ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Dave owns several apartments and listed one for rent in the newspaper. Julie called Dave and inquired about the apartment. Dave told her that rent was $1,000 per month, with the first month, plus two months prepaid, and a $100 security deposit due upon signing. Dave sent Julie a written month-to-month rental agreement which contained a typographical error stating that the security deposit was $1,000. The rental agreement provided that in the event of a failure to pay rent Dave had the option of applying the prepaid rent prior to exercising other remedies he might have. Julie signed the agreement and sent Dave the lease and a check for $4,000 ($1,000 first month, $2,000 prepaid rent, $1,000 security deposit).

A few weeks later, Dave gave her keys to the apartment. He then asked her to sign a written agreement to mediate any dispute they might have related to the rental agreement, prior to filing in court. The title to the document was "Attachment 1: Mediation Agreement." Dave explained that he forgot to include it when he mailed the rental agreement. Julie expressed annoyance with having to sign something after-the-fact and not referenced in the rental agreement, but did sign the mediation agreement.

A few months later, Julie discovered that the apartment was more expensive than her budget allowed and that she did not have that month's rent. She called Dave and told him as much. Dave, who knew that he had an extra $900 of Julie's money (plus the two months prepaid rent), scolded her and said he would apply one of the prepaid month's rent to the currently due month. Julie made a few more timely payments, but again called to tell Dave that she didn't have rent for the next month. He told her to pay up or face the consequences. That month passed without Julie making any payment. Dave sent Julie a written notice of default due to nonpayment of rent giving her seven days to cure, or face eviction.

After the seven days expired, and with Julie still in the apartment, Dave filed an action for possession in the local Alaska District Court. Julie answered claiming that the action should be dismissed because of Dave's failure to mediate the dispute.

Julie also argues on the merits that she was not in default because Dave violated the statutory limitation on the amount of prepaid rent and security deposit that he could demand, and that Dave was required to apply her last month of prepaid rent prior to finding her in default.

1. Discuss Julie's arguments on the merits that she was not in default.

2. As Dave's tenant, can Julie force Dave to mediate the dispute? Explain.

GRADER'S GUIDE

***** QUESTION NO. 6 *****

SUBJECT: REAL PROPERTY

1. Discuss Julie's arguments on the merits. [70 points]

Julie has made two arguments on the merits. First, that she was not in default because Dave violated the statutory limit on the amount of prepaid rent and security deposit he could collect. Second, that she was not in default because Dave had to apply the last month of prepaid rent he was holding prior to finding her in default.

A. Statutory limitation on the amount of prepaid rent and security deposit defense.

Julie's first argument is based upon a provision of the Alaska URLTA, AS 34.03.070(a), which provides:

> A landlord may not demand or receive prepaid rent or a security deposit, however denominated, in an amount or value in excess of two months' periodic rent. This section does not apply to rental units where the rent exceeds $2,000 a month.

Here, it is clear that Dave violated this provision when he demanded the first month plus two additional months rent be paid upfront,[1] plus a security deposit (the facts state that Dave asked for the first month's rent, plus two months prepaid rent, plus a $100 security deposit). Dave, in fact, received the equivalent of three months rent for purposes of AS 34.03.070(a) because of the typographical error in the written agreement stating that the deposit was $1,000 instead of $100.

The Alaska URLTA provides no specific remedy for a violation of AS 34.03.070(a) like Dave's. However, because Dave violated AS 34.03.070(a), the URLTA provides an additional affirmative duty of acting in good faith before exercising any right under the Act (*see* AS 34.03.320), Dave knew that he had an extra $900 of Julie's money (almost the equivalent of a full month's rent), and Dave still had not applied the final month of Julie's prepaid rent (discussed in more detail below), a court would be likely to find that Julie was

[1] The Alaska URLTA defines prepaid rent as "that amount of money demanded by the landlord at the initiation of the tenancy for the purpose of ensuring that rent will be paid, but does not include the first month's rent or money received as security for damage." AS 34.03.360(15).

not in default of payment of rent obligations at the time that Dave filed his action for eviction and possession.

B. Application of prepaid rent defense.

Julie's second argument is related to the first: that Dave should have been required to apply her last month of prepaid rent to her delinquent rent prior to Dave finding her in default. It is unclear whether Julie will succeed on this argument.

Both the Alaska URLTA and the rental agreement address the issue. AS 34.03.070(b) provides:

> Upon termination of the tenancy, property or money held by the landlord as prepaid rent or as a security deposit may be applied to the payment of accrued rent and the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with AS 34.03.120 . The accrued rent and damages must be itemized by the landlord in a written notice mailed to the tenant's last known address within the time limit prescribed by (g) of this section, together with the amount due the tenant. . . .[2]

The facts state that the rental agreement included a provision "that in the event of a failure to pay rent Dave had the option of applying the prepaid rent prior to exercising other remedies he might have."

Under the Alaska URLTA and the rental agreement, *normally* Dave would have the option of applying the prepaid month's rent or the security deposit to Julie's delinquent rent. *See* AS 34.03.070(b) ("Upon termination of the tenancy, property or money held by the landlord as prepaid rent or as a security deposit *may* be applied to the payment of accrued rent . . . .")(emphasis added); Rental Agreement ("option of applying").

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[2] AS 34.03.070(g) provides:

> (g) If the landlord or tenant gives notice that complies with AS 34.03.290, the landlord shall mail the written notice and refund required by (b) of this section within 14 days after the tenancy is terminated and possession is delivered by the tenant. If the tenant does not give notice that complies with AS 34.03.290 , the landlord shall mail the written notice and refund required by (b) of this section within 30 days after the tenancy is terminated, possession is delivered by the tenant, or the landlord becomes aware that the dwelling unit is abandoned. If the landlord does not know the mailing address of the tenant, but knows or has reason to know how to contact the tenant to give the notice required by (b) of this section, the landlord shall make a reasonable effort to deliver the notice and refund to the tenant.

However, Julie has a fairly strong argument that this is not a normal situation for two reasons. First, because of Dave's violation of AS 34.03.070(a) (discussed above). Second, because Dave had previously applied one of Julie's prepaid months to a delinquent month's rent but refused to do the same the second time. Although not directly on point, the Alaska Supreme Court in *Sullivan v. Subramanian*, 2 P.3d 66 (Alaska 2000), did hold that a landlord should have prorated a tenant's monthly rent under AS 34.03.070(b) when the tenant paid the month's rent, but vacated the premises prior to the end of the month due to disputes with the landlord. The *Sullivan* case involved many other issues not relevant to this case, but can be read as an endorsement of requiring a landlord to use a tenant's money that the landlord already holds prior to trying to enforce other remedies.

It does not matter which conclusion an applicant may reach on this issue.

2. Can Julie force Dave to mediate the dispute? [30 points]

Julie will probably be able to force Dave to mediate the dispute prior to bringing his court action. The facts state that Dave had Julie sign a mediation agreement. Dave will argue that AS 34.03.345(a) requires mediation agreements to be a part of, or at least referenced in the actual rental agreement, and that because this agreement was not referenced in the rental agreement it is unenforceable. Dave probably will not prevail on this argument.

The Alaska Uniform Residential Landlord and Tenant Act ("Alaska URLTA"), AS 34.03.345(a) provides:

> A landlord and a tenant may agree to mediate disputes between them as to an obligation of either of them arising out of the rental agreement. If the landlord and tenant agree to mediate disputes, they shall include the scope of the agreement within the executed rental agreement, incorporate a reference to that agreement within the rental agreement, or add the text of the agreement as a separate attachment to the rental agreement.

Dave will argue that the mediation agreement was: (1) not within the text of the executed rental agreement; (2) not incorporated by reference in the rental agreement; and (3) not a separate attachment to the rental agreement. Julie will argue first that the mediation agreement was titled "Attachment 1" and that AS 34.03.345(a) allows the parties to "add the text of the agreement as a separate attachment to the rental agreement." She will argue that she and Dave did exactly what is allowed by the statute when they executed the mediation agreement. That is a fair reading of the statute. Although the

Alaska Supreme Court has not yet addressed AS 34.03.345, it has expressed on several occasions a preference favoring the enforcement of alternative dispute resolution mechanisms. *See Blood v. Kenneth Murray Ins.*, 68 P.3d 1251, 1255 (Alaska 2003)("The law favors arbitration. Waiver is not to be lightly inferred.")(internal footnotes omitted); *DeSalvo v. Bryant*, 42 P.3d 525, (Alaska 2002)(expressing policy in favor of private settlement of matters); *cf. Dena' Nena' Henash v. Ipalook*, 985 P.2d 442, 450 (Alaska 1999) (holding "Sound judicial policy dictates that private settlements and stipulations between the parties are to be favored and should not be lightly set aside."). Therefore, Julie has a fairly good chance of being able to enforce the mediation agreement.

