

STATE OF VERMONT
WINDSOR COUNTY, SS

David M. Holmes
Margot A. Holmes
Plaintiff

v.

Paula Keenan O'Brien
Randall Bishop
Defendant

WINDSOR SUPERIOR COURT
Docket No. 465-7-09 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This landlord-tenant dispute came on for hearing on the merits on September 29th and 30th, 2009. Plaintiffs David Holmes and Margot Holmes were present and represented by Attorney Frank Berk (29th only) and Attorney Joseph Andriano. Defendants Paula Keenan O'Brien and Randall Bishop were present and represented themselves. Based upon the credible evidence presented at the hearing, the court makes the followings of fact, conclusions of law, and order.

Findings of Fact

Defendants rent an apartment located at 4650 Rt. 14 in Sharon, Vermont. Plaintiffs are the landlords, and the apartment (apartment B) is one of two in the building. Defendants have lived in the apartment for twelve years.

Mr. Holmes bought the building in November 2003. Mr. and Ms. Holmes lived in apartment A from the time of purchase until they bought another home in July 2008.

There was no written lease for many years. However, there came a time when the Holmes wanted to purchase another home, and they needed a written lease to prove income from the property. At that time, the parties signed a written lease. (P. Ex. 1.) The written lease was for a one month term, beginning July 1, 2008, with automatic renewal unless terminated with at least 30 days notice. The lease provides for the recovery of attorneys fees by the landlord if an action is necessary to collect rents. Attorneys fees of \$3,957 have been incurred by the Holmes in connection with this action.

The lease agreement recites that the tenants had examined the premises and that they were in good order and repair, and in a safe, clean, and tenantable condition. Despite this, tenants complain of the failure of the landlords to make repairs which pre-date the signing of the written lease. These complaints include exterior stairs, exterior mold, and a rotted deck.

FILED

OCT 8 2009

The evidence in this case was extensive, but demonstrates a generally good relationship between the parties until the landlords moved out. A dispute erupted over the use of the garage once apartment A was rented to a non-owner on January 1, 2009.

The lease agreement provides that the garage is left to the tenants to share on such terms as they agree upon. It is not part of the leased premises. Defendants and the renters in apartment A got into a dispute over the use of the garage, and defendants thereafter became angry at the landlords due to the perceived unwillingness of the landlords to enforce an equitable arrangement concerning the garage.

The problems erupted in a telephone conversation between Mr. Holmes and Mr. Bishop on April 24, 2009. At that time, Mr. Bishop told Mr. Holmes that if he did not do something about the garage problems, "he would be sorry." Mr. Bishop denies threatening Mr. Holmes and claims that it was Mr. Holmes who made rude and threatening comments during the phone conversation. During the hearing, Mr. Bishop was sarcastic and accusatory, which gives credence to Mr. Holmes' testimony concerning the phone call.

In any event, Mr. Bishop followed the telephone call with a letter (D. Ex. R) which provides written notification of complaints concerning the apartment. This was the first "actual notice" to the landlords as defined by 9 V.S.A. § 4451(1).

The fire marshal and town health officer inspected the apartment on April 27th. These officials were summoned to the property by the defendants because they were angry at Mr. Holmes.

The fire inspectors' report dated April 30, 2009 (P. Ex. 2) may have actually been received by the landlords before the aforementioned letter. If so, the report was the first "actual notice" of any problems at the apartment. This was followed by a letter from the Town of Sharon dated April 29, 2009 (P. Ex. 5) concerning the health officer's inspection.

It is not possible to determine from the evidence whether the landlords received the tenants' letter outlining the complaints before or after they received the fire inspection report or the health officer's report. In any event, at the earliest, no actual notice was provided regarding problems within the apartment until after the angry telephone exchange on April 24th, 2009.

Mr. Bishop wrote a check for the May rent on April 25, 2009. (P. Ex. 9.) On April 30th, he voided the check "until bathroom, porch and bats are remedied." The defendants thereafter withheld rent until the rent escrow hearing was held on August 4, 2009.

