

IN THE PROVINCIAL COURT OF ALBERTA
CIVIL DIVISION

BETWEEN:

JOHN SNETHUN

Plaintiff

- and -

KELLY CARSON

Defendant

**REASONS FOR JUDGMENT OF
THE HONOURABLE JUDGE J.N. LeGRANDEUR**

Nature of Proceedings

[1] In this case the Plaintiff claims for arrears of rent in the sum of \$3,900.00 arising from the lease by the Plaintiff to the Defendant of a rural residence located on the SE 1/4 quarter of 34-44-11 W4th meridian.

[2] The Defendant disputes the claim alleging that the rent payable was to be set off by work done and materials supplied by the Defendant in the repair and upgrading of the residential premises leased.

[3] The Defendant also counterclaims for the return of certain personal articles currently in the possession of the Plaintiff which the Plaintiff refuses to return.

Issues

[4] The issues facing the Court may be summarized as follows:

1. Is the Defendant in arrears of rent and if so how much?
2. Is the Defendant entitled to any setoff against the rent outstanding by way of the value of materials and the Defendant's labor used to incorporate the materials and repair and upgrade the leasehold residence?
3. Is the Plaintiff entitled to rent for the use of the quonset located in the vicinity of the leasehold residence and if so, in what amount?
4. Is the Plaintiff entitled to damages, although not claimed for in the pleadings, for the cost incurred by the Plaintiff in steam melting the ice that developed in the quonset hut?
5. Is the Plaintiff entitled to retain possession of the Defendant's personal articles, and if not, what remedy is available to the Defendant at this time?

Facts

[5] In May of 1996, the Plaintiff had two residences he was prepared to rent. There was initial discussion as to the rental of one of those properties between the Plaintiff and the Defendant. The Defendant was advised that the Plaintiff's daughter, Brenda would have the key. I am satisfied that thereafter any discussions concerning the residence were

had between Brenda and the Defendant. This is confirmed by the fact that Mr. Snethun was away in Norway during the month of June.

[6] The Defendant had access to the residence during the latter part of May and the month of June and did cleaning, repair work and some upgrading of the premises. He was given access to the premises during that period, but does not appear to have formally occupied the same as his residence until approximately the 1st of July, 1996.

[7] It is the Defendant's assertion that he made an arrangement with the Plaintiff, such that the cost of doing the repair work, cleaning and upgrading the premises would be seen as a credit against the accruing rent. Mr. Snethun denies this, but does accept responsibility for the cost of materials used in repairing or enhancing the premises prior to the occupation thereof by the Defendant. Mr. Snethun's position was that the tenant wished to do the work and that was a matter of the tenant's choice and he never made any arrangement to pay him for giving effect to that choice. Mr. Snethun denies that he ever asked the Defendant to do the work and he further states that his arrangement was that he would pay for the materials used in the work provided what was being done had been pre-authorized by him.

[8] The Defendant testified that once he had completed the work that he attended on Mr. Snethun in early July and provided him with his invoice for labor and the material costs, (Exhibit #3). The Plaintiff apparently did not have time to consider it at that point, and the matter was not discussed any further. The evidence is unclear as to whether the parties ever did discuss these items again. The Defendant says the Plaintiff called him on October 20th concerned about the bills he had

submitted. The Plaintiff doesn't appear to recall ever discussing the matters again with the Defendant. In any event, the Defendant did not pay any rent for the months July, 1996 through December, 1996. The rent had been agreed between the parties at \$500.00 per month.

[9] In November, the Defendant, apparently with permission of one of the sons of the Plaintiff, stored certain of his personal effects in the quonset building located near the residential property that had been rented by the Defendant. This was only to be a temporary storage space, apparently until the space was needed by the farming operations of Mr. Snethun. The Plaintiff himself denies he knew anything about this arrangement and testifies that there had never been any agreement for Mr. Carson to rent the quonset as part of the original lease.

[10] On December 3rd, 1996, the Defendant went to work for Canadian Frachmaster and as a consequence was away from his residence. Since he and his wife had separated, no one was occupying the home when he was away at work. On December 9th he received a call from his wife who apparently had been called by the Plaintiff. He immediately called the Plaintiff to determine what was needed and was told by the Plaintiff that he had changed the locks on the residence and only when the Defendant got the matter of rent straightened out would he be given a key. The Defendant's belongings were still in the premises and the Plaintiff had entered the home. I am satisfied the Plaintiff knew that the Defendant had not abandoned the residence. As well, the Defendant had left many personal items in the quonset, including a golf cart, a riding lawnmower, a push lawnmower, weedeater, aerator, fertilizer spreader, canopy top, running boards for a car, and two battery operated miniature cars. Mr. Carson estimated the value of those items to be in excess of \$3,000.00,

however no evidence was presented in support of that amount. The Plaintiff is still in possession of the items that were located in the quonset.

