

IN THE PROVINCIAL COURT OF ALBERTA  
CIVIL DIVISION

BETWEEN:

JANINE KLYS

Plaintiff

- and -

JANICE FOSTER

Defendant

JUDGMENT OF THE HONOURABLE JUDGE J.N. LeGRANDEUR

COUNSEL:

Frank de Walle for the Plaintiff

Frank Llewellyn for the Defendant

Nature of Proceedings

[1] In this case the Plaintiff/Landlord Klys seeks judgment against the Defendant/Tenant Foster in the sum of \$1,530.16 plus interest for damages to the rental property allegedly arising during the currency of the Defendant's tenancy which was in force during the months November, 1997 through May of 1999, inclusive.

[2] The Plaintiff claims that parts of the floor of the premises were damaged by water leaking or escaping from the Defendant's washing machine, that a trellis on the premises was damaged by the Defendant's dog and that the Plaintiff suffered damages as a consequence of the Defendant's failure to maintain the yard surrounding the rental premises in a proper fashion.

[3] The Plaintiff bases her claim on the terms of the residential tenancy agreement entered into between the parties (Exhibit #4), including the specific provisions of paragraphs 5.03 and 5.04.

Issues

[4] The issues to be decided by the Court may be stated generally as follows:

1. What damages did the subject premises sustain during the tenancy of the Defendant and how was such damage, if any, caused?
2. What liability does the Defendant have for such damage, if any, under the terms of the tenancy agreement or otherwise?
3. What is the quantum of damage sustained by the Plaintiff, if any, and for which the Defendant is liable?

Facts

[5] Pursuant to a tenancy agreement, a copy of which was delivered to the Defendant on October 28th, 1997 (Exhibit #4), the Defendant took up residence in the subject premises on or about the 1st of November, 1997. Prior to the occupation by the Defendant, a condition report was prepared as a result of an inspection of the premises, (Exhibit #5). One of the items noted in the report points to some of the grouting between the tiles on the bathroom floor, which run along the corner wall and by the toilet bowl, breaking up. Ms. Foster described this problem as being primarily along the wall behind the bathroom door as one enters the bathroom. On the other side of this wall is located the washing machine and clothes dryer. (See Exhibit #2 for an illustration of the layout of the bathroom, the washer and dryer location, the hallway and front entrance way.) There is no suggestion in the condition report that the floor at the front entrance way or the utility area where the washer and dryer are located was soft or unstable at the time of the condition report being undertaken, however, Ms. Foster says she noticed such a problem with the front entrance way once she had actually taken up possession. Upon lifting up the front carpet located in the front entrance, she noticed the floor was soft and it got even softer over the first winter of her tenancy. Over time, the left rear corner of the utility room, where the washer was located, seemed to be sinking, according to her. She contacted a contractor by the name of Heilman, to try and determine what the problem was. Mr. Heilman testified that the floor was made up of K3 board which he described as a very poor floor to begin with. Upon his viewing of the premises, he observed no water in the vicinity of the washer, nor the front entrance and in fact the K3 board in these areas were described by him as being dry at the time. He noticed some give in the bathroom floor and considerable give in the utility room floor and the front entrance way. He concluded that the floor problem he had observed in those areas was moisture related. The K3 floor does not repel water very well, rather it tends to absorb it and this leads to softness and ultimate deterioration. He concluded that these areas had already deteriorated to such an extent as to be unsafe.

[6] Mr. Heilman also concluded that the softness of the front entrance was not caused by water leaking from the washer area in the utility room. It was his view that had water leaked

from that area and run down to the front entrance, there would have been damage to the hall floor as well. Neither he nor Mr. Mitchell found any such damage, although Mr. Mitchell did replace the hall floor covering to maintain continuity with the coverings placed in the damaged areas. Mr. Heilman opined that the front entrance would be an area of much traffic, and moisture from footwear would be present at that location and that this was likely the cause of the moisture problem at that location. He also believed that any excess moisture on the floor in the utility room would flow towards the utility room wall that separated it from the bathroom. The water would accordingly collect there and not run down the hallway towards the entrance way.

[7] I accept Mr. Heilman's opinions in this regard and I am satisfied on balance that the moisture problem as it existed at the front entrance way arose not from water leaking from the washing machine, but from the moisture that would normally accumulate at such an entrance from wet footwear and the like.

[8] With respect to the utility washer area, the evidence is clear that this area also had damaged flooring, and I am satisfied that it was precipitated primarily by moisture on the floor in the washer area which seeped also into the bathroom area, thereby causing some of the bathroom tile which bordered the wall separating the two areas to lift and the grouting to deteriorate.

[9] The Plaintiff's case argues that the moisture arose as a result of a leaking washing machine. There is no direct evidence that there was anything wrong with the washing machine itself, or its connections to the water system. No one ever saw the washing machine actually leaking, either at its hookup or elsewhere. Mr. Waterfield, who was called to testify by the Plaintiff, observed first-hand, a wet, spongy floor, in the area of the utility room and was convinced that the washing machine was leaking, although on cross-examination, he acknowledged that he had never seen the machine actually leak. Ms. Foster and her son both testified that the only instance of water escaping from the washing machine, that they were aware of, was on one occasion when Ms. Foster's son had either over-loaded or not balanced the load in the washing machine properly which caused it to gyrate and thereafter, Ms. Foster found water on the floor in front of the washing machine. It is clear that the utility area floor was damaged by escaping water during the period of Ms. Foster's tenancy. I am satisfied however, that there was water damage in this area prior to her taking up residence. The condition report (Exhibit #5) expresses the fact that there was a grout breakup in the bathroom in an area that is similarity described to be a problem area in the bathroom as a result of moisture damage. Certainly it was not as severe as was observed later in Ms. Foster's tenancy, however, the grout breakup in the area along the wall separating the bathroom and the utility room is consistent with moisture seeping under the wall and into the floor along the bathroom wall which is consistent with the floor in the area expanding and causing the tiles to shift and the grout to break up. I do not find it unusual that there may be water from time to time in a utility room floor, when that utility room has a washing machine located in it.

[10] I accept on the evidence that any water in the area of the utility room floor came from the washing machine. What is cloudy however, is why the water escaped from the washing machine. There is no direct evidence of any fault with the machine or its hook up. Counsel for the Plaintiff asked me to draw an adverse inference in this regard against the Defendant as a result of the Defendant not calling the repairman she had come in and inspect the washing machine. I am asked to infer from this fact that the machine was in fact leaking. I will address this issue later herein.

[11] With respect to the washing machine area, I conclude, that there was, at the commence of the defendant's tenancy, already some water damage to this area, although it does not appear to have been so severe as to have caused the defendant to notes its presence at the beginning of her residency. I accept, on the evidence, that further water escaped into this area during the currency of the tenancy. How often and how much I am unable to determine, nor am I able to conclude how the water came into the utility area save to the extent that I'm satisfied that it came from the operation of the washing machine. There is no evidence that the machine was defective or that the water hook-up to the machine was faulty. I am not prepared to draw an inference to that effect. The Plaintiff argues that I should, based upon the Defendants failure to call, as a witness, the repairman she had come in and check-out her washing machine. However, in this case, the Defendant made known to the Plaintiff through her Dispute Note that she had a repairman come in and check the washing machine and that the results thereof indicated there was no problem with the machine itself. The repairman is not a witness over which the Defendant had exclusive control and certainly this individual could have been called by the Plaintiff. The Plaintiff could have inquired as to the repairman's name and in the event the Defendant refused to give the same and then failed to call the witness, such an inference as the Court is being asked to draw today, could, in those circumstances, be drawn. However, I have no such evidence that would support that circumstance and I will not draw the adverse inference of fact as sought by the Plaintiff.

[12] It has been noted that when Mr. Heilman observed the utilities area in June or July of 1998, it was dry. When the Plaintiff and Mr. Waterfield attended in the Fall of 1998, the floor was wet. Mrs. Foster testified that the washing machine had overflowed while her son was washing clothes prior to the Plaintiff's attendance and observation of the area and that is why the area was wet. Mrs. Foster indicates that she wiped only a small puddle of water from the front of the washing machine. There is no direct evidence of any other escapes of water onto this area.

#### Trellis

[13] There is no dispute between the parties as to the fact that the damage to the trellis as alleged by the Plaintiff was caused by the Defendant's dog.

Weeds

[14] The evidence discloses that the City issued a notice for weed clean-up with respect to the subject property during the tenancy of the Defendant. The notice was given to the Plaintiff and whether it got to the Defendant or not, is, on the evidence, inconclusive. Nonetheless, a notice was issued and the weeds were subsequently cut by the City pursuant to the provisions of the Municipal By-Law concerning the same.

ANALYSIS

Liability

[15] The Plaintiff points the Court to Clause 5.04(d) of the leasehold agreement between the parties (Exhibit No. 4), which provides that:

The Tenant shall be responsible for and shall promptly pay to the Landlord upon demand:

d. The cost of repairing any damage done by reason of water or gas escaping from the premises or causing damage to the premises,

provided that the costs were incurred due to the fault or neglect of the tenant or any person for whom the tenant is responsible, except with respect to the damages set out in (b) above.

[16] Pursuant to this clause the Tenant is only liable for damages arising from the escape of water if such escape was as a consequence of the fault or neglect of the Tenant. This is not a clause of absolute liability, but one requiring fault or negligence on the part of the Tenant.

[17] In the application of this clause, I am of the view that the onus is on the Landlord to demonstrate to the degree required in a civil proceedings, that the Tenant was negligent in this regard. The clause does not speak of the Tenant being liable unless the Tenant can show that there was no negligence on his or her part. It is not enough that the Landlord shows water damage occurred during the course of the tenancy, the Landlord has both the evidential burden and the legal burden of proving the negligence of the Tenant.

[18] With respect to the use of the words "fault or neglect", as set out in Clause 5.04(d), I find them to be interchangeable in the context in which they are used in this contract. I can find no

reason to conclude that "fault" means anything more than "neglect" as that word is ordinarily understood, and vice versa. The question is, did the water escape in this instance as a result of the negligence of the Tenant.

[19] The evidence before the Court does not demonstrate that the Tenant's washing machine was defective or faulty so as to result in the leakage of water, nor does it demonstrate that the Tenant knew of any defect or ought to have known there was a defect. The evidence does show that on one occasion the Defendant found water on the floor in front of the washing machine, which incident apparently occurred in the Fall of 1998 just prior to the Plaintiff and Mr. Waterfield attending at the subject premises to view the floor problem that the Defendant had alerted the Plaintiff to. There is no direct evidence of any other such instances or any direct evidence that the Defendant Foster knew of water escaping from the washing machine at any other time. That, of course, is not to say that it did not happen. Given that the floor was saggy, it is entirely possible that any water that had escaped would puddle under or behind the machine itself, therefore not being visible unless one were specifically looking for it. Certainly on the basis of Mr. Heilman's evidence, the floor was damaged such that water would, in his opinion, pool towards the back of the washing machine along the wall that separates the utility area from the bathroom.

[20] I am satisfied, on the evidence of Mr. Heilman, that the underfloor in the utility area and part of the bathroom area, as well as at the front door, were, at the time he viewed them, already damaged to the extent that they were in an unsafe condition and ought to have been replaced. He described the front entrance area as being unsafe and the utility room area as having sunk below the level of the bathroom such that any water in the area would flow or would likely collect in that area. The damage had already been done by this time and any moisture escaping to this area thereafter, simply exacerbated the damage already done. The sub-floor in these areas, by the time Mr. Heilman inspected the premises, required replacement in any event of any further moisture escape thereafter. Accordingly, what Mrs. Foster ought to have done after this point in time is not determinative because the damage had already occurred. The question becomes whether she was negligent during the time leading up to this discovery by Mr. Heilman.

[21] I have previously concluded herein that there was evidence of moisture damage in the utility room and bathroom area at the time the Defendant moved into the subject residence. There is no direct evidence of the Defendant's washing machine thereafter being defective or faulty such that water could escape from it. There is no direct evidence of water in the utility area save for one instance in the Fall of 1998 when the premises were inspected by the Plaintiff and Mr. Waterfield. The Defendant acknowledges finding a pool of water on the floor in front of the washing machine but indicates that this was caused by her son not loading the washing machine properly.

[22] Given that the condition of the sub-floor appears to have deteriorated to some extent

between the time the Defendant took up residence and the inspection of Mr. Heilman, I am prepared to draw the inference that some moisture had escaped to this area during that time. Again, the cause of the water escaping from the washing machine is not clear. Given, the nature of the floor board, previous damage and the regular operation of the washing machine in the area, that is the weight and stress placed upon the floor by its vibration while operating, I believe it would not take much added moisture during this period to bring the floor to the condition it was in when inspected by Mr. Heilman.

