Thayer et al. v. Wyszynski, No. 97-2-15 Wrcv (Teachout, J., Sept. 2, 2016).
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STATE OF VERMONT

SUPERIOR COURT	**CIVIL DIVISION**
Windsor Unit	**Docket No. 97-2-15 Wrcv**

WARREN THAYER and TONI APGAR THAYER

v.

ASAF WYSZYNSKI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The final hearing in this action was held on August 2 and 4, 2016. Plaintiffs were represented by Attorney John C. Candon. Defendant was represented by Attorney Todd C. Steadman. Both attorneys filed proposed findings of fact and memoranda. The court made a site visit to the property on August 2, 2016 prior to taking evidence.

Plaintiffs rented a residential home to Defendant for one year ending in July of 2015. During the tenancy, Defendant withheld four months' worth of rent plus compensation for a water bill based on a claim of breach of the warranty of habitability. Plaintiffs denied breach of habitability and sued for eviction and unpaid rent, and retained the security deposit at the end of the tenancy.

Plaintiffs seek judgment for unpaid rent plus attorneys' fees and costs. Defendant seeks return of the security deposit and other damages and attorneys' fees based on several grounds in the counterclaim.

Based on the credible evidence, the court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

Plaintiffs Warren and Toni Apgar Thayer have lived in Norwich for approximately 15 years in a large house where they raised their family. In 2012 they purchased a much smaller house located at 66 Turnpike Road, which they intended to use as a retirement home although they were not yet ready to move to it. This house is the subject of this case. It is a deck home built in the 1960's on the side of a hill in the woods, surrounded by trees. They call it the "treehouse."

After purchasing, they spent about $100,000 on renovations. Their contractor Terry Bragg redid many parts of the home (completely new kitchen, new windows, insulation, etc.). No work was done to the roof as it had been reshingled in 2006. While the Thayers did not intend to occupy it immediately, they were preparing it in anticipation of occupying it in the future as their own home. After the renovations, they rented it to one family in 2013 and then to

Dr. Koff, a single father with three boys, from February to July of 2014. Both rentals were without incidents or problems. They did not receive any complaints from either of those tenants about any leak in the kitchen ceiling.

In July of 2014 the Thayers rented it for a one-year term under a written lease beginning July 8 to Defendant Asaf Wyszynski, a research scientist, whom Mr. Thayer had met because they were both on the Norwich Fire Department. Ms. Thayer handled most of the rental arrangements, including preparing and signing a written lease.

Dr. Wyszynski took possession on July 8, 2014 and moved in on July 13th. The next day, on July 14th, he sent an email to the Thayers that included the following: "I noticed a moldy leak in the kitchen ceiling (kitchen side of chimney) which doesn't look very healthy. I'm happy to spray it down with some bleach before it starts kicking off my allergies but wanted to let you guys know about its existence." He also noted a number of other minor items that needed attention and asked several questions.

Ms. Thayer responded the next day in an email: "The leak by the fireplace chimney on the kitchen side was supposed to be fixed. I will talk to Terry about it. Yes, by all means spray it with bleach to kill the mold." She also responded to all of the other issues he had raised, and also stated that she would ask Terry to fix another item (a screen door that was off track).

Terry Bragg came to the house on July 30, 2014 and checked the roof. He found a crack in the flashing and sealed it. Throughout July, August, and September, Dr. Wyszynski brought a number of issues and problems to the Thayers' attention, and they were prompt in responding to his concerns and remedying the problems. They offered to let him out of the lease if he was not happy with the property, but he wished to stay. When adequacy of hot water was a problem, they wound up replacing the aged hot water heater at a cost of $2,945. The evidence shows that the Thayers responded promptly to all the numerous issues raised by Dr. Wyszynski about the condition of the property (oven door did not close properly, screens did not fit properly, the fan wobbled, etc.) by providing the requested remedies.

