

STATE OF VERMONT

**SUPERIOR COURT
Windsor Unit**

**CIVIL DIVISION
Docket No. 364-6-14 Wrcv**

GILL TERRACE RETIREMENT APARTMENTS, INC.

v.

MARIE JOHNSON

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The final hearing in this eviction action came before the court on June 27, 2016. Plaintiff was represented by Attorney Joanna K. Watts. Defendant was represented by Attorney Jacob Speidel. Both attorneys filed proposed findings of fact and memoranda.

Plaintiff seeks eviction on the basis of two alleged lease violations: keeping an unauthorized dog, and smoking in the unit. Based on the credible evidence, the court makes the following findings of fact and conclusions of law.

Findings of Fact

Plaintiff Gill Terrace owns two residential housing complexes in Springfield with apartments rented to disabled senior residents under a Section 8 HUD program. Defendant Marie Johnson is a woman with 8 children between the ages of 58 and 44 who has been a tenant in one of the complexes since 2002. In her complex, there are six units in each of four buildings, and each building shares a common walkway for all six units. She is in Apartment 9, which shares a vestibule with another apartment. The doors to each apartment are from the vestibule.

The lease prohibits tenants from having pets without the owner's consent, and there is a procedure for obtaining the owner's consent. There is an exception from the regular pet rules for animals that qualify as a reasonable accommodation for a person with a disability. There is also a procedure for seeking approval of a pet as a reasonable accommodation.

In the past, Ms. Johnson had children living with her. In 2004 she also had a pet dog. At that time she was informed that she had a pet without proper permission. She apologized, stating that she was not aware of the policy, and she then complied. She obtained permission and paid the required special pet damage deposit. She had the dog for 3 ½ years. After the dog died, her unit was inspected as called for in the procedure and the pet deposit was returned to her in full. Thus she was familiar with the policy and process concerning having a pet.

Ms. Johnson has been a smoker for many years. Through 2013, smoking was allowed in tenants' individual units. At some point in the past, the tenant with whom she shared a vestibule

asked Ms. Johnson not to smoke on her way in and out of the apartment because it made the vestibule smell of smoke, and she complied.

The lease that is currently in effect is a required HUD lease that became effective October 1, 2009 and replaced the prior lease. At some point after that date and continuing to December of 2013, Ms. Johnson's son Dennis was living with her. He had a dog named Dutchess, who is a large black mixed breed dog that is part pitbull. Ms. Johnson told others that he was trained to be aggressive to people and to other dogs. On one occasion in early 2013, Dutchess, while on a leash, lunged at Michael Lorraine, who managed the property. It is not clear whether Dutchess was an allowed dog at the time, but this is irrelevant to the current controversy.

In May of 2013, notice was given to all the residents that as of January 1, 2014, they would no longer be allowed to smoke in their units. On November 4, 2013, Ms. Johnson signed an Addendum to the Lease agreeing to the new lease term disallowing smoking in the units. It reads as follows:

Smoking is prohibited in all indoor areas including your apartment as well as common areas, entry areas, and laundry room. Smoking is also prohibited outdoors except for the designated, sheltered smoking area. If you own a car, you are also able to sit in your car, with the windows up, and smoke there. Violating this policy will be a violation of your lease and subject to termination of your tenancy.

This policy applies to all employees, visitors, residents, subcontractors and volunteers.

In the event Tenant breaches/violates this Lease Addendum, Landlord shall have the right to terminate the lease and evict the Tenant.

In December of 2013, Ms. Johnson's son Dennis moved out of the apartment. He is a disabled adult who is in a wheelchair. Dutchess stayed with Ms. Johnson.

On January 1, 2014, the new smoking rule went into effect. Tenants were allowed to smoke in their cars or in a smoking hut that the landlord erected on the premises. Ms. Johnson acknowledges that at first, she forgot a few times and smoked in her unit. She testified that she then changed to e-cigarettes when she smoked in the unit, although she used traditional cigarettes when she smoked in her car or elsewhere. She acknowledges that she smokes e-cigarettes in her unit. The smoking policy makes no distinction between traditional cigarettes and e-cigarettes. There is no exemption for e-cigarettes, which also produce smoke. The court heard testimony from several witnesses who have smelled fresh smoke on several occasions while near Ms. Johnson's apartment. The court finds that Ms. Johnson has continually smoked in her unit on a regular basis since January 1, 2014. This is a violation of the Lease Addendum she signed in November of 2013.

In January of 2014, Ms. Johnson was asked about Dutchess, who continued to live with her. She said that she had a note from a doctor saying that she needed the dog for her condition. She did not provide a note. She apparently was receiving cancer treatments at the time, and at

that time, she herself was not taking Dutchess outside. She was not capable of controlling the dog. One of her children would come and take Dutchess out.

