STATE OF VERMONT

SUPERIOR COURT Windsor Unit	CIVIL DIVISION Docket No. 698-11-13 Wrcv
CHRISTOS PANAGIOTIDIS, HRISANTHI PANAGIOTIDIS, Plaintiffs v. ALEXANDROS GALANIS and other occupants, Defendant	

DECISION

DEFENDANT'S MOTION FOR A STAY

By order dated June 26, 2014, this court found that defendant, the tenant of plaintiffs' commercial property in Hartford, Vermont, had failed to pay rent and was in breach of the parties' lease agreement. On July 9, 2014, plaintiffs were issued a writ of possession. Prior to its execution, defendant filed a notice of appeal and moved for a stay pending disposition by the Supreme Court.

This court granted a temporary stay to allow the parties to be fully heard on defendant's motion. At this time, the motion has been fully briefed, oral argument was heard on August 19, 2014, and, for the reasons explained more fully below, the court will extend its stay of the execution of plaintiffs' writ of possession, pending final disposition of defendant's appeal.

Rule 8(1)(A) of the V.R.A.P. requires that when, as here, a stay is not automatic, a party must move first in the superior court for a stay of the judgment or order during the pendency of any appeal. It is well settled that "[t]o prevail on a motion for stay, the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995).

In defendant's motion for a stay, the primary ground set forth to establish his likelihood of success on the merits is an allegation that the court erred in determining that plaintiffs provided proper notice of defendant's breach.[1] As was previously set forth by this court, the

[1] In their opposition to defendant's motion, plaintiffs correctly contend that defendant did not challenge the notice received in either his answer or counterclaim. However, this does not mean defendant waived any defense related to the lease agreement's notice provisions. Defendant, through counsel, alleged the notice was deficient

terms of the lease require that written notice of a breach be given and that the breaching party have ten days to cure from receipt thereof. The lease further lists the names and addresses to which notice should be sent, and states that notice shall be deemed given when sent by certified mail, return receipt requested. This court recognized that plaintiffs' notice was not sent directly to defendant by certified mail, return receipt requested, but went on to discuss how defendant had expressly declared his intent to breach the lease, and found that this act, combined with the notices plaintiffs did provide, left defendant with more than adequate knowledge that the ten day period to cure his breach had been triggered.

The "general rule around the country" is that notice provisions which impose certain technical requirements "should not be strictly enforced where the party seeking enforcement had actual notice and cannot show prejudice as a result of the failure to follow the technical requirements." *In re Soon Kwon*, 2011 VT 26, ¶ 14, 189 Vt. 598 (mem.). In the *Soon Kwon* matter, the Supreme Court departed from this "general rule," as the specific statutory schemes at issue, related to residential lease agreements and the return of security deposits, demonstrated a legislative intent that there be "punctilious compliance" with the statutes' notice provisions. See *In re Soon Kwon*, 2011 VT 26, ¶¶ 15-19 (quotation and citation omitted) (referring to 9 V.S.A. § 4461(e) and a related local ordinance as "consumer protection provision(s)" that explicitly set forth a method of notice delivery and provided a consequence for failing to comply). The cases cited to in support of this exception from the "general rule" involved jurisdictions which had also adopted statutory notice provisions in the context of actions related to residential leases. See *id.* at ¶ 14 (citing *Weise v. Dover Gen'l Hosp. & Med. Ctr.*, 608 A.2d 960, 963 (N.J. App. Div. 1992); *Jones v. Brawner Co.*, 435 A.2d 54, 56 (D.C. 1981); *American Mgmt. Consultant LLC v. Carter*, 915 N.E.2d 411, 428 (Ill. 2009)).

Here, there are no statutory schemes to consider—the notice provisions at issue are contractual, the lease involves commercial property, and, indeed, the statute which provides plaintiff with an action for ejectment does not itself require that notice be provided to a tenant. See 12 V.S.A. § 4773. Under these circumstances, one may be justified in distinguishing the *Soon Kwon* matter and applying the well-established "general rule" outlined above. However, in a more recent case, the Supreme Court, citing to *Soon Kwon*, indicated its opinion that "[t]here is no reason to require less 'punctilious compliance' with terms of a lease providing for notice in the nonresidential context." *Vermont Small Business Development Corp. v. Fifth Son Corp.*, 2013 VT 7, ¶ 15, 193 Vt. 185. The Court also espoused the previously applied standard that "'[i]n Vermont, when a lease expresses an agreement with regard to notice of termination, the time, mode and manner of such notice must conform to the agreement.'" See *id.* (quoting *Deschenes v. Congel*, 149 Vt. 579, 583 (1988); citing *Archambault v. Casellini-Venable Corp.*, 115 Vt. 30, 32 (1946)).

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at the merits hearing on the underlying action. Accordingly, this court addressed the issue in granting plaintiffs partial judgment and rejecting defendant's counterclaim. Rule 12(h)(2) of the Vermont Rules of Civil Procedure provides that the defense of failure to state a claim upon which relief can be granted—which is implicated by the alleged notice deficiency—may be raised and thereby preserved "at the trial on the merits." The hearing held in this matter and the court's partial adjudication "was tantamount to a trial on the merits." *171234 Canada Inc. v. AHA Water Co-op., Inc.*, 2008 VT 115, ¶ 18 184 Vt. 633.

This court notes, though, that while the Supreme Court used the "punctilious compliance" language in the context of nonresidential leases, the dispute at issue in that case was much more one of substance, particularly when compared to the true matters of punctilio raised here. To wit, the *Fifth Son Corp.* matter involved a lease that required any notice of termination to specify a date of termination "at least twenty (20) days after the giving of such notice." *Fifth Son Corp.*, 2013 VT 7, ¶ 16. The landlord provided notice that was completely silent as to a date of termination and the Court rejected his argument that it should be "assumed" to be twenty days. See *id.* More substantive matters were also at issue in the above-cited cases of *Deschenes* and *Archambault*. Specifically, in *Deschenes*, the lease required that in order for it to be terminated by the tenant, he had to provide written notice of termination and payment of rent up to the termination date; the Court held that while the tenant provided written notice, his failure to also continue with paying rent was fatal to any right to terminate. See *Deschenes*, 149 Vt. at 583-584. In *Archambault*, the Court addressed a lease which required three months' notice of termination, and refused to uphold a "so-called notice" in which the landlord informed his tenant that he "may wish to have [him] vacate the ... property." See *Archambault*, 115 Vt. at 32.

Here, defendant admits he was on actual notice of his breach of the lease agreement—in fact, the notice of breach sent by plaintiffs was only precipitated by defendant's declaration, through counsel, that he would no longer be paying rent. Unlike the above-cited cases, it is not necessary for the court to draw any assumptions from or read terms into plaintiffs' notice. Defendant's sole basis for arguing that plaintiffs' notice was defective is that it was sent as a response to his attorney, rather than directly to him, and that it was not sent by certified mail, return receipt requested. This situation, which presents no prejudice to defendant, appears to be one in which the "general rule" of not adhering to strict compliance would apply. However, if the Supreme Court's "punctilious compliance" standard applies to the minutia at issue here, defendant very well may have a strong likelihood of success on the merits of his appeal.

Because this court finds there may be a likelihood of success on the merits with respect to the issue of notice, it is unnecessary to reach the other two grounds on which plaintiff relies on in his appeal: that he did not breach the terms of the lease in that he continued to pay rent into an escrow account; and that he has cured the breach by exercising his right to redemption under 12 V.S.A. § 4773. The court notes, however, that defendant has cited to no legal authority which supports his unilateral decision to pay rent into an escrow account, rather than directly to plaintiffs per the terms of the lease agreement. Moreover, whereas 12 V.S.A. § 4773 provides defendant with a right to redeem, significant dispute remains over the question of whether defendant has paid into court "all rent due through the end of the current rental period, including interest and the costs of suit." *Id.*

As for whether or not defendant will suffer irreparable injury, the court notes that a stay will usually not be granted where it appears the movant has an adequate remedy in the form of money damages. See *In re Tariff Filing of New England Tel. & Tel. Co.*, 145 Vt. 309, 314 (1984) (denying a stay where utility ratepayers could be refunded any excess revenues). Here, the past profits of defendant's business could afford a basis for calculating money damages, but the right to continue a business "is not measurable entirely in monetary terms." *Semmes Motors,*

Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970). Defendant has been operating his restaurant for more than a year now, developing customer loyalty and a particular reputation in his community. If plaintiffs were to execute their writ of possession, this would effectively result in the indefinite closure of defendant's business—public perceptions will be drawn from the closure and, even if defendant was to prevail on appeal to the end of reopening his restaurant, former customers may choose to never return, thereby giving rise to a permanent harm that is without an adequate remedy in this court.

Plaintiffs argue they will be substantially harmed by a stay because they are "currently unable to negotiate with and locate potential tenants." However, the alleged inability to rent their property is a harm that is ascertainable in money damages alone. To mitigate that harm, the court will act to protect plaintiffs' interests by ordering that defendant continue to pay rent pursuant to the rent escrow order of March 3, 2014, pending disposition of his appeal. See V.R.C.P. 62(a)(3)(C) ("Any stay shall be granted upon such terms as the court considers necessary to protect the interests of any party."). Moreover, if defendant's appeal is denied, the issue of damages related to his breach, including costs associated with litigation, will still before this court.

Finally, as for the public's interest in granting a stay, the court focuses on the employees of defendant's business. Plaintiffs contend that even if they were to execute their writ of possession, defendant's employees will continue in their positions. However, this appears to be mere speculation that a yet to be determined new tenant or manager of the business will retain those individuals currently employed. Whereas any terminated employees could be compensated for lost income, the court notes that these individuals are third parties to this action and there are no facts before the court indicating how even a temporary loss of income will affect their livelihoods. Under these circumstances, it is best for the court to err on the side of caution. It is, therefore, in the public's interest to ensure these individuals have the opportunity to remain employed during the pendency of defendant's appeal.

ORDER

Defendant's motion for a stay of plaintiffs' writ of possession is **GRANTED**, pending final disposition of his appeal. For the duration of this stay, defendant shall continue to pay rent pursuant to the rent escrow order of March 3, 2014. The Clerk shall continue to disburse the escrowed payments pursuant to the earlier order of the Court.

Dated this 20 day of August, 2014.

Harold E. Eaton, Jr.
Superior Court Judge

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VERMONT SUPERIOR COURT
WINDSOR UNIT