

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

MIDWEST PROPERTY MANAGEMENT

Respondent

- and -

PATRICIA MOORE

Applicant

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REASONS FOR JUDGMENT  
of the  
HONOURABLE MADAM JUSTICE C.I. JOHNSTONE

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APPEARANCES:

Wendy A. Danson  
McCuaig Desrochers  
for the Respondent

Patricia Moore  
on her own behalf

BACKGROUND FACTS

[1] Patricia Moore (the "Applicant") was a tenant of Midwest Property Management (the "Respondent") from October 23, 2002 to June 1, 2003 at premises located at 1007 Hooke

Road in the City of Edmonton, in the Province of Alberta (the "Premises"), pursuant to the terms of the Residential Tenancy Agreement entered into between the parties on October 23, 2002 (the "Agreement"). The tenancy was for a one year fixed term expiring on October 31, 2003.

[2] In consideration of entering into the Agreement, the Applicant was paid an incentive bonus of \$500.00 to be applied against her first month's rent. As an addendum to the Agreement, the parties signed an incentive schedule C.1 whereby if the rental obligation was not paid in full in advance on the 1<sup>st</sup> day of each month, the credit would become payable in full immediately. Although the Applicant fell into arrears during the currency of the Agreement, the Respondent has not required her to repay the incentive bonus.

[3] Pursuant to the terms of the Agreement, no pets were allowed. However, on October 28, 2002 the parties entered into a Pet Policy Addendum to Lease Agreement ("Pet Addendum") permitting the Applicant to maintain two animals known as "Ruby" and "Mumford" with payment of a deposit of \$255.00. The Pet Addendum does not denote the type of animal, only their names. However, the Applicant acknowledged at the Hearing that these were the names of her two cats. The Pet Addendum required the Applicant to apply to the Respondent for permission to bring any other pets onto the Premises, whether permanently or for "pet sitting".

[4] Shortly thereafter the relationship between the Applicant and the employees of the Respondent rapidly deteriorated. During the course of the tenancy the Applicant made complaints in writing to the Respondent noting innumerable concerns about neighbouring tenants. She also voiced her complaints concerning the condition of the Premises including the exterior walkways. She alleged that because of ice and snow accumulation on the walkways she had three separate slip and fall mishaps that caused her physical injuries.

[5] The Applicant failed to make her January rent payment on January 1<sup>st</sup> and as a result the Respondent served a notice to deliver up possession of the Premises. The notice was dated January 7, 2003. The rent was paid late by the Applicant and processed by the Respondent on January 21, 2003.

[6] In March 2003, following complaints from other tenants, the Respondent became aware that the Applicant was keeping more pets in the Premises than authorized by the Pet Addendum. Neighbouring tenants complained of the resultant noise disturbance and the foul odours emanating from the Premises. The Applicant denied the validity of these complaints.

[7] In March 2003, the Applicant was given a choice: either remove the dogs she kept on the Premises or vacate. In response, the Applicant threatened the Respondent's Site Manager with criminal charges for harassment.

[8] On March 19, 2003, the Respondent issued a second eviction notice to the Applicant for failure to pay rent, failure to remove the dogs from the Premises and interference with the

rights of tenants and the Respondent. She was required to deliver up possession of the Premises by April 3, 2003; she failed to comply with the eviction notice. On the same date the eviction notice was issued, the Applicant complained of a slip and fall.

[9] On April 8, 2003, the Respondent brought an application in Master's Chambers to have the tenancy terminated. The Applicant brought a cross-application in Queen's Bench on the same day to maintain her tenancy and sought damages for various alleged infractions by the Respondent. The matter was heard in Justice Chambers by Justice Cooke who ordered the Applicant to pay all outstanding rent by April 11, 2003; conditional upon her doing so, he delayed any further request for repossession of the Premises until after April 30, 2003. He granted costs to the Applicant in the sum of \$250.00 on an ex parte basis. To date the Respondent has not paid these costs.

[10] The Applicant brought four further applications before the Court of Queen's Bench in the month of May, 2003. In the initial application, the Applicant sought a termination of her tenancy effective May 31, 2003. This was granted by Justice Ouellette. He further ordered her to pay \$377.50 in outstanding rent (an abatement of one half of the May rent) by 4:30 p.m. on May 2, 2003, failing which the tenancy was terminated effective April 30, 2003. When the Applicant failed to pay the rent ordered, the Respondent moved to enforce the Writ of Possession against the Applicant.

[11] In the next two applications, the Applicant sought to postpone the date for delivery of vacant possession, filing a fourth motion after Justice Agrios denied her application on the third motion on May 26, 2003.

[12] The Applicant delivered up possession of the Premises on June 1, 2003. The Out Inspection Report was completed and all monies owing to the Applicant by way of security deposit and pet deposit were returned in full on June 3, 2003.

[13] The respective Chambers Justices referred several issues to a Special Chambers application. The Special Chambers date was scheduled for June 10, 2003. The Applicant failed to file her brief in accordance with the *Alberta Rules of Court* and the matter was struck. Her application was revived and once again she was late in filing her brief but was granted a Fiat by Justice Lee for late filing and service of her material. This matter came before me on June 17, 2002. At the Hearing, the Applicant provided the Respondent's counsel and the Court with further material.

## ISSUES

[14] The issues requiring my determination are as follows:

1. Has there been a constructive eviction of the Applicant?

2. Is the Respondent liable for abuse of process?
3. Did the Respondent defame the Applicant?
4. Should the Respondent be held in civil contempt?
5. Is the Applicant entitled to Punitive Damages?
6. Is there a valid Personal Injury action before the Court?
7. Should the Applicant be enjoined from commencing further actions or applications against the Respondent relative to the Agreement without prior leave of the Court?
8. Who should pay the Costs of the various applications?

**THE APPLICANT'S POSITION**

[15] The Applicant alleges that the actions of the Respondent and the statements made constitute constructive eviction, abuse of process and defamation. Furthermore the Respondent should be found in civil contempt of the Orders of the Court, and in particular those granted by Justice Cooke on April 8, 2003 and Justice Erb on May 8, 2003. As a result of the Respondent's wrongdoings, damages flow as follows:

<b>ACTUAL DAMAGES</b>	
Photocopying	\$25.00
Parking 4 @ 4.00 per day	\$16.00
Overcharged late fees	\$87.50
Transcript Fees	\$32.45
Other Transcript Fees	\$200.00
Unpaid Costs	\$250.00
Movers	\$250.00
Carpet Cleaning	\$140.00
Rent charges	\$755.00
Storage	\$100.00

Kennel Boarding Fees	\$150.00
Utility Transfers	\$180.00
Alternate Lodging 7 @ 60 per day	\$420.00
Food 5 @ 45.00 per day	\$225.00
Teleconference call Justice Erb	\$24.82
Rent increase 5 months @ 200.00	\$1,000.00
Damage Deposit Increase	\$350.00
Costs	\$1,000.00
Address Change	\$32.10
<b>TOTAL</b>	<b>\$5,237.87</b>
<b>PUNITIVE DAMAGES</b>	<b>\$50,000.00</b>
<b>JUDGMENT</b>	<b>\$55,237.87</b>

### THE RESPONDENT'S POSITION

[16] Simply put, the Respondent submits that as the Applicant breached the covenant to pay rent the Respondent is entitled to rely on the Agreement and evict the Applicant. In any event, the Applicant brought a motion to terminate the Agreement which was granted by the Court. Both the pet deposit and damage deposit have been paid to the Applicant in full. Given the plethora of applications made by the Applicant, the Respondent is asking that the Court enjoin the Applicant from commencing further actions or applications against the Respondent concerning her former tenancy without prior leave of the Court or at the very least until the costs requested have been paid by her. The Respondent is not arguing that the application of the Applicant constitutes vexatious proceedings within the meaning of s. 23 of the *Judicature Act*, R.S.A. 2000, c. J-2 but provides no other authority for this form of relief.