In February of 2014, the landlord sent Ms. Johnson a letter warning her of three lease violations that needed correction: keeping a dog without proper authorization, smoking in her unit, and not moving her car when needed for plowing. Sometime during that spring, another tenant was out when Dutchess, while being walked on a leash, reared up on her hind feet and bared her teeth in a threatening manner to the tenant. Ms. Johnson's son Willy took the dog out 3-4 times a day during that period. When that tenant sees Willy's car, she stays away from fear of encountering Dutchess.

In April of 2014, the landlord sent Ms. Johnson a Notice of Termination of tenancy, terminating the tenancy as of May 25, 2014 based on violations of the lease in maintaining an unauthorized dog, and smoking in her unit. Ms. Johnson had an informal meeting with the complex manager and the landlord's attorney. She claimed she needed the dog as a reasonable accommodation for her disability. Landlord's attorney sent her the papers to submit to request a reasonable accommodation. She claims she never sent them in because she never received them. The evidence shows that she was fully aware that she needed to submit a request for approval of maintaining the dog as a reasonable accommodation. She continued to smoke in the unit and keep Dutchess in her unit.

On June 9, 2014, she was served with the process to begin this eviction action. She then submitted a request to keep Dutchess as a reasonable accommodation. A health professional whose credentials are unknown wrote as follows: "I believe Mrs. Johnson should have a pet companion because she has chronic pain – which leads to poor sleep and ↑ anxiety – I think having her pet in home helps with that anxiety – therefore she can sleep. This is not however a service animal but a therapeutic recommend [sic]."

On August 8, 2014, the landlord sent Ms. Johnson a letter granting her request for a reasonable accommodation, but denying approval of Dutchess as the specific dog allowed due to aggressiveness and complaints from other tenants and Ms. Johnson's inability to control Dutchess.¹ Landlord's manager relied in part on second-hand reports of an incident on June 8, 2014 described in a complaint from another tenant. He understood that during the incident Dutchess was aggressive to police. He has subsequently read the police report and found it to lack details. There is conflicting evidence about the June 8, 2014 incident. The evidence does not support a finding that Dutchess was aggressive on that occasion.

This lawsuit continued, with landlord seeking eviction on the basis of the two lease violations alleged.

In April of 2015, the landlord was expecting a HUD inspection, and notified the tenants in advance. Ms. Johnson called the office and left a message that she could not be home during the inspection and did not want anyone coming into her unit because of the risk that Dutchess

¹ The letter also claimed that Landlord's insurance company would not permit "Pit Bull/Straffordshire Bull Terriers" on the premises. This was not proved at trial.

might bite or lunge. During the inspection, Ms. Johnson's son took Dutchess out of the unit and walked her to the other side of the property.

Dutchess has a distinct angry bark or growl. She has never bitten anyone in the complex. When another tenant walks by with her own dog outdoors, Dutchess flares up and bares her teeth. Dutchess spends most of her time indoors, but "goes crazy" from within the unit when other dogs walk by the window. Some residents are afraid of Dutchess and do not want her there. Others are fine with her being there. Ms. Johnson has told another tenant that Dutchess is "people and dog aggressive." She asked the other tenant to walk her own dog at 8:00, 12:00, 4:00, and 8:00 to avoid interactions with Dutchess. She has told a different tenant that Dutchess was trained as a guard dog. She stated in testimony that Dutchess was brought up and trained as a watchdog. Some residents deliberately stay indoors if they believe that Dutchess is outside. The presence of Dutchess on the premises is reasonably threatening to the safety of other residents of the complex.

In recent weeks, Ms. Johnson herself takes the dog outside. She does not take Dutchess out for a walk to exercise, but only takes her out for short periods of time to "do her business." Ms. Johnson believes she may be having a recurrence of medical problems. If so, she would again not be able to control Dutchess herself.

She testified that if Dutchess has to leave the apartment, she will go, too.

Conclusions of Law

This is an eviction based on material breach of a residential rental agreement. Under Vermont law, a landlord "may terminate a tenancy for failure of the tenant to comply with a material term in the rental agreement or with obligations imposed by statute, by actual notice given to the tenant at least 30 days prior to the termination date specified in the notice." 9 V.S.A. § 4467(b).

Based on the foregoing findings of fact, the court concludes that Ms. Johnson failed to comply with two material provisions of the lease: the provision regarding smoking in the unit and the provision regarding pet ownership.

