STATE OF VERMONT
WINDSOR COUNTY, SS

Jennifer Ankner-Edelstein Eric Edelstein Plaintiff v. Rebeca Maloney Donald Heroux, Jr. Defendant	SUPERIOR COURT Docket No. 571-9-09 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-captioned matter came on for court trial on October 20, 2009. Plaintiff Eric Edelstein was present and represented by attorneys Frank Berk, Esq., and Joseph Andriano, Esq. Defendant Rebeca Maloney was present and represented herself. Jennifer Ankner-Edelstein and Donald Heroux, Jr., were not present. Based upon the credible evidence presented at trial, the court makes the following findings of fact, conclusions of law, and order.

Findings of Fact

Plaintiffs Eric Edelstein and Jennifer Ankner-Edelstein are the owners of a house and acreage located at [address redacted] in Bethel, Vermont. On May 23, 2009, they entered into a written lease agreement for the property with defendants Rebeca Maloney and Donald Heroux, Jr. Under the written lease agreement, the rental term commenced on June 1, 2009, and continued until August 1, 2010. Monthly rent was $1,900. (P. Ex. 1.)

Both parties testified that Ms. Maloney and Mr. Heroux had some trouble moving in on June 1st. They did not actually move into the premises until around June 20th. There is a delay-of-possession clause in the lease (¶ 23) which provides that if the landlords cannot deliver possession of the premises, they must provide thirty days' notice to the tenants. However, this provision does not apply here because the premises were made available to the tenants at the stated time, and any delay in possession was caused by the tenants rather than the landlords. There is no reciprocal provision allowing the tenants to delay occupancy without paying rent. Although the parties discussed a delay in possession by the tenants, they did not execute a written agreement modifying the lease as required by ¶ 25.

Almost immediately there were issues between the parties, including difficulties in getting the full amount of the required deposit. Ultimately, the landlords received the

last month's rent and the security deposit, each in the amount of $1,900. The tenants did not pay rent in a timely manner for the month of July, however.

The landlords sent a notice requiring the tenants to quit the premises by August 10, 2009, for nonpayment of rent. (P. Ex. 2.) The tenants do not contest the adequacy of this notice.

The tenants did not pay rent for the month of July or for the first eleven days of August. They have paid rent into court beginning August 12th pursuant to a rent escrow order, and the total amount paid into court is $5,020 at present. The amount of as-yet-unpaid rent is $1,900 for the month of July and $674.19 for the first eleven days of August. The total amount of unpaid rent is $2,574.19 (not $2,960, as the landlords claim).

The tenants claim that they are current on rent. The central dispute here involves whether the tenants are responsible for rent during the month of June. For the reasons discussed in more detail above, it is clear from the written lease agreement that the tenants were obligated to pay the June rent regardless of when they were able to occupy the premises. Accordingly, the court finds that the tenants are in arrears on rent in the amount of $2,574.19.

The landlords sent a second notice to quit on July 21, 2009. (P. Ex. 3.) The notice alleged failure to supply renter information, "consistently late" rental payments, failure to have the utilities placed in the tenants' names, "failure to disclose dangerous animal will be kept on the premises," and "consistent evasive behavior, false statements and demonstrated disregard for the terms of the lease." The effective date of the notice to quit based upon breaches of the lease agreement was August 31, 2009.

The landlords live in France. In early August, they arranged for a man named Don Fielder to inspect the premises at a cost of $200 due to concerns regarding the tenants' use of the property. As a result of Mr. Fielder's inspections, Mr. Edelstein came from France a few days later in an effort to further inspect the premises. The tenants refused to let him enter the house. Only recently did Mr. Edelstein gain access to the home so that he could inspect it for himself.

The landlords now claim that the second notice to quit included the following actions by the tenants: damaging a pickup truck, using furniture that was not included in the lease, leaving the yard messy, and painting rooms without authorization. None of these actions were actually stated in the notice to quit, however. (P. Ex. 3.)

As to the items that were set forth in the notice to quit, the evidence shows that the CVPS account was placed in the tenants' names as of July 7, 2009, some two weeks before the notice was sent to the tenants. Furthermore, the lease specifically allowed the tenants to have dogs on the premises. The only evidence of "dangerous animals" concerns the tenants' "pit bull" dogs. The lease does not prohibit the tenants from having any particular breed of dog.

It may be that the landlord's recent inspections have provided additional and/or more specific reasons for a notice to quit, such as use of property not included within the lease terms, damage to a pickup truck, unauthorized painting, etc., but no notice has been served as to these matters. Moreover, and more importantly for present purposes, there was no evidence introduced showing the amount of damages incurred by the landlords in connection with any unauthorized painting, truck repairs, or any other item of property damage.

The landlords were billed by CVPS for electric service used by the tenants after they leased the premises. The lease requires the tenants to pay for electric and heating costs. The plaintiffs have incurred $107.75 in charges to CVPS which are the responsibility of the tenants.

The oil tank and gas tank were full at the time the defendants took possession of the property. The landlords now claim that the tanks are probably close to empty, but they did not demonstrate how much fuel had actually been used. The defendants admit that some heating fuel was used, but claim that it was nowhere near the amount claimed. Based on the present evidentiary record, it would be purely speculative for the court to guess how much fuel was consumed. The court cannot find that the plaintiffs have met their burden of proving the amount of fuel used by the defendants.

Plaintiffs also seek rents for the remainder of the rental period, including November 2009 through August 1, 2010. There is an acceleration clause in the lease that provides that upon the landlord's termination of the lease for non-payment of rent or another material term, "the entire remaining balance of unpaid rent for the remaining term of this Lease shall accelerate, whereby the entire sum shall become immediately due, payable and collectable." (P. Ex. 1, ¶ 6.) Plaintiffs claim that they may be able to re-rent the property for $1,000 per month, but this is uncertain at this time.

Plaintiffs also seek $1,166 in air, train and bus fares for Mr. Edelstein's travel to Vermont for inspection of the property and trial attendance. However, the recent inspection of the property took place on the same trip as attendance at trial, and it was necessary for at least one of the plaintiffs to attend the trial in order to support their claims for relief. There is no evidence of additional costs incurred by Mr. Edelstein that are not also attributable to trial attendance. The costs incurred by the plaintiffs for their failed effort at inspection of the property in August were not introduced into evidence.

Plaintiffs also seek a $95 late fee pursuant to the term of the written lease agreement providing that such fee will be incurred if rent is not paid by the 10th of the month. The lease agreement explains that the landlord is using the rent to cover the mortgage payments on his home, and that the late fee covers the cost of a late mortgage payment. In other words, the lease explains, the landlord is "passing along the cost for late payment to the Tenant—not charging a penalty." (P. Ex. 1, ¶ 5.) The testimony at trial supported this conclusion.

Finally, plaintiffs claim $5,076.24 in attorneys' fees in addition to sums for attendance at the hearing. (P. Ex. 6.) The written lease agreement provides for the right to recover attorneys' fees in the event of a breach by the tenant. The court finds that $5,000, inclusive of trial attendance, is a reasonable attorneys' fee in this matter.

Conclusions of Law

The respective obligations of tenants and landlords concerning rent and rental issues are set forth in detail in chapter 137 of Title 9 of the Vermont Statutes Annotated. The primary responsibility of the tenant is to pay rent without demand or notice at the time and place specified in the rental agreement. 9 V.S.A. § 4455(a). Here, the tenants have not paid rent for the month of July 2009 and for the first eleven days of August 2009. The tenants have been paying rent into court beginning August 12th.

The tenants argue that their withholding is justified by the fact that they were not able to occupy the premises until about June 20th. As explained in more detail above, however, the written lease agreement made clear that the lease began on June 1st, and the parties did not enter into any written agreement modifying the express terms of the lease. Moreover, the difficulties in moving in on the anticipated date were not caused by the landlord. Accordingly, the court must conclude that the tenancy began on June 1st, and that rent was due beginning on that date. The amount of unpaid rent is $2,574.19.

