Citation: *Wintemute Electric Ltd. v. Louis Gagnon and Bobbi Rhodes,* 2014 YKTC 5

Date: 20140213
Docket: 13-T0043
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

IN THE MATTER OF THE *LANDLORD AND TENANT ACT*
R.S.Y. 2002, C. 131 AND AMENDMENTS THERETO

BETWEEN:

WINTEMUTE ELECTRIC LTD.

LANDLORD

AND:

LOUIS GAGNON AND BOBBI RHODES

TENANTS

Appearances:
Drew and Mary Wintemute — Appearing on behalf of Landlord
Louis Gagnon and Bobbi Rhodes — Appearing on their own behalf

REASONS FOR JUDGMENT

Overview

[1] This is an application by the Landlord, Wintemute Electric Ltd, against the Tenants, Louis Gagnon and Bobbi Rhodes, for damages and unpaid rent in the amount of $6,026.20 that arose out of a tenancy at 29B Stope Way, Whitehorse, Yukon (the "Residence").

[2] The application is brought pursuant to sections 96(1), 76(2) and 91(1) of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131 (the "*Act*").

[3] The Landlord's Application is premised on the following circumstances:

(a) The Landlord and the Tenants signed a Lease Agreement on June 18, 2012 for a term of 12 months, commencing July 1, 2012 (the "Lease");

(b) The Tenants terminated the Lease without the requisite 90 days' notice;

(c) The Tenants owe the Landlord rent for the month of June 2013;

(d) The Tenants left the Residence and associated premises in an unclean and damaged state;

(e) The Tenants did not fill the fuel tank as required by the terms of the Lease;

(f) The Tenants disconnected the electrical services which had to be re-connected by the Landlord at a cost; and

(g) The Landlord expended time in order to attempt to rectify problems caused by the actions of the Tenants for which the Landlord should be compensated.

[4] The Landlord claims the following amounts:

(a) $1,600.00 for rent for June 2013;

(b) $480.00 for cleaning;

(c) $2,997.75 for wall repair and painting;

(d) $461.00 for kitchen countertop repair;

(e) $85.00 for landscaping repairs;

(f) $50.00 to clean up dog feces;

(g) $115.50 for dryer vent repair;

(h) $1,085.36 for fuel;

(i) $101.59 for electrical service, including a re-connection fee; and

(j) $250.00 for five hours of time spent in connection with attempting to rectify these matters.

[5] The Landlord has retained the $1,200.00 deposit paid by the Tenants at the commencement of the Tenancy and is therefore seeking an additional $6,026.20 for the above claims.

[6] At the outset of the hearing of the Application, the Tenants conceded that the amount of $1,085.36 claimed for the fuel was owed to the Landlord. At the conclusion of the hearing, the Tenants did not dispute the $1,600.00 claimed for rent for the month of June. The Tenants do not, however, accede to any of the remaining claims of the Landlord.

Jurisdiction

[7] After the conclusion of the testimony in direct of Mary Wintemute for the Landlord, I raised the issue of jurisdiction with the parties. In particular, I noted for the parties that some of the relief claimed may arguably be within the jurisdiction of a Small Claims Court proceeding and not within proceedings commenced under the *Act*. All parties consented to have the Landlord's claims dealt with in this proceeding as though there had also been a proceeding commenced in Small Claims Court.

[8] The Tenants then sought an adjournment to attempt to retain legal counsel, stating that the proceedings were more complex than they had anticipated. I granted this adjournment and the matter was adjourned for several weeks. When the proceedings resumed, the Tenants had not retained counsel. During the remainder of the proceedings, Mr. Gagnon made several references to the proceedings being under

the *Act* and not the *Small Claims Court Act*, R.S.Y. 2002, c. 204. Mr. Gagnon did not expressly challenge the jurisdiction of the Territorial Court to adjudicate on the entirety of the claims under the *Act*, or withdraw the consent the Tenants had previously given, however. This said, I will elaborate further, albeit briefly, upon the jurisdiction of the Territorial Court to adjudicate matters that arise on an application under the *Act*.

[9] I note that s. 96 of the *Act* allows for a judge, if satisfied that a tenancy agreement is terminated, to make "any… order as considered appropriate in the circumstances". A liberal reading of this section would therefore allow for a judge to adjudicate upon any claim that arises out of the termination of a tenancy agreement, including claims for damages. I agree with the reasoning of Davidson J. in ***Albert Bloom Ltd.*** v. ***Cunning***, [1995] O.J. No. 1720 (Ct. Jus. Gen. Div.) (Q.L.):

> [12] It also seems to be that in the entirety of the *Landlord and Tenant Act*, it is within the judge's jurisdiction to control the court's own process and, as such, any deficiency in the proceedings is open to the court to assess and to make any order as is appropriate.
>
> [13] The court should be wary in opening wider fields for adjudication under the *Landlord and Tenant Act* which contains its complete code. However, I am of the view that it is appropriate for the Landlord and Tenant Court to adjudicate upon the process taken under the *Act* and the appropriate remedy for deficiency in the process rather than for it to require a separate proceeding in another court.

[10] In my view, so long as the basis for an application properly arises under the *Act*, such as the termination of a tenancy, the court has the jurisdiction to deal with all matters that are ancillary to the tenancy, unless there is express statutory authority to the contrary.

[11] Therefore, notwithstanding that consent was obtained from the parties regarding the issue of jurisdiction of the court to deal with all the Landlord's claims, I find that the Territorial Court has jurisdiction under the *Act* to hear these claims and provide such relief as is sought.

Analysis

[12] The Landlord bears the burden of establishing each claim on a balance of probabilities.

Rent for June 2013

[13] The Lease required the Tenants to pay rent from July 1, 2012 through to June 30, 2013 in the amount of $1,600.00 per month. The Tenants moved out in May 2013 and did not make any rent payment for June. Section 91(1) of the *Act* requires that a notice to terminate a yearly tenancy "…shall be given on or before the ninetieth day before the last day of any year of the tenancy to be effective on the last day of that year of the tenancy." I note that Clause 1.16 states that "The Tenant must notify the Landlord as least one rental month before if you are not going to renew the Lease." I am not required to resolve any issue between the inconsistency between the Lease and the *Act*. Clause 1.16 does not purport to allow for the Tenants, by notice, to terminate the Lease earlier than before the end of the year-long length of the Lease. The Landlord, in this case, is not seeking any compensation beyond the rent chargeable for the final month of the Lease.

[14] It is also not necessary to resolve the dispute as to when the Tenants first provided notice to the Landlord. Regardless of when notice was given, the Tenants

were obliged to pay rent for the entire term of the Lease, which included June 2013. I find that the Landlord did not, at any time, waive the obligation of the Tenants to pay rent for June 2013, and at best offered to relieve the Tenants of their obligation for June rent if the Landlord was able to find another tenant for June. The Landlord was not able to do so and, therefore, the Landlord is entitled to $1,600.00 for unpaid rent for June.

Cleaning

[15] Clause 1.6 of the Lease states that, upon termination of the Lease, the Tenant covenants and agrees to "…vacate the premises and to clean the premises to the standard that existed upon taking possession of the premises…".

[16] Clause 3.4 further states that "The Tenants accepts that the premises are in good clean condition and are to be vacated in such condition on the termination of the lease".

[17] Ms. Wintemute testified that she went to the Residence after it had been cleaned by the Tenants and found, in fact, that it was not cleaned to the requisite standard. She stated that she had never seen one of her places left in such a state before.

[18] Mr. Wintemute testified that he was the first person to enter the Residence after the Tenants moved out. He said that he contacted Ms. Wintemute to advise her to come over because it did not appear to him that the Residence had been cleaned.

[19] The Landlord provided an invoice dated June 17, 2013 from "That Girl with a Vacuum", operated by Danyea Sulyma, in the amount of $480.00, which represents 16 hours of labour to clean the Residence. Ms. Sulymea had provided cleaning services to

the Landlord for approximately 1.5 years. In a filed letter she wrote that the Residence was left in such a state that a general cleaning would not suffice, and a deep cleaning was required. She also wrote that in her experience this was "the filthiest house I've had to clean".

[20] Ms. Sulymea's testimony provided additional detail to that stated in her letter, with respect to the time it took her to clean and to the cleaning work she completed.

[21] Generally speaking, I find Mr. Wintemute's, Ms. Wintemute's and Ms. Sulymea's evidence to be credible. I have also been provided photographs depicting the state of cleanliness of several areas inside the Residence and, while I would not necessarily agree that the state of the Residence was "filthy", it is apparent that there remained cleaning to be done to bring the Residence to a suitable standard for renting out to another tenant.

[22] Ms. Rhodes, the only witness to testify for the Tenants in this proceeding as Mr. Gagnon elected not to, denied that the Residence was left in a state of uncleanliness. She testified that she had much experience as a property manager and she had cleaned the Residence to an acceptable standard, including bringing in a carpet cleaning company.