Julie will also argue that Dave cannot avoid the mediation requirement based upon his argument that his own actions violated the statutory requirements for incorporating a mediation requirement into the rental agreement. She should succeed in this argument. Courts are reluctant to allow parties to escape their own otherwise valid contractual obligations due to their own negligence or malfeasance. *See Inman v. Clyde Hall Drilling Co.*, 369 P.2d 498, 500 (Alaska 1962) ("As a matter of judicial policy the court should maintain and enforce contracts, rather than enable parties to escape from the obligations they have chosen to incur.").

Julie will also be able to establish that the dispute over whether or not she was in default clearly "relate[s] to the rental agreement" and is within the terms of the mediation agreement.

In short, Julie should prevail on her arguments, get the case dismissed, and force Dave to mediate the dispute.

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Question **No. 6** *Only*

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Essay Question #6

1. DIscuss Julie's arguements on the merits that she was not in default?

In the lease agreement Dave required the first month's rent of $1,000 plus two additional months prepaid in the the amoung of $3,000 and a security deposit of $100. Because of his mistake in writing $1000 instead of $±00 on the security deposit Julie sent Dave $4,000 the/~~equivlan~~/ amount equal to 4 months of rent. Dave applied her first $1000 to her first month's rent leaving $2000 in prepaid rent equal to two months. He applied $1000 for the first month she did not pay her rent leaving one month of prepaid rent in escrow. When Dave took his action to demand ~~tht~~ that Julie leave the apartment he was still holding one month of prepaid rent and the extra $900 in security. In actuality he still held $2000 equal to two months of rent. when the action for possession was filed Dave was still holding $2000 of Julie's money. On the merits Dave still held two months worth of rent and on the merits his action for possesion should be denied.

2. As Dave's tenant, can Julie force Dave to mediate the dispute? Explain.

Under the law an agreement to mediate is between both parties. It is not one-sided. In Dave providing the mediation agreement he was stating that all disputes between him and his tenants would be resolved through mediation. Julie asking that the action filed by Dave be dismissed due to his failure to mediate the dispute is valid. When Dave gave Julie the keys to the apratment he had her sign the Mediation Agreement and stated that he had forgotten it when he mailed the r3ental agreement. Julie expressed her annoyance at the time of having to sign something after the fact, and pointed out that it did not mention the lease. It can be argued in her favor that since the agreement did not specically mention the lease

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that mediation would be required to resolve all disputed between tenant and leasor. Dave had obligated himself to ~~medaition~~ mediation when he ~~inluced~~ included the document as part of the rental agreement. Although not attached he implicated that it was part of the agreement that he inadvertenlty failed to include in the mailed lease agreement. If this is part of his business practice in leasing apartment it should not be hard for find additional such agreements in his files.

Dave ~~s~~ still ~~have~~ has to mediate the dispute. It is possible that Dave does not want to go into mediation becaasue his actions would show that he was holding Julie's money outside of the rquirements of his own contracts.

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(1) Julie's arguments that she was not in Default?

Alaska has Adopted the Uniform Residential Landlord Tenant Act which Applies to Residential Rentals. the Maximum ~~am~~ amount allowed For collection previous to occupation is $2,000 For deposit and prepaid Rent. In this case the tenant prepaid $4,000 so the Landlord Failed to adhere to the URLTA.

A tenant is allowed to use prepaid Rent Before an eviction. In this case the tenant still had 1 months Rent she ~~ha~~ had prepaid

but not used for Applying to the Rent. Therefore the eviction Notice was hasty and invalid.

A month to month tenancy requires a 7 day notice to evict, and subsequent to this 7 day waiting period, the landlord may obtain a forcible Entry & Detainer if the Tenant fails to leave. The FED allows the landlord a speedy 3 day process of getting before the Judge quickly and arranging for the tenant to be ousted.