### ANALYSIS

#### 1. Has there been a constructive eviction of the Applicant?

[17] The first issue requiring my determination is whether there has been constructive eviction of the Applicant. Section 34 of the *Residential Tenancies Act*, R.S.A. 2000, c. R-17 (the "Act") prescribes the remedies available to a tenant where the landlord has breached a covenant contained in the residential tenancy agreement or imposed by the *Act*.

[18] The relevant covenant of the Applicant for purposes of this determination is found in s. 15(b) of the Act, the covenant of peaceful enjoyment or possession. Whether the covenant has been breached is a question of fact and accordingly depends upon the facts of each particular case. The Applicant must establish on a balance of probabilities that the Respondent intentionally and substantially acted in such a way as to deprive the Applicant of her enjoyment of the Premises.

[19] It is not necessary to prove a direct physical interference with the tenant's enjoyment and possession; a substantial interference is sufficient. However, the substantial interference must be of such a degree that it is so intolerable to the tenant that she must vacate. The nature of the interference should have elements of a permanent and continuing effect, and have the character of wrongfulness: *Kingswood Estates Inc. v. Moss*, [1999] M.J. 541 (Q.B.) at para. 22, *Arangio v. Patterson*, [1993] O.J. No. 448 (Gen.Div.) para. 22 ff and authorities cited therein.

[20] The evidence in this case does not support a finding of such an interference. Rather the Respondent was simply relying upon the terms of the Agreement which the Applicant acknowledged she had breached on more than one occasion. It is clear that the Respondent acted swiftly after the first breach of the covenant to pay rent by issuing a notice of eviction. However, the Respondent was entitled to do so in accordance with the terms of the Agreement. The covenant of peaceful enjoyment does not protect a tenant against termination of the tenancy under the provisions of the lease: *Wood v. Saunders* (1912), 3 D.L.R. 342 (Sask.S.C.).

[21] The Applicant also complains of the actions of other tenants. A landlord is not responsible for the actions of its other tenants unless the landlord has caused the tenants to interfere with another tenant's peaceful enjoyment, or has assumed such responsibility. There is no evidence before me in this regard; rather, only allegations by the Applicant based entirely on hearsay and anecdotal information.

[22] There is also the acknowledged breach of the Pet Addendum, namely that the Applicant was keeping unauthorized pets, two Chinchillas (her own pets) and "pet sitting" dogs for a friend, including a litter of ten puppies. I do not accept as a valid argument that the Respondent knew that the Applicant had the two Chinchillas at the outset and simply turned a blind eye to their presence. Nor do I accept her argument that the Pet Addendum referenced only the names of the two pets and not the species, so it could have included dogs. Finally, although the dogs were housed in the Premises for only for a short duration, a breach still occurred.

[23] Where a lease is surrendered, the lessor remains liable for breaches of covenant committed prior to the surrender: *Saskatchewan (Attorney General) v. Whiteshore Salt and Chemical Co.*, [1955] S.C.R. 43.

[24] The Applicant is seeking damages for the failure of the Respondent, as her landlord, to repair the Premises. The written brief of the Respondent notes that there is no duty upon it,

either in the *Act* or in the Agreement to repair and maintain the Premises during the existence of the tenancy. At the hearing, the Respondent acknowledged that there is a duty under the Agreement for the Respondent to maintain certain appliances, namely: the refrigerator, stove, dishwasher, washer and dryer. The Respondent submits receipts attached as Exhibit R to the Affidavit of Sandy Smith (the Respondent's site manager) sworn June 4, 2003 evidencing repairs of the bathtub taps, door locks, hot water tank and dryer, and replacement of the toilet flappers and the dishwasher. The Applicant has not established on a balance of probabilities that the Respondent breached its limited duty of repair.