In mid-September Dr. Wyszynski found a dead mouse and mouse droppings. There were already bait stations throughout the house but the Thayers arranged for a visit from their pest control service, which came September 29th and rebaited the stations. The Thayers also offered to pay for mousetraps. Dr. Wyszynski testified that a nest with acorns was found in a bedroom wall, and Terry Bragg testified that when he was asked to investigate a sound in a wall, he found an acorn in a heating pipe that caused noise. However, the house had been there since the 1960s, and it is unknown how long either of those items had been there. There is no evidence that any mice were present in the house at any time after the discovery of the one mouse. There was no ongoing problem of a rodent infestation.

On September 18, 2014, Ms. Thayer emailed Dr. Wyszynski to see if it was acceptable for her to come that weekend to do some gardening, and she also asked if she could show the interior of the house to a friend when she came. He gave permission for both in a return email.

The July 30th repair was apparently insufficient to stop the leak. Terry Bragg put more sealant on the roof on October 14th, but told Dr. Wyszynski he didn't know "how well it would solve the issue because the flashing is mangled." When Dr. Wyszynski reported this to Ms. Thayer, she responded within 17 minutes, "I'll call him tonight. I thought he fixed the flashing. I would prefer to have it fixed for good as winter and melting snow are not far off. . . I'll let you know what he says."

By October 23, 2014, the kitchen ceiling leak recurred. Dr. Wyszynski emailed that it had "been dripping since I've been home." The Thayers called Terry Bragg again, who came back and took off shingles and roofing materials around the chimney and discovered that water had come down along the chimney and there was some interior rot and that repairs had previously been done but poorly during the prior owner's tenure. Terry Bragg is a contractor who does primarily renovation work. While he had done some roofing work earlier in his career, it was not part of the type of work he normally did as a renovation contractor. He removed rot and replaced plywood and shingles.

On November 4, 2014, Dr. Wyszynski sent a photo showing that water was still leaking in at the roofline next to the chimney in the kitchen and dripping to the floor. The Thayers called Terry Bragg again, who returned and suggested to them that they pursue other efforts to correct the problem, as it could be either a chimney leak or serious roof leak that was beyond the scope of the work he did. The Thayers arranged for a chimney contractor to come and repair the chimney, which occurred during the month of November. The Thayers spent $2,500 on rebuilding the chimney.

On November 25, 2014, Ms. Thayer emailed Dr. Wyszynski as follows: "Just checking to see if there has been any leaking water from the roof. As soon as we are sure this has been fixed, I'll ask Terry to mend the ceiling in the kitchen." Dr. Wyszynski responded, "I haven't been home when it has rained so I have no idea. Seems dry but I'll keep you posted." Ms. Thayer responded, "Let us know if the leak reappears."

The parties' lease required the landlords to give at least 24 hours notice of any inspection visit to the property. On two occasions during the fall, Dr. Wyszynski returned home to find footprints on the stairs, once inside and once outside the house. On both occasions, he contacted the Thayers to ask if they had been there. Regarding the inside footprints, Ms. Thayer responded that she had been there with a service person, apparently without advance notice. With respect to the prints on the outside stairs, Ms. Thayer had no knowledge. The Thayers kept a house key hanging on a nail in plain sight outside the door. Dr. Wyszynski specifically requested that the key be removed and only made available when permission had been given for entry by someone such as a service person for a planned appointment. Dr. Wyszynski was clearly attentive to when people entered his home and wanted to make sure it was with permission.

In early December, there were several email exchanges between the parties concerning snowplowing, but no mention of further incidents of leak in the kitchen until December 10th, when Dr. Wyszynski wrote, ". . .still water getting through. Only saw one drip on floor but you can see the collected drops on the brick at the roofline." The Thayers called Terry Bragg to come back, which he planned to do December 18th.

On December 22, 2014, all three parties met by chance at a restaurant in Hanover. Dr. Wyszynski told them that the roof leak was continuing. They discussed the circumstance that it seemed to happen when there was a significant rain. The weather forecast was for significant rain on December 24th. Ms. Thayer asked if it would be all right if they came into the house both before and after the rain to inspect, and he stated that he was going to be away and gave them permission to do so.