[23] Ms. Rhodes testified that the time of the termination of the tenancy was a stressful and upsetting time for her. She described herself as being "totally wrung out". It was apparent during the hearing of the Application that she was obviously quite upset at the Landlord's allegations regarding the condition that the Residence was left in.

[24] In all the circumstances that existed at the time, after considering the testimony of the witnesses and the documentary evidence, I prefer the evidence proffered by the Landlord over that of the Tenants. As such, I find that the Tenants are liable to the Landlord for cleaning costs.

[25] I note that Ms. Sulymea cleaned the same Residence in June, 2012, just prior to the Tenants taking possession of the Residence. Ms. Wintemute testified that she always had a cleaner come in prior to a new tenancy commencing. Ms. Sulymea's invoice for that cleaning was in the amount of $135.00, at the same rate of $30.00 per hour charged in June 2013. I have no evidence to suggest that there was anything unusual about the state of the Residence when Ms. Sulymea cleaned it in 2012 or that the previous Tenants reimbursed the Landlord for this amount. Therefore, it would appear that the amount of $135.00 represents the charges for a normal cleaning required by the Landlord prior to a new Tenant taking possession of the Residence and that this amount should be deducted from the amount claimed. Therefore, I award the Plaintiff $345.00 for cleaning.

Wall and Trim Repair and Painting

[26] Clause 1.5 of the lease states that the Tenant covenants and agrees to "maintain the building and all appliances, fixtures in good order." Clause 1.8 states that the Tenant covenants and agrees "To pay for damage that was caused wilfully, or by negligence or carelessness. To indemnify the Landlord for losses due to careless or negligent acts".

[27] The Landlord states that there was damage to the walls, trim and ceiling of the Residence well beyond that associated with normal wear and tear, with numerous marks, chips and holes. Ms. Wintemute testified that in her 10 years as a landlord with 16 – 20 rental units, she had seen what she considered to be acceptable damage, and the damage to the Residence in this case far exceeded what was acceptable.

[28] Mr. Wintemute testified that he was in the Residence after the Tenants moved out and the Residence was in such a condition that it was an easy decision to have it patched and painted. He testified that the Residence was not in such a need of repair prior to the Tenants moving in.

[29] A letter provided by Pascal Bonnin, of Pascal & Regine Painting, was attached to the Affidavit of Mary Wintemute. This letter stated that there were lots of holes in the walls, lots of chips of paint missing on the trim and baseboards, and lots of black spots on the ceilings. Mr. Bonnin stated that in the four years he has done the painting work for the Landlord, it was the first time he had a place in such bad shape. An invoice was filed in the amount of $2,997.75 for wall repair and painting.

[30] Again, the Tenants deny that they caused the damage to the walls, trim and ceilings of the Residence. Ms. Rhodes testified that the picture-hanging holes were filled in by the Tenants and marks on the walls were cleaned. Again, in light of all the evidence, I prefer the evidence of the Landlord. I find that the Residence was not left in an appropriate condition and the Landlord is entitled to be compensated for the repairs.

[31] There remains the issue of “betterment” I accept that the Landlord benefited from the repairs such that the Landlord ended up with the Residence being in a better

condition than it was when it was first occupied by the Tenants. While the Tenants are not to be considered responsible for bearing the costs associated with the Landlord bringing the state of the Residence to a condition that exceeded the condition it was in when the tenancy commenced, were it not for the actions of the tenants, the Landlord may not have need required to retain the services of the painting company at all. I have no evidence before me to suggest that the Landlord routinely had any rental unit or the Residence repainted as a matter of course prior to the commencement of a new tenancy. In fact, the evidence is that the Residence was not repainted prior to the Tenants beginning to reside there.

[32] I find that after deducting the amount of $500.00 as compensation for betterment, the Landlord is entitled to receive the amount of $2,497.75 for repairs under this heading.

Kitchen Countertop Repair

[33] The Landlord claims that the kitchen countertop was damaged by the Tenants during the tenancy and needs to be repaired at a cost of $461.00. An estimate supporting this claim from Cinderwood Kitchens was provided by the Landlord. Also filed were photographs of the damage.

[34] The Tenants claim that the kitchen countertop was damaged prior to the tenancy commencing.

[35] I accept the evidence of the Landlord in this regard. If the countertop was in fact damaged at the commencement of the tenancy, I would have expected the Tenants, especially given the experience in property management that Ms. Rhodes testified to

having, to have pointed this out. I also find it highly unlikely, given what I consider the Landlord's general manner of attending to detail, that the Landlord would not have noticed this damage had it existed at the time of the commencement of the tenancy. I do not believe the Landlord would have left it unrepaired, or would now be seeking compensation for the repair from the Tenant if in fact the damage had not occurred during the tenancy.

[36] Therefore I award the Landlord $461.00 for repairs to the kitchen countertop.

Landscaping Repairs

[37] In Clause 1.10 of the Lease the Tenant covenants and agrees that "All outside areas to be maintained to the standard of taking possession…"

[38] The Landlord states that the Tenants made alterations to the landscaping that resulted in a hole in the yard which needed to be repaired. The Landlord provided a quote from a company for $85.00 to complete this repair and, in fact, had the work completed for this amount. I note in an e-mail from Ms. Rhodes to the Landlord dated June 10, 2013, that she agreed to have the hole filled back in. In cross-examination she agreed that the hole had not been filled in.

[39] I find the Tenants liable to the Landlord for this landscaping repair and award the Landlord $85.00.

Dog Feces

[40] Clause 1.5 of the Lease states, in part, that "…the Tenant is responsible and agrees to pay for damage caused by…animal faeces or stains on flooring". This clause

is not entirely clear and could be interpreted as meaning any flooring damage caused by animal feces, and not as applying to feces that has accumulated in the yard. However, I consider Clause 1.10 to be sufficient to require the Tenant to clean up dog feces in the yard. The evidence of the Landlord is that Mr. Wintemute spent in excess of an hour cleaning up a large amount of dog feces that had accumulated in the area of the yard where the dog(s) had been chained up by the Tenants. The Tenants argue that the land attached to the Residence was unfenced and that any number of other dogs could have deposited the feces in the area where their dog(s) had been kept. Ms. Rhodes testified that the Tenants had cleaned up the dog feces at the same time as they had cleaned the Residence and, therefore, the dog feces cleaned up by the Landlord had been deposited after they had left the Residence.

[41] While this may be possible, I find it unlikely. Just as I am satisfied that the Residence was not adequately cleaned when the Tenants left the Residence, I am satisfied that the Tenants did not clean up all the dog feces from the area when they left and, as a result, the Landlord had to do so.

[42] I find the $50.00 claimed to be reasonable and award the Landlord this amount.

Dryer Vent Repair

[43] When Ms. Sulymea moved the dryer to clean behind it, she noticed that the dryer vent hose was not attached. The Landlord contacted Milligan Sheet metal who connected the hose at a cost of $115.50.

[44] Ms. Sulymea testified that she had cleaned behind the dryer in June 2012, and that she had ensured that the dryer vent hose was attached when she pushed the dryer

back in. She stated that she had the same connection on her dryer at home and therefore was careful to ensure it was properly connected when she had finished cleaning.

[45] Ms. Rhodes testified that neither she nor Mr. Gagnon had ever moved the dryer. While she had noticed a large amount of dust in the laundry room, it had never occurred to her that the dryer hose was disconnected.

[46] While I am satisfied that the dryer hose was not connected and that the price charged by Milligan's was acceptable, I am not satisfied that the blame for this can be assigned to the Tenants. There is no evidence to contradict the evidence of Ms. Rhodes that the Tenants never moved the dryer. Ms. Rhodes was never asked whether anything had fallen behind the dryer that required the dryer to be moved in order to retrieve the item. There was no evidence from Milligan as to what, if any, repairs were required other than simply refastening the hose to the vent. The requirement in Clause 5 for the Tenants to "…maintain in good order…all appliances" would require the Tenants to ensure the dryer vent hose was attached, if there was an apparent reason for the Tenants to know it was unattached.

[47] Perhaps the Tenants should have been alerted to the problem due to the excessive accumulation of dust in the laundry room. Ms. Rhodes was not asked, nor did she otherwise testify, as to when she first started to notice the accumulation of dust, and I have no other evidence to pinpoint when the dryer vent hose first became unattached. As such, it is as reasonable to conclude that it was unattached at the beginning of the tenancy, as it is to conclude it became unattached at some point during

the tenancy. If it was unattached at the commencement of the tenancy, it would not have been the Tenants' obligation to bear the costs of repairing it. Even if it became unattached during the tenancy, I would still need to be able to attribute this to some action of the Tenants, or inaction when some action was required. The Landlord bears the burden of proof in this regard. I am not satisfied that this burden has been discharged and, therefore, I find that the Tenants are not responsible for the costs associated with the reconnection of the dryer vent hose.

Fuel

[48] Clause 1.11 of the lease stipulates that "Upon occupancy heating fuel tank will be filled by the Landlord, upon departure of premises the heating fuel tank must be filled by the Tenant".