The landlords have requested future lost rents for the remainder of the original lease, meaning November 2009 through August 1, 2010, at the original rate of $1,900 per month. The general rule is that when it is the landlord who terminates a lease and seeks possession of the premises (as opposed to when the tenant abandons the premises), the landlord cannot also seek rent that accrues after the lease has been terminated. *Sabourin v. Woish*, 116 Vt. 385, 387–88 (1951); *Barr v. Country Motor Car Group, Inc.*, 789 N.Y.S.2d 350, 351 (N.Y. App. Div. 2005); Restatement (Second) of Property: Landlord & Tenant § 12.1 cmt. g. The rationale is that a landlord has a choice of remedies when the tenant fails to pay rent: the landlord may allow possession to continue and seek payment for each installment as it comes due, or the landlord may instead terminate the lease and seek immediate possession of the property, plus the rent accrued up to that point, but not more. *Sabourin*, 116 Vt. at 387–88.

This general rule makes sense because it prevents windfalls and discourages economic waste. If the landlord were permitted to recover possession of the property and all future rents, the landlord could either let the property sit idle, which is an economically wasteful result, or the landlord could re-rent the property to another tenant, which would amount to a windfall not contemplated by the original lease agreement. Neither result is encouraged. *O'Brien v. Black*, 162 Vt. 448, 452 (1994). It is for these reasons that the American Law Institute takes the position that when the lease is terminated by the landlord during the rental period, the tenant's "obligation to pay rent ceases when the lease is terminated." Restatement (Second) of Property: Landlord & Tenant § 12.1 cmt. g.

In recognition of the reality that there may be some lapse in time between the eviction of one tenant and the commencement of a new lease term, however, some courts have held that the parties to a lease agreement may contract in advance to hold the tenant liable for rent after an eviction.[1] In order to enforce such a provision, the landlord must establish that it is a valid liquidated damages clause, rather than a penalty. *Cummings Properties, LLC v. Nat'l Communications Corp.*, 869 N.E.2d 617, 620–21 (Mass. 2007); *Peterson v. P.C. Towers, L.P.*, 426 S.E.2d 243, 245 (Ga. Ct. App. 1992).

Here, the lease agreement includes a provision stating that, in the event of an eviction, "the entire remaining balance of unpaid rent for the remaining term of this Lease shall accelerate, whereby the entire sum shall become immediately due, payable, and collectable." In order to determine whether this clause is enforceable, this court must consider (1) whether damages arising from a breach of the lease would be difficult to calculate accurately, (2) whether the sum fixed as liquidated damages reflects a reasonable estimate of the landlord's likely damages, and (3) whether the provision is intended to compensate the landlord, rather than to penalize the tenant or to create an incentive for the tenant to pay rent. *Highgate Assocs., Ltd. v. Merryfield*, 157 Vt. 313, 316 (1991). "The ultimate test for the validity of a liquidated damages clause is whether the clause is reasonable under the totality of the circumstances." *Id.*

As to the first factor, it is true that future damages arising from an eviction are difficult to calculate accurately at the time of an eviction. Consideration must be given to the ability of the landlord to find another tenant, and to changes in the rental market between the time of the lease and the time of an eviction.

Turning to the second factor, however, the acceleration clause in this lease does not include any consideration of the landlord's ability to rent the property to another tenant after taking possession. Instead, under the written agreement, the landlord is entitled to terminate the lease, regain possession, and then collect all future rents from the evicted tenant for the remainder of the original lease term, regardless of whether or not the landlord is able to rent the property to another tenant. This means that there is a very high likelihood that the landlord will recover additional rents at some point between now and August 2010 that would not merely make the landlord even, but rather would amount to an unfair windfall. The court cannot approve a liquidated damages provision that is not tailored at all to the ability of the landlord to collect rent for the same property from another tenant, as this does not represent a reasonable estimation of the landlord's likely damages.

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[1] The American Law Institute takes the position that rent acceleration clauses cannot be enforced when the landlord also seeks possession of the property. Restatement (Second) of Property: Landlord & Tenant § 12.1 cmt. k. The reason is that rent acceleration clauses serve the purpose of ensuring that, once the tenant has failed to make a timely payment, the landlord may immediately receive all rents to which he is entitled "without having to harass a reluctant tenant as periodical payments come due." *Pierce v. Hoffstot*, 236 A.2d 828, 830 (Pa. Super. 1967). Once the landlord exercises the rent acceleration clause, however, the tenant must be permitted to remain in possession for the remainder of the lease, since in essence the tenant has prepaid for the remainder of the lease. *Id.* It is not necessary to decide here which rule applies because the court concludes that there are other reasons why the rent acceleration clause in this case cannot be enforced.

Moreover, the acceleration clause here does not account for any reduction based upon the present value of the future rent. For these reasons, the court concludes that the acceleration clause in this written lease cannot be enforced because is not "reasonable under the totality of the circumstances." *Merryfield*, 157 Vt. at 316.

Finally, even without the acceleration clause, and even assuming that damages might be available as compensation for some lapse in time before another tenant can be found, the plaintiffs have not proven the amount of any damages by a preponderance of the evidence. The evidence presented at trial was not sufficient to permit the court to fix the amount of damages beyond a matter of speculation and guesswork. For these reasons, the court declines to award damages representing future lost rents in this case.

The court also declines to award damages based upon Mr. Edelstein's travel expenses or Mr. Fielder's inspection fee. As to the former, the evidence did not show any travel expenses that were not attributable to the need to attend the trial itself, for which costs are not ordinarily awarded. As to the latter, the cost of hiring a property manager to make an inspection of the premises is an ordinary cost of doing business for landlords.

The court does award $107.75 in damages for the electric bill that was not paid by the tenants, and the $95 late fee. The evidence showed that the late fee was tailored to the amount of damages that the landlord incurred on his own late mortgage payments, and was meant to pass on the costs to the tenant rather than penalize the tenants. The late fee is enforceable. *Merryfield*, 157 Vt. at 316.

The landlords are entitled to costs in the amount of $250 for the filing fee and $40 in service fees, for a total award of costs of $290.

In addition, the court finds that the written lease agreement provided for attorneys' fees in the event of a breach by the tenant, and that reasonable attorneys' fees in this matter were $5,000. See 12 V.S.A. § 4854 (reasonable attorneys' fees may be awarded when provided for in the written rental agreement).

The court accordingly concludes that the tenants breached the lease by failing to make the required rental payments, and that the landlords are entitled to a judgment for possession and rents due in the amount of $2,574.19. In addition, the landlords are entitled to damages in the amount of $202.75, costs in the amount of $290, and reasonable attorneys' fees in the amount of $5,000, for a total judgment of $8,066.94.

Plaintiffs are currently holding $3,800 as the security deposit and the last month's rent. Plaintiffs may apply both the security deposit and last month's rent to the judgment amount, but must provide a written accounting to the defendants within 14 days of the termination of the lease as required by law. 9 V.S.A. § 4461(b)–(c).

ORDER

Plaintiffs Eric Edelstein and Jennifer Ankner-Edelstein are entitled to a judgment for possession of [address redacted] in Bethel, Vermont. Plaintiffs are also entitled to judgment for rents due in the amount of $2,574.19, damages in the amount of $202.75, costs in the amount of $290, and reasonable attorney's fees in the amount of $5,000, for a total judgment of $8,066.94.

Plaintiffs shall provide defendants with a written accounting within 14 days of the termination of the lease, as required by law.

A writ of possession shall issue today directing the sheriff to serve the writ upon the defendants and, no sooner than ten days after the writ is served, to put the plaintiff into possession.

Dated at Woodstock, Vermont this ____ day of October, 2009.

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Hon. Harold E. Eaton, Jr.
Superior Court Judge