

IN THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

FRANK CORLIS

Applicant
(Plaintiff)

- and -

KENNETH ST. CROIX

Respondent
(Defendant)

JUDGMENT OF THE HONOURABLE JUDGE A.H. LEFEVER

COUNSEL:

Frank Corlis appeared in person
R.M. Lewis, Q.C., for the Respondent

Introduction

[1] This matter came on for trial before me on December 3, 2001. The Applicant (Plaintiff) (referred to as "Corlis"), relying upon s. 20 of the *Residential Tenancies Act*, R.S.A. 1980, c. R-15.3 (since amended as the *Residential Tenancies Act*, R.S.A. 2000, c. R-17) (hereinafter referred to as "the *Act*") requests a court order directing that the Respondent (Defendant) (referred to as "St. Croix") pay Corlis a total of \$7,500.00 to remedy alleged arrears of rent, and alleged damages for breach of lease.

[2] At the close of the case for the Applicant, Counsel for St. Croix applied for a non-suit without electing whether to call evidence.

[3] Even though the Provincial Court is not bound to follow the Alberta *Rules of Court* (the *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 8), I treated the application as brought pursuant to Rule 260 of the Alberta *Rules of Court*, which states:

260. At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the action on the ground that upon the facts and the law, no case has been made out.

[4] After hearing from Counsel for St. Croix, and because Corlis was self-represented and due to the fact that the application caught him by surprise, I allowed Corlis to file written argument in

answer solely to the points raised on the non-suit application. Counsel for St. Croix has responded to that written argument. For purposes of this decision, I propose to deal only with the issues raised on St. Croix's application.

Position of the parties

St. Croix

[5] St. Croix put forward two alternative arguments. First, St. Croix argues that Corlis did not comply with s. 15.2 (2) of the *Act* by failing to complete an "out" inspection with St. Croix, and that the effect of this failure when coupled with s. 39 (4.1) of the *Act* precludes Corlis from keeping any part of the security deposit, and bars him from making the present application. The referenced sections of the *Act* state:

15.2 (2) A landlord and tenant shall, within one week before or after a tenant gives up possession of residential premises, complete an inspection of the premises, and the landlord shall provide the tenant with a report of the inspection that describes the condition of the premises.

39(4.1) A landlord shall not make a deduction from a tenant's security deposit for damages to the residential premises unless the requirements respecting inspection reports under section 15.2 have been met.

[6] The second argument advanced was that if there was a failure to comply with s. 15.2, a proper interpretation of s. 15.2, 15.3, 39 (4.1) and 48 (4) of the *Act* should find that the referenced sections operated as a limitation upon Corlis right to recover any damages. The *Act* states:

15.2 (3) The Landlord may complete the inspection without the tenant if an adult person who falls within the definition of tenant has refused to take part in 2 inspections suggested by the landlord to take place

- (a) on different days,
- (b) on days that are not holidays, and
- (c) between 8 a.m. and 8 p.m.

48 (4) If a landlord is unable to serve a tenant by reason of the tenant's absence from the premises or by reason of his evading service, service may be effected

- (a) on any adult person who apparently resides with the tenant, or

- (b) By posting it in a conspicuous place on some part of the premises.

Corlis

[1] Corlis' response is equally twofold. First, Corlis argues that St. Croix was deemed to have refused to participate in the "out" inspection by virtue of having abandoned the premises. This argument is essentially an argument of law premised upon certain findings of fact having been reached.

[2] Secondly, Corlis argues that a proper interpretation of the referenced sections cannot lead to a limitation upon Corlis right to recover damages, and that at most, it can only restrict a set-off for damages from a security deposit. In effect, a landlord could return in full a security deposit to a tenant, but would not be restricted from maintaining an action for damages arising out of the tenancy agreement.

Facts

[3] Because this is an application for a non-suit, the findings of fact that I make are restricted solely to those necessary to deal with the application and the arguments raised.

[4] On July 1, 1999, a residential tenancies agreement (the "agreement"), was executed between Corlis and Darlene Corlis as "landlord," and Kenneth St. Croix, as "tenant," with respect to the residential premises located at 9506-83 Avenue, Grande Prairie. The agreement reflects a periodic, or month to month tenancy, commencing at noon on July 1, 1999. The rental rate indicated in the agreement is \$725.00 per month; the security deposit is \$525.00. Corlis evidence is that the advertised rent was \$750.00, but that he agreed to reduce the monthly rate by \$25.00 in exchange for St. Croix performing stipulated repairs to the premises.

[5] No document evidencing the subcontract was made available to the court, and the actual agreement makes no reference to its existence or terms. There are a set of "rules and regulations," (the "rules") attached to the actual agreement, and bearing the acknowledging signatures of the parties as of July 1, 1999. Paragraph "8" of the rules stipulates that "no structural alterations, painting, papering or redecorating shall be done by the tenant without the prior written consent of the landlord." Corlis claim includes a sum for "supplies" and work not done.

[6] There is a further document attached to the agreement, entitled *accommodation inspection report* dated July 1, 1999 (hereinafter referred to as "the 'in' report"), which evidences that at the commencement of the tenancy, an inspection was performed in the presence of both parties; it contains the signatures of St. Croix, and the "landlord's agent."

[7] Corlis bases his claim (in part) on numerous alleged breaches of the agreement, including the

following:

- (a) St. Croix purchased a large dog contrary to the "no pets" provision of the agreement, as a result of which Corlis sent St. Croix a registered letter on April 6, 2001 requesting removal of the dog;
- (b) Corlis sent St. Croix a letter dated May 8, 2001 alleging that St. Croix had failed to perform the subcontracted repairs to the premises which failure provoked a rental increase of \$25.00 per month; and
- (c) On June 3, 2001 matters appear to have come to a head with an alleged N.S.F. cheque being given by St. Croix, and an alleged assault of Corlis by St. Croix. Later that day Corlis served St. Croix with a **termination** notice.

[8] Corlis posted a 'notice of inspection' on the premises on June 11, 2001 at 6:00 am., stipulating that he was coming to perform the "out" inspection within 24 hours. At this time, Corlis knew where the respondent worked, but made no attempt to contact him there. No efforts were made by Corlis to ensure that St. Croix had notice of the 'scheduled' inspection, other than the posting of this notice.

[9] On June 13, 2001, upon entering the premises Corlis decided that the premises had been abandoned. Corlis then completed the "out" inspection (as planned) in the absence of St. Croix, on the assumption that St. Croix had waived his right to be present by virtue of not having left a forwarding address or any means of contact. Corlis view was that St. Croix was thereby deemed to refuse participation in the inspection.

[10] Corlis was aware of St. Croix place of employment in Grande Prairie. No effort was made by Corlis to seek out St. Croix at this place of employment, or to inquire if he was not working where he might be located, in order to arrange an "out" inspection some time on or after June 11, 2001.

[11] In the *Notice of Application* form filed June 28, 2001, Corlis seeks an order to remedy arrears of rent and damages for breach of lease. The action is grounded upon alleged violations of the rental agreement signed July 1, 1999 including alleged non payment of rent, keeping a pet, unreasonable damage, and; the fact that the repairs agreed to in the subcontract were not performed by St. Croix despite Corlis having deposited \$690.00 into St. Croix bank account toward materials, including paint. Corlis provided an itemized list of expenses that allegedly have resulted from the claimed breaches of the agreement. This list also includes items such as picture development and film costs, June rent, lawyer fees, registered letter expenses, and \$96.00 for rug shampooing. The legal fees and expenses relating to the present action are related to costs, and would appear to be recoverable only in the event of this application succeeding. The total amount purportedly owing is \$6,409.91.

The Issues

- [12] The application for a non-suit raises the following issues:
- (a) What is required to establish that a tenant has abandoned residential premises?
 - (b) Had St. Croix abandoned the premises on June 13, 2001?
 - (c) If Corlis failed to comply with s. 15.2 (2) and (3) of the *Act*, does the operation of s. 39 (4.1) operate as a limitation of action preventing Corlis from recovering any damages arising out of the agreement?

The Law

Abandonment

- [13] The most directly relevant sections of the *Act* have been set forth above.
- [14] “Abandoned premises” are not defined within the *Act* in relation to the point at which a landlord, or a court, could conclusively held a tenant has abandoned residential premises. However, the *Act* does speak of “abandoned goods” in s. 24 (1) in the following language:

24 (1) In this section, “abandoned goods” means goods left on residential premises by a tenant who has

- (a) abandoned the premises, or
- (b) vacated the premises and whose tenancy has expired or been terminated.

[15] A review of the various authorities illustrates that the concept of “abandoned” must be considered in the context in which it arises. For example, parties to an agreement may stipulate certain acts or events which will constitute abandonment of either the agreement or some benefits under the agreement. In those situations, the analysis focuses upon whether the defined state of affairs exists. Generally speaking, if the defined state of affairs exists, the agreement operates to produce abandonment.

[16] However, in other contexts, a different analysis is required. For example, the term when used in builder’s lien legislation and authorities attracts a number of factors unique to that aspect of the law in assessing whether a work or undertaking has been abandoned.

[17] Finally, there may be situations where, as a matter of fact, the court must determine whether

a party has abandoned some right or entitlement. This analysis is one essentially of fact. In these situations generally speaking, a person must give up something to which one is entitled. In *Goldberg v. Employers' Liability Assurance Corporation*, [1922] 1 W.W.R. 529 (Alta. S.C.), Tweedie J. relying upon *O'Connor v. Maryland Mtge. Insur. Co.*, 122 N.E.R. 489 (Ill. S.Ct.), adopted the following general definition of "abandonment" (at page 544):

"Abandonment in its technical sense, means the relinquishment of a right; the giving up of something to which one is entitled; the giving up of a thing absolutely . . .".

[18] In yet a different context, a person who occupied real property as the family home might be absent for an extended period of time traveling, or working in some other location, but not have abandoned the property and thereby render the property exigible to judgment creditors (see for example the *Civil Enforcement Act*, R.S.A. 2000, c. C-15, s. 88 (f) (g), s. 93 (d); *Hart v. Rye*, (1914) 5 W.W.R. 1280 (Alta.S.C.)). What is essential in factually driven situations considering abandonment is the intention of the person who it is alleged has abandoned something or place.

[19] What emerges from the various authorities and the *Act* is the conclusion that "abandonment" may be either a matter of agreement in which a tenancy agreement stipulates certain acts as amounting to abandonment of the tenancy agreement, or where such agreement is silent, to be ascertained as a matter of fact taking into account all the surrounding circumstances.

Limitation of action

[20] *Attar v. Jackson*, [1995] A.J. No. 62 (Alta. P.C.) (referred to as "*Attar*") considered whether a breach of s. 15.2 prohibited any deduction from a security deposit for damages operated as well to limit the landlord's right to bring a separate action seeking damages arising out of the tenancy agreement.

[21] In *Attar* in construing the *Act*, Scott A.C.J. concluded that the operation of s. 15.2 and 39 (4.1) of the *Act* did not operate as a limitation of action in the following terms (para. 8):

"As to the security deposit, s. 39(4.1) of the *Act* provides:

'(4.1) A landlord shall not make a deduction from a tenant's security deposit for damages to the residential premises unless the requirements respecting inspection reports under section 15.2 have been met.'

Clearly, there were no inspection reports completed as required by s. 15.2 of the *Act* and, accordingly, the defendants were not entitled to deduct from the security deposit any damages alleged to have been caused to the premises by the plaintiff.

Despite that conclusion, this Court has consistently held that nothing prevents a landlord from commencing an action against the tenant directly or by counterclaim in an action brought against him or her by the tenant for damages to his or her premises which can be proven to have been caused by the tenant or by persons for whom the tenant is responsible during the tenancy. Nor is the landlord precluded from claiming for recovery for such things as cleaning to which he or she may be entitled pursuant to specific provisions of a formal lease.”

[22] This issue was also addressed by Patterson A.C.J. in *Lyman v. 637568 Alberta Ltd. (c.o.b. Emglo Apartments)* (1999), 249 A.R. 331 (Alta. P.C.) (referred to as “*Lyman*”), in the context of the landlord’s failure to send the required statement of account reflecting deductions for damages, as required by s. 39(1) of the *Act*, as follows:

“The failure of a landlord to comply with the requirements of s 15.2 of the *Residential Tenancies Act* will foreclose his right to deduct from the tenant’s security deposit [s.39(4.10)] [sic]. **However, the failure to deliver a statement of account does not preclude a judicial determination of damages suffered by the Landlord.**” (my emphasis)

[23] In *Seaton v. Bernard*, [2001] A.J. No 1265 (Alta. P.C.) (referred to as “*Seaton*”) a landlord returned in full a security deposit in the face of a claim against the tenant for damages because the landlord had failed to complete either an “in” or an “out” inspection report. While neither *Attar* or *Lyman* is discussed in *Seaton*, LeGrandeur Prov.Ct. J. heard the landlord’s claim to damages and awarded damages (see also *Kocyba v. Hughson*, [1996] A.J. No. 273 (Alta. P.C.)).

[24] Even though s. 50 (1) (a) of the *Act* makes it a quasi-criminal offence punishable by a fine of up to \$5,000 to breach s. 39 (4.1) of the *Act*, both Scott A.C.J., in *Attar* and Patterson A.C.J. in *Lyman* were able to conclude that s. 15.2 and 39 (4.1) did not operate to create a limitation upon the landlord’s right of action to seek damages for breach of a residential tenancy agreement.

[25] In *Andres-Magdiak v. Zaniol*, [1994] A.J. No. 939 (Alta.P.C.) (referred to as “*Andres-Magdiak*”) Norheim, Prov. Ct. J. was considering whether a landlord’s failure to deliver a statement of account under s. 39(2) and (3) of the *Act* operated as a limitation upon the landlord’s right so seek damages arising out of the tenancy agreement. In *Andres-Magdiak* Norheim J. stated (at paragraphs 6-7):

“Section 39(4.1) of the *Residential Tenancies Act* provides that a landlord shall not make a deduction from a tenant’s security deposit for damages unless the requirements respecting inspection reports under s. 15.2 have been met. This section appears to be in conflict with s. 39(0.1) (2) and (3) which

gives the Court the authority to make a determination of the proper amount to be deducted from a damage deposit, even if no statement of account has been delivered.

It is my view that the right way to deal with this conflict is not to deny the landlord his actual damages, but to award costs to the tenant.”

[26] In respect of a failure to deliver a statement of account, a tenant is not precluded from seeking damages from a landlord. The *Act*, s. 39 (2) states:

“39 (2) If a landlord fails to return all or part of a security deposit to a tenant in accordance with subsection (1), then, *whether or not a statement of account was delivered to the tenant*, the tenant may commence an action in a court to recover the whole of the deposit or that part of the deposit to which the tenant claims to be entitled.” (my emphasis)

[27] As I read *Andres-Magdiak*, Norheim Prov. Ct. J. did not conclude that the failure to deliver a statement of account operated in a general manner as a limitation of action section. What he was faced with was a claim based upon no evidence or insufficient evidence, as a result of which he concluded that the landlord had failed to prove his case. In my opinion, much stronger language and analysis of s. 15.2 and 39 (4.1) would be required to conclude that s. a breach of the *Act* coupled with s. 39 (4.1) of the *Act* constituted a limitation of actions.

[28] In conclusion, I find that upon a proper interpretation of s. 15.2 and 39 (4.1) of the *Act*, no general limitation is created which precludes a landlord from commencing and maintaining an action seeking damages arising out of alleged breaches of a residential tenancy agreement.

Application of the law to the facts

[29] Corlis argues that s. 39(4.1) is not triggered in the present case, since St. Croix was deemed to have refused to participate in the “out” inspection by virtue of having abandoned the premises. The alleged abandonment is based upon St. Croix having vacated the premises without having left a forwarding address.

[30] With respect, this argument is flawed, for a number of reasons. Corlis did not have the forwarding address prior to June 13, 2001, nor had he been in contact with St. Croix regarding the inspection, yet Corlis clearly did not enter the premises on June 13, 2001, thinking that they had been abandoned. Notice is not required in such circumstances. Instead, Corlis posted what could only be classified as a notice of “*entry of premises*” under s. 17(1) of the *Act*, which permits a landlord to enter a rented premises on at least 24 hours notice to inspect the state of repairs of the premises, make repairs, or to show the premises to specified individuals.