With respect to smoking, the parties do not dispute that on November 4, 2013, Ms. Johnson signed an Addendum to the Lease agreeing to the new lease term disallowing smoking in her unit. However, there was some dispute at trial over whether smoking e-cigarettes constitutes smoking under the provision. The no-smoking provision itself does not differentiate between e-cigarettes and other cigarettes. The court was unable to find any legal authority in Vermont or elsewhere regarding the interplay between no-smoking provisions and e-cigarettes, nor was the issue briefed in the parties' respective post-trial memoranda.

As a matter of first impression, the court concludes that the no-smoking provision in this case encompasses e-cigarettes. At trial, the court heard testimony from witnesses that they smelled "smoke" around Ms. Johnson's unit after November 4, 2013. The court also heard testimony that e-cigarettes, although they do not "burn" cut tobacco to produce smoke in the traditional sense, nevertheless produce smoke. Thus, the court concludes that use of e-cigarettes

produces some of the same noisome effects that the no-smoking provision is intended to prevent, and that Ms. Johnson breached the no-smoking provision by using e-cigarettes in her unit.

The court's interpretation of the no-smoking provision in this case is consistent with public policy in Vermont. In Vermont, the Legislature recently amended 18 V.S.A. § 1742 to restrict the use of tobacco substitutes, including e-cigarettes, in all the same places where regular cigarettes are prohibited. In so doing, the Legislature relied on materials indicating that tobacco substitutes, particularly e-cigarettes, share some of the same negative health effects as regular cigarettes, both for the user and for non-users in proximity to the user. See 2015 H.171; see also Daniel F. Hardin, "Blowing Electronic Smoke: Electronic Cigarettes, Regulation, and Protecting the Public Health, 2011 U. Ill. J. Tech. & Pol'y 433 (Fall 2011). Although research into the effects of e-cigarette use remains in its infancy, the early indications are that e-cigarettes are as harmful as regular cigarettes, albeit in different ways, and should accordingly be banned in a similar manner. See Proposed 24 C.F.R. § 965.653, available at <https://www.regulations.gov/document?D=HUD-2015-0101-0001> ("HUD is seeking additional comments on the issue of [Electronic Nicotine Delivery Systems], and may prohibit the use of these products in public housing in the final rule.").

With respect to Dutchess, Ms. Johnson's memorandum offers the clearest statement of the law. There is no real dispute that, in spite of a no-pets policy, a tenant with disabilities may be entitled to a reasonable accommodation, including an emotional support animal. See 24 C.F.R. § 5.303. However, Ms. Johnson also acknowledges that a specific assistance animal may be excluded if the animal in question "poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation" or "the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation." Defendant's Memorandum at 4 (citing FHEO-2013-01 at 3).

Contrary to Ms. Johnson's assertions, the court has received sufficient evidence in this case to indicate that Dutchess falls into both categories. As noted above, although Dutchess has not bitten anyone or any other animal at the complex, Dutchess has shown aggressive tendencies which have put other tenants in substantial apprehension. The court received testimony that when another tenant walks by with her own dog outdoors, Dutchess flares up and bares her teeth. Dutchess spends most of her time indoors, but "goes crazy" from within the unit when other dogs walk by the window. Some tenants have expressed fear of Dutchess. Ms. Johnson has told another tenant that Dutchess is "people and dog aggressive." She asked the other tenant to walk her own dog at 8:00, 12:00, 4:00, and 8:00 to avoid interactions with Dutchess. She has told a different tenant that Dutchess was trained as a guard dog. She stated in testimony that Dutchess was brought up and trained as a watchdog. Some residents deliberately stay indoors if they believe that Dutchess is outside.

The court has also received evidence that Ms. Johnson herself is unable to control Dutchess. Although in recent weeks, Ms. Johnson has been letting Dutchess out to do her business, in the past she has delegated this responsibility to one of her children. Even when she does let Dutchess out, however, she has not taken Dutchess for walks or otherwise exercised the

dog. Further, Ms. Johnson herself testified that she may be having a recurrence of her medical conditions, and if that is the case, she may not be able to control Dutchess in the future.

For the foregoing reasons, the court concludes that, while Ms. Johnson may be entitled to an emotional support animal as a reasonable accommodation, such reasonable accommodations do not extend to the specific animal in question here, Dutchess. Because of the aggressive propensities which Dutchess has shown, Gill Terrace was entitled to reject Dutchess as a specific assistance animal for the purposes of reasonable accommodation of her disability, on the basis that Dutchess “poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation” or would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.” This determination is not based on the fact of Dutchess’s breed, but on the demonstrated behavior of the specific animal and its effect on other tenants over the past two and one half years.

Dated at Woodstock this ____ day of August, 2016.

Hon. Mary Miles Teachout
Superior Judge

Hon. Jack W. Anderson
Assistant Judge

Hon. Ellen Terie
Assistant Judge