Payments have been made pursuant to the escrow order and the defendants remain in possession of the apartment at this time. A total of \$2,852.42 has been paid into court. Rent has not been paid for May and June. The total rent due for the entire period since the withholding began is \$3,680.64 as of the date of decision, leaving a balance of unpaid rent of \$828.22.

The landlords provided defendants with a written notice of termination of tenancy for non-payment of rent on June 11, 2009. (P. Ex. 10.) The notice terminated the tenancy as of July 1, 2009. The action was filed July 2, 2009.

FILED

In response to the notices from the fire marshal (Landon Wheeler) and the town health officer (Dr. David Indenbaum, a medical doctor), Mr. Holmes undertook a series of repairs to the property. At one point in making these repairs, Mr. Holmes entered the property without prior notice to the tenants. He mistakenly believed that this would be okay based on past circumstances and interactions, but the tenants were upset by the lack of notice. The court finds the mistake to have been an honest one, and further finds that any infringement was immaterial in light of all the circumstances presented.

The fire marshal's report identified eleven problems which needed correction in the apartment. Each of the problems was addressed by Mr. Holmes and receipts for the corrective work were received in evidence. (P. Ex. 3.) There is no evidence of any actual notice of any of these problems prior to April 25, 2009. The problems identified and the repairs conducted are as follows:

1. Handrails and Stairs. The handrail guards were insufficient and the height between the stairs was not uniform. Mr. Holmes replaced the stairs and repaired the handrails. (P. Ex. 3-10, 3-11, 3-12, 3-13, 3-15, & 3-16.) Defendants claim that they had been complaining about the stairs for years and that earlier efforts at repairs by Holmes were insufficient. No written notice of stair complaints was provided to the landlords prior to April 2009.

2. Gutter support. A rain gutter was hanging in a way so as to interfere with the opening of a screen door. Mr. Holmes tied up the rain gutter so that it would not impede the opening of the screen door. This is a minor repair that did not affect the habitability of the house.

3. Main door. There was a problem with the locking mechanism of the main door. Mr. Holmes purchased a new lock set and installed it. (P. Ex. 3-4.) Defendants also complain that the door did not fit properly in the doorjamb. This is a minor problem and did not affect the habitability of the house.

4. Painted electrical receptacles. Some electrical outlet receptacle covers had been painted at some time. Mr. Holmes removed the painted covers and replaced the electrical outlets. (P. Ex. 3-5 & 3-6.)

5. Power cord traveling through a wall. During his inspection, the fire marshal saw a power cord traveling through a wall. This cord had been removed by the time Mr. Holmes came to start his repair work a few days after the inspection.

6. Electrical system evaluation. The fire marshal required an electrical system evaluation by a Vermont licensed electrician. In response, Mr. Holmes arranged for his uncle, who is a Vermont licensed electrician, to inspect the property. As a result of the evaluation, Mr. Holmes replaced a dryer outlet. (P. Ex. 3-7, 3-8 & 3-20.) Defendants are unhappy with the electrical evaluation and feel that Mr. Holmes' uncle did a less-than-thorough job with the evaluation. There is no evidence that the state fire marshal felt that the inspection was less than satisfactory.

FILED

OCT 8 2009

7. Bedroom window size. The window in the bedroom was too small (less than five feet square) and did not provide for a means of egress from the bedroom in the event of a fire. Mr. Holmes removed the window and replaced it with a bigger one. (P. Ex. 3-9.) Although not required by the fire marshal, he also replaced another window.

8. Inconsistent stair tread height. See #1 above.

9. Smoke detectors. The fire marshal required the installation of hard-wired smoke detectors. Mr. Holmes was fined \$50 for not having a working smoke detector in the apartment. New hard-wired smoke detectors were installed within 72 hours of the April 27th inspection.

10. Absence of fire extinguisher. Mr. Holmes purchased a fire extinguisher and placed it in the apartment after the fire marshal's inspection.

11. Properly mounted electrical heater. An electrical heater in the bathroom was not properly mounted. In response, Mr. Holmes attempted to mount the heater on the wall by attaching it with screws to the studs. Mr. Holmes thought he had been successful in doing so. At some time later the heater came loose from the wall again. Defendants did not provide Mr. Holmes with any notification that this had occurred.

The fire marshal, Mr. Wheeler, returned to the apartment on June 22, 2009. At that time he found that all violations had been corrected and that there were no existing violations at that time. The electrical heater therefore must have come detached from the wall at some time subsequent to June 22nd.

The invoices show that Mr. Holmes spent more than \$2,000 in addressing the fire marshal's concerns. (P. Ex. 3.) There is no evidence of the time spent making the repairs.

The court finds that the landlords' response to the fire marshal's report was immediate and satisfactory—in less than 60 days, all violations had been corrected. On the other hand, the defendants did not afford the landlords any opportunity to correct the written complaints before withholding rent. The defendants voided their May rent check three days after the inspections occurred on April 27th.

The Sharon health officer found three items which needed correction. (P. Ex. 5.) These were:

1. A broken window in the kitchen. A single pane of a double-pane window was broken. Mr. Holmes ordered a replacement window. Defendants had been orally complaining about the window to Mr. Holmes for some time before the inspection, and they are dissatisfied with the length of time it took Mr. Holmes to get the window replaced. Apparently the window broke in December 2008, and it was replaced in June 2009. Given that the window was one pane of a double-pane window, the problem was aesthetic in nature and did not present a health or safety concern. Dr. Indenbaum did not feel that the broken window was a code violation but he included it in his findings given the tenants' strong feelings on the issue.

FILED

OCT 8 2009

2. Inadequate bathroom flooring. Mr. Holmes responded by tearing up the vinyl flooring, filling in the rotten portions of the subfloor, laying a homosote substrate, laying new vinyl flooring, using cleaner to scrub the bathroom walls, and replacing the bathroom trim. Defendants are dissatisfied with the work and claim that mold remains in the bathroom.

3. Bats in the attic. Dr. Indenbaum found evidence of bats in the attic, including substantial bat guano. Dr. Indenbaum required the attic to be sealed off from the living space to prevent contact with bats. In response, Mr. Holmes secured the attic hatch so that entry into the attic could not be made. He also installed hardware cloth between the ridge cap and roof ridge. This prevented additional bats from getting into the attic, but did not let the existing bats out.

Thereafter, Mr. Holmes contacted Pest Elimination Services to inspect the premises and to deal with the bats in the attic. Pest Elimination Services installed one-way bat cones so that the bats could get out of the attic but not get back in. When Pest Elimination Services finished their work, the house was bat free.

Neither Dr. Indenbaum nor Pest Elimination Services recommended the removal of the bat guano in the attic. In fact, both felt that leaving the guano in place was proper under the circumstances. Dr. Indenbaum felt that if entry into the attic was necessary, it could be done safely by using a paper mask.

Dr. Indenbaum returned to the apartment on June 11, 2009, for a follow-up inspection. He found no violations at that time and expected professional bat control work to be completed within 30 days. It was. Defendants complained to Dr. Indenbaum that bats were getting into the living area through a crack in the ceiling, but Dr. Indenbaum could not find any area where the bats could gain entry. In any event, all bats were eliminated from the property by July 2009.

Defendants complained about mold issues to Dr. Indenbaum. He found little evidence of mold in his inspections, and he considered the mold he did find to be housekeeping issues rather than a shortcoming of the property. Regardless of cause, Dr. Indenbaum did not find any danger to tenant health based on the presence of mold on the property. He felt that the apartment was safe and habitable.

Defendants were very dissatisfied with Dr. Indenbaum's inspections. As a result, Dr. Indenbaum, who is a volunteer, told the Sharon Selectboard that he would no longer be involved with the defendants' complaints. The selectboard consequently appointed selectboard chair, Paul Haskell, as the deputy health officer.

Mr. Haskell conducted another inspection on the property on September 25, 2009, in response to the expressed dissatisfactions of the defendants. He prepared a written report on September 28, 2009, and a copy was delivered to the plaintiffs on the morning of the 29th. (D. Ex. W.)

