GOAL 1

PROMOTING ACCESS TO JUSTICE

Arizona Commission on Access to Justice
SRL-LJC Workgroup

Meeting Agenda

January 25, 2018 - 2:00 p.m. to 3:30 p.m.
State Courts Building ♦ 1501 West Washington ♦ Conference Room 332 ♦ Phoenix, Arizona
ACAJ WEBPAGE

	TIME	AGENDA ITEM	PRESENTER
*Pg. 1	2:00 p.m.	**Welcome and Opening Remarks**	*Judge Anna Huberman, Maricopa County Justice Court*
*Pg. 7	2:05 p.m.	**Review New Rule Petition from State Bar Regarding Subsidized Housing Pleading and Disclosure Requirements (R-18-0020)**	*Judge Huberman*
*Pg. 15	2:20 p.m.	**Eviction-Related Projects**	*Judge Huberman*

- Review and approve logo for Legal Info Videos
- Review and approve drafted storyboards for video production
  - *Pg. 15 Tenant Options if Landlord is not Following the Lease
  - *Pg. 19 Landlord Options if Tenant is not Following the Lease
  - *Pg. 21 What a Landlord Needs to Know About Court
  - *Pg. 28 Your Landlord is Taking you to Court
  - *Pg. 33 When Can a Tenant Fight the Eviction?
  - *Pg. 37 What Will Happen at the Hearing in Court?
  - *Pg. 47 What is a Stipulated Judgment?
  - *Pg. 48 Security Deposits
- Pending Production
  - Landlord's Obligations
  - Tenant's Obligations

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order. Please contact Kathy Sekardi (602) 452-3253 or Julie Graber (602) 452-3250 with any questions concerning this agenda. Persons with a disability may request reasonable accommodations by contacting Julie Graber at (602) 452-3250. Please make requests as early as possible to allow time to arrange accommodations.

3:10 p.m. **Review Case Law Regarding Partial Acceptance of Rent in Section 8 Housing** *Judge Huberman*

*Pg. 49 • Courtyard at Encanto v. Michael Delgado
*Pg. 62 • Redacted decision from Commissioner Myra Harris
*Pg. 70 • Myrtle Manor Apartments v. City of Phoenix
*Pg. 87 • National Corp. for Housing Partnerships v. Chapman

3:25 p.m. **Discuss next Access to Justice meeting report** *All*

Wednesday, February 7, 2018 - 10:00 a.m. to 2:00 p.m.
State Courts Building, Phoenix, Arizona
Conference Room 119A/B

Arizona Commission on Access to Justice
SRL-LJC Workgroup
NOTES
October 26, 2017
2:00 p.m. to 3:30 p.m.

Present: Judge Anna Huberman (chair), Mike Baumstark, Scott Davis, Denise Holliday, Paul Julien
Telephonic: Pamela Bridge, Judge Thomas Berning, Anthony Young
AOC Staff: Kathy Sekardi, Julie Graber

Matters considered:

1. **Welcome and opening remarks**
   The October 26, 2017, meeting of the SRL-LJC Workgroup was called to order by Judge Anna Huberman, Chair, at 2:05 p.m.

2. **Status of Rule Petitions**
   Judge Huberman reviewed the status of rule petitions.
   - **R-17-0020 – Rule Petition regarding Stipulated Judgments in Eviction Actions**
     The rule petition was approved and the new rule is effective January 1, 2018.
   - **R-16-0022 – Rule Petition regarding Change of Judge**
     The rule petition was continued until the December Rules Agenda so more data can be compiled regarding the pilot project.
   - **R-16-0040 – Rule Petition regarding Mandatory Eviction Forms**
     Judge Huberman reported that the notices and pleadings were posted as recommended forms on the eviction webpage on the Judicial Branch website. In addition, the Legal Info Sheets (LIS) were shared with the Arizona Landlord Tenant Attorneys Association to obtain additional feedback. The section on the acceptance of partial payments was removed from the Section 8 Housing LIS because of existing controversy regarding interpretation of case law.

     Pam Bridge inquired about the process in place to make changes to the materials because the change to the Section 8 Housing LIS was made without any conversation with the workgroup. After discussion, the workgroup agreed to revisit the issue of acceptance of partial payments in Section 8 Housing at the next meeting, and Pam Bridge and Denise Holliday will share applicable decisions with the workgroup.

3. **Eviction-Related Projects**
   - <u>Review eviction video production list</u>
     One of the first steps to develop eviction videos is to identify and prioritize topics. The workgroup reviewed the most popular topics from the inventory based on members' feedback.

   - <u>Review best practices for video production</u>
     Staff reviewed the process and best practices for video production. As an example, Judge Huberman's script that was shared at the previous meeting was storyboarded and produced as an animation video using GoAnimate!.

1) Define the audience. Is the self-represented litigant viewing the video on the website in advance of a court hearing? Or is the self-represented litigant viewing the video at the court?
2) Identify and prioritize topics. The workgroup selected the following initial topics from the inventory:
    - Overview of the court (include what is an eviction action? (No. 20) and Should I attend the hearing? (No. 30))
    - Tenant options if landlord is not following the lease (No. 6)
    - Landlord options if tenant is not following the lease (No. 12)
    - When can a tenant fight the eviction? What are the possible grounds? (No. 27)
    - What will happen at the hearing in court? (No. 29)
    - What is a stipulated judgment? (No. 34)
3) Decide whether to use live talent recording (Camtasia) or animation (GoAnimate!). The advantages and disadvantages of both types were explained. Live talent requires human talent and graphics and takes longer to develop because it is more resource intensive. Animation is easy to develop and requires less resources. It is also easy to be inclusive of race, gender and ethnicity.
    - The workgroup agreed that animation would be the preferred format but a live judge should do a brief one-minute introduction to the court system because it would add authenticity.
    - How do you find a judge who is a professional communicator?
4) Use video branding. Possible Legal Info Video logos were presented but the workgroup still needs to approve one.
    - This item will be revisited at the next workgroup meeting.
5) Write a script according to certain guidelines:
    - Scripts should be kept at 2 to 3 minutes (that means 1 page).
    - Remember the audience. It is usually a self-represented litigant with no or very little experience with the court system.
    - Stay on topic and do not mix issues.
    - Include actions (e.g., walk up to the judge when called)
    - Keep writing generic so all courts that handle eviction calendars can make use of the video instead of making it court-specific.
    - The scriptwriting must be reviewed for legal accurateness.
6) Review and approve the script for development.
7) Develop and storyboard the video.
8) Review and approve the video.
9) Translate the video into Spanish.
    - Translate script and graphics in Spanish
    - Perform voice over in Spanish
10) Distribute video on AZCourtHelp.org and azcourts.gov.
11) Notify news media.

Staff described the proposed roles and responsibilities for workgroup members and AOC staff. The workgroup agreed to the following:

<u>Workgroup members:</u>

- Choose inventory topics and prioritize;
- Assign scriptwriting to members with deadlines;
- Write script;

- Review and approve the script for development;
- Review and approve the video;
- Notify news media.

AOC staff:

- Transfer script to storyboard;
- Develop GoAnimate! Video;
- Obtain workgroup approval;
- Publish product;
- Distribute to azcourts.gov and AZCourtHelp.org.

The workgroup agreed to start the project by producing six eviction videos to be completed and posted together in English and in Spanish by April 2018. The workgroup reviewed the top topics and assigned workgroup members to write scripts.

Initial 6 Videos	
1. Overview of the court • What is an eviction action? (No. 20) • Should I attend the hearing? (No. 30)	Live Talent Pam Bridge
2. Tenant Options if Landlord is not Following the Lease (No. 6)	Animation Pam Bridge
3. Landlord Options if Tenant is not Following the Lease (No. 12) • What does the landlord need to know about court?	Animation Denise Holliday
4. When can a tenant fight the eviction? What are the possible grounds? (No. 27)	Animation ?
5. What will happen at the hearing in court? (No. 29)	Animation Judge Huberman
6. What is a stipulated judgment? (No. 34)	Animation Judge Huberman

Next Videos	
7. What happens after court?	Animation ?
8. When is the landlord required to accept payment, and may not continue to seek an eviction on non-payment grounds? (No. 28)	Animation Pam Bridge, Denise Holliday, and Judge Berning
9. Public Housing or Section 8 Housing (No. 11)	Animation Paul Julien and Judge Berning will start

4. **Discuss next Access to Justice meeting report**
   Next steps:
   - The next workgroup meeting will be on January 25, 2018. The deadline for members to submit final scripts is January 1, 2018.
   - Scripts will be located on OneDrive for Business so live changes can be made.
   - Staff will distribute a blank storyboard for workgroup members.
   - Staff will distribute assignments and deadlines to the workgroup.

Meeting adjourned at 3:35 p.m.

Next SRL-LJC Meeting: January 25, 2018

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-18- 0020
PETITION TO AMEND THE RULES OF PROCEDURE FOR EVICTION ACTIONS	**PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona respectfully petitions this Court to amend the Rules of Procedure for Eviction Actions, Rules 5(a) and (b), to add pleading requirements to the complaint if the rental unit is subsidized housing. The proposed amendments include a disclosure in the pleading regarding rent apportionment between the tenant and the public housing entity. This Petition also seeks to amend Rule 13(a) to require that the court ensure proper disclosure in this respect.

I. Background and Purpose of the Proposed Rule Amendment

A. Current Rules

In 2008, the Arizona Supreme Court approved the Rules of Procedure for

Eviction Actions. The rules have limited information on subsidized housing. The only current specific reference is in Rule 4(f):

> **f. Compliance with Laws and Regulations Governing Subsidized Rent.** The parties shall comply with all federal and state laws and regulations governing subsidized rent. (emphasis in original).

The pleading requirements do not refer to subsidized housing. Rule 5(b) sets forth the pleading requirements for an eviction complaint, yet the rule is silent on a landlord's duty to disclose whether or not the tenant receives a housing subsidy.

Rule 5(c) applies to cases in which complainant seeks monetary relief, including unpaid rent. Although the rule requires the landlord to state how rent is calculated, this rule is also silent on disclosure of information regarding subsidized rent.

Rule 13(a) sets forth the criteria reviewed by the court prior to entering a judgment, and is also silent on consideration of subsidized housing.

B. The Importance of Subsidized Housing Units in Arizona

The purpose of subsidized housing is to provide safe, habitable, and affordable housing for low-income individuals and families. While there are several types of subsidized housing programs, the federal government's largest subsidized housing program is the "Housing Choice Voucher" program – or what is commonly referred

to as "Section 8" housing. U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, HOUSING CHOICE VOUCHERS FACT SHEET (n.d.), www.hud.gov/topics/housing_choice_voucher_program_section_8.

Under the Section 8 program, a public housing agency (PHA) issues a family or individual a housing voucher to assist in the payment of rent for a habitable residence. *Id.* Additionally, the PHA sets payment standards based on the cost of a moderately-priced rental unit in the locality. *Id.* For tenants receiving such housing assistance, the amount of rent and utilities paid by the tenant is generally limited to 30% of the tenant's adjusted monthly income. *Id.* If the unit rent is greater than the payment standard, then the tenant pays the additional amount. *Id.* The PHA subsidizes the difference. *Id.* As an example, a disabled tenant whose income is $800 per month will typically be responsible to pay approximately $240 per month for rent (30% of $800). In turn, the PHA will be responsible for the payment standard minus $240, or the gross rent minus $240, whichever is less. *See id.*

In Arizona, over 45,000 households are federally subsidized tenants, not counting public housing units operated by state and local governments. CENTER ON BUDGET & POLICY PRIORITIES, ARIZONA FACT SHEET: FEDERAL RENTAL ASSISTANCE (Mar. 30, 2017), https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-AZ.pdf.

C. Tenant is not Responsible for the Subsidized Portion of Rent.

Under the housing voucher program, tenant is not obliged to the pay the public entity's portion of the rent and should not be sued for the subsidized portion of unpaid rent. *See, e.g.*, HOUSING CHOICE VOUCHERS FACT SHEET, *supra*. Nor should the landlord obtain possession of the unit if tenant has met his or her obligations to pay tenant's portion of the rent. The tenant should not be adversely affected by the housing program's failure to pay its apportionment of the subsidized rent.

II. Tenants' Property Interests and Due Process Considerations.

Tenants have a property interest in their residences. *Greene v. Lindsey*, 456 U. S. 444, 451-52 (1982); *see also Foundation Development Corporation v. Loehmann's*, 163 Ariz. 438, 442, 788 P.2d 1189, 1193 (Ariz. 1990) (recognizing common law right of tenant's property interest in rental). Eviction proceedings that deprive tenants of that property must comply with the due process requirements of the Fourteenth Amendment to the United States Constitution. *Greene*, 456 U.S. at 455. Moreover, tenants also have a property interest in their subsidized housing benefits because they are in the class of persons the program is intended to benefit. *Ressler v. Pierce*, 692 F.2d 1212, 1215, (9th Cir. 1982).

It is well recognized that for low-income persons, an eviction action may threaten their only means of shelter. *See, e.g.*, Chester Hartman & David Robinson,

Evictions: The Hidden Housing Problem, 14 HOUSING POLICY DEBATE 461 (2003), https://www.innovations.harvard.edu/sites/default/files/10950.pdf. The inability to find other housing on short notice can lead to the disruption of children's education, interruption of employment, dislocation from health care providers, loss of personal belongings, and homelessness. In addition, the eviction process may lead to monetary judgments. These monetary judgments make it difficult for tenants to secure new rental housing. Thus, eviction cases are highly consequential to tenants and especially low-income tenants, who often lack back-up resources. The result of an eviction may be homelessness.

If a landlord requests and obtains a judgment for a public entity's portion of the rent when the tenant is not responsible for that portion of the rent, the tenant is adversely affected. The tenant may lose not only their housing, but their Section 8 certification as well, thereby affecting their ability to secure housing in the future.

CONCLUSION

Because of the severe consequences that a tenant receiving a housing subsidy could face if held responsible for a default on payment of the subsidized portion of tenant's rent, the rule changes proposed in this Petition are necessary to streamline the pleading requirements for landlords bringing an eviction action against a tenant whose housing is subsidized. This effort is made to ensure protection of these tenants

from the loss of home and their government subsidy through no fault of their own. The Petition also seeks to create proper court oversight in eviction proceedings to ensure that landlords are only seeking possession of rental units and monetary judgments from the portion of the rent that tenant is obliged to pay. Therefore, the State Bar respectfully requests the Court approve this Petition.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 10th day of January, 2018.

by: _____

Appendix

(Please note: deletions are reflected by ~~strikethrough~~ and additions are reflected by underline.)

Rules of Procedure for Eviction Actions

Rule 5. Summons and Complaint: Issuance, Content and Service of Process

a. [No change in text.]

b. Complaint. The complaint shall:

(1)-(7) [No change in text.]

(8) State whether or not the rental is a subsidized housing unit and, if it is, state the total rent per month and specify the amount of rent per month that is the tenant's responsibility.

(9) Current Rule 5(b)(8) would be renumbered 5(b)(9).

c. Complaint for Monetary Damages. If the complaint seeks a money judgment for rent, late charges, or other fees, charges or damages permitted by law, the complaint shall also state:

(1)-(7) [No change in text.]

(8) If the rental is a subsidized housing unit, the landlord must state the total amount of the rent per month, the tenant's portion of the monthly rent and the total amount of the tenant's portion of the rent that the tenant owes.

Rule 13. Entry of Judgment and Relief Granted

a. Items to Review. Except for stipulated judgments entered pursuant to Rule 13(b)(4), in each eviction action the court shall:

(1)-(4) [No change in text.]

(5) Determine whether the rental is subsidized. If the court determines the rental is subsidized, determine whether there is unpaid rent that the tenant is obligated to pay as the tenant's portion of the rent.

No.	Original Script Submission	Modified Script	Directives	Visual/Graphics
1			*Animated* *Sound FX – elevator doors opening, dinging, and closing*	
2	*Intro - Music fades in*			
3	If you are a tenant and your landlord is violating your lease or law, many of your options are spelled out in your lease, the Arizona Mobile Home and Residential Tenant Act, the Arizona Residential Landlord Tenant Act. This video will focus on your rights under the Arizona Residential Landlord Tenant Act.			
4	Although you have many options, you cannot stop paying rent just because your landlord violates the law.			
5	The most frequent complaint against landlords is that fail to repair something in your unit.			
6	If you would like your landlord to make repairs, you must give your landlord a written notice requesting the repairs.			
7	The amount of time you must give your landlord to make the repairs depends upon the seriousness of the repairs.			

8	For instance, if your landlord fails to provide running water, hot water, gas, electrical services, heat, air conditioning or cooling or other essential services, required by the lease or law, you only need to give a reasonable (usually 2 days) written notice to the landlord about the failure to provide the service and do one of the following:			
9	• Get the service, such as bottled water or a space heater and the deduct the cost from your rent			
10	• Put the utilities in your name and deduct the cost from your rent			
11	• Pay the past due utility bill and deduct it from your rent			
12	• Get other reasonable housing and not pay rent while the utilities or services are not provided			
13	• You should be very careful if you are going to do any of these options. Make sure you told the landlord in writing you are going to do one of these options and make sure you keep the receipts of your cost.			
14	If the needed repairs affect your health and safety, you must give the landlord a five day notice to fix the repairs.			
15	If there are other needed repairs, you must give your landlord ten days notice.			
16	In each of the above situations, if the landlord does not fix the problem,			

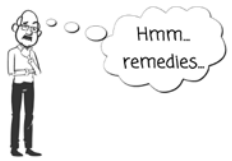
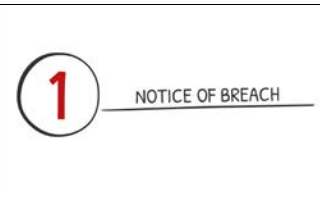
	the tenant can end the lease and sue the landlord in court.			
17	Remember, you can't do any of these options unless you give your landlord a written notice!			
18	Besides repairs, some other frequent complaints against landlords are abuse of access, unlawful removal and retaliation			
19	If your landlord enters the rental without 2 days' notice, unless it is an emergency, you may			
20	• File a lawsuit against the landlord and			
21	• End the lease			
22	If the landlord removes or keeps you out of your rental unit, you should contact the police to see if they will help you. You may also			
23	• Sue the landlord and			
24	• End the rental agreement.			
24	Retaliation is another frequent complaint.			
25	If, in the past 6 months, you complained to your landlord or a government agency concerning health and safety of the unit, and then your landlord did any of the following, you may be entitled to damages.			
26	1. Landlord increased rent			
27	2. Landlord decreased services			
28	3. Your landlord filed an action for possession (eviction action)			

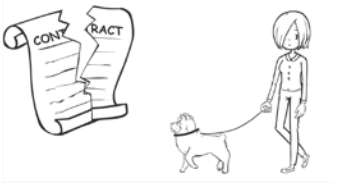
29	If you are unable to resolve these issues with your landlord, you can litigate these issues in court by filing a lawsuit against or your landlord, or if you are being evicted, you may be able to raise them as counterclaims.			
30	In order to file a counterclaim to an eviction action:			
31	• You must put it writing, and file it with the court.			
32	Your counterclaims must state the following:			
34	1) The specific facts claiming that your landlord violated the rental agreement or statute.			
35	2) If notices were required to be given to your landlord, when the notices were given and what they said.			
36	At trial, you must be able to prove the counterclaims.			
37	Another common complaint tenants have against their landlords is failure to return the security deposit. For info on how to get your security back, see that video.			
38				
39			*Animated* *Sound FX – elevator doors opening, dinging, and closing*	

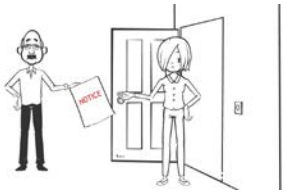
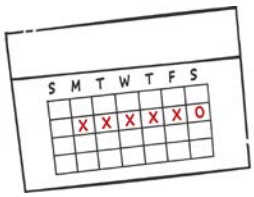
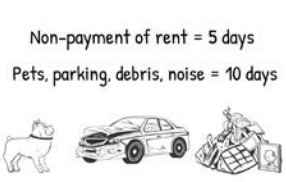
No.	Narration	Directives	Visual/Graphics	Time
1	It is the Landlord's obligation to understand what they need to do at court in an eviction action	Landlord turning pages of the ARLTA and the RPEA	Landlord reading the ARLTA and the RPEA	5 seconds
2	The landlord must first issue a written notice to the tenant explaining the breach and keep a copy for their records	Landlord handing one to the Tenant and keeping one in their folder	Landlord handing Notice to Tenant and putting one in their file	5 seconds
3	The landlord must be able to prove how they served the notice	A close up shot of Notice with Landlord marking the box that says hand-delivered and writing the date and time and to whom	Landlord with a Notice	5 seconds
4	The Notice must clearly explain to the Tenant what the alleged breach is and what the Tenant must do to fix it	A close up of the 5 Day Notice from the Court's website	5 Day notice	10 seconds
5	The Landlord must wait the proper period of time to allow the Tenant to fix the breach	A calendar being marked off	A calendar or watch?	5 second
6	The Landlord must have proof the Tenant did not fix the breach	Dog barking and Landlord watching and shaking his head and writing down date and time	Landlord walking up to the home and seeing the dog	10 seconds
7	The Landlord must fill out a Complaint and a Summons and attach a copy of the breach notice and a REIS notice to these documents	Typing of info on a Complaint	Copy of Complaint from website	10 seconds
8	These documents must be served by a process server or constable	Process server walking up to the Tenant at the house	Picture of a Process Server and a Person	10 seconds
9	The court date will be set at least 5 to 8 days out	Calendar showing date served with x'd out dates and then one day marked Court Date	A calendar	10 seconds
10	The Landlord should bring a copy of the lease and the ledger to court, as well as the Affidavit of Service (from the process server)	Landlord walking into court and carrying a Lease and Ledger	Landlord, Lease, Ledger and courthouse	5 seconds

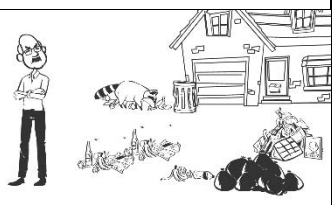
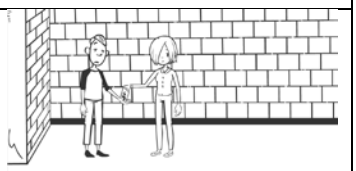
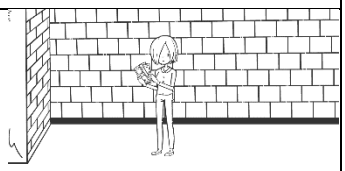
11	The Court will call the case and the Landlord will walk up to the bench	Landlord walking up to the bench with a Judge	Landlord, bench and Judge	5 seconds
12	The Judge will swear in the Landlord and ask the Landlord questions about what is alleged in the Complaint	Landlord raising his hand and Judge swearing him in	Landlord, bench and Judge	5 seconds
13	The Judge will ask the Tenant if they agree or disagree with the allegations and either grant a Judgment or set it for trial	Tenant walking up to stand next to judge at bench and raising his hand to testify	Landlord, Tenant, bench and Judge	10 seconds
14	After a Judgment is issued, the Tenant must vacate in 5 days (or 24 hours if an Immediate). If they do not, the Landlord can file for a Writ of Restitution and must wait to do the lockout until the Constable or Sheriff meets them at the property.	Calendar marking off 5 days, Tenant moving his stuff (should the Writ be a separate slide??)		5 seconds

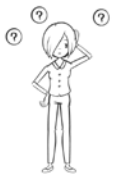
Do we need to cover what happens after the Writ, the 21 day letter and the Tenant's right to recover their possessions? What about the SODA?

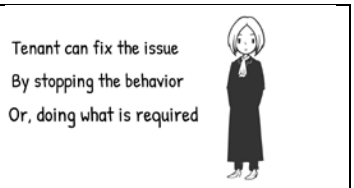
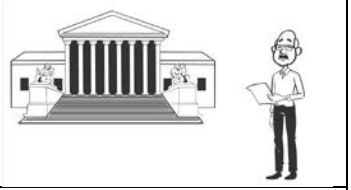
No.	Original Script Submission	Modified Script	Directives	Visual/Graphics
1.			*Animated Sound FX – elevator doors opening, dinging, and closing*	
2.			*Intro - Music fades in*	
3.	Landlords and Tenants each have different rights and responsibilities	Landlords and tenants each have different rights and responsibilities.	Walk toward each other and shake hands	
4.	If a Tenant is not following the rules or the law, the landlord has various remedies	If a tenant is not following the rules or the law, the landlord has various remedies.	Landlord pondering an idea with thought cloud above him. "What are my remedies?"	
5.	but they must follow a process to exercise those rights	but the landlord must follow a process to exercise those rights, which are found in the Arizona Residential Landlord Tenant Act.	Landlord reading the ARLTA	
6.		The first thing a landlord must do is to prepare a written notice of the alleged breach.	Outline the first requirement with "Notice of breach"	

7.		A breach happens when one of the parties to a contract, here a rental agreement, has failed to do something they promised to do, or did something that shouldn't be done.		
8.		For example, if a tenant allows a pet to live on the premises when the rental agreement indicates that pets are not allowed…that's a breach of the rental agreement.		
9.	The Notice must tell the tenant specifically what the alleged breach is and what needs to be done to correct it	The notice must tell the tenant specifically what the alleged breach is and what needs to be done to correct it.	A Notice with "On this date you breached the lease as follows and must fix this"	
10.		Let's talk about the second requirement…	Outline the second requirement with "Delivery of notice"	

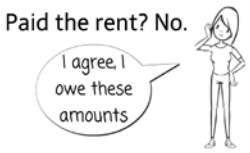
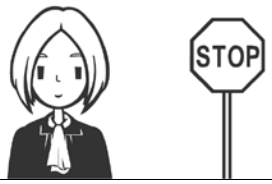
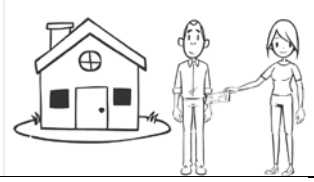
11.	The Landlord must deliver the notice to the Tenant by delivering it to the premises and handing it to someone	The landlord must deliver the notice to the tenant by delivering it to the premises and handing it to someone.	A landlord handing a tenant the notice	
12.	The landlord may deliver the Notice by mailing it certified or registered mail	The landlord may deliver the notice by mailing it certified or registered mail.	Landlord putting a letter in the mail box	
13.		The third requirement concerns how much time is given to the tenant to fix the breach.	Outline the third requirement with "TIME FOR FIXING BREACH"	
14.	If the Notice is sent via mail, the time to fix the issue	If the notice is sent by mail, the time to fix the issue		
15.	is extended by up to 5 days, even if the Tenant does not pick up the certified letter	is extended by up to 5 days, even if the tenant doesn't pick up the certified letter.	Calendar Place a "X" on five days and a "0" on the 6th day	
16.	There are different time frames to fix different types of breaches	There are different time frames to fix different types of breaches.	$= 5 days Dog, noise, parking, etc.=10 days	
17.	If the Tenant does not fix the issue within the required time frame, the	If the tenant does not fix the issue within the required time frame, the	Landlord watching a large watch spin	

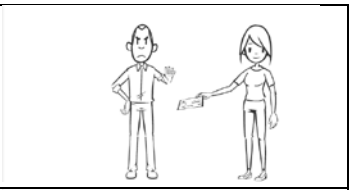
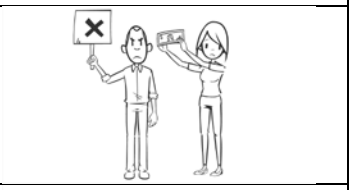
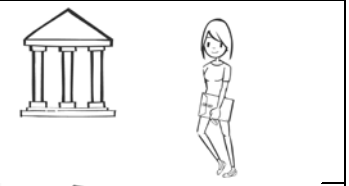
	Landlord can file an eviction action	landlord can then file an eviction action.		File an eviction action
18.	If the Tenant fixes the issue but then commits the same or similar breach in the future,	If the tenant fixes the issue but then commits the same or similar breach in the future,	The landlord handing the notice, both tenant and landlord smiling, a clock, then the landlord frowning and handing a Moveout Notice	
19.	the Landlord can terminate the lease with a 10 day notice	the landlord can terminate the lease with a 10-day notice.		
20.	If the issue involves a crime or other serious issue,	If the issue involves a crime or other serious issue,	Man walking over to another person and handing them drugs and receiving money	
21.	the Tenant can't fix that issue and must move to avoid the eviction hearing if they are responsible for the serious breach	the tenant can't fix that issue and must move to avoid the eviction hearing if they are responsible for the serious breach.		

22.	If the issue involves a serious health or safety issue,	If the issue involves a serious health or safety issue,	Person sitting with lots of stuff all around them and the pile getting higher and higher	
23.	the Tenant must fix that within 5 days	the tenant must fix that within 5 days.		
24.	The Tenant has the right to fix most breaches	The tenant has the right to fix most breaches.	Tenant with questions marks above their head and then a lightbulb	 
25.	If the breach is for the non-payment of rent, the Tenant can fix the issue by paying the rent plus any late fees listed in the lease.	If the breach is for the non-payment of rent, the tenant can fix the issue by paying the rent plus any late fees listed in the lease.	Tenant handing the Landlord the money and the Landlord handing the Tenant a receipt	
26.		For more detailed information regarding the non-payment of rent, view the video entitled “Your Landlord is Taking You to Court”		

27.	If the breach is for something else, the Tenant can fix the issue by stopping the alleged behavior or fix whatever they were not doing but are required to	If the breach is for something else, the tenant can fix the issue by stopping the alleged behavior or fix whatever they were not doing but are required to do.	Tenant walking dog on leash, turning down radio, parking car in driveway	
28.	If the breach is not fixed, the landlord can file an eviction action with the court	If the breach is not fixed, the landlord can file an eviction action with the court.	Landlord walking up to a courthouse with papers in his hand	
29.	The Landlord can't lock out the Tenant at this stage	However, the landlord can't lock out the tenant at this stage.	A circle that has a picture of a landlord locking out a tenant with a big "X" across the circle	
30.	The Landlord must go before a Judge and get a Judgment	Instead, the landlord must go before a judge and get a judgment.	Landlord and Tenant standing in front of a Judge	
31.	See Steps regarding going to court, what happens at court and after court	For more information about what to expect once you get to court, watch the video entitled "What Happens in Court."	Judge handing Landlord a Judgment and Tenant taking a copy and looking sad	
32.		*(Music fades out)*		

No.	Original Script Submission	Modified Script	Visual/Graphics
1		*Intro - Music fades in*	 
2.	*My Landlord is Taking Me to Court*	*Your Landlord is Taking You to Court*	 Your Landlord is Taking You to Court
3.	If you are watching this video you have probably received papers from the court that an eviction has been filed against you and you have a court date.	You've received papers from the court entitled, summons and complaint. This paperwork tells you than an eviction has been filed against you and that a date and time is scheduled for a court hearing.	1. Received court papers 2. Eviction filed 3. Court date 
4.	Those papers might have been left at your door or handed to you by a process server.	Those papers might have been left at your door or handed to you by a process server.	
5.	In most cases the law that applies is the Arizona Residential Landlord Tenant Act. But there are other laws that could apply, like the Arizona Mobile Home Park Act.	In most cases, the law that applies to evictions is the Arizona Residential Landlord Tenant Act. But there are other laws that could apply, like the Arizona Mobile Home Park Act.	 Arizona Residential Landlord Tenant Act (ARLTA)

6.	There is a link to these laws on the web page.	You can find a link to these laws on the Arizona Department of Housing web page.	
7.	The court date is very soon and you don't have much time to prepare. And it is not likely that the judge will postpone your court date because you don't want to miss work or you don't have a baby sitter. It is important that you read all of the documents and decide if you agree or disagree with the allegations.		
8.	If you have not paid the rent yet and agree that these amounts are owed	If you have not paid the rent yet and you agree that these amounts are owed…	
9.	you can stop the eviction process	…you can stop the eviction process…	
10.	by paying the landlord all the money owed calculated on the date that you pay.	…by paying the landlord all the money owed calculated on the date that you pay.	
11.	This includes all of the court costs, the attorney fees and the late fees.	This includes all the court costs, the attorney fees, and the late fees.	

12.	If you offer to pay the full amount the landlord MUST accept it but he may refuse a personal check and	If you offer to pay the full amount the landlord MUST accept it but the landlord may refuse a personal check and…	
13.	require the payment only be by certified check or money order.	…require the payment only be made by certified check or money order.	
14.	If the landlord does not accept your full payment	If the landlord does not accept your full payment	
15.	you need to provide proof to the judge of how much you offered to pay and when.	you need to provide proof to the judge of how much you offered to pay and when.	
16.	If for some reason you can't pay before the court date you can bring the money to court.	If for some reason you can't pay before the court date you can bring the money you owe to the court.	
17.	You may be able to bring cash to court.	You may even bring cash to court.	
18.	If you don't stop the eviction you should come to court.	If you don't stop the eviction you should come to the court hearing.	
19.	Make sure to check where you need to be and at what time.	But, make sure to check where you need to be and at what time.	

20.		To locate the court where the hearing will be held, visit AZCourtHelp.org, click on the Find my Court tab, click on Justice Courts, then insert the court's street, town, or city name.	
21.	If you don't come to the hearing the judge will probably enter a default judgment against you, meaning the judgment is signed without you being able to defend yourself. If the judge calls the case and you aren't there you might lose your chance to be heard.	If you don't come to the hearing, and the judge calls your name, you will lose your chance to be heard and the judge will probably enter a default judgment against you.	
22.		A default judgment means a judgment is signed, in your absence, without you being able to defend yourself.	
23.	The next video will talk about what to expect once you get to court.	For more information about what to expect once you get to court, watch the next video entitled "What Happens in Court."	
24.		*(Music fades out)*	 

Tenant Defenses to an Eviction

If you are a tenant and your landlord wants to evict you, there are three possible types of defenses you can present:

1) Your landlord did not follow the rules and laws concerning the procedures to evict you;
2) You did not commit the violations listed on the complaint.
3) You have a valid, legal defense to the violations.

If you are going present a defense and try to stop the eviction against you, you will need to go to court at the time on your summons and be ready to show your defense to a judge. Based upon the information you present and the landlord presents, a judge will make a decision whether you should be evicted. Take copies of any receipts or notices you need for your defense. If you have witnesses, make sure they come to court on time. Try to be 15 minutes early.

You do not have to file a written answer or counterclaims in order to present your defenses to the judge. You can tell the judge your defenses in person. The judge may later ask you to file an answer.

If you want to bring counterclaims, you will need to file a written answer and counterclaim before the time of your hearing. The answer will cost money to file but if you are low income, you can request your fees waived. Make sure to give a copy of your counterclaims and answer to the landlord or their attorney before the hearing.

Make sure you are in the courtroom at the time of your hearing. When the judge calls your case, make sure you tell the judge your defense at that time. The judge may hear all the facts of your case at that time or set it for another time.

Depending upon the type of violation and housing, you may have different defenses. There are different laws concerning the Arizona Residential Landlord Tenant Act and the Mobile Home Park Residential Landlord and Tenant Act. In addition, you

may have additional rights if you live in subsidized housing. If you live in subsidized housing, make sure to tell the judge when your case is called.

Landlords have to comply with all of the procedures spelled out in the rules and law to evict you.

For all types of evictions, you have a defense if the landlord did not do the following:

1) The landlord did not give you a proper written notice of your violation. Different types of violations require giving you different amounts of notice of your violation. However, all notices must state clearly what you did wrong.
2) The landlord did not provide you with a proper summons and complaint that included the required language such as telling you clearly the details of what you did wrong.

This video will focus on the defenses available to you if the Arizona Residential Landlord Tenant Act applies to you. If you own a mobile home and rent a space, the Mobile Home Park Residential Landlord and Tenant Act may apply to you. To review your rights and defenses, under that Act, you can go to this link.

Nonpayment of rent is most common type of eviction. Here are some possible defenses to a nonpayment of rent case:

1) Your landlord failed to give you a notice stating the amount due and giving you five days to pay the full amount due.
2) Your landlord is requesting the wrong amount due.
3) You paid your rent in full and any late fees allowed in the lease within five days of receiving a notice that your rent is late.
4) Your landlord accepted your rent, or a portion of your rent and did not provide you a written waiver.
5) Your landlord failed to provide you an essential service, like heat, water and

air conditioning, and after reasonable notice to the landlord, you supplied your own essential service or found reasonable substitute housing and deducted the cost from your rent.

6) Your landlord is requesting late fees and your lease does not mention late fees.
7) If, before the court orders a judgment against you, you can pay the full amount due including court costs and attorney's fees, you should tell the judge.

Here are some possible defenses to an eviction based upon a 10-day notice of material breach:

1. Your landlord failed to give you a notice stating what you did wrong and informed you that you had ten days to fix it.
2. The problems stated in the notice and complaint did not occur.
3. The problems stated in the notice and complaint are trivial and not material.
4. You fixed the problem within ten days of receiving your notice from the landlord.
5. Your landlord knew about your violation but still accepted all or part of your rent without having you sign a waiver.
6. You complained to your landlord or government agency about a health and safety issue within 6 months of when your landlord filed the complaint and you think they are being retaliatory.
7. Your landlord cannot prove you committed the violation and at trial and has no admissible evidence that you committed the violation.
8. Your guest committed the violation and you could not reasonably foresee that your guest would the violation and you tried your best to stop your guest from committing the violation.

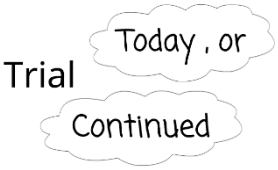
For 5 day notices concerning health and safety, you may have the same defenses, except you only have 5 days to fix the problem after receiving the notice.

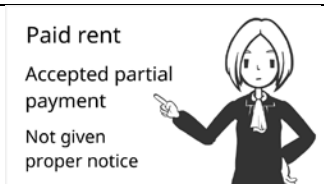
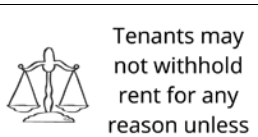
If you receive a second 10-day notice in one year for the same violation, you will not be able to fix the problem after the 2nd notice, but you may have a defense if the violation is not for the same type of violation.

If you receive a notice of immediate and irreparable violation, you do not have a right to cure the violation, but you may have all of the rest of the defenses.

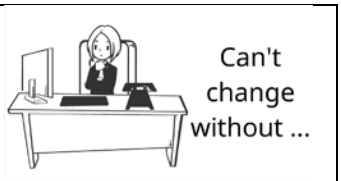
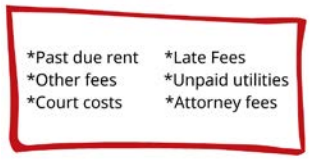
No.	Original Script Submission	Modified Script	Directives	Visual/Graphics
1.			*Animated Sound FX – elevator doors opening, dinging, and closing*	 
2.	*Intro - Music fades in*			
3.	If you are watching this video you have probably received papers from the court that an eviction has been filed against you and you are going to go to court.	You've received papers from the court entitled, summons and complaint.	-Judge speaking to audience -enter "Summons and Complaint" paperwork	
4.		This paperwork tells you that an eviction has been filed against you and that a date and time is scheduled for a court hearing.	-Zoom in on court hearing date and time	
5.	Make sure you arrive in time to the proper location.	It's important to make sure you arrive in time to the proper location.	-Tenant running with clock in background	
6.		To locate the court where the hearing will be held, visit AZCourtHelp.org, click on the Find my Court tab, click on Justice Courts, then insert the court's street, town, or city name.	-Video clip of AZCourtHelp.org showing how to "Find My Court"	

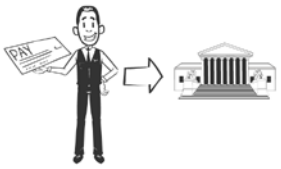
7.	The judge will call your name and you should go up to the bench. You should pay attention so you hear when the judge calls your case.	Pay attention to what the judge is saying while you're in the courtroom. The judge will call your name and you should walk up to the judge's bench.	-Tenant actively listening to judge speaking from bench -Tenant walking up to bench	
8.	The judge will verify that the file contains all the necessary paperwork.	The judge will verify that the file contains all the necessary paperwork.	-Judge behind desk reviewing files or writing	
9.	The judge will ask you if you agree or disagree with the complaint.	The judge will ask you if you agree or disagree with the complaint.	-Judge sitting at bench -Speech bubble "Agree?" -Speech bubble "Disagree?"	
10.	If you agree, the judge will sign the judgment and give you a copy.	If you agree, the judge will sign the judgment and give you a copy.	-Close-up of tenant nodding head in agreement	
11.	The judgment will tell you how much money you owe and when you have to move out.	The judgment will tell you how much money you owe and when you have to move out of the rental property.	-Judgment paper -Red circles around money owed and date to move out by	
12.	If you disagree, you may file a written answer to the complaint before the case is called	If you disagree, you may file a written answer to the complaint before the case is called…	-Close-up of tenant shaking head -Tenant handing paperwork to clerk	

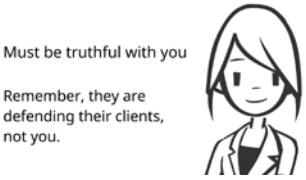
13.	or you may answer orally when you come forward.	… or you may answer orally when you come forward.	-Tenant speaking with judge	
14.	You may also file a written counterclaim.	You may also file a written counterclaim.	-Pad and paper -Text “You may also file a written counterclaim.”	
15.	If the judge determines that you may have a legal defense or there are facts in dispute, the judge will set the case for trial.	If the judge determines that you may have a legal defense or there are facts in dispute, the judge will set the case for trial.	-Judge walks across screen -“Trial” delayed entrance on right screen	
16.	The trial might be heard on that same day but it could also be continued to the next eviction calendar.	The trial might be heard on that same day but it could also be continued to the next eviction calendar.	-“Trial” text on left screen -“Today, or” speech bubble -“continued” speech bubble	
17.	You can only request a jury if there are facts in dispute that a jury can decide.	You can only request a jury if there are facts in dispute that a jury can decide.	-Jury image “Facts in dispute?”	
18.	We understand that tenants fall on hard times for all sorts of reasons and it is no reflection on you as a tenant that you haven’t been able to pay your rent.	We understand that tenants fall on hard times for all sorts of reasons and it is no reflection on you as a tenant that you haven’t been able to pay your rent.	-Woman crying sits on bench -Fly-in images of finances, family, transportation concepts and surround her	
19.	But the judge must follow the law. And the law does not consider hardship as a legal	But the judge must follow the law. And the law does not consider hardship as a legal	-Judge walks and talks across screen	

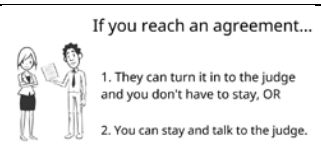
	defense to the non-payment of rent.	defense to the non-payment of rent.		
20.	A legal defense might be that you did pay the rent, that the landlord accepted a partial payment, or that you were not given proper notice.	A legal defense might be that you did pay the rent, that the landlord accepted a partial payment, or that you were not given proper notice.	-Judge close-up with finger pointing at reasons -Text "Paid rent" -"Accepted partial payment" -"Not given proper notice"	
21.	The law does not allow tenants to withhold rent for any reason not authorized by law.	The law does not allow tenants to withhold rent for any reason not authorized by law.	-Scales of justice left screen -Text "Tenants may not withhold rent for any reason unless law allows."	
22.	There are situations where the tenant may pay to obtain a service the landlord is not providing, like water or heating, or may find another place to live in the meantime.	There are situations where a tenant may pay to obtain a service the landlord is not providing, like water or heating.	-Image of tenant shrugging shoulders -In background image of water stopping from faucet or, -Tenant's family overheating	
23.		If this is your situation, view the video entitled "Tenant Defenses to an Eviction." This video details when and how	-Image from "Tenant Defenses to an Eviction" video	

		a tenant can defend against an eviction action.		
23 a	In those cases, the tenant can discount the money spent from the rent owed.	**Question for the workgroup:** Insert the highlighted narration or include in the video regarding tenant's defenses to an eviction action?		
23 b	But the tenant must have first given the landlord reasonable notice, delivered in hand or by certified mail, and then actually obtained the services or the housing.			
23 c	Tenant may not simply stop paying rent.			
23 d	You might be entitled to recover damages because you believe you were paying more rent than you should have if the landlord was not complying with the rental agreement. But you might have to do that in a separate lawsuit.			
24.	If you are ordered evicted, the judgment will say that you must move out in 5 days.	If you are ordered evicted, the judgment will say that you must move out in 5 days.	-Order -Text "Move out in 5 days"	

25.	We know that does not give you much time but that is what the law says and the judge cannot change that	We know that doesn't give you much time but that is what the law says and the judge cannot change that…	-Judge sitting at desk thinking -Text "Can't change without …"	
26.	without agreement from the landlord.	… without agreement from the landlord.	-Landlord and tenant shaking hands -Text "Agreement from the landlord"	
27.	The judgment will also include past due rent, late fees, and other fees that may be in the lease, unpaid utilities, court costs and attorney fees.		-Frame with text of fees and costs enumerated	
28.	The landlord may be entitled to some other damages but only if they are proved and were included in the complaint.	The landlord may be entitled to some other damages but only if they are proved and were included in the complaint.	-Landlord image on right screen -Animate from bottom to top -Text "Damages proved and included in the complaint"	
29.	Once a judgment is signed it will be on your record and rental history.	Once a judgment is signed it will be on your record and rental history.	-Judge signing document in office	

30.	If you pay the full amount of the judgment, the landlord must file a document called	If you pay the full amount of the judgment, the landlord must file a document called…	-Image of landlord holding a check left screen -Image of arrow pointing to the right -Image of courthouse right screen	
31.	a satisfaction of judgment with the court indicating the debt was paid.	… a satisfaction of judgment with the court indicating the debt was paid.	-Text “Satisfaction of judgment”	"Satisfaction of judgment"
32.	But it will remain on your record.	But it will remain on your record.	-Judge on screen right -Text “Judgment remains on your record”	Judgment remains on your record 
33.	The only way to get a judgment removed from your record is to have the landlord vacate the judgment.	The only way to get a judgment removed from your record is to have the landlord vacate the judgment.	-Image of “Your record” on-screen -Text “Judgment” vanishes	
34.	That is something you would have to work out with him.	That is something you would have to work out with the landlord.	-Close-up of judge speaking to audience	
35.	We find that many times after a judgment is signed, landlords are willing to work with the tenants.	Many times after a judgment is signed, landlords are willing to work with the tenant to help them stay in the rental property.	-Image of house to the left -Tenant seems happy in middle screen -Landlord neutral stance	

36.	They are under no obligation to reinstate the lease even if you pay everything that you owe.	However, the landlord is under no obligation to reinstate the lease even if you pay everything that you owe.	-Same image of house and landlord -Tenant is now neutral with arms crossed -"No" symbol over the house	
37.	But many times they work with the tenants to help them stay in the property.			
38.	You should talk to your landlord to see if you can come to some kind of agreement. Be sure to get any agreement you make in writing.	You should talk to your landlord to see if you can come to some kind of agreement. And be sure to get any agreement you make in writing.	-Animated judge talks seriously to audience	
39.	Most landlords in court will be represented by an attorney.	Typically most landlords will be represented by an attorney.	-Landlord stands in background with attorney forward	
40.	Many of them might offer to talk to you and you may talk to the attorney if you want.	Many of them might offer to talk to you and you may talk to the attorney if you want.	-Tenant stands equally with landlord's attorney	
41.	As officers of the court, they have an obligation to be truthful with you and not mislead you. But	As officers of the court, they have an obligation to be truthful with you and to not mislead you, but remember, they are	-Text on left "Must be truthful with you" -Text on left "Defending	

	they will be defending their clients, not you.	defending their clients, not you.	their clients, not you"	
42.	If you reach an agreement with them they can turn it in to the judge and you don't have to stay or you can stay and talk to the judge.	If you reach an agreement with the landlord and their attorney, they can turn it in to the judge and you don't have to stay or you can stay and talk to the judge.	-Attorney with tenant on left, tenant holding agreement -Text "If you reach an agreement…" 1. They can turn it in to the judge and you don't have to stay, OR" "2. You can stay and talk to the judge."	
43.	If you do not move by the date the court tells you to move,	If you do not move by the date the court tells you to move…	-Judge talking to audience	
44.	the landlord can file a request for a writ of restitution.	…the landlord can file a request for a writ of restitution.	-Image of document with title "Writ for Restitution"	
45.	This is an order the judge signs for the constable or sheriff to come and remove you from your home.	The writ of restitution is an order the judge signs that allows the constable or sheriff to come and remove you from your home.	-Close-up of judge explaining the order	
46.		For more information regarding eviction, visit AZCourtHelp.org.	-Typing on screen A-Z-C-o-u-r-t-h-e-l-p-.-o-r-g -Webpage pops on screen	

47.			*Animated Sound FX – elevator doors opening, dinging, and closing*	

WHAT IS A STIPULATED JUDGMENT?

When there is a stipulation, it means that both sides are in agreement.

A stipulated judgment means that both the landlord and tenant agree that the landlord has the right to recover possession of the rental property and they agree as to the amounts owed.

You can agree to everything the landlord is claiming or you can agree to make changes.

The Rules that govern eviction cases spell out certain language that must be on all stipulated judgments. Make sure that you read everything and understand what it says. Once you sign the stipulated judgment it is not easy to back out if you change your mind.

If you don't enter a stipulation, the judge will decide the case. If you are not there, the judge may sign what is called a default judgment. The consequences of all judgments are the same, whether it is stipulated, a default or a judge's decision.

The judgment will say how much you owe and by what date you need to move out.

If you are ordered evicted, in most cases the judgment will say that you must move out in 5 days. We know that does not give you much time but that is what the law says and the judge cannot change that without agreement from the landlord. The judgment will also include past due rent, late fees, and other fees that may be in the lease, unpaid utilities, court costs and attorney fees. The landlord may be entitled to some other damages but only if they are proved and were included in the complaint.

Once a judgment is signed it will be on your record and rental history.

How can I get my security deposit back?

At the end of your lease, you may want your security deposit returned. You should check your lease to make sure there are not any administrative fees that state they will not be returned. Also, a landlord may be able to keep parts or all of your security deposit for damage to your unit caused by you or unpaid rent.

In order to have your security deposit returned, there are certain procedures you must do.

Upon your request written, a landlord must give a tenant written notice of the move-out inspection date and the right to be present. Generally, this is best after you moved your belongings but before you turn in the key for the landlord to join you on a walk-through inspection of the home.

If you can, use the copy of the completed walk-through checklist you used when you moved in to compare the condition of the home. This allows you and the landlord to decide if you owe any money for damages. You may want to keep a copy of the completed walk through check list signed by the landlord for your records.

Also, you may want to take pictures of the rental unit to keep for your records in case any dispute should later arise over the return of your security deposit.

You should give your written request for the return of your security deposit and provide your landlord an address where they should send your money or response.

Within 14 days of this request, your landlord must return the security deposit to you or they must give you a written list of the deductions they made (such as for unpaid rent or repairs) along with a payment of any remaining money.

If the landlord does not respond to your written request or if you disagree with any charges, you may sue for the return of your deposit plus twice the amount wrongfully withheld.

Most tenants are able to bring these suits by themselves in small claims court. Sample forms you can use to file in small claims court are found here:

You will need to prove in court that the landlord owes you this money

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000230-001 DT 09/14/2017

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
C. Avena
Deputy

COURTYARD AT ENCANTO

THAYNE K CULLIMORE

v.

MICHAEL DELGADO (001)

ZACHARY THEODORE DORN

ENCANTO JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2017–030257.

Defendant-Appellant Michael Delgado (Defendant) appeals the Encanto Justice Court's determination that found Defendant guilty of a detainer (eviction). Defendant contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

Procedural Background

On Feb. 14, 2017, Plaintiff-Appellee Courtyard at Encanto (Plaintiff) filed an eviction action and claimed Defendant owed past due rent totaling $1,195.22 plus court costs and attorneys' fees. Plaintiff claimed the monthly rent was $603.00[1] and Defendant also owed late

[1] The amount of rent is inconsistent with the Complaint alleging rent was $603.00 but much of the documentation suggesting the correct amount was $608.00.

fees of $158.57; a rental concession of $250.00; utilities of $137.52; taxes of $18.51; insurance of $10.00; charges for the Service of the Notice of $25.00; plus the costs of an eviction Turn Over of $35.81. Plaintiff attached a copy of the Five Day Notice to the Complaint. Defendant was served on Feb. 14, 2017, by post and mail service.

Defendant filed an Answer and Counterclaim on Feb. 21, 2017. Defendant admitted the utilities charges of $137.52 were unpaid but denied the remainder of Plaintiff's claim about this charge. Defendant claimed the landlord violated federal law by filing an eviction action for the non-payment of rent since, pursuant to the Section 8 program, Defendant was not personally responsible for any portion of the rent—Defendant's assigned percentage of rent was 0%. Defendant also alleged (1) Plaintiff accepted the rent paid by Section 8; and (2) the eviction action was the result of retaliation because Defendant complained about violations of A.R.S. § 33–1324.

