, in balancing equities, will relieve a tenant from the harsh consequences of a forfeiture where the payment of money damages will adequately compensate the landlord. . . . In the case before us, "[the tenant] has a substantial equitable interest in maintaining her fully subsidized housing. . . ." Gorsuch Homes, Inc. v. Wooten, 597 N.E.2d 554, 561 (Ohio App.1992).

This significant difference between a standard rental involving two private individuals and one between an individual and an agency of the federal government should be considered an important factor in this case. The equities, including the probable difficulty in finding other subsidized housing, a factor relied upon by the Gorsuch court, should here assist Lopez. The trial court's refusal to terminate her tenancy and her subsidy and forfeit her lease should be upheld.

**III. THE TRIAL COURT CORRECTLY RULED THAT THE FACTS PRESENTED AMOUNT TO SUBSTANTIAL COMPLIANCE WITH THE LEASE AGREEMENT**

Whether the facts presented at trial showed that Lopez was substantially in compliance with her lease is a factual question and so the decision of the trial court should be given deference unless shown to be clearly in error. State v. Gordon, 886 P.2d 112, 115, (Utah App. 1994)

Lopez placed a money order in the amount of \$57.00 in the locked box at Housing's property on February 4, 1995, that is 6 days before the 14 day notice to pay or vacate was served. [R. 79-

80] The housing authority could not find the money order and wrote Lopez a letter on February 17, 1995, asking her to trace it. [R. 65, 80, 83] As per the letter, the 14-day notice would stay effective until the Housing Authority received proof of the trace [R. 64], and the Housing Authority would hold off any legal action until then. [R. 65] Lopez' trace of the money order revealed that the money order had not been cashed or recovered. [R. 80-81]

While defendant's payment of \$57.00 was \$.96 short and she took two weeks to trace the money order, the trial court ruled that Lopez was "substantially in compliance" with the terms and conditions of the lease agreement, and while "it would have been nice if she had done things a little more quickly", she prevailed. [R. 40-41, 88]

Appellant now states that "While at first blush, 96 cents does not appear to be a significant sum, the circumstances of this tenant and this landlord must be considered. One dollar is a significant part of this tenant's part of the rent . . ." [Brief of Appellants at 15]

To be more precise, appellant is claiming that the amount unpaid,  $1/58$  or .01724 of the total payment due should be considered a "significant" enough portion of Lopez' responsibilities under the lease agreement to warrant her eviction and the forfeiture of the lease. The trial court could and did find that all but  $1/58$ th of the total payment was made, no other significant breaches of the lease were raised, and it would be unjust and inequitable for an eviction to proceed based on this

minimal amount. This discretionary ruling by the trial court should be upheld on appeal.

IV. THE HOUSING AUTHORITY IMPROPERLY  
DEMANDED PAYMENT OF OTHER CHARGES  
IN THE PAY-RENT-OR-QUIT NOTICE

As previously stated, this court should uphold the decision of the trial court on any proper basis presented on appeal. Kenyon v. Regan, 826 P.2d 140, 142 (Utah App. 1992). One such basis would be that Housing failed to serve a proper notice in this action. Housing served Lopez an eviction notice demanding payment of rent owing, late charges and the entire balance owing on the repayment agreement. [R. 14-17] This notice intended to be a combination of the 14 day notice required by federal regulation 24 CFR §966.4(1)(3)(i)(A) and a notice under Utah law, Utah Code §78-36-3(1)(c). A combination of state and federal notices is allowed by 24 CFR §966.4(1)(3)(iii). However, the notice was an incorrect combination: it required payment of the balance of the repayment agreement within 14 days. The 14 day notice can only be used for nonpayment of rent. 24 CFR §966.4(1)(3)(i) The inclusion of other charges allegedly owed rendered the notice improper under the federal regulations and the lease agreement. A 30 day notice should have been served to demand payment of the other charges in order to comply with 24 CFR §966.4(1)(3)(i)(C) and paragraph 16 of the lease agreement. [R. 8]

In St. Clair County Hous. Auth. V. Turner, No. 89-LM-451 (111. Cir. Ct., St. Clair County, May 19, 1989), 23 CLEARINGHOUSE REV. 618 (No. 44,680, Aug./Sept 1989), the Housing Authority served a 14



day notice demanding both rent and other charges owed. The court granted Turner's motion to dismiss because the notice was fatally defective. It should not have included other charges in the demand for rent.

Utah law also requires strict compliance with the notice requirements in the unlawful detainer statute. Failure to follow state law notice requirements resulted in dismissal of the eviction action in Sovereign v. Meadows, 595 P.2d 852 (Utah 1979). While federal regulations govern this tenancy, those regulations incorporate state law procedures for termination of a tenancy. Our state law requires strict compliance. Housing served a notice demanding more money than was due, and demanded that the extra amount be paid within a shorter time period than allowed by federal regulation.

Housing has not strictly complied with applicable law, here the federal regulations. This improper notice should be considered another basis for the court's ruling dismissing the eviction action.

#### CONCLUSION

This court should uphold the decision of the trial court dismissing the eviction action against Lopez.

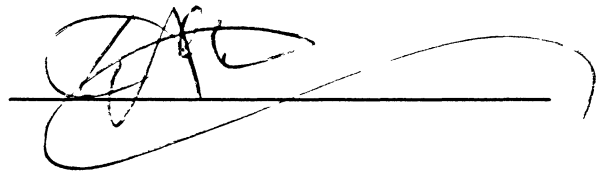
Respectfully submitted this 15<sup>th</sup> day of September, 1995.

UTAH LEGAL SERVICES, INC.  
Attorneys for Appellee

  
BY: ERIC MITTELSTADT

CERTIFICATE OF MAILING

I do hereby certify that I mailed four true and correct copies of the foregoing BRIEF OF APPELLEE to: L. Zane Gill, LAW OFFICE OF L. ZANE GILL, P.C., Attorneys for Appellants, 215 South State Street, Suite 545, Salt Lake City, Utah 84111 on this 15<sup>th</sup> day of September, 1995, postage prepaid.

A handwritten signature, likely of L. Zane Gill, is written over a horizontal line. The signature is stylized and cursive.

[common\housing\appeals\lopez5.brf]

#### 78-36-2. "Forcible detainer" defined.

Every person is guilty of a forcible detainer who either:

(1) by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

(2) in the nighttime, or during the absence of the occupants of any real property, unlawfully enters thereon, and, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who within five days preceding such unlawful entry was in the peaceable and undisturbed possession of such lands.

1953

#### 78-36-3. Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, including nuisance as defined in Section 78-38-9, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and

## CHAPTER 36

### FORCIBLE ENTRY AND DETAINER

Section	
78-36-1.	"Forcible entry" defined.
78-36-2.	"Forcible detainer" defined.
78-36-3.	Unlawful detainer by tenant for term less than life.
78-36-4.	Right of tenant of agricultural lands to hold over.
78-36-5.	Remedies available to tenant against undertenant.
78-36-6.	Notice to quit — How served.
78-36-7.	Necessary parties defendant.
78-36-8.	Allegations permitted in complaint — Time for appearance — Service of summons.
78-36-8.5.	Possession bond of plaintiff — Alternative remedies.
78-36-9.	Proof required by plaintiff — Defense.
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78-36-11.	Time for appeal.
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78-36-12.3.	Definitions.
78-36-12.6.	Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises.

#### 78-36-1. "Forcible entry" defined.

Every person is guilty of a forcible entry, who either:

(1) by breaking open doors, windows or other parts of a house, or by fraud, intimidation or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,

(2) after entering peaceably upon real property, turns out by force, threats or menacing con-

premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

(2) Unlawful detainer by an owner resident of a mobile home is determined under Title 57, Chapter 16, Mobile Home Park Residency Act.

