

STATE OF VERMONT  
ORANGE COUNTY, SS

Bernard Asonevich

Orange Superior Court

v.

R. Dee Moller

Docket No. S-74-93 OeC

Decision and Order-  
Defendant's Motions

This is a landlord-tenant action. Plaintiff is the owner of certain premises located on Randolph Avenue in Randolph, Vermont. Plaintiff and defendant entered into an arrangement whereby defendant would lease an apartment on the premises from plaintiff, but plaintiff would retain certain specific rights to use the premises in a limited manner under certain narrow conditions. A written lease document was created, but later destroyed. The parties fell into disagreement as to the scope and terms of the plaintiff's rights to use the premises, and the landlord-tenant relationship appears to have degenerated markedly and rapidly from there.

Plaintiff served defendant with a notice of eviction on March 30, 1993; this notice did not specify any ground for the eviction, other than generally alleging "... failure to comply with a material term of your rental agreement...." Plaintiff filed the complaint in this action on May 6, 1993, seeking an immediate writ of possession. Defendant sought dismissal, on the grounds that plaintiff had failed to properly specify in the notice the grounds for the eviction. Judge Cook ruled that the matter would be treated as a "no cause" eviction, with the time frames for such an eviction to apply.

On June 16, 1993, defendant filed an answer to plaintiff's complaint, asserted the affirmative defense of retaliatory eviction, and also filed a counterclaim, asserting the following causes of action: breach of lease

agreement, unlawful entry into premises, retaliatory conduct, intentional infliction of emotional distress, and breach of the covenant of quiet enjoyment. Defendant also demanded trial by jury.

On August 5, 1993, Plaintiff filed several motions with the court. The first of these was a motion for partial summary judgment on his request for an immediate writ of possession. In support of this request, he asserted that a period over and above the statutorily required amount for "no cause" evictions had passed since he had provided notice of eviction to defendant.

Plaintiff also sought dismissal for failure to state a claim, or, alternatively, judgment on the pleadings, as to defendant's counterclaims. Plaintiff asserted that defendant's counterclaims as to breach of the lease and unlawful entry have been mooted by the passage of the statutorily required notice period for a "no cause" eviction. Plaintiff appeared to assert a lack of factual basis for defendant's retaliatory eviction claim. Plaintiff also claimed that defendant's counterclaims as to intentional infliction of emotional distress and breach of covenant of quiet enjoyment were not among the remedies encompassed within Vermont's landlord-tenant statutes. Finally, plaintiff sought to strike defendant's demand for a jury trial, asserting that the landlord-tenant statutes do not encompass a right to a jury trial, and that permitting trial by jury in such cases would allow dilatory tactical delays.

Defendant opposes all of plaintiff's above-listed motions.

#### Conclusions of Law

##### Plaintiff's Motion for Summary Judgment in Regard to The Writ of Possession:

Plaintiff claims that, as a matter of law, the passage of the statutorily required notice period entitles him to a writ of possession to the apartment premises. Defendant opposes this motion, asserting that the running of the

notice period does no more than govern the date at which an action can go forward, and arguing that the running of the notice period can in no way defeat substantive counterclaims which arise from facts pre-dating the notice. Defendant argues that her raising of retaliatory eviction as both an affirmative defense and as a counterclaim precludes summary judgment on plaintiff's request for a writ of possession.

9 V.S.A. §4467(c) provides that a landlord must give a minimum of 60 days notice prior to no-cause termination of a monthly tenancy. 9 V.S.A. §4468 provides that a landlord may bring an action for possession of the premises if a tenant remains in possession after proper termination of the tenancy. 9 V.S.A. §4465(b) provides that retaliatory eviction is a defense to an action for possession.

Defendant has squarely raised retaliatory eviction as both an affirmative defense and a counterclaim. Defendant has filed an affidavit detailing the facts which she believes document her claim that plaintiff is acting in a retaliatory manner. As just noted, retaliatory eviction, if proven, is a good defense to an action for possession. 9 V.S.A. §4465.<sup>1</sup> The record in this matter contains an affidavit/ statement by plaintiff explaining why he does not believe that his actions can be characterized as being retaliatory in nature. However, plaintiff's motion for summary judgment and a writ of possession does

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<sup>1</sup>. Plaintiff claims that it would be unjust and contrary to the purpose of the landlord-tenant law for defendant's affirmative defense or her counterclaims to defeat or delay his action for possession. Though 9 V.S.A. §4465 is not intended to defeat legitimate claims for unpaid rent (which are not an issue in the present case), see Gokey v. Bessette, 154 Vt. 560, 565 (1990), it does specifically provide that retaliation is a defense to an action for possession: "If the landlord acts in violation of this section [which prohibits retaliatory conduct], the tenant... has a defense in any action for possession." In light of this explicit statutory language, these arguments by plaintiff are without basis and must fail.

not refer to or incorporate any facts from that earlier affidavit.

Retaliation is a factual question, to be determined by an objective standard from the events surrounding the termination of the tenancy. Gokey, supra, 154 Vt. at 564 ("In determining what is and is not retaliatory, the events must speak for themselves.") A history of disagreement and conflict can sometimes lend support to contentions of retaliatory conduct. Gokey, at 565.

In moving for summary judgment on his request for a writ of possession, plaintiff has referred to no specific facts or law which would entitle him to such relief. The burden is on the moving party to demonstrate indisputable entitlement to relief: "Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Murray v. White, 155 Vt. 621, 628 (1991). "A motion for summary judgment under V.R.C.P. 56 is not a trial of the underlying merits of the case on the basis of written affidavits." Martin v. Eaton, 140 Vt. 134, 136 (1981). "The party against whom summary judgment is sought is entitled to the benefit of all reasonable doubts and inferences in determining whether or not a genuine issue of material fact exists.... The facts bearing on the issue must be clear, undisputed, or unrefuted." Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 49 (1990).

As the plaintiff has not borne the burden of showing an absence of disputed material facts, and that he is entitled, as a matter of law, to a writ of possession, summary judgment must remain unavailable at this time. The motion for summary judgment on the writ of possession is therefore DENIED.

The Motions to Dismiss:

Plaintiff has also brought a motion to dismiss plaintiff's counterclaims. He asserts that the running of the notice period required for no-cause

evictions has the effect of mooting defendant's claims for breach of the lease and for unlawful entry. Plaintiff also alleges that defendant will not be able to demonstrate that plaintiff, in seeking eviction, is acting out of a desire to retaliate. Finally, plaintiff argues that the landlord-tenant statutes do not recognize actions based on intentional infliction of emotional distress or breach of covenant of quiet enjoyment, and claims that these parts of defendant's counterclaim therefore fail to state a claim upon which relief may be granted. Plaintiff also invokes V.R.C.P. 12(c), which governs motions for judgment on the pleadings.

This court begins its analysis by reviewing the standards applicable to motions to dismiss. A motion to dismiss for failure to state a claim should not be granted unless the moving party demonstrates that, beyond doubt, there are no circumstances which the claimant could prove which would entitle her to relief. In re A.G., 151 Vt. 167, 169 (1989). Plaintiff also cites V.R.C.P. 12(c) (motion for judgment on the pleadings). On a motion for judgment on the pleadings, "the issue is whether the movant is entitled to judgment as a matter of law on the basis of the pleadings. 'For the purposes of the motion, all well pleaded factual allegations in the nonmovant's pleadings and all reasonable inferences that can be drawn therefrom are assumed as true and all contravening assertions in the movant's pleadings are taken to be false.'" Thayer v. Herdt, 155 Vt. 448, 456 (1990). Under either standard, then, it is clear that the court, for purposes of analysis of plaintiff's motion, must assume that defendant will be able to prove all of the factual assertions contained in the counterclaim.

Plaintiff claims that the running of the statutory notice period for no cause evictions defeats those portions of defendant's counterclaim that allege

breach of lease and unlawful entry. Plaintiff cites no authority for this proposition. There is no authority to support this position. 9 V.S.A. §4467(c)(1), which requires 60 days notice for no cause evictions merely provides that tenants are entitled to that amount of notice before the eviction becomes effective. Neither the language of the statute, nor any implication from it, nor, for that matter, any case law interpreting the statute, in any way suggests that the running of the notice period defeats causes of action arising from alleged facts which pre-date the notice period. Plaintiff's claims in this regard are wholly devoid of merit; this portion of the motion to dismiss is therefore DENIED.

Plaintiff next claims, in essence, that defendant will be unable to substantiate her counterclaim for retaliatory eviction. As noted above, in ruling on a motion to dismiss, the court must accept as true all of the factual allegations set forth in the pleadings of the nonmoving party. A motion to dismiss for failure state a claim "test[s] the law of a claim, not the facts which support it." Levinsky v. Diamond, 140 Vt. 595, 600 (1982). Defendant has alleged that plaintiff's actions are retaliatory in nature. The court must accept, for purposes of the present motion, that defendant will be able to prove those allegations. Accordingly, defendant has indeed stated a claim on which relief theoretically could be granted. This portion of plaintiff's motion to dismiss is therefore also DENIED.

Plaintiff next asserts that defendant's counterclaims for intentional infliction of emotional distress and breach of the covenant of quiet enjoyment are not encompassed within Vermont's landlord-tenant statutes, and are therefore not viable causes of action. This argument is specious. The Residential Rental Agreements Act supplements but does not supplant the common

law rights and duties existing between landlords and tenants. See, e.g. Nepveau v. Rau, 155 Vt. 373, 375, (1990); Gokey v. Bessette, 154 Vt. 560, 563 (1990) (each recognizing that rights under the act overlap with common law rights). The Residential Rental Agreements Act is remedial in nature. See Bisson v. Ward, No. 92-426, slip op. at 5-7 (Vt. Jun. 11, 1993). Remedial statutes are to be given a liberal interpretation which furthers their purposes. Muzzy v. Chevrolet, 153 Vt. 179, 187 (1989). "Because the Residential Rental Agreements Act does not govern all aspects of the landlord-tenant relationship, it does not preclude other claims between tenants and landlords." Bisson, supra, slip op. at 9. For the foregoing reasons, those portions of defendant's motion which seek dismissal of defendant's counterclaims for intentional infliction of emotional distress and breach of covenant of quiet enjoyment are also DENIED.

Finally, plaintiff seeks to have this court strike defendant's demand for trial by jury. Plaintiff asserts that the Residential Rental Agreements Act does not provide for trial by jury, that defendant's demand for jury trial is merely a stalling tactic, and that defendant has no right to trial by jury. As just noted, the Residential Rental Agreements Act is a statute with a remedial purpose. The statute does not state that it does away with a right to trial by jury. Defendant demanded trial by jury in a timely manner when she filed her answer and counterclaim. Plaintiff cites no authority for the proposition that defendant is not entitled to a trial by jury on her counterclaims. Accordingly, plaintiff's motion to strike plaintiff's demand for jury trial is DENIED

#### Order

Plaintiff's motion for summary judgment and for a writ of attachment is

hereby DENIED.

Plaintiff's motion to dismiss defendant's counterclaims is also hereby DENIED.

Plaintiff's motion to strike defendant's demand for trial by jury is also DENIED. Defendant's timely demand for trial by jury trial stands.

Dated this 24th day of September, 1993, at Chelsea, Vermont.

Mary Miles Teachout  
Mary Miles Teachout  
Presiding Judge