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STATE OF V
BENNINGTON

Bennington Housing Authority
Plaintiff,

v.

Terri Davis,
Defendant.

BENNINGTON SUPERIOR COURT
DOCKET NO. 203-6-02 Bncv

FINDINGS OF FACT. CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

Plaintiff, Bennington Housing Authority ("BHA"), brought this suit against Defendant, Terri Davis on May 28, 2002 seeking to evict Ms. Davis after learning of alleged "criminal activity" on the premises. In its complaint, BHA requests this Court to order Judgment against Defendant for possession of the premises, its costs of suit, its damages for further occupancy after termination of the lease and during the pendency of this action, and reasonable attorney's fees.

The matter came before the Court on November 22, 2002 for a hearing on the merits. Plaintiff was represented by James Cormier, Esq. Defendant was represented by Mary Welford, Esq. Based on the evidence and stipulations, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Terri Davis lives in Apartment 61 at the Willowbrook housing development in Bennington. Ms. Davis occupies a three-bedroom apartment with her two children, an eleven-year-old daughter and an eight-year-old son.
2. Ms. Davis and her children have lived at Willowbrook since May of 1999. The children attend school at the Molly Stark Elementary School

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3. Ms. Davis is unemployed and vocational rehabilitation has recommended that she apply for disability benefits. She currently receives state assistance in the amount of \$638.00 per month. She also receives food stamps and Medicaid.
4. Ms. Davis' rent at Willowbrook is \$204.00 per month. Her rent payments are current.
5. Ms. Davis also has an older son, Tyrell. Tyrell recently turned sixteen.
6. Tyrell has been in the custody of the Department of Social and Rehabilitation Services (SRS) and living away from home since shortly after Ms. Davis moved to Willowbrook in 1999. Tyrell came into SRS custody due to violent behavior towards his mother and siblings.
7. Tyrell currently lives at the Bennington School. He has an overnight visit with his mother and younger siblings approximately once per month.
8. As of April 7, 2002, SRS required that Ms. Davis not allow Tyrell out of her sight for more than 45 minutes during his home visits. She fully complied with this condition.
9. On April 7, 2002, Tyrell shot an owl in a tree situated in Willowbrook with a Crossman .177 Air Gun ("BB gun"), a high powered pellet gun with an effective range of up to 500 yards. The BB gun belonged to the Coon family. The shooting was witnessed by other tenants and their children. It occurred within 120 feet from Willowbrook Units Nos. 27-33. The incident occurred between 2-3 p.m. when other tenants were at home and their children were outside playing in the vicinity.
10. An owl is a bird protected under federal and state law. To kill an owl is a crime under the Endangered Species Act 16 U.S.C. § 531 et seq. and under Vermont Law (10 V.S.A. § 4902 and § 5401).
11. Tyrell was fifteen at the time of the incident and faced juvenile charges in the family court.
12. After April 7, 2002, SRS amended Tyrell's conditions to require that he be within his mother's sight at all times during his home visits. Ms. Davis has fully complied with this new condition.
13. BHA complaint for eviction against Ms. Davis seeks to ~~dispossess~~ dispossess her and her children from their apartment, claiming that Tyrell's conduct constitutes a violation of the lease. BHA claims Ms. Davis has violated the following sections of the lease:

Section 11A. Management shall not terminate or refuse to renew this lease other than for serious and repeated violations of material

terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations as set forth herein, or for other good cause.

Section 6(k): Tenant shall be obligated as follows: To conduct himself or herself and cause other persons who are on the premises with tenant's consent to conduct themselves in a manner which will not disturb other tenant's peaceful enjoyment of their accommodations, and will be conducive to maintaining the project in a decent, safe, and sanitary condition.

Section 6(l): The tenant, any member of tenant's household, or guest or other person under the tenant's control shall not engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of the management's housing premises by its other residents or employees, including drug-related criminal activity on or near Bennington Housing Authority property and such criminal activity shall be cause for termination of tenancy and eviction.