On Feb. 24, 2017, Defendant filed a Motion To Dismiss[2] and claimed Plaintiff's Complaint violated federal law and was fatally defective because Defendant participated in the Section 8 program administered by the City of Phoenix and was required to pay 0.00 dollars toward rent. Accordingly, Defendant asked that the Complaint be dismissed because, pursuant to 24 CFR § 982.310, a tenant is not responsible for any portion of the rent that is covered by the housing assistance payment. Defendant also asserted the landlord could not transform a past due utility payment into "rent" despite a provision in the Utility and Services Addendum that stated unpaid utilities charges could be considered additional rent "where lawful". Defendant argued it was not lawful for the utilities charges to be considered "rent" because (1) this provision of the utilities addendum conflicted with the Section 8 regulations and the Housing Assistance Payments (HAP) contract which the Plaintiff accepted; and (2) where there is a conflict between the HAP contract and other lease provisions, the HAP contract governed. Defendant also claimed Plaintiff accepted February rent from HAP and, pursuant to A.R.S. § 33–1371(B) waived the right to terminate Defendant's lease.

Plaintiff responded to the Defendant's Motion To Dismiss and asserted (1) Plaintiff was just seeking the amounts owed under the Utility Addendum to the lease; and (2) the HAP contract stated the Tenant was responsible for the utilities. Plaintiff argued the utilities should be considered as "rent". Plaintiff also argued that the acceptance of a HAP payment is not identical to the acceptance of rent because a HAP payment is not a rental payment and, instead, is a housing assistance payment. Plaintiff argued that "rent" pursuant to the Arizona Landlord Tenant Act is a payment to the landlord in full consideration for the rented premises—A.R.S. § 33–1310(11)—while the HAP payment was not the full consideration for the rented premises.

Plaintiff filed a Motion For Summary Judgment on March 1, 2017, and alleged Defendant owed a utility balance of $157.81 as of January 31, 2017; and an additional utility payment of

[2] The trial court later decided to treat the Motion To Dismiss as a Motion For Summary Judgment.

$137.52 for the month of February, 2017. Plaintiff claimed Defendant failed to pay these charges within five days of Plaintiff's Five Day Notice.

Defendant replied to Plaintiff's response to Defendant's Motion To Dismiss and essentially re-iterated his argument.

The trial court held a hearing on March 7, 2017, and considered the Motion To Dismiss.[3] Defense counsel argued there was a conflict between the lease and the HAP contract the landlord signed with the City of Phoenix; and Plaintiff was asserting the required utility payment could be considered rent while Defendant maintained the utility charges could not be transformed into rent according to the HAP agreement.[4] Defense counsel maintained the HAP contract listed rent as the $608.00 that was paid for the residential unit.[5] Defense counsel also asserted that because the landlord accepted the Section 8 payment for February rent, Plaintiff could no longer file any eviction action for the non-payment of rent. In addition, Defendant asserted that according to federal regulations, it was unlawful for the utilities charges to be transmuted into rent.

Plaintiff's counsel relied on the lease agreement and Defendant's acceptance of his obligation to pay for utilities.[6] Plaintiff's counsel argued that if there was a conflict in the two contracts, the two conflicting clauses must be construed to give effect to the intent of parties.[7] Plaintiff's counsel also argued that the Section 8 subsidy is not a rental payment.[8] Counsel stated:

> Concerning the partial payment waiver agreement, first, the Section 8 subsidy is not a rental payment. Courts have held that - - that the subsidy payments are in fact that, subsidy payments. [9]

Plaintiff's counsel re-iterated this argument and again stated "courts have held that any subsidy payments are not rental payments"[10] and that no rental payments had been made.[11] To support this claim, Plaintiff's counsel cited to *Myrtle Manor Apartments v. City of Phoenix* and its internal reference to an Ohio case—*National Corporation v. Chapman*.[12] Counsel agreed the issue was a legal issue.[13]

Defense counsel maintained that while there was a conflict between the various agreements, there is a specific provision within the HAP contract that resolved that controversy. Defense

[3] Certified Transcript, March 7, 2017.
[4] *Id.*. at p. 4, ll. 1–24.
[5] *Id*. at p. 4, ll. 14–23.
[6] *Id.* at p. 6, ll. 15–23.
[7] *Id*. at p. 9, ll. 8–17.
[8] *Id.* at p. 10, ll. 6–7.
[9] *Id.* at p. 10, ll. 7–8.
[10] *Id*. at p. 12, ll. 4–5.
[11] *Id*. at p. 12, ll. 8–10.
[12] *Id*. at p. 10, ll. 8–16. Plaintiff's counsel did not provide the legal citation for these cases.
[13] *Id*. at p. 13, ll. 10–25; p. 14, ll. 1–2.

counsel also asserted that while Plaintiff may have the ability to collect payment for the utilities charges, Plaintiff could not do this under the rubric of a nonpayment of rent case.[14]

Defense counsel also argued that Plaintiff waived the right to proceed with an eviction action by accepting the February rent payment.[15]

The trial court ruled in favor of the Plaintiff. The trial court stated:

> So here's the thing I've gotta decide. And for the reasons I've articulated I'm rejecting the waiver argument. And I believe that under this series of contracts, the HAP contract and the lease contract, the landlord can make claim for the utilities and can do it with a five-day notice. That if the - - those utilities are not paid, an eviction can proceed as if - - and the utilities are essentially rent for that purpose.[16]

Defendant filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion When It Determined The Unpaid Utilities Were Part Of The Rent And Therefore Allowed For An Eviction.

Introduction

This case explores the interrelationship between a lease negotiated between a landlord and tenant with the requirements imposed when the landlord agrees to participate in the Section 8 voucher program.[17] Although the lease is negotiated between the landlord and tenant, the tenant is not a direct party to the agreement between the landlord and the PHA (public housing authority). Under the section 8 housing program, the landlord and the PHA sign a housing assistance payments contract that runs for the same term as the lease. The tenant—Defendant—is a third party beneficiary to this contract and is specifically named in the HAP contract. Arizona recognizes the right for a third-party beneficiary to sue on a contract. *Basurto v. Utah Const. & Min. Co.*, 15 Ariz. App. 35, 38–39, 485 P.2d 859, 862–63 (Ct. App. 1971). Accordingly, the tenant, the landlord, and the PHA all have obligations and responsibilities under the Section 8 voucher program. The issue in the current case results from conflicting provisions regarding the payment of utilities. The lease agreement did not contain any special stipulations that provided the lease provisions would govern if there was a conflict with the HAP contract.

[14] *Id*. at p. 20, ll. 1–9.
[15] *Id.* at p. 20, ll. 11–25; p. 21; p. 22, ll. 1–10.
[16] *Id*. at p. 22, ll. 22–25; p. 23, ll.1–4.
[17] Defendant alleged three issues on appeal: whether (1) the trial court erred by finding the utility charges could be considered rent; (2) the Section 8 payment of the rent was a partial payment which precluded an eviction action; and (3) the trial court should have accepted the Plaintiff's counsel reference to case law that was not disclosed in Plaintiff's pleadings.

However, the HAP contract provided that if there was any conflict between the provisions of the tenancy addendum as required by HUD, and any other provisions of the lease, the requirements of the HUD-required tenancy addendum "shall" control.

Defendant agreed to pay utility charges separate from rent charges. While the lease provided the utilities charges could be added as additional rent, the HAP contract provided for a specific rental amount which did not include utilities. A review of the relevant documents and provisions follows.

Standard of Review

Eviction issues are generally reviewed for an abuse of discretion. *Miller v. Condon*, 66 Ariz. 34, 40, 182 P.2d 105, 109 (1947) and the trial court's decision will not be set aside absent a clear abuse of discretion. *Hirsch v. National Van Lines, Inc*. 136 Ariz. 304, 666 P.2d 49 (1983). However, legal questions, including questions of statutory interpretation, are reviewed *de novo*. The interpretation of a contract is a matter of law and the appellate court is not bound by the trial court's legal conclusions. *Phillips v. Flowing Wells Unified Sch. Dist. No. 8 of Pima Cty*., 137 Ariz. 192, 194, 669 P.2d 969, 971 (Ct. App. 1983). The trial court viewed this matter as a legal issue. This Court concurs. Accordingly, this Court shall review the trial court's decision *de novo*.

The Residential Rental Agreement

The Residential Rental Agreement—Plaintiff's Exhibit 2—listed the following charges as Rent and Fees: The Monthly rent was $592.32 with the pro rata rent for move-in from May 1, 2016 to May 31, 2016 listed in the amount of $602.32. The Rent and Fees list two other charges: tax of $5.19 and "additional Rent for Waiver of the Requirement for Renter's insurance of $10.00 monthly. In a separate section—demarcated by two parallel lines—are additional charges for a Late Fee of $76.73 if payment was not received before 5:00 PM on the 4th day of the month; a Daily Late Fee of $10.23; a Lease Initiation Fee of $143.22; a Service of Notice Fee of $25.58; an Eviction Turnover Fee of $35.81; a Security Deposit of $579.00; a Month to Month Fee of $102.30; an Inspection Fee of $102.30; and an Early Termination Fee of $1,227.00. Utilities charges are not listed in the section referred to as Rent and Fees.

The term "rent" is again used in the Miscellaneous section of the contract. That provision—in relevant part—states:

> As used in this Agreement, rent shall mean all obligations of this Agreement (and addendums) owed to Owner, including but not limited to, monthly rent, late fees, service fees, attorney fees, damages, month-to-month fees, court costs, pet fees, taxes, and security deposits.

No specific mention is made of utilities in the Miscellaneous section when detailing the financial obligations for a tenant.

Utilities are included in the contractual provision re "Rent Increases". That provision states—in relevant part:

> If, during the lease term, taxes (non-property), utilities, governmental fees, or other common expenses paid by Owner increase in any year in excess of five percent (5%), Owner may increase Resident's monthly rental amount in a pro rata amount (formula to be determined by Owner) with thirty (30) days written notice. In addition, if **any utility** or governmental entity **creates a new fee**, **tax or assessment** at any time during the tenancy, **such amount may be assessed directly** to the resident in a pro-rata amount as stated herein or as otherwise assessed by such entity.

Utilities are not encompassed in the term rent in this section. Indeed, this section specifically allows any change in the utility charges to be separately assessed. The provision does not include having the additional utilities charges assessed as rent.

The contract also has a specific provision about utilities. It states:

> Utilities shall be used for ordinary household purposes only. Resident will provide and pay for all utilities except those listed below or those for which a separate agreement is entered into concurrently. All utility services whether provided by Owner or Resident are subject to interruption or temporary termination for the purpose of repairs, alterations, or improvements to the Premises or for emergency reasons. Any such interruption or temporary termination of utility service shall not constitute a default by Owner, nor is Owner liable for interruption or termination. In any event resident shall be responsible for its own telephone service, cable service (unless specifically stated otherwise), and any other optional service which may be deemed a utility. Resident must obtain written approval to install a satellite dish and sign an addendum to this Agreement. Resident shall establish the utilities for which it is responsible in its name immediately. If Resident fails to establish the utilities, Owner may at its option terminate this Agreement or bill Resident a handling fee of $51.15 per utility per month. It is required that all Residents have both gas and electrical service. Owner may establish a policy for payment of pro-rating utilities that are not directly metered, including but not limited to sewer, water and garbage and may charge Resident a monthly administrative fee for such utility billing.
>
> Utilities paid and established by Owner <u>None.</u>

This provision does not indicate any utility bill would be transformed into rent.[18] Accordingly, the Plaintiff's original contract does not clearly state that utilities payments are rent.

Plaintiff's Exhibit 3 is the Utility and Services Addendum. An initial provision in this Addendum indicates that if the Addendum conflicts with the lease, the Addendum controls. However, the Addendum does not state that it controls if the Addendum conflicts with the HAP requirements. This Addendum indicates the charges Defendant needed to pay and how these charges are to be calculated. This Addendum also describes how the rental payments are to be enforced and states:

> 9. Where lawful, **all utilities charges** and fees of any kind under this lease **shall be considered additional rent**, and if partial payments are accepted by Agent or Owner, they will be allocated first to non-rent charges and then to rent last.

Thus, in interpreting these two documents, the Utility and Services Addendum controls where there is a conflict with the lease. However, the Utility and Services Addendum does not provide it supplants the HAP Contract.

The Housing Assistance Payments Contract

Defendant proffered the Housing Assistance Payments Contract (HAP Contract) which states (1) the initial rent to the owner is $608.00; (2) during the initial lease term the owner may not raise the rent to tenant; and (3) the lease term ran from May 1, 2016, to May 31, 2017.[19] While the amount of the monthly housing assistance payment was subject to change, the rent was fixed pursuant to this agreement. The HAP Contract also had a provision about utilities and appliances which required the tenant to pay for—or provide—a variety of utilities. This HAP

[18] Plaintiff argues that all payments to be made to the landlord "in full consideration for the rented premises" are rent. Appellee's Responsive Memorandum at p. 7. Plaintiff failed to support this proposition with legal authority. Our Court of Appeals adopted Black's Law Dictionary's definition—as noted in *Pavilion Hotel, Inc. v. Valley Nat. Bank of Arizona*, 180 Ariz. 498, 504, 885 P.2d 186, 192 (Ct. App. 1994)—of rent:

> *Black's Law Dictionary* defines rent as "[c]onsideration paid for use or occupation of property." *Black's Law Dictionary* 1297 (6th ed. 1990). Also, the Arizona legislature's use of the term "rent" appears to be in accord with this broad definition.

However, Arizona law often separates "utilities" from "rent". A.R.S. § 33–1324 specifically deals with the failure to supply heat, air conditioning, cooling, water, hot water or essential services. A.R.S. § 33–1314.01 allows a landlord to charge separately for utilities by either installing a submetering system or by allocating charges through a ratio utility billing system. This statute requires the landlord to include a disclosure in the rental agreement that lists the utility services that are separately charged to the tenant. Nothing in this statute indicates utility charges should be considered rent. Accordingly, while utilities may be considered rent, Plaintiff has not provided legal authority indicating utilities payments must (shall) be considered rent. Thus, there is a discrepancy as to whether utilities charges should be considered as rent in the current case.

[19] The plaintiff signed this contract on May 4, 2016.

contract does not allow the landlord to add these charges to the rent and does not include the consequences for a tenant's failure to pay for the charges.

The HAP Contract, Part B (3)(b) provides the owner must provide the utilities while Part B (5)(a) states the lease must specify what utilities are to be provided or paid by the tenant. Part C of the HAP contract includes a Tenancy Addendum. Part C (4) addresses the rent. Part C(4)(a) specifically provides **the initial rent to the owner may not exceed the amount approved by the PHA**. That initial amount was for $608.00 pursuant to the HAP Contract. Part C(6) of the HAP Contract states that the rent to the owner does not include any supportive services and that the nonpayment of charges for supportive services is not grounds for termination of the tenancy. Part C(7) also lists utilities as a separate category of payment. In addition, Part C(14)(b) deals with conflict between the terms of the tenancy addendum to the HAP contract and the lease. It states:

> **In case of any conflict between the provisions of the tenancy addendum as required by HUD, and any other provisions of the lease** or any other agreement between the owner and the tenant, **the requirements of the HUD-required tenancy addendum shall control.**

(Emphasis added.) This agreement used the mandatory term "shall". To determine the meaning of words, Arizona courts have looked to definitions in both Black's Law Dictionary, *Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 ¶ 25 (2005) as well as the Merriam Webster Dictionary *State Tax Commission v. Peck*, 106 Ariz. 394, 396, 476 P.2d 849, 851 (1970). As stated in *State v. Lewis*, 224 Ariz. 512, 233 P.3d 625, ¶ 17 (Ct. App. 2010) aff'd, 226 Ariz. 124, 244 P.3d 561 (2011):

> A general principle of statutory construction is that the use of the word 'may' generally indicates a permissive provision; in contrast, the use of the word 'shall' typically indicates a mandatory provision.

The word "shall" traditionally means must. https://www.merriam-webster.com/dictionary/shall. Similarly, the controlling rule for contract interpretation is that the ordinary meaning of language should be given to words where there is no showing that a different meaning was intended. As our Supreme Court stated:

> The controlling rule of interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning applicable. Restatement of the Law, Contracts s 235(A).

Brady v. Black Mountain Inv. Co., 105 Ariz. 87, 89, 459 P.2d 712, 714 (1969). Accordingly, the provisions of the HAP contract must control where there is a conflict with the lease agreement.

Part C(17) of the HAP contract defined the term "Rent to owner" as:

> **Rent to owner**. The total monthly rent payable to the owner for the contract unit. The rent to owner is the sum of the portion of rent payable by the tenant plus the PHA housing assistance payment to the owner.

Utilities are not included in this definition of rent and charges for utilities do not support a claim for the nonpayment of rent.

***Myrtle Manor* Does Not Support Plaintiff's Claim**

This Court recognizes Plaintiff argued—and the trial court accepted—the position that the housing authority's payment was a subsidy and not rent. However, the trial court erred when it did so. Although Plaintiff's counsel referenced *Myrtle Manor Apartments v. City of Phoenix*, 177 Ariz. 465, 868 P.2d 1048 (Ct. App. 1994) (*Myrtle Manor*) as authority for this stance, Plaintiff's counsel misconstrued the holding of *Myrtle Manor*. *Myrtle Manor* did not deal with the payment of rent. Instead, the case involved taxation and whether HAP payments were taxable under the City of Phoenix tax code.[20] In discussing the background of *Myrtle Manor*, our Court of Appeals stated:

> A HAP contract establishes the maximum monthly rent, including utilities and all maintenance and management charges, that the owner is entitled to receive on each dwelling unit for which assistance payments are to be made. 42 U.S.C. 1437f(c)(1). Maximum monthly rents may not exceed by more than ten percent the rental value set by HUD for the relevant market area.

Myrtle Manor, id., 177 Ariz. at 467, 868 P.2d at 1050. Our Court of Appeals continued:

> HUD has adopted numerous regulations affecting HAP contracts. 24 C.F.R. §§ 880.101 through 880.613. 24 C.F.R. section 880.501(d)(1) provides **that the amount of the housing assistance payment made to the owner of the unit is the difference between the contract rent for the unit and the tenant rent** payable by the eligible family.

Myrtle id., 177 Ariz. at 467, 868 P.2d at, 1050 (emphasis added). Thus, rather than standing for the proposition that the money paid was a "subsidy" as Plaintiff's counsel asserted, *Myrtle Manor* established the HAP payment was "rent" where it stated the HAP contract established the maximum monthly rent and the housing assistance payment was the portion of the rent that was not paid by the eligible family. In Defendant's case, the portion of the rent that was paid by the housing authority was 100% since Defendant had been assigned a 0% responsibility for the monthly payment. Because the entire rental payment was made by the housing authority, Defendant did not fail to pay any rent. Accordingly, when the housing authority paid the $608.00 established by the HAP contract, the housing authority paid the rent.

[20] In *Myrtle Manor*, the Court of Appeals determined taxes were appropriate because the governmental entity was taxing gross income and the payment fell within the category of "gross income" from the business of renting.

Plaintiff's counsel also erred when it argued *Myrtle Manor, id.,* adopted *National Corporation v. Chapman*[21]—an Ohio case re whether the housing assistance payment was a subsidy and not rent. While Plaintiff's counsel was correct that the Court of Appeals mentioned *Chapman*, the Court of Appeals held the proposition that federal housing assistance payments were not rent was incorrect. The Court of Appeals said:

> The taxpayers' **reliance on out-of-state authorities for the proposition that federal housing assistance payments are not "rent" is misplaced**. *Chapman* merely held that a public housing tenant could be evicted for failing to pay her portion of the rent even though the landlord had received partial payment in the form of federal housing assistance payments.

Myrtle Manor Apartments v. City of Phoenix, id., 177 Ariz. at 471, 868 P.2d at 1054 (emphasis added). Contrary to Plaintiff's counsel's assertion, the Arizona Court of Appeals did not adopt the position that the federal housing assistance payments were a subsidy and not rent. Instead, our Court of Appeals specifically held that reliance on *Chapman* was not appropriate.[22]

In addition, the situation in *Chapman* is factually distinct from that presented by Defendant. In *Chapman*, the landlord did not receive the full amount of rent allowed under the assistance program because the defendant failed to pay her portion of the rent. In the current case, the landlord received the full amount of rent contracted for in the HAP Contract because the Defendant had a 0% responsibility for the rent and the housing authority completely paid the contracted-for $608.00 rental payment.

Plaintiff's entire subsidy argument fails. To the extent the trial court relied on Plaintiff's subsidy argument the trial court erred since the position is legally wrong. Despite Plaintiff's assertions to the contrary—both at trial[23] and on appeal[24]—the Section 8 HAP payment was rent; and the $608.00 payment was the maximum rental payment that was required by the HAP contract. This amount was paid.

B. Did The Trial Court Abuse Its Discretion When It Determined The Section 8 Rental Payment Was Not The Payment Of Rent.

The Section 8 Payment

During argument, Plaintiff's counsel asserted the Section 8 payment was not rent. As discussed above, Plaintiff's counsel is incorrect. Plaintiff's assertion is controverted by the HAP Contract as seen above. When Plaintiff accepted this payment, Plaintiff lost the ability to evict Defendant. Acceptance of even a partial rent payment[25] voids the landlord's opportunity to evict

[21] *National Corp. for Hous. Partnerships v. Chapman*, 18 Ohio App.3d 104, 481 N.E.2d 654 (1984).
[22] *National Corp. for Hous. Partnerships v. Chapman,* is only persuasive authority.
[23] Certified Transcript, March 7, 2017, at p. 10, ll. 5–16 and p. 12, ll. 4–5.
[24] Appellee's Responsive Memorandum at p. 4, ll. 4–5.
[25] A.R.S. § 33–1371 deals with the acceptance of a partial rent payment. It states:

during that rental period. Here, however, the entire rent was paid. Plaintiff accepted the rental payment from the housing authority. Consequently, Plaintiff could not proceed with an eviction action for the non-payment of rent.[26]

The Eviction

Forcible detainer actions and special detainer actions are both subsumed under the rubric of evictions. Rules of Procedure For Eviction Actions (RPEA), Rule 1. They are summary proceedings. RPEA, Rule 2. The only right to be decided in a detainer action is the right of actual possession. *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641 ¶ 21 (Ct. App. 2004). The remedy was originally conceived as a way for landlords to obtain quick possession of premises when the tenant withheld possession. *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946). The purpose of a forcible detainer is to award possession of property and not to determine if the parties have a landlord-tenant relationship or if the parties had a lease agreement. *RREEF Mgmt. Co v. Camex Prods., Inc*., 190 Ariz. 75, 79, 945 P.2d 386, 390 (Ct. App. 1997). In *Old Bros. Lumber Co., id.,* the Arizona Supreme Court explained that if other issues were permitted—and the court heard testimony about these issues—the action would "not afford a summary, speedy and adequate remedy for obtaining possession of the premises." *Old Bros, Lumber Co. v. Rushing, id.,* 64 Ariz. at 205. As our Court of Appeals stated in *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P.3d 641 ¶ 21 (Ct. App. 2004):

> The only issue to be decided in the action is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff. A real dispute regarding a landlord-tenant relationship must be tried in an "ordinary civil action, in which time periods are not accelerated, counter- and cross claims are allowed, and there is an opportunity for discovery."

> **A.** A landlord is not required to accept a partial payment of rent or other charges. **A landlord accepting a partial payment of rent or other charges retains the right to proceed against a tenant only if the tenant agrees in a contemporaneous writing to the terms and conditions of the partial payment with regard to continuation of the tenancy**. The written agreement shall contain a date on which the balance of the rent is due. The landlord may proceed as provided in article 4 of this chapter[1] and in title 12, chapter 8[2] against a tenant in breach of this agreement or any other breach of the original rental agreement. If the landlord has provided the tenant with a notice of failure to pay rent as specified in § 33-1368, subsection B prior to the completion of the agreement for partial payment, no additional notice under § 33-1368, subsection B is required in case of a breach of the partial payment agreement.
> **B.** Except as specified in subsection A of this section, **acceptance of rent,** or any portion thereof, with knowledge of a default by tenant or acceptance of performance by the tenant that varied from the terms of the rental agreement or rules or regulations subsequently adopted by the landlord **constitutes a waiver of the right to terminate the rental agreement.**

(Emphasis added**.)**

[26] This Court does not comment on whether the Plaintiff could have evicted Defendant for failing to timely pay the required utilities. However, and as Defense counsel noted, the failure to pay the utilities would have occasioned the need for a Ten Day Notice as opposed to the Five Day Notice Plaintiff provided.

Plaintiff's Complaint was an eviction action based on the non-payment of rent. The first statement in the Complaint was "Your landlord is suing to have you evicted." In that Complaint, Plaintiff claimed Defendant failed to pay his rent. As has been seen, the statement about the non-payment of rent was erroneous. Defendant paid the rent albeit via the housing authority. Accordingly, there was no basis for the eviction and the trial court should have dismissed Plaintiff's eviction action.

C. Is Defendant Entitled To Attorneys' Fees For The Appeal.

Defendant prevailed on appeal. Because this matter is based on contract, Defendant is entitled to his reasonable attorneys' fees for the appeal. SCRAP—Civ. Rules 13(a) and 13(b). Should Defendant wish an award of attorneys' fees, Defendant shall provide this Court with a China Doll affidavit[27] and fee application on or before **October 6, 2017**. Defendant shall send a copy of this fee application to Plaintiff. If Plaintiff wishes to contest the fee application, Plaintiff shall (must) file their response on or before **October 27, 2017.**

D. Is Defendant Entitled To Other Relief.

Defendant requested relief that is beyond the power of this Court to award. This Court does not award damages. Accordingly, this matter is remanded to the trial court for its further disposition of this action.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Encanto Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Encanto Justice Court.

IT IS FURTHER ORDERED awarding Defendant his reasonable attorneys' fees and costs on appeal provided Plaintiff submits a China Doll affidavit on or before **October 6, 2017**.

IT IS FURTHER ORDERED Defendant shall mail/deliver a copy of his China Doll affidavit to Plaintiff on the same day Defendant files his China Doll affidavit with the Clerk of the Maricopa County Superior Court.

IT IS FURTHER ORDERED Defendant shall provide this Court with a courtesy copy of his China Doll affidavit.

IT IS FURTHER ORDERED Plaintiff shall submit any response to Defendant's attorneys' fee (China Doll) request on or before **October 27, 2017**.

IT IS FURTHER ORDERED Plaintiff shall mail/deliver a copy of its response to Defendant's request for attorneys' fees (China Doll) to Defendant on the same day Plaintiff files its response with the Clerk of the Maricopa County Superior Court.

[27] *Schweiger v. China Doll Restaurant, Inc.,*138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983).

IT IS FURTHER ORDERED Plaintiff shall provide this Court with a courtesy copy of its response to Defendant's China Doll affidavit.

IT IS FURTHER ORDERED remanding this matter to the Encanto Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. **Therefore, you will have to deliver to the Judge a conformed courtesy copy of any new filings.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

v.

BRET RASNER

JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. .

Defendant-Appellant (Defendant or Ms. appeals the Justice Court's determination that found her guilty of a detainer. Defendant contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

Defendant rented a home from Plaintiffs-Appellees and (Plaintiffs) with a total monthly rent of $985.00. Because the premises were subject to a Housing Assistance Payment Contract—HAP Contract—where $754.00 of each monthly rental payment was paid for by Section 8, Ms. was only liable for $231.00 of the monthly rent. There are two versions of the lease that allegedly govern this rental property. One version was signed but did not include any provision for late fees or lawn care. The second version contained provisions about late fees and lawn care but was not signed by any party.

On May 18, Plaintiffs created a Notice of Intent to Terminate Lease for Non-payment of Rent. They filed an eviction action on May 27, and claimed Defendant (1) failed to pay rent since April 5, and (2) owed monthly rent of $306.00 plus late fees of $5.00 per day (the $306 was the sum of the $231.00 rent plus an additional $75.00 for lawn care). This $75.00 was not provided for in the HAP contract. Plaintiffs also claimed Defendant owed rental concessions, attorneys' fees, and utility payments for the premises. During the time that Defendant failed to pay rent, Plaintiffs accepted payment from Section 8 as partial rental on the premises.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

The trial court held trial on .[1] All parties appeared *pro se*. Plaintiffs testified they were the owners of the premises.[2] The trial court reviewed proceedings from earlier that morning (which were not included on the provided audio transcript) and summarized—and the parties affirmed—(1) the case was for non-payment of rent; and (2) Defendant received the Five-day Notice.[3] The trial court asked for the date of the eviction notice; Mr. confirmed the eviction notice was dated May 18; and Ms. agreed she received the notice.[4] The trial court summarized the testimony from earlier that day and said (1) rent in the amount of $231.00 was unpaid for April, May, and June; (2) late charges were $5.00 per day after the fifth of every month; (3) late charges were due for April and May for a total late charge of $250.00; (4) there was an agreement for lawn care for $75.00 per month; and (5) the charges were $37.50 for February; and $75.00 for March, April, May, and June for a total of $337.00.[5] The trial court added Plaintiff was alleging rent of $693.00; late fees of $250.00; and lawn care of $337.50; and Ms. added there were additional charges for a balance due to SRP for $8.36; and one due to SW gas for $51.58 for the month of February; although she could not prove she paid those amounts.[6] The trial court asked what occurred regarding April, May, and June regarding Plaintiffs' attempts to collect rent; and Plaintiffs responded they had been unable to collect the rent although (1) they were available every Saturday to mow the lawn; (2) Defendant promised she would make the payment; and (3) Defendant failed to do so.[7]

The trial court asked Ms. to respond. Ms. said she (1) had not seen Plaintiffs for a month and a half as she worked every Saturday; (2) told Plaintiffs she did not want them to cut her grass; and (3) told them not to come and do the lawn care.[8] The trial court asked for a copy of the rental agreement indicating the Housing Authority was going to pay for the lawn care/landscaping and Ms. stated the parties were under the impression the lawn care was to be included and that was why she agreed the rent was $306.00[9] Ms. explained she originally believed the landscaping was included in the rent but after she learned Section 8 did not cover the lawn care cost, she informed Plaintiff not to come although Plaintiffs disregarded her request.[10] Ms. added she tried to pay the rent and had pictures of money orders and the rent with her but she had not paid April rent, May rent, or June rent.[11]

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[1] Audio Transcript, at 10:56:09.
[2] *Id.* at 10:56:41–48.
[3] *Id.* at 10:56:48–10:57:24.
[4] *Id.* at 10:59:02–21.
[5] *Id.* at 10:59:32–11:00:38. The transcript for the earlier part of the hearing was omitted from the CD provided.
[6] Audio Transcript, *id.*, at 11:00:38–11:02:05.
[7] *Id.* at 11:02:11–33.
[8] *Id.* at 11:02:40–11:03:07.
[9] *Id.* at 11:03:07–11:04:01.
[10] *Id.* at 11:04:01–11:05:14.
[11] *Id.* at 11:05:14–43.

The trial court asked about a rental agreement that "says no late charges" and Ms. proffered a copy of the rental agreement that did not include late fees and was signed by Plaintiffs and Defendant; and the trial court commented (1) it looked like Ms. was handing the trial court a copy of the same agreement that the other party handed to the trial court; but (2) Ms. copy was incomplete.[12]

The trial court gave Mr. a copy of the lease Ms. provided to the trial court and Ms. testified that according to her copy of the agreement there were no late charges.[13] Ms. said Plaintiffs avoided accepting her rent on purpose.[14] The trial court asked how Plaintiffs refused to accept rent and Ms. responded she had all of the outgoing calls on her phone; copies of money orders; and, although she called Plaintiffs, they failed to return her calls.[15] The trial court looked at the lease agreement; Ms. confirmed Plaintiffs' address was on the agreement; the trial court noted the agreement stated payment should be mailed to Plaintiffs' address; the trial court asked how it was relevant that Plaintiffs did not return her calls; and Ms. replied that Plaintiffs said they would not accept the rent without the late fees which was the crux of the problem.[16] The trial court provided Ms. with a copy of the lease agreement the Plaintiffs proffered; and reviewed the provisions in that version of the agreement which included late fees.[17] Ms. stated she was unaware of any late fees in the agreement and, when she paid her rent on March 10, Plaintiffs were silent about any late fees and did not raise this issue until April.[18]

The trial court asked Ms. if she received Plaintiffs' Exhibit 1—an undated typed Lease and Rental Agreement where on item 15, it was indicated that late fees will apply if rent is not paid on time—and Ms. —after identifying her signature—said she was unaware of the provision.[19] The trial court asked Defendant if the owner came to do the landscaping in February, March, April, May, and June; and Ms. replied the owners had not been out in June and had only been there for two weeks in May although they did come during the other months.[20] The trial court asked Plaintiffs if Ms. ever told them not to do the landscaping; they replied Ms. had not done so; and Ms. contradicted this testimony.[21] Although Ms. stated she had voicemails on her phone, the trial court did not listen to these and, instead,

[12] *Id.* at 11:06:33–11:07:48.
[13] *Id.* at 11:09:43–11:10:48.
[14] *Id.* at 11:10:48–11:11:22.
[15] *Id.* at 11:11:22–11:12:06.
[16] *Id.* at 11:12:06–11:13:52.
[17] *Id.* at 11:13:52–11:15:18.
[18] *Id.* at 11:15:18–43.
[19] *Id.* at 11:15:43–11:17:48.
[20] *Id.* at 11:17:48–11:18:08.
[21] *Id.* at 11:18:08–11:19:46.

stated that logically, if a tenant knew when rent was due, the tenant would drop the rent off if the landlord did not come to pick up the rent.[22] The trial court added the documentation was consistent between the filled out rental agreement and the addendum regarding late charges.[23] Plaintiffs stated they had indicated to the social worker that if Defendant wanted to be released from the agreement so she could find a more affordable location, they would be amenable.[24]

The trial court asked if Plaintiffs had a process server serve the Summons and Complaint and Ms. replied she brought the documents to Defendant herself.[25] The trial court informed Ms. that by law Plaintiff was required to properly serve the Summons and Complaint and the lack of proper service is always a defense.[26] The trial court asked if Ms. was going to require proper service or waive it and Ms. chose to waive service.[27]

The trial court determined Defendant did not timely pay rent and, awarded Plaintiffs past due rent of $693.00; late charges of $250.00; court costs of $60.00; and other damages of $337.50 for a total award of $1,340.50.

On defense counsel filed a Motion To Set Aside Judgment and Dismiss and raised several arguments that were not presented at time of trial. Defense counsel first argued there were discrepancies between the two versions of the lease agreement with Plaintiffs' version being unsigned and Defendant's version lacking many of the provisions that were included in the version Plaintiffs proffered. Defense counsel also argued Plaintiffs accepted partial rent payments when they accepted the rent paid by Section 8 Housing on behalf of Defendant. Defense counsel asserted that because Plaintiffs failed to obtain a contemporaneous partial-payment agreement from Section 8 Housing, they were legally unable to proceed with an eviction action. This argument was not presented to the trial court at the time of the trial. Defense counsel maintained the Judgment was contrary to law because it included charges for lawn care that were not permitted under the HAP contract Plaintiffs had. In addition, defense counsel claimed the trial court had no basis for awarding Plaintiffs late fees because the only signed rental agreement lacked any late fees provision.

The trial court failed to grant this Motion.

Defendant filed a timely appeal. Plaintiffs failed to file a responsive memorandum.[28] This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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[22] *Id.* at 11:19:46–11:21:52.
[23] *Id.* at 11:21:52–11:22:22.
[24] *Id.* at 11:22:22–50.
[25] *Id.* at 11:22:32–11:24:42.
[26] *Id.* at 11:24:42–11:26:07.
[27] Id. at 11:26:07–26.
[28] Plaintiffs are not required to file any responsive memorandum. Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) Rule 8(a)(1) provides the failure to file an appellee memorandum is not a confession of error.

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion By Failing To Set Aside Its Judgment.

Standard of Review

In determining if the trial court abused its discretion, this court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

> In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

> 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). To prevail on appeal, Defendant must demonstrate the trial court made an incorrect finding of fact or applied incorrect substantive law. Absent such circumstance, this Court must sustain the trial court's decision. As our Court of Appeals stated, an order setting aside a final judgment will not be disturbed absent a clear abuse of the trial court's discretion. *Modla v. Parker,* 17 Ariz. App. 54, 56, 495 P.2d 494, 496 (1972). The trial court conducted a trial on the merits and determined Plaintiffs proved their case. Although Ms. provided contradictory testimony about her knowledge of the possibility of late fees and lawn charges, the trial court found Plaintiffs' evidence and documents were more persuasive. Thereafter, Defendant obtained counsel who moved to set aside the trial court's determination based on evidence and argument that had not been presented to the trial court. Defense counsel argued Plaintiffs were unable to impose charges for lawn care and late fees because of their contracts with Section 8. While this is an argument Defendant never specifically raised with the trial court, the issue before the trial court was a balancing test between the finality of judgment and the trial court's need to allow relief pursuant to RPEA, Rule 15. The trial court did not provide any explanation about its failure to grant the Motion To Set Aside Judgment.

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RPEA, Rule 15

Rule 15, RPEA, provides a party may file a motion to set aside a judgment under a number of circumstances including—but not limited to—(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered material facts exist that could establish a defense to an allegation; (3) the judgment is contrary to law; or (4) there has been fraud, misrepresentation or misconduct of an adverse party. Here, the trial court's judgment was contrary to law and there was some misconduct on the part of the Plaintiffs. Nonetheless, the trial court did not set aside its prior judgment even when apprised of these circumstances.

Lawn Care

The more egregious error relates to the imposition of fees for lawn care. These fees were in derogation of Plaintiffs' lease agreement with the Housing Authority of Maricopa County (HAMC). On April 6, Plaintiffs acknowledged receiving a Warning from the Section 8 Program informing them that HUD has "conveyed to us its serious concerns about violations of the Section 8 Existing Housing Program requirements. The Warning listed as examples of fraud:

1. Requiring extra "side" payments in excess of the family's share of the rent. As you know, any payment in excess of the rent must receive prior approval by us.

The Housing Authority Maricopa County (HAMC) Section 8 Program Housing Choice Voucher (Section 8) Landlord Certification Plaintiffs signed specifically listed that Plaintiffs understood it is illegal to charge any additional amounts for rent or any other item not specified in the lease which was not approved by the Housing Authority. Defendant's Exhibit 1 was the only signed copy of the lease agreement for the premises. That lease agreement version—signed by both Plaintiffs and Defendant on February 15, —had no provisions about lawn care. The HAMC Notice of Rent Amount and HAP Amount sent to Ms. dated March 27, indicated the required rental contract rate of $985.00 which was a combination of the HAP Payment of $794.00 and the Tenant Rent of $231.00. Because this document placed a maximum of tenant's obligation at $231.00, Plaintiffs knew or should have known they had no basis for charging Ms. any extra sums for lawn care and that the maximum amount they could legally charge her was $231.00. Despite this, Plaintiffs presented the trial court with their version of a contract—the Lease and Rental Agreement or Plaintiff's Exhibit 1—indicating Plaintiffs were adding an additional $75.00 charge to the rent. This is the document the trial court relied on in assessing Ms. additional charges of $337.50 for other "damages." At the time of trial in June, Plaintiffs had been apprised they were unable to add any charges to the rent and knew—or should have known—their claim for lawn care for the premises was not legally allowed according to their contract with HAMC. Nonetheless, Plaintiffs ignored the warning from HAMC and failed to apprise the trial court that their request for lawn care charges was illegal. Defense counsel, in its Motion To Set Aside Judgment, presented these facts to the trial court but the trial court did not act on this information.

Partial Payment

Plaintiffs also failed to inform the trial court they had been accepting partial rental payments from the Section 8 Housing program. While this is akin to a "sin of omission" rather than one of commission, Plaintiffs allowed the trial court to believe they received no rental payments for three months. This was inaccurate. A.R.S. § 22–1371(B) provides that if the landlord accepts a partial rental payment, the landlord waives his or her right to terminate the rental breach for the time period covered by the payment. Plaintiffs never informed the trial court they (1) were receiving the government's monthly portion of the rental due on the premises; and (2) legally waived their right to evict Ms. Because the trial court later learned of this occurrence, the trial court should have exercised its discretion and set aside Plaintiffs' Judgment.

Late Fees

Plaintiffs also erroneously claimed late fees although there is no basis for assessing late fees in the signed version of the parties' contract. As was seen with the charges for lawn care, the only signed version of the contract lacked any provision for late fees. Late fees only surfaced in the unsigned version of the rental agreement. Because there was no valid agreement for late fees, the trial court erred when it imposed these costs. RPEA, Rule 13 (c)(2)(C) states:

> Late Charges. If the written rental agreement provided for periodic late charges in the event of a rent default, the court shall award the prevailing plaintiff reasonable late charges. No late charges shall be awarded unless the court is presented with evidence that they are specified in a written rental agreement.

Plaintiffs failed to support their claim for late fees.

B. Is Defendant Entitled To Attorneys' Fees On Appeal.

The parties' residential lease agreement has a provision about attorneys' fees. Clause 19 of this lease states:

> In any action or legal proceeding to enforce any party of this Agreement, the prevailing party shall recover reasonable attorney fees and court costs.

Defendant prevailed on appeal. This matter is based on contract and Defendant requested attorneys' fees. Accordingly, Defendant is awarded her reasonable attorneys' fees and costs for the appeal. SCRAP—Civ. Rules 13(a) and 13(b); A.R.S, § 12–341.01. Should Defendant wish an award of attorneys' fees, Defendant shall provide this Court with a China Doll affidavit[29] and fee application on or before Defendant shall send a copy of this fee application to Plaintiffs. If Plaintiffs wish to contest the fee application, Plaintiffs shall (must) file their response on or before

[29] *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983).

III. CONCLUSION.

Based on the foregoing, this Court concludes the Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Justice Court.

IT IS FURTHER ORDERED awarding Defendant her reasonable attorneys' fees and costs on appeal provided Defendant submits a China Doll affidavit on or before

IT IS FURTHER ORDERED Defendant shall mail/deliver a copy of her China Doll affidavit to Plaintiffs on the same day Defendant files her China Doll affidavit with the Clerk of the Maricopa County Superior Court.

IT IS FURTHER ORDERED Defendant shall provide this Court with a courtesy copy of her China Doll affidavit.

IT IS FURTHER ORDERED Plaintiffs shall submit any response to Defendant's attorneys' fee (China Doll) request on or before

IT IS FURTHER ORDERED Plaintiffs shall mail/deliver a copy of their response to Defendant's request for attorneys' fees (China Doll) to Defendant on the same day Plaintiffs file their response with the Clerk of the Maricopa County Superior Court.

IT IS FURTHER ORDERED Plaintiffs shall provide this Court with a courtesy copy of their response to Defendant's China Doll affidavit.

IT IS FURTHER ORDERED remanding this matter to the Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

Myrtle Manor Apartments v. City of Phoenix

Court of Appeals of Arizona, Division 1, Department T.January 18, 1994177 Ariz. 465868 P.2d 1048 *(Approx. 12 pages)*

Original Image of 868 P.2d 1048 (PDF)

177 Ariz. 465

Court of Appeals of Arizona,
Division 1, Department T.
MYRTLE MANOR APARTMENTS, an Arizona limited partnership, and Morningside Villa Apartments, an Arizona limited partnership, Plaintiffs, Counterdefendants-Appellants, Cross Appellees,
v.
CITY OF PHOENIX, a municipal corporation, Defendant, Counterclaimant-Appellee, Cross Appellant.
No. 1 CA-TX 91-0040.
Jan. 18, 1994.As Amended Feb. 18, 1994.

Landlords brought actions seeking refund of city real property rental income privilege taxes. City asserted counterclaims for additional taxes. The Tax Court, Cause Nos. TX 89-00151, TX 89-01154, William T. Moroney, entered judgment for city on taxpayers' claims and for taxpayers' on counterclaims. Taxpayers appealed and city cross-appealed. The Court of Appeals, Garbarino, J., held that: (1) sums received by landlords under housing assistance payment (HAP) contracts funded by United States Department of Housing and Urban Development (HUD) were subject to city privilege taxes; (2) federal law did not preempt those taxes; and (3) rental value of apartments provided, rent-free, to resident managers of landlords' apartment buildings was subject to privilege taxes.

Affirmed in part, reversed in part, and remanded.

West Headnotes (5)Collapse West Headnotes

Change View

1**Licenses**

Amount

Sums received by landlords under housing assistance payment (HAP) contracts funded by United States Department of Housing and Urban Development (HUD) were “gross income” from business activity of renting real property within meaning of city code and, therefore, were subject to city privilege taxes. United States Housing Act of 1937, §§ 2-25, as amended, 42 U.S.C.A. §§ 1437-1437w.

0 Case that cites this headnote

238Licenses

238IFor Occupations and Privileges
238k27License Fees and Taxes
238k29Amount
2**Municipal Corporations**

Power and Duty to Tax in General
Federal law concerning provision of housing under housing assistance payment (HAP) contracts funded by Department of Housing and Urban Development (HUD) did not preempt city real property rental income privilege taxes on sums received under HAP contracts; nothing in statute governing HAP contracts expressly preempted state or local transaction privilege taxes on amounts received by landlords from HUD, there was no evidence that taxes on HUD payments, if paid periodically, posed significant obstacle to purposes underlying federal low income housing subsidies due to insufficient revenues to cover both taxes and services to tenants, and there was no evidence of congressional intent to preempt specific field covered by city rental privilege tax. United States Housing Act of 1937, §§ 2-25, as amended, 42 U.S.C.A. §§ 1437-1437w.
0 Case that cites this headnote

268Municipal Corporations
268XIIIFiscal Matters
268XIII(D)Taxes and Other Revenue, and Application Thereof
268k956Power and Duty to Tax in General
268k956(1)In General
3**Indians**

Preemption
General preemption standards do not apply to cases involving Indian law.
0 Case that cites this headnote

209Indians
209VGovernment of Indian Country, Reservations, and Tribes in General
209k212Preemption
(Formerly 209k32(3))
4**Municipal Corporations**

Power and Duty to Tax in General
“No room” test for federal preemption did not apply to landlords' claim that federal law preempted city real property rental income privilege taxes on sums received under housing assistance payment contracts (HAP) funded by United States Department of Housing and Urban Development (HUD); “no room” test derived from Indian law case, and distinct branch of preemption analysis, rather than general preemption principles, applies to Indian law cases. United States Housing Act of 1937, §§ 2-25, as amended, 42 U.S.C.A. §§ 1437-1437w.
0 Case that cites this headnote

268Municipal Corporations
268XIIIFiscal Matters
268XIII(D)Taxes and Other Revenue, and Application Thereof
268k956Power and Duty to Tax in General
268k956(1)In General
5**Licenses**

Amount
Rental value of apartments provided, rent-free, to resident managers of landlords' apartment buildings was subject to city real property rental income privilege taxes as “gross income” from landlords' rental business; requiring managers to live on site was landlords' policy, rather than requirement of housing assistance payment (HAP) contracts with United States Department of Housing and Urban Development (HUD), and landlords obtained direct benefit in form of on-site management services in exchange for allowing managers to use apartments. United States Housing Act of 1937, §§ 2-25, as amended, 42 U.S.C.A. §§ 1437-1437w.
1 Case that cites this headnote

238Licenses
238IFor Occupations and Privileges
238k27License Fees and Taxes
238k29Amount

Attorneys and Law Firms

**1049 *466 Newman, Ahern, Chambliss & Banen by Kevin T. Ahern and Copple, Chamberlin & Boehm, P.C. by Scott E. Boehm, Phoenix, for plaintiffs, counterdefendants-appellants, cross appellees.
Roderick G. McDougall, Phoenix City Atty. by James H. Hays, Asst. City Atty., Phoenix, for defendant, counterclaimant-appellee, cross appellant.

OPINION
GARBARINO, Judge.
Taxpayers Myrtle Manor Apartments and Morningside Villa Apartments appeal from a judgment in favor of the City of Phoenix on refund claims for Phoenix privilege taxes assessed on sums the taxpayers received under housing assistance payment (HAP) contracts funded by the United States Department of Housing and Urban Development (HUD). The City cross-appeals from the tax court's holding that the value of the taxpayers' on-site managers' use of apartment units was not includable in the taxpayers' gross income. We consider:
(1) Whether the tax court erred in holding that HUD housing assistance payments to the taxpayers were taxable under Phoenix tax code sections 14-2 or 14-445(a) as “gross income from the business activity ... of leasing ... or renting real property located within the city;”

(2) Whether the tax court erred in concluding that federal law did not preempt application of the city's real property rental income privilege tax to HUD housing assistance payments; and
(3) Whether the tax court erred in holding that the value of services performed by the taxpayers' on-site managers in partial exchange for personal use of apartment units was not taxable as gross income from the business of renting real property.
We have jurisdiction pursuant to A.R.S. section 12-2101(B).
FACTS AND PROCEDURAL HISTORY
The taxpayers borrowed funds from First Interstate Bank to construct multi-family housing complexes, and HUD agreed to insure the loans. To obtain the HUD guarantee, each taxpayer signed a "regulatory agreement for insured multi-family housing projects." The agreements required each taxpayer to enter into a HAP contract under which the taxpayer would rent apartment units to low-income persons in return for HUD subsidy payments on each unit.
The HUD program authorizing these agreements, known as the "General Program of Assisted Housing," is governed by **1050 *467 42 U.S.C. sections 1437 through 1437w. Section 1437 sets forth the federal government's policy of promoting the general welfare of the nation by assisting the states and their political subdivisions in providing safe and sanitary dwellings for low-income families, while vesting local public housing agencies with the maximum amount of responsibility for administering these programs. Section 1437a fixes eligibility criteria for low-income housing and caps the percentage of monthly income a family may be charged as rent. Section 1437f determines the amount of housing assistance payments due owners of low-income housing. A HAP contract establishes the maximum monthly rent, including utilities and all maintenance and management charges, that the owner is entitled to receive on each dwelling unit for which assistance payments are to be made. 42 U.S.C. 1437f(c)(1). Maximum monthly rents may not exceed by more than ten percent the rental value set by HUD for the relevant market area. *Id.*
Section 1437f(c)(2) provides in part:
(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the [HUD] Secretary determines, on the basis of a reasonable formula.
(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are *necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).* The Secretary shall make additional adjustments in the maximum monthly rent for units under contract ... to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption.
(Emphasis added.) Section 1437f(c)(3)(A) provides in part: "The amount of the monthly assistance payment with respect to any dwelling unit shall be the difference between the maximum monthly rent which the contract provides that the owner is to receive for the unit and the rent the family is required to pay under section 1437a(a) of this title."
HUD has adopted numerous regulations affecting HAP contracts. 24 C.F.R. §§ 880.101 through 880.613. 24 C.F.R. section 880.501(d)(1) provides that the amount of the housing assistance

payment made to the owner of the unit is the difference between the contract rent for the unit and the tenant rent payable by the eligible family. For a vacant unit, the regulation provides that the owner will receive eighty percent of the contract rent for the the first sixty days of the vacancy. § 880.501(d)(2). Any excess over the contract rent collected by the owner from any source must be repaid as HUD directs. *Id.* For any vacancy exceeding sixty days, the housing assistance payment for the vacant unit is that amount "equal to the principal and interest payments required to amortize that portion of the debt attributable to the vacant unit for up to 12 additional months." § 880.501(d)(3).

Under 24 C.F.R. section 880.609(a), "contract rents" will be adjusted on the anniversary date of the contract upon the owner's request of the contract administrator. In addition, if not adequately compensated for by the annual adjustments, special adjustments may be granted to the extent HUD determines necessary to reflect increases in actual and necessary expenses of owning and maintaining the units as a result of substantial general increases in real property taxes, assessments, utility rates, and utilities not covered by regulated rates. § 880.609(b). Contract rent adjustments may not result in material differences between rents charged for assisted units and those for comparable unassisted units beyond differences that existed when the contract was executed. § 880.609(c).

**1051 *468 24 C.F.R. section 880.205 sets the limitations on the distribution of project funds to the owner. The maximum distribution for a project for elderly families is six percent of the owner's equity in the project. § 880.205(b)(1). The maximum for all other projects is ten percent. § 880.205(b)(2).

In 1983, each taxpayer entered into a HAP contract with HUD and its contract administrator, the City of Phoenix, for its respective project. The provisions of each contract were consistent with 42 U.S.C. section 1437f and the HUD regulations. Both projects were managed by Biltmore Properties, Inc. The Biltmore Properties' comptroller testified that between 1984 and 1990, approximately eighty-three percent of Myrtle Manor's income and eighty-seven percent of Morningside Villa's income came from HUD.

Nancy Bills, an employee of Biltmore Properties, testified that some of the residents may qualify to contribute nothing toward the rent, and may thus have a "negative rent" from allowances to which they are entitled. In those cases, HUD pays the entire contract rent on the unit and gives the tenant a check for an additional sum.

Bills further testified that if Biltmore had paid Phoenix privilege taxes on the taxpayers' housing assistance payments as they became due, those taxes would have been "taken into consideration." She stated that the four-year assessment of privilege taxes Biltmore Properties paid on the taxpayers' behalf came out of the operating account, which is usually applied to mortgages, insurance, taxes, operating expenses, and maintenance expenses. She testified that Biltmore Properties has no way to recoup this amount other than through the rent increase process.

Bills also testified that owners receive an annual percentage increase in contract rates based on the particular area in which the projects are situated; here, the Phoenix Standard Metropolitan Statistical Area. This annual adjustment factor is not directly connected to a project's actual expenses, damages or utility increases.

An administrative aide with the City's Neighborhood Improvement and Housing Department testified that neither taxpayer had inquired how they might recoup the sales taxes they paid under protest in this litigation.

Nancy Bills testified that Biltmore Properties employed resident managers for each of the taxpayers' projects. Resident managers, usually a couple, maintain the property, collect the rent, do the necessary paperwork, and keep the peace. They are on call twenty-four hours a day. The owners' policy requires managers to live on site in an employee apartment. When the resident managers' employment is terminated, they must vacate the apartment. The employment agreement for the resident managers of Morningside Villa, who were hired on July 10, 1984, provided in part:

2. Your gross cash wages are $500.00 per month, payable semi-monthly. In addition, you are permitted to occupy employee apartment No. 18, *the rental value of which is $629.00 per month (the "Rental Allowance").*

(Emphasis added.) The employment agreement for the resident managers of Myrtle Manor contained a similar provision.

On May 31, 1988, the City of Phoenix tax audit division informed Biltmore Properties that it had audited the taxpayers' accounts for the period from December 1983 through February 1988. The City assessed additional privilege taxes of $10,736.38 against Morningside Villa and $8,605.96 against Myrtle Manor. A portion of each assessment represented additional taxes computed on the taxpayers' HUD housing assistance payments over the audit period. Another portion represented additional taxes on the rental value of the apartments in which the taxpayers required the resident managers to live. Before a City hearing officer, each taxpayer challenged the inclusion of the HAP portion of the total rent payment and the value of the resident managers' apartments within their gross income subject to privilege license taxation. The hearing officer rejected the taxpayers' arguments concerning housing assistance payments but agreed that the value of resident managers' apartments should not be included in their taxable gross income.

Pursuant to City Code section 14-575, the taxpayers filed separate actions in the Arizona **1052 *469 Tax Court. In each, the City asserted a counterclaim for additional taxes computed on the estimated rental value of the resident managers' apartments. The tax court consolidated the separate actions.

The taxpayers each moved for summary judgment. After briefing and argument, the tax court ruled in pertinent part:

The Court holds that the definition of gross income in the City Code, whether the old or the new, does not include the value of the resident manager's apartment. In making this ruling, the Court is assuming certain facts not reflected in the record. The Court assumes that the manager is required by his job to reside on premises, and the apartment is only available to the manager during the term of the manager's employment by the landlord. In such a case, the Court holds that the services of the manager are not measured by the value of the manager's apartment, and the apartment is not being rented to the manager. The Court rejects the City's argument that there is a reduction of or forgiveness of indebtedness in the arrangement described.

The Court also does not agree with the City of Phoenix that the arrangement between the manager and the landlord is a barter transaction. While it may be true that an individual might be willing to accept less compensation as apartment manager if he or she is given an apartment to live in rent free, if the landlord needs the manager to reside on the premises then the apartment cannot be construed to be a rental unit and whatever incidental or indirect benefits the Taxpayers obtain as a result of the arrangement is not part of the Taxpayers' gross income from the business of renting residence units.

If the factual assumptions which the Court has made are not correct, then the City of Phoenix may present such evidence at trial, and the Court will reconsider its holding herein.

....
The Court further holds that the federal assistance payments are also within the definition of gross income as defined by both old and new City codes. The Court, therefore, rejects the Taxpayers' argument that such payments are, by the language of the applicable ordinances, not to be included.
The Taxpayers' argument is that such payments are not rent. The tax, however, does not tax rent, it taxes gross income from the business of renting. These payments clearly fall within that definition.
....
The Court does not find persuasive the Taxpayers' arguments on the preemption issue....
The federal preemption and manager apartment issues were tried to the tax court on April 1, 1991. The tax court affirmed its earlier decision holding that the rental value of the managers' apartments was not taxable and held that the federal preemption doctrine does not prevent a taxing authority from imposing a transaction privilege tax on revenues received by a landlord from the federal government. The taxpayers appealed and the city cross-appealed.
DISCUSSION
HUD Housing Assistance Payments as Gross Income
1 Before April 1, 1987, Phoenix City Code section 14-2 provided in part:
There is hereby levied upon persons on account of their business activities within the City ... privilege taxes ... to be measured by the gross income of persons ... in accordance with the following schedule:
(a) The tax rate for all activities hereunder ... shall be at an amount equal to 1.2 percent of the gross income from the business activity upon every person engaged or continuing in the following business activity:
....
(9) Leasing, renting or licensing for a consideration the use or occupancy of real property located within the City, including any improvements, rights or interest in such property. This tax shall be levied on and collected from the person leasing or renting or licensing the **1053 *470 property to the tenant in actual possession. If the person so leasing or renting or licensing the tenant in possession is not engaged in the business of leasing or renting real property, or otherwise is exempt from the tax, the tax is levied on and shall be collected from the lessor nearest such person in any chain of subleases on the property who is engaged in the business of leasing or renting real property.
City Code section 14-1 defined “business” as “[a]ll activities or acts, personal or corporate, engaged in and caused to be engaged in with the object of gain, benefit or advantage, either direct or indirect, but not casual activities or sales as herein defined.” Section 14-1 defined “gross income” as:
The gross consideration realized by a taxpayer in the conduct of any activity subject to tax under Section 14-2 and not expressly exempt or excluded. “Gross income” includes (a) the value proceeding or accruing from the sale of tangible personal property, or service, or both; (b) the total amount of the sale, lease, license or rental price; (c) all receipts, cash, credits, reduction of or forgiveness of indebtedness, and property of every kind or nature derived from a sale, lease, license or other taxable activity; and (d) all said receipts whether payment is advanced prior to, contemporaneous with or deferred in whole or in part subsequent to the activity or transaction....
Effective April 1, 1987, the City of Phoenix adopted a version of the Model City Tax Code. New Phoenix City Code section 14-100 adopted the definition of “business” contained in former

section 14-1 and new section 14-200 adopted the former definition of “gross income” contained in former section 14-1 almost verbatim. New § 14-200(a)(1) through (4), (c).
New section 14-445 recast the rental tax provisions without materially changing them as follows:
(a) The tax rate shall be at an amount equal to one and two-tenths percent (1.2%) of the gross income from the business activity upon every person engaging or continuing in the business of leasing, licensing for use, or renting real property located within the City for a consideration, to the tenant in actual possession, including any improvements, rights, or interest in such property; provided further that:
(1) Payments made by the lessee to, or on behalf of, the lessor for property taxes, repairs, or improvements are considered to be part of the taxable gross income....
The taxpayers contend that, under either version of the Phoenix City Code, the housing assistance payments they received from HUD were not taxable to them as gross income from the business of renting real property for a consideration. They reason that the payments are neither rent nor income derived from rental or leasing activity but are direct contractual payments by the federal government to the taxpayers. They contend that the consideration for those payments is the taxpayers' maintenance of their dwelling units in a decent, safe and sanitary condition in conformance with HUD's precise standards and that additional consideration for the contractual payments is the taxpayers' reservation of all their housing units exclusively for low-income families and the elderly. The taxpayers rely on *East Lake Management & Dev. Corp. v. Irvin*, 195 Ill.App.3d 196, 141 Ill.Dec. 279, 551 N.E.2d 272 (1990), and *National Corp. for Hous. Partnerships v. Chapman*, 18 Ohio App.3d 104, 481 N.E.2d 654 (1984), for the proposition that federal housing assistance payments do not constitute rental income.
The taxpayers incorrectly assert that the assistance payments are not tied to project owners' particular tenants. The applicable federal statutes, regulations, and the HAP contracts make it clear that project owners receive monthly payments calculated as the aggregate difference between the monthly per-unit rates specified in the contract, as adjusted, and the amount each particular tenant is charged individually according to income level. In substance, these are partial payments of contractually agreed rent on behalf of low-income tenants. *Cf.* *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir.1981) (tenants of federally subsidized housing project had **1054 *471 enforceable rights as intended third-party beneficiaries of HAP contracts).
The taxpayers' reliance on out-of-state authorities for the proposition that federal housing assistance payments are not “rent” is misplaced. *Chapman* merely held that a public housing tenant could be evicted for failing to pay her portion of the rent even though the landlord had received partial payment in the form of federal housing assistance payments. The court stated:
The rent subsidy, while providing a personal benefit to a qualified tenant, such as Chapman, is not personal in the sense that it is her money. The fact that Spring Hill continued to receive the rent from HUD for Chapman's account does not entitle Chapman to avoid her contractual obligations.
481 N.E.2d at 656. Similarly, in *Irvin*, the question was whether a landlord's accepting federal housing assistance payments constituted acceptance of rent and waiver of the right to terminate the lease for noncompliance. The court held it did not. 141 Ill.Dec. at 283, 551 N.E.2d at 276. Both cases held that federal housing subsidy payments constituted something distinct from a partial payment of rent made on behalf of a low-income tenant.
However, the distinction made in those cases is not relevant in this case. Gross income is clearly defined in section 14-200(a)(3) of the Phoenix City Code as “all receipts ... derived from a ... lease, ... rental, or other taxable activity.” The HAP contribution is a portion of the gross income

from the lease or rental of real property. It is this component of the definition that sweeps HAP payments into the taxpayers' gross income. The HAP payments constitute a part of their “gross income” “from the business activity” of renting real property. *See* former City Code §§ 14-1, 14-2; current City Code §§ 14-200(a)(3), 14-445(a).

Accordingly, the tax court did not err in holding that the federal housing assistance payments received by the taxpayers during the audit period were subject to Phoenix privilege taxation.

Federal Preemption of Privilege Tax on Housing Assistance Payments

2 The taxpayers observe that federal statutes and regulations governing subsidized low-income housing cover financing, design, construction, operation and day-to-day management, maintenance, record-keeping, rent subsidization, lease terms, tenant grievance procedures, notice requirements for rent changes, personnel policies, and compensation of employees. They urge that the field of renting housing to low-income persons under HAP contracts with HUD is completely occupied by federal law. Citing *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), as followed in *Department of Revenue v. Moki Mac River Expeditions, Inc.*, 160 Ariz. 369, 773 P.2d 474 (App.1989), *cert. denied,* 493 U.S. 964, 110 S.Ct. 405, 107 L.Ed.2d 371 (1989), the taxpayers argue that federally subsidized low-income housing is so tightly regulated that no room exists for taxation or regulation by the states. They further assert that, because the federal funds are intended to be used for mortgages, insurance, heating, cooling, water, power, repair and upkeep of the project premises, there is not enough money left to pay for all of the tenants' necessities if the City takes those funds by taxation. The taxpayers argue that the Phoenix privilege tax conflicts with the federal purpose to provide decent, safe, sanitary housing for low-income tenants, and is therefore invalid.

The taxpayers' analysis squares neither with the applicable case law nor with the record. In *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986), the Supreme Court stated:

[S]tate law is not preempted whenever there is any federal regulation of an activity or industry or area of law. The Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has through the years employed various verbal formulations in identifying numerous varieties of pre-emption. See, *e.g.*, **1055 *472 *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 [106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369] (1986). But we have consistently emphasized that *the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law*. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 [103 S.Ct. 1713, 75 L.Ed.2d 752] (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 [104 S.Ct. 615, 78 L.Ed.2d 443] (1984).

477 U.S. at 6, 106 S.Ct. at 2372 (emphasis added). *Accord Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

Nothing in 42 U.S.C. sections 1437 through 1437w expressly declares that state or local transaction privilege (excise) taxes on amounts received by project owners, either from low-income tenants or from HUD, are preempted.
Further, contrary to the taxpayers' contention, no true conflict exists between the provisions of 42 U.S.C. sections 1437 through 1437w and the Phoenix privilege tax on the business of leasing or renting real property. The taxpayers make no serious attempt to substantiate their claim that it would have been "physically impossible" for them to comply both with federal law and the Phoenix privilege tax. *See* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963). Indeed, the testimony of Nancy Bills indicated that the taxpayers could have absorbed the assessed taxes if they had paid them periodically when due.
The record similarly fails to support the taxpayers' repeated assertion that taxation of their HUD subsidy payments posed a significant obstacle to accomplishing the purposes underlying federal low-income housing subsidies because they received insufficient revenues to cover both Phoenix privilege taxes and tenant necessities. The testimony on which they rely, from Nancy Bills, was as follows:
Q. ... In the case of this particular tax paid under protest where you're talking eight or nine years or six or seven years worth of taxes because the audit has gone way back, that loss is exacerbated because it's five or six times a particular year, correct?
A. Yes.
Q. And, also, it included interest and penalties. So the project is completely foreclosed from ever recouping that because it's not a current tax item, for example, in a future year?
A. That's correct.
Q. Well, where did the money come from to pay the taxes?
....
A. From the federal government.
Q. And did the federal government give the project a special dispensation and say: we're going to give you some additional money to pay this tax, or did you have to take it from the funds that were already coming from the federal government under the voucher system to pay for the housing?
A. We had to take it from the existing funds.
Q. Did that short the project on funds for the year in which that payment was made, the funds that were available to do what you do with the project?
A. Because it came directly out of the operating account, yes.
Q. And to what factors are the funds in the operating account applied? Mortgages and what else?
A. Mortgage, insurance, taxes, operating expenses, which is various types of utilities, and maintenance expenses, which includes **1056 *473 salaries and the breakdown of the day-to-day expenses that any project of that type might have.
Q. Are those operating funds applied for such things as the payment of the heating and utilities, the water, the exterminating, the repairs, a broken window, whatever, where someone lives?
A. Yes, uh huh.
Q. What does the project do? It's now short of funds when it pays these extraordinary amounts. What does the project do to replace the services that it doesn't have the money to pay for?
A. We either have to go without, find a way to deal with the situation, or approach the owner for an advance to the project to cover an item like this.

Q. Is there any kind of truism in the area of subsidized housing about whether you get monies out of owners?
A. Generally because the limitation on the amount of distribution that can be made, it's just kind of an unwritten rule that, in addition to that limitation, you don't ask an owner for additional operating dollars. Most of the time they put in significant cash up front.
This testimony only establishes that paying the multi-year Phoenix privilege tax assessment may have forced the taxpayers either to find a way to deal with the situation, to withhold certain tenant services, or to approach a reluctant owner for an advance. Contrary to the implication the taxpayers seek to raise, nothing they presented in the tax court tended to show that even these moderately inconvenient temporary consequences would have occurred had the taxpayers periodically paid the taxes in question when due rather than in a single lump sum for a period exceeding four years. The taxpayers fall short of establishing that the City's personal property rental privilege tax by itself posed any genuine obstacle to accomplishing the purposes of 42 U.S.C. section 1437 *et seq.*
Given the lack of any express declaration of preemption or actual conflict between federal and local law, the taxpayers may prevail on their preemption claim only if there is evidence of a congressional intent to preempt the specific field covered by the Phoenix rental privilege tax. *See Wardair Canada,* 477 U.S. at 6, 106 S.Ct. at 2372. All the available evidence, however, is to the contrary. As we have stated, Congress expressly excepted HAP contracts from a general provision requiring that low-income projects be exempt from state and local real and personal property taxes. *See* 42 U.S.C. § 1437f(h). Additionally, 42 U.S.C. section 1437f(c)(2)(B) requires that HAP contracts permit the HUD secretary to adjust maximum monthly rents as "necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, *or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).*" (Emphasis added.) This would appear to permit an owner to request an adjustment of maximum monthly rent to cover local privilege taxes on the business of renting real property. *See also* 24 C.F.R. § 880.609. The taxpayers fail to make a case for preemption under any of the applicable legal standards.
Decisions from other jurisdictions have reached the same conclusion on analogous facts. In *U.S. Constructors & Consultants, Inc. v. Cuyahoga Metro. Hous. Auth.*, 35 Ohio App.2d 159, 300 N.E.2d 452 (1973), the court stated:
Congress did not enact legislation exercising exclusive jurisdiction in regard to housing. The federal legislation merely sets forth a national housing policy, to promote the general welfare of the nation by employing its funds and credit to assist the states and their political subdivisions in eliminating unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low-income in urban areas. 42 U.S.C.A., § 1401. The legislation permits the federal government to offer and provide financial assistance, in the form of grants and/or loans to state or local housing agencies to develop low-rent housing. 42 U.S.C.A., §§ 1409 and 1411. It is clear from reading 42 U.S.C.A., §§ 1401 to 1436 **1057 *474 that Congress did not intend to limit or exclude state action or to exercise supremacy in this area. 300 N.E.2d at 456-57.
Similarly, in *Northgate Constr. Co., Inc. v. State Tax Comm'n,* 377 Mass. 205, 385 N.E.2d 967, 968-69 (1979), the court held that federal statutes and regulations on building low-income housing projects did not invalidate state sales and use taxes on materials used in constructing the HUD-financed projects. Rejecting the taxpayer's contention that the state taxes should be deemed

preempted because they would increase the cost of low-income projects, the court found that no federal statute, regulation or contractual provision between HUD and the local housing authority barred their imposition.[1]

34 Here, the taxpayers' contention that federal law leaves “no room” for application of the City's privilege tax to HAP subsidy payments reveals itself as legally vacuous. The “no room” formulation derives from *Warren Trading Post*, 380 U.S. at 690, 85 S.Ct. at 1245, which concerned a state tax applied to activities conducted by non-Indians on an Indian reservation. A distinct branch of federal preemption analysis has evolved for such cases. Preemption standards from other areas of the law do not apply. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980). The Supreme Court has instead applied “a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case ‘requires a particularized examination of the relevant state, federal and tribal interests.’ *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 [102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174] (1982).” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989). In this case, Indian law federal preemption principles, like the “no room” test the taxpayers urge, must yield to the general preemption standards we have discussed above.

The tax court correctly held that federal law does not preempt local transaction privilege taxes on revenue that low-income housing project owners receive from the United States government.

Taxability of Value of Management Services Received in Partial Exchange for Use of On-Site Managers' Apartments

5 On cross-appeal, the City argues the tax court erred in holding that the taxpayers' on-site managers' apartments are not “rented” to them and that their services are not measured by the apartments' value. The City points out that a typical resident manager's employment agreement sets a particular sum as gross monthly cash wages and, in addition, permits the manager to occupy an apartment with a specified monthly rental value. The City reasons that “gross income” may be property of any kind, and that the specified rental value of the managers' apartments represents a “non-cash payment in the form an apartment.” The City contends that as long as this item of “gross income” is derived from the business of renting real property, it is subject to Phoenix privilege taxation. The City urges that the rental value of the apartments the managers live in constitutes a portion of the consideration paid for managerial services. The City maintains that if on-site managers actually paid the taxpayers the stipulated rental value of their apartments, those payments would clearly constitute gross income from the business of renting real property even if the taxpayers reimbursed the resident managers those same amounts through their monthly wages.

