Citation: *Gareau v. Aguilar,* 2016 YKSM 1

Date: 20160210
Docket: 15-S0047
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Chisholm

MARCEL GAREAU

v.

CRISTINA LEONEN AGUILAR

Appearances:

Marcel Gareau	Appearing on own behalf
Cristina Leonen Aguilar	Appearing on own behalf

REASONS FOR JUDGMENT

[1] This action stems from a residential tenancy arrangement. The Plaintiff, Marcel Gareau, rented a basement suite to the Defendant, Cristina Aguilar. The Plaintiff terminated the tenancy after seven months, following the discovery of mould in one of the bedrooms, and a disagreement with the Defendant as to who was liable for the problem.

[2] The Plaintiff argues that the use of the premises by the Defendant and her family created ideal conditions for mould to develop, and caused damage to two bedroom walls. The Defendant, on the other hand, claims that the mould issue was caused by a lack of insulation and a lack of heat sources in the bedroom.

[3] The Plaintiff seeks $1981.75 in damages for the cost of repairing the drywall in the bedroom.

Relevant Facts

[4] The Defendant rented 38B Klondike Road, Whitehorse (the 'Premises') on a month to month basis. The tenancy agreement commenced January 1, 2015. The Plaintiff was outside the country at this time and only returned on May 17, 2015.

[5] It is undisputed that the Premises were in good condition when the Defendant and her family moved into this basement suite.

[6] The Plaintiff says he inspected the Premises in the latter part of May or early June 2015, soon after his return to Whitehorse. He did not note any issues. He does not recall the humidity level being high. According to the Plaintiff, the Defendant advised him soon thereafter that she had discovered mould in her teenage children's bedroom ('Children's Bedroom').

[7] Prior to being advised of the mould, the Plaintiff testified that he had seen the Defendant on more than one occasion apparently drying mattresses outside.

[8] The Plaintiff understood that the mattress next to the walls where mould had been discovered was second-hand. He believed it was mouldy when first placed in the bedroom, and that this mattress was the source of the mould problem.

[9] The Defendant testified that she discovered mould on two walls in the Children's Bedroom a week before the Plaintiff returned to Whitehorse. The mould was located behind a bed which had been placed in the corner against two walls.

[10] Although the Defendant had been corresponding with the Plaintiff by e-mail whenever a tenancy issue arose, she did not do so after discovering the mould. Instead, she waited until he returned to Whitehorse. She recalls that the Plaintiff returned to Whitehorse within a week of her discovery of mould.

[11] The Defendant indicated that she thought the melting snow outside the premises was causing somewhat elevated humidity in the apartment.

[12] The Defendant agrees that after the discovery of mould, she took both mattresses outside on one occasion in order for them to dry out. She also bought wooden bedframes on which the mattresses could be placed. She ultimately replaced one of the mattresses.

[13] An experienced contractor, Maxime Dugré-Sasseville, testified that the Plaintiff hired him to remediate the areas in the Children's Bedroom where mould had been located.

[14] When Mr. Dugré-Sasseville entered the Premises, he observed what he described as 'fairly new mould' along two exterior walls in the Children's Bedroom. He recalled that two of the beds had been affected by mould. It had propagated into the mattresses and into the wall.

[15] Mr. Dugré-Sasseville encountered uncomfortably high humidity when he entered the Premises. He described the windows in the Premises as sweating profusely. He explained that, especially in the warmer months, mould may form in areas where there is high humidity and cold surfaces (e.g. walls).

[16] In older homes such as the Premises, ventilation is usually achieved by leaving windows partly open or by using a dehumidifier. Both methods allow humidity to be removed.

[17] Mr. Dugré-Sasseville removed the gyprock of the two walls affected by mould. He noted that these two exterior concrete walls were dry and without cracks. The fact that the concrete walls were dry and undisturbed was significant, as it revealed that that no water or moisture was entering these walls from outside and causing the mould.

[18] In his opinion, the mould developed because of high humidity in the Premises and a lack of air flow where the beds were placed. The lack of air flow resulted from the beds having been placed up against the walls. He estimated that the mould had been growing for at least two months.

