

VERMONT SUPERIOR COURT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 37-2-12 Oecv

Ann Swanson
Plaintiff

v.

Robyn Gilmartin
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter came on for hearing on April 30, 2012. Both parties were present, pro se. Based upon the evidence at the hearing, the Court makes the following findings, conclusions and order:

Findings of Fact

The Plaintiff rented residential property located at 185 Tucker Hill Road in Thetford to Defendant commencing on October 16, 2011. There was a written lease for the property (P. Ex. 1). The rental agreement was indefinite in term and provided Defendant would give Plaintiff 30 days notice if she should choose to vacate. The lease further provided if rent was more than 14 days late without further agreement, it would be considered non-payment of rent and Defendant would be given 30 days notice to vacate. The amount of the rent was \$950 per month, due on the first of each month. The Defendant was required to pay for heat.

Defendant paid a \$500 pet deposit and the balance of the rent for the month of October 2011. When November's rent became due, Defendant paid \$250 by check on November 14. Defendant claims she paid the remainder of the rent, \$700, in cash by leaving it in an envelope in the drawer of a desk in Plaintiff's office. Defendant admits no one saw her leave the money in the drawer and she did not get a receipt for the cash. Plaintiff claims she did not receive the \$700. The Court finds that the \$700 cash payment was never made, and that Defendant owed Plaintiff \$700 for unpaid rent for November.

In December, the Defendant paid \$450 by check to Plaintiff on the 16th. The Defendant made no further payment to Plaintiff for that month. However at the time the prior tenant had left the property, the gas lines providing heat had been disconnected. Defendant did not want to use the previous gas company for heat and therefore contacted another gas company to supply the heat. As a result, Defendant spent money having the gas lines reconnected and other associated charges in November, which were billed to her in December. The parties dispute how much of



VERMONT SUPERIOR COURT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 37-2-12 Oecv

Ann Swanson
Plaintiff

v.

Robyn Gilmartin
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter came on for hearing on April 30, 2012. Both parties were present, pro se. Based upon the evidence at the hearing, the Court makes the following findings, conclusions and order:

Findings of Fact

The Plaintiff rented residential property located at 185 Tucker Hill Road in Thetford to Defendant commencing on October 16, 2011. There was a written lease for the property (P. Ex. 1). The rental agreement was indefinite in term and provided Defendant would give Plaintiff 30 days notice if she should choose to vacate. The lease further provided if rent was more than 14 days late without further agreement, it would be considered non-payment of rent and Defendant would be given 30 days notice to vacate. The amount of the rent was \$950 per month, due on the first of each month. The Defendant was required to pay for heat.

Defendant paid a \$500 pet deposit and the balance of the rent for the month of October 2011. When November's rent became due, Defendant paid \$250 by check on November 14. Defendant claims she paid the remainder of the rent, \$700, in cash by leaving it in an envelope in the drawer of a desk in Plaintiff's office. Defendant admits no one saw her leave the money in the drawer and she did not get a receipt for the cash. Plaintiff claims she did not receive the \$700. The Court finds that the \$700 cash payment was never made, and that Defendant owed Plaintiff \$700 for unpaid rent for November.

In December, the Defendant paid \$450 by check to Plaintiff on the 16th. The Defendant made no further payment to Plaintiff for that month. However at the time the prior tenant had left the property, the gas lines providing heat had been disconnected. Defendant did not want to use the previous gas company for heat and therefore contacted another gas company to supply the heat. As a result, Defendant spent money having the gas lines reconnected and other associated charges in November, which were billed to her in December. The parties dispute how much of



these charges (P. Ex 5) are the responsibility of Plaintiff. There is no claim for breach of habitability.

The Court finds \$290.89 (\$162.75 plus \$128.14) to be charges incurred by Defendant that were part of Plaintiff's obligation to supply heat. For the month of December, therefore, Defendant paid \$740.89 (\$450 to Plaintiff and \$290.89 to the gas company) against her rent obligation of \$950. Defendant owed \$209.11 in unpaid rent for December. Defendant admits that even with the disputed amount paid to the gas company, December's rent was not fully paid.

In January and February, Plaintiff received no rent from Defendant. A rent escrow order was entered in March following hearing. Since that time, \$3374.16 has been deposited with the Court. No payments have been made to Plaintiff directly. For the five months since the first of the year, \$4750 in rent has accrued. Subtracting the \$3374.16 paid into the court leaves an unpaid balance of \$1375.84 for those months. Including the \$990.89 in unpaid rent for November and December, Defendant owes Plaintiff \$2366.73 in unpaid rent beyond the sums previously paid either to Plaintiff or to the court.

Based upon the unpaid rent from November and December, Plaintiff sent Defendant a notice to quit (P. Ex. 3) by certified mail on December 13, 2011, requiring Defendant to vacate the premises no later than January 15, 2012. Defendant became aware that there was a certified letter from Plaintiff in her mailbox and refused to claim it. She talked with Plaintiff on the phone about Plaintiff's concerns regarding past due rent and felt no need to claim the letter. Based upon Defendant's failure to claim the original notice to quit, Plaintiff had a second notice (P. Ex.4), undated, served on Defendant by the sheriff on January 16, 2012.