The taxpayers respond that the City incorrectly assumes that the managers' apartments would be rented at fair market value if not assigned to the managers rent-free as a condition of their employment. The taxpayers assert:

**1058 *475 This could never occur because the taxpayers are *required by their HAP contracts to provide an apartment for their on-site manager at all times.* The managers' apartments are therefore a part of the taxpayers' business premises, not one of the units available to the public. Accordingly, due to the employer-employee relationship and *the contract requirement that the managers live on the premises*, any “imputed income” to the taxpayers results from the employer relationship and not the leasing of the apartments.

The services of the manager are not measured by the value of the managers' apartments, and it is uncontested that the apartments are not being rented to the manager. Therefore, the apartments

cannot be construed to be a rental unit, and whatever incidental or indirect benefits the taxpayers obtain as a result of the arrangement is not part of its gross income from the business of renting or leasing real property.
(Emphasis added.) In reply, the City denies that the HAP contracts require the taxpayers to provide apartments for on-site managers. The City also argues it is immaterial whether the apartments would otherwise have been rented to persons other than the on-site managers.
The City's position is the better reasoned. The taxpayers cite nothing in their HAP contracts in support of their assertion that HUD requires them to provide on-site manager apartments. Our review of the HAP contracts, and the remainder of the record, reveals no such provision. We further observe that the taxpayers' witness Nancy Bills testified that requiring managers to live on-site in employee apartments was the owner's policy. That, however, is not the principal defect in the taxpayers' analysis.
There is no dispute that at all material times the Phoenix City Code levied privilege taxes on all gross income from the business activity of "leasing, renting or licensing for a consideration the use or occupancy of real property located within the City...." Former City Code § 14-2(a)(9); current City Code § 14-445(a). The code defines gross income as including "the total amount of the sale, lease, license or rental price ..." and "all receipts, cash, credit, reduction of or forgiveness of indebtedness, and property of every kind or nature derived from a sale, lease, license or other taxable activity...." Former City Code § 14-1; current City Code § 14-200(a). As of April 1, 1987, the code expressly included as "gross income" "barter, exchange, trade-outs, or similar transactions ... at the fair market value of the service rendered or property transferred, whichever is higher, as they represent consideration given for consideration received." Current City Code § 14-200(b). Both versions of the code define "business" as including "all activities or acts ... engaged in ... with the object of gain, benefit or advantage, either direct or indirect, but not casual activities or sales." Former City Code § 14-1; current City Code § 14-100.
In this case, the taxpayers obtained a direct benefit in the form of on-site management services in exchange for allowing their managers to use apartment units. Consistent with this view, the taxpayers' own witness testified that the taxpayers followed a policy of requiring this as a condition of their managers' employment. Thus, exchanging management services for apartment space was an integral component of the taxpayers' "business" of renting real property for a consideration. The services the taxpayers received from their resident managers can be characterized as "receipts" representing the "rental price" of each apartment unit. The value of the management services exchanged in the form of apartment rent constitutes income from the real property rental business. This element of the taxpayers' gross income is subject to Phoenix privilege taxation to the same extent as the rents their tenants pay them and the amounts they receive from HUD on the tenants' behalf.
The tax court based its contrary view on the proposition that the taxpayers' managers are required to reside on the premises and the apartments are available to them only during their employment. This does not affect our analysis.
The judgment is affirmed to the extent it holds (1) the City's privilege tax on the real property rental business is applicable to federal **1059 *476 low-income subsidy payments received by the taxpayers from HUD and (2) such application is not federally preempted. The judgment is reversed to the extent it holds that the agreed value of the on-site managers' services was not taxable as gross income from the taxpayers' real property rental business. The matter is remanded for further proceedings consistent with this opinion.
Affirmed in part; reversed in part; remanded.

WEISBERG, P.J., and CLABORNE, J., concur.

All Citations

177 Ariz. 465, 868 P.2d 1048

Footnotes

1
But cf. *Housing Auth. of City of Seattle v. State of Washington, Dep't of Revenue*, 629 F.2d 1307 (9th Cir.1980) (*dictum*) (federal exemption of public housing authority (PHA) from local real and personal property taxation potentially blocked collection of sales tax on building materials incorporated into PHA-constructed projects where state sales tax burden was on "consumer" and building contractor was viewed as conduit of building materials to ultimate consumer).

Selected Topics

- Government of Indian Country, Reservations, and Tribes
  - Nature of the State, Federal, and Tribal Interests
- Municipal Corporations
  - Fiscal Matters
    - City Real Property Rental Income Privilege Taxes
- Licenses
  - For Occupations and Privileges
    - Purposes of Business and Occupation Tax Statute

1. Secondary Sources

P900 SAMPLE JOB CLASSIFICATION SPECIFICATIONS

Public Employer's Guide to FLSA Emp. Class. ¶900

...The job classification specifications ("class specs") provided in this tab cover a wide range of public employer positions. Classification specifications are not job descriptions; they are broader docu...

2. **APPENDIX A: STATUTES**

   Domestic Partner Benefits: Employers Guide, 7th Ed. Appendix A

   ...Federal law enacted Apr. 7, 1986 that generally requires group health plans sponsored by employers with 20 or more employees in the prior year to offer employees and their families the opportunity for ...

3. **s 44:193. Foreclosure**

   16 McQuillin Mun. Corp. § 44:193 (3d ed.)

   ...Although judicial proceedings may, under particular statutes, be unnecessary for that purpose, the rule prevails in a number of jurisdictions that an action may be brought for the foreclosure of liens ...

5. See More Secondary Sources

6. **Briefs**

   JOINT APPENDIX, VOL. I OF II

   2008 WL 467348
   John BRIDGE, et al., Petitioners, v. PHOENIX BOND & INDEMNITY CO., et al., Respondents.
   Supreme Court of the United States
   Feb. 14, 2008

   ...[Filed July 15, 2005] Plaintiffs Phoenix Indemnity & Bond Co. (“Phoenix”), Oak Park Investments, Inc. (“Oak Park”), and BCS Services, Inc. (“BCS”) (collectively, “Plaintiffs”), by and through their att...

7. **CITY OF SHERRILL, NEW YORK, Petitioner, v. ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS, Respondents.**

   2004 WL 2295574
   CITY OF SHERRILL, NEW YORK, Petitioner, v. ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS, Respondents.
   Supreme Court of the United States
   Aug. 12, 2004

...FN* Counsel of Record 1. The Oneida Indian Nation sues the City of Sherrill to stop Sherrill from further efforts to enforce its property tax laws with respect to Nation lands located in Sherrill. Sher...

8. Reply Brief

2011 WL 5834653
Robert A. LEWICKI and Joseph W. Lewicki, Jr., Petitioners, v. WASHINGTON COUNTY, PENNSYLVANIA; Washington County Tax Claim Bureau; Treasurer of Washington County; P.S. Hysong; The Commonwealth of Pennsylvania, Respondents.
Supreme Court of the United States
Nov. 17, 2011

...The lower courts failed to address the Lewickis' other Causes of Action upon which relief could be granted. Rather the lower courts chose to focus only on the 42 U.S.C. §1983 claim in an attempt to sum...

10. See More Briefs

11. Trial Court Documents

In re Neff Corp

2010 WL 6982740
In re: NEFF CORP., et al., Debtors.
United States Bankruptcy Court, S.D. New York.
Sep. 21, 2010

...FN1. The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Neff Holdings LLC (0571); Neff Corp. (6400); Neff Finance Corp. (363...

12. In re Landstock, LLC

2009 WL 8189470
In re: LANDSTOCK, LLC, Debtor.
United States Bankruptcy Court, S.D. Mississippi.
May 26, 2009

...(Chapter 11) This Cause came on for hearing on the Motion of Creditor, Madison County Mississippi, by and through Kay Pace, Tax Collector in and for said County, for relief from the automatic stay to c...

13. In re Prime Properties of New York, Inc.

2014 WL 3714133
In Re: PRIME PROPERTIES OF NEW YORK, INC., Debtor.

United States Bankruptcy Court, E.D. New York.
June 06, 2014

...Prime Properties of New York, Inc., the debtor and debtor in possession (the “Debtor”) (by and through its vice president and sole shareholder Nicholas Gordon (“Gordon”)) along with FTBK Investor II, L...

National Corp. for Housing Partnerships v. Chapman

Court of Appeals of Ohio, Ninth District, Summit County.July 5, 198418 Ohio App.3d 104481 N.E.2d 65418 O.B.R. 468 *(Approx. 3 pages)*

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Country Squire Apartments v. Morales, Ohio App. 6 Dist., August 7, 1992

Original Image of 481 N.E.2d 654 (PDF)
18 Ohio App.3d 104

Court of Appeals of Ohio, Ninth District, Summit County.
NATIONAL CORPORATION FOR HOUSING PARTNERSHIPS, d.b.a. Spring Hill Apartments, Appellees,
v.
CHAPMAN, Appellant.
No. 11612.
Decided July 5, 1984.
Landlord brought action for forcible entry and detainer for restitution of premises. The Municipal Court entered judgment for landlord, and defendant appealed. The Court of Appeals, Summit County, George, J., held that tenant could be evicted even though landlord had received partial payment in form of federal housing assistance.
Affirmed.

West Headnotes (1)Collapse West Headnotes

Change View
1**Landlord and Tenant**

Nonpayment of rent
Tenant could be evicted for failing to pay rent or portion of rent even though landlord had received partial payment in form of federal housing assistance.
7 Cases that cite this headnote

233Landlord and Tenant
233XPublic and Publicly Subsidized Housing
233X(E)Termination of Tenancy; Eviction
233k2071Grounds for Recovery or Nonrecovery
233k2073Violation of Tenancy
233k2073(3)Nonpayment of rent
(Formerly 393k82(3.5))
***655 Syllabus by the Court*

*104 A tenant may be evicted for failing to pay rent or a portion of the rent even though the landlord has received partial payment in the form of federal housing assistance.

Attorneys and Law Firms

*105 Paul Rose, Akron, for appellee.
Dennis Nealon, Akron, for appellant.

Opinion

GEORGE, Judge.
The defendant-appellant, Jeanette Chapman, appeals the judgment of the trial court granting the petition for forcible entry and detainer filed by plaintiff-appellee, National Corporation for Housing Partnerships, d.b.a. Spring Hill Apartments. This court affirms the judgment.
On May 7, 1983, Chapman entered into an agreement to rent an apartment from Spring Hill. The agreement required Chapman to pay a monthly rental of twenty-one dollars, due on the first day of each month. The United States Department of Housing and Urban Development (HUD) contracted with Spring Hill to provide assistance for several tenants, including Chapman.
On January 6, 1984, after Chapman failed to pay her January rent on time, Spring Hill served Chapman with a notice to vacate the premises. Spring Hill then filed an action in forcible entry and detainer for restitution of the premises.
A hearing was held before a referee of the municipal court. He found that Chapman had violated the rental agreement and recommended that a writ of restitution be issued for the premises. This recommendation was adopted by a judge of the municipal court. Chapman appeals raising the following assignment of error:
"The trial court lacked jurisdiction to grant plaintiff-appellee's petition for writ of restitution as plaintiff-appellee did not serve defendant-appellant with a valid, unwaived three day notice as required by Ohio Revised Code § 1923.04(A)."
The record reveals that during 1983, Chapman was late in her rent payments on four occasions. After receiving a warning, she failed to pay January's rent on time. She tendered her rent payment only after receiving the notice to vacate. Spring Hill refused to accept her payment. However, Spring Hill retained the subsidized portion of her rent received from HUD for the months of January and February of 1984. HUD paid ninety-three percent of the total monthly rental required for Chapman's occupancy under a separate agreement between HUD and Spring Hill. Chapman had a separate contract with Spring Hill requiring her to pay twenty-one dollars of the monthly rent. That was the amount determined to be proper in accordance with her income. It was her responsibility to honor this agreement.
Chapman argues that payments from HUD were made on her behalf. Because Spring Hill retained these payments, the notice to vacate was waived. As such, Spring Hill could not maintain a forcible entry and detainer action against her.
Generally, a landlord's acceptance of current or future rent payments from a tenant creates a continuation of the landlord-tenant relationship and bars a forcible entry and detainer action. *Graham v. Pavarini* (1983), 9 Ohio App.3d 89, 92, 458 N.E.2d 421. In determining whether payments from HUD had the same legal effect as if they were payments made by Chapman, it is

necessary to look at the terms of Chapman's contract, in addition to applicable federal regulations. Chapman's lease provides in part:
" * * * The Landlord may terminate this Agreement only for: (1) the Tenant's material noncompliance with the terms of this Agreement; * * *.
"Material noncompliance includes, but is not limited to, non-payment of rent * * *."
Thus, under this provision, Chapman's lease may be terminated for failing to pay her portion of the rent.
Further, according to the brief filed by Spring Hill, its contract with HUD was **656 authorized under Section 886.02, Title 24, C.F.R. and *106 Section 236.701, Title 24, C.F.R. Thus, the relevant eviction provisions are set forth in Section 886.128, Title 24, C.F.R., as follows:
"(a) The Owner shall not evict the Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner."
While this provision does not expressly authorize eviction for a tenant's failure to pay rent, such authorization is found in other provisions concerning subsidized housing. Section 881.607, Title 24, C.F.R. Therefore, a tenant may be evicted for failing to pay rent or a portion of the rent even though the landlord has received partial payment in the form of federal housing assistance. See, generally, *Sandefur Co. v. Jones* (1982), 9 Ohio App.3d 85, 458 N.E.2d 390.
The rent subsidy, while providing a personal benefit to a qualified tenant, such as Chapman, is not personal in the sense that it is her money. The fact that Spring Hill continued to receive the rent from HUD for Chapman's account does not entitle Chapman to avoid her contractual obligations.
Accordingly, this assignment of error is overruled and the judgment of the trial court is affirmed.
Judgment affirmed.
BAIRD, P.J., and MAHONEY, J., concur.

All Citations

18 Ohio App.3d 104, 481 N.E.2d 654, 18 O.B.R. 468

Selected Topics

- United States
  -
  - Fiscal Matters
    -
      - Federally Subsidized Public Housing Tenant

1. Secondary Sources

APPENDIX B. Ohio Revised Code (Selected Provisions)

Oh. Landlord Tenant L. Appendix B (2017-2018 ed.)

...A public housing tenant's due process rights are violated by court failure to apply the federal mandate that landlords of public housing facilities give notice to the Public Housing Authority that evic...

2. **Substantive issues relative to rent levels and termination of benefits under United States Housing Act of 1937 (42 U.S.C.A. secs. 1437 et seq.)**

77 A.L.R. Fed. 884 (Originally published in 1986)

...This annotation collects and analyzes the federal and state cases that have addressed substantive issues relating to the setting of rent levels and to the termination of benefits under the United State...

3. **Tenants' procedural rights prior to eviction or termination of benefits under sec. 8 of Housing Act of 1937 (42 U.S.C.A. sec. 1437f)**

81 A.L.R. Fed. 844 (Originally published in 1987)

...This annotation collects and analyzes the state and federal cases in which the courts have discussed or decided whether, or under what circumstances, tenants are entitled to certain procedural rights p...

5. See More Secondary Sources

6. **Briefs**

BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

2001 WL 1504155
U.S. Department of Housing and Urban Development v. Pearlie Ruckie; Oakland Housing Authority v. Pearlie Rucker
Supreme Court of the United States
Nov. 20, 2001

...The opinion of the en banc court of appeals (Pet. App. 1a-67a) is reported at 237 F.3d 1113. The order of the court of appeals (Pet. App. 68a-69a) directing that the case be reheard en banc is reported...

7. **BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

2001 WL 1480820
U.S. Department of Housing and Urban Development v. Pearlie Rucker; Oakland Housing Authority v. Pearlie Rucker; Washington Legal Foundation
Supreme Court of the United States
Nov. 09, 2001

...The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to the support of governm...

8. **Brief for Amici Curiae AARP, ENPHRONT, Island Tenants on the Rise, Massachusetts Union of Public Housing Tenants, Carmelitos Tenants Association, & Public Housing Resident Council, in Support of Respondents Pearlie Rucker, et al.**

2001 WL 1820807
U.S. Department of Housing and Urban Development v. Pearlie Rucker; Oakland Housing Authority v. Pearlie Rucker; AARP
Supreme Court of the United States
Dec. 20, 2001

...FN1. Amici Curiae have obtained the written consent of Petitioners United States Department of Housing and Urban Development (HUD), Oakland Housing Authority (OHA), and Harold Davis, as well as the wri...

10. See More Briefs

11. Trial Court Documents

MIAMI MANOR TENANTS ASSOCIATION, et al., Plaintiffs, v. AIMCO et al., Defendants.

2006 WL 4483770
MIAMI MANOR TENANTS ASSOCIATION, et al., Plaintiffs, v. AIMCO et al., Defendants.
Court of Common Pleas of Ohio.
Aug. 18, 2006

...FN1. During oral arguments the defendants volunteered that Miami Elderly Associates, L.P. was the owner of Miami Manor. This point was not conceded by the plaintiffs. Judge Matthew J. Crehan The defend...

12. Haynes v. Dayton Metropolitan Housing Authority

2009 WL 6895756
Wyticha HAYNES, Plaintiff(s), v. DAYTON METROPOLITAN HOUSING

AUTHORITY, et al., Defendant(s).
Court of Common Pleas of Ohio.
July 21, 2009

...Plaintiff Wyticha Haynes was a former resident of Cliburn Manor, a public housing development owned by Defendant Dayton Metropolitan Housing Authority (DMHA). DMHA sought and received approval from the...

13. Cincinnati Metropolitan Housing Authority v. Foster

1997 WL 34685275
CINCINNATI METROPOLITAN HOUSING AUTHORITY, Plaintiff, v. Constance FOSTER, Defendant.
Ohio Municipal Court
Nov. 18, 1997

...This matter came on for hearing on Plaintiff Cincinnati Metropolitan Housing Authority's (hereinafter “CMHA”) Complaint for Forcible Entry and Detainer and for back rent due from Defendant. Defendant F...