Citation: *B & K Electric Ltd. v. Rupert*, 2008 YKSM 4

Date: 20081014
Docket: 07-S0145
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Cozens

Between:

B & K Electric Ltd.

Plaintiff

and

Richard Rupert

Defendant

Appearances:
Graham Lang — Counsel for the Plaintiff
Richard Rupert — Appearing on own behalf

DECISION

Overview

[1] This is an action for recovery of damages arising out of a commercial tenancy between the Plaintiff, B & K Electric Ltd., and the Defendant, Richard Rupert, for the rental of commercial space at 211 Black Street (the "Premises"). The tenancy was originally governed by a five year lease agreement between the Plaintiff and the Defendant that was entered into on January 15, 1996 (the "Agreement"). After the five year term of the Agreement, the tenancy was continued on a month-to-month basis on the same terms set out in the Agreement, other than the possibility of rental increases. Although the Claim filed by the Plaintiff indicates that the rent at the time the Defendant vacated the Premises was $1,300.00 per month, Mr. King testified at trial that it was $1,100.00, plus goods and services tax.

[2] The Defendant vacated the Premises on October 31, 2007. The Defendant provided the Plaintiff with oral, but not written, notice of his intention to vacate the Premises. During the tenancy, the Defendant made certain changes and alterations to the Premises that resulted in the Premises being left in an alleged state of damage and disrepair. These changes and alterations were made without the consent of the Plaintiff.

[3] The Plaintiff has since rented the Premises to a new tenant but, although making some renovations to the Premises to accommodate the new tenant, has not taken steps to repair the majority of the alleged damage and disrepair to the Premises caused by the Defendant.

[4] The Plaintiff relies upon the terms of the Agreement and the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, to seek the following relief:

(a) Judgment against the Defendant in the amount of $9,238.64 for damages to the Premises;
(b) Costs, including legal fees;
(c) Pre-judgment interest in accordance with the terms of the Agreement;
(d) Post-judgment interest pursuant to the *Judicature Act.*

Issues

1. Did the Defendant give the Plaintiff sufficient notice of his intention to terminate the tenancy?
2. Is the Defendant liable for damage to the Premises resulting from changes and alterations made to the Premises, and, if so, what is the extent of his liability?
3. Is the Plaintiff entitled to recover his legal costs?

Agreement

[5] The relevant clauses of the Agreement are as follows:

> …
>
> 3.1 The Tenant covenants with the Landlord:
>
> (d) Repairs – to repair and maintain the Premises at its own cost and expense, except for reasonable wear and tear….consistent with the standards of a careful owner and in keeping with the character of the Building;
>
> (f) Leave in Repair – to surrender and leave the Premises in good repair in accordance with the section 3.1(d);
>
> 5.1 Tenant Improvements. The Tenant will not make any alterations or improvements to the Premises without the prior written consent of the Landlord, which consent will not be unreasonably withheld. All alterations and improvements shall comply with and meet the standards of all applicable statutes, regulations or bylaws of all and any authority having jurisdiction. The Tenant shall be responsible

for working drawings of any proposed alterations or improvements to the Premises. All work shall be done by qualified and licensed contractors and subcontractors of whom the Landlord shall have approved in writing. All alterations or improvements made by the Tenant shall be solely at the Tenant's own expense.

5.3 Landlord's Property. ….The Tenant shall at the expiration of the Term remove all of its trade fixtures and make good any damage caused to either or both of the Premises and the Building as a result of such removal.

6.3 Landlord's Expenses. All costs, expenses, legal fees and disbursements incurred by the Landlord in the enforcement of its rights and remedies hereunder including, without limitation, any action taken by the Landlord for the recovery of possession of the Premises, or recovery of Rent or other amounts required to be paid by the Tenant hereunder, or as a result of a failure by the Tenant to comply with and perform any covenant, condition, or agreement contained herein shall be paid by the Tenant to the Landlord immediately on demand.

9.6 Notice. Any notice required to be given hereunder must be made in writing and delivered to the address noted on page 1 of this Lease, or such other place as either party may give notice to the other, of the party to whom the notice is to be delivered. Delivery may be made either:

(a) personally, in which case delivery shall be deemed to have been given the day delivered; or
(b) by registered mail, postage prepaid, in which case delivery shall be deemed to have been given 3 days after the date of posting, unless there is a postal strike or slowdown, in which delivery shall be deemed to have been given the day the notice is actually received.

9.11 Interest. The Tenant shall pay to the Landlord interest at the rate of 5% above the prime rate for The Royal Bank of Canada in effect from time to time on all payments of Rent or other amounts required to be paid hereunder from the date such payments were due until they are made.

