ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Marge owned a small apartment building located in Alaska. Marge had a written rental agreement with a month-to-month tenant, Dave, which required payment of rent on the first day of each month and prohibited the keeping of more than one pet in an apartment, among other things. While Dave had leased Marge's apartment for several years, Marge grew tired of dealing with Dave and found a friend who was interested in leasing the apartment. During his tenancy, Dave often was a few days late paying rent and Marge would have to call Dave to remind him to pay his rent. Dave occasionally called Marge in the middle of the night demanding that some minor problem be repaired immediately. Marge twice had to enforce the one pet rule against Dave because Dave liked to have two dogs.

In late May, Marge noticed that the large living room window in Dave's apartment was shattered and that there appeared to be two dogs in Dave's apartment. After a few days had passed and Dave had failed to contact her about fixing the window, she decided that she would terminate his tenancy. Marge had paid $300 to replace the window a few years ago. However, she estimated that it would cost $500 to replace the window now.

On June 1, 2007, Marge taped a letter to Dave's door that stated that she was terminating his rental agreement and that Dave had one week to move out. The letter stated that Dave's rental agreement was terminated due to intentional damage to the property by breaking the window. The letter further mentioned Dave's occasional late rent payments, unreasonable repair demands and the violations of the one-pet rule as reasons for eviction. Marge also sent the letter to Dave by certified mail.

When Dave had not moved out a week later, Marge filed a forcible entry and detainer ("FED") action in state court to evict Dave. Marge properly served Dave.

Dave appeared at the FED hearing and made several arguments. First, Dave argued that Marge had no valid reason to terminate his rental agreement because the window damage was minor and was not caused by him; instead, the window was broken by his visiting nephew. Second, Dave argued that the other reasons Marge cited were impermissible reasons for terminating his rental agreement. Third, Dave argued that Marge was acting in bad faith because the true reason for terminating his rental agreement was so that Marge could rent the apartment to her friend. Finally, Dave stated that he did not receive Marge's June 1, 2007 letter. He argued that Marge's notice was defective because he never saw the letter she allegedly taped to his door and because he never picked up the certified mail. He stated that he only learned

about the hearing because Marge called him the day before to confirm whether he was going to the hearing.

1. Analyze and discuss Dave's arguments.

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: REAL PROPERTY

Analyze Dave's arguments.

A. Reason for eviction. [60 points]

Marge's letter gave several reasons for terminating Dave's tenancy. First, it stated that Dave had intentionally caused damage to the apartment by breaking a window. Second, the letter referenced the prior late rent payments, unreasonable repair demands and violations of the one-pet rule.

i. Termination for intentional and substantial damage. [30 points]

Alaska Statutes provide that a landlord may terminate a rental agreement for intentional and substantial damage caused to the premises, as follows:

> [I]f the tenant or someone in the tenant's control deliberately inflicts substantial damage to the premises in breach of AS 34.03.120(a)(5), the landlord may deliver a written notice to quit to the tenant under AS 09.45.100 - 09.45.105 specifying the act constituting the breach and specifying that the rental agreement will terminate upon a date that is not less than 24 hours after service of the notice; for purposes of this paragraph, damage to premises is "substantial" if the loss, destruction, or defacement of property attributable to the deliberate infliction of damage to the premises exceeds $400;

AS 34.03.220(a)(1) (emphasis added) (AS 34.03.120(a)(5) provides: "The tenant … may not deliberately or negligently destroy, deface, damage, impair, or remove a part of the premises or knowingly permit any person to do so."). The statute thus sets out two requirements for termination of the rental agreement: (a) the damage must be substantial, and (b) it must have been deliberately caused.

Here, it is would be a close call as to whether the damage would qualify as substantial. The facts state that the window cost $300 to install several years ago but that Marge "estimated" that it would cost $500 to replace now. Alaska Statute 34.03.220(a)(1) defines substantial damage as loss, destruction, or defacement that exceeds $400. Given that Marge bears the burden to prove the damage she contends justified terminating the rental agreement, it is unlikely that a court would find Marge's "estimate" adequate to support her argument.

