

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-045

AUGUST TERM, 2002

	}	APPEALED FROM:
	}	
Windham Court Partners	}	Windham Superior Court
	}	
v.	}	DOCKET NO. 224-5-01 Wmcv
	}	
Daphanie N. Turner	}	Trial Judge: Richard W. Norton
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Windham Court Partners ("WCP") appeals the Windham Superior Court's denial of a motion to amend its complaint under V.R.C.P. 15, and the court's sua sponte dismissal of the action. We reverse and remand.

According to WCP's complaint, defendant and WCP entered into a written lease agreement for an apartment WCP owns in Brattleboro. By certified letter dated March 15, 2001, WCP notified defendant that she was in breach of several material provisions of the agreement and directed defendant to vacate the apartment on or before April 18, 2001. Defendant did not leave the premises by the date stated in the notice. WCP thereafter filed the present action in Windham Superior Court on May 16, 2001 seeking possession of the premises, any rent arrearages accrued during the pendency of the action, costs, and attorney fees. WCP served the complaint on defendant personally by sheriff on May 25, 2001. On May 11, 2001, prior to filing suit, WCP served defendant with a notice to quit for nonpayment of rent, which the parties agree defendant cured.

Because defendant did not pay rent for July 2001, WCP served defendant with a second notice to quit for nonpayment of rent on July 31, 2001. The trial court docket entries in this matter show that WCP's attorney advised the court on October 2, 2001 that defendant was in the process of moving out of the apartment, and that a hearing on back rent was necessary, but possession was not an issue. On October 12, 2001, WCP moved to amend the complaint to add an allegation that defendant failed to pay rent due from July 1, 2001 to October 10, 2001, and that it had notified defendant of that failure.

Defendant opposed the motion. She argued that the court lacked jurisdiction over the matter because the July 31 notice to quit was served subsequent to the complaint, which was filed on May 24, 2001. She claimed that allowing the amendment would deny her the protection 9 V.S.A. 4467(a) affords her. On October 31, 2001, the court denied WCP's motion and dismissed the action sua sponte. The court's order states:

May 11, 2001 Notice to Quit is not relevant, Court assumes tenant cured under 9 V.S.A. 4467(a). July 31, 2001 Notice to Quit was subsequent to complaint Plaintiff seeks to amend. This notice does not legally serve as a jurisdictional basis for a complaint for ejectment served on May 24, 2001, and cannot "relate back" under V.R.C.P. 15(c).

(Emphasis in original.) WCP asked the court to reconsider its decision, noting that its complaint was based originally on a March 15, 2001 notice to quit for breach of material provisions in the parties' lease agreement. The court denied the motion stating that the case "lack[ed] a lawful notice to quit upon which to base a summons and complaint for eviction." This appeal followed.

WCP argues that dismissal was improper because it complied with the requirements of Title 9, chapter 137 prior to initiating the present action. Under 9 V.S.A. 4467(b), a landlord may terminate a tenancy for a tenant's failure to comply with a material term of a lease agreement by giving the tenant actual notice at least thirty days prior to the termination date specified in the notice. 9 V.S.A. 4467(b). If the tenant remains in the premises after the specified date, the landlord may bring an action in superior court for possession, damages, and costs. 9 V.S.A. 4468. Here, WCP served defendant personally with notice of termination for alleged breaches of several material terms of the rental agreement by certified mail dated March 15, 2001. The notice advised defendant to vacate the apartment on or before April 18, 2001. When defendant did not move out, WCP filed the present suit on May 16, 2001, and served defendant personally with the summons and complaint on May 25, 2001. The March 15, 2001 notice was sufficient to serve as a basis for WCP's complaint. Defendant did not argue that the March 15, 2001 notice was defective before the trial court, and makes no such argument here. In fact, defendant's arguments below and before this Court ignore the existence of that initial notice to quit, which complied with 9 V.S.A. 4467(b). The court's determination that the case lacked a lawful notice to quit upon which to base the May 2001 complaint was therefore error, and dismissal was improper.

WCP also claims the court erroneously denied its motion to amend the complaint to add an allegation that defendant failed to pay rent from July 1, 2001 to October 10, 2001. It appears that the trial court denied the motion due to its belief that dismissal of the case was required. In any event, it was error to deny WCP's motion.

V.R.C.P. 15 allows a party to amend its pleadings with the court's permission where there is no prejudice to the opposing party. Reporter's Notes, V.R.C.P. 15; Bevins v. King, 143 Vt. 252, 254 (1983). Leave to amend must be "freely given when justice so requires." V.R.C.P. 15(a). One rationale for a liberal amendment policy such as ours is to "enable a party to assert matters that were overlooked or unknown to him at an earlier stage in the proceedings." Bevins, 143 Vt. at 255. Although the trial court is vested with discretion to determine whether an amendment should be permitted, "[w]hen there is no prejudice to the objecting party, and when the proposed amendment is not obviously frivolous nor made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny the motion." Id. at 245-55.

In this case, WCP's original complaint sought, among other things, "any existing rent arrearages and rent that may accrue during the time of these proceedings, including penalties, interests, and costs relating to such rents and arrearages." Defendant was therefore on notice that WCP would seek to recover any amounts defendant failed to pay during the pendency of the action. The proposed amended complaint filed in October added a more specific allegation that defendant failed to pay rent from July 1, 2001 to October 10, 2001. It was unknown to WCP at the time of its original complaint that defendant would not pay rent during that period. We fail to see any prejudice to defendant from the proposed amendment, particularly where the original complaint put her on notice that WCP would not waive rent during the action, and where she received notice from WCP about the failure to pay rent through the July 31, 2001 notice to quit for nonpayment. Moreover, WCP's motion came well before trial, which was scheduled for November 1, 2001. Thus, no bad faith or dilatory tactics appear from the substance or timing of WCP's motion. The court therefore abused its discretion by denying WCP's motion to amend.

Defendant argues that the court did not err because the matter was mooted by her move from the apartment. We agree, as does WCP, that WCP's claim for possession of the property was mooted by defendant's move. WCP still has a claim for rent due, however, and for costs and attorney fees. Defendant's vacation of the apartment has no effect on those claims.

Reversed and remanded for further proceedings.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

James L. Morse, Associate Justice

Marilyn S. Skoglund, Associate Justice