STATE OF VERMONT
ORANGE COUNTY, SS

Robert and Marjorie Sweet

v.

William and Clara Rutledge

Orange Superior Court

Docket No. S 17-93 OeC

Entry Order re: Plaintiff's Motion for Summary Judgment

This is a landlord-tenant action, instituted by the owners of the rented premises. Robert and Marjorie Sweet filed a complaint on January 28, 1993 which alleged that William Rutledge Sr. and Clara Rutledge, their tenants, were $2,500.00 in arrears on their rent obligations under a written lease agreement. They sought judgment for the arrears and a writ of possession to retake control of the premises. Defendants have raised various defenses, which generally revolve around claims that plaintiffs breached the implied warranty of habitability which attaches to the rental of a dwelling. At this time defendants are no longer in possession of the property, so the only issue before the court is plaintiffs' entitlement to unpaid rent. Defendants assert that the plaintiffs' purported breach of the implied warranty of habitability offers a legal excuse for their nonpayment of rent.

Plaintiffs have moved for summary judgment. They note that the Residential Rental Agreements Act states that a tenant "shall" give a landlord "actual notice" of an asserted breach of the implied warranty of habitability. 9 V.S.A. §4458(a). The landlord-tenant statutes define actual notice as "written notice hand-delivered or mailed to the last known address." 9 V.S.A. §4451(1).

In response to interrogatories propounded by plaintiffs, defendant William Rutledge has stated that the defendant tenants' complaints to their landlords

regarding the condition of the premises were not in writing and that the defendants could not recall the exact dates of their oral complaints to the plaintiffs. From these facts and legal authorities, plaintiffs argue that the defendants' failure to provide written notice to plaintiffs of the defects of the rented premises prevents the defendants from invoking the claimed breach of the warranty of habitability as a defense to plaintiff's action. They argue that the language of the statutes is clear, and that the law must therefore be enforced according to its terms.

Defendants strenuously object to the plaintiffs' construction of the present state of landlord-tenant law. They note that a tenant's option to withhold rent in response to a breach of the implied warranty of habitability was first set forth in the case of Hilder v. St. Peter, 144 Vt. 150, 162 (1984), a decision which overhauled, by common law edict, the entire legal framework of landlord-tenant relationships in Vermont. Defendants argue that the landlord-tenant legislation (which was passed in the wake of Hilder) codified, in large part, the principles and remedies set forth in the Court's decision, and, to the extent that it did not adopt every possible remedy enunciated in Hilder, it also evinced no intention to do away with those judicially created remedies not explicitly recognized by statute. The decision in Hilder did not specifically require written notice as a prerequisite to the withholding of rent in response to an asserted breach of the warranty of habitability.

To buttress their interpretation of the landlord-tenant statutes, defendants refer the court to several decisions of the Vermont Supreme Court which have been rendered since the passage of the landlord-tenant statutes, but which seem to recognize continuing vitality in the common law principles from

Hilder. In particular, they note that, in the case of Gokey v. Bessette, the Vermont Supreme Court recognized both Hilder and 9 V.S.A. §4458(a)(1) as standing for the principle that a tenant may withhold rent in response to a landlord's breach of the warranty of habitability. 154 Vt. 560, 563 (1990).

Plaintiffs, in a supplemental memorandum in support of their motion for summary judgment, reiterate their assertion that the defendants' failure to give written notice precludes the defendants from raising the defense of breach of the warranty of habitability. They assert that the decisions cited by defendants which post-date the passage of the Residential Rental Agreements Act did not expressly deal with the question of whether the tenants in those matters had given, or were required by statute to give, written notice of the asserted breach of the warranty of habitability. The plaintiffs also note that in the case of Nepveu v. Rau, the Vermont Supreme Court, discussing the operation of the landlord-tenant statutes, stated:

> A tenant is required to give the landlord written notice of noncompliance with the landlord's obligation of habitability. 9 V.S.A. §§4458(a) and 4451(1). "If the landlord fails to make repairs within a reasonable time and the noncompliance materially affects health and safety, the tenant may [elect the remedies provided for by 9 V.S.A. §4458(a)].

Nepveu, 155 Vt. at 375.

The court has consulted the authorities referred to by each of the parties in this matter, and has also conducted independent research of its own. The parties each have legitimate arguments in the matter: on the present state of the law it is not immediately clear whether a tenant's failure to provide written notice to a landlord of an asserted breach of the warranty of habitability deprives the tenant of the right to later raise that breach as a defense in an action for unpaid rent. A quick reference to 9 V.S.A. §§4458(a)(1) and 4451(1) would tend to suggest that plaintiff landlords are

correct that the failure does deprive tenants of the defense. On the other hand, reference to Hilder v. St. Peter, with its holding that a tenant's obligation to pay rent is contingent upon the landlord's compliance with the duty to provide habitable premises, suggests otherwise. 144 Vt. at 162. The issue is whether the common law defense created in Hilder still applies now that the Residential Rental Agreements Act has been adopted by the Legislature. The court will attempt to sort out this point of confusion and contention.

The case of Hilder v. St. Peter, decided in 1984, worked major changes upon the landscape of landlord-tenant law in Vermont, catapulting the state's jurisprudence from theories "which had originated in the Middle Ages" to a perspective based instead upon a recognition of the complex nature of modern housing and the extent to which tenants are often dependent upon landlords for the provision of services or equipment for modern amenities such as heat, functional plumbing, and maintenance. 144 Vt at 157-58. Hilder noted that, under the new approach therein adopted, which included recognition of an implied warranty of habitability, 144 Vt. at 159, "the tenant's obligation to pay rent is contingent upon the landlord's duty to provide and maintain a habitable dwelling..." 144 Vt. at 162, n. 3.

The Court endorsed the option of the withholding of rent by a tenant in response to a breach of the warranty of habitability, noting that the landlord could then bring an action, and "'[t]he trier of fact, upon evaluating the seriousness of the breach and the ramification of the defect upon the health and safety of the tenant, will abate the rent at the landlord's expense in accordance with its findings.' ...." 144 Vt. at 162, (citation omitted). The court noted that the burden would remain upon the tenant to show (1) that the

landlord had notice of the defect and failed to remedy the defect within a reasonable time, and (2) "that the defect, affecting habitability, existed during the time for which rent was withheld." 144 Vt. at 162-63.

The historical notes accompanying Vermont's landlord- tenant statutes indicate that those statutes were passed in 1985, approximately a year after the Vermont Supreme Court's decision in Hilder, and were to be applicable to rental agreements entered into, extended or renewed on or after July 1, 1986. See note "History" at introduction to Chapter 137 of Title 9. The historical notes accompanying 9 V.S.A. §4458, the section relied upon by the plaintiffs in support of their motion for summary judgment, indicates that that section was present in the law as originally enacted, and has not been revised since. This indicates that the landlord-tenant statutes relied upon by plaintiffs in support of their argument for summary judgment were passed a relatively short time after the Vermont Supreme Court rendered its decision in Hilder. As previously noted in this decision, the Court's decision in Hilder represented a major shift in the common law as it applied to the interactions of landlords and tenants, and recognized a wide range of remedies which could be exercised by tenants.

"A statute can be construed as changing the common law only where that intent is expressed clearly and unambiguously." In re S.B.L., 150 Vt. 294, 301-302 (1988). "When the meaning of a statute is not plain on its face, legislative intent "should be gathered from 'a consideration of the whole and every part of the statute, the subject matter, the effects and consequences, and the reason and the spirit of the law.'" Greenmoss Builders v. Dun & Bradstreet, Inc., 149 Vt. 365, 369 (1988), quoting Langrock v. Dept. of Taxes, 139 Vt. 108, 110 (1980).

The statutes pertaining to the landlord-tenant relationship were passed shortly after the Hilder decision. A reading and cross-comparison of Hilder and Chapter 137 of Title 9 of the Vermont statutes indicates to this court that the landlord-tenant statutes represent, in large part, a legislative codification of the common law principles set forth in Hilder. Cf., e.g., Hilder, 144 Vt at 159 (noting warranty of habitability is implied in residential rental agreements) 9 V.S.A. §4453 (stating that all obligations imposed by landlord-tenant act on landlords and tenants, including warranty of habitability, "shall be implied in all rental agreements).

Nonetheless, this court cannot find any provisions of the statutes which indicate that the legislature intended to limit the reach of the common law principles set forth in Hilder. Indeed, as noted by defendants, the Vermont Supreme Court has, in the very same sentence, cited both 9 V.S.A. §4458(a)(1) (the section relied upon by plaintiffs), and Hilder as standing for the proposition that a tenant may withhold rent in response to an asserted breach of the implied warranty of habitability. Gokey v. Bessette, 154 Vt. at 563. The Court has continued to recognize the significance and vitality of the principles of Hilder, even after the passage of the landlord-tenant statutes. See, e.g. Favreau v. Miller, 156 Vt. 222, 228-229 (1991). It has given the Residential Rental Agreements Act a broad remedial reading. See, e.g., Bisson v. Ward, No. 92-426, (6/11/93), slip op. at 5-6 ("We believe that the legislature intended to provide attorney's fees to prevailing tenants in order to encourage tenants, who are usually at a financial disadvantage, to pursue claims under the Act, thus promoting safe and clean rental housing in Vermont."). It has also stated that the Act "does not govern all aspects of the landlord-tenant relationship, and so does not preclude other claims between

landlords and tenants." Bisson, slip op. at 9.

From all of the foregoing, this court concludes that the intention behind the legislature's passage of the present landlord-tenant statutes was to recognize and codify the common law principles enunciated in Hilder, not necessarily to limit the reach of those principles. Had the legislature wanted to limit the reach of Hilder, it certainly could have legitimately done so. Nonetheless, the text of the landlord-tenant statutes do not provide evidence that the Legislature intended to do so, and subsequent case law interpreting those statutes does not suggest that the Vermont Supreme Court considers the Act to have abrogated the common law.

Recent landlord-tenant law in Vermont has gone far in placing limits on the behavior of those landlords who might abuse their position, in recognition of the fact that some landlords may have an economic advantage, and thus potentially disparate power, in relation to their tenants. This is a legitimate policy goal. The recent developments in the law have perhaps gone less far in assuring that some tenants do not abuse the new-found protections of the law. It would certainly be within the power of the legislature to revise the landlord-tenant laws to explicitly state that the defense of breach of the implied warranty of habitability would be precluded in an action for unpaid rent unless the tenant had given written notice of the asserted breach before withholding rent based on the asserted breach. This would have the advantage of eliminating the possibility of dubious after-the-fact claims that the warranty of habitability has been breached, and would simplify the evidentiary issues placed before the courts. However, in light of the case law and statutes as they now stand, this court is not ready to infer a legislative intent to limit the common law remedies created by the Vermont Supreme Court in

Hilder.

Summary judgment is appropriate only where the moving party meets the burden of establishing both: (1) that there is no genuine issue of material fact; and (2) that, on those undisputed facts, they are decisively entitled to judgment as a matter of law. Murray v. White, 155 Vt. 621, 628 (1991). It is indeed an undisputed fact that defendants failed to give written notice to plaintiffs of the conditions which they now assert were a breach of the warranty of habitability. However, for the reasons previously explained, this court concludes that defendants may be able to assert a common law defense of breach of the implied warranty of habitability.

Accordingly, summary judgment is not appropriate in favor of plaintiffs. Defendants, of course, still bear the ultimate burden of establishing a breach of the warranty of habitability by showing: (1) that the landlord had notice of the defect and failed to remedy the defect within a reasonable time, and (2) "that the defect, affecting habitability, existed during the time for which rent was withheld." Hilder, 144 Vt. at 162-63. The court does note that defendants' specific allegations in support of their claim of a breach of the warranty of habitability focus upon difficulties in keeping the premises adequately heated during colder weather. In light of the requirement of Hilder that "the defect, affecting habitability, [must have] existed during the time for which rent was withheld," id, the court believes that these asserted defects in the heating system would justify the withholding of rent only for periods of the year where the weather was such as to actually render the premises beneath the level of habitability required by the implied warranty.

Order

Plaintiffs' motion for summary judgment is hereby DENIED.

Dated this 31st day of ~~December~~ January 1994, ~~1993~~, at Chelsea, Vermont.

Mary Miles Teachout
Presiding Judge