VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 58-1-12 Wrcv

Glenn Boule
Plaintiff

v.

Rick Salzinger
Betty Salzinger
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A final hearing was held on this matter on November 21, 2012. Plaintiff had notice of the hearing but did not attend. Defendants were present, represented by their attorney, Mark Nemeth, Esq. Based upon the evidence at hearing, the Court makes the following findings, conclusions, and order:

Findings of Fact

Plaintiff filed suit seeking to collect unpaid rents he claims he is owed arising out of lease arrangement with Defendants for a duplex apartment at 1246 Skitchewaug Trail in Springfield, Vt. The lease agreement dated October 8, 2011(D. Ex. A) was not signed by Glenn Boule or anyone on behalf of the Plaintiff. It was signed by Defendants and was typed on JB & Co. Builders letterhead. JB & Co. is a building company operated by the Plaintiff, Glenn Boule, and his wife, Jennifer Boule. The lease purported to be for a six month term with rent of $1000 per month, including lights and heat "as long as not abused".

Defendants had learned of the rental through an ad placed by Plaintiff on Craig's List. They were homeless at the time they saw the rental advertisement and were anxious to find a home. The advertisement gave no indication the home was not ready to be leased.

In connection with the lease, Defendants paid a security deposit of $1000, a $500 payment at the time they signed the lease and two payments of $250 each made in the two weeks after the lease was signed. Defendants made their monthly rental payment for November and December 2011. Defendants received receipts for the monies they paid to Plaintiff (D. Ex. B & C).

Whatever deficiencies in clarity that existed in the written lease, and they are several, the agreement between the parties was a 6 month rental for $1000 each month with lights and heat provided. The term "as long as not abused", although vague, is not at issue as there is no

that Defendants abused the heat or lights, Mr. Boule's later written contentions notwithstanding. That Plaintiff did not sign the lease is of no consequence here as he ratified its terms by his subsequent conduct, including reference to it on several subsequent occasions.

Defendants moved into the apartment on October 8, 2011. At the time they moved in the exterior of the apartment was unfinished, with Tyvek house wrap blowing loosely in places and bare wood in other places. The apartment was without heat. After several days, Plaintiff was able to get the heat problem remedied temporarily.

Upon moving in, Defendants told Plaintiff they had no electrical power in two of the rooms in the apartment. Several of the electrical outlets had no covers. Smoke detectors were missing. For a time the apartment was without hot water. Plaintiff did not correct the various electrical problems, despite being informed of them.

The conditions of the apartment regarding its lack proper weather barrier, lack of smoke detectors, incomplete electrical service, and inconsistent heat, were conditions open and obvious to Plaintiff, within his knowledge as a building contractor, and existed at the time he chose to rent the apartment. He knew these problem existed.

In December, the Defendants noticed significant mold growing in the children's bedroom. Defendants told Plaintiff about the mold problem as soon as they noticed it. Throughout the remainder of Defendants' occupancy the mold issue was never resolved.

In December, Plaintiff became concerned about the amount of the electric bill. Despite the lease agreement which provided that Plaintiff was responsible for the electric bill "as long as not abused", Plaintiff informed Defendants they would be responsible for the January electric bill (D. Ex. E).

On January 3, 2012, Betty Salzinger received a visit from the Department for Children and Families (DCF) at which time they expressed concern about the safety of Defendants' children given Plaintiff's "criminal history". DCF required Ms. Salzinger to execute a safety plan (D. Ex. X) concerning the potential risk to her children posed by Mr. Boule. The plan required that she not allow her children to have contact with Mr. Boule unless supervised. Defendants had not been told of any past criminal problems of Mr. Boule at any time before being visited by DCF.

On January 7, 2012, Ms. Salzinger informed Plaintiff in writing about the DCF visit and her complaints about the condition of the apartment and suggesting they would call an attorney or the police in the event of an illegal eviction (D. Ex. U). No prior written notice had been sent by or on behalf of Defendants to Plaintiff about the condition of the apartment. Plaintiff responded by saying defendants had moved into the apartment before it was ready, an assertion he had not made prior to that time.

The next day, January 8, 2012, Plaintiff gave the Defendants what he claimed was a notice to quit for non-payment of rent (D. Ex. F). In the notice he claimed Defendants owed $2600 in rent and security deposit and stated Defendants had not paid the security deposit,

despite giving them receipts for it (D. Ex. B). At a rent escrow hearing in February 2012 this notice was deemed insufficient due to its lack of clarity. Plaintiff attempted to provide a new notice at the rent escrow hearing (D. Ex. G) which suffers from the same deficiencies as the first notice.