9.12 Holding Over. If the Tenant remains in possession of the Premises after the end of the Term and without the execution and delivery of a new lease, there will be no tacit renewal of this Lease or the Term, and the Tenant will considered to be occupying the Premises as a tenant from month to month.

9.14 Waiver. No condoning, excusing or overlooking by either party of any default, breach or non-observance by the other party at any time in respect of any term or condition in this Lease to be observed and performed by the other party will operate as a waiver of the Landlord's or Tenant's rights in this Lease in respect of any continuing or subsequent default, breach, or non-observance or so as to defeat or affect in any way the rights of the Landlord or the Tenant in respect of any such continuing or subsequent default, breach or non-observance, and no waiver will be inferred from or implied by anything done or omitted to be done by the Landlord or the Tenant save only an express waiver in writing.

Evidence

Robert King

[6] Robert King was the sole witness for the Plaintiff. He is the owner of the Premises and executed the Agreement as Authorized Signatory for the Plaintiff.

[7] He testified that, at the time the Agreement was entered into, the Premises were in very good condition, having been renovated for the Northern Lights School of Dance, which occupied the Premises from 1992 until 1996. There were no holes or marks in the walls. The walls were vinyl panelboard, which is a covered drywall board. The vinyl panelboard was specifically chosen for its ease of maintenance and better durability as compared to drywall without the vinyl covering. He estimated that the lifespan of the vinyl panelboard is likely the same as the lifespan of the building, but certainly is a long period of time if it is not abused. The price of vinyl panelboard is approximately three times that of drywall.

[8] On September 28, 2007, Mr. Rupert telephoned Mr. King and told him that he would be terminating the tenancy. Mr. King told Mr. Rupert that he wanted the termination to be in writing and did not consider the telephone call to be appropriate notice. Mr. King also wanted Mr. Rupert to write into the termination notice that Mr. Rupert would be responsible for repairs to any damage to the Premises. No written notice of intent to terminate the tenancy was ever provided to the Plaintiff.

[9] Mr. King and Mr. Rupert attended the Premises on November 6, 2007. Mr. King observed the following damage to the Premises:

- numerous penetrations and holes in the vinyl panelboard
- broken trim on the floor and a broken doorjamb
- ceiling tiles that were broken and chipped in the corners
- exposed electrical wiring and control equipment on the walls and hanging down from the ceiling
- main door sill plate was dislocated
- damaged baseboard heater.

[10] Mr. King testified that he told Mr. Rupert the vinyl panelboard needed to be replaced to which Mr. Rupert responded that what was observed was only normal wear and tear.

[11] Sixty-six photographs were provided by Mr. King to show the damage he observed. It is clear from these photographs that there were an extensive number of holes in the vinyl panelboard. Many, if not the majority, of these holes were caused by the removal of the slat shelving that had been installed by the Defendant. These holes ranged from pinhole to screw size.

[12] There is also one larger rough hole and a drop slot cut into the wall. The drop slot created a further problem in that it allowed cold air to flow into the Premises and under the counters that had been installed by the Defendant. These counters were installed tight against the wall, thus not allowing for adequate airflow. The end result was that the under-counter heater froze. This led to additional holes being made in the wall where a plumber attempted to correct the problem.

[13] Mr. King testified that the only change or alteration that he had been asked by the Defendant to allow was the removal of an interior office wall. He approved this change. He never approved any of the other changes made to the Premises by the Defendant and never waived any of the Defendant's obligations under the terms of the Agreement. He stated that the requirement for the Landlord's consent was in order to ensure that any changes or alterations to the Premises would be done in a way that did not damage the Premises.

[14] Since the Defendant vacated the Premises, the Plaintiff has incurred costs to purchase and install, on a temporary basis, slat shelving for a new tenant. The Plaintiff is not seeking compensation from the Defendant for these costs. However, the Plaintiff intends at some point to restore the Premises to a condition proximate to what it was when rented to the Defendant, through replacing all the vinyl panelboard.

Mr. Rupert

[15] Mr. Rupert was the Tenant and the sole witness in defense of the Plaintiff's claim. He did not view the Premises at the time he entered into the Agreement and first saw it when his business, the Adult Warehouse, was operating in the Premises. He was

unaware of any holes being in the walls prior to assuming responsibility for the Premises under the Agreement.

[16] At trial, Mr. Rupert did not dispute that the damage claimed by the Plaintiff was caused by the operation of his business in the Premises, including the installation of the counter and the drop box, the removal of the interior wall and the installation and subsequent removal of the slat shelving.

[17] He testified that he did not ask for or receive consent before he made these changes and alterations to the Premises.

[18] Mr. Rupert's testimony was primarily directed at challenging the Plaintiff's position that the vinyl panelboard had to be replaced. He filed some documents from internet searches and two contractors, Windows & Walls Interior Designs Inc. and Raymar Painting Contractor, in support of his position that the vinyl panelboard could be repaired and not replaced. The quotation from Windows & Walls Interior Designs Inc. estimated a cost of $4,231.00 for supply only of medium range vinyl commercial grade wallpaper. There was no price estimate from Raymar. Neither of these contractors had actually viewed the Premises on site.

[19] He also gave some evidence regarding the state of the building in which the Premises were situated insofar it regarded his obligation to make repairs that were "in keeping with the character of the building". I do not consider this latter evidence to be of any particular value in this case.

[20] He agreed that he provided the Plaintiff with oral notice only of his intention to terminate the tenancy.

Analysis

Adequacy of notice to terminate the tenancy

[21] The Agreement stipulates in Clause 9.12 that the tenancy continued on a month-to-month basis after the expiration of the Agreement. The evidence before me is that this monthly tenancy was continued on the same terms and conditions as the

Agreement. Clause 9.6 stipulates that any notice required under the Agreement be in writing.

[22] The *Landlord and Tenant Act* provides as follows:

> **Notice to terminate tenancies and overholding tenants**
>
> 16(1) Subject to any express agreement to the contrary, sufficient notice to quit shall be deemed to have been given if there is given,
>
> (b) in the case of a monthly tenancy, a month's notice ending with the month….

[23] There is no requirement in the *Act* that the notice to terminate the tenancy be in writing. However, the *Act* requires that a monthly tenancy is to be terminated by the provision of notice to the Landlord. Clause 9.6 of the Agreement requires any notice be given in writing and, as the monthly tenancy was continued on the terms set out in the Agreement, the Defendant was required to provide written notice to terminate the tenancy to the Landlord. The oral notice provided in the telephone conversation of September 28, 2007 does not constitute satisfactory notice. As such, I find for the Plaintiff on this issue and award $1,100.00 plus GST in the amount of $55.00.

Damage to the Premises

[24] It is obvious on the evidence that the Defendant made changes and alterations to the Premises, without the consent of the Plaintiff, which caused damage to the Premises. In particular, I find that the changes and alterations caused damage to all of the vinyl panelboard. The Defendant bears the onus of demonstrating that these changes and alterations fall within the "reasonable wear and tear" exception of the Agreement (***Stellarbridge Management Inc.*** v. ***Magna International (Canada) Inc.*** (2004), 71 O.R. (3d) 263 (C.A.), paras. 62-64). I find that the Defendant has not met his onus and the damage is well in excess of what could be considered acceptable within the "reasonable wear and tear" exception.

[25] It has been recognized that "…the measure of damages for the breach of a lessee's repair covenant depends upon the state of repair of the premises to which the

lessor is entitled under the bargain made by the parties". (***Stellarbridge***, paras. 39, 40). It has also been held that "…a covenant to repair requires a tenant to put the building into a state of repair similar to that existing when the tenancy began." (***O'Connor*** v. ***Fleck***, 2000 BCSC 1147, para. 48).

[26] The Defendant covenanted with the Plaintiff to leave the Premises in good repair when surrendering the Premises to the Plaintiff, subject to reasonable wear and tear. The "reasonable wear and tear" clause within the Agreement contemplates the Plaintiff receiving the Premises from the Defendant in a condition that would include some degree of deterioration of the Premises, but nonetheless in a condition similar to the state it was at the time the Agreement was entered into. The Defendant did not do so.

[27] At the time the Plaintiff and the Defendant entered into the Agreement, the vinyl panelboard was no longer new. Awarding the Plaintiff damages for replacement of all the existing vinyl panelboard with new vinyl panelboardswould appear to be providing the Plaintiff with Premises left in better condition at termination of the Agreement than at its commencement. The question then, is whether the Defendant is entitled to a "betterment discount" on the damages awarded as a result.

[28] The onus is on the Defendant to satisfy the Court that he is entitled to such a "betterment discount". (***Stellarbridge***, para. 60). The uncontradicted evidence of the Landlord is that the vinyl panelboard would have lasted as long as the building, with little required in the way of maintenance. There is no evidence as to what would constitute reasonable wear and tear to vinyl panelboard. I have found, however, that the numerous holes in the vinyl panelboard within the Premises does not constitute reasonable wear and tear. There is no reliable evidence before me to show that the vinyl panelboard can be repaired at a cost equal to or less than what the Plaintiff's replacement estimates are.

[29] As such, I decline to apply a "betterment discount" and I award the Plaintiff the full cost of replacing the vinyl panelboard. Two estimates were provided by the Plaintiff:

- Home Hardware - 50 panelboards at a cost of $65.00 per board plus GST for a total of $3,412.50;

- Final Touch Industries - 48 panelboards at a cost of $54.00 each plus $4,000.00 installation and GST for a total cost of $6,921.60.

[30] I note, however, that the Final Touch Industries estimate is based on a December 10, 2007 date and the Home Hardware estimate is from September 4, 2008. I am allowing the later estimate of $65.00 per board as being more representative of the present day cost of the materials required, although I will apply this to a total of 48 vinyl panelboards.

[31] I award the Plaintiff a total of $7,476.00, inclusive of GST, for the cost of the vinyl panelboard.

[32] I also award the Plaintiff the amount of $892.50, inclusive of GST, for the electrical repairs made by the Plaintiff.

[33] From this total amount of $8,368.50, I apply the $850.00 damage deposit held by the Plaintiff to calculate the final amount awarded as being $7,518.50.

Costs

[34] Clause 6.3 of the Agreement stipulates that the Tenant shall indemnify the Landlord for any legal fees or disbursements incurred by the Landlord in enforcing the terms of the Agreement that arise from a breach by the Tenant of a covenant, condition or agreement. There is no question that, on my findings, the Defendant did breach his obligations as a Tenant under the Agreement, and the Plaintiff is entitled, pursuant to Clause 6.3, to recover his legal costs.

[35] The *Small Claims Court Regulations,* Y.O.I.C. 1995/152 (the *Regulations*) provide as follows:

> 58. Where the amount of the claim exceeds $1,500.00 exclusive of interest and costs, the court may allow
>
> > (a) an amount not exceeding $150.00 as counsel fee at trial, if the successful party is represented by a solicitor, or
> > (b) an amount not exceeding $75 as counsel fee at trial, if the successful party is represented by a student-at-law.

….

74.(1) The successful party is entitled to be paid his or her disbursements, as assessed by the clerk of the court, by the unsuccessful party unless the court orders otherwise.

[36] The issue of recoverability of legal fees in Small Claims Court proceedings was canvassed in ***Gord Hill Log Homes Ltd.*** v. ***Cancedar Log Homes (B.C.) Ltd.***, 2006 BCPC 480 at paras. 15-18. The Court in ***Gord Hill*** held that legal costs were not recoverable in Small Claims Court proceedings, notwithstanding that there was a specific provision in a General Security Agreement executed between the parties that allowed for the recovery of such costs.

[37] The relevant sections of the British Columbia *Small Claims Act*, R.S.B.C. 1996, c. 430, read that:

2(1) The purpose of this Act and the rules is to allow people who bring claims to the Provincial Court to have them resolved and to have enforcement proceedings concluded in a just, speedy, inexpensive and simple manner.

….

19(4) The Provincial Court must not order that one party in a proceeding under this Act or the rules pay counsel or solicitor's fees to another party to the proceeding.

[38] The Court held that s. 19(4) was to be interpreted in a manner consistent with s. 2(1) of the *Act* "…to create a less expensive forum for litigants in which they will not be deterred from bringing and defending claims because of a fear that, if unsuccessful, they will have to shoulder the other side's legal fees". (See also ***McGillion*** v. ***Barnett***, 2007 BCPC 10, paras. 8-14; ***Soccer Quest Coaching Inc.*** v. ***Ice Box Arena Corp.***, 2008 BCSC 1484 at paras. 14, 15).

[39] The only somewhat similar provision in the Yukon *Small Claims Court Act*, R.S.Y. 2002, c. 121, to that of s. 2(1) of the British Columbia *Small Claims Act* is found in s. 3 which reads:

> 3. Subject to this Act and any other Act, the Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make any order that is considered just (emphasis added).

[40] The Territorial Court of Yukon is established under the *Territorial Court Act*, R.S.Y. 2002, c. 217 and, as per s. 3(1), a judge of the Territorial Court has jurisdiction to exercise all the power conferred under an enactment of the Yukon or of Canada. The Territorial Court is a court without inherent jurisdiction.

[41] Therefore, insofar as the *Regulations* limit what is recoverable for counsel fees in Small Claims Court proceedings, Clause 6.3 of the Agreement is unenforceable in this Court for the recovery of legal fees.

Conclusion

[42] The Plaintiff is awarded $8,673.50, plus counsel fees in the amount of $75.00, $100.00 for the preparation and filing of pleadings and $50.00 for scheduling a trial, for a total of $8,898.50. The Plaintiff is also awarded disbursements to be assessed by the clerk of the court.

[43] The Plaintiff is awarded pre-judgment interest pursuant to Clause 9.11 of the Agreement on the amount of $1,197.50, which represents the rent and the out-of-pocket electrical repairs minus the damage deposit, calculated from November 1, 2007. The Plaintiff is awarded post-judgment interest pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128, on the total amount awarded.

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Cozens T.C.J.