However, Because the tenant [redacted]

still had 1 months Rent to be yet Applied, she was not in default and not subject to either the eviction or the FED.

② <u>Can tenant Julie force Dave to mediate the dispute?</u>

As a contract, the statute of Frauds Requires the signature of the party being held to the contract. In this case there is no indication that the Landlord signed the agreement so he can not be held to adhere to the Agreement. In Addition if this agreement

is a modification of the original contract then consideration must be Addressed. In this case neither party offered new consideration for the mediation Agreement. Finally, an Adhesion contract is invalid. An Adhesion contract is a "take it or leave it" Approach. In this case it Appeared as if the Landlord demanded the tenant sign the agreement even if she chose not to. Therefore the mediation agreement will probably not be held up in court.

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1. Violation of Statutory Limit on Amount of Prepaid Rent

Julie is claiming that she is not in defaul as Dave witheld an amount in excess of the statutory limit of rent and security deposit. A security deposit cannot exceed two months rent. Here, Dave is asked Julie to put up $2000, which amounts to two months rent. However, he also asked her to put up $1000 of a security deposit. Julie is right, this is in excess of the statutory limit, which in this case would have been $2000.

A court will probably agree that this violates the Uniform Residential Landlord Tenant Act, and will require Dave to return the additional $1000 security deposit. The court will also evaluate the degree of Dave's misconduct, and possible fine him for acting in violation of the Act. An individual who does not return a security deposit in a timely fashion, for example, can be fined up to two times the amounth witheld.

2. Applying Last Month's Rent

Julie is also claiming that Dave should have applied her last month of prepaid rent prior to finding her in default.

Here Julie is incorrect. Dave should not dip into her security deposit to pay for the last month of rent. This money should be kept in an escrow, and when Dave has notified Julie of her default and the issue is resolved either via mediation, via the court, or independently, then Dave may be justified in witholding the security deposit/two months rent. However, he cannot do so until

the issue has been resolved, and Julie given adequate opportunity to cure the breach, etc.

In sum, Julie is not correct in arguing that she is not in default of her lease. She is responsible for paying $1000/mo and she has failed to do so. It may be that Dave has witheld too much money. However, this will not excuse Julie from her obligation to pay rent. Additionally, as discussed above, it is not Dave's right or responsibility to be applying Julie's security deposit towards her defaulted month. A security deposit is held, among other reasons, to pay for possible damages that a tenant may cause during their tenancy. Therefore, spending the security deposit on a defaulted month would use up these funds, which could possibly hurt the landlord if the tenant eventually vacates, leaving behind a very damaged apartment. Here, Dave has given Julie a chance to cure her rent, and the case has not proceeded to court. If Julie pays up, then she will be fine - she's given a chance to cure. If she defaults again then the landlord can be more severe, and the second time he could evict her if she doesn't immediatly cure.

3. Forcing Dave to Mediate

All material terms and agreements between the landlord and the tenant should be set forth in the rental agreement. Here, the mediation agreement was not included in the rental agreement. Instead, Dave offered Julie the agreement after the fact, which obviously has the potential to put tenants in a terrible situation. They could become very vulnerable to fraud, blackmail, etc., having already signed a rental agreement (and possibly moved in) and then be asked to sign an additional memorandum later on. Here, if Dave wanted Julie to agree to mediate disputes, this should have been made clear in the initial rental agreement.

Dave's course of conduct was correct: after giving Julie a chance to cure her default, he has filed an action in court, which is the proceedure required by teh Uniform Residential Landlord Tenant Act. Julie will be entitled to a hearing, and the matter will be properly addressed by the court. Julie cannot force Dave to mediate

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(1) In Alaska, a landlord can in no case demand prepaid rent plus security deposit in excess of twice the monthly rental on a dwelling. By collecting two months of prepaid rent and another months worth of rent money as a security deposit, Dave clearly violated this provision. The question is, does this violation preclude Dave from ~~finding~~ holding Julie in default when Dave still held one month of prepaid rent and a $1000 "security deposit". The answer ~~is~~ that these facts must prevent Dave from finding Julie in default.