The parties also had disputes about the inclusion of internet and cable in the lease agreement, problems with Mr. & Ms. Boule withholding Defendant's mail and temporarily blocking the driveway access to the apartment. The written agreement does not indicate that internet and cable are included in the lease, as Defendants claimed. Mr. & Ms. Boule refused to plow the driveway, claiming that driveway plowing was likewise not part of the lease. During January, February and March Defendants withheld payment of rent.

Immediately following receipt of the first notice to quit, Betty Salzinger called the Springfield Health Officer, Russell Thompson. He conducted a site visit on January 13, 2012. He found many problems with the apartment, including no electrical service to one bedroom, missing smoke detectors, no working outlets in a second bedroom, major water and mold issues in one bedroom, and surface mold in other locations throughout the apartment. Thompson offered to provide the Boules with smoke detectors at no charge however Plaintiff's wife assured him they would install smoke detectors immediately themselves. They did not. The absence of smoke detectors was a violation of the housing code.

The relations between the parties had deteriorated by this time to one of open hostility. In two follow-up visits Thompson did not see any significant progress in correcting the many issues plaguing the apartment. The minimal efforts made by Plaintiff to address the mold issues were ineffectual.

In March 2012, Defendants elected to move out of the apartment. On March 22, 2012, as they were attempting to move out, Mr. & Ms. Boule blocked the driveway, in an effort to prevent Defendants from moving out and to prevent a contractor, Michael Welch, and an environmental consultant, Mike Berry, from gaining access. Welch and Berry had been asked to inspect the apartment by Ms. Salzinger to document its condition at the time they vacated. After some tense moments, access via the driveway was restored. Mr. Boule then claimed the furniture in the apartment, which had been brought in by Defendants, was actually his. After some minimal delay, Defendants were able to vacate the apartment and take their furniture with them.

Welch saw significant mold problems in the house due to moisture penetration. These mold problems were significant and required immediate and extensive corrective measures. The outside of the house remained unfinished, with loose Tyvek blowing in the wind and allowing for moisture penetration in to the apartment. There were missing electrical outlet covers and smoke detectors throughout the apartment. There did not appear to have been any damaged caused to the apartment by Defendants' tenancy.

Some time after the Defendants vacated the premises it burned to the ground. The cause of the fire has not been determined at present.

Welch charged Defendants $200 for his home inspection and $150 to appear at trial D. Ex. N & O). The environmental consultant charged Defendants $500 for his inspection.

Plaintiff filed suit for eviction on January 30, 2012. Defendants asserted a counterclaim in which they allege unlawful eviction, breach of contract, breach of the covenant of good faith and fair dealing, retaliatory conduct, and consumer fraud.

Conclusions of Law

Plaintiff was not present to prosecute his claim for eviction. Had he been, the notice to quit was insufficient and confusing. 9 V.S.A. §4467 requires 14 day notice of the termination of tenancy for non-payment of rent. That statute further requires a specific termination date to be stated in the notice. Plaintiff's second attempt at notice dated February 17, 2012, stated that if rent was not fully paid within 14 days Plaintiff would "be forced to file in court." The notice also contained other complaints including too many things being broken in the apartment and alleged slander, too many cars "all hours of the night" and suspected drug & or alcohol use. Nonetheless, only an attempt at 14 days notice was given, although other breaches of the lease agreement require more notice.

The second notice is fatally defective because at the time it was given the ejectment action had already been filed in court. Thus the notice provided an illusory 14 days. Whether a specific date to leave is mandated under the statute or whether information sufficient to determine the exact date is sufficient is an open question. However, in this case, because the action was already commenced the operative time for the 14 day notice could not be calculated. The notice was insufficient and therefore even had plaintiff appeared, his claim must fail.

Counterclaims:

Illegal eviction:

Defendants have alleged illegal eviction under 9 V.S.A. § 4463. Because the notice provided by Plaintiff was insufficient, the eviction action was not proper. This alone, however, is not sufficient to establish a claim for illegal eviction. While proper judicial process is required in order to deny a tenant access to their property or the rented premises, the evidence here is not sufficient to establish that Plaintiff denied the Defendants access to their property on anything more than a temporary basis. Something other than a transient interruption is necessary in order to establish an illegal eviction on this basis.

Illegal eviction can also be shown if a tenant shows that a landlord willfully interrupted a utility service. Had the court been satisfied that cable and internet were part of the lease agreement, such a claim might have been established here. However, the lease agreement, such as it was, had been reduced to writing and did not include internet and cable as part of the agreement. As such the defendant can not now claim there existed a contemporaneous oral agreement to include those items when the written agreement does not reflect that. *Housing Vermont v. Goldsmith & Morris*, 165 Vt. 428 (1996). Defendants claim the written lease,

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although signed only by them reflects their obligations under the lease. They can not pick and choose the terms of the lease as they see fit. *Boville v. Dalton Paper Mills*, 86 Vt. 305 (1912).

Defendants are not entitled to recovery for illegal eviction in Counts I and II.

Breach of Contract:

Defendants allege a breach of contract in broad-brush terms by alleging that Plaintiff did not fulfill his obligations under the lease agreement. The evidence here shows that Plaintiff rented a premises which was not weather tight, was plagued by mold issues, lacked smoke detectors, and which did not have adequate electrical service and inconsistent heat.

Vermont law requires that every residential lease agreement includes a covenant by the landlord that premises leased are safe, clean, and fit for human habitation. Plaintiff breached that implied obligation in this instance. The premises was not weather tight, allowed for excessive moisture resulting in unsafe mold conditions in children's bedrooms. The electrical service was lacking completely in one bedroom and lacked working outlets in another. Heat was available on an inconsistent basis.

When a landlord breaches his habitability obligations 9 V.S.A. § 4458 provides available remedies. Triggering those remedies is receipt of actual notice of non-compliance by the landlord. Actual notice means written notice. 9 V.S.A. § 4451(1). In this instance, Plaintiff received actual notice on January 7, 2012. Defendants' damages for breach of the warranty of habitability run from that date forward. In this instance they would include return of the damage deposit, attorney's fees and costs. 9 V.S.A. § 4458 (3). Because of the Court's award of damages on the consumer fraud claim as discussed below encompass the damages the court would award under this claim, the court declines to award the same damages twice.

Defendants are entitled to a remedy for breach of contract, however the damages recoverable under such claim would duplicate those awarded for consumer fraud as discussed below and therefore are not separately awarded here.

Good Faith and Fair Dealing:

Defendants claim that plaintiff breach the covenant of good faith and fair dealing implied in all contracts. *Carmichael v. Adirondack Gas Co.*, 161 Vt. 200 (1993). What is required for good faith varies depending upon the context in which is it an implied obligation. *LoPresti v. Rutland Regional Health Services, Inc.*, 2004 VT 105, 177 Vt. 316. The basis for this claim is Plaintiff's failure to disclose his past criminal history.

"The definition of the "covenant of good faith and fair dealing" is broad. An underlying principle implied in every contract is that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement. *Shaw v. E.I. DuPont de Nemours & Co.*, 126 Vt. 206, 209 (1966). The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of

Contracts § 205 comment a (1981)." *Carmichael v. Adirondack Gas Co.* 161 Vt. 200, 208 (1993).

Defendants have established that DCF required them to execute a safety plan concerning their children. Defendants have not established that DCF's requirement was reasonable under the circumstances or that its requirement undermined the benefit of Defendants' bargain with respect to the rental of the apartment. The proof here is insufficient to show that Plaintiff's failure to disclose his past criminal history, especially when that history has not been entered into evidence, was a beach of the covenant of good faith and fair dealing.

Defendants are not entitled to remedy for breach of the covenant of good faith and fair dealing.

Retaliatory Eviction:

A landlord is prohibited from retaliating against a tenant who has raised concerns to the landlord about habitability violations or who has complained to a government agency about violations of regulations which materially affect health and safety. 9 V.S.A. § 4465. The burden of establishing retaliatory conduct rests with the tenant. *Houle v. Quenneville*, 173 Vt. 180 (2001).

Here, Plaintiff sought termination of the rental agreement by a notice of termination one day after receiving actual notice of Defendants' complaints about the condition of the apartment and their raising the issue of attorney or police involvement in the event Plaintiff sought to evict them. The retaliatory conduct statute does not prohibit landlords from bring an action for termination based upon non-payment in good faith. *Gokey v. Bessette*, 154 Vt. 560 (1990).

The notice provided by Plaintiff, while purportedly for non-payment of rent, actually contains a jumble of other reasons why he was seeking eviction, including too many things being broken in the apartment, slanderous email, too many cars at all hours of the night, suspected drug and/or alcohol use, and failure to pay the security deposit. At the time the notice was given Defendants were only eight days late on their rent and had notified Plaintiff of their intent to withhold rent until conditions were rectified in the apartment. All of the other reasons stated by Plaintiff would have required additional notice than what was provided by Plaintiff.

The timing and content of Plaintiff's notice make it clear that the non-payment basis for the notice was not in good faith. The real reason Plaintiff sought to evict Defendants was their raising of the issues brought to their attention by DCF and their complaints about the condition of the apartment. Government officials were not contacted by Defendants until after they had received the notice of termination and therefore the presumption of retaliation contained in 9 V.S.A. § 4465 (c) does not apply here. Even without the presumption, Defendants have established that Plaintiff's notice of termination was not made in good faith for non-payment, but was in retaliation over the content of Ms. Salzinger's email of the previous day.

Retaliatory conduct on the part of a landlord entitles a tenant to damages, reasonable attorney's fees and a defense to a claim for possession. 9 V.S.A. § 4465(b). Defendants are

entitled to a remedy for Plaintiff's retaliatory conduct. Because Defendants have already voluntarily vacated the premises possession is not in issue. The damages recoverable under such claim would duplicate those awarded for consumer fraud, as discussed below, and therefore are not separately awarded here.

Consumer Fraud Act:

Plaintiff rented the premises to Defendants knowing the absence of exterior siding and the damaged condition of the Tyvek. Further, the landlord had reason to know that the electrical service was incomplete and that two rooms had no, or limited electrical service, and that smoke detectors were missing.

Plaintiff, in addition to being a landlord, is a building contractor. He advertised this apartment for rent on the internet, holding it out as a rentable premises, while knowing that it had serious deficiencies. The Consumer Fraud Act applies to landlord-tenant contracts. *Kwon v. Eaton*, 2010 VT 73, 188 Vt. 623. Plaintiff engaged in unfair and deceptive practices by holding out a unit for rental which he knew was unsuitable in violation of 9 V.S.A. § 2453(a). Defendants are thus entitled to the remedies specified in 9 V.S.A. § 2461(b).

Under that section, Defendants are entitled to either damages or the consideration given by them to the landlord. The Defendants paid the Plaintiff a $1000 security deposit and $3000 in rent for a premises which was unsuitable for rental from the outset. Given the condition of the apartment, the Court declines to credit Plaintiff for any value of providing Defendants with a place to live during the months of their occupancy. The apartment was unsuitable for rental from the outset and the risks of occupancy far exceeded any value conferred. Thus, Defendants are awarded $4,000.00 on the Consumer Fraud Act claim.

Defendants have requested an award of the fees they spent on inspections by Mr. Welch and Mr. Berry and Welch's charges for testifying at trial. The inspections were done after suit was filed and on the day Defendants were moving out. They were done in preparation for litigation, not as a cost of curing defects. Accordingly, the Court will not include those sums in Defendants' damages.

The Consumer Fraud Act also allows for the potential recovery of exemplary damages up to three times the value of the payments made by Tenant. 9 V.S.A. § 2461(b). In order to be entitled to recover exemplary damages, Tenant is required to show "malice, ill will, or wanton conduct" on the part of landlord. *L'Esperance v. Benware*, 2003 VT 43, ¶ 17, 175 Vt. 292. The Vermont Supreme has recently clarified that malice requires more than an indifference to a party's rights and that even a "willful violation of the law" will not necessarily suffice. *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33, ¶ 28, 187 Vt. 541. Rather, the actions in question must be "outrageously reprehensible." *Id.* at ¶ 27.

Here, Defendants cannot satisfy this heavy burden. Although the evidence shows that Plaintiff engaged in a "willful violation of the law" by renting the apartment to Defendants, it does not support a finding of malice as a matter of law. Instead, Plaintiff's behavior in

renting the apartment to Defendants despite his awareness of the defective conditions is best characterized as "indifference" to the Defendants' rights. As the Vermont Supreme Court has stated, indifference without some sort of more egregious behavior is not sufficient to support a finding of malice and therefore an award of exemplary damages. This case lacks the more egregious behavior to allow for a finding of malice. See, e.g., *Villaneuve v. Beane,* 2007 VT 75, 182 Vt. 575.

A recovery under the Consumer Fraud Act entitles the consumer to an award of reasonable attorney's fees. 9 V.S.A. § 2461(b). Defendants' counsel shall make a motion for his fees, should he wish to do so, accompanied by an affidavit of fees, within 10 days from this order.

ORDER

For the foregoing reasons:

(1) On plaintiff Glenn Boule's complaint, judgment is entered for defendants Rick Salzinger and Betty Salzinger.

(2) On defendants Rick Salzinger and Betty Salzinger's counterclaims for illegal eviction and breach of the covenant of good faith and fair dealing, judgment is entered for plaintiff Glenn Boule.

(3) On defendants Rick Salzinger and Betty Salzinger's counterclaims for breach of contract, retaliatory eviction, and consumer fraud, judgment is entered for defendants Rick Salzinger and Betty Salzinger, and damages are awarded in the amount of $4,000 plus court costs.

(4) Defense counsel may file a motion for award of attorney fees, accompanied by an affidavit of fees, within 10 days from this order. Plaintiff has five days after any motion seeking attorneys fees is filed to object to the reasonableness of the amount of claimed fees. A final judgment order shall issue thereafter.

Dated at Woodstock this 29th day of November, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

Jack W. Anderson
Assistant Judge

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