14. After being notified of her right to do so, Ms. Davis appeared for an "informal conference" with BHA Executive Director, Deborah Reed to discuss the eviction notice Ms. Reed sent her. Ms. Davis and Ms. Reed discussed the alleged incident involving Tyrell and the fact that BHA intended to evict the family based on this incident.
15. At no time during the meeting did they discuss the seriousness of the alleged criminal activity. The alleged criminal activity in this case was an isolated incident. There is no evidence of other similar incidents.
16. At no time during the meeting did they discuss the extent, if any, of Ms. Davis' participation in the incident. There is no evidence that Ms. Davis had prior knowledge that Tyrell was going to be involved in this incident.
17. At no time during the meeting did they discuss the extent to which Ms. Davis had shown personal responsibility for Tyrell's conduct nor what steps she had taken to prevent or mitigate the conduct.
18. At no time did they discuss the effect an eviction would have on Ms. Davis and her younger children. Because of her low income it will be very difficult for Ms. Davis and her two young children to find other housing. She is at risk of becoming homeless.

CONCLUSIONS OF LAW

Willowbrook is a federally funded low-income housing complex subject to 42 U.S.C. § 1437d and to federal regulations, the relevant provisions of which are codified at 24 CFR § 966.42 U.S.C. § 1437d, requires that owners of housing units receiving assistance payments place in their leases the following provision:

(6) [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(6). See also 24 CFR § 966.4(f)(12)(i)(A).

When Ms. Davis rented her apartment, provisions contained within Willowbrook's leases, in compliance with 42 U.S.C. § 1437d, provided that tenant actions which would disturb other tenant's peaceful enjoyment of their accommodations, or result in criminal activity that threatens the health, safety or right to peaceful enjoyment of the management's housing premises constituted grounds for termination of the lease. See Paragraphs K and L of Section 6 "Obligations of Tenant".

The lease provisions give BHA such authority to evict Ms. Davis. Such provisions, however, do not mandate eviction; they permit eviction after suitable weighing of positive and negative factors such as those enumerated in federal regulations and HUD's April 16 letter.¹

¹In a letter dated April 16, 2002 from HUD Secretary Met Martinez to Public Housing Directors, Mr. Martinez urged public housing administrators: "*to be guided by compassion and common sense in responding to cases involving the use of illegal drugs*" and cautioned them that "*eviction should be the last option explored, after all others have been exhausted.*" While this case does not involve a drug eviction, the regulations clearly apply to both drug activity and other criminal activity. The regulations give housing authorities discretion in deciding how to deal with these cases based upon the seriousness of the situation, "the effect on the family." Deborah Reed, Bennington Housing Authority Executive

Oakwood Plaza Apartments v. Smith, 352 N.J.Super 467, 474 (2002) (citing Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002)). Title 24 CFR section 966.4

provides, in pertinent part:

[T]he [public housing authority] may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

24 CFR 966.4(l)(5)(vii)(B) (2002).

A weighing of factors is particularly significant here because of the apparent strength of Defendant's case for a lenient application of the regulations regarding criminal activity by family members. As stated, the eviction action at issue was precipitated by the killing of an owl, a criminal activity under both the Endangered Species Act and Vermont Law. The Court recognizes that eviction in response to criminal behavior may be justified not only as a means of deterrence but also by the need to prevent recurrence of criminal activity on the premises.

Oakwood, 352 N.J.Super at 475. However, scant explanation for Plaintiff's decision to evict appears from the evidence. Rather, it appears that Plaintiff improperly abdicated its responsibility to weigh various factors bearing on the eviction determination in favor of an inflexible "zero tolerance" policy, presumably in response to the use of a BB gun. Id.

Significantly, this case did not involve repeated criminal activity, but rather a single isolated incident, the fault for which BHA makes no attempt to attribute to Ms. Davis. See Charlotte Housing Authority v. Patterson, 120 N.C.App. 552, 558 (1995) (under 42 U.S.C. §

Director, acknowledged receiving this letter in her testimony.

1437d(1)(5) good cause for eviction does not exist when a public housing tenant is not personally at fault for a breach of the criminal activity termination provision of a public housing lease by a member of the tenant's household).² The Court notes that Ms. Davis had no prior knowledge that Tyrell was going to be involved; that the "BB gun" used in the shooting was not kept in Ms. Davis' home and did not belong to anyone in the household. See, e.g., Delaware County Housing Authority v. Bishop, 749 A.2d 997 (Pa. Commw. Ct. 2000) (holding that tenant could not be evicted when she did not have control over her adult sons and did not have knowledge of their criminal activity). The record suggests that had Ms. Davis known she would have exercised control to prevent such criminal activity. Ms. Davis is able to control Tyrell as evidenced by the continuation of home visits, and the lack of further incidents under the new SRS condition that he is not to be out of her sight during the visits.³

As with the ruling in Oakwood, supra, this Court is loathe to lend its fearsome power to the effort to dispossess an otherwise law-abiding tenant, innocent of any breach except strict liability for a single act of adolescent recklessness on the part of her 15 year-old son. While acknowledging that the BB gun was hardly a toy, and that different circumstances might have produced more drastic outcomes, it must be emphasized that the facts of this case bear no relationship to those described in the line of authorities that have struggled with vicarious

²In Charlotte, plaintiff brought a summary ejectment against defendant, who was a tenant of a public housing development managed by plaintiff. Plaintiff attempted to evict defendant after defendant's son, who resided with her and was named in her lease, allegedly shot and killed a person. On appeal, the court affirmed the trial court's conclusion that good cause did not support defendant's eviction. In its decision, the court noted that defendant "had no knowledge of the shooting until after it occurred[;]" that "the gun used in the shooting was not kept in defendant's home" and "did not belong to anyone in her household[;]" and that defendant "had no reason to know that her son might commit such an act." Id. at 558.

³ The Court further notes Tyrell's unobtrusive presence during the trial, in support of his mother.

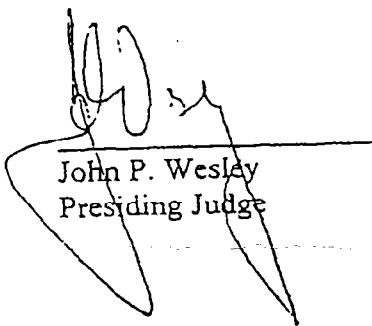
responsibility visited on public housing tenants for the acts of family members or guests. Much of this jurisprudence has been in response to the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(3), enacted to address the scourge of drug dealers “increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants”. See, Department of Housing & Urban Development v. Rucker, *supra*.⁴ While Congress and the courts have recognized the need to grant broad discretion to housing authorities in their efforts to maintain safe and decent shelter for low-income tenants, arbitrary resort to the eviction remedy for isolated minor criminal behavior threatens to subvert the very purpose of national assisted housing policy, as suggested by the cautionary letter from HUD Secretary Martinez and 24 CFR section 966.4. In this action, BHA’s failure to demonstrate any meaningful consideration of Defendant’s ability to supervise her son in the future, or the consequences of eviction on innocent siblings, compels the conclusion that its decision to terminate the lease is arbitrary and capricious, and cannot be used to invoke the power of the state to evict.

⁴ This Court concedes that Rucker supports the wide discretion of housing authorities to evict, and to impose strict liability on tenants for the drug-related behaviors of their family members and guests. Indeed, the ruling rejects arguments from legislative history on which earlier decisions favorable to innocent tenants had been based. See, Charlotte Housing Authority v. Patterson, and Delaware County Housing Authority v. Bishop, *supra*. Yet, in further rejecting the substantive due process argument advanced by tenants, the Supreme Court nonetheless emphasized the role that state courts play during eviction proceedings to resolve “individual factual disputes about the whether the lease provision was actually violated.” 535 U.S. at 130. Thus, as with the court in Oakwood Plaza Apartments v. Smith (decided after Rucker, and distinguishing its holding), this Court concludes that it retains the inherent authority to review the public housing authority’s decision to evict for abuse of discretion.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that judgment be entered for Defendant, and Bennington Housing Authority's complaint is **DISMISSED**.

Dated at Bennington, County of Bennington and State of Vermont, this 14th day of January, 2003.



John P. Wesley
Presiding Judge