

IN THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

HELGA GUTERMAN,

Plaintiff

- and -

GERRY RASMUSSEN,

Defendant

JUDGMENT OF THE HONOURABLE JUDGE D.G. INGRAM

COUNSEL:

H. Guterman for the Plaintiff
Ikbal Singh for the Defendant

[1] This is a claim by a landlord against her former tenant of the residence located at 7408 - 111 Street, Edmonton. The claim is for repairs to the basement and garage, cleaning costs, replacement of a refrigerator and for unpaid rent. After allowing a credit for a security deposit and reduction of the claim to the monetary limit of this court, the claim was for \$7,500.00.

[2] The Defendant denied causing the damage to the basement, disputed the amount of the Plaintiff's claim for repairs to the garage, and denied damaging the refrigerator. The Defendant denied liability for the rent on the basis that the Plaintiff had terminated the tenancy by notice and retaken possession by changing of all of the locks. In addition, the Defendant raised the defence of res judicata arising from an order made in earlier proceedings by way of an application by the Plaintiff under the Residential Tenancies Act. The Defendant also counterclaimed alleging that this action is an abuse of the process of the court, harassment, and maliciously pursued within intent to cause the Defendant loss. The counterclaim sought exemplary or punitive damages, restitutionary damages, and an injunction to restrain the Plaintiff from further harassment.

[3] In the result, for reasons outlined below, I find that the Plaintiff has not satisfied me on a

balance of probabilities that the Defendant caused the damage to the Plaintiff's basement. I find that the Defendant caused some damage to the garage and failed to leave the premises in a reasonably clean condition. I also find the Defendant did not damage the Plaintiff's refrigerator. Further, I find that the Defendant is liable for unpaid rent subject to mitigation by the Plaintiff in renting the premises to another tenant. I am satisfied that res judicata has no application in this case and I dismiss the counterclaim.

[4] The parties displayed a marked degree of acrimony, each indicating fear of the other based upon the reciprocal belief that the other was "crazy" and therefore unpredictable and potentially capable of bizarre conduct. Some of the actions taken by the parties reflected these beliefs.

[5] The Plaintiff claims rent of \$900.00 for each of the months of August and September 2001, under a written tenancy agreement for a fixed term expiring at the end of September, 2001. The rent was paid only until the end of July. The Plaintiff received \$875.00 from the new tenant for the month of September, 2001. This mitigation reduced the Plaintiff's rent claim to \$925.00.

[6] The Defendant denies liability for rent on the basis that the Plaintiff terminated the tenancy on July 27, 2001, by a notice of termination for substantial breach dated July 11, 2001. This notice was served pursuant to the Residential Tenancies Act (all references in this judgment are to the sections as numbered in RSA 2000 Chapter R-17).

[7] If effective the notice, exhibit 22, would have terminated the tenancy at 12:00 noon July 27, 2001.

[8] However, the Defendant served the Plaintiff with a notice in writing objecting to the termination under section 26(3)(b). The notice of objection rendered the notice to terminate ineffective. The Plaintiff then applied to this court on July 26 for an order to terminate the tenancy. The Defendant opposed the application and the Plaintiff's application was dismissed. Neither the notice to terminate nor the application to court for an order to terminate were effective due to the actions of the Defendant in objecting to the notice and opposing the application.

[9] The Defendant also denies liability for the rent on the basis that the Plaintiff terminated the tenancy on July 31 by taking possession of the premises and changing all of the locks thereby depriving the Defendant of access to the property. The Defendant testified that he was convinced, from early July 2001, that the Plaintiff was determined by any means to evict him from the premises. When he received the notice of termination he was concerned that the Plaintiff might well be able to evict him. When he received the notice of application to the court for an order for possession he noted that the application was to be heard July 26. The notice had

provided for termination on July 27 and the Defendant apparently thought that if the application were successful his eviction would be carried out by force of law on July 27. The Defendant considered the risk too great and he then arranged to move out by July 25, leaving at that time only a few goods in the house and garage.

[10] Ironically, had the Defendant understood his position he could have simply moved out and let the Plaintiff terminate the tenancy, under the notice of termination or by court order,. In that event the Defendant's obligation to pay rent would have ended. However, not understanding his position and not wishing to let the Plaintiff have her way, the Defendant succeeded in keeping the lease alive and with it his obligation to pay rent.

[11] The Plaintiff alleged that the Defendant damaged the property and failed to keep it reasonably clean. To protect himself, the Defendant took numerous photographs of the inside and outside of the house. The photographs were produced on the application of July 26 and re-entered as exhibit 17 at the trial of this action. The Defendant stated that the photographs were taken July 25. This was challenged by the Plaintiff who suggested that the photographs had been taken on some earlier occasion - perhaps when the Defendant took possession in 1999. I reject that suggestion of the Plaintiff. The Defendant's explanation is entirely credible. The Defendant demonstrated considerable fear of the Plaintiff and uncertainty as to how she might try to cause him harm. The pictures relate to the areas of the house about which the Plaintiff was complaining. I could see no reasonable explanation for the Defendant taking pictures of the roof of the house, for example, except for the allegations the Plaintiff was then making. I find that the photographs in exhibit 17 fairly represent the condition of the areas of the house and the yard depicted therein as of July 25, 2001.

[12] Following the court application of July 26, the Defendant did not return to the property until July 30. Meanwhile, the Plaintiff, apparently either out of concern for her property or in her zeal to find some basis to evict the Defendant, attended at the then vacant property on July 29. The Plaintiff stated that she was unaware that the Defendant had then moved out. The Plaintiff posted a "notice of entry" on the property to notify the Defendant that the Plaintiff intended to enter the property between the hours of 2:00 p.m and 8:00 p.m on July 30 to "inspect the state of repair(s) of the premises".

[13] On July 30, 2001, the Defendant returned to pick up some of his remaining goods. On entering the house he found that the basement was flooded. He said he was "shocked" at the sight - a description used by all of the witnesses to the flooding - by which I take them to mean that they were both surprised and somewhat horrified by what they saw. The Defendant believed that the Plaintiff was not aware of the condition of the basement, which appears to be correct; although by this time it appears that the Plaintiff was probably aware that the Defendant had moved out. However, the parties were "not on speaking terms" and the Defendant, feeling that he had taken "a lot of abuse" from the Plaintiff decided he would not advise her of the condition of

her basement. As he then saw it, it was "her problem now". He did, however leave the Plaintiff two notes, exhibits 6 and 7, the former address to "Hellga" a deliberate misspelling of her Christian name.

[14] Later on the same day, July 30, the Plaintiff accompanied by her witness, Joanne Heard, entered the house, finding it abandoned, the basement flooded, and damage done to basement windows, the front door, the walls, the basement ceiling, and "garbage strewn about". The witness Joanne Heard stated that she had been contacted by the Plaintiff on or about July 26 and that the Plaintiff stated that she had had "altercation" with the Defendant and expected that the house was abandoned. The Plaintiff and the witness then took numerous pictures showing the damage to the house.

[15] The Plaintiff then phoned her daughter, Nadina Kaminer, who lived in Calgary and came to Edmonton to attend at the property with the Plaintiff on July 31. After surveying the damage they took more pictures, also exhibits. The Defendant arrived and went to the garage to obtain some of this goods. There was a confrontation between the parties and the Defendant left.

[16] The Plaintiff then changed the locks on the house and garage and went to buy and rent additional equipment and materials to clean up the basement leaving Kaminer in the house. The Defendant returned, apparently believing the Plaintiff and her daughter to no longer be there, to retrieve more of his goods from the garage which was then locked and not accessible to him. In anger and frustration, the Defendant forced his way into the garage which damaged the door and frame. The Defendant removed his belongings and departed.

[17] I am satisfied that the Defendant abandoned the premises and gave the Plaintiff reasonable grounds to believe that he had repudiated the Residential Tenancy Agreement. The Plaintiff accepted the repudiation as a termination of the tenancy and, under section 25 of the Residential Tenancies Act, is entitled to recover any damages resulting from the breach of the tenancy agreement prior to the repudiation and any damages for the loss of the benefit of the tenancy agreement until it would have expired had the Plaintiff not accepted the repudiation, subject always to the Plaintiff's obligation to mitigate. I find that the Plaintiff made reasonable efforts to mitigate and the Plaintiff's claim for the benefit of the tenancy agreement is therefore loss of rent in the sum of \$975.00.

[18] As to damages prior to repudiation, I am not satisfied that the Plaintiff is entitled to the cost of replacement of the basement refrigerator. The Plaintiff did not replace the refrigerator nor am I satisfied that it no longer functions nor was it repaired. The Plaintiff stated that the Defendant had agreed to replace the refrigerator but I find that he did not. The claim in respect of the refrigerator is dismissed.

[19] The substantial claim for damages in this case relates to the flooding of the basement as well as the broken windows, door screen and holes in the walls in various places. Under the

Residential Tenancies Act, a tenant covenants that he "will not do or permit significant damages to the premises". There is no evidence that the Defendant did or permitted the flooding, the damages to the windows or door, or the holes in the walls and I accept his evidence that he did not.