[49] The Tenants do not dispute that the Landlord fulfilled its obligation, and concede that they did not fill the fuel tank upon leaving the Residence. I find that the Landlord is owed the amount of $1,085.36 for fuel, and I grant the Landlord judgment for this amount.

Electrical Service Re-Connection

[50] When the Tenants moved out in May 2013, they had the electrical service disconnected as of May 31. The Landlord paid the amount of $52.50 to have the power re-connected on June 1, as well as an additional $49.09 for costs associated with the period from May 31 to July 2. The Tenants were responsible for paying the electrical bill. I note that Ms. Rhodes stated, in an e-mail to Ms. Wintemute on June 10, 2013, "As for the electrical, I said I am not willing to leave a house that I no longer occupy and

have no control over hooked up in my name. Go ahead and bill me the $30 or so it will be, but I will not leave the account in my name". This is exactly what the Landlord is doing; attempting to collect for the re-connection fee, as well as for the electrical charges for the month the Residence should have been occupied by the Tenants. While it may have been reasonable for the Tenants to not leave the electrical service connected in their name when no longer occupying the premises, it was also reasonable for the Landlord to recoup the costs associated with re-connecting the power, as well as the costs to ensure a power supply for June. It appears from the electrical bills that the Landlord paid for electrical service for the period of May 31 through to and including July 1. In the circumstances, I am not going to make an adjustment for July 1. I award the Landlord the amount of $101.59.

Compensation for Time Spent

[51] The Landlord is seeking compensation in the amount of $250.00 for five hours spent by Ms. Wintemute in resolving the issues surrounding the termination of the tenancy. This includes time spent in meeting with contractors, dealing with Yukon Electric and communicating with the Tenants.

[52] Clause 1.3 of the Lease stipulates that the Tenants covenant and agree "To pay all court costs and reasonable attorney's fees incurred by the Landlord in enforcing legal action or otherwise any of the Landlords rights under this lease or under any By-law of the Territory".

[53] There is no stipulation in the Lease that the Tenants would covenant and agree to pay the Landlord an amount in compensation for any inconvenience caused by a failure or failures by the Tenants to comply with their obligations under the Lease.

[54] The Landlord was not represented by counsel in these proceedings. The Landlord incurred no court costs associated with filing this application under the *Act*. I am not aware of any other costs borne by the Landlord that could properly be categorized as court costs.

[55] Costs such as the Landlord is seeking may well be available in proceedings commenced under the *Small Claims Court Act*. I do not consider, however, that the consent of the parties to deal with all matters as though there had also been an action commenced in Small Claims Court went so far as to include exposure to costs as are available under that Act. I also do not consider my determination that s. 96 of the *Act* provides the jurisdiction to deal with all the matters before me under the *Act*, extends my jurisdiction to award costs. There is no provision in the *Act* that allows me to award costs, unless it be through an expansive reading of s. 96.

[56] I do not doubt that Ms. Wintemute was inconvenienced and that she spent the time she states that she did, directly as a result of the Tenants' failure to comply with their obligations under the Lease. I can understand her and Mr. Wintemute's frustration. This said, I am not prepared to order the Tenants to pay the Landlord for Ms. Wintemute's time as the Landlord has sought.

Security Deposit

[57] The Landlord has retained the $1,200.00 security deposit that the Tenants provided. Interest accrues on the security deposit at the rate of 1% per annum. I find that the Landlord is entitled to apply the $1,200.00, plus any accrued interest between July 1, 2012 and May 31, 2013, towards the amount of $1,600.00 owed by the Tenants for rent for June, 2013.

Conclusion

[58] I find for the Landlord in the following amounts:

- $1,600.00 rent for June, 2013;
- $345.00 for cleaning;
- $2,497.75 for damage to walls, trim and ceiling;
- $461.00 for kitchen countertop repair;
- $85.00 for landscaping rectification;
- $50.00 for cleaning up of dog feces;
- $1,085.36 for fuel; and
- $101.59 for electrical re-connection and billing.

[59] From this total amount of $6,225.70 shall be deducted the amount of $1,200.00 for the security deposit, plus the accrued interest as is required to be paid by the Landlord under s. 63(5) of the *Act*.

[60] I award the Landlord pre-judgment interest on the amount of $4,514.70 (which amount reflects deductions for monies not expended for the kitchen countertop and dog

feces clean-up), from July 1, 2013, and post-judgment interest on the final amount of the judgment, both pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128.

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COZENS C.J. T.C.