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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-152

NOVEMBER TERM, 2002

Northgate Housing Limited	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Maxine Kirkland	}	DOCKET NO. 40-02 CnC
	}	Trial Judge: Mary Miles Teachout

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

Northgate Housing Ltd. appeals from a superior court judgment denying its claim for possession of a leased residential apartment in the City of Burlington. Northgate contends that the court erred in ruling that: (1) the notices to terminate failed to provide a valid basis for possession; (2) the tenant' s failure to pay rent in accordance with an escrow order failed to provide a basis for possession; (3) certain rent owed was de minimus and failed to provide a basis for possession; and (4) it would not reopen the evidence after trial. We affirm.

The pertinent facts may be briefly summarized as follows. Maxine Kirkland rented an apartment in the Northgate Apartments. The written lease required that rental payments be paid on the first of the month and that utilities be maintained in the resident' s name and paid by the tenant. Kirkland became ill and unemployed, and received a rent subsidy under a federal program and general assistance for her other costs. Contrary to the lease terms, the gas and electric utilities were placed in Northgate' s name, and unpaid gas and electric charges began to accumulate.

On September 19, 2001, Northgate mailed a letter to Kirkland notifying her that she was in breach of the lease agreement because the electricity bill was not in her name, and that it intended to terminate the tenancy on October 19. Northgate also placed a notice to this effect under Kirkland' s door on that date. On November 16, Kirkland was $38 in arrears on her rent, and Northgate mailed her letters, and placed a notice under her door, notifying her of its intent to terminate the lease on December 1. On January 3, 2002, Northgate mailed Kirkland two additional termination notices, one for non-payment of rent, and one for breach of the lease term requiring her to maintain the gas utility in her name. These notices were also hand-delivered to Kirkland.

On January 11, Northgate filed suit for possession of the premises for non-payment of rent and breach of the lease agreement. On January 17, Northgate mailed an additional notice of termination for non-payment of rent, and placed a notice to the same effect under Kirkland' s door. A rent escrow hearing was held on February 8, at which Kirkland failed to appear, and a rent escrow order was signed on that date, requiring her to pay rent into court.

A trial on the merits was held on March 6, 2002. At the conclusion of the trial, the court issued oral findings and conclusions. The court concluded that none of the termination notices provided a valid basis for possession. The court found that the first notice for breach of the lease agreement, dated September 19, 2001, had not provided " actual notice" as required by statute because there was no evidence that it was received more than thirty days prior to the stated termination date of October 19 by either of the delivery methods. See 9 V.S.A. § 4467(b) (landlord may terminate lease

for breach of lease agreement " by actual notice given to the tenant at least 30 days prior to the termination date"). The court found, similarly, that there was no " actual notice" of the November 16 notice of termination for non-payment of rent because there was no evidence it had been received by either delivery method fourteen days prior to the stated termination date of December 1. See id. § 4467(a) (landlord may terminate tenancy for nonpayment of rent " by providing actual notice to the tenant of the date on which the tenancy will terminate which shall be at least 14 days after the date of the actual notice").

As to the two notices sent on January 3, 2002, the court found that Kirkland had actual notice of both, since they were both hand-delivered and Kirkland had signed an acknowledgment of delivery. The court further found, however, that the non-payment of rent claim had been obviated when Kirkland paid the overdue rent on January 16, prior to the stated date of termination, and that the notice of termination for breach of the lease agreement had not yet ripened into a valid claim when Northgate filed suit on January 11, prior to the stated termination date of February 3. The court found, similarly, that the final termination notice for non-payment of rent, mailed on January 17, was sent after the filing of the lawsuit and thus failed to provide a valid claim for termination of the tenancy. Absent a valid claim for possession, the court further concluded that there was no valid basis for the rent escrow order.

The court nevertheless concluded that Northgate had established a right to unpaid rent through March totaling $50, as well as unpaid gas and electric bills of $280.33 and $210.79 respectively, plus court costs and fees, and entered judgment accordingly. This appeal followed.

Northgate contends that the court erred in ruling that it was required to demonstrate Kirkland had received notice rather than merely prove that the notices had been mailed or delivered within the required time frames. The governing statute provides that a landlord may terminate a tenancy for nonpayment of rent " by providing actual notice to the tenant of the date on which the tenancy will terminate which shall be at least 14 days after the date of the actual notice." Id. § 4467(a). The landlord may terminate a tenancy for failure to comply with a material term of the rental agreement " by actual notice given to the tenant at least 30 days prior to the termination date specified in the notice." Id. § 4467(b). The statute defines actual notice as " written notice hand-delivered or mailed to the last known address." Id. § 4451(1).

Although, as Northgate argues, the statutes plainly contemplate that notice of termination may be mailed, the full requirement is that " actual notice" be given or provided the tenant, which notice may be " hand-delivered or mailed." The common legal meaning of actual notice is A [n]otice given directly to, or received personally by, a party." Black' s Law Dictionary 1087 (7th ed. 1999). This and other courts routinely use the phrase " actual notice" to signify the actual receipt of notice as opposed to mere " constructive notice," which generally may be established by proof that the notice has been mailed or posted. See, e.g., State v. Chicoine, 154 Vt. 653, 653 (1990) (mem.) (constructive notice of license suspension by mail is sufficient to effectuate suspension " even absent actual notice"); Ault v. Dep' t of Revenue, 697 P.2d 24, 26-27 (Colo. 1985) (en banc) (defining actual notice as " actual receipt, not simply mailing, of the notice"); State v. Kovtuschenko, 521 A.2d 718, 718-19 (Me. 1987) (statute requiring " written notice" required proof only of mailing, not proof of actual notice through receipt); Wells Fargo Credit Corp. v. Ziegler, 780 P.2d 703, 705 (Okla. 1989) (act of mailing does not constitute actual notice, which requires proof of receipt of notice).

Although not without ambiguity, the statutory requirement of actual notice, which contemplates actual receipt " filtered through the statutory definition referring to two delivery methods, hand-delivery or mail " suggests at a minimum that landlords must prove the mailed or hand-delivered notice was actually received at least fourteen days prior to the date of termination for non-payment of rent, and thirty days prior to the stated date of termination for breach of the lease agreement. What proof will suffice to show receipt is not a question we need address here, because the trial court found that Northgate had failed to prove actual receipt and Northgate has not challenged this finding of fact.

The trial court also properly ruled that the claims based on the termination notices of January 3 and January 17 had not properly accrued, as the lawsuit was filed prior to the stated termination dates. The statute provides that " [i]f the tenant remains in possession after termination of the rental agreement . . . the landlord may bring an action for possession." 9 V.S.A. § 4468 (emphasis added). The lawsuit filed on January 11 was therefore premature as to those notices with later termination dates. See Avdich v. Kleinert, 370 N.E.2d 504, 508 (Ill. 1977) (plaintiff landlord was not entitled to possession until after expiration of stated termination date, and therefore could not maintain action to recover possession prior to that time); Hous. Auth. of the City of Newark v. Caldwell, 589 A.2d 1088, 1089 (N.J. Super Ct. Law Div. 1991)

(filing complaint for possession prior to expiration of required termination period means cause of action has not accrued, and court lacks jurisdiction to dispossess tenant).

Northgate contends that the court erred in failing to find a valid basis for possession based on the failure to abide by the escrow order. The court correctly ruled, however, that absent a valid claim for possession, the escrow order for payment of rent was unenforceable. Nor did the court err in finding that $6.00 in unpaid rent (the actual month for which this amount was due is unclear) was de minimus and failed to provide a basis for possession.

Finally, Northgate contends that the court erred in refusing to reopen the evidence to allow it to show that Kirkland had refused to accept certified letters. Northgate offered no persuasive explanation as to why it had failed to adduce the purported evidence during the trial, when it was afforded ample opportunity to do so, and we therefore find no basis to disturb the court' s ruling. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588-89 (1996) (standard of review of court' s decision to reopen evidence after trial is abuse of discretion).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice