VERMONT SUPERIOR COURT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 285-12-11

Jillene Syphus
Plaintiff

v.

Brooke Kinney, Cherie Kinney
and Pam Kinney
Defendant

Judgment

Judgment is entered for Plaintiff against the Defendants in the amount of $2480.43.

Plaintiff is also awarded taxable costs as follows: Filing fee of $262.50, witness fees of $90, and service fees of $176.34.

Dated at Chelsea this 16th day of July, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

Joyce E. McKeeman
Assistant Judge

Victoria N. Weiss
Assistant Judge

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JUL 16 2012
FILED
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter came on for final hearing on July 9, 2012. All parties were present, pro se. Based upon the evidence at the hearing, the Court issues the following findings, conclusions and order:

Findings of Fact

This is a landlord-tenant dispute arising out of the lease by Defendants of Plaintiff's house located at 3 Amasa Bond Rd. in Thetford Center, Vt. There was a written lease (P. Ex. 1) for a term beginning on October 15, 2011 and ending on July 1, 2012. The lease called for monthly payments of $1075 due on the first of each month. Also due was a security deposit of $1075, payable in five installment payments, due "mid-month" for five consecutive months starting in October 2011. Plaintiff agreed to installment payments because Defendants did not have the full security deposit at the inception of the lease. Plaintiff's usual practice would have been to collect the full security deposit up front but she agreed to spread it out over five installments as an accommodation to Defendants (D. Ex. C).

Defendants had contacted Plaintiff about renting property with some urgency as their relationship with their prior landlord was not going well. The Plaintiff was having some work done on the house after her prior tenant had left it in an unsatisfactory condition. This work included some repair work in the first floor bathroom and a kitchen sink to repair water leakage. The home could not be ready for occupancy on October 15 due to the work being done. The work was completed and the Defendants took occupancy on October 19, 2011.

Very shortly after occupancy, the Defendants complained of continued leakage from the first floor bathroom into the basement. Plaintiff took immediate action to address this concern and had her plumber do additional work on the kitchen sink and claimed bathroom leaks in late October and on November 2, 2011. Plaintiff believed the problems had been fully addressed at that point and was assured of as much from her plumber.

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On November 20, 2011 an angry telephone exchange occurred between the Plaintiff and Cherie Kinney. Ms. Kinney was complaining that there was still leakage into the basement from the downstairs bath. During that conversation Ms. Kinney indicated that she would not be paying the balance of the security deposit. No further payments on the security deposit had been made beyond the initial payment of $200 in October 2011 and no more have been made to the date of this hearing.

Immediately following that conversation, Plaintiff prepared a notice of eviction based upon the failure to pay the balance of the security deposit as required under the lease. This notice (P. Ex. 2) was dated November 21, 2011 and was hand delivered on that date by Plaintiff's husband, who also wanted to inspect the property as a result of the continued complaints by Defendants. The notice provided 30 days for Defendants to vacate. There is no claim that the notice was insufficient.

The delivery by Plaintiff's husband of the notice to quit was met with further hostility and unpleasantness. Later that day, after delivery of the notice to quit, Plaintiff received a letter from an attorney on behalf of the Defendants complaining about various conditions in the house, which was not offered into evidence. The relationship between the parties continued to deteriorate over the next several weeks. Plaintiffs attempted to have workers inspect the claimed problems and Defendants were resistant and uncooperative, ultimately resulting in both parties calling attorneys and the Thetford Police Department. On all occasions Defendants consented to the entry by Plaintiff or her agents, although a lot of discord accompanied these repair attempts.

Defendants did not pay December rent and did not pay any additional rent up until the time they vacated the property on February 13, 2012. This prompted another notice to quit for non-payment of rent on December 6, 2011, which was hand delivered to Defendants on the same date.

On December 2, 2011, Plaintiff had the Thetford Health Officer, Alfred Stone, inspect the property. He found no problems with ongoing leakage and no active mold issues. He came back for a final inspection on December 24, 2011. (P. Ex. 5,6). During his two inspections he found Defendants to be quite pushy. On the December 2 visit they got him to sign a document (D. Ex. A) which was written by one of the Defendants. Thereafter, Defendants were dissatisfied with Stone's inspection and tried to prevail upon the Vershire health officer to come to the property to inspect it. The Vershire health officer refused to do so. To the extent that the document signed by Stone at the request of the Defendants suggests some on-going leakage at the house, the document is inconsistent with Stone's testimony at the hearing, which is found by the Court to be more accurate than the document.

