

STATE OF VERMONT
COUNTY OF CALEDONIA

VERMONT SUPERIOR COURT
DOCKET NO. 66-2-08 Cacv

Moose River Housing Ltd. Partnership

v.

Denise Taylor and Jason Dupell

FILED
JUN 17 2008
CALEDONIA COURTS

Decision on Cross Motions for Summary Judgment

The plaintiff, Moose River Housing Ltd. Partnership, has moved for summary judgment asserting breach of the lease agreement by failure to pay rent and failure to vacate the apartment defendant's lease from the plaintiffs as stated in the notice to quit. Defendants opposed the plaintiff's summary judgment motion and moved for summary judgment on their own behalf, alleging insufficient notice and waiver of termination due to subsequent amendment. Plaintiff has not filed a responsive pleading to Defendants' summary judgment motion.

Discussion

In plaintiff's statement of uncontested facts, plaintiff asserts that defendant received a notice to quit the premises for nonpayment of rent dated December 19, 2007. Plaintiff alleges this notice was received via certified mail. No proof of receipt was attached to plaintiff's pleading papers.

In opposition, defendants state that the Notice to Quit was never received and that the certified mail was returned. Defendants have attached a copy of the post office's efforts at delivery, which supports their contention. Plaintiff has not filed any opposing statement of facts in opposition to defendant's motion for summary judgment with respect to the non-delivery of the Notice to Quit.

In addition, defendants received a notice of rent adjustment dated April 30, 2008. The Notice of Rent Adjustment states "this notification amends your lease agreement, which sets forth the amount of rent you pay each month." This rent adjustment resulted in a decrease in defendants rent to \$233 per month from \$567 per month which had been the previous amount. On March 24, 2008, the court issued a rent escrow order for \$567. Following the Notice of Rent Adjustment, the parties agreed to a modification of the rent escrow order to \$233 month and a modified order was signed on May 12, 2008.

Plaintiff does not dispute that the rent adjustment letter was sent to defendants.

Conclusions of Law

Summary judgment is appropriate where the moving party establishes that there's no genuine issue of material fact and that party is entitled to judgment as a matter of law. In determining whether a genuine issue of fact exists, the non moving party receives the benefit of all reasonable doubts and inferences. *Samplid Enterprises, Inc. v First Vermont Bank*, 165 VT 22 (1996).

A writ of ejectment is proper when a person holds possession of the demised premises without right after the termination of the lease. 12 VSA §4851; 9VSA §4468. For plaintiff to eject the tenant, the lease must be at an end. *Andrus v Dunbar*, 178 VT 554 (2005).

In order to terminate a residential rental agreement, such as the one involved here, a landlord must provide actual notice to the tenant at least 14 days prior to the date of the termination of the tenancy. 9 VSA §4467(a). Here, defendants dispute that actual notice was received. This is a

material fact in the validity of the termination of the lease and consequently in the plaintiff's efforts at ejectment.

Where there are disputed issues of material fact, summary judgment is inappropriate. *State Environmental Board v Chickering*, 155 VT 308 (1990). Because the actual notice for termination of the lease is disputed, and because such notice is a material fact, plaintiff's summary judgment motion must be denied.

Plaintiff has not filed an opposition to defendants' Motion for Summary Judgment.

Consequently, the statement of facts which plaintiff controverts as required by VRCP 56 (c) has not been filed. Thus, in considering defendants' motion, it is uncontroverted that defendants' did not receive actual notice as required under 9 VSA §4467 (a). Because the lease was not validly terminated, defendants are entitled to summary judgment based on the notice issue. *Andrus v Dunbar*, 178 VT 554 (2005). As the right of ejectment must necessarily follow the valid termination of a lease agreement, where the lease agreement is not validly terminated, no right of ejectment is available. *Andrus v Dunbar*, 178 VT 554 (2005). Here the lease was not validly terminated by the plaintiff due to shortcomings with notice and therefore defendants are entitled to summary judgment.

Defendants further suggest that the April notice concerning modified rent would serve to extend the lease in this instance. Although not dispositive to the summary judgment motions, the Notice of Rent Adjustment here, although perhaps inartfully worded, is significantly different than the multiple notices to quit filed in *Andrus*. Here the Notice of Rent Adjustment was sent long after

the attempted date of termination in the un-served Notice to Quit. On the contrary, in *Andrus*, multiple Notices to Quit were sent with conflicting dates. The second notice was sent before the termination date in the initial notice. This allowed for confusion in the mind of the tenant as to the correct ending date for the tenancy.

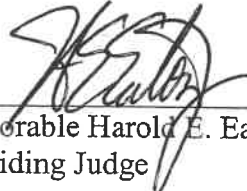
The notice of Rent Adjustment here did not create similar confusion. By the time the Notice of Rent Adjustment was sent, defendants were aware of the efforts at eviction, had filed an answer to the complaint and had a rent escrow hearing.

Accordingly the court does not hold the subsequent efforts at amending the rent, which served to work in defendants' monetary favor, would constitute a waiver of the lease termination had notice been otherwise proper. Whether such would be the case had the landlord sought to increase monthly payments is not before the court.

Order

For the reasons stated herein, plaintiff's Summary Judgment Motion is DENIED and defendants' Motion for Summary Judgment Motion is GRANTED.

Dated at St. Johnsbury, Vermont in Caledonia County this 16th day of June 2008.



Honorable Harold E. Eaton, Jr.
Presiding Judge