

Legal Opinion: GCH-0060

Index: 2.245
Subject: PH Due Process Determination: Vermont

June 22, 1992

DUE PROCESS DETERMINATION

for the

STATE OF VERMONT

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ANALYSIS

- I. Jurisdiction: Vermont.
- II. Elements of Due Process

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d(k), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process

The statutory phrase, "elements of due process," is defined by HUD at 24 CFR § 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for

terminating the tenancy and for eviction;

- (2) Right of the tenant to be represented by counsel;

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- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have; and
- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination."

The present due process determination is based upon HUD's analysis of the laws of the State of Vermont to determine if eviction procedures under those laws require a hearing with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of Vermont law for a Superior Court ejectment action pursuant to Vt.Stat. Ann. tit. 9, 4451-4468 and Vt.Stat. Ann. tit. 12, 4851 et seq. include all of the elements of due process as defined at 24 C.F.R. 966.53(c). This conclusion is based on the legal requirements established by Vermont statutes, case law, and court rules.

III. Overview of Vermont Eviction Procedures

Vermont law (1985 Vt. Acts No. 175 (Adj. Sess.), 8) provides that Vt.Stat. Ann. tit. 9, 4451-4468, apply to rental agreements entered into, extended, or renewed on or after July 1, 1986. Obligations imposed on landlords and tenants pursuant to Chapter 137 are implied in all rental agreements (Vt.Stat. Ann. tit. 9, 4453), and may not be waived or circumvented (Vt.Stat. Ann. tit. 9, 4454).

Tenant's obligations, including but not limited to restraint from conduct which disturbs other tenants' peaceful enjoyment of the premises, are set forth at Vt.Stat. Ann. tit. 9, 4456.

The landlord may terminate the tenancy if the tenant fails to comply with a material term of the rental agreement, or with obligations imposed under Chapter 137 of Vermont Statutes Annotated. Vt.Stat. Ann. tit. 9, 4467(b). If the tenant remains in possession after the rental agreement is terminated, without consent of the landlord, the landlord may prosecute a claim for the possession of property occupied by the tenant. The landlord may commence an action under the Superior Court ejectment procedures. Vt.Stat. Ann. tit. 12, 4851 et seq.. The Superior

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Court has jurisdiction to hear ejectment cases and issue a writ of possession to restore a plaintiff-landlord to the possession of property. Vt.Stat.Ann. tit. 12, 4851.

The Vermont Rules of Evidence (V.R.E) govern proceedings in the courts of the State. V.R.E. 101. Such proceedings are also subject to the Vermont Rules of Civil Procedure (V.R.C.P.). V.R.C.P. 1.

Rules of Evidence pertinent to this determination include: V.R.E. 402-3 (admission and exclusion of relevant evidence); V.R.E. 601 (witness competency); V.R.E. 602 (matters appropriate for witness testimony); V.R.E. 607-9 (witness credibility); and V.R.E. 611 (cross-examination).

Rules of Procedure pertinent to this determination include: V.R.C.P. 11, 26, 43, and 51 (attorneys' activities); V.R.C.P. 4 (service of summons and complaint); V.R.C.P. 8 (pleading requirements); V.R.C.P. 32 (use of depositions at trial); and V.R.C.P. 54 (final judgments).

IV. Analysis of Vermont Eviction Procedures for Each of the Regulatory Due Process Elements

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 CFR 966.53(c)(1))

Vt.Stat.Ann. tit. 9, 4467 states procedures which must be followed to give a tenant proper notice of lease termination. The landlord must give written notice of the termination of the tenancy. The notice may be served either by hand-delivery or by mailing to the tenant's last-known address. Vt.Stat.Ann. tit. 9, 4467(b), 4451(1). It does not appear that this notice must specify the grounds for termination. When a landlord terminates a tenancy "in accordance with the terms of a written rental agreement," the notice to terminate must be at least 30 days, when rent is payable on a monthly basis. Vt.Stat.Ann. tit. 9, 4467(e).

Under Vt.Stat.Ann. tit. 12, 4852, process in a Superior Court ejectment action:

may issue as a summons . . . requiring the defendant to appear and answer to the complaint of the plaintiff which shall state that the defendant is in the possession of the lands or tenements in question

(describing them), which he holds unlawfully and against the right of the plaintiff

Process must "be served and notice given as in other civil actions." Vt.Stat.Ann. tit. 12, 4853.

The summons must notify the defendant of "the time within which these rules require the defendant to appear and defend." V.R.C.P. 4(b).

V.R.C.P. 8 requires that all pleadings which set forth a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." V.R.C.P. 8 also requires that such pleadings contain "a demand for judgment for the relief which the pleader seeks."

Consequently, a tenant-defendant in a Superior Court ejectment action must be informed of the grounds for eviction as required by HUD's due process definition at 24 C.F.R. 966.53(c).

B. Right to be represented by counsel
(24 CFR 966.53(c)(2))

A tenant-defendant's right to be represented by counsel is implied by various provisions of the Vermont Rules of Civil Procedure. These rules include: V.R.C.P. 11, which refers to the role of counsel in signing pleadings; V.R.C.P. 26(g), which requires the signing of discovery requests or responses by parties or their attorneys; V.R.C.P. 43(g), which refers to the role of counsel during the examination and cross-examination of witnesses; and V.R.C.P. 51, which governs the role of counsel for each party in closing argument.

C. Opportunity for the tenant to refute the evidence presented by the PHA, including the right to confront and cross-examine witnesses (24 CFR 966.53(c)(3))

Proceedings in Vermont courts are subject to the Vermont Rules of Evidence (V.R.E.). V.R.E. Rule 101. The V.R.E are intended to promote the development of the law of evidence in order to attain the truth in a judicial proceeding. V.R.E. 102.

Generally, all relevant evidence is admissible unless limited by constitutional requirements or by statute or by rules of the courts in the state. V.R.E. 402. Relevant evidence may only be excluded if probative value of the evidence is substantially outweighed on grounds of prejudice, confusion, or

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waste of time. V.R.E. 403. The court must determine the qualifications of a witness and the admissibility of evidence based on the court's determination of relevance. V.R.E. 104(a); cf. V.R.E. 104(e).

The testimony of witnesses must be taken orally in open court (unless otherwise provided by V.R.C.P., or the V.R.E., or

other rules adopted by the Supreme Court). V.R.C.P. 43(a). Generally, every person is deemed competent to be a witness (unless specifically disqualified due to prescribed incapacities). V.R.E. 601(a), (b). However, a witness must generally have personal knowledge of the matter (other than opinion testimony by expert witnesses). V.R.E. 602.

The defendant-tenant may refute the credibility of the plaintiff's witness. The credibility of a witness may be impeached by any party. V.R.E. 607. Evidence in the form of opinion or reputation may be used to attack the credibility of a witness. V.R.E. 608(a). Such evidence, however, may only refer to character for truthfulness or untruthfulness. V.R.E. 608(a). Credibility of a witness may also be attacked by evidence of a prior conviction of a crime which involved dishonesty, or was punishable by death or imprisonment for a year or more. V.R.E. 609. A prior statement of a witness is also subject to examination. V.R.E. 613.

The V.R.C.P. grants a tenant-defendant the right to impeach or contradict the plaintiff's case through cross-examination of plaintiff's witnesses. V.R.C.P. 43(g). A witness may be cross-examined on any matter relevant to the case, including credibility. V.R.E. 611(b). Ordinarily, leading questions are permitted on cross examinations of an adverse witness. V.R.E. 611(c).

At trial, a pretrial deposition may only be used against a party who had the opportunity to be present at the taking of the deposition. V.R.C.P. 32(a). At the taking of a deposition, the witness may be cross-examined in the same manner as permitted at trial. V.R.C.P. 30(c). A deposition may only be used at trial in specific and restrictive circumstances stated in the rules. V.R.C.P. 32(a). Provisions which allow the use of a deposition at trial under "exceptional circumstances" note the importance of presenting the testimony of witnesses orally in open court. V.R.C.P. 32(a)(3).

A party has a right to inspect writings or recorded statements utilized in court by the adverse party. V.R.E. 106.

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A defendant tenant has the right to present evidence and witnesses to refute the case presented by the PHA, subject to reasonable judicial control as to the method of interrogating witnesses and of presenting evidence on direct and cross examination. V.R.E. 611(a).

The Vermont rules of evidence and civil procedure give a defendant-tenant a full opportunity to refute the PHA's evidence, including the right to confront and cross-examine witnesses as required by HUD's due process definition at 24 C.F.R.

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have
(24 CFR 966.53(c)(3))

V.R.C.P. 8(b) states that a party "shall state in short and plain terms the party's defenses to each claim asserted." This rule places no restrictions on a tenant-defendant's right to raise any defenses the tenant may have under law.

In the absence of any statutes or rules abridging a tenant's right to raise available defenses, a tenant-defendant in an ejectment action may present any affirmative legal or equitable defenses to which the tenant is entitled as required by HUD's due process definition at 24 C.F.R. 966.53(c).

- E. A decision on the merits (24 CFR 966.53(c)(4))

The overall structure of the trial and hearing requirements of an ejectment action pursuant to Vt.Stat.Ann. tit. 9, 4468 imply that the Superior Court's decision is to be based on evidence presented which bears upon the legal and factual issues framed by the complaint and answer. V.R.C.P. 38, 39, and 41-54.

V.R.C.P. 52 also expressly provides that in all actions tried upon the facts, the Superior Court must, "upon the request of a party made as a motion within 5 days after notice of the decision" or "upon its own initiative, find the facts specially and state separately its conclusions of law thereon." There is no exception to this rule requiring that the Superior Court may be requested to find the facts specially and state its conclusions of law after notice of the decision. Finally, V.R.C.P. 54(c) requires that every final judgment, except those entered against a party as a result of default, must "grant the relief to which the party in whose favor it is rendered is entitled."

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Under Vermont law, the decision in a Superior Court ejectment action must be rendered on the merits as required by HUD's due process definition at 24 C.F.R. 966.53(c).

V. Conclusion.

Vermont law governing Title 9 4451-4468 and Title 12 4851 et seq. ejectment proceedings in the Superior Court requires that the tenant have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations.

By virtue of HUD's due process determination under section 6(k) of the U.S. Housing Act of 1937, a PHA in Vermont may evict a public housing tenant pursuant to a Superior Court decision in a Superior Court ejectment proceeding for any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA or any

drug related criminal activity on or near the premises. The PHA is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.