[25] The further damages sought by the Applicant are not substantiated by any evidence and certain of the damages are properly characterized as disbursements: photocopying, transcript fees, and teleconference call. I assume that the reference to unpaid costs of \$250.00 is to the costs awarded by Justice Cooke, which do not constitute damages. There is no particularization of the costs claimed in the amount of \$1,000.00.

[26] The Applicant's claim for damages is denied.

**2. Is the Respondent liable for abuse of process?**

[27] A party advancing a claim of abuse of process must establish that the other party resorted to a legal process solely for the purpose other than that which it was designed to serve: L.N. Klar et al., *Remedies in Tort*, vol. 1 (Toronto: Carswell, 2001) at §14.

[28] The evidence supports the action commenced by the Respondent for an order of termination of tenancy based on non-payment of rent and other breaches of the Agreement. There is no evidence before me that the Respondent was malicious or vexatious in the use of the Court process to seek such a remedy in the circumstances.

[29] Accordingly, the claim by the Applicant for abuse of process fails.

**3. Did the Respondent defame the Applicant?**

[30] Defamation is a tort and must be properly pled. The Statement of Claim must contain a concise statement of the material facts upon which the plaintiff relies: the publication by the defendant, the words published, and the fact that they were published about the plaintiff: *Remedies in Tort, supra* at 6-102. The Applicant's pleadings do not support any counter-claim in defamation.

**4. Should the Respondent be held in civil contempt?**

[31] The Order of Justice Cooke granted costs to the Applicant of \$250.00. The remedy of civil contempt is not available for failure to obey an order for payment of money, pursuant to Rule 703(1) of the *Alberta Rules of Court* which reads as follows:

703(1) Every person is in civil contempt who

- (a) fails, without adequate excuse, to obey any order of the court, **other than an order for payment of money.**

[Emphasis added]

[32] It is clear that the Respondent has not appealed the Order of Justice Cook awarding costs of \$250.00 ex parte to the Applicant. Therefore this Order stands and the amount is payable. However, even assuming a contempt sanction or any similar sanction were available, given the circumstances and results of this application, in particular the set off of costs owing, compliance by the Respondent will not be an issue, and I would therefore decline to make a declaration of contempt.

[33] The Order of Justice Erb of May 8, 2003 required the Applicant to pay her rent arrears of \$377.50 within one-half hour of the granting of the Order, failing which the eviction Order would be enforced. If she paid the amount, which she did, she was entitled to retain possession of the Premises until May 31, 2003 and enjoy the covenant of peaceful enjoyment. It was further ordered that the Applicant and the Respondent's employees not have direct contact. All other matters were referred to this Special Chambers Application.

[34] There is nothing before me to establish that the Respondent failed, without adequate excuse, to obey this Order of the Court. Because of the effluxion of time, other than the issue of costs, all other provisions of the Order are redundant or have been concluded.

**5. Is the Applicant entitled to Punitive Damages?**

[35] The Applicant submits that she is entitled to an award of punitive damages because of the treatment she received from the employees of the Respondent including verbal abuse, threats of physical force, and emotional stress. Punitive damages are awarded for purposes of punishment, deterrence and denunciation: J. Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000), ch. 8.

[36] The Respondent's conduct was neither reprehensible, oppressive, harsh nor malicious. It does not warrant punishment compensable by an award of punitive damages.

**6. Is there a valid Personal Injury action before the Court?**

[37] At the Special Chambers Hearing, the Applicant alleged that she received an eviction notice minutes after reporting a slip and fall accident. The Respondent's evidence is to the effect that the slip and fall complaint of that date occurred shortly after receipt by the Applicant of a letter of inquiry regarding certain breaches of the Agreement.

[38] It is not clear whether the Applicant intends to pursue a claim for personal injury, or was simply relying on that allegation to demonstrate abuse by the Respondent in attempting to terminate the tenancy. In any event, none of the documents filed by the Applicant support a counter-claim for personal injury, and if they did, such a claim could not be conveniently disposed of in this action.