Defendant remains in possession of the premises as of this date.

Conclusions of Law

It is undisputed by Defendant that she has not paid all of the money she owes in rent pursuant to the lease agreement. The parties disputed the amounts due, which the court has resolved in its findings of fact.

At the time the original notice to quit was sent to Defendant by certified mail, there was rent due to Plaintiff. Since that time, Defendant has never been caught up on her rental obligation.

The requirement to provide notice of termination to the tenant that the landlord intends to terminate the lease for non-payment is to provide protection for the tenant against arbitrary and immediate terminations, and to afford the tenant the opportunity to cure any deficiency. The notice statute, 9 V.S.A. § 4467, requires that "actual notice" as defined in 9 V.S.A. § 4451 be provided to the tenant in order to terminate a lease for non-payment of rent. Actual notice is "receipt of written notice hand-delivered or mailed to the last known address. A rebuttable presumption that the notice was received three days after mailing is created if the sending party proves that the notice was sent by first class or certified United States mail."

In this case, the evidence is undisputed that Defendant knew of the certified letter from the Plaintiff in her mailbox. She also knew Plaintiff was claiming that she was behind in her rent. The purpose of notice as required in the statute is not to set up a mechanism whereby a tenant can avoid notice by knowingly refusing to claim a letter, thereby complicating the landlord's efforts to provide sufficient notice, as was done here. In other words, the notice provision is not a sword to be used by a tenant acting in bad faith by refusing certified mail. Where, as here, the Defendant knew of the existence of the letter in her mailbox, knew of the existence of the claim of past due rent, and deliberately refused to claim the letter, she is "deemed to have knowledge of its content." See 58 Am. Jur. 2d Notice § 31 (citing cases for black-letter rules that "[a] party may not escape the effect of the giving of a written notice by refusing to receive it when it is presented in person," and that "[c]onstructive receipt and notice are chargeable to one who willfully avoids actual notice by refusing to accept a notice"): Plaintiff's notice of termination of December 13, 2011 was sufficient notice as required by statute and under the lease.


The court does not reach the question of whether the subsequent notice would have been sufficient in the absence of the December 13th mailing, although it appears to be deficient. The notice to quit is required to provide a specific date of termination per 9 V.S.A. § 4467(f). Here the subsequent mailing, which itself was undated, did not provide a specific termination date.


Plaintiff commenced her action on February 13, 2012, well within the 60 days of the termination date set forth in the notice to quit as required by 9 V.S.A. § 4467(k).


Plaintiff is, therefore, entitled to judgment against Defendant for \$2366.73 in addition to release of the sums being held by the Court. Further, Plaintiff has incurred a filing fee of \$262.50 and service costs of \$69.83 and is entitled to partial judgment under Rule 54(b) for those sums together with possession as per 12 V.S.A. § 4854. As the existence of any property damage is not now known, Plaintiff may bring any claim for additional damages by appropriate filing with the Court within 30 days. If no further claim is asserted within that time, the court will enter final judgment.

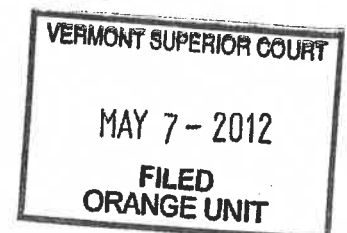
Plaintiff is required to account for the pet deposit as per 9 V.S.A. § 4461(c).

Dated at Chelsea this 3 day of May, 2012.


Harold E. Eaton, Jr.
Civil Division Judge


Joyce E. McKeeman
Assistant Judge


Victoria N. Weiss
Assistant Judge



VERMONT SUPERIOR COURT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 37-2-12 Oecv

Ann Swanson
Plaintiff

v.

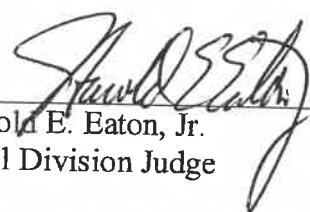
Robyn Gilmartin
Defendant

Partial Final Judgment Order

Based on the findings of fact and conclusions of law entered on even date, plaintiff Ann Swanson is entitled to a judgment for possession of 185 Tucker Hill Road in Thetford, Vermont. Plaintiff is further entitled to a judgment for rents due in the amount of \$2,366.73 in addition to release of the sums being held by the Court, and costs in the amount of \$332.33, for a total partial judgment of \$2,699.06.

A writ of possession shall issue directing the sheriff of the county in which the property or a portion thereof is located to serve the writ upon the defendants and, no sooner than ten days after the writ is served, to put the plaintiff into possession.

Dated at Chelsea this 3 day of May, 2012.


Harold E. Eaton, Jr.
Civil Division Judge

