SUPREME COURT OF YUKON

Citation: *Fox* v. *Northern Vision Development Corp., Northern Vision Development Limited Partnership and Lanix Property Management Ltd.* as agent for the Landlord Northern Vision Development, 2009 YKSC 64

Date: 20091007
Docket S.C. No.: 09-AP010
Registry: Whitehorse

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
R.S.Y. 2002, c. 131, and amendments thereto

BETWEEN:

WENDY FOX

Appellant/Tenant

AND:

NORTHERN VISION DEVELOPMENT CORP., NORTHERN VISION DEVELOPMENT LIMITED PARTNERSHIP and LANIX PROPERTY MANAGEMENT LTD. as agent for the Landlord Northern Vision Development

Respondents/Landlords

Before: Mr. Justice L. F. Gower

Appearances:

Wendy Fox	Appearing on her own behalf
Michael Nixon	Appearing for Lanix Property Management Ltd.
Heiko Franke	Appearing for Northern Vision Development Corp. and Northern Vision Development Limited Partnership

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an appeal by Wendy Fox under the *Small Claims Court Act,* R.S.Y. 2002, c. 204, from the decision of a Territorial Court Judge made on August 31, 2009. It relates to a matter under the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131.

[2] Ms. Fox was a tenant of the respondents in an apartment located at Suite 208 - 21 Roundel Road in Whitehorse. That tenancy commenced May 1, 2007 pursuant to a written residential tenancy agreement, which has been filed in evidence and was dated April 13, 2007.

[3] In August 2008, the landlords provided notice to Ms. Fox of its general intention to convert the apartments in the building in which her apartment was located to condominiums, and that she would eventually have to vacate her apartment for that reason, or purchase it. Subsequently, there was a further notice provided by the landlords that Ms. Fox would have to vacate her apartment by May 1, 2009, at which time renovations would be done to the apartment to convert it into a condominium for resale.

[4] On March 19, 2009, Ms. Fox provided notice by e-mail to the landlords indicating that her move-out date would be April 1, 2009, and that she was looking forward to receiving the $800 deposit she paid when she moved into the premises. The landlords retained the $800 deposit without bringing an application to the Court, contrary to the provisions of the *Landlord and Tenant Act.* Accordingly, Ms. Fox wrote to the landlords indicating her complaint in that regard and that, if steps were not taken by the landlords, she would bring her own application to the Court, which she did.

[5] The matter was adjudicated in Small Claims Court on August 31, 2009. The Territorial Court Judge was satisfied that there were damages to the apartment which justified the retention of at least $800 by the landlords. In his view, the damages exceeded that amount by approximately twice as much or more. However, the Judge did order that the landlords pay to Ms. Fox the interest that she was entitled to under the provisions of the *Landlord and Tenant Act*. That interest has since been paid pursuant to that order. It was calculated in the amount of $55.62, and although Ms. Fox had some minor disagreement with that calculation by the landlords, she did not include that as part of the relief that she is seeking on this appeal.

[6] Pursuant to s. 9 of the *Small Claims Court Act*, R.S.Y. 2002, c. 204, as amended by *Small Claims Court Act, Act to Amend,* S.Y. 2005, c. 14:

> "An appeal lies to the Supreme Court from a final order of the Small Claims Court on questions of fact and on questions of law and must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that Court as a new trial."

[7] On this appeal, I have reviewed the two affidavits filed by Ms. Fox in Small Claims Court, the one affidavit filed by the landlords, and an additional package of material, which was filed by Ms. Fox on July 21, 2009 and was headed with a letter dated July 20, 2009 addressed "To whom it may concern". The package attached a further letter from the landlords to Ms. Fox dated April 15, 2009, as well as a copy of a Rental Unit Condition Report respecting the subject apartment which showed a move-in date of May 1, 2007 and is, apparently, signed by both the landlords and Wendy Fox and is witnessed. The final document in that package is a letter from Wendy Fox to

Lanix Property Management Ltd. dated April 22, 2009, which is the letter I referred to earlier where Ms. Fox complained that the landlords had improperly withheld the damage deposit without making the requisite Court application.

[8] I am satisfied that this matter can be disposed of by my review of the material on record and that a new trial is not required. I am further satisfied that there are some questions of fact which need to be resolved on this appeal and that the Territorial Court Judge erred in his general determination of the amount of the damages to the apartment.

[9] I am referring principally to para. 12 of the landlords' affidavit which was filed in the Small Claims Court on July 13, 2009. That paragraph refers to a list of costs incurred by the landlords due to the damage in Suite 108 (sic) by Ms. Fox. The first listed item relates to moving the items left behind in the apartment by Ms. Fox, holding them for 30 days, and disposal, in the amount of $160. That is unchallenged by Ms. Fox.

[10] The second item relates to cleaning the suite, with the exception of the walls, in the amount of $80. That is also unchallenged.

[11] The next item relates to damage to the screen door in the amount of $150. That was challenged by Ms. Fox in the Small Claims Court, and I have a transcript of those proceedings. I also note that the only reference to anything relating to the "Suite Door" in the Rental Unit Condition Report, seems to be that it was "being replaced [with] reno". Ms. Fox indicated that there was no damage to the door, but there was a piece of cardboard along the bottom that was used as a draft protector. Other than that, she

maintained that the door was in the same condition when she moved in as when she moved out. There is no evidence to the contrary from the landlords to dispute Ms. Fox's assertion in that regard, and I am disallowing the claim for $150.

[12] The next item in the landlords' list is with reference to replacing a damaged electrical receptacle in the kitchen. Again, Ms. Fox took the position that the condition of the receptacle when she moved in was the same as when she moved out. There was a photograph of the damaged receptacle in evidence, which is also before me. A representative of the landlords, Mr. Heiko Franke, indicated at the hearing that if you were to come into the kitchen, "you would not see it because the fridge would cover it." There is no reference to the damaged receptacle in the Rental Unit Condition Report. I am satisfied that Ms. Fox was not responsible for that damage and I am disallowing that claim for $85.

[13] The next item on the landlords' list is referring to the replacement of the damaged fridge shelf. This item was claimed in the landlords' affidavit filed July 13, 2009; however, there is no dispute about it by Ms. Fox in her subsequent letter to the landlords dated July 20, 2009, nor in her second affidavit, filed August 28, 2009. The first time that this item was defended by Ms. Fox was at the hearing in the Small Claims Court. She claimed that she did not break the shelf, that it was a piece of glass resting on the crisper drawers, and it was in the same condition as when she moved in. The photograph of that shelf, in my mind, speaks for itself, and if the shelf was in that condition when Ms. Fox moved in, then I would have expected her to insist that a note be made of it in the Rental Unit Condition Report, which she signed. However, as no such note was made, I am going to allow the landlords' claim of $130 for that item.

[14] The next item on the landlords' list refers to "April Rent due to less than 30 days written notice to vacate". In that regard, Ms. Fox indicated in her letter to the landlords dated July 20, 2009 that she had had a conversation with Mr. Nixon, the landlords' property manager, asking if he could be flexible with her move-out date, since they both knew that she was going to be moving. She says she reminded him that she had been looking for affordable housing since the previous August and may have to take a place with less notice, and he said "that would be fine."

[15] In addition to that, there is a similar reference in Ms. Fox's second affidavit, para. 3:

> "… I asked Michael Nixon if I would be allowed to be flexible in the date of my moving out of the rental premises. I reminded Nixon that I had been attempting to locate affordable housing since the previous August and that, if I had found a place, I might have to move on short notice. Nixon then verbally agreed that I could in fact be flexible in my moving date, as long as it was no later than the end of May …"

[16] Further, at the hearing on August 31, 2009, Ms. Fox said to the Territorial Court Judge:

> "And when Mr. Nixon gave me that second notice for the three months, that I had to be out by three months, I asked him then, because I had been having trouble finding anything, I said, "What if I do find something earlier? Is it okay to give two weeks notice?" And he verbally said yes."

I note for the record that the Judge was able to take into account the oral submissions that were made before him as part of the evidence in making his decision.

[17] There has been no specific denial by the landlords in their affidavit that there was a discussion along those lines between Ms. Fox and Mr. Nixon. That is significant to me. In addition, at the hearing on August 31st, Mr. Nixon stated to the Territorial Court Judge:

> "She asked for an extension onto April 2nd, and I didn't have a problem with that. I told her that we'd be flexible …"

[18] The final piece of evidence that is most significant to me on this point is the letter sent by the landlords to Ms. Fox dated April 15, 2009. Mr. Nixon signed the letter. In the second paragraph of that letter, the landlords state:

> "Please find enclosed closing inspection report. It is estimated that an additional weeks rent, cleaning, painting and repairs that the amount owing super exceeds the amount you placed for a damage deposit by nearly $1,500.00." (my emphasis)

[19] So I take it from all of that evidence combined, plus the lack of any specific denial by the landlords that there was a variation of the written tenancy agreement to allow Ms. Fox to vacate with less than 30 days notice, that this amount should be reduced from a total of one month's rent to one week of rent, which I have rounded down to $200.

[20] The last item claimed by the landlords refers to painting and washing the nicotine off the walls in the amount of $1500. I credit the landlords for fairly having arrived at that number by deducting some additional costs which would have had to have been undertaken by them in any event for some work done in the kitchen and the bathroom. The adjusted balance owing, says the landlords, would have been $1500.

[21] There are a number of places where this issue arose. Firstly, in Ms. Fox's first affidavit at para. 5, where she speaks about a conversation that she had with Mr. Nixon about cleaning the apartment before vacating:

> "I asked Mr. Nixon if they required that I clean the carpet and wash the walls of the rental unit prior to vacating. I was advised by Mr. Nixon that I only needed to vacuum the carpet and not have it cleaned because they were removing the carpet as part of their planned renovations to the rental units. He also advised that I did not have to wash the walls because the walls were going to be repainted."

[22] In her letter of July 20, 2009 to the landlord, Ms. Fox stated in her fourth paragraph:

> "… I asked Mr. Nixon if he wanted the walls washed. He told me no, as they were going to paint the suite. Although, he did ask me to have the cupboards, etc. wiped down."

[23] The third reference is in Ms. Fox's second affidavit at para. 5, where she says:

> "I asked of Nixon if the Landlord required that the walls of the apartment be washed. Again, I was advised by Nixon that there was no need to wash the walls and that the walls were going to be repainted as part of the conversion of the apartment into condominium units."

[24] There has been no express denial of this alleged variation of the written tenancy agreement in either the landlords' affidavit or in the submissions that were made before the Territorial Court Judge. Plus, what I gather from the landlords' submissions on August 31, 2009, is that the cost of cleaning and repainting the walls in Ms. Fox's unit was very likely passed on to the subsequent purchaser of the condominium. Therefore, I can see no net loss to the landlords nor any reason which would indicate that it would be unfair or inequitable to deny the landlords this damage item, especially in light of the

alleged variation of the agreement, which is uncontradicted by the landlord. So I am going to disallow this item in the amount of $1500.

[25] By my calculations, that reduces the legitimate damages from $2,905 to $570. The damage deposit plus the interest, which has been calculated by the landlord, would total $855.62. Subtracting from that the legitimate damage claim of $570 would result in a subtotal of $285.62. However, the interest of $55.62 has already been paid by the landlord. That results in a total balance due from the landlord to Ms. Fox in the amount of $230.

[26] Because Ms. Fox has been substantially successful on her appeal, I am also going to award her costs for the appeal, which will include her filing fee of $140, plus any additional disbursements that she has incurred for the transcript that she ordered and for service of various court documents on the landlords, upon providing copies of the receipts to the clerk. Ms. Fox, how long are you going to need to do that?

[27] THE APPELLANT: I can probably get it done this afternoon or tomorrow morning for sure.

[28] THE COURT: All right. Once that is done and the costs have been assessed by the clerk, I am going to direct that repayment of the damage deposit plus costs be made by the landlords within 30 days of the assessment of costs.

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GOWER J.