

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-248

DECEMBER TERM, 2002

	}	APPEALED FROM:
	}	
Philip Aaron, et al.	}	Chittenden Superior Court
	}	
v.	}	
	}	DOCKET NO. S0340-01 CnC
Jordan Stern, et al.	}	
	}	Trial Judge: Mary Miles Teachout
	}	
	}	

In the above-entitled cause, the Clerk will enter:

In this landlord-tenant dispute, plaintiff landlord appeals from a superior court judgment awarding landlord a total of \$616.50 for damages to the rental property. Landlord contends the court erred in: (1) declining to award damages for unpaid rent; (2) finding that landlord had breached the warranty of habitability; and (3) denying its request for attorney's fees. We affirm.

The facts may be summarized as follows. The property in question is a large, older home located in the City of Burlington near the campus of the University of Vermont. In 1999, Keith Aaron purchased the property, resided there briefly, and thereafter leased it to a group of college students for one year beginning on June 1, 1999. In June 2000, Aaron leased the property to another group of students (tenants) for the period from June 1, 2000 to May 31, 2001, for a monthly rental of \$2300. Shortly after moving in, several of the tenants called Aaron to complain about the condition of the house, and one of the tenant's parents contacted the City. A housing inspector visited the property in August 2000, and sent Aaron a letter detailing a number of health and safety violations. Aaron eventually retained a contractor to remedy some of the problems, but others remained.

In October, Aaron conveyed the property to his father Phillip Aaron, as Trustee of the Keith S. Aaron Hickock Place Trust (hereafter " landlord"). Keith Aaron continued to manage the property. In November, Phillip Aaron visited the property in response to police complaints about noise violations. Shortly thereafter, on November 14, an attorney on behalf of the landlord Trust sent a letter to tenants terminating the tenancy as of December 20, 2000, on the basis of lease violations resulting from the noise disturbances. The following week, tenants informed landlord's contractor, who was still working on repairs, of a longstanding problem relating to water from a second-floor shower leaking through the floor into a light fixture in the bedroom below. The contractor told tenants to make sure that the shower curtain fully circled the tub when showering, but otherwise did nothing to fix the problem.

In December, tenants failed to pay their monthly rent, and sent landlord a notice through their attorney that the property was in breach of the warranty of habitability. Landlord responded with a letter terminating the lease on the grounds of non-payment of rent. Tenants vacated the premises on December 20th. They left trash, furniture, and other items in the house. Landlord thereupon sent tenants a notice that he was applying the full amount of the security deposit of \$2325 to the payment of December's rent, and thereafter filed this action for unpaid rent, damages, and attorney's fees. Tenants raised a defense of breach of the warranty of habitability, and counterclaimed for return of rent previously paid, return

of their security deposit, and attorney' s fees.

Following an evidentiary hearing, the court issued a written decision containing extensive findings and conclusions. The court found that tenants had left the premises in a condition that required repairs and cleanup requiring a reasonable expenditure of \$849. The court further found that the condition relating to the upstairs bathroom violated the warranty of habitability and reduced the value of the premises by 10%, although tenants notice did not show that they actually exercised their right to terminate the tenancy on this ground. Accordingly, the court reduced landlord' s damages by \$232.50 (10% of the monthly rental of \$2,325), resulting in a damage award of \$616.50. The court rejected landlord' s additional claim for unpaid rent for the remainder of the lease term (January through May 2001), and for attorney' s fees, and also rejected tenants' claims for return of previously paid rent and for attorney' s fees. This appeal by landlord followed.

Landlord first contends the court erred in rejecting its claim for unpaid rent from January 1, 2001 to May 31, 2001, the end of the lease term. In so ruling, the court noted that landlord had kept the property off the market for the month of January 2001, for the purpose of making extensive repairs and upgrades to the property, many of which were unrelated to tenants' use of the premises. Thereafter, landlord attempted to lease the property as of February 1, 2001 at an increased rental. The court concluded that " [w]hile [tenants] should be held responsible for the rent if [the property] could not be relet at the same rental value they paid, they should not be responsible for [landlord' s] failure to rent it in an upgraded condition at a higher rate."

A landlord has a duty to mitigate damages arising from breach of a lease through reasonable efforts to relet the premises. O' Brien v. Black, 162 Vt. 448, 452-53 (1994). A landlord' s attempt to relet at a higher rent than it had been receiving from a defaulting tenant may not constitute a good faith effort to mitigate damages. See, e.g., MBC, Inc. v. Space Center Minnesota, Inc., 532 N.E.2d 255, 261 (Ill. App. Ct. 1988) ((landlord' s efforts to relet property at rents higher than under prior lease constituted breach of duty to exercise reasonable diligence to mitigate damages); Mar-Son, Inc. v. Terwaho Enters., Inc., 259 N.W.2d 289, 292 (N.D. 1977) (upholding finding that attempt to relet at higher rent violated landlord' s duty to mitigate damages). We cannot conclude, therefore, that the trial court clearly erred in finding that landlord had failed to make a reasonable effort to mitigate damages, and therefore was not entitled to rent for the remainder of the lease term. We need not reach the additional claim that the court improperly placed the burden of proof concerning mitigation on landlord. Whether or not the court erred in its assignment of the burden, the decision was not grounded on the failure to meet the burden but instead on the undisputed evidence produced by both parties.

Landlord further contends the evidence failed to support the court' s finding of breach of the warranty of habitability. Our review of the court' s findings is limited. See O' Brien, 162 Vt. at 454 (findings will not be set aside on appeal unless, taking evidence in light most favorable to judgment, and disregarding modifying evidence, they are clearly erroneous). There was credible evidence to support the finding that water leaking through the floor of the second-story bathroom into the light fixture below constituted a health and safety risk, which in turn violated the warranty of habitability and reduced the value of the premises. In light of the evidence, we cannot conclude that the court clearly err in finding that the condition was not solely the result of tenants' failure to ensure that no water escaped from the tub. Accordingly, we discern no basis to disturb the court' s ruling.

Finally, landlord contends the court erred in denying its request for attorney' s fees incurred in prosecuting its claim for unpaid rent. Having properly denied landlord' s request for unpaid rent, the court was correct in denying the request for attorney' s fees.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice