

IN THE SUPREME COURT OF THE STATE OF OREGON

C.O. HOMES, LLC,
Plaintiff-Respondent,
Respondent on Review,

v.

NANCY CLEVELAND, and occupants,
Defendant-Appellant
Petitioner on Review.

Court of Appeals
A165208

S066504

PETITIONER'S REPLY BRIEF ON THE MERITS

This is a petition for review of the decision of the Court of Appeals on appeal from a judgment of the Deschutes County Circuit Court, Honorable Circuit Court Judge Walter Miller. On January 3, 2019, the Court of Appeals affirmed the judgment without opinion.

Before: Armstrong, Presiding Judge, Tookey, Judge and Shorr, Judge

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INDEX

I.	Summary of Argument.....	1
	A. The 30-day Notice of Termination is a new basis for the Landlord’s claim of recovery, distinct from the 72-hour Notice of Termination	2
	B. Substantial Prejudice	5
	C. Conform to Evidence	7
	D. Attorney Fees	7
II.	Conclusion	7

PETITIONER'S REPLY BRIEF ON THE MERITS

I. Summary of Argument

The Landlord is making two main arguments in its response. The first argument the Landlord is making is that the newly added notice of termination attached to the eviction complaint was not a new basis for the Landlord's claim of possession and therefore the amendment was proper.

The second argument is that the Tenant was not surprised by the substance of the newly added notice of termination. The Landlord argued that because the Tenant had received the notice and was prepared to explain why she believed she did not owe the money alleged in the notice, the motion to postpone the trial was properly denied.

However, the Tenant should prevail in this case because the 30-day Notice of Termination was a new basis for the Landlord's claim of eviction, and, although the Tenant was prepared to explain why she believed she did not owe the money alleged in the notice, she was not prepared to make the legal arguments that were unique to the newly added notice.

Because the amendment was allowed to add the new notice and the trial was not postponed, the Tenant lost her ability to exercise her statutory right to challenge the date of service of the new notice by having someone from the US Post Office testify about the significance of the postmark date on the envelope the

new notice was received in. The date of the notice did not correlate with the postmark date four days later. Compare ER-1 and ER-2. If the actual date of service was later than the date of the notice, the notice would not provide the Tenant with the required notice period and would be invalid.

The Tenant also lost her statutory right under the Residential Landlord Tenant Act (RLTA) to argue that the Landlord waived its right to evict based on nonpayment of the security deposit because it had accepted rent for three months or more with notice of the unpaid security deposit. ORS 90.412.

Because the Tenant did not have time to prepare legal defenses and arguments related to the newly added notice, she lost the ability to exercise important and substantial rights under the RLTA.

A. The 30-day Notice of Termination is a new basis for the Landlord's claim of recovery, distinct from the 72-hour Notice of Termination.

The Landlord argues on the first page of its brief on review that, "If a new "basis" for the "claim for recovery" were added, trial should be postponed at least 7 days to comply with ORS 105.135." Tenant agrees that this is the law.

The narrow issue is then, do the two notices provide different bases for the Landlord's claim of recovery. The Landlord argues that because both notices include the same subject matter, nonpayment of the security deposit, that the bases for both notices are the same. The Tenant argues that it is the notice, the validity

of the notice, and the proper service of the notice that forms the basis for a claim of eviction, not simply the subject matter of the notice. As it occurred in this case, the 72-hour Notice was found to be invalid for technical legal reasons, not because the trial court found that underlying issue was not a legitimate issue. The problem was that the wrong procedure was used. The Tenant had similar legal defenses to the 30-day Notice that were not argued because there was no time to prepare. The specific defenses are discussed below.

Perhaps the easiest way to dispel this issue is to look at the statutory form of the residential eviction complaint set forth in ORS 105.124, specifically paragraph two. It looks like this:

2.

Landlord is entitled to possession of the property because of:

___ 24-hour notice for personal injury, substantial damage, extremely outrageous act or unlawful occupant. ORS 90.396 or 90.403.

___ 24-hour or 48-hour notice for violation of a drug or alcohol program. ORS 90.398.

___ 24-hour notice for perpetrating domestic violence, sexual assault or stalking. ORS 90.445.

___ 72-hour or 144-hour notice for nonpayment of rent. ORS 90.394.

___ 7-day notice with stated cause in a week-to-week tenancy. ORS 90.392

(6).

___ 10-day notice for a pet violation, a repeat violation in a month-to-month tenancy or without stated cause in a week-to-week tenancy. ORS 90.392 (5), 90.405 or 90.427 (2).

___ 20-day notice for a repeat violation. ORS 90.630 (4).

___ 30-day, 60-day or 180-day notice without stated cause in a month-to-month tenancy. ORS 90.427 (3) or (4) or 90.429.

___ 30-day notice with stated cause. ORS 90.392, 90.630 or 90.632.

___ 60-day notice with stated cause. ORS 90.632.

___ Notice to bona fide tenants after foreclosure sale or termination of fixed term tenancy after foreclosure sale. ORS 86.782 (6)(c).

___ Other notice _____

___ No notice (explain) _____

COPY OF THE NOTICE RELIED UPON, IF ANY, IS ATTACHED....

ORS 105.124 (1).

Each different box or check line in paragraph two of the statutory form of residential eviction complaint is a separate basis for the claim of eviction. See ORS 105.124 (1). Paragraph two begins with the statement that, “Landlord is entitled to possession of the property because of:....” Id. Paragraph 2 of the statute then lists the various bases for the claim of recovery. A 72-hour notice for

nonpayment is one such basis. *Id.* A 30-day notice with stated cause is another basis.

Each basis is separate and distinct relying on separate statutes, in this case ORS 90.392 and ORS 90.394. Each statute requires that the notice contain certain specified information. The information required for a 72-hour Notice for nonpayment is different than the information required for a 30-day Notice with stated cause. The two notices were served on different days, by different individuals, with different deadlines to comply. In fact, the 72-hour Notice, which was delivered after the 30-day Notice, extends the deadline for the Tenant to pay the security deposit, invalidating the 30-day Notice.

Although the two bases are related in that each complains about the nonpayment of the security deposit, each notice afforded different procedural defenses unrelated to whether the security deposit was truly owed.

B. Substantial Prejudice

The Landlord goes to great lengths to illustrate that the Tenant was prepared to explain why she believed she did not owe the money alleged in the notice. However, the Tenant explained and argued that the issue was not one of being unfamiliar with the facts related to the security deposit, the surprise related to the reliance on the newly added notice of termination that required different evidence, witnesses and legal arguments to defeat that were not required to defeat the 72-

hour Notice. The legal arguments could be made without discussion of whether the money was truly owed. There were procedural defects with the 30-day Notice that the Tenant was prevented from arguing at trial because of the lack of time to prepare.

For example, the Landlord cites page 21 of the Tr. The trial court notes that the “only newness in [the amended complaint] is this additional notice that is now attached to the amended complaint. But the fact pattern that they claim is the basis for all of these notices hasn’t changed at all.” Tr. 21, Lns 20-24. The Tenant argues that “This other notice, there’s other defenses that we have, we didn’t come here today prepared to present those defenses because we didn’t know.” Tr. 24, Lns 11-13.

The trial court questions the Tenant “you knew the argument was a failure to pay deposits, timely deposits.” Tr. 25, Lns 17-18. The Tenant admits this was known. However, it was not known that the Tenant would have to defend a new notice of termination related to the failure to pay the deposit. The trial court says, “You’re hung up on the notices, I’m not.” Tr. 50, Lns 10-11. However, it is the notice of termination that forms the basis for an eviction, not just a set of facts. Whether the money was owed was immaterial to defeating the claim based on the new notice because the Landlord waived its right to evict pursuant to the RLTA by accepting rent for three months or more with notice of the nonpayment of the

security deposit. ORS 90.412. The statute doesn't say that the money is no longer owed, it simply says that the Landlord cannot evict the Tenant for this reason.

C. Conform to Evidence

The Landlord argues in its response that the Tenant failed to object to the introduction of the 30-day Notice at trial and therefore, the notice should be admitted to conform to evidence. The 30-day Notice was admitted over the Tenant's objection. Tr. 61, Lns 23-24. As such, the issue is properly preserved.

D. Attorney Fees

The Landlord requests attorney fees on review. However, the Landlord is not entitled to attorney fees because the right to attorney fees was waived. Tr. 235, Lns 11-12; Tr. 260, Lns 4-6; Tr. 263, Lns 17-19 (What I will say is, is that they have waived their fees, and I'm – I've accepted that and I'm not allowing any changes to that.).

II. Conclusion

The Tenant's objection to the motion for leave to amend should have been sustained because the amendment added a new basis for the claim of eviction and, once the motion to amend was allowed, the trial should have been postponed for at least 7 days. Had the Tenant been given this time she would have prevailed on one of the legal defenses. The waiver defense would be a clear winner the Tenant.

Because the amendment should not have been allowed, the judgment of

restitution should be vacated and a judgment of dismissal in the Tenant's favor should be entered.

In the alternative, if the allowance of the motion for leave to amend is affirmed, the case should be remanded and set for a second First Appearance Hearing based on ORS 105.135 so the Tenant can exercise the substantial and important rights she has under the RLTA which were promulgated to protect people like the Tenant from being evicted from their homes.

In this case, even though the Legislature has said that tenants should not be evicted when a landlord has waived the right to do so, the Tenant here was prevented from making the legal argument because there was no time to prepare. The trial court remarked, "there's no dispute that plaintiff comes in on the eve of trial, as that phrase is used, and in this case it's nearly exactly right, and they file a motion to amend." Tr. 39, Lns 9-11. In doing so, the Landlord prevented the Tenant from exercising her substantial rights under the RLTA.

Respectfully submitted August 13, 2019.

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s/ Geoffrey B. Silverman

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August 2019

**CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 (2)(b) and (2) the word count of this brief (as described in ORAP 5.05 (2)(a)) is 1,810 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05 (4)(f).

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August 2019

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I electronically filed the Petitioner's Brief on the Merits and Excerpt of Record with the Appellate Court Administrator, Appellate Courts Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on August 13, 2019 by filing it in the appellate court eFiling system under ORAP 1.35 (1).

I further certify that I directed the Petitioner's Brief on the Merits and Excerpt of Record to be served on the attorneys for Respondent on August 13, 2019, by email at the address below and via the eFiling system to:

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