The reason for permitting landlords to require prepayment of rent and security deposits is to protect the financial interests of the property owner.

The limitation on this right protects tenants from abusive landlords and keeps the ~~co~~ upfront cost of housing from becoming prohibitive.

Although security deposits are held by the landlord primarily against the possibility of damage to the property, prepaid rent is held to protect the landlord against the nonpayment of rent. Permitting a landlord to evict a tenant on the basis of such nonpayment while the landlord still holds prepaid rent would be inequitable and would ~~x~~ defeat the proper purpose of permitting prepayment of rent. On these facts Dave's actions are particularly egregious since he holds two months worth of Dana's rent

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money. Since $900 of that is being held by Dave in bad faith, there is no way a court would permit him to evict Jane on the basis of her alleged default. If Dave had not charged an improper amount up front, Jane may ~~be~~ have been able to make her rent payments.

Alaska law does not permit a landlord ~~from~~ to require his tenants ~~submit to~~ bring their claims ~~under~~ through alternative dispute resolution unless the landlord ~~be~~ is also bound to ~~the same rules~~ bring his claims through the same procedures. In this case it is doubtful that Dave could enforce the agreement against Jane if Jane tried to circumvent it (since she signed it for no consideration), but a

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court is likely to enforce the agreement against the landlord nevertheless. The court is likely to suspect that Dave's motives in requiring Jane to sign the agreement after ~~that he~~ she had paid him were less than pure, especially given that he never told her of the $900 mistake. In addition, it is highly probable that ~~a tenant~~ Jane might have believed herself bound by the mediation agreement, ~~as~~ something Dave might have been counting on. A court will ~~therefore~~ enforce the mediation agreement against Dave for all of these reasons.

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Question **No. 6** *Only*

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QUESTION 6:

As an initial matter, this dispute is governed by the Uniform Residential Landlord-Tenant Act ("URLTA"), which Alaska has adopted. The URLTA applies to the renting of any "residential" premises, which Dave's apartment building clearly is.

I. Julie's arguments that she was not at fault

A. Amount of Prepaid Rent and Security Deposit

Julie is asserting several arguments: She first claims that Dave violated the statutory limitation on the amount of prepaid rent. Under the URLTA, a landlord can only demand up to two months rent as a security deposit. Here, Julie's rent was $1,000. Therefore, Dave could only demand a total of $2,000. That Dave termed the additional $100 a "security deposit" and the $2,000 "prepaid rent" does not matter - the additional $100 is invalid. Thus, Julie did not have to pay the $100, or the $1,000 "security deposit."

B. Applying Prepaid Rent Prior to Default

Julie additionally argues that Dave was required to apply her last month of prepaid rent prior to finding her in default. Under the URLTA, if rent is late, landlords need to give seven days notice and with an opportunity to cure before initiating an eviction procedure. Here, Dave

did appropriately send Julie a written notice with seven days to cure.

When the URLTA does not apply, ordinary rule of contract law govern the relations between tenants and landlords. When Dave told Julie that he would apply one month of the prepaid rent to cover her late rent, he was bound to do so. Thus, when he did this, he voluntarily relinquished his right to $1,000 of the $2,000 "prepaid rent" deposit.

However, because Dave did not have a right to the additional $1,000 that Julie paid (see above), he was obligated to either return this amount to her or apply it towards rent. Because he did not have a right to the additional $1,000, he *had to* apply it towards rent, and he could not demand eviction for tardy rent. Therefore, Julie is wrong that Dave needs to apply the last month of rent towards prior to finding her in default. But she is right that he cannot find her in default before applying the additional $1,000 security deposit that Dave illegally retained.

II. Can Julie Force Dave to Mediate?

Julie signed an agreement titled "Mediation Agreement" when she moved in, which was not attached to the original rental agreement. Generally, landlords must include any waiver of rights, such as an arbitration agreement, with the lease agreement, and cannot surprise the tenant with a waiver after they have agreed to rent residential property. However, Julie and Dave did sign the agreement. Because Dave is the party charged here, and he proposed the agreement, the District Court will likely find that he cannot now disavow the obligation to mediate the dispute.

Further, even if the District Court does find that the agreement is invalid, it can order

mediation if it believes it will help resolve the dispute.