Performing an inspection is not one of the permissible activities justifying a 24 hour notice of entry of premises, though Corlis may have entered to inspect the state of repair of the premises.

[31] Regardless, a 'notice of inspection,' is neither contemplated nor required by the *Act*. Instead, s. 15.2, and especially subsection (3), places the onus on the landlord to make reasonable efforts to arrange an inspection with the tenant. The accuracy of this interpretation is strengthened by the language of 15.2(3), which stipulates that different dates, and times, are to be presented as options. It is only when the tenant refuses to participate in 2 proposed inspections that the landlord can proceed with the inspection in the tenant's absence.

[32] Citing the failure of St. Croix to leave a forwarding address as a reason for what equates to deemed compliance seems to place the onus on St. Croix to ensure that Corlis complies with s. 15.2.

[33] Practically speaking, the fact of abandonment could make communication with a tenant impractical, and frustrate a landlord's efforts to comply with s. 15.2, if the landlord had no knowledge as to the tenant's whereabouts.

[34] This is not the case here, where Corlis knew where St. Croix was employed. Further, it does seem contradictory for Corlis to argue that the tenancy was terminated for just cause by notice on June 3, 2001 on the one hand, and then state that St. Croix, having vacated the premises as directed, abandoned them. This is particularly true when the actual term of tenancy had not yet reached the 14 day mark as stipulated in the termination notice.

[35] A tenancy may be terminated by the landlord pursuant to s. 23(1) of the *Act* if a tenant commits a substantial breach under a residential tenancies agreement, but the notice must be given at least 14 days "before the day the tenancy is to terminate." A tenant has a right to the premises until that date. One can well imagine a situation where a tenant moved out his belongings 10 days after a 14 day termination notice was given, and then left the premises empty, only to return on the 14th day to hand in the keys and set up an inspection date. Corlis haste in the present case leaves it open to speculation as to whether this might have occurred here had he not been so precipitous.

[36] As already noted, "abandoned premises" are not defined in the *Act*, but s. 24 (1) of the *Act* defines "abandoned goods," as those left on residential premises by a tenant who has *either* abandoned the premises, *or* vacated the premises and whose tenancy has expired or been terminated. The latter portion of the definition suggests that the premises may have been considered abandoned, had the respondent vacated the premises, and had the actual termination date come to pass, prior to the applicant's performing the inspection.

[37] Because the *Act* does not excuse the landlord from compliance with s. 15.2 in a case of

abandonment, I do not need not determine the factual issue of whether St. Croix did or did not abandon the premises. As implied in s. 39(4.1), the landlord's attempts to arrange a standard inspection is crucial. In a case where the tenant is told to vacate, does so, and then leaves no forwarding address, but the landlord knows of a place where he can be contacted, s. 15.2(3) cannot properly be relied upon, if no real efforts toward contact are made. The wording of the section indicates that the landlord should make reasonable efforts to contact the tenant, and arrange the inspection.

[38] In the present case, evidence that Corlis attempted to reach St. Croix at his place of employment, but had been unsuccessful would be evidence of his having made reasonable efforts to comply with the section. This was not done, and on the face of it, s. 39(1.4) is thereby applicable in the circumstances.

Conclusions

[39] I find that Corlis was in breach of s. 15.2 of the *Act* in failing to take the necessary steps to arrange an "out" inspection of the premises. In the result, no deduction is permitted to be made from St. Croix security deposit for any alleged damages Corlis claims were caused by St. Croix to the premises.

[40] However, the ultimate decision on the merits of this action must await St. Croix decision as to whether he will call evidence, and if so, the nature of that evidence when taken as a whole with the evidence already heard.

[41] In view of the conclusion I have reached interpreting s. 15.2 and 39 (4.1) of the *Act*, I have concluded that Corlis right to maintain an action seeking damages allegedly caused by breaches of a residential tenancy agreement can be pursued.

[42] The application for a non-suit is dismissed. Costs of this application can be spoken to at the conclusion of the trial. Counsel are requested to speak to the Clerk of the Court to arrange a suitable date for the resumption of this trial.

Dated at the City of Grande Prairie, in the Province of Alberta this 8th day of February, 2002.

Judge A.H. Lefever