Marge cannot prove the second requirement, that the damage be intentionally caused. Dave has argued that his nephew broke the window playing baseball outside. The facts do not provide any other information that would suggest intentional damage, other than Marge's unsubstantiated allegation. Consequently, a court likely would not find that Marge had reason under AS 34.03.220(a)(1) to terminate Dave's rental agreement.

ii. Termination for other reasons. [30 points]

AS 34.03.220(a)(2) defines landlord remedies in situations of noncompliance with the rental agreement. It provides:

> (2) if there is a material noncompliance by the tenant with the rental agreement, or if there is noncompliance with AS 34.03.120 , other than deliberate infliction of substantial damage to the premises or other than noncompliance as to a utility service for which the provisions of (e) of this section apply, materially affecting health and safety, the landlord may deliver a written notice to quit to the tenant under AS 09.45.100 - 09.45.110 specifying the acts and omissions constituting the breach and specifying that the rental agreement will terminate upon a date not less than 10 days after service of the notice; if the breach is not remedied, the rental agreement terminates as provided in the notice subject to the provisions of this section; if the breach is remediable by repairs or the payment of damages or otherwise and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement will not terminate; in the absence of due care by the tenant, if substantially the same act or omission that constituted a prior noncompliance of which notice was given recurs within six months, the landlord may terminate the rental agreement upon at least five days written notice to quit specifying the breach and the date of termination of the rental agreement.

AS 34.03.290 governs a landlord's termination of a month-to-month tenancy in the absence of noncompliance by a tenant with the rental agreement. It provides in relevant part:

> (b) The landlord or the tenant may terminate a month to month tenancy by a written notice given to the other at least 30 days before the rental due date specified in the notice.
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> (c) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or after its termination under (a) or (b) of this section, the landlord may, after serving a notice to quit to the tenant under AS 09.45.100 - 09.45.105, bring an action for possession. . . .

Marge cannot prove any material non-compliance with the rental agreement that would warrant termination under AS 34.03.22(a)(2). Marge's letter mentioned Dave's occasional late rent payments, unreasonable repair demands and the violations of the one-pet rule. None serve as a basis for terminating Dave's rental agreement within the one-week time Marge provided Dave.

Marge was obligated by AS 34.03.220(a)(2) to provide a ten-day period for Dave to cure any noncompliance. Marge's notice did not provide for a period for Dave to cure any stated noncompliance. It was therefore defective. See AS 34.03.220(a)(2); Curry v. Tucker, 616 P.2d 8, 12 (Alaska 1980) ("[C]ourts have generally required that such notices specify the time in which default may be cured"); but see Curry, 616 P.2d at 12 (holding that "the omission of [the] information [regarding the time to cure a default] does not automatically make the notice ineffective" where the facts of the case provide that the information was otherwise conveyed to the tenant).

Further, AS 34.03.240, provides that a landlord can waive the right to terminate a rental agreement for a breach of the agreement if the landlord thereafter accepts rent:

> Acceptance of rent with knowledge of a default by the tenant or acceptance of performance by the tenant that varies from the terms of the rental agreement or rules or regulations subsequently adopted by the landlord constitutes a waiver of the right of the landlord to terminate the rental agreement for that breach, unless otherwise agreed after the breach has occurred.

Here, the facts indicate that Marge had accepted rent after each of Dave's alleged breaches of the rental agreement and that acceptance would constitute a waiver of Marge's right to terminate the rental agreement for those alleged breaches of the rental agreement. The facts do not state that Dave was non-compliant with his obligation to pay rent when Marge posted and sent the letter to Dave. The facts also do not state that Dave had more than one pet at the time that Marge posted and sent the June 1, 2007 letter. Third, even if Dave's unreasonable repairs demands constituted a violation of any obligation under the rental agreement or constituted a violation of Dave's duty of good faith, Marge's continued acceptance of rent means that she cannot use the unreasonable demands as reason to terminate Dave's rental agreement.

Finally, Marge did not provide the 30-day notice required under AS 34.03.290 to terminate Dave's tenancy.

B. Bad Faith/Retaliation [20 points]

Dave has argued that Marge acted in bad faith when she allegedly terminated his rental agreement because her real reason for termination was to permit her friend to move into Dave's apartment. AS 34.03.320 imposes an obligation of good faith on the landlord in all actions taken arising under the URLTA:

> Every duty under this chapter and every act that must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement. The aggrieved party has a duty to mitigate damages.

The Alaska Supreme Court has addressed the obligation of good faith and retaliatory conduct under the URLTA in McCall v. Fickes, 556 P.2d 535, 540 (Alaska 1976). The court explained as follows:

> The retaliatory conduct with which the statute is concerned is clearly conduct which is undertaken in retaliation for actions by the tenant. As a defense, 'retaliatory eviction' is addressed to conduct which deters the assertion of tenant rights. We think it logically untenable to assert that an act which benefits the landlord is one which will result in retaliation.

McCall v. Fickes, 556 P.2d 535, 540 (Alaska 1976).

Here, Dave's bad faith argument is not likely to succeed. The only right that Dave advanced during his tenancy, based on the facts, was his right to have the apartment maintained. It is arguable that Marge was motivated to terminate Dave's rental agreement, in part, because she was tired of dealing with Dave's exercise of his right to have the apartment maintained. A court likely would find Dave's actions unreasonable and not consistent with his good faith duties, however. In addition, Dave's regular failure to pay rent timely, his non-compliance with the one-pet rule and the broken window constitute other facts indicating legitimate reasons for Marge's attempt to terminate Dave's rental agreement even if she failed to give timely notice.

A landlord is not prohibited from making a decision to lease property to a different tenant. The problem is that Marge failed to follow the 30-day notice required by statute if she simply wanted to terminate Dave's tenancy

In summary, a court is not likely to conclude that Marge acted in bad faith.

C. Notice Requirements [20 points]

Alaska Statutes require landlords to give tenants written notice in order to effect an eviction.

AS 09.45.100 governs the form of notice required:

> (a) Except where service of written notice is made under AS 09.45.090(a)(1) or (b)(1), or except when notice to quit is not required by AS 09.45.090(a)(3) or (b)(3), a person entitled to the premises who seeks to recover possession of the premises may not commence and maintain an action to recover possession of premises under AS 09.45.060 -- 09.45.160 unless the person first gives a notice to quit to the person in possession.
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> …
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> (c) A notice to quit shall be in writing and shall be served upon the tenant or person in possession by being
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> (1) delivered to the tenant or person;
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> (2) left at the premises in case of absence from the premises; or
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> (3) sent by registered or certified mail.

1. Notice Taped to Door [10 points]

Dave argued that the notice taped to his door is not sufficient to provide him notice because he never actually received it. AS 09.45.100(c)(2) allows written notice to be "left at the premises." The Alaska Supreme Court has not specifically addressed this subsection of the statute

However, in Greene v. Lindsey, 456 U.S. 444 (1982), the United States Supreme Court addressed a similar statute in Kentucky. There, a landlord posted a notice of eviction on a tenant's door. See id. at 446-47. A Kentucky statute provided that posting notice in a conspicuous place sufficed for purposes of notice. The Court held that posting notice on a door was not sufficient for purposes of Due Process:

> But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting pursuant to the provisions of § 454.030 results in a failure to provide actual notice to the tenant concerned. Indeed, appellees claim to have suffered precisely such a failure of actual notice. As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they could have their intended effect. Under these conditions, notice by posting on the

> apartment door cannot be considered a "reliable means of acquainting interested parties of the fact that their rights are before the courts." Mullane, 339 U.S., at 315, 70 S.Ct., at 657.

Id. at 453-54 (internal footnote omitted).

Here, Dave has argued that he did not actually receive the notice taped to the door. The facts do not indicate circumstances similar to those in Greene. While Alaska Statute expressly provides that leaving a notice to quit at a premises is adequate, Dave has an argument that Marge's letter taped to the door was not adequate notice to him. As demonstrated above, however, the notice was untimely and inadequate in any event.

2. Notice Sent by Certified Mail [10 points]

Dave has also argued that the notice Marge sent by certified mail was defective because he never actually picked up the certified mail and it was eventually returned to Marge. AS 09.45.100(c)(3) allows written notice to be "sent by registered or certified mail." The statute does not address the situation where a tenant fails to actually pick up the registered or certified mail.

The Alaska Supreme Court has not directly addressed this subsection of the statute. There is a statutory construction argument recited but not decided in Dawson v. Temanson, 107 P.3d 892 (Alaska 2005), that the statute requires only that the notice be "sent" and that proof of receipt is not directly required by the statute. See id. at 895-96. In other circumstances, the Court has held that there is no requirement to prove receipt in order to satisfy a statutory notice requirement. See e.g., Jeffcoat v. State, 639 P.2d 308, 313 (Alaska Ct. Appeals 1982).