[23] There is no evidence that the Defendant Foster knew nor am I prepared to leap to the inference, that she ought to have known that water may have been escaping from time-to-time into this area, during the period preceding Mr. Heilman's inspection. Neither is this a case where the Court is singularly drawn to the probable conclusion that the escaping water, whether it be from a defective or faulty washing machine or overloaded machine, would not have occurred but for the neglect of the Defendant. Water could escape from the washing machine from time-to-time without any negligence from the Defendant and without the defendant knowing of such escape, given the likelihood that the water would pool behind the machine along the wall. I am satisfied that when she realized that there was some problem in the area, that is when she contacted Mr. Heilman, The damage however, had already been done and only then could it be said that she ought to have taken further precautions with respect to the problem. Again however, by that time, the damage had already been done.

[24] The Plaintiff has the onus of demonstrating by a preponderance of evidence, that the Defendant was negligent with respect to the escape of water in this area and that the damages alleged, arose therefrom. The weight of the evidence presented in this case does not move me to conclude that the Plaintiff has satisfied its' onus in this regard. The Defendants' claim for damages related to the water damage in the utility room and bathroom is accordingly dismissed.

#### Front Entrance

[25] I am satisfied, as I've said, on the evidence of Mr. Heilman that the moisture damage to the front entrance flooring was not caused by water escaping from the utility area but resulted from moisture that was brought into the front entrance area as a consequence of normal use. This is a matter of normal wear and tear in my view and the Defendant is not liable for such a problem simply because it came to fruition during her tenancy. Such an accumulation of moisture would not, in my view, be covered or be considered to be an escape of water as contemplated by the subject covenant in the leasehold agreement. In any event of that conclusion, the evidence does not demonstrate the Defendant's negligence in this regard. The Plaintiff's claim is accordingly dismissed as to this damage item as well.

#### Tenant's Duty to Use Premises in Tenant-Like Manner

[26] At common-law, the Tenant has a duty to use the premises in a tenant-like manner. Even if factually it could be said that the Defendant's use was not such, (which I do not so conclude) the leasehold agreement specifically makes liability for damage arising from the escape of water, depend upon the fault or neglect of the Tenant. The leasehold agreement, in my view, would override any common-law covenant in that regard and accordingly no liability in favour of the Plaintiff can be founded on that common-law covenant.

#### Damage to Trellis

[27] The Defendant acknowledges that her dog caused the damage alleged by the Plaintiff, to this particular portion of the premises. The Plaintiff estimated the cost of materials and labour to repair the area at \$150.00. Despite little evidential support for the estimate, I accept it as reasonable and allow the Plaintiff's claim in that regard.

#### Cost of Cutting Weeds

[28] The City of Lethbridge under its By-Laws gave notice that the weeds on the subject premises were to be cut and removed. That did not occur and the City proceeded to do the work themselves at a cost to the Plaintiff property owner of \$53.87. The Tenant has a duty under the leasehold agreement, specifically clause 5.03(a) to maintain the yard area of the premises. The fact that a notice was issued by the City and acted upon by the City is sufficient proof in the absence of compelling evidence otherwise, that this covenant was not being fulfilled by the Tenant. The Plaintiff's claim is accordingly allowed in the amount of \$53.87.

#### Counterclaim

[29] The Defendant's counterclaim is dismissed.

#### Interest

[30] The Plaintiff claims interest pursuant to the Judgment Interest Act of Alberta. Interest is accordingly awarded on the judgment granted herein for the period commencing January 25th, 1999 to date of the issuance of the within judgment at the rate prescribed in the said Act.

#### Costs

[31] Given the individual success of each of the parties in these proceedings, each party will bear their own costs, save that the Plaintiff shall receive the costs of issuing the within claim, \$25.00 and a service cost of \$5.00.

Summary of Judgment

[32] The Plaintiff shall have judgment against the Defendant for the sum of \$203.87 plus interest at the appropriate rate for the period commencing January 25th, 1999 through to date of the within judgment plus costs of \$30.00.

Dated at the City of Lethbridge, in the Province of Alberta, this 15th day of February, 2000.

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Jerry N. LeGrandeur  
Judge of the Provincial  
Court of Alberta

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