

STATE OF VERMONT

SUPERIOR COURT  
Orange Unit

CIVIL DIVISION  
Docket No. 270-12-09 Oecv

Robert Hepburn  
Plaintiff

v.

Jamie & Heather DeForge  
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

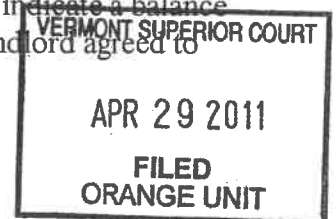
The above-matter came on for trial on April 25, 2011. The parties were present and represented by their counsel of record, John Nicholls Esq. for the Plaintiff and Michael Monte, Esq. for the Defendants. Based upon the evidence presented, the Court makes the following findings, conclusions and order:

Findings of Fact

Plaintiff leases a lot to Defendants located at 84 Garden St. Williamstown. Defendants own a mobile home which they have on this lot. There is a written lease agreement (P. Ex. 1) requiring Defendants to pay \$315 monthly for lot rental. The lease is titled as a residential lease agreement, but the mobile home is fully owned by Defendants. There is an addendum to the lease agreement requiring landlord to pay for 36 units of water and sewer per year. The lease and the addendum were signed November 4, 2006, for a period ending September 30, 2011. There is no evidence before the Court that the Plaintiff is operating a mobile home park as that term is defined in 10 V.S.A. §6201.

The written lease provides a 30 day grace period before the tenant is considered in default for non-payment of rent (Section 3). The lease also provides for the tenant to indemnify the landlord for attorney's fees in the event of failure of tenant to comply with the terms of the lease (Section 15). The lease also contains an arbitration provision which neither party has sought to enforce (Section 18).

The Town of Williamstown charges a flat fee for each water/sewer connection and bills additional "units" based upon usage. Plaintiff receives a bill for water/sewer in his name for his premises located at 54 Garden Street and for the rental lot located at 84 Garden Street. The parties are in disagreement about the amount of water and sewer charges owed by the Defendants to Plaintiff. In August of 2007 or 2008, Defendants paid Plaintiff \$180 in cash toward the sewer bills. Plaintiff's records of the water/sewer usage (P. Ex. 2) indicate a balance due to Plaintiff of \$1438.07, net of the \$180 cash payment and the 36 units landlord agreed to



pay under the lease. This written reconciliation is dated April 23, 2011. There is no written evidence of prior attempts to reconcile disputed water/sewer billings and no evidence that tenants knew the amount of water/sewer billing being claimed by Plaintiff prior to the date of Plaintiff's letter reconciling the prior usage and billings.

In December 2009, Plaintiff filed suit seeking ejectment based upon non-payment of rent. The notice of non-payment was dated October 26, 2009 for non-payment of the October 2009 rent. The notice claimed past due rent for October 2009 of \$315 (Def. Ex. A). Plaintiff had sent a number of prior notices of non-payment and violations of the lease to Defendants. Apparently the rent and other violations were cured by Defendants as no suit was brought on those notices.

On several occasions since this action was filed, Defendants have brought themselves current with the past-due rent. The most recent of these was on the day of the hearing when \$630 was paid into Court. The notice of termination for non-payment of rent of October 26, 2009 was the last notice provided to Defendants. There has never been a notice to terminate based upon the failure to pay water/sewer charges.

The Court is currently holding \$1890 in rent paid in escrow into the Court. It is not disputed that this money is owned under the rental agreement. These monies were paid on February 14, 2011 in the amount of \$1260 and on April 25, 2011 in the amount of \$630. Rent is current at the present time.

#### Conclusions of Law

This is an action for ejectment brought for non-payment of rent for a mobile home lot. As such, the provisions related to evictions in Title 12 V.S.A. apply to this action. 10 V.S.A. § 6204(c).

A prerequisite to a successful eviction action is valid termination of the lease. *Andrus v. Dunbar*, 178 Vt. 552 (2005) (mem.). Here, the lease provided that tenant would be in default of the lease if he had failed to pay the rent within 30 days of the date it was due. Under those terms, the rent for October 2009 was due, at the latest, on October 30, 2009.

Here, the landlord filed a notice to terminate the lease for non-payment on October 26, 2009, alleging only that the October rent was due. At the time Plaintiff sought to terminate the lease the Defendants were not in default of the lease agreement because Defendants were still within the grace period. Their subsequent default does not retroactively turn the notice to terminate into a valid one, otherwise a landlord could preemptively file notices of termination without existing breach. Simply stated, whatever their past course of dealing was, the Plaintiff here sought to terminate this lease and evict Defendants by giving them a notice to terminate for non-payment when they were not in default under the lease. Once the Defendants went into default on the lease, no termination notice was given.

An action for ejectment may be defeated only once every twelve months by the payment of rent into court. 12 V.S.A. § 4773. However, here the action is not being defeated by multiple payments of rent into Court. The action fails here because the notice was improperly given. Had

the Plaintiff given proper notice of termination, i.e., the Defendants were in breach of the rental agreement when notice given and then filed suit, the Defendants could have defeated the ejectment action only once within a twelve month period by paying up the past due rent. The multiple "cures" by Defendants here do not count for purposes of 12 V.S.A. § 4773 because the lease was not properly terminated.

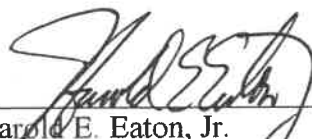
There is no dispute that the monies paid into Court by Defendants are owed under the lease agreement. Accordingly, those sums shall be disbursed to Plaintiff in payment of Defendants' rent obligation.

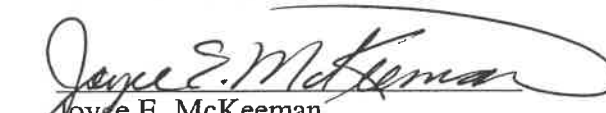
Nothing in this decision impacts Defendants' obligations to make water/sewer payments as they are obligated to do under the lease agreement or Plaintiff's ability to seek termination of the lease agreement and ejectment based upon Defendant's failure to do so (which has not been sought at present) or other breach of the lease agreement.


Order

Plaintiff is entitled to the escrowed funds being held by the Court. Defendants are entitled to judgment in their favor. A separate judgment order shall issue pursuant to V.R.C.P. 58.

Dated at Chelsea this 29 day of April, 2011.

  
Harold E. Eaton, Jr.  
Superior Court Judge

  
Joyce E. McKeeman  
Assistant Judge

  
Victoria N. Weiss  
Assistant Judge