Memorandum

To: Judge Brackett L. Scheffy

From: Joe Reed, Elizabeth Beliveau (Plaintiffs)

Date: December 25, 2008

Subject: Joe Reed, Elizabeth Beliveau v. Teresa Allen, Henniker District Court Case # 444-2008-LT-072, Statement of facts and argument in Support of Sufficiency of Seven Day Notice.

STATEMENT OF FACTS

On October 31st, 2008, Joe Reed and Elizabeth Beliveau ("Plaintiffs"), purchased the property located at 25 Dodge Hill Rd. Bennington NH. 03442 ("Property") from the Town of Bennington for the sum of $29510.69 in cash. Teresa Allen ("Defendant") has not been the legal or equitable owner of the property since June 18,2008 when the Town of Bennington caused a tax deed to be recorded in their favor. A seven-day notice to quit was served in hand on November 1st, 2008 by Plaintiffs to Defendant, witnessed by an officer of the Bennington Police Department. To date, Defendant has refused Plaintiffs any access to the remaining residential mobile home described in the deed and has similarly refused to vacate the property and remove her personal effects. Plaintiff's total inability to use the property has caused them damage in the amount of at least $35 per day and affected their ability to be free from unreasonable restraint at the hands of a private actor.

At all times, and at present, Defendant owns and maintains another residential home located at 27 Island St in Wilton, NH. Recorded at the Hillsborough County Registrar of Deeds, book 3321, page 462 dated May 13th 1985, that she can reside in. Defendant has not been the record owner of the property since June 18th, 2008 and Defendant was clearly aware of the Town's tax deed recording as noted in the Selectman's Meeting on June 18th, 2008. "Listened to Theresa Allen's denouncement of family, town employees, town government, state government, judicial system, etc. for an extended period of time before asking her to leave the meeting. . . . . Chairman Germain notified Ms. Allen that because of nonpayment of her 2005 Tax Lien a Tax Deed for her property was recorded at the Registry of Deeds June 18(.)" Town of Bennington Board of Selectman Meeting June 18th, 2008. <http://www.townofbennington.com/administration/BOS/2008/06.18.08Minutes.pdf.>

"The statutory process was intended to be summary and was designed to provide an expeditious remedy to a landlord seeking possession." Matte v. Shippee Auto, 152 N.H. 216, 218, 876 A.2d 167 (2005). However, in the present case, Plaintiffs have had their property completely and entirely withheld from them for 55+ days.

ARGUMENT

Seven days notice to quit is sufficient under RSA 540:2 II (b) and (d) for owners who *ELECT* RSA 540 v. common law remedies and for all eviction purposes where the property is subject to substantial damage and the behavior of tenant adversely affects health and safety of others. Further, only a notice to quit is necessary for nonrestricted property under RSA 540:2:I and other good cause under RSA 540:2:II (e).

RSA 540:2:II (b)

"RSA 540:12 (1997) provides in part that the purchaser at a mortgage foreclosure sale may recover possession thereof from a person in possession, holding it without right, after notice in writing to quit as prescribed in RSA chapter 540. See also RSA 540:2, I (Supp.2006) (owner may terminate "any tenancy" by giving occupant notice to quit); AIMCO Props. v. Dziewisz, 152 N.H. 587, 589, 883 A.2d 310 (2005) ("any tenancy" includes tenancies at sufferance). Indeed, the plaintiff initiated this action by filing a landlord-tenant writ under RSA chapter 540. Given the availability of that process and in light of the policy reasons discussed above, we conclude that the time when the public interest required the existence of self-help for a purchaser at a foreclosure sale to recover possession from a tenant at sufferance has passed. Cf. Standish, 93 N.H. at 205, 37 A.2d 788." Greelish v. Wood, 914 A.2d 1211 (N.H., 2006)

"RSA 540:2, II, sets forth several grounds for eviction of a tenant of restricted property, like the plaintiff's property, that do not require a landlord to provide prior written notice. See RSA 540:2, II. These include *substantial damage to the property*, failure to pay rent, and failure of the tenant to comply with a material term of the lease, among others. RSA 540:2, II(a), (b), (c). The legislature further provided that, even *under the "other good cause" provision, the cause for termination "need not be based on the action or inaction of the tenant," but may include legitimate business or economic reasons that do not require prior written notice to the tenant*." Great Traditions v. O'Connor, 949 A.2d 724 (N.H., 2008) (emphasis added).