[20] The Plaintiff argued that the Defendant was liable for the flooding and other substantial damages which accrued after he abandoned the property, even if he did not cause or permit the damage personally, on the basis that he failed to notify the Plaintiff of his abandonment. The argument is that had the Defendant notified the Plaintiff she would have taken steps which would have prevented the damage. There is no evidence as to the actual direct cause of any of the damage. The most substantial cause was clearly the flooding and the source of the flooding is not known. The Defendant produced a statement from Environment Canada, being a certified official weather record, which indicated an unusually heavy rainfall at the Edmonton City Centre Airport on July 29. Roughly two thirds of the rain during the month of July 2001, fell on the days July 24 to 29 inclusive. In addition, there is evidence that it is probable that someone other than the Defendant was in the premises after July 25 and before July 30. The Plaintiff described extensive damages which are not present when the Defendant took the photographs of July 25. The Plaintiff described cigarette burns and accumulation of cigarette butts which I find were not present on July 25. The Defendant and his son were non smokers. I do not speculate on the causes of the flooding and the other extensive damage. Suffice it is to say that I find the Defendant did not cause or permit any of this damage. In my view, the fact that the Defendant substantially moved out on July 25, with a view to abandonment on July 30, the date to which the rent was paid, does not make the Defendant responsible for the damage which occurred between July 25 and July 30.

[21] There are, however, some damages to the premises which were caused by the Defendant. He admits to the forced entry through the garage door. The Defendant also admits that his son caused the damage to the ceiling tiles in the basement. In addition it appears that there was some other minor damage for which the Defendant was responsible. Specifically, although not referred to in evidence by any witness, I note there was a gouge in the main floor kitchen wall which appears in the Defendant's pictures of July 25 and more clearly in the Plaintiff's photos of July 30 and 31. Further, I am satisfied that some of the cleaning and removal of garbage and debris are matters for which the Defendant is properly held responsible. It appears that the Defendant's photographs showed the premises in the best possible light and the Plaintiff's photograph just the opposite.

[22] Having reviewed the evidence and the exhibits, including the accounts for the works and materials, I find that the Defendant is liable to the Plaintiff for damages to the premises and for cleaning in the amount of \$300.00. I therefore allow the Plaintiff's claim for rent in the sum of \$975.00 and damages in the sum of \$300.00, against which the security deposit of an admitted \$931.90 should be deducted, leaving a balance of \$343.10.

[23] The Defendant argued that the Plaintiff's damage claims were barred by the doctrine of res judicata on the basis of the dismissal of the Plaintiff's application on July 26. I find that the July application did not decide those claims. Substantially all of the claims in this action occurred as a result of matters which occurred after July 26. The Defendant's repudiation of the tenancy, the flooding, the major damages, the damage to the garage door, all occurred after the application under the Residential Tenancies Act had been commenced and in fact after it was heard. Res judicata cannot apply in respect of events which occurred after the court order relied upon as having decided the matter. Further, clearly the Plaintiff could not have discovered these damages at the time of the court proceedings, which is another ground for rejecting res judicata.

[24] In addition, applications under the Residential Tenancies Act deal, broadly stated, with two distinct matters: termination of tenancies and possession of premises, on the one hand, and monetary claims for rent and damages and other compensation, on the other hand. The Plaintiff's application of July 26 was an application for termination and possession. Any references in that application to damages were advanced only as grounds for termination, that is, they were allegations of substantial breaches of the tenancy agreement. There were (vague) attempts to bring the tenant's conduct within sections 20(b), (e),(f), and (g) of the Act. There was no evidence of any actual loss or damage nor was the Plaintiff seeking any judgment for loss or damage. Further, the order of July 26 specifically did not affect the rights of the parties to any other or further claims. Clearly, the merits of the claims in this action were not dealt with, or even before the court, on the application of July 26.

[25] The Defendant counterclaimed on the basis that the within action is an abuse of the process of this court. The Defendant believes that the Plaintiff maliciously intended to cause harm to the Defendant by any means, including these proceedings. The Plaintiff has considerable animosity toward the Defendant. The Plaintiff appears to believe that the Defendant deliberately trashed her house. In my view it is not an actionable abuse of process to bring action against a person where the Plaintiff genuinely believes she has a good cause of action and brought the action in order to recover damages, which is the purpose for which an action of this kind is legitimately commenced and prosecuted. Abuse of process is a claim which may be brought where a person has resorted to a legal process solely for some purpose other than that for which the legal process was designed to serve. I am satisfied that the Plaintiff brought this action for the legitimate purpose of seeking to recover damages; her animosity toward the Defendant does not make the process an abuse of process.

[26] The counterclaim is dismissed. Exemplary, punitive or restitutionary damages would not be appropriate, nor would injunctive relief which this court probably has no power to grant in any event.

[27] Having regard to all the circumstances of this case, I find that the Plaintiff should have

costs consistent with the fact that she has been successful, limited by the fact that the substantial claims advanced have not been allowed and that the primary claim which was allowed was successful only as a result of the Defendant's self-defeating conduct in objecting to the Plaintiff's efforts to terminate his tenancy. I award the Plaintiff costs in the sum of \$100.00 inclusive of disbursements.

[28] The Plaintiff will therefore have judgment for \$343.10 and costs of \$100.00.

Dated at the City of Edmonton, in the Province of Alberta this 24th day of April, 2002.

Judge D.G. Ingram