(3) The notice provisions for nuisance in Subsection 78-36-3(1)(d) are not applicable to nuisance actions provided in Sections 78-38-9 through 78-38-16 only. 1992

#### **78-36-4. Right of tenant of agricultural lands to hold over.**

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the owner, his designated agent, or his successor in estate, he shall be deemed to be held by permission of the owner, his designated agent, or his successor in estate, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year; and the holding over for the 60-day period shall be taken and construed as a consent on the part of the tenant to hold for another year. 1981

#### **78-36-5. Remedies available to tenant against undertenant.**

A tenant may take proceedings similar to those prescribed in this chapter to obtain possession of the premises let to an undertenant in case of his unlawful detention of the premises underlet to him. 1953

#### **78-36-6. Notice to quit — How served.**

The notices required by the preceding sections may be served:

- (1) by delivering a copy to the tenant personally;
- (2) by sending a copy through registered or certified mail addressed to the tenant at his place of residence;
- (3) if he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the tenant at the address of his place of residence or place of business;
- (4) if a person of suitable age or discretion cannot be found at the place of residence, then by affixing a copy in a conspicuous place on the leased property; or
- (5) if an order of abatement by eviction of the nuisance is issued by the court as provided in Section 78-38-11, when issued, the parties present shall be on notice that the abatement by eviction order is issued and immediately effective or as to any absent party, notice shall be given as provided in Subsections (1) through (4).
- (6) Service upon a subtenant may be made in the same manner. 1992

#### **78-36-7. Necessary parties defendant.**

(1) No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced,

shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

(2) If a person has become subtenant of the premises in controversy after the service of any notice as provided in this chapter, the fact that such notice was not served on the subtenant is not a defense to the action. All persons who enter under the tenant after the commencement of the action shall be bound by the judgment the same as if they had been made parties to the action.

(3) A landlord, owner, or designated agent is a necessary party defendant only in an abatement by eviction action for an unlawful drug house as provided in Section 78-38-13. 1992

#### **78-36-8. Allegations permitted in complaint — Time for appearance — Service of summons.**

The plaintiff in his complaint, in addition to setting forth the facts on which he seeks to recover, may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor or compensation for the occupation of the premises, or both. If the unlawful detainer charged is after default in the payment of rent, the complaint shall state the amount of rent due. The court shall indorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than three or more than 20 days from the date of service. The court may authorize service by publication or mail for cause shown. Service by publication is complete one week after publication. Service by mail is complete three days after mailing. The summons shall be changed in form to conform to the time of service as ordered, and shall be served as in other cases. 1987

#### **78-36-8.5. Possession bond of plaintiff — Alternative remedies.**

(1) At any time between the filing of his complaint and the entry of final judgment, the plaintiff may execute and file a possession bond. The bond may be 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 court shall approve the bond in an amount that is the probable amount of costs of suit and 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 by 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;

(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; and

(c) advise the defendant of his right to a hearing to contest the terms of the order of restitution or the manner of its enforcement.

(2) (a) A copy of the order of restitution and a form for the defendant to request a hearing shall be served personally upon the defendant in accordance with Rule 4, Utah Rules of Civil Procedure. If personal service is impossible or impracticable, service may be made by 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.

(b) The date of service, the name, title, signature, and telephone number of the person serving the order and the form shall be legibly endorsed on the copy of the order and the form served on the defendant.

(c) Within ten days of service, the person serving the order and the form shall file proof of service in accordance with Rule 4(h), Utah Rules of Civil Procedure.

(3) (a) If the defendant fails to comply with the order within the time prescribed by the court, a sheriff or constable at the plaintiff's direction may enter the premises by force using the least destructive means possible to remove the defendant

(b) Any personal property of the defendant may be removed from the premises by the sheriff or constable and transported to a suitable location for safe storage. The sheriff or constable, with the plaintiff's consent, may delegate responsibility for storage to the plaintiff, who must store the personal property in a suitable place and in a reasonable manner.

(c) The personal property removed and stored shall be inventoried by the sheriff or constable who shall keep the original inventory and personally deliver or mail the defendant a copy of the inventory immediately after the personal property is removed.

(4) (a) After demand made by the defendant within 30 days of removal of personal property from the premises, the sheriff or constable shall promptly return all of the defendant's personal property upon payment of the reasonable costs incurred for its removal and storage.

(b) The person storing the personal property may sell the property remaining in storage at a public sale if:

(i) the defendant does not request a hearing or demand return of the personal property within 30 days of its removal from the premises; or

(ii) the defendant fails to pay the reasonable costs incurred for the removal and storage of the personal property.

(c) In advance of the sale, the person storing the personal property shall mail to the defendant's last-known address a written notice of the time and place of the sale.

(d) If the defendant is present at the sale, he may specify the order in which the personal property shall be sold, and only so much personal property shall be sold as to satisfy the costs of removal, storage, advertising, and conducting the sale. The remainder of the personal property, if any, shall be released to the defendant. If the defendant is not present at the sale, the proceeds, after deduction of the costs of removal, storage, advertising, and conducting the sale shall be paid to the plaintiff up to the amount of any judgment the plaintiff obtained against the defendant. Any surplus shall be paid to the defendant, if the defendant's whereabouts are known. If the defendant's whereabouts are not known, any surplus shall be disposed of in accordance with Title 78, Chapter 44, Uniform Unclaimed Property Act.

(e) If the property belonging to a person who is not a defendant is removed and stored in accordance with this section, that person may claim the property by delivering a written demand for its release to the sheriff or constable. If the claimant provides proper identification and evidence of ownership, the sheriff or constable shall promptly release the property at no cost to the claimant.

(5) In the event of a dispute concerning the terms of the order of restitution or the manner of its enforcement, the defendant or any person claiming to own stored personal property may file a request for a hearing. The court shall set the matter for hearing within ten days from the filing of the request, or as soon thereafter as practicable, and shall mail notice of the hearing to the parties.

(6) The Judicial Council shall draft the forms necessary to implement this section.

#### 78-36-11. Time for appeal.

(1) Except as provided in Subsection (2), either party may, within ten days, appeal from the judgment rendered.

(2) In a nuisance action under Sections 78-38-9 through 78-38-16, any party may appeal from the judgment rendered within three days.

1992

#### 78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted.

It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under Subsection 78-36-12.6(2) and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises.

1981

#### 78-36-12.3. Definitions.

(1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

1981

#### 78-36-12.6. Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises.

(1) In the event of abandonment the owner may retake the premises and attempt to rent them at a fair rental value and the tenant who abandoned the premises shall be liable:

(a) for the entire rent due for the remainder of the term; or

(b) for rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection applies, if less than Subsection (a) notwithstanding that the owner did not re-rent the premises.

(2) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant. The owner shall make reasonable efforts to notify the tenant of the location of the personal property; however, if the property has been in storage for over 30 days and the tenant has

made no reasonable effort to recover it, the owner may sell the property and apply the proceeds toward any amount the tenant owes. Any money left over from the sale of the property shall be handled as specified in Section 78-44-18. Nothing contained in this

**(l) Leases; terms and conditions; maintenance; termination**

Each public housing agency shall utilize leases which—

- (1) do not contain unreasonable terms and conditions;
- (2) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;
- (3) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than—
  - (A) a reasonable time, but not to exceed 30 days, when the health or safety of other tenants or public housing agency employees is threatened;
  - (B) 14 days in the case of nonpayment of rent; and
  - (C) 30 days in any other case;
- (4) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;
- (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy; and
- (6) specify that with respect to any notice of eviction or termination, notwithstanding any State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

For purposes of paragraph (5), the term “drug-related criminal activity” means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of Title 21).

(1) *Termination of tenancy and eviction*—(1) *Procedures*. The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease.

(2) *Grounds for termination*. (i) The PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in §966.4(f) or for other good cause.

(ii) Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents.

(B) Any drug-related criminal activity on or near such premises.

(3) *Lease termination notice*. (i) The PHA shall give written notice of lease termination of:

(A) 14 days in the case of failure to pay rent;

(B) A reasonable time considering the seriousness of the situation (but not to exceed 30 days) when the health or safety of other residents or PHA employees is threatened; and

(C) 30 days in any other case.

(ii) The notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right (pursuant to §944.4(m)) to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

(iii) A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (1)(3)(i) of this section.

(iv) When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination (see §966.51(a)(1)), the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

(v) When the PHA is not required to afford the tenant the opportunity for a hearing under the PHA administrative grievance procedure for a grievance concerning the lease termination (see §966.51(a)(2)), and the PHA has decided to exclude such grievance from the PHA grievance procedure, the notice of lease termination under paragraph (1)(3)(i) of this section shall:

(A) State that the tenant is not entitled to a grievance hearing on the termination.

(B) Specify the judicial eviction procedure to be used by the PHA for evic-



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B

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IN THE MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT-EMERYVILLE  
JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA  
DEPARTMENT NUMBER TWO

BEFORE HONORABLE JAMES STANFORD WHITE, JUDGE

---oOo---

ACORN I, LTD., et al.,

Plaintiff,

vs.

GWENDOLYN JONES,

Defendant.

No. 426956

*Beach Sp...*

MUNICIPAL COURT BUILDING, OAKLAND, ALAMEDA COUNTY, CALIFORNIA

STATEMENT OF DECISION

TUESDAY, JUNE 25, 1985 -- 10:20 O'CLOCK A. M.

APPEARANCES:

For the Plaintiff:

WILLIAM H. LIGHTFOOT,  
Attorney at Law.

For the Defendant:

CONSTANCE DeLaVEGA,  
Attorney at Law.

1                    TUESDAY, JUNE 25, 1985 -- 10:20 O'CLOCK A.M.

2                    ----oOo----

3            MS. DeLaVEGA: I would just like to make, make an oral  
4 argument if Mr. Lightfoot doesn't want to go first. I would  
5 like to request a statement of decision under CCP332.

6            MR. LIGHTFOOT: I think, your Honor, that isn't  
7 appropriate. I think a trial has to last all day or at least  
8 a half a day or something.

9            THE COURT: No. She can request it. Well, first of all,  
10 I still agree with your position the \$2 rent is at the  
11 minimus amount of money in light of the fact that the rent for  
12 this property is \$618 a month, \$612 of which has been paid by  
13 the Government, that there ought to be some other procedure  
14 for collecting this small amount of money before resorting to  
15 an eviction proceeding, that under the circumstances of this  
16 case I think that it would be unfair to evict a tenant for  
17 this small amount of money.

18           First of all, the landlord had more money than the  
19 landlord was entitled to at one point. He had some of the  
20 tenant's money. I assumed that it was in a bank account  
21 somewhere. It might have even been drawing interest. The  
22 tenant get any credit for that? That -- that considering the  
23 total circumstances surrounding the way the rent -- the way the  
24 tenant became behind in the rent as well as the amount for  
25 which she was behind that some other procedure other than  
26 eviction should have taken place first to give her an  
27 opportunity to pay the money, and then if she wasn't -- did  
28 not make up the rent, then I think it would have been appropriat

1 to result to the eviction proceedings. And because of that  
2 I'm going to deny your request for eviction.

3 MR. LIGHTFOOT: Before the Court makes the decision, may  
4 I just respond to that?

5 THE COURT: Okay.

6 MR. LIGHTFOOT: Okay. Your Honor, on HUD's subsidized  
7 property there's a multitude of regulations that has been  
8 laid out to a particular tenant that no conventional tenant  
9 is entitled to. And then I think to superimpose any  
10 additional requirements over and above those, that we can't  
11 really anticipate the -- you know, we can at least anticipate  
12 all these HUD requirements. And as I said there's a whole  
13 bunch of those they have to be aware of and do everything we  
14 can to be able to interpret correctly and comply with that  
15 are designed for the other tenants. [Sic.] I think then to  
16 go a step beyond that and say we are going to have to meet  
17 some other additional requirement that we couldn't anticipate  
18 having done everything that we need to do as far as both the  
19 State Law is concerned and the Federal Law, I think, would  
20 be asking too much.

21 THE COURT: Well, what would have been wrong with  
22 sending her a notice in December stating that "You've got a  
23 credit of \$5 from past rent that's paid. You owe \$2 and you  
24 have ten days to pay it"?

25 MR. LIGHTFOOT: I think, your Honor --

26 THE COURT: You know. What would have been wrong with  
27 that?

28 MR. LIGHTFOOT: I think that would be fine. No

1 problem with it. I think it's not required. What HUD says  
2 is that you have to give them ten day notice in which you state  
3 on that notice that they have ten days in which to respond,  
4 which that notice does state, and advise them. And as Miss  
5 Jones testified at the time I served her, I told her, you know,  
6 "Don't worry about it, she's got ten days to come in and pay  
7 it." She asked me something about it. I don't really recall  
8 the conversation, but I know that's what I tell tenants  
9 sometime.

10 So that she knew she had ten days. She said she thought  
11 she had ten days other than the weekend. But it would be on,  
12 an assumption that is like playing Russian Roulette to make that  
13 assumption instead of going ahead and paying it. And in fact  
14 she didn't make the payment until after she got the complaint --  
15 summons of complaint.

16 THE COURT: I understand.

17 MR. LIGHTFOOT: So the rumor might be that after she got  
18 the summons of complaint she went over and paid the rent.  
19 According to my reasoning, there's no legal basis for a  
20 complaint here. It's like feeling sorry for, for a tenant.

21 THE COURT: It's not feeling sorry. But that defeats the  
22 whole purpose of the complaint as I understand the program that  
23 tends to subsidize rent for low budgeted people. I don't know  
24 what her income is like but it seems to be a low budget.  
25 There's -- it's no problem for the HUD, Acorn Projects  
26 sending out a notice before resorting to eviction proceedings.  
27 I don't see how that can be a hardship to you.

28 And I think that it points out, too, by implementing the

1       eviction procedure without doing that that she later said she  
2       misunderstood what the ten-day notice meant whether it was  
3       working days versus ten days -- calendar days. And a lot of  
4       times that's even confused by lawyers as to when you have to  
5       act within ten days whether you mean ten calendar days versus  
6       ten working days.

7           MR. LIGHTFOOT: But should that be shifted over, the  
8       blame put on us, your Honor, for her misinterpretation?

9           THE COURT: No. I'm not saying it's who's at fault or --  
10      but I'm just saying eviction proceedings has to be fair to the  
11      tenant and as well as to the landlord. And in this case it's  
12      not fair for you to be evicting a tenant over the payment of  
13      a \$2 bill when you implemented the eviction procedure. I  
14      think she has an obligation to pay the rent and it sounds like  
15      she was doing okay. She was paying in advance even, and that  
16      there ought to have been some other way to collect the \$2  
17      other than through serving the notice of eviction.

18          MR. LIGHTFOOT: Your Honor, I think we are going to ask  
19      for the Plaintiff's --

20          THE COURT: Well, I just stated and that's why I'm telling  
21      you on the record why I'm making the decision so that it will  
22      serve as the statement of decision. That I'm denying your  
23      request for restitution of the property --

24          MR. LIGHTFOOT: I see.

25          THE COURT: Because of the way the background came about  
26      and also the way that you proceeded to collect it.

27          MR. LIGHTFOOT: So it would be basically, your Honor, the  
28      mini diminimus because of the rent diminimus; is that right?

1 THE COURT: Well, the way it came about is through her  
2 paying rent in advance as well as the way that you attempted  
3 to collect it by using the eviction process without first  
4 giving her a bill for the additional \$2.

5 MR. LIGHTFOOT: Prior to the ten-day notice?

6 THE COURT: Prior to the ten-day notice I think is --  
7 the ten-day notice -- if you'd sent her a bill first and she  
8 didn't pay it the ten-day not be would have brought home to  
9 her that this was serious and that this defect was serious and  
10 that you intended to evict her. I'm also concerned that  
11 almost her total rent is being paid by the Government and so I  
12 don't see where it's a financial hardship to the Plaintiff in  
13 this case.

14 MR. LIGHTFOOT: Any other reason, your Honor?

15 THE COURT: For all those reasons I'm denying restitution  
16 of the property.

17 MR. LIGHTFOOT: Thank you, your Honor.

18 MS. DeLaVEGA: Thank you, your Honor.

19 [Proceedings concluded at 11:00 o'clock a.m.]

20 ---oOo---