VERMONT SUPERIOR COURT
Rutland Unit
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CIVIL DIVISION
Case No. 23-CV-01323

Haley and Jim McLees, Plaintiffs v. Jonathan B. Shulman and Ngan T. Nguyen, Defendants	DECISION ON MOTION TO DISMISS

RULING ON DEFENDANTS' MOTION TO DISMISS

This is a landlord-tenant dispute. Plaintiffs Haley and Jim McLees bring this action against their landlords Defendants Jonathan Shulman and Ngan Nguyen for the return of their $3,600 security deposit following the conclusion of their approximately one-year rental. Plaintiff Tenants are represented by Wendy E. Radcliff, Esq. and Defendant Landlords represent themselves. Tenants allege Landlords failed to return the security deposit with a written statement itemizing any deductions as required by 9 V.S.A. § 4461(c). Landlords have filed a motion to dismiss pursuant to Rule 12(b)(3) of the Vermont Rules of Civil Procedure based on improper venue, asserting that under the parties' Lease all disputes regarding the tenancy must be submitted to mediation and then arbitration. They further seek an order compelling arbitration and mediation. In response, Tenants argue that any such provision is unenforceable under the Vermont Arbitration Act and the Vermont Residential Rental Agreement Act. For the reasons discussed below, Landlords' motion is DENIED.

Discussion

Venue "is a question of law." *Bain v. Potanas*, No. 2011-401, 2012 WL 1980365, at *2 (Vt. Apr. 2012) (unpub. mem.) (citing *Bergeron v. Boyle*, 2003 VT 89, ¶¶ 9-11).[1] As an initial matter, Landlords' challenge to venue in this unit is misplaced. 12 V.S.A. § 402(a) provides: "An action before a Superior Court shall be brought in the unit in which one of the parties resides, if either resides in the State; otherwise, on motion, the complaint shall be dismissed. If

[1] Trial courts are free to "consider three-justice decisions from [the Vermont Supreme] Court for their persuasive value, even though such decisions are not controlling precedent." *Washburn v. Fowlkes*, Docket No. 2015-089, 2015 WL 4771613, at *3 (Vt. Aug. 2015) (unpub. mem.) (citing V.R.A.P. 33.1(d), which provides that an "unpublished decision by a three-justice panel may be cited as persuasive authority but is not controlling precedent," except under limited circumstances).

neither party resides in the State, the action may be brought in any unit." Given that neither Plaintiffs nor Defendants reside in Vermont, venue is proper in this Court.[2] However, construing Landlords' pro se motion liberally, it is clear that they are seeking dismissal and an order compelling arbitration based on the language of the parties' Lease agreement.[3] Accordingly, the Court must determine whether the arbitration provision is enforceable.

"Vermont law and public policy favor arbitration as an alternative to litigation for resolving disputes." *Knaresborough Enters., LTD v. Dizazzo*, 2021 VT 1, ¶ 11. However contractual provisions requiring arbitration must comply with the Vermont Arbitration Act ("VAA"), which states:

> No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgment shall be displayed prominently. The acknowledgment shall provide substantially as follows:
>
> "ACKNOWLEDGMENT OF ARBITRATION.
> I understand that (this agreement/my agreement with _____ of _____) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator."

12 V.S.A. § 5652(b).

Tenants argue the language of the Lease provision is insufficient under the VAA to show they intended to waive their right to bring a lawsuit and to agree to arbitration of all disputes. Paragraph 46 of the parties' Lease reads:

> If any dispute relating to this Lease between the Parties is not resolved through informal discussion within 14 days from the date a dispute arises, the Parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event that mediation fails. The decision of the arbitrator will be binding on the Parties. Any mediator or arbitrator must be a neutral party acceptable to both

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[2] Thus, Plaintiffs' assertion that venue is proper in this Court "because the residential real estate rental property, 37 Lester Lane ("Property") is located in Rutland County, Vermont" is likewise incorrect. As the Vermont Supreme Court has made clear, the "concerning real estate language" in § 402(a) is construed "narrowly to place venue in the county where the land is located only in actions to establish or to settle title to real estate." *Bergeron*, 2003 VT 89, ¶ 11 (noting that "[w]here no party disputes title, real property actions – including those for ejectment – may properly be brought in the county where either party resides").

[3] Landlords have also cited Rule 12(b)(6) and the standard for deciding motions for summary judgment in their filing.

> Parties. The cost of any mediations or arbitrations will be shared equally by the Parties.

Pl.'s Compl., Ex A. There can be no question that this clause does not contain the language required by § 5652(b), nor does it signal to Tenants that signing the agreement forecloses their ability to seek relief in court. *See Knaresborough*, 2021 VT 1, ¶ 13 ("The statutory requirement of a written acknowledgement is designed to ensure that parties understand the significance of the arbitration provision and to protect them from unknowingly waiving their right to seek redress in court. . . . The statute does not identify any exceptions to this requirement."); *Joder Bldg. Corp. v. Lewis*, 153 Vt. 115, 119 (1989) (holding contractual language that "fails to state clearly that signing the agreement forecloses any court remedies concerning any dispute" does not satisfy statutory acknowledgement required by § 5652(b)). Moreover, the parties did not execute a separate written acknowledgment of arbitration. Accordingly, the Court concludes that the Lease's arbitration language is unenforceable under the VAA.

Tenants further argue that requiring pre-suit mediation regarding return of their security deposit violates their statutory rights under the Vermont Residential Rental Agreement Act ("VRRAA") and thus cannot be enforced. The Court agrees.

Under 9 V.S.A. § 4454: "No rental agreement shall contain any provision that attempts to circumvent or circumvents obligations and remedies established by this chapter and any such provision shall be unenforceable and void." The VRRAA establishes clear rules for landlords regarding the return of tenants' security deposits:

> A landlord shall return the security deposit along with a written statement itemizing any deductions to a tenant within 14 days from the date on which the landlord discovers that the tenant vacated or abandoned the dwelling unit or the date the tenant vacated the dwelling unit, provided the landlord received notice from the tenant of that date.

9 V.S.A. § 4461(c). In addition, § 4461(d) states that the "landlord shall comply with this section by hand-delivering or mailing the statement and any payment required to the last known address of the tenant." *Id*. § 4461(d). "If a landlord fails to return the security deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit." *Id*. § 4461(e). The Vermont Supreme Court has explained it "is likely that the primary concern of the Legislature was the expeditious return of security deposits"; therefore, strict compliance with the VRRAA is required. *In re Soon Kwon*, 2011 VT 26, ¶¶ 17, 19.

As Tenants contend, requiring disputes concerning the return of security deposits to be subject to pre-suit mediation would frustrate tenants' rights to the simple and speedy return of their security deposits and their ability to enforce such rights through the courts. *Cf. id*. ¶ 15 ("The security deposit section of the Landlord and Tenant Act is clearly a consumer protection provision regulating contractual security deposit procedures . . . ."). Likewise, imposing on tenants all or part of the expense of such mediation would create obstacles to tenants' recovery, making the process potentially cost-prohibitive and allowing landlords to circumvent their

obligations set forth in § 4461. Accordingly, the Court concludes the mediation language in the parties' Lease contradicts the VRRAA and is unenforceable. 9 V.S.A. § 4454.

Order

For the foregoing reasons, Defendants' Motion to Compel Arbitration and to Dismiss is DENIED.

Defendants shall file their Answer within 14 days of the date of this Order, and the matter shall then be set for a status conference, at which time the Court will discuss with the parties whether a discovery scheduling order is needed or if the parties are essentially ready for trial.

Electronically signed on July 28, 2023 at 4:59 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge