

[Teachout, J., June 17, 2007]

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**STATE OF VERMONT
WASHINGTON COUNTY**

MICHAEL MERCANDANTE and)	
DENISE MERCANDANTE)	
Plaintiffs,)	Washington Superior Court
)	Docket No. 465-8-05 Wncv
v.)	
)	
EASTERN INDUSTRIES, INC., d/b/a)	
SUMMER PLACE CAMPGROUND,)	
MARK GRIMES, and AIMEE GRIMES)	
Defendants.)	

**DECISION
Cross-Motions for Partial Summary Judgment
Motion to Amend**

This matter came before the court for hearing on April 10, 2007 on the parties’ oral cross-motions for summary judgment. Plaintiffs were present and represented by Attorney Leighton C. Detora. Defendants were represented by Attorney Thomas C. Nuovo. As agreed upon on the record at the hearing, the attorneys set forth orally their statements of undisputed facts.

Plaintiffs seek recovery for alleged wrongful eviction of themselves and their camper from a campground they had rented for a summer season. Defendants claim that they lawfully terminated the campsite lease based on Plaintiffs’ breach of contract, and that they were entitled to retake possession peaceably without legal process, and move the camper from its campsite and utility hookups.

Facts

Plaintiffs are a husband and wife who live in Montpelier and have two children. Defendant Eastern Industries, Inc. is a corporation owned by Mark and Aimee Grimes that owns and operates a seasonal campground, the Summer Place Campground, on Isle LaMotte. The Grimes personally operate the campground.

Plaintiffs first started renting a site at the campground for the camper in 1983. They set up their camper on a pad or lot, and the campground provided hookups for electricity, water, and waste water. They spent weekends there during the summer

seasons from 1983 to 1995, and again from 2000 until the events of 2005 that form the basis for this lawsuit.

On March 14, 2005, Aimee Grimes sent a letter to the Plaintiffs specifying that the campground would open in 2005 on May 1 and the season would run to October 1, and their rate would be \$910.00 for the season. Additional terms were set forth concerning payment and other matters. In addition to this document, the Plaintiffs had previously been given a copy of a 3-page document entitled "Summer Place Campground Rules." One of the rules states, "Parents are responsible for the proper conduct of their children at all times, and are liable for their actions." The Plaintiffs paid for the summer season on June 12, 2005, deducting a discount applicable for payments made prior to June 1, 2005. Prior to the events at issue in July, Defendant did not seek payment of the shortfall.

In the summer of 2005, Plaintiffs' children were ages 12 and 9. The Grimes heard information from others about troublesome conduct of the Plaintiffs' children, specifically that one had kicked in and dented an aluminum shed. The Grimes were aware that there might be a concern about their behavior, but had no direct knowledge themselves, and did not raise the subject with the Plaintiffs. One day in early July, Mr. Grimes observed Plaintiffs' son hold a soccer ball while watching another child slide down the slide, and when the child got to the bottom, Plaintiffs' child "pegged him hard" with the soccer ball. Mr. Grimes considered this to be aggressive and unacceptable, and approached the child. He told him, perhaps angrily, that he would be keeping an eye on his behavior. The child told his parents about the incident, and his description of Mr. Grimes's manner indicated rougher behavior than Mr. Grimes described.

Ms. Mercandante called Mr. Grimes, and the Plaintiffs and Mr. Grimes met. A heated discussion took place, in which Ms. Mercandante challenged Mr. Grimes for threatening their child. Both were angry. Mr. Grimes believed that she was not paying appropriate attention to concerns about the child's conduct, and he spontaneously decided, and told the Plaintiffs, that they had to leave the campground.

On July 8th, Mr. Grimes wrote a letter to the Plaintiffs terminating the seasonal tenancy "[d]ue to your children's disruptive behavior and your inability to supervise and control them." Plaintiffs were given seven days from receipt of the letter to vacate the premises, and the letter stated that after that date, the water and electric services would be discontinued and they would be considered trespassers. The letter was served on Mr. Mercandante by sheriff on July 12th.

The Plaintiffs did not leave. At some point they made an arrangement to have their camper moved from its spot, but then changed their minds. They returned to the campground, and discovered a small padlock, the size for a suitcase, on their electrical service box. They broke and removed it, and occupied their camper, using services.

On July 28th, Mr. Grimes wrote another letter to Plaintiffs entitled "NOTICE OF REMOVAL." It states that termination had taken place on July 19, 2005, and that

Plaintiffs had subsequently returned, willfully damaged property, and stolen electricity. It further provided that if Plaintiffs had not removed their camper and personal property by Wednesday, August 3rd, Defendant would hire someone to have it moved at Plaintiffs' expense. The Grimes knew that Plaintiffs did not normally occupy the camper during the week, and thus were not likely to be there then. The letter further stated that the unused portion of the seasonal rent would be returned, which did happen.

The Plaintiffs did not remove the camper. After August 3rd, on a midweek day when the Plaintiffs were not present, the Grimes used their tractor to move the camper from its spot, pulling it away from an attached wooden platform. It was moved with the pop-up open, causing some damage that needs repair. It was moved to a location approximately 50 feet away. Some food in the camper spoiled. The electric service box was removed altogether, and the water and waste water pipes were disconnected. At some later point, the Plaintiffs retrieved the camper.

Legal issues

Both parties seek summary judgment, but on different legal issues. Plaintiffs seek a ruling that, regardless of whether or not Plaintiffs breached the lease themselves, Defendant is liable for damages for engaging in an unlawful self-help eviction of Plaintiffs from the premises. Defendants oppose on the grounds that upon termination of the lease, Defendants were entitled to retake possession peaceably without legal process and they claim that is what occurred.

Defendants seek summary judgment on Plaintiffs' claim for breach of contract, on the Consumer Fraud Act claim, and on any claim for punitive damages in the event that they do not prevail on Plaintiffs' breach of contract claim.

Plaintiff's Motion for Summary Judgment

Self Help Retaking of Possession

Plaintiffs have argued that, regardless of whether Defendants properly terminated the tenancy, Defendants had no legal right to effect an eviction without judicial process, and that Plaintiffs are entitled to damages as a result. Defendants have taken the position that they had a common law right to a peaceful "self-help" eviction notwithstanding their alternative ability to pursue statutory ejectment proceedings. Defendants concede that a forcible, self-help eviction is unlawful. See 12 V.S.A. § 4911 (prohibiting forcible entry or detainer). Statutory ejectment proceedings, they argue, are available if force is needed, but a peaceful self-help eviction remains available under the common law. Because, they claim, the eviction in this case was "peaceful," it was lawful.

The court need not determine whether a right to a peaceful self-help eviction remains available under the common law because the eviction in this case was not without force, or peaceful in the sense that matters. Forceful self-help evictions are barred because they "endanger the public peace." *Foster v. Kelsey*, 36 Vt. 199, 201

(1863). While Defendants avoided a physical confrontation with Plaintiffs, their conduct entailed the use of force, and also endangered public peace by creating a clear risk of the sort of physical confrontation that the unlawful entry and detainer statute is designed to avoid.

Defendants used force in two ways, after having had a discussion with Plaintiffs that was heated, in which the Plaintiffs were angry, and which resulted in them being told to leave a summer campground they had enjoyed for many years. First, locking the electrical service box was a use of physical force designed to prevent use of the camper and related possession of the premises. This was followed by using a tractor to pull the camper away from an attached deck and utility connections, and involved damaging the camper and some of its contents. There was no ensuing breach of the peace, but this sort of conduct unnecessarily created a risk that there would be.

Defendants literally applied physical force by removing the camper, and they endangered the public peace by acting in a provocative manner that risked a violent response by Plaintiffs. See *Town of Grundy v. Goff*, 60 S.E.2d 273, 279 (Va. 1950) (describing implication that violence would be necessary to prevent eviction as contributing to showing of force); see also *Karp v. Margolis*, 323 P.2d 557, 559 (Cal.App. 1958) (noting that forcible entry and detainer statutes are not predicated on breaches of the peace, they are designed to prevent them).

Plaintiffs' Motion for Summary Judgment is granted on the issue of Defendants' liability regarding a self-help eviction. Defendants are liable for forcibly evicting Plaintiffs. A hearing on compensatory damages will be scheduled.

Defendants' Motions for Summary Judgment

Breach of Contract

Plaintiffs argue that Defendants breached the lease agreement by terminating their tenancy and thereby "cutting short" the full season term of the lease agreement. There is no dispute that the campground "rules" were incorporated into the lease agreement, and that the rules required that parents supervise their children sufficiently to ensure their children's proper conduct. The facts show that Plaintiffs' son was unreasonably physically aggressive to the child on the slide, and was thereby not engaging in "proper conduct." Plaintiffs were in violation of campground rules to a sufficient degree to support Defendants' claim that Plaintiffs breached the lease. Defendants were entitled to terminate the lease based on Plaintiffs' breach. Plaintiffs have not shown that Defendants' termination of their tenancy under these circumstances was a breach of the lease.

Defendants' Motion for Summary Judgment is granted on Plaintiff's claim for breach of lease.

Punitive Damages

Plaintiffs seek punitive damages based on the forceful eviction. “[P]unitive damages are available only to punish and deter defendants who acted with actual malice.” *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 55, 179 Vt. 167. The facts do not show that Defendants acted with actual malice. Though the eviction was unlawful and forceful, Defendants attempted to ensure that Plaintiffs had clear notice of the steps that they intended to take, and thereby made a physical confrontation less likely. These facts do not make a sufficient showing of malice.

Malice is also not shown by Mr. Grimes’ spontaneous decision, perhaps made in anger during a heated argument with Plaintiffs, to terminate the lease, when he had not previously intended to do so based on the child’s conduct alone. There was a lapse of time between the argument and decision to terminate and the events involved in the self-help eviction, and as stated above, the manner in which the self-help eviction took place does not support an inference of bad motive. The facts do not support a claim for punitive damages.

Defendants’ Motion for Summary Judgment is granted on the issue of punitive damages.

Plaintiffs’ Motion to Amend/Consumer Fraud Act

On March 28, 2007, the parties notified the court that they wished to use the oral summary judgment process discussed at the status conference on January 10, 2007 in lieu of proceeding with mediation and a bench trial. Accordingly, the trial scheduled for April 10, 2007 was converted to an oral summary judgment hearing. The day before, on April 9, 2007, Plaintiffs filed a Motion to Amend to add a claim under the Consumer Fraud Act. At the hearing on April 10, 2007, Defendants opposed the Plaintiffs’ Motion to Amend as untimely as discovery was closed, but also argued for summary judgment on any claim under the Consumer Fraud Act in the event the court determined to consider it.

The Motion to Amend was untimely, as it was filed almost three months after the close of discovery, and one day before the hearing scheduled to determine the final merits on liability. It was filed too late to add a new cause of action to the case.

ORDER

For the foregoing reasons,

1. Summary judgments are granted as set forth above,
2. Plaintiffs’ Motion to Amend is denied, and
3. A hearing on damages will be scheduled. If more than 2 hours will be needed, counsel should notify the court.

Dated at Montpelier, Vermont this 16th day of July 2007.

Mary Miles Teachout
Superior Court Judge