**7. Should the Applicant be enjoined from commencing further actions or applications against the Respondent relative to the Agreement without prior leave of the Court?**

[39] The Respondent has argued that given the innumerable applications that the Applicant has commenced against the Respondent relative to her former tenancy, she should be enjoined from starting further actions or making additional applications relative to this issue without prior leave of the Court. The Respondent was not requesting that I invoke the provisions of the *Judicature Act, supra*, on the basis that this constitutes vexatious litigation.

[40] In the alternative, the Respondent asks that the Applicant be enjoined from commencing any further applications or actions against the Respondent unless and until all costs awarded in this action are paid in full to the Respondent.

[41] This Court does not have the inherent jurisdiction to prevent a litigant from instituting or continuing legal proceedings without leave: I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at p. 43. In Alberta it is only in rare circumstances that the Court may prohibit a litigant from taking steps in an action or from instituting legal proceedings. The Court may take such a step to prevent abuse of process, for example where the claim itself is vexatious: see Rule 129(1)(b) of the *Rules*. As I indicated earlier where a vexatious litigant habitually and persistently abuses the process of the Court, s. 23 of the *Judicature Act, supra* affords the Court a broad discretion to restrict access to the Court without further leave.

[42] Justice Veit considered the seriousness of invoking such a process in *Hillcox v. Morrow* (1995), 175 A.R. 141 (Q.B.) (at paras. 11-12). She noted that the judiciary should prevent access to the Courts in only the rarest of circumstances and only then for the good of the community as a whole.

[43] Given the fact that the Respondent's counsel is not applying for the invocation of s.23 of the *Judicature Act, supra*, and absent any inherent jurisdiction to grant such an application, the Respondent's application for an order enjoining the Applicant from starting further actions

or making additional applications relative to this issue without prior leave of the Court is denied.

[44] As for the request that the Applicant be enjoined from commencing any further applications or actions in this matter until all costs are paid in full, to date there is no history of non-payment of costs by the Applicant (nor any further motion by the Applicant before the Court) which would justify prospectively enjoining the Applicant from making further applications until costs are paid. However, this ruling does not preclude the Respondent from relying on the various tools available under the *Alberta Rules of Court* to address vexatious proceedings in the future.

**8. Who should pay the Costs of the various applications?**

[45] The Applicant is claiming costs in the amount of \$1,000.00 as part of her damages. The Respondent requests costs of the previous applications before the Court of Queen's Bench on May 1, 8, 23 and 28, 2003, costs of this Special Chambers application, including costs for rescheduling the hearing and the late filing of the Applicant's Brief.

[46] The Order of May 1, 2003 granted by Justice Ouellette had the parties bear their own costs. This Order has not been appealed; it therefore stands.

[47] The Order of Justice Erb of May 8, 2003 directed that the costs of that application would be determined at the Special Chambers Hearing. Given the mixed success of each party, they will bear their own costs.

[48] The Order of Justice Agrios granted May 23, 2003 again directed that the costs of that application be dealt with at the Special Chambers hearing. Justice Agrios denied the Applicant's application to vary and extend the Orders of Justices Ouellette and Erb. The Respondent shall have its taxable costs of that application.

[49] The Order of Justice Erb granted May 28, 2003 was silent as to costs. The Applicant was denied her application. The Respondent shall have its taxable costs for that application.

[50] Finally with respect to this Special Chambers application, given the success of the Respondent, it is awarded its taxable costs but no costs for the rescheduling of the application nor for the late filing of the Applicant's brief. The costs awarded the Respondent shall be set off against the costs awarded the Applicant by Justice Cooke.

HEARD on the 17<sup>th</sup> day of June, 2003.

DATED at Edmonton, Alberta this 3<sup>rd</sup> day of July, 2003.

