VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 24-CV-00876

BAIR, LLC v. JACOB JORDAN et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion: 2)
Filer: Everett M. Secor
Filed Date: April 04, 2024

The motion is DENIED IN PART.

Defendants have filed a motion to dismiss based on the following language in Plaintiff's notice to terminate their tenancy:

> **Accordingly, each of your tenancy at the Property is hereby terminated for nonpayment of rent effective November 6, 2023. Your landlord has calculated that you owe $2,887.00 in back rent, which you may pay in full prior to November 6, 2023 to cure your nonpayment of rent. Rent is $625..00 per month and an additional month's rent will be due November 1, 2023. If you think you owe a different amount, you should pay what you believe you owe, but you will only have cured your nonpayment of rent if you pay all amounts actually past due.**
>
> **In addition, your tenancy is also terminated November 24, 2023 for nonpayment of rent as stated above, but providing at least 30 days rather than 14 days notice of termination for nonpayment of rent. In addition, your tenancy is terminated on November 24, 2023, December 25, 2023, and January 25, 2024 for no cause. These additional termination dates are not intended to extend your tenancy, but to provide additional termination dates upon which your landlord will rely if any earlier termination date is determined not to be valid. Finally, your tenancy is hereby terminated on November 6, 2023 for engaging in criminal activity at the Property, specifically illegal drug use.**

Pltf. Ex.1 (emphasis in the original).

Defendants contend that the piling on of dates led to their confusion regarding when their tenancy terminated. Plaintiff contends that the notice fits within the allowance for multiple termination dates under 9 V.S.A. § 4467(i). That provision expressly allows that "All actual notices

that are in compliance with this section shall not invalidate any other actual notice and shall be a valid basis for commencing and maintaining an action for possession pursuant to this chapter . . ." 9 V.S.A. § 4467(i).

The notice in this case provided four different notice categories. The first paragraph is a termination of tenancy under 9 V.S.A. § 4467(a) for non-payment of rent. This paragraph is neither confusing nor inaccurate. While the direction for tenants to pay landlord what they think they owe might seem gratuitous, it does not make the provision invalid. The language noting that payment will only cure this notice for non-payment signals that other, separate notices will be forthcoming.

The next notice is also a termination for non-payment of rent, but this provision gives the tenants 30 days of notice and terminates the tenancy on November 24, 2024. It is not clear why landlord gave a second notice for non-payment of rent under an additional timeline.

The third notice category terminates the lease for no cause but gives three days: November 24, 2024, December 25, 2024, and January 25, 2024. These notices would appear to correspond to 9 V.S.A. § 4467(c) and (e), which provide that a no cause termination may take effect anywhere from 30 to 90 days depending on whether there is a written lease and the age of the tenancy. In this section the letter includes language that none of these dates are intended to extend the tenancy but are provided in the alternate if any earlier date is deemed invalid.

Finally, the landlord includes a notice category for criminal activity that terminates the lease by November 6, 2023 for criminal activity under 9 V.S.A. § 4467(b).

The Court finds no issue with either the first or the fourth notices. They are straightforward alternate grounds for termination under their respective provisions and are consistent with Section 4467(i)'s allowance for multiple notices. They are also not valid grounds for the present action because the time to bring an action under the notices expired prior to March 6, 2024 when the present action commenced. 9 V.S.A. § 4467(k) (requiring commencement of a legal action prior to 60 days after the date of termination.

As to the second notice, it is not clear why Landlord served a second date of termination based on non-payment of rent or what statute this 30-day notice provision was based. The impact of this notice, however, is minimal since it sits apart from the other notice provisions, is not part of

the present ejectment action, and does not by its mere presence in the notice invalidate the other notices. 9 V.S.A. § 4467(i). [1]

The third notice category is where Defendants' motion is primarily focused. It is the sole basis for the present action as only the January 25, 2024 termination date falls within the 60-day limitation of Section 4467(k). This notice is somewhat confusing in that it states a range of dates for a no cause termination that range from November to January with little explanation. The potential confusion caused by these multiple dates is addressed and somewhat mitigated by the subsequent explanatory sentence, which states that these alternate dates are proffered to give notice in the alternative in case the prior dates are deemed invalid.

Still, there is little to no explanation as to why the multiple dates might be in play—even in a cursory manner—that would signal to the tenants why these three dates are potentially in play. But by putting all three dates into the notice Landlord is acknowledging that it has not determined whether the Tenants have a written lease or oral lease, whether they have been in the apartment for less than two years or more. It has simply noticed them all.

Under 9 V.S.A. § 4467, a landlord is not required to choose between different potential causes for termination, but Section 4467(i) only protects "actual notices that are in compliance with this section [4467]." This is both a logic and a chicken-and-egg problem. The first problem is that the various provisions of 9 V.S.A. § 4467(c) and (e) contain contradictory and contrary propositions, which create certain minimum notice standards depending on various factual accidents.[2] For example, if the parties have a lease, then section 4467(e) applies to no cause termination. If there is no lease, then 4467(d) applies.

Thus, if a tenant has been in the dwelling unit for less than two years, then Sections 4467(c)(1)(A) (60 days) and 4467(e) (30 days) applies, depending on the existence or non-existence of a lease. If a tenant has been in the dwelling unit for two or more years, then Sections 4467(c)(1)(B) (90 days) and 4467(e)(60 days) apply, again, depending on the existence of a lease.

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[1] The Court rejects Defendants' contention that the notice was effectively a single notice. It was a single letter containing multiple notices. Section 4467(i) is a permissive statute in this respect in that it allows multiple notices to be sent separately, but nothing in its provisions requires that the multiple notices must be sent separately or that multiple notices in a single letter must be treated as a single notice.

[2] Accident in this sense meaning a nonessential property or quality of an entity or circumstance. Miriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/accident (last visited May 19, 2024).

Under these provisions, a tenancy without a lease involving a tenant who has lived at the dwelling unit for two years cannot give 30 or 60 days of notice. A tenancy with a lease and a tenant who has lived at the unit for less than two years, however, only needs to give the tenant 30 days of notice, but there is not proscription preventing the landlord from giving the tenant additional notice time of 60 or 90 days.

This creates a factual issue. Was the present tenancy subject to a written lease? Was the tenancy less than two-years old. If so, then the multiple dates look like multiple notice and the subsequent explanatory sentence puts these multiple dates into context.

On top of this issue, there is a question when a landlord must make this determination. The termination of a tenancy occurs at the beginning of the eviction process. There may, very well, be significant questions about the validity or applicability of a lease. There may also be, particularly if the landlord is a successor landlord, some question as to the length of the tenancy. This, like much of landlord tenant law, appears to be a fact-based consideration. Did the landlord know or have reason to know the nature of the tenancy. If the landlord is aware that the tenant has occupied the dwelling unit for more than two years without a lease, then it would be unreasonable for the landlord to assert a right to terminate for no cause for anything less than 90 days. Similarly, if there was a contested factual issue in which there was room for uncertainty about either length of tenancy or nature of the lease relationship, then it would be unreasonable and impractical and inconsistent with Section 4467(i) to impose a requirement that the landlord make a definitive determination and give only one form of no cause notice.

The facts of this case do not indicate whether Landlord had or did not have reason to know the parameters of the lease relationship and whether the notices were, by extension, unreasonable duplicative of facially invalid causes of termination, or if they reflected reasonable uncertainty and hedging consistent with this lack of knowledge. In other words, a landlord has a duty to perform some due diligence to understand the nature of its lease relationship with tenant, but there is no requirement that a landlord definitively determine the legal rights to the exclusion of alternative bases of termination that may or may not apply.

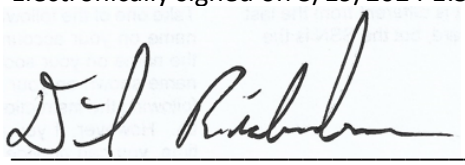
ORDER

Based on these factual issues, a Motion to Dismiss is not appropriate. *Colby v. Umbrella Inc.*, 2008 VT 20, ¶ 5; see also *Brigham v. State of Vermont*, 2005 VT 105, ¶ 11 (quoting *Powers v. Office of*

Child Support, 173 Vt. 390, 395 (2002)) (instructing that the purpose of a motion to dismiss for failure to state a claim is "to test the law of the claim, not the facts which support it."). While this motion raises valid defenses, the Court cannot rule as a matter of law that the notice of termination is invalid or fails to properly give notice under 9 V.S.A. § 4467. While some elements raise issues of potential confusion, the impact of these elements is dependent on the context in which they were delivered. *Andrus v. Dunbar*, 2005 VT 48, ¶ 13, 178 Vt. 554, 557 (2005).

For these reasons, Defendants may continue to argue these defects, and seek discovery and testimony that would demonstrate whether the context of the parties relationship was such that the notice was confusing and invoked standards that Landlord knew or should have known reasonably did not apply.

Electronically signed on 5/19/2024 1:51 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge