

V.C.A.S.

Mar. 20, 2001

5 vt. Tr. Ct. Rep. 289

STATE OF VERMONT
WINDHAM COUNTY, S.S.

BRATTLEBORO HOUSING AUTHORITY,
Plaintiff,

Docket No. 398-9-00 Wmc

v.

MICHELLE CLEAVES,
Defendant.

OPINION AND ORDER

In this ejectment action, Brattleboro Housing Authority ("BHA") obtained a default judgment and writ of possession against Defendant Michelle Cleaves. Defendant filed a motion to open the default and vacate the writ of possession, and a hearing was held on December 6, 2000. Evidence was taken, and the parties were given additional time to file proposed Findings of Fact and memoranda of law.

Based on the evidence, the Court makes the following Findings of Fact and Conclusions of Law, and Order.

Findings of Fact

1. Defendant Michelle Cleaves resides with six children (ages six months to nineteen years) in Apartment 17, 77 Ledgewood Heights, Brattleboro, Vermont. Ms. Cleaves has lived in this apartment for approximately five years.
2. Ms. Cleaves' landlord is BHA, which owns and operates the Ledgewood Heights complex under the United States public housing program.
3. For all times relevant to this proceeding, Ms. Cleaves' monthly rent has been \$253.00. She pays this amount under a federal formula used to set individual rent levels of public housing tenants.
4. On August 15, 2000, BHA sent Ms. Cleaves a "Notice to Quit/Non-

Payment of Rent." The notice claimed that Ms. Cleaves owed a portion of her August 2000 rent in the amount of \$183.00, plus "\$40.00 repairs and \$30.00 air conditioner." The notice stated that Ms. Cleaves must pay this full amount in fourteen days, or move out by September 1, 2000.

5. Ms. Cleaves made no payment before September 1, 2000. A \$300.00 money order that she had planned to use to pay her rent to BHA was stolen.

6. On September 8, 2000, the Brattleboro Town Constable served Ms. Cleaves with a copy of the summons and complaint in this ejectment action.

7. On September 8, 2000, Ms. Cleaves owed BHA the \$183.00 remaining due from August 2000 rent. Her current rent of \$253 for September 2000 was due then as well.

8. When Ms. Cleaves received the summons and complaint, she went to various social service agencies with whom she was working for help in paying her rent debt to BHA. A staff worker at Community Action of Brattleboro (CABA) helped her to negotiate a repayment agreement with BHA, whereby Ms. Cleaves was to pay \$600 in back rent by September 26, 2000, and a remaining amount of \$78 for court and service costs by October 2, 2000 in order to avoid eviction.

9. John Berkowitz was a case worker for Brattleboro Early Childhood Education. He testified that he had been working to provide social services to Ms. Cleaves' children. In mid-September 2000, Mr. Berkowitz spoke with Ann Jones of BHA on Ms. Cleaves' behalf, and with her written release, regarding the terms of the repayment agreement. He then helped Ms. Cleaves to find the funds to pay up her back rent and court costs.

10. Based on Mr. Berkowitz's conversations with Ann Jones of BHA in mid-September 2000, Ms. Cleaves and Mr. Berkowitz understood that if Ms. Cleaves paid \$600.00 by September 26, 2000, and \$78 by October 2, 2000, BHA would stop the eviction process and Ms. Cleaves would not be evicted. Mr. Berkowitz's agency assisted Ms. Cleaves in obtaining \$150.00 that she could use to complete these payments, and he helped her find other funds to make the payments on time.

11. Ms. Cleaves paid \$600.00 to BHA on approximately September 28, 2000, and she paid \$125.00 to BHA on October 2, 2000. At the time of this second payment, the October rental payment was also due. It was not paid in full.

12. After completing these payments on October 2, 2000, Ms. Cleaves believed that she would not be evicted, and that there was nothing further she needed to do about the court case. She did not file an Answer or Notice of Appearance in the case. She believed that the case had been discontinued based on her fulfillment of her agreement to pay the amounts under the agreement worked out with Ms. Jones. Ms. Cleaves understood that there was a work order charge was for a toilet repair in the amount of \$45. She disputed liability for the charge, and did not believe that failure to pay this disputed amount was a basis for eviction for nonpayment of rent under the repayment agreement.

13. On October 5, 2000, BHA filed a motion for default judgment against Ms. Cleaves with the court, without serving a copy on Ms. Cleaves. No notice of any kind was given to Ms. Cleaves signifying BHA's intention to proceed with the case. BHA's records show that as of that date, unpaid was \$206.50 for the month of October. This motion was supported by an affidavit stating that Ms. Cleaves owed \$251.50 in "unpaid rent." The BHA ledger also shows a charge for a work order for \$45, as well as legal fees and court costs. A second affidavit of BHA's attorney stated that court costs were due in the amount of \$22.50, and stated that the Defendant had previously paid costs of \$172.50, leaving the \$22.50 as a remaining unpaid balance. The affidavit also sought legal fees of \$391.00.

14. On October 16, 2000, the court entered a default judgment for \$665.00 and for possession in favor of BHA and against Ms. Cleaves. BHA also requested and obtained a writ of possession, which the clerk issued on October 30, 2000.

15. On October 17, 2000, BHA's attorney mailed a copy of the judgment Order to Ms. Cleaves.

16. Ms. Cleaves made an additional payment of \$206.00 to BHA on October 20, 2000. Upon making this payment, BHA's records showed that Ms. Cleaves owed a total rent arrearage of \$.50 to BHA.

17. On October 20, 2000, BHA's office clerk, Ann Jones, wrote a letter to Ms. Cleaves. The letter acknowledged that Ms. Cleaves had paid the \$678.00 by October 2, 2000, to cover the "rent arrearage and court costs as of that date," and \$206.00 on October 19, 2000. The letter went on to state, "However, you did not pay the legal fees." The letter states that BHA "obtained a judgment against you on October 16, 2000 in the amount of Six Hundred Sixty-five Dollars (\$665.00)" based on legal fees of \$391.00 in addition to more court costs (\$22.50) and a \$45.00 repair cost, and states that the \$206 payment on October 19, 2000 would be applied against the judgment. The letter continues by telling Ms. Cleaves that the current amount due is \$459.00 based on the judgment. Nowhere in the letter does Ms. Jones inform Ms. Cleaves that the judgment includes a judgment for possession upon which BHA intended to proceed.

18. On November 5, 2000, at BHA's request, the Brattleboro Town Constable served Ms. Cleaves with the writ of possession and informed her that she and all members of her household would be removed from the apartment by law enforcement officials at noon on Monday, November 13, 2000.

19. While Ms. Cleaves believed that BHA had a claim for legal fees and that it intended to try to collect the money debt from her following a hearing, she understood that BHA had dropped the claims for eviction. On November 5, 2000, she was surprised to receive the writ of possession and immediately sought legal help from Vermont Legal Aid. She sent her Motion to Set Aside the Default Judgment and Vacate Writ of Possession to the court on November 8, 2000.

20. There is no evidence that Ms. Cleaves engaged in any kind of deliberate or planned tactical maneuver to benefit in any way from entry of a default judgment against her. She paid rent and court costs in reliance on an agreement that she in good faith believed would prevent her eviction.

Legal Analysis

Under V.R.C.P. 60(b)(1), the court has discretion to vacate a judgment based on, among other reasons, mistake or excusable neglect. As default judgments are not favored, courts generally will exercise their discretion to vacate a default judgment where the defendant shows excusable neglect and a meritorious defense. See Desjarlais v. Gilman, 143 Vt. 154 (1983). Both are present here.

On October 2, 2000, after the filing of the complaint but before the filing of the motion for default, Ms. Cleaves completed paying off her back rent and costs pursuant to an agreement with BHA as to a level of repayment that would cause the eviction to be discontinued. She believed this was sufficient to avert eviction -- a belief which was corroborated by third party Mr. Berkowitz, based on an agreement made with BHA. The court concludes this belief was reasonable and makes the neglect in failing to respond to the complaint neglect of an excusable nature.