They visited the house on either December 24 or December 26. It is unclear what they saw. Mr. Thayer testified that he observed moisture where the brick work met the ceiling. Ms. Thayer testified that she does not believe they saw water. The evidence does not establish whether their visit was before or after the rain that occurred on December 24, which is strange as the purpose of the visit was to observe the condition before and after rain.

On December 27th, the Thayers had house guests. They wanted to show the treehouse to these guests. Ms. Thayer knew that Dr. Wyszynski was away. She telephoned him to say she wanted to do so and did not reach him. She left a voice mail message that she wanted to show the house to friends and assumed that it would be okay with him. She received no response. Twenty minutes later, the Thayers, their daughter-in-law, and the daughter-in-law's parents all entered the house.

They spent 22 minutes going throughout the house, including bedrooms and bathroom and upstairs and downstairs. The Thayers showed off their renovations, and at least once a cupboard door was opened by one of the visitors. Unbeknownst to the Thayers or their guests, Dr. Wyszynski had installed a motion camera, and their entire visit was captured on video. Although it is possible that at some point during the tour and visit, Mr. or Ms. Thayer looked up at the kitchen ceiling, that was clearly not the purpose or focus of the visit. It may have been the original basis on which they planned to enter the property, but it is not what they actually did. Neither of the Thayers could testify at the hearing about what they saw at the leak site on that day. The five people in the house did not stay together as a group. People wandered around the house, including going in and out of the bedrooms and bathroom, sometimes in pairs or small groups, and sometimes on their own. They chatted and looked at what interested them, as was apparent on the video when someone casually opened a cupboard door and looked inside. The tone of the conversation they maintained throughout the visit was that of admiring the house and engaging in social conversation, as at an open house.

When Dr. Wyszynski discovered the voicemail and saw the video of the visit to his home, he sent a prompt email: "Guided tours of the house aren't acceptable. At all. In any way. Ever."

The lease provided at ¶ 10: "The Landlord or his agent shall be permitted during the term of this lease to visit and examine the premises at any reasonable hour of the day, upon reasonable notice of no less than 24 hours to the Tenant." There was no basis at all for the Thayers to infer from any prior conduct of Dr. Wyszynski that he waived his right to exclusive possession and privacy of the premises throughout the term of the lease. On the occasions when he suspected someone had been there, he specifically contacted Ms. Thayer, and when he found out that

unpermitted visits had occurred he clarified that he did not wish a key to be made available to anyone unless there had been a prearrangement for a visit. The permission for a visit around December 24th was to the Thayers only and for the specific limited purpose of checking the leak that was in the kitchen ceiling related to rain forecast for December 24th. The visit on December 27th was a serious invasion of privacy and an egregious violation of Dr. Wyszynski's right of exclusive possession.

There were no communications in evidence from the Thayers to Dr. Wyszynski about the condition of the leak site between December 27th and January 8, 2015, despite the fact that inspection of the leak site was the purpose of the two visits around December 24 for which permission had been given.

On January 8, 2015, Dr. Wyszynski gave notice by both email and first class mail that he was withholding rent on grounds of lack of habitability because of the continuing water leak in the kitchen. The notice also referred to the unauthorized visit on December 27th.

The Thayers contacted Dr. John Lawe, the Norwich Town Health Officer, who came to the house to meet with the Thayers and Dr. Wyszynski and Terry Bragg on January 19, 2015 to review habitability issues. Dr. Lawe asked Dr. Wyszynski to identify all the problems he found with the house, and Dr. Lawe inspected the property in relation to all of them. There had been a heavy rain the day before his visit. Water was leaking down the chimney brickwork.

Following the visit, on January 22, 2014, Dr. Lawe sent a letter to Mr. Thayer in which he described the results of his inspection.

The primary issue was the leak in the kitchen where the ceiling and chimney joined. Dr. Lawe noted wet areas on the floor near the chimney and noted that there had been a heavy rain storm the day before. He also observed that the sheetrock ceiling had been removed and there was staining on the brick work below the opened ceiling. He did not inspect directly but believed "that the staining may well be localized mold." In testimony at trial, he identified the spot as a place where mold might grow, as mold needs moisture to grow and he observed moisture, but he could not say that mold was present. In his letter he noted that the owners had made repeated efforts to locate the source of the leak and attempted several repairs, "none of which have fixed the problem." He commented that the structural problem "clearly needs to be corrected," and that "continued moisture will encourage mold growth." "I would suggest obtaining a second opinion from some contractor experienced in roof problems. This should occur by early spring this year."

On other issues identified by Dr. Wyszynski during the visit, Dr. Lawe stated the following:

Interior wrought iron hand rail. He recommended correcting a wobble within a couple of weeks, which was done.

Rodents. He saw no evidence of mouse droppings in the kitchen and boiler rooms. He suggested a contractor re-inspect for possible sites of entry and another visit from the pest controller and mouse traps.

Wooden steps outside. The lowest handrail was loose. "Nailing may provide an immediate fix, but more extensive repair may be needed in the spring."

He also made suggestions about replacing smoke detectors and checking electrical outlets. These items were resolved and are not at issue in the case.

In his final paragraph, he stated, "In general the house was bright, clean and attractive and well maintained by the tenant. I believe that most of the problems examined can be readily repaired, although the roof leak clearly poses a challenge to resolve."

He sent another letter on February 6, 2014 in which he concluded that the premises were habitable. (The court is not relying on Dr. Lawe's conclusion, but is making its own findings on the issues of habitability. See below.) He wrote, "In my opinion the house is habitable. The basic structure appears sound and the major systems, water, sewer, hearing, ventilation, kitchen, bathrooms etc all appear to be functional and in good repair. . . . As detailed in my letter of 22 January, 2015 I noted several minor problems, which should be addressed. Apart from the missing smoke detectors. . .it is my opinion that the other problems do not constitute a significant health hazard."

Later in February, the Thayers filed this action seeking eviction and unpaid rent on grounds of nonpayment of rent. Dr. Wyszynski counterclaimed on grounds of breach of the warranty of habitability, breach of quiet enjoyment, breach of lease, retaliatory eviction, and consumer fraud. Beginning with the January rent, he made the monthly rent payments of $2,000 to his lawyer who held the funds in escrow pending the outcome of this lawsuit. The lease also called for the tenant to pay quarterly water bills. When a water bill became due, Dr. Wyszynski paid the amount into his lawyer's escrow account.

After the January visit from Dr. Lawe, the Thayers contacted their insurance company, which sent a representative to the home for an inspection. They also contacted Action Construction Company, which did roofing work. In March, Action replaced the portion of the roof that surrounds the chimney for a distance of approximately 12 feet. The work cost $900. A follow-up visit by Action took place on April 7, 2015 after a heavy rain, at which time the Action roofer determined that the new roof was tight and the problem was solved. Terry Bragg happened to be there that day working on interior work that needed to be done as a result of prior leaking.

There was no more leaking after the completion of the roofing job and follow-up inspection on April 7th. In May, Dr. Wyszynski resumed making rental payments directly to the Thayers. On May 15th, Terry Bragg returned to complete the work of patching the hole in the kitchen ceiling following the roofing work.

The court finds that the leak created circumstances that carried the potential for the growth of mold which would be serious if it occurred, but there is no proof that there was actually any mold except for perhaps the first day Dr. Wyszynski moved in. Although water leaked from where the ceiling joined the chimney, over the course of the tenancy it occurred only occasionally when there was significant rainfall. By December 10th, there was one drip on the floor and collected drops at the roofline, so the size of the leak was not significant. It occurred in the kitchen in a heated house in winter, indicating circumstances consistent with drying conditions that could prevent sustained moisture. The notice to the landlords on December 22nd took place as a result of a chance encounter and not as a specific act of giving notice of a habitability problem. Dr. Wyszynski testified that living in the house was possible, and he did so, and declined several opportunities to be released from the lease.

With regard to snowplowing, Dr. Wyszynski claims breach of the lease based on lack of snowplowing the driveway all the way up to its highest point. The lease states at ¶ 6: "The Landlord shall, at his/her own expense: . . .Provide or pay for snow removal on the driveway. Tenant is responsible for removal of snow & ice from stairs and walkways that are commonly used by tenant, his family, tenant guests, delivery and service personnel and the Landlord and his representatives. Tenant is responsible for keeping snow away from the door to the outside storage shed so that the oil tank can be accessed at any time."

The property is on a hillside with a steep driveway. As the driveway approaches the lower part of the house, there is a lower "mezzanine" flat area for parking, with a set of wooden steps leading from there up to the front of the house. A spur of the driveway continues on up to an upper level which has a smaller area for parking and is on a level with the back door of the house. Ms. Thayer testified credibly that at the beginning of the lease, she pointed out to Dr. Wyszynski, while on the property, that plowing was done only to the mezzanine level, as it was too steep to plow up the spur. Dr. Wyszynski acknowledges that Ms. Thayer may have pointed that out while they were on the property. The lease refers to "the stairs leading from the parking spots to the house," indicating the location of the parking area, which it is reasonable to expect would be plowed, and it was plowed. During the term of the lease, Dr. Wyszynski wanted plowing to extend up to the upper level, and he had other complaints about the plowing. The Thayers attempted to accommodate him, but the plowing contractor declined to extend plowing. In fact, Dr. Wyszynski had a 4-wheel drive vehicle and stated that despite the upper spur not being plowed, he was able to drive to the upper level every day during the winter except once.

Dr. Wyszynski also wanted extra parking spaces to be plowed out at the base of the driveway next to Turnpike Road for guests. The Thayers had planned to make that available, but the necessary work could not be done before winter, and this area was not plowed during the winter. Under ¶ 4 of the lease relating to Tenant's responsibilities, "the Tenant shall: Keep not more than 4 vehicles on the premises without the written permission of the Landlord." There is nothing in the lease that guarantees the Tenant a particular number of parking spaces or the parking spaces that he wished to have plowed over the winter. The plowing that was done provided him with reasonable and sufficient parking during the lease term as required by the lease, except for one incident when the plower left a pile of snow inappropriately in the middle of the driveway. It was a single incident in early December that did not recur.

He argues breach of lease on the grounds that the lack of plowing to the upper level forced him to use the flight of front wooden steps, which were unsafe. It is true that the wooden steps were old and were subsequently replaced. Dr. Lawe wrote on January 22, 2015: "The upper hand rails appear sound while the lowest is loose and probably has come away from its support. Nailing may provide an immediate fix, but more extensive repair may be needed in the spring. The steps appeared sound and level and I am not aware that uneven heights would be a health violation in a garden structure." Dr. Wyszynski repaired the loose handrail himself without complaint.

The lease provided as follows: "We understand, and you acknowledge, that the stairs leading from the parking spots to the house are in sub-optimal state of repair. You are using them at your own risk. Be careful! Please take care when you are using them." Dr. Lawe had been asked to look at the steps and did not note loose steps. During the lease term, Dr. Wyszynski did not make an issue of the stairs, and he did not rely on it as a basis for his claim of lack of habitability. His testimony was that except for once, he was always able to drive up to the upper level, and he used the upper door. A video that is in evidence shows loose boards on a step, but the video was made in the spring of 2015, after snow season. There is no evidence that the Thayers were ever given notice of loose steps between the time of Dr. Lawe's inspection and the time of the video showing loose steps. Dr. Wyszynski has not proven breach of contract or damages with respect to the condition of the stairs.[1]

Dr. Wyszynski left at the end of the lease term. The Thayers retained the $2,000 security deposit pending the outcome of this lawsuit. There were no other grounds for deductions from the security deposit. The sum of $8,076.39 remains in Dr. Wyszynski's lawyer's client trust account, representing withheld rent for January through April plus the water bill, to be awarded as a result of this decision.

Conclusions of Law

The residential lease between the parties is subject to the requirements and terms of Vermont's Residential Rental Agreements Act, 9 V.S.A. § 4451 et seq. It is undisputed that Dr. Wyszynski did not pay rent and the water bill in the total amount of $8,076.39. The Plaintiffs' entitlement to the unpaid rent and water bill depends on whether there are any offsets based on resolution of Dr. Wyszynski's counterclaims.

Habitability

Dr. Wyszynski first seeks a right to have withheld rent for four months because of issues with habitability of the leased premises. 9 V.S.A. § 4458 states the law for withholding rent because of habitability issues and provides that:

[1] The condition of the stairs was not relied on as a basis for breach of habitability and moreover there is insufficient factual basis for doing so. Because the court finds that the condition of the stairs does not support Plaintiff's claim for breach of contract, the court takes no position on whether the lease term attempting to shift responsibility for consequences of use of the stairs to the tenant is enforceable as a matter of public policy. It is unnecessary to do so.

> (a) If the landlord fails to comply with the landlord's obligations for habitability and, after receiving actual notice of the noncompliance from the tenant, a governmental entity or a qualified independent inspector, the landlord fails to make repairs within a reasonable time and the noncompliance materially affects health and safety, the tenant may:
> (1) withhold the payment of rent for the period of the noncompliance;
> (2) obtain injunctive relief;
> (3) recover damages, costs, and reasonable attorney's fees; and
> (4) terminate the rental agreement on reasonable notice.

In Vermont, "the warranty of habitability covers all latent and patent defects in the unit's essential facilities, i.e., those that are vital to residential life." *Willard v. Parsons Hill P'ship*, 2005 VT 69, ¶ 14.

The primary habitability issue alleged by Dr. Wyszynski is the leak in the kitchen at the roofline. As found above, there was a periodic, small leak into the kitchen ceiling and down the chimney when it rained. Occasionally, this would lead to water accumulation on the ceiling and on the floor, and there may have been some minor mold around the leak in July of 2014. Dr. Wyszynski gave notice that he is susceptible to allergies brought on by mold.

There is no dispute that a leak which allows water to invade the house creates a risk of mold, which could present habitability issues. See, e.g., *Welsch v. Groat*, 95 Conn. App. 658, 897 A.2d 710 (2006) (room unusable because of growing mold or mildew, described as rot, that fell apart at touch); see also 43 Am. Jur. Proof of Facts 3d 329, § 12, "Landlord's Liability for Breach of Implied Warranty of Habitability." The issue is whether there was mold and/or a leak that constituted a violation of the warranty of habitability and entitled Dr. Wyszynski to withhold all rent until the problem was repaired, or alternatively to a reduction in rent.

There is no evidence that the leak did in fact cause a mold problem which threatened Dr. Wyszynski's health or safety at the time of the withholding, nor was there any indication that the leak had an actual effect on the habitability of the house other than causing inconvenience and annoyance due to the condition of the house not being up to standard. The evidence shows that the landlords' conduct was reasonable in response to the leak. They responded promptly each time Dr. Wyszynski reported the leak and they obtained professional assistance to fix the leak within a reasonable time. The structural problem that caused the leak was not known until each prior attempt to fix the leak ruled out likely causes, and they checked back with him after repairs to see if the problem was fixed. The landlords ultimately fixed the leak by undertaking a substantial structural repair of the roof after first attempting repair by redoing the chimney. Grounds for withholding all rent have not been shown, as there is insufficient proof of both violation of the warranty of habitability and lack of repair within a reasonable time after notice.

On the other hand, the chronic periodic leak represented a condition that was substandard compared to what Dr. Wyszynski intended to rent and what he paid for and what the landlords were obliged to provide. The landlords themselves offered to let Dr. Wyszynski out of the lease because of the leak, which indicates that they recognized that the condition of the property did not meet the intended standards of the lease. Accordingly, the court concludes that Dr. Wyszynski is entitled to reduction in rent of 10% of the rental amount, or $200 per month for

January, February, and March because of the leak. Dr. Wyszynski is not entitled to such a reduction for April, as rent is due on the 8th of each month and the leak was totally fixed as of April 7. However, the ceiling was not repaired until May 15th, so a reasonable reduction from rental for the unrepaired ceiling until May 15th is $100. The total offset against rent due to the leak is $700.

The second habitability issue raised by Dr. Wyszynski is the alleged presence of rodents in the home. As above, the presence of rodents can present habitability issues, if the severity of the infestation is such that it renders the leased premises unfit for human habitation. 43 Am. Jur. Proof of Facts 3d 329, § 11, "Landlord's Liability for Breach of Implied Warranty of Habitability." In this case, however, the court concludes that the evidence of rodents in the home did not show a severe infestation and therefore did not constitute a breach of the warranty. Only one mouse and droppings were discovered and that was in mid-September, which is when mice tend to come inside in preparation for winter in this region. The house was outfitted with bait stations, the landlord called a pest service upon notice of Dr. Wyszynski finding the mouse, and the pest service came within a reasonable time. There is no evidence of an ongoing rodent infestation or any effect on habitability. Accordingly, Dr. Wyszynski is not entitled to either withholding of all rent or reduction in rent because of evidence of mice.

Breach of Quiet Enjoyment/Trespass

Dr. Wyszynski's second counterclaim is for breach of the implied warranty of quiet enjoyment and common-law trespass. This claim is based on the unauthorized bringing of strangers into the house on December 27 for a 22-minute house tour, which resulted in trespassers going through all rooms and opening at least one cupboard.

The implied warranty of quiet enjoyment is breached where there has been "(1) a substantial interference with (the lessee's) use of the demised premises; and (2) . . . (the) interference has been caused by the lessor." *N. Terminals, Inc. v. Smith Grocery & Variety, Inc.*, 138 Vt. 389, 395, 418 A.2d 22, 26 (1980) (citing 2 R. Powell, The Law of Real Property P 225(3), at 273). Common-law trespass is proven by showing an intentional entry onto land in possession of another. Restatement (Second) of Torts, § 158.

In this case, the landlords' presence in the home, with guests, and without the permission of Dr. Wyszynski, constituted a total violation of the covenant of quiet enjoyment and also constituted trespass. Dr. Wyszynski was in exclusive possession of home, had no notice of the landlord's intent to enter, did not give permission for them to do so, and would not have known about the entry but for his suspicions that there had been previous unauthorized entries and his camera. There are no circumstances from which the landlords could have inferred permission to enter the home and bring non-service people for a personal purpose. While the Thayers may have, in fact, inspected the roofline, their entry with guests far exceeded the permitted purpose and was clearly social in nature rather than in keeping with their obligations as landlords. This was a serious invasion of Dr. Wyszynski's privacy, and he is entitled to damages. The court concludes that the egregious nature of the violation warrants damages in the amount of $5,000.

Breach of Lease

Dr. Wyszynski's third counterclaim is that the landlords breached the lease because snow plowing was insufficient.

The court concludes that there was no breach of the lease incident to snow removal. The explicit terms of the lease agreement did not guarantee plowing of the spaces that Dr. Wyszynski wanted to have cleared, nor did they require the landlords to provide snow removal in a manner inconsistent with what is reasonably possible for the layout of the premises. Rather, it can be implied from the lease that the landlord was only obligated to provide snow removal such that Dr. Wyszynski had reasonably sufficient access to the home from the mezzanine parking area, and this was done.

Dr. Wyszynski claims that because plowing was done only to the mezzanine level and not all the way up to the back door, he was forced to use the steps from the mezzanine level up to the house, but he testified himself that he was able to drive up to the top level all the time except once. Being prevented from driving to the top because of snow only once during a winter on a property with a steep driveway is reasonable in Vermont. Additionally, Dr. Wyszynski acknowledged that Ms. Thayer may have pointed out the limits of plowing at the beginning of the lease. Her testimony that she did so is credible. Accordingly, Dr. Wyszynski is not entitled to an offset for breach of the lease.

Retaliatory Eviction

Under the Residential Rental Agreements Act, a tenant may recover damages for retaliatory eviction, which is defined by 9 V.S.A. § 4465:

> (a) A landlord of a residential dwelling unit may not retaliate by establishing or changing terms of a rental agreement or by bringing or threatening to bring an action against a tenant who:
> (1) has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health regulation of a violation applicable to the premises materially affecting health and safety . . .

In essence, proof of retaliatory eviction requires proof of a retaliatory motive for eviction. *Houle v. Quenneville*, 173 Vt. 80 (2001).

In this case, Dr. Wyszynski would be entitled to damages for retaliatory eviction if he were to prove that the landlords brought the eviction case in response to his reporting of habitability or safety issues to authorities. The evidence does not support a finding of retaliatory eviction. While the sequence of events in this case is consistent with a prima facie case of retaliation (that is, Dr. Wyszynski complained and the landlords' subsequently brought an eviction action), the surrounding circumstances do not show bad faith on the part of the landlords. It was the landlords, and not Dr. Wyszynski, who called in the health officer for an independent inspection on habitability issues. The health officer found no major habitability problems, and what problems he did find were promptly corrected by the landlords. Despite the

health officer's conclusions, Dr. Wyszynski continued to refuse to pay rent. The evidence shows that the nonpayment of rent following the health officer's conclusions, rather than the habitability complaints, is what prompted the eviction action.

There was a legitimate dispute over whether or not there was a habitability problem. The landlords had a good faith basis for commencing an eviction action in reliance on the health officer's conclusions that there were no habitability issues. Dr. Wyszynski has not proved that the eviction was brought for a retaliatory purpose.

Consumer Fraud

Finally, Dr. Wyszynski claims that the landlords knew there was a roof leak and rented the property out anyway. He alleges that this constitutes consumer fraud under Vermont's Consumer Protection Act, 9 V.S.A. § 2461(b). Under the case of *Terry v. O'Brien*, 2015 VT 132, ¶ 38, a tenant can state a claim for consumer fraud against a landlord only if they prove that the landlord made a misleading statement about or failed to disclose a defect on the premises of which the landlord knew or should have known.

In this case, Dr. Wyszynski's evidence does not meet the *Terry* standard. The evidence does not show that the landlords knew or should have known about the leak before renting the property to Dr. Wyszynski. The testimony of the Thayers and Dr. Koff that no prior tenant had complained of a roof leak was credible. The circumstantial evidence indicates that the landlords spent over $100,000 renovating the property, including the kitchen, with the intention of living in it themselves as a retirement home, and that they believed that any problems in the home had been fixed by this renovation. They did not learn of the recurrence of moisture at the kitchen ceiling line until after they had rented to Dr. Wyszynski and he had taken possession.

The landlords' email indicating that they thought the leak had been fixed is not a sufficient basis from which to infer that they knew or should have known of an existing leak. Rather, it indicates the opposite: that they in fact believed there was no leak. This inference is buttressed by the fact that the landlords promptly engaged in successive and increasingly expensive attempts to fix the leak, which indicates that they had both the means and the desire to fix it as soon as they became aware of it. Dr. Wyszynski has not proved a claim of consumer fraud.

Summary

The landlords are entitled to $8,076.39 - $700.00 = $7,376.30 in rent. Dr. Wyszynski is entitled to an offset in the amount of $5,000 for breach of the covenant of quiet enjoyment and trespass. Thus the landlords are entitled to $7,376.30 - $5,000 = $2,376.30. They are currently holding $2,000 in security deposit funds, which they are entitled to keep as a credit against the $2,376.30. Plaintiffs are thus entitled to be paid the balance of $376.30 from the funds held in escrow by Dr. Wyszynski's attorney. Dr. Wyszynski is entitled to the remaining balance in his attorney's escrow account. Neither party has shown legal grounds for an award of attorneys' fees. Each party is responsible for their or his own costs.

Order

Plaintiffs' attorney shall prepare a proposed Judgment, which Defendant's attorney shall have five days to review.

Dated at Woodstock this ____day of September, 2016.

____
Hon. Mary Miles Teachout
Superior Judge

____
Hon. Ellen Terie
Assistant Judge