[19] He testified that sporadic insulation along the two exterior walls of this bedroom allowed the mould to develop more readily, as those two walls were cold. He also agreed that a lack of a heat source in the bedroom likely exacerbated the problem. Ideal conditions for mould to be produced include cool areas, a lack of air flow and high humidity.

[20] The affected gyprock was not salvageable and had to be replaced.

Analysis

[21] The Plaintiff must prove his case on the balance of probabilities.

[22] I find that all witnesses generally gave credible and reliable evidence, except where otherwise noted.

[23] The tenancy agreement the parties had entered into contained the following clause as part of the tenant's responsibilities:

> Clause 2.9: To pay for damage that was caused wilfully by negligence or carelessness. To indemnify the Landlord for losses due to careless or negligent acts.

[24] 'Wilful negligence' or 'wilful carelessness' are not legal concepts commonly used.

[25] As Southin, J. stated in *Clansmen Resources Ltd. v. Toronto-Dominion Bank*, (1990) 43 B.C.L.R (2d) 273 (C.A.):

> No authority was put before us as to the meaning of the words "wilful negligence". I find it difficult to ascribe any meaning to a phrase which, at least on its face, is an oxymoron.

[26] In Black's Law Dictionary, 9th ed., (West Publishing, 2009) at 1134, both 'advertent negligence' and 'gross negligence' are defined. The definition of advertent negligence reads:

> Negligence in which the actor is aware of the unreasonable risk that he or she is creating; RECKLESSNESS. – Also termed *willful negligence; supine negligence* (my emphasis added).

[27] The definition of gross negligence is:

> 1. A lack of slight diligence or care.
> 2. A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages. – Also termed *reckless negligence; wanton negligence; willful negligence; willful and wanton negligence; hazardous negligence; magna neglegentia* (my emphasis added)

[28] Although the term 'wilful negligence' has apparently received little judicial interpretation in Canada, it has been used in insurance policies (see *Wong Estate v.*

Liberty Mutual Insurance Company, 2009 ABQB 324). In that decision, it was noted that the 6th edition of Black's Law Dictionary defined 'wilful, wanton or reckless negligence'. Part of that definition reads:

> The result is that 'wilful', 'wanton', or 'reckless' conduct tends to take on the aspect of highly unreasonable conduct or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. As a result there is often no clear distinction at all between such conduct and 'gross negligence', and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care. It is at least clear, however, that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion and more than mere thoughtlessness or inadvertence, or simple inattention.

[29] Wilful negligence, then, would encompass acts or omissions that fall well below the standard of care that a reasonably prudent person would have exercised in a similar situation. The term 'wilful negligence' would apply to acts or omissions which are reckless.

[30] Based on the tenancy agreement, the Plaintiff must establish, on a balance of probabilities, that the Defendant was grossly (or wilfully) negligent in the use of the Premises, which in turn led to the development of mould in her Children's Bedroom.

[31] The evidence tends to indicate that the use of the Premises by the Defendant and her family created a higher level of humidity. In the lengthy period of time that the Plaintiff owned the Premises and rented the basement suite, there had never been a humidity problem.

[32] It is unclear whether the high humidity in the basement suite was constant. For example, when the Plaintiff inspected the premises in late May or early June, he did not

recall a high humidity level. On the other hand, Mr. Dugré-Sasseville noted that the humidity level was very high during the period in which he made repairs in mid-June. Each morning he attended, he would open the window in the Children's Bedroom and ensure that there was good air flow throughout the apartment. He testified that the humidity level would decrease within a short period of time because of this ventilation.

[33] The source of the high humidity could not be clearly established. Mr. Dugré-Sasseville believed that the Defendant's family of five was likely creating higher humidity in the Premises through the taking of showers and regular cooking.

[34] It seems more likely than not that the use of the Premises by the Defendant and her family did create high levels of humidity. As the windows were generally closed, there was no escape for the humid air.

[35] I should point out that Mr. Dugré-Sasseville did not agree with the Plaintiff's view that mould was already present in the second hand mattress when purchased by the Defendant. I agree. There is no evidentiary foundation to support the Plaintiff's view in this regard.

[36] Did the Defendant's use of the Premises fall well below the standard of care that a reasonably prudent person would have exercised in a similar situation?

[37] Based on all the evidence, I cannot say that it did. The Defendant, who was new to Canada, noted that there was some condensation on the windows of the Premises when temperatures rose in the spring, and the snow began to melt. She did not think anything more of it.

[38] At some point in May, while cleaning the Children's Bedroom, she did locate mould behind one of the beds. I accept the evidence of both the Defendant and Plaintiff that mould was only located on the wall beside one of the two beds, even though Mr. Dugré-Sasseville believed mould had been located beside both beds. The Defendant removed both mattresses to dry. She also cleaned the mouldy areas with soap and water. She bought wooden bedframes for both beds.

[39] In my view it is significant that the evidence presented at trial revealed that two characteristics of this bedroom encouraged the development of mould. Firstly, there was only sporadic insulation along the affected walls, making them cold. Secondly, the bedroom lacked a heating source. The Plaintiff had blocked a heating vent years ago, as the vent was causing the room to be too hot, but no other heating source (e.g. baseboard heaters) had been installed. These deficiencies, when combined with the humidity, allowed for the growth of mould.

[40] Based on the evidence I accept, I cannot find that the Defendant was grossly or wilfully negligent.

[41] The second issue to be considered is the timing of Defendant's disclosure to the Plaintiff with respect to the discovery of mould.

[42] The tenancy agreement sets out that the Defendant agrees to notify the landlord "of immediate damages caused to the property" (Clause 4.8). This clause is awkwardly worded. Although the intention may have been that any damages to the Premises were to be reported immediately to the Landlord, this is somewhat unclear from the wording of the clause.

[43] In any event, I must consider the doctrine of *contra proferentem*. In interpreting documents, ambiguities are to be construed unfavourably to the drafter. As outlined in *1862429 Ontario Inc. (c.o.b. Shadow River Farms) v. Sallewsky,* 2013 ONSC 1405, this maxim only applies where there is an inequality in bargaining power. An inequality in bargaining power clearly exists in the matter before me. The Defendant is a recent immigrant whose first language is not English. From my observations, she struggles at times in English. The residential tenancy agreement was presented to her by the Defendant's representative. This clause was poorly drafted and is unclear.

[44] As a result, the uncertain meaning of this clause should be resolved in favour of the Defendant. I interpret the clause as meaning that the tenant should advise the landlord of damages to the Premises and a failure to do so immediately does not contravene the contract.

[45] That does not, however, end the issue. I find that the Defendant did not advise the Plaintiff of the mould issue when she saw him in person on May 20th. This would have been a reasonable time to do so, as the mould had been discovered by her a week or so beforehand. I accept the Plaintiff's evidence that he was not aware of the mould issue when he inspected the premises in late May or early June. He did note during his inspection that the two beds in the small bedroom were on wooden frames.

[46] The Defendant testified to having bought the bedframes after the discovery of mould. I find that a few weeks passed between the Plaintiff's return to Whitehorse and the Defendant's disclosure of her discovery of mould to the Plaintiff.

[47] Based on the evidence I accept, the mould had developed over the course of the previous two months. I find that a reasonable person would have disclosed the existence of mould very soon after its discovery. I say this because the presence of mould is a serious issue that may well affect other tenants. As I understood the evidence, the Plaintiff had other tenants occupying the main level of the house.

[48] If the Defendant had disclosed the issue to the Plaintiff earlier, the problem could have been remediated more quickly. The evidence reveals that one of the walls had much less mould infiltration than the other. If work had commenced to remediate the walls a few weeks earlier, the damage would have been less severe. Based on the information I have, it is likely that the cost of the remedial work would have been less expensive.

[49] In the result, the Plaintiff is awarded $500.00 in damages. Pre-judgement and post-judgement interest is payable in accordance with the *Judicature Act.*

[50] Considering the result, each party will bear its own costs.

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CHISHOLM T.C.J.