The Notice to Quit provided to Defendant stated that 1) lack of services/utilities to the property will result in the immediate substantial damage to the property; and 2) items in and around the yard present serious danger to Plaintiffs and others entering onto the property including Defendant. Under RSA 540:3:II(b) and (d), seven day notice to quit is sufficient if there is "substantial damage to the premises by the tenant, members of his household, or guests." Here, Defendant has no water, and therefore sewer resulting in the improper disposal of human waste. The mobile home has no known source of heat and the roof is in need of immediate repair. Defendant has told us that the electrical system in the mobile home is in need of replacement, yet she admittedly has electric service installed. Because Defendant has refused us all access to the property for maintenance we can't even assess to what extent the damage is accruing, other than the obvious piles of junk and rubbish that surround the mobile home. *See Town Meeting Notes, Infra*. There also appears to be a number of feral cats on the property. During one of our only two visits, we observed no less than seven cats around the mobile home. In addition to the issues described above, un-kept pets present a major issue of damages to the property, particularly when they are not up-to-date with shots and flea preventive programs. The

damages caused by such disease/infestation could render the mobile home useless for a number of months. Further, NO maintenance is being done on the property based on our exterior visual observation making it immediately necessary to get possession of the property we own in fee simple to perform necessary repairs and maintenance as well as protect our cash investment.

Therefore, Defendant's possession and use of the property and mobile home without services and/or utilities causes substantial damage to our property. Damage that will likely be unrepairable . In fact, Defendant's loss of the property via tax deed was due to the fact that a second trailer on the property was condemned because it had a collapsed roof due to snow load. We are in the initial throws of winter and just had a storm of almost two feet and cannot even access the property to see if it was damaged making it extremely difficult to ascertain if defendant is liable for the damage or it existed prior to our purchase. Every day that goes by Plaintiffs interest is further damaged to the point Plaintiffs will likely lose the entire mobile home to a collapsed roof like that of the condemned unit which was the very reason Defendant lost the property to the Town of Bennington.

RSA 540:2:II (d)

Under subsection (d), "behavior of tenant . . which adversely affects the health or safety of other tenants or landlord or his representatives . . ." is sufficient to permit the use of a seven-day notice to quit. RSA 540:2:II (d) Here, the property condition is gravely dangerous. In addition to the substantial damages described above, there are electrical lines on the ground on the property and Defendant has acknowledged there is live power to the property, unmarked holes with water and sewer lines intended for the condemned trailer location, piles of sharp metal, wood, glass, and garbage, as well as numerous other hazards such as roadside trash piled next to the public way that could very easily inflict very serious injury on any entrant, Defendant, Plaintiffs or one of the many children that live on the street. The condition of the property is the very reason it was taken by tax deed. *See* RSA 155. Defendant's failure to care for the mobile homes resulted in the caving in of the roof of the second mobile home and was subsequently condemned by the town. Much of the debris from the collapsed roof remains in the yard which creates serious and unreasonable risk of injury. Additionally, when we became the legal owners of the property we had to purchase insurance to cover injury to others on or entering the property. This exposes us to an unreasonable risk of liability given we did not bargain for the illegal occupation of the property by Defendant. Due to the condition of the property, the town has informed us they will require and clean up as soon as Defendant is removed and is closely monitoring the situation to ensure we are actively working to clean the property. However, we cannot gain access and we remain liable to others for injury for circumstances we did not create, nor did we bargain for.

The notice served to Defendant stated that due to the physical hazards of the property, i.e. Dangerous wood, metal, glass, and other hazards such as human waste because there is, and has not been, water service to the property since approximately November 2005. The Town of Bennington has also previously imposed orders on Defendant to remove trash from the roadway/public right of way as noted by the selectman's minutes, "While in attendance, the Selectmen instructed Theresa Allen to remove accumulated trash located within the Town's right of way in front of the residence. Ms. Allen stated that it was personal property. Ms. Allen was instructed to remove or relocate the belongings;"

Town of Bennington Board of Selectman Meeting September 3, 2008.
<http://www.townofbennington.com/administration/BOS/2008/09.03.08Minutes.pdf>

In addition to providing Defendant with sufficient notice under the terms of RSA 540:2:II, Plaintiffs accepted and extended the notice for *another* three weeks for the removal of personal property. This was both oral and written as stated in the trail on the merits and the subsequent agreement was submitted to the District Court. Defendant acknowledged both the 7-day notice to quit, and the three-week extension for the removal of personal property Plaintiffs provided and Defendant makes no argument that either were, or are, insufficient. We extended as much flexibility to tenant as possible even though "(a) holding over is not excused by the necessity of the removal of the tenants goods . . . ." 49 Am.Jur.2d, § 1118,pg. 1071. As a result of this extension, we became liable for possible injury for an extended period of harm in order to accommodate Defendant. Therefore, it is unreasonable and unnecessary for Plaintiffs to assume, or be ordered to accept, any further risk of harm, either financial or physical.

Therefore, the condition of Defendant's personal property and the remnants of the collapsed mobile home create an unreasonable risk of injury to plaintiff, Defendant, and others. Because of the high degree of danger given the physical nature of the property and surroundings, RSA 540 provides that 7 days is sufficient. RSA 540:2:II (d). However, because Plaintiffs attempted to accommodate Defendant and Defendant's removal of property and elect to provide notice under RSA 540 rather than elect a immediate common law remedies, Plaintiffs should not further penalized and summary judgment in favor of Plaintiffs request should immediately follow.

Not only was seven day notice provided to Defendant, but more than 52 days has expired since Defendant was served during which our rights as the legal and equitable owners of the property have been ignored.

Here, Plaintiffs became the legal and equitable owners of the property on 10/31/2008. On 11/1/2008, in the company of the Bennington Police department, served Defendant with a 7-day notice to quit. As discussed supra, Plaintiffs DO NOT have a landlord tenant relationship with Defendant and elected to evict Defendant under RSA 540 rather than a common law election primarily due to the Supreme Courts statements in Greelish that, "The statutory process was intended to be summary and was designed to provide an expeditious remedy to a landlord seeking possession. Matte v. Shippee Auto, 152 N.H. 216, 218, 876 A.2d 167 (2005)." Greelish v. Wood, 914 A.2d 1211 (N.H., 2006).

RSA 540:3:II provides, " For all residential tenancies, 30 days notice shall be sufficient in all cases; provided however, *that 7 days' notice shall be sufficient if the reason is set forth in RSA 540:2, II(a), (b), or (d).* As noted our 7-day notice was delivered on 11/1/2008 at 10:54am and required Defendant vacate the property on or before 11/8/2008. Because this document was drafted on 10/31/2008 the date specified in the heading was still set to 11/7/2008, however, the reason for the eviction clearly states that the document is a ***7 day notice to quit*** and Defendant acknowledged the document as such and made no objections to its terms. In fact, Defendant made a request, which was granted, that she be permitted an additional 21 days to remove her personal property. This extended

Defendants time for removal of personal property to 30 days. Another example of Plaintiffs good will attempt at providing Defendant with time to remove property rather than elect an immediate possessory action.

Plaintiffs are not required to provide more than 7 days notice based on the facts and discussion supra, but have in fact provided 30 days notice because of the extension and later refusal of Defendant to vacate. Any *de minimis clerical or scrivener error* in the Notice to Quit should be deemed in favor of compliance by Plaintiffs because Defendant does not complain that the 7 days notice is or was insufficient and any other result would result in the taking of plaintiff's property based on a minor scrivener error which had no effect on actual time Defendant has been permitted to vacate. "Presumably there is room for a *de minimis* concept where there has been tortious impact but such inconsequential manifestations that a reasonable person would not consider he was either injured or that it was appropriate to make inquiry." Nivens v. Signal Oil & Gas Co., 520 F.2d, 1024 (5th Cir. 1975). The NH Supreme Court held that the violation of a search warrant condition, knocking on a door versus leaving a package in front of the door, is " that such de minimis noncompliance with the triggering event is of no consequence." State v Gonzalez, 738 A.2d 1247 (N.H., 1999). Similarly, the effect of a minor scrivener's error here is of no consequence because Defendant believed and received over 30 days notice to quit. Additionally, if the Court finds that the Notice to Quit is insufficient the notice "is nevertheless adequate to terminate the tenancy at the end of the next notice period." 50 Am.Jur.2d, § 1212, Pg. 98

Therefore, Defendant was provided with sufficient notice to comply with RSA 540 and any potential clerical or scrivener's error in the documentation should be deemed *de minimis* because Plaintiffs and Defendants both understood it to be a seven-day Notice to Quit and Defendant was ACTUALLY provided with 30+ days to vacate. Additionally, no landlord tenant relationship exists here. At no time did Plaintiffs have any prior agreement with Defendant, nor was there an explicit or implicit agreement accompanying the foreclosure purchase. "It is the option with a landlord to treat a tenant wrongfully holding over as trespasser or to waive the wrong of holding over and treat him as a tenant." 49 Am.Jur.2d, § 1116, pg. 1070. Plaintiffs made every possible accommodation for Defendant given the circumstances but in no way accept Defendant as a tenant and seek immediate ejectment for Defendant's dissiessen.

Plaintiffs are entitled to the Fair Rental Value of the property for the entire period of dispossession by Defendant.

Defendant's possession of the property requires that plaintiff be remunerated for its fair rental value to prevent an unjust result. "Where possession of leased premises is unlawfully withheld by a tenant, damages are recoverable against him." 49 Am.Jur.2d, § 1124, Pg. 1075.

"In the absence of proof of special damages, the general rule is that the proper measure of recovery "against a tenant for the failure to surrender the premises is the reasonable rental value for the time possession is withheld." 49 Am.Jur.2d Landlord and Tenant § 278 (2006). This is consistent with the view of the Restatement (Second) of Property, which states that a landlord is entitled to recover

from a tenant who improperly holds over after the termination of a lease "for the use and occupation of the leased property during the holdover period at a rate based on the previous rental rate, or on the proven reasonable value independently established if that differs from the previous rental rate." Restatement (Second) of Property, Landlord and Tenant § 14.5 (1977). As the Reporter's Note explains, this rule "simply requires the tenant to pay for what he got during the holdover period." Id. at 34 Reporter's Note 2." Greelish v. Wood, 914 A.2d 1211 (N.H., 2006)

Here, Defendant has possessed and prevented us access to the property we purchased on 10/31/2008. Because of this dispossession, Defendant "is liable for their reasonable rental value for the time that he retains possession, or . . . for the fair value of the use of the premises." 49 Am.Jur.2d, § 1125, pg. 1075.

On Plaintiffs complaint it was noted they were seeking fair market or fair rental value for the period of dispossession. Because the court clerk did not know how to handle a tax deed rental value assessment, Plaintiffs were told we could not seek damages unless accompanied with a demand for rent. Plaintiffs emphatically disagree and Greelish provides clear stare decisis demonstrating that damages do accrue for the dispossession of real property in a tax deed situation because the holdover tenant is a tenant at sufferance and no prior lease agreement existed preventing Plaintiffs from demanding "rent."

Therefore, Plaintiffs are entitled to damages as awarded in Greelish in the amount of the fair rental value, which Plaintiffs intended to rent at a rate of $750.00 per month.

Conclusion

Plaintiffs are entitled to immediate possession of their real property. Under no circumstances did Plaintiffs accept Defendant as tenant, either expressly or implicitly. Plaintiffs are the legal and equitable owners of the real property and Defendant is adversely possessing the property and not permitting Plaintiffs to access the mobile home nor clean the property to which substantial danger and liability exists.

In addition, Plaintiffs are experiencing unreasonable economic harm at the hands of Defendant because Plaintiffs are not able to make the property productive after paying $29510.69 in cash and $860 in taxes, thereby losing interest and investment on that same money. Further, Plaintiffs real property rights have been invaded without consent and Defendants taking results in an inequitable benefit to Defendant. Plaintiffs provided Defendant with more than a reasonable period of Notice to Quit, more than required because they chose to provide Defendant with a reasonable time to vacate, rather than a common law choice of trespass. The "legislature (further) provided that, even under the "other good cause" provision, the cause for termination "need not be based on the action or inaction of the tenant," but may include legitimate business or economic reasons that do not require prior written notice to the tenant. *See* RSA 540:2, V (2007)." Great Traditions Home Builders, INC. v. O'Connor, 949 A.2d 724, (N.H., 2008). Plaintiffs should not be penalized for attempting to provide defendant with a reasonable opportunity to vacate even though they were not required to do so.

Therefore, any decision other than the immediate order for a writ of possession with damages in Plaintiffs favor results in economic and constitutional harm to Plaintiffs that this court should not and cannot permit to occur. Plaintiffs attempt to provide Defendant with a reasonable period to vacate rather than the election of a common law remedy such as trespassing should not be avoided due to a *de minimis* scrivener error when both parties and the substantive document properly expresses the notice required by RSA 540. Further, Defendant makes no argument that Plaintiffs election of remedy is insufficient or inappropriate.