

AUG 22 2012

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 220-5-12 Wmcv

Laurie Shapiro and Andrew Shapiro,
Plaintiff,

v.

Raina Cormier,
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A court trial was held on August 21, 2012 on the plaintiffs' and defendant's claims. Plaintiff Laurie Shapiro appeared, representing herself. The defendant did not appear, but was represented by Attorney Sara Kagle. Based on the evidence presented, the court finds that the plaintiffs and the defendant entered into a landlord tenant agreement on October 11, 2010. The plaintiffs agreed to rent Apartment 3, at 29 Canal Street, Brattleboro, to the defendant. At the same time, the plaintiffs entered into a housing assistance payments contract with the Vermont State Housing Authority stating that they would be renting the premises to the defendant for \$644 per month. However, the lease with the defendant stated: "The rental amount for this dwelling is \$744 per month." The lease provided that only "[i]f paid on or before the first of the month and Tenant owe[s] Owner no other monies, the monthly rental installment shall be discounted to \$644."

The evidence presented shows that with rent calculated at \$644 per month, as of the date of trial, after deduction for payments into court, the defendant owes the

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plaintiffs \$40.63 for unpaid rent. The plaintiffs have incurred costs in connection with this action of \$362.50 to date.

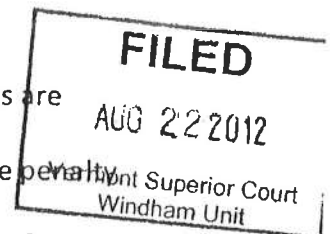
On August 9, 2012, a writ of possession was issued based on the defendant's failure to fully comply with the rent escrow order.

ANALYSIS

The plaintiffs have established that they are entitled to judgment against the defendant for the rent due, \$40.63, and for their costs of \$362.50.

The more difficult issue is whether the defendant is entitled to judgment against the plaintiffs on her counterclaim alleging that the "incentive" provision in the lease is unlawful consumer fraud. At the hearing, the plaintiffs did not seek the imposition of this penalty/incentive, or request that the court order the defendant to pay them the difference between the supposed contract amount of the rent and the \$644 they had agreed to with the Vermont State Housing Authority. Ms. Shapiro conceded that, at the request of SEVCA, which had assisted the defendant in the past, they had agreed not to seek this \$100 monthly difference. Some of their correspondence with the defendant suggests that the plaintiffs had sought to collect this higher amount of rent from her before December 2011. Defendant's attorney asked that the plaintiffs be required to pay a penalty of \$100 because of their attempt to impose this penalty, disguised as an incentive.

As the court stated on the record at the hearing, late fees and penalties are generally unlawful, unless there is a direct relationship between amount of the penalty and costs actually incurred by the creditor. *Highgate Associates, Ltd., v. Merryfield*,

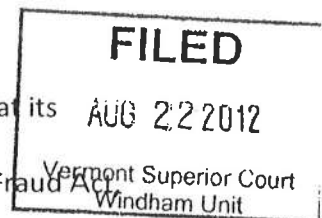


157 Vt. 313 (1991). The plaintiff acknowledged here, just as the landlord in the Highgate case did, that the \$100 difference between rent paid on the 1st of the month, and rent paid any later was not related to actual out-of-pocket costs for late payments, and was intended to serve as an incentive to tenants to pay on time or early. Thus, the \$100 is in effect a “liquidated damages” clause.

The ultimate test for the validity of a liquidated damages clause is whether the clause is reasonable under the totality of the circumstances. . . . [T]hree factors that should be considered in determining whether a contract provision is a reasonable liquidated damages clause rather than an unlawful penalty: (1) because of the nature or subject matter of the agreement, damages arising from a breach would be difficult to calculate accurately; (2) the sum fixed as liquidated damages must reflect a reasonable estimate of likely damages; and (3) the provision must be intended solely to compensate the nonbreaching party and not as a penalty for breach or as an incentive to perform.

