

STATE OF VERMONT
WINDHAM COUNTY, SS.

BRATTLEBORO HOUSING AUTHORITY,
Plaintiff,

v.

CHRISTIE MACELMAN,
Defendant.

Windham Superior Court
Civil Action
Docket No. 366-8-00 Wmc

Opinion and Order

Plaintiff Brattleboro Housing Authority ("BHA") obtained a default judgment and writ of possession against Defendant Christie MacElman on its claim for nonpayment of rent in this ejectment action. Defendant filed a motion to open the default; and a hearing was held on the motion on December 6, 2000. Findings of Fact and Conclusions of Law are as set forth below.

FINDINGS OF FACT

1. Defendant Cristie MacElman resides with her six-year old son, Kody, in Apartment No. 8, 22 Moore Court, Brattleboro, Vermont.
2. Moore Court is a development of apartments owned and managed by BHA. BHA manages the property under the United States public housing program.
3. Ms. MacElman and her son have lived in the Moore Court apartment since approximately January 1998. For the time relevant to this action, Ms. MacElman's monthly rental payment to BHA has been \$196.00. This is a subsidized rent, calculated under a formula defined by the National Housing Act and HUD regulations. The public housing tenant's rent level is generally set at thirty percent of the household's monthly income.
4. Beginning in 1998 and continuing until late October 2000, Ms. MacElman received income in the form of a public assistance grant from the Vermont Department of Social Welfare ("DSW") under the ANFC program.

5. While she received the DSW welfare payments, Ms. MacElman had DSW pay her rent to BHA directly, through direct deposit, also known as a "vendor payment." Ms. MacElman took this action because she wanted to ensure that her rent payments were made on a regular basis. Under the vendor payment program, DSW pays the rent out of the recipient's grant first, and then pays the remainder of the grant to the recipient in the form of cash. Since DSW pays benefits to welfare recipients on a bi-weekly basis, DSW paid Ms. MacElman's rent to BHA the same way, in two installments every month. Typically, DSW made one payment of \$116 around the first of the month, and another of \$76 around the fifteenth of the month. At some time earlier in the year 2000, Ms. MacElman's rent had increased from \$192.00 monthly to \$196.00 monthly. Ms. MacElman believed that her DSW caseworker and BHA made an adjustment to increase the amount of the monthly vendor payments by \$4.00 a month. This had not happened, resulting in a monthly shortfall of \$4.00 in rental payments.

6. During the months of July 2000 through October 2000, DSW continued to make Ms. MacElman's rent payments to BHA on the same basic schedule described above. BHA's rent receipts show the following payments on Ms. MacElman's behalf: July 3, 2000 - \$116; July 17, 2000 - \$76; August 1, 2000 - \$116.00; August 16, 2000 - \$76; September 1, 2000 - \$116; September 18, 2000 - \$76; October 2, 2000 - \$116; October 17, 2000 - \$76.

7. On July 14, 2000, BHA sent Ms. MacElman a "Notice to Quit/Non-Payment of Rent." The notice stated that BHA was terminating Ms. MacElman's lease because of "non-payment of rent for \$78.00 and \$215.00 repairs." The notice informed Ms. MacElman that she must either pay this full sum of \$293.00 in fourteen days, or she must move.

8. As indicated above in para. 6, BHA received \$76 in vendor payments from DSW for the second installment of Ms. MacElman's July 2000 rent on July 17, 2000.

9. On August 4, 2000, BHA had the Brattleboro Town Constable serve Ms. MacElman with a summons and complaint in ejectment for non-payment of rent. The cost of service of the summons and complaint was \$22.50, and the filing

fee was \$150.00. During August 2000, DSW paid \$192 in rent through vendor payments to BHA for Ms. MacElman. BHA received the payments on August 1, 2000, and on August 16, 2000.

10. Ms. MacElman's Answer was due on August 24, 2000. During August and September 2000, Ms. MacElman suffered from symptoms of depression and post-traumatic stress disorder. Although she had these impairments before, the symptoms were particularly severe during these months. She received ongoing treatment from a psychiatrist and therapist at the Brattleboro Retreat. During this time, due to the severity of the symptoms, these treating professionals urged Ms. MacElman to admit herself for in-patient hospitalization at the Brattleboro Retreat. Ms. MacElman declined hospitalization, but participated in significant treatment with medications. She regularly took various prescribed anti-depressive medications, including Klonopil, Paxil, and Atavan. During August and September 2000, Ms. MacElman experienced disorientation and had difficulty concentrating, making plans, and managing her affairs.

11. During the latter part of August 2000, Ms. MacElman broke her ankle and was confined to bed for two weeks. For the next four weeks after this, she had difficulty walking in a cast and remained essentially homebound, leaving the apartment only for physical therapy appointments. She had difficulty managing her household, and had to send her son away to be cared for by others.

12. Ms. MacElman's doctors prescribed a number of pain relieving medications for her to alleviate symptoms of the leg injury. Ms. MacElman found these medications to be disorienting, and they impaired her ability to manage her affairs.

13. On September 6, 2000, BHA filed a motion for default judgment in this action. This motion was supported by an affidavit stating that "there is currently due and owing from the Defendant \$366.00 for unpaid rent and there will be due and owing an additional \$205.00 as of September 1, 2000 for a total of \$571.00." In fact, at that time, there was only \$28.00 in unpaid

rent (the \$4.00 shortfall for 7 months), and rent was regularly paid twice a month by vendor payments. There was therefore \$338.00 claimed as "unpaid rent" which must have been based on other charges. BHA did not serve Ms. MacElman with the motion for default judgment or otherwise notify her that it was proceeding to evict her. During September 2000, BHA received \$192 in two installments for Ms. MacElman's current rent.

14. On September 28, 2000, upon BHA's motion, the court entered a default judgment in favor of BHA and against Ms. MacElman for possession and for \$1,226.00. The judgment order prepared by BHA stated that the money judgment consisted of "\$571.00 in unpaid rent, costs in the amount of \$195.00, and attorney's fees in the amount of \$460.00."

15. On October 16, 2000, at BHA's request, the Court Clerk issued a writ of possession to evict Ms. MacElman.

16. On October 18, 2000, the Town Constable served Ms. MacElman with the writ of possession and a copy of the September 28, 2000 judgment order. The Constable told Ms. MacElman that she must be completely out of the property by October 30, 2000, or she would be forcibly removed.

17. After the date of service of the Complaint (August 4, 2000) and up until the date the Constable served the writ of possession (October 18, 2000), Ms. MacElman received no documents from either BHA or from the court regarding the ejectment action. BHA did not serve Ms. MacElman with a copy of the September 28, 2000 judgment order until the Constable gave her a copy with the writ of possession on October 18, 2000. BHA claims that its attorney served her on October 10, 2000 with a copy of the Order by first class mail, and a Certificate of Service is on file with the court. The cover letter does not show that a copy of the cover letter was sent to Ms. MacElman.

18. With a letter dated October 20, 2000, BHA's counsel sent Ms. MacElman a copy of the September 28, 2000 judgment order. Ms. MacElman filed a *pro se* objection with the court on October 23, 2000.

19. Ms. MacElman did not understand the nature and effect of her failure to answer in writing until she received the writ and order in October

2000. Up until then, she believed that she would be notified of a court date when she could appear and answer the claims of BHA. She did not believe that she faced a risk of eviction for non-payment of rent because DSW was regularly paying her ongoing rent to BHA.

20. Ms. MacElman was aware that BHA claimed she owed between \$215.00 and \$335.00 for repairs. She did not believe that BHA could evict her for these charges by calling them "rent." At the December 6, 2000 motion hearing, Ms. MacElman testified that at a trial she would dispute her responsibility for payment of charges for items like a defective washing machine, smoke detectors that she had turned in to BHA because they were defective, a lamp covering that fell, and a door-bell cover that she did not cause to fall down.

21. With a money order dated October 24, 2000, Ms. MacElman paid BHA \$85.00 to cover a \$9.00 monthly charge for use of a washing machine that had accrued over the year.

22. By October 2000, the \$4.00 per month underpayments had accumulated to a total of \$32.00. Ms. MacElman made a payment by money order to BHA for \$32.00 to cover this arrearage on approximately October 24, 2000. Ms. MacElman testified that, now that she understands it is her responsibility to do so, she will make sure DSW adjusts her vendor payments to reflect any future changes in the rent.

23. Shortly after being served with the writ of possession on October 18, 2000, Ms. MacElman called BHA for information about what was going on. BHA office clerk Ann Jones told her it was no use trying to fight the eviction and she should just get out.

24. Ms. MacElman then contacted Community Action of Brattleboro ("CABA") for help. CABA referred her to Vermont Legal Aid, and she found counsel available. She filed her Motion to Set Aside Default on October 25, 2000. Before the referral from CABA, Ms. MacElman did not know about the availability of free legal assistance.

25. There was no evidence to indicate or suggest that Ms. MacElman had any kind of deliberate plan to benefit herself by not filing an answer. She

did not gain anything from not filing an answer.

26. In late October 2000, after she recovered sufficiently from her injury, Ms. MacElman began to work as a waitress at the Chelsea Royal Diner in Brattleboro, Vermont. She supports herself and her son without an ANFC grant and makes payments of ongoing rent directly to BHA.

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).

In this case, Ms. MacElman's rent was being paid regularly by direct deductions from her ANFC grant.¹ In late August when she was required to answer the lawsuit, she knew her rent was being paid automatically by vendor payments. She was physically and mentally disabled and under heavy medication that affected her ability to carry out normal daily functioning. Therefore her belief that BHA could not evict her for non-payment of rent, and thus that the ongoing rental payments were an adequate response to the complaint, was understandable under all the circumstances. As Ms. MacElman's payment of rent provides both an excuse for her neglect and a meritorious defense to the eviction action, the court exercises its discretion to set aside the judgment and vacate the writ of possession.

There is a second ground for a meritorious defense, which is Defendant's argument that "other charges" may not be substituted for rent for purposes of

¹ To be precise, the regular payments being made resulted in a shortfall of \$4.00 per month for several months. Since these shortfalls obviously resulted from a misunderstanding and totalled less than \$30.00 at the time BHA moved for default judgment, they are not enough to support an eviction for non-payment of rent.

an ejectment action on the basis of nonpayment of rent. 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 without following specified procedures. There is no evidence that such procedures were followed. It appears that BHA provided inaccurate information to the court when it filed its affidavit stating that Ms. MacElman owed \$571.00 in "unpaid rent" since other charges were included. Ms. MacElman was up to date with her regular rental payments and may have a meritorious defense to the claim of nonpayment of rent in an amount sufficient to support eviction.²

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). As this default judgment was based on a representation concerning the amount of Ms. MacElman's unpaid rent that may have inaccurately labeled other charges as "rent", this sub-section provides an additional basis for setting aside the judgment and vacating the writ of possession.

ORDER

Ms. MacElman's motion to set aside the default judgment and vacate the

²The \$28.00 in shortfall payments is *de minimus* and not sufficient under the circumstances to support an ejectment action. At this stage, the court is not deciding the merits of the defense, but merely determining whether Defendant appears to have a meritorious defense that could change the outcome of the default judgment.

writ of possession is GRANTED.

This case is therefore reinstated on the docket. If Ms. MacElman pays (or has paid) actual rent due and costs, BHA must discontinue the ejectment action. See 12 V.S.A. § 4773; BHA v. Jacobs, Case No. S26-1-99 Wmc, issued August 5, 1999. Whether or not the ejectment is discontinued, BHA may proceed with an action for a money judgment as to the other charges. Ms. MacElman 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