There has been insufficient time for the plaintiffs to address any of the concerns raised in the September 28th report. To the extent that the letter contains recommendations different than those of Dr. Indenbaum, the fact remains that Mr. Holmes did the work that was required by Dr. Indenbaum's report. As of the time of the follow-up inspections by the

FILED

fire marshal and the town health officer, both felt that the necessary repairs had been completed or were underway such that no violations of any health or safety codes were found. The work that had yet to be completed (the professional pest control and the window replacement) were finished very shortly thereafter.

Defendants presented many photographs showing what they claim is mold, bat guano, rust, improper electrical work, and deteriorated conditions in and around the apartment. Unlike most cases, however, this apartment has been professionally inspected by a fire marshal (twice), a town health officer who is a physician (twice), a professional pest control company, and a Vermont licensed electrician.

Plaintiffs responded to the various inspections by undertaking a wide array of repairs and upgrades on the premises. Those actions were taken within a reasonable time after actual notice of the issues was received. There is no evidence on non-compliance by the plaintiffs with the inspection recommendations, and there is no evidence that any condition of the premises following the repairs materially affected the health and safety of the defendants. Mr. Bishop has had a number of health issues which are a concern to the defendants, but they are not caused by any condition of the apartment.

Defendants began withholding rent without affording the landlords a reasonable time after actual notice of the claimed defects to respond to them. Defendants are dissatisfied at a minimum with the repairs that have been made, with the inspections of Dr. Indenbaum, with the inspection by the electrician, and with the recommendations made by Pest Elimination Services. In short, defendants appear to be dissatisfied with anyone who does not agree with their views concerning the problems at the apartment or the work, if any, necessary to address the problems.

Conclusions of Law

The respective obligations of tenants and landlords concerning rent and habitability issues are set forth in detail in chapter 137 of Title 9 of the Vermont Statutes Annotated. The primary responsibility of the tenant is to pay rent without demand or notice at the time and place agreed upon by the parties in their rental agreement. 9 V.S.A. § 4455(a). Here, the tenants began withholding rent in May 2009, and have not paid any rent for the months of May 2009 or June 2009. The tenants have been paying rent into court since August.

The tenants argue that their withholding is justified by the condition of the apartment. The statutes provide that a tenant may withhold rent when (1) the landlord fails to comply with his obligations for habitability, (2) the tenant or a governmental agency hand-delivers or mails written notice of the habitability problems to the landlord, and (3) after receiving the actual notice, the landlord fails to make repairs within a reasonable time, and the noncompliance materially affects health and safety. 9 V.S.A. §§ 4451(1) & 4458(a). For the following reasons, the court concludes that rent withholding was not justified in this case.

The first reason is that the tenants began withholding rent without affording the landlord a reasonable opportunity to make repairs. The evidence shows that the landlord received actual notice of some of the problems in the apartment no earlier than April 25th, 2009, and that the landlord did not receive the reports from the health officer and the fire

FILED

marshal until at least April 27th.¹ The tenants began withholding rent on April 30th. Five days (at most) is not a reasonable time within which to make the repairs requested.

The second reason is that the landlord made efforts to address each and every complaint for which actual notice was provided, and the landlord began these efforts promptly after receiving the reports from the fire marshal and health officer. Moreover, although the tenants dispute the quality of the landlord's efforts, the evidence showed that the repairs were successful to the point that the fire marshal and health officer felt that there were no more habitability problems in the apartment by mid-June at the latest. In other words, all of the problems raised in the written notices were remedied within 60 days. Under the circumstances, the court concludes that the problems were repaired within a reasonable time.

For these reasons, the tenants were not entitled to withhold rent under § 4458(a), and they breached the lease agreement by failing to pay rent for the months of May and June. It follows that there was a reasonable and legitimate basis for the notice of termination of tenancy for non-payment of rent that was issued by the landlord on June 11, 2009. The notice followed the proper procedures prescribed by statute in that it provided more than fourteen days' actual notice to the tenant of the date on which the tenancy would terminate if rent was not brought current. 9 V.S.A. § 4467(a). Since the tenants did not pay rent, the lease terminated on the date stated in the notice, which was July 1st, 2009. It was therefore appropriate for the plaintiffs to file the complaint for eviction the following day, and the court concludes that the plaintiffs have proven by a preponderance of the evidence that they are entitled to a judgment for possession of the premises. 12 V.S.A. §§ 4851-4854.

The defendants have filed a counterclaim alleging that the eviction proceedings constitute retaliation for the complaints that they filed with the fire marshal and town health officer. See 9 V.S.A. § 4465(a) (prohibiting retaliatory evictions). In assessing this counterclaim, the court has in mind that the tenants bear the burden of proving the elements of retaliatory eviction, *Houle v. Quenneville*, 173 Vt. 80, 93 (2001), and that resolution of the claim requires an objective evaluation of all the facts and circumstances surrounding the interactions between the parties in order to determine whether the eviction was retaliatory. *Gokey v. Bessette*, 154 Vt. 560, 564-65 (1990).

Here, the court finds it to be significant that the landlord acted immediately to correct the problems raised by the reports of the health officer and the fire marshal. The follow-up inspections showed that the landlord's repairs had addressed all of the concerns noted in their reports. The general rule is that a landlord can rebut a claim of retaliatory intent by showing that he has brought the premises up to code, and that there is another lawful basis for eviction. *Quenneville*, 173 Vt. at 94. Here, the credible evidence showed that the landlord addressed all of the problems within a reasonable time, and that the eviction proceedings were initiated for the legitimate reason that the tenants were not paying rent. Since an

¹ The tenants claim that they had orally raised many of the concerns with the landlord prior to this date. However, for purposes of rent withholding, the statutes are very specific: "actual notice" means that the tenant must provide written notice of the alleged problems to the landlord. 9 V.S.A. § 4451(1). The requirement of written notice makes sense because it provides a clear record of the date on which the landlord was formally notified of the problem, and avoids factual disputes as to what was said to whom and when.

FILED

inference of retaliatory intent is not supported by the objective circumstances of the case, the court concludes that the tenants have not proven their counterclaim for retaliatory eviction.

Based upon the foregoing evidence, the court also concludes that the tenants have not proven their counterclaims for habitability violations and punitive damages. The evidence showed that the habitability problems for which the landlord had actual notice were corrected within a reasonable time, and the evidence does not support a finding of malice on the part of the landlord.

The total amount due for the entire period since the withholding began is \$3,500 for the months of May, June, July, August, and September 2009, plus the prorated amount of \$180.64 for October through the date of decision, for a total amount due of \$3,680.64. A total of \$2,852.42 has been paid into court, leaving a balance of unpaid rent of \$828.22.

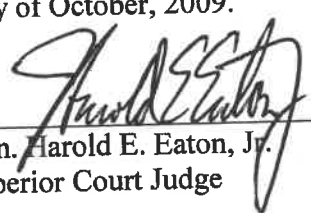
The landlords seek reasonable attorneys' fees based upon the lease agreement, which called for recovery of attorneys' fees by the landlord if legal action were necessary to collect rent. See 12 V.S.A. § 4854 (reasonable attorneys' fees may be awarded where authorized by written rental agreement). The court finds that legal action was necessary to collect rent in this case, and that the incurred fees of \$3,957 are reasonable in light of the amount of evidence presented and the complexity of the case.

The filing fee was \$250, and the file shows that the costs of serving the complaint were \$20. The court awards these amounts to the plaintiffs as costs pursuant to V.R.C.P. 54(a).

ORDER

Plaintiffs are entitled to a judgment for possession, distribution of the escrowed funds in the amount of \$2,852.42, and a money judgment in the principal amount of \$828.22 plus attorneys fees of \$3,957.00 and costs of \$270.00, for a total money judgment of \$5,055.22. A writ of possession shall issue today directing the sheriff to serve the writ upon the defendant and, no sooner than ten days after the writ is served, to put the plaintiff into possession. A separate final judgment order shall issue.

Dated at Woodstock, Vermont, this 8th day of October, 2009.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

OCT 8 2009