Here, although the first factor may be met, because it is difficult to calculate how a landlord may be affected by the late payment of rent, the second and third factors clearly are not applicable. Ms. Shapiro admitted that \$100 per month is not an amount that relates to her likely damages for late payment of rent, and that, in fact, she included this term in the lease in order to give the tenants an incentive to pay on time, i.e. to comply with the lease’s legitimate payment terms. Therefore, the provision of the plaintiffs’ lease that provides an “incentive” for on-time or early payment of rent cannot be enforced, because it is not a legitimate liquidated damages clause, but a penalty.

Defendant argues not only that this clause of the lease is invalid, but that its imposition or attempted imposition was also consumer fraud. The Consumer Fraud Act, 9 V.S.A. §§ 2451 et seq., applies to transactions between landlords and tenants. *Bisson*



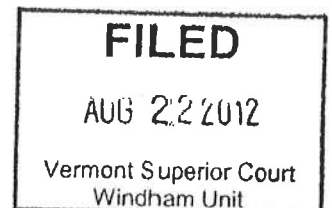
v. Ward, 160 Vt. 343, 348-352 (1993). The defendant argues that because the incentive provision contained in the lease was illegal, its inclusion in the lease was also an act of consumer fraud in violation of this statute.

The Consumer Fraud Act is intended to prevent “unfair or deceptive acts or practices.” Section 2451. In order to show that the Act has been violated, a claimant “must show that: (1) there was a representation, practice, or omission likely to mislead the consumer; (2) the consumer interpreted the message reasonably under the circumstances; and (3) the misleading effects were material, that is, likely to affect the consumer's conduct or decision with regard to a product.” *Lang McLaughry Spera Real Estate, LLC v. Hinsdale*, 2011 VT 29, 190 Vt. 1, ¶ 32 (citation omitted). The claimant must also show that she was damaged by the misleading information in order to recover any money damages. *Id.*

The evidence presented clearly demonstrated that the plaintiff believed that this provision was in fact legal and proper. Ms. Shapiro relied on the fact that many other vendors impose similar penalties for late payment, and assumed that such fees were legitimate and lawful.

However, in determining whether there has been a violation of the act, “the elements are viewed under an objective standard because the focus of the Act is to protect the public rather than punish wrongdoing.” *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 2008 VT 6, 183 Vt. 144, ¶ 10. All that the claimant is required to prove is “that the representation. . .had the tendency or capacity to deceive a reasonable consumer.” *Id.*

Proof of bad faith or ill will on the part of the landlord is not required.

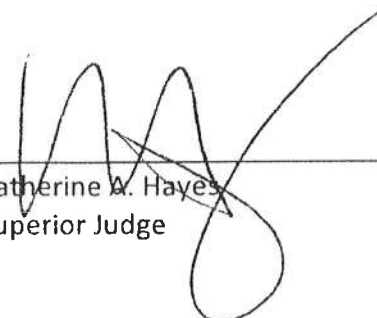


The court concludes that in this case, the inclusion of this illegal clause was in fact likely to mislead the potential tenant into thinking that such a premium could indeed be charged legally, and that a tenant could well have believed that this provision was in fact legitimate and that they would be obligated to pay the premium if their rent payment was late. Knowledge of such a provision would be likely to affect a tenant's decision regarding whether to enter into a lease agreement, and to affect the payments of rent. Had the plaintiff sought to enforce this unlawful term, the court would find that there was a violation of the Consumer Fraud Act. However, here, the defendant's counsel acknowledged that there is no damage to this defendant as a result of this misleading term being included in the lease, because the plaintiff did not seek enforcement of the illegal provision of the lease. Accordingly, the court finds there is no violation of the Consumer Fraud Act.

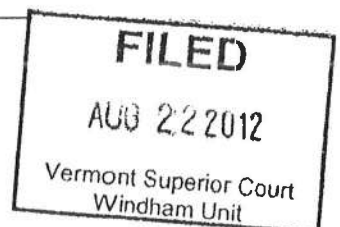
ORDER

Judgment will therefore be entered for the plaintiffs and against the defendant, in the sum of \$403.13, and the clerk is directed to transfer any remaining sums paid by the defendant into court to the plaintiffs. A separate simple judgment order will be issued.

Dated at Newfane, this rd 27 day of August, 2012.


Katherine W. Hayes
Superior Judge

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cc: L. M. KAYLO
S. KAGLE