Defendants have produced a number of photographs (D. Ex. B) which they claim show the extent of water leakage at the premises. The photographs do show some minor water leakage had occurred at some time but do not show any problem which would implicate habitability of the premises. Also shown to the Court was a video recording from a cell phone which was of poor quality and showed nothing of consequence.

On December 10, 2011 Defendants claimed that the pellet stove in the home "died". They called Plaintiff to complain. Plaintiff told them they could use the oil heating system as their primary heat until they vacated, which Plaintiff anticipated would be only a few days from that date. There is no claim that the oil heating system was insufficient to heat the house.

Defendants say they also complained orally about some wood rot in a kitchen cabinet, which Plaintiff denies. In addition, they claim water was coming into the basement through an exterior cellar wall, which they admit they did not report to Plaintiff.

When the time came for Defendants to leave the house as per the first notice to quit they did not do so. Defendants undertook no repairs themselves during their occupancy.

The evidence shows repeated efforts on the part of Plaintiff to address the concerns of the Defendants. Each of Plaintiff's attempts to inspect or repair the premises after Defendants took occupancy was in direct response to a complaint from Defendants. Yet Plaintiff's efforts were met with resistance from the Defendants in allowing Plaintiff, her husband, workers, or inspectors access to the property to address their complaints. The Defendants' claimed reason for being resistant to allowing access to the property was due to their ownership of a dog which apparently suffers from some type of separation anxiety. How the dog would have been affected differently with more notice concerning workers dealing with issues in the basement, or in the bathroom, related to Defendant's complaints of water leaks was not explained.

The evidence also shows the complaints of Defendants were minor in nature. The photographs produced do not show any major water problem, if they show any ongoing water leakage at all. Attempted documentation through cell phone recording showed nothing of value to the Court, and Defendants' testimony about the scope of the problem was inconsistent with the physical evidence produced and the testimony of Plaintiff, her husband, the Thetford health officer, and Plaintiff's plumber. Some photos do show very minor mold in small areas which the health officer did not feel impacted habitability of the property in any way. Any on-going water leakage, however minor, into the basement was not evident to the health officer or to Plaintiff's plumber. Such leakage, if it occurred at all, is equally as possible from improper use of the shower curtain, as Plaintiff's plumber felt was the case. Defendant has not proven the existence of any hole in the shower, which they claim is responsible for the leakage.

After Defendants vacated in mid-February, Plaintiff did some cleaning and re-listed the property for rent. She was able to find a new tenant starting on April 1, 2012. Plaintiff was aware Defendants had vacated on February 13, as they returned one of three sets of keys Plaintiff had given them.

Plaintiff seeks her unpaid rent, $192.93 for fuel oil replacement, $221.58 for re-keying the locks because the Defendants returned only one of the three keys she provided them, $125 for cleaning the carpet when Defendants vacated, witness fees, attorney's fees for her consultation with counsel, and punitive damages against each defendant of $500 each for the aggravation they have caused her. Defendants admit they owe the fuel oil charge but deny responsibility for the other claimed damages. They admit they did not clean the carpet but claim Plaintiff told them they did not have to given the amount of time they were in the premises.

Given the level of rancor that existed between the parties at the time the Defendants vacated and as persists at present, it is unlikely any concession on cleaning was made by Plaintiff. However, the lease provision concerning carpet cleaning is confusing and in part provides that the security deposit may be withheld in part if "major repairs or cleaning are necessary due to the Lessee's tenancy." This suggests the cleaning which is required in order to withhold a portion of the security deposit must be significant. Further, although the lease states that no portion of the security deposit will be withheld for unclean carpets if they have been professionally cleaned, the lease does not say such professional cleaning is required. In this instance, the testimony concerning any significant cleaning upon Defendants vacating the property is lacking. Some cleaning would reasonably be expected upon the termination of any tenancy and there is no evidence of any extraordinary cleaning being required.

Plaintiff continues to hold the first installment of the security deposit of $200. Defendants have filed a counterclaim for their damages, which relate to their costs of moving into the subject property due to problems with their prior tenant. How these expenses became the responsibility of this landlord when this relationship also soured has not been explained.

Conclusions of Law

Residential landlord-tenant relationships are governed by the Vermont Residential Rental Agreements Act (RRAA) for leases entered into after July 1, 1986. The RRAA contains specific provisions setting forth both the rights and the responsibilities of landlords and tenants.

A landlord is obligated to provide housing which is safe, clean, and fit for human habitation. 9 V.S.A. § 4457. A breach of the implied warranty of habitability may be found in situations where, for example, a toilet has been clogged for a period of weeks, rendering it unusable. *Nepveu v. Rau*, 155 Vt. 373 (1990). In this case, the complaints of water leakage made by Defendants here did not impact their ability to use the bathroom shower. Even if their complaints of ongoing water leakage had been found to be persuasive, those complaints did not render the home unfit, unsafe, or uninhabitable. At most they were an annoyance. Although Defendants' counterclaim does not specifically assert a breach of habitability claim, the Court has considered such claim to be attempted by the counterclaim.

Moreover, if a landlord does receive actual notice as defined in the RRAA, the landlord has a reasonable time to make repairs. Only if the landlord does not make repairs within a reasonable time after actual notice, and the noncompliance furthermore materially affects health and safety, may the tenant resort to the remedies afforded to them for the landlord's breach of habitability. 9 V.S.A. § 4458.

Plaintiff here was prompt in addressing Defendants' complaints. The evidence shows those complaints were satisfactorily addressed. Even if they had not been, Defendants began withholding rent, and payment of security deposit installments, within just a few weeks after they made their complaints and while efforts by the Plaintiff to address their concerns were on-going. A withholding of rent is proper in situations where, for example, a landlord took no action for four months to address a tenant's concern about a broken sewer line. *Gokey v. Bessette*, 154 Vt.

560 (1990). This case is far different than *Gokey*. The Plaintiff here was persistent in her efforts to address Defendants' concerns, even going to the extent of having two inspections conducted by the town health officer.

The Court has considered the letter sent by Defendants' attorney to Plaintiff immediately after the notice to quit was delivered by Plaintiff to be actual notice of the water leakage problem. Later complaints by the tenants of problems with the pellet stove, kitchen cabinet, or of water leaking into the basement through the side walls were not the subject of actual notice to Plaintiff as defined and required under the RRAA. 9 V.S.A. § 4451. In the case of the water leaking in through the side wall, no report of any kind was made to the landlord.

There was no breach of the warranty of habitability by the landlord. The withholding of rent by the Defendants was improper. The failure to make the installment security deposit payments under the lease was a breach of a material term of the lease by Defendants. Plaintiff was within her rights to terminate the lease for material breach upon learning that Defendants would not be paying the installment payment which was due under the lease in mid-November. The notice Plaintiff provided was legally sufficient. 9 V.S.A. § 4467. Thereafter, Defendants did not pay their rent for December, January, and February, months during which they occupied the premises. While Plaintiff did not have a tenant during March 2012, the lease was terminated at Plaintiff's insistence. The vacancy during the second half of February and the month of March was created by Plaintiff's decision to terminate the lease and therefore Defendant is not responsible for the payment of rent for periods after vacating. Plaintiff is entitled to 2 ½ months rent at $1075 per month for a total of $2687.50. 9 V.S.A. §4455(a); Restatement (Second) of Property: Landlord & Tenant § 12.1 cmt. g.

It bears noting that Defendants did not avail themselves of the provisions of the RRAA regarding minor defects set forth in 9 V.S.A. § 4459, allowing them to repair minor defects and deduct them from the month's rent up to one half of one month's rent, which in this case would have provided for over $500 in repairs.

There was considerable testimony at the hearing of the attempts by Plaintiff and her agents to gain access to the home to effectuate repairs. A landlord is required to provide 48 hours notice if access is not gained by tenant's consent in order to conduct repairs. 9 V.S.A. § 4460. As the Defendants consented, however grudgingly, to allow access by Plaintiff and her agents there was no breach of the access provision by Plaintiff.

Plaintiff has claimed various additional damages beyond the unpaid rent. The Plaintiff's claim for cleaning expenses of $125 is disallowed because of lack of proof that such expenses were beyond what should have been expected at the end of any tenancy and it has not been shown that the cleaning done by Defendants did not meet the requirements under the lease.

Plaintiff decided to re-key the premises because not all of the keys were returned to her at the end of the tenancy. This was Plaintiff's decision, the prudence of which does not necessarily depend on the number of keys returned by any tenant as duplicate keys are easily made. Plaintiff's decision to re-key the locks was hers and does not make Defendants responsible for that expense.

It is conceded by Defendants that they owe Plaintiff $192.93 for fuel oil.

Plaintiff seeks punitive damages for the aggravation she has been caused by Defendants' conduct. Punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. *Hilder v. St. Peter*, 144 Vt.150 (1984) *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 135 Vt. 594 (1977). This Court is aware of no case where a landlord was awarded punitive damages for the actions of a tenant.

As was stated in *Hilder*, "[a] willful and wanton or fraudulent breach may be shown "by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting ... a reckless or wanton disregard of [one's] rights ...." *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33 (1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper." 144 Vt. at 163, citing *111 East 88th Partners v. Simon*, 434 N.Y.S.2d 886, 889 (N.Y.Civ.Ct.1980).

The limited circumstances allowing for the award of punitive damages against a landlord do not apply in the ordinary non-payment claim by a landlord against a tenant. "The purpose of punitive damages ... is to punish conduct which is morally culpable .... Such an award serves to deter a wrongdoer ... from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action .... The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages." *Hilder*, 144 Vt. at 164 (citation omitted). A breach of contract by failing to pay rent is not morally culpable conduct for which punitive damages are an appropriate remedy. To award punitive damages for an ordinary breach of a rental contract by a tenant would make such damages available in all such cases, which is well away from the purpose and justification for punitive damages. Even if there may be circumstances where punitive damages would be recoverable against a tenant, which appears doubtful, Defendants' conduct in this case in no way approaches the standard necessary for their award.

Plaintiff seeks an award of attorney's fees, which are authorized under paragraph 23 of the lease. Plaintiff may make a post-judgment motion for attorney's fees, providing support for the claim, within the time frame allowed under V.R.C.P. 54. *Murphy v. Stowe Club Highlands*, 171 Vt. 144 (2000).

Plaintiff also seeks an award of witness fees for the witnesses she called at the hearing. Witness fees are allowed as costs only to the extent authorized by statute. *Ianelli v. Standish*, 156 Vt. 386 (1991). 32 V.S.A. § 1551 provides that witnesses may receive $30 per day plus mileage. Plaintiff called three witnesses and therefore may recover $90 in costs for witness fees. Plaintiff may also recover as costs the mileage from the witnesses' residence to the court building should she wish and may submit affidavits from the witnesses as to their mileage within 14 days.

The Court's file reflects $176.34 in service fees which are awarded to Plaintiff. Plaintiff also incurred a filing fee of $262.50, which is likewise awarded.

Plaintiff continues to hold $200, which was the first of five installment payments of the security deposit. Defendants vacated the home on February 13, 2012 and Plaintiff knew of Defendants' departure at that time. Plaintiff was required to return the security deposit and a written statement to Defendants' itemizing any deductions within 14 days from the date when the landlord discovers tenants have vacated the premises. Without either return of the damage deposit in full or itemization of any and all deductions, the withholding of the security deposit is improper, even if the landlord is owed money for unpaid rent or other reasons. The purpose behind the statute is to require landlords to make a prompt accounting to the tenants of the damage deposit money, even if no money is due to be returned.

In this case Plaintiff was obligated to return the damage deposit, or itemize any deductions and provide Defendants with a copy of the itemization no later than February 28, 2012. 9 V.S.A. § 4461(c). There is no evidence Plaintiff provided such itemization. Plaintiff would have been within her rights to apply the $200 toward unpaid rent so long as she provided Defendants with the itemization which the statute requires. As there is no evidence this was done, and with acknowledgement from Plaintiff that she continues to hold the $200, the evidence supports a finding that the withholding was willful on Plaintiff's part, that is, purposeful and not due to inadvertence or mistake. See *State v. Penn*, 2003 VT 110, ¶ 9, 176 Vt. 565 (mem.) (defining a willful act as one done "purposefully and intentionally, and not by accident, mistake or inadvertence"); *Russell v. Armitage*, 166 Vt. 392, 399 (1997) (explaining that, in the contempt setting, a defendant willfully violates a child-support order when he fails to make a required payment despite an ability to comply). Where the failure to return the security deposit, or in this case provide the itemization within 14 days, landlord is liable for double the amount wrongfully withheld.

Defendants are therefore entitled to a $400 offset ($200 x 2) from the sums they owe Plaintiff. Plaintiff shall therefore be entitled to judgment in the amount of $2480.43 ($2687.50 + $192.93 - $400).

Dated at Chelsea this 16th day of July, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

Joyce E. McKeeman
Assistant Judge

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