Moreover, Ms. Cleaves' payment of back rent and costs provides a meritorious defense. When a defendant to an ejectment action pays all rent arrearages and costs, the ejectment action "shall be discontinued." 12 V.S.A. § 4773. This does not include legal fees. Ravenwood Estates, Inc. v. Mason, 156 Vt. 642 (1991). See also BHA v. Jacobs, Case No. S26-1-99 Wmc, issued August 5, 1999, an action between the same parties deciding the same issue. As of October 20, 2000, prior to BHA's request for a Writ of Possession, Ms. Cleaves had paid all rent arrearages and costs, except for \$.50, which the court deems is *de minimus* and insufficient to support an ejectment action. She was therefore entitled to have the ejectment action discontinued at that time. Because Ms. Cleaves has shown both excusable neglect and a meritorious defense, the court grants the motion to set aside the default judgment and vacate the writ of possession based on V.R.C.P. 60(b)(1).

Furthermore, a judgment also may be set aside if it is procured by a misrepresentation of the adverse party. See V.R.C.P. 60(b)(3). The default

judgment in this case was based on BHA's misrepresentation to the court regarding the existence and terms of Ms. Cleaves' repayment agreement with BHA, resulting in the granting of a default judgment based on affidavits that did not inform the court of the true state of the agreement between BHA and Ms. Cleaves, and Ms. Cleaves' reasonable expectations based on her performance of the agreement. This may have been based on incomplete communication between BHA's office clerk and its attorney rather than any specific intent to withhold pertinent information. Whatever the reason, the information presented to the court by affidavit as the basis for a default judgment without a hearing was incomplete and constituted a misrepresentation of pertinent facts as to the existence of an agreement to resolve the litigation.

Furthermore, in addition to leaving out of supporting affidavits information relating to a settlement agreement between the parties, BHA's affidavit misrepresented to the court the amount of unpaid rent as of the date of the affidavit. The rights and responsibilities of a housing authority and its tenants are set by federal statutes and regulations; if lease terms conflict with those statutes and regulations, the lease terms must fall. Cf. Escalera v. New York City Housing Authority, 425 F.2d 853, 864 (1970) (housing authority cannot impose additional charges without due process, even if lease allows it).

Federal law provides the formula for determining the amount of rent a housing authority tenant must pay -- generally, 30% of the household adjusted income. 42 U.S.C.A. § 1437a(a)(1)(A). The implementing regulations define this amount as "rent." 24 C.F.R. § 966.4(b)(1). And while the regulations permit imposition of additional charges if proper procedures are followed, it clearly treats them as a separate category from rent. See 24 C.F.R. § 966.4(b)(2).

BHA asserts that additional charges are "rent" because its lease includes such charges in its description of rent. A public housing tenant's level of rent is established by federal law, however, and a housing authority

cannot increase this amount by including other charges in it. It follows that BHA was misrepresenting the situation when it filed its affidavit stating that Ms. Cleaves owed \$251.50 in "unpaid rent". The affidavit misled the court into understanding that \$251.50 of undisputed rental due was unpaid, when in fact the unpaid rent due was \$206.50, and there was a disputed charge of \$45 between the parties. Although the difference in amount is not great, the principle is important that the court was misled as to the actual amount of "unpaid rent". For this reason, also, the default judgment is vacated under V.R.C.P. 60(b)(3).

ORDER

Ms. Cleaves' motion to set aside the default judgment and vacate the writ of possession is GRANTED.

This case is reinstated on the docket. The ejectment action is dismissed, as the facts show that it should have been discontinued on October 20, 2000 when rent arrearages and pre-October 2nd court costs had been paid. See 12 V.S.A. § 4773. If any rent has subsequently been unpaid, BHA may file an amended complaint within ten (10) days to seek ejectment on the basis of such unpaid rent.

A hearing will be scheduled at which BHA may proceed with an action for a money judgment as to the other charges. Ms. Cleaves may dispute these charges, and may also proceed with her counterclaims.

Dated at Brattleboro, Vermont, this 14th day of March, 2001.

Mary Miles Teachout
Hon. Mary Miles Teachout, Judge