[11] On December 18th the Defendant returned to the home and managed to retrieve his personal belongings save for the items in the quonset. He did not seek to maintain his residence in the subject premises. Thereafter the Defendant testifies that he made four trips to the residence to retrieve his goods from the quonset, however he was unable to do so.

[12] The Plaintiff testified that while in the quonset, the premises were flooded by a leaking valve which he attributed to the Defendant and which resulted, as a consequence of cold weather, in the freezing of the Defendant's personal goods onto the floor of the quonset. The Plaintiff had the ice melted by steam at a cost of \$545.10. (Exhibit #2) This sum the Plaintiff seeks from the Defendant as well as the rent.

Rent Outstanding

[13] The Plaintiff seeks rent in the sum of \$500.00 per month for the period July 1996 through January 1997, plus the further sum of \$400.00 for the use of the quonset. Ignoring for a moment, any issue of setoff by way of contract or damages, the Defendant is clearly liable for rent for the period of July through November, 1996. I am of the opinion however, that the claim for rent for December, 1996 and January, 1997 must fail.

[14] The Defendant as a tenant in a residential tenancy was entitled to the benefit of s.14(b) of the Residential Tenancies Act, R.S.A., 1980 Chap.R-15.3 as amended, which provides:

14. The following covenants of the landlord form part of every residential tenancy agreement:

- (b) that, subject to section 17, neither the landlord nor a person having a claim to the premises under the landlord will in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises;

[15] In this case, the Plaintiff, by entering the premises and changing the locks, with full knowledge that the Defendant had not abandoned the premises, was in breach of this covenant. By doing so he repudiated the lease agreement. The Defendant accepted that repudiation by leaving the premises as opposed to seeking reinstatement of his residency therein. The landlord cannot claim rent for December as he had wrongfully repudiated the lease at that time, nor can he expect to receive the rent for January 1997 which would be in the normal course the rent payable in lieu of notice, since he himself terminated the tenancy. The Plaintiff cannot have both the termination of the tenancy and the rent therefore. The fact that the tenant was in arrears of rent does not authorize the landlord to enter the premises and change the locks. The Residential Tenancies Act, provides lawful remedies to a landlord in such situation; the landlord may distrain for the rent or serve notice of termination and claim for arrears of rent; he cannot, without proper process, interfere with the tenant's possession and peaceful enjoyment of the property rented. Entering the premises in the absence of the tenant and changing the locks in order to extract rent from the tenant is such an interference. The Plaintiff cannot claim rent accruing after the wrongful eviction. (Buttimer v. Betz, (1914) 6 WWR 22, B.C. County Court)

Quonset Rent Claim

[16] The Defendant had not rented the quonset as part of the residential tenancy agreement and in fact had indicated no desire to rent the same. The arrangement made between the Defendant and the son of the Plaintiff, although perhaps not legally binding on the Plaintiff, at least given the evidence presented to the Court, does not found the basis for payment of rent by the Defendant. The Defendant had arranged for temporary use of the buildings at apparently no cost and there is no suggestion in the evidence that he ever anticipated being responsible for any cost. I can find

no basis for liability in law on the facts presented here. Perhaps more thorough evidence in this regard might have revealed something further, however, given the evidence, this part of the Plaintiff's claim must be dismissed.

Cost of Removal of Ice

[17] The Plaintiff seeks damages in an amount equal to the sum he expended to melt the ice in the quonset so that the goods therein presumably, his and the Plaintiffs, could be removed. The Plaintiff did not articulate this claim in the initiating pleadings, but only indicated the claim was for unpaid rent. In any event of that deficiency, the Court only has the evidence that the flooding of the premises arose as a result of some sort of a leaky valve. There is no evidence that ties the leaky valve to the Defendant. The simple fact that he had stored some of his goods in the quonset does not lend itself to such a finding of causation as there is no evidence that he actually caused the leakage or that he had sole control of the quonset such that causation could be attributed to him. This portion of the Plaintiff's claim must fail as well.

Agreement to setoff labor and materials against rent

[18] The Defendant asserts that he had an agreement with the Plaintiff whereby he was entitled to setoff against any rent accruing the labor and materials expense in cleaning, repairing and upgrading the residence which he undertook prior to and during his occupation of the premises. The Defendant tenders invoices identifying the costs he incurred and his labor, (Exhibit #3) the total amount of which is \$2,476.03.

[19] The Plaintiff disputes that any such agreement was ever made. Instead, he states that the agreement was simply that he would setoff against rent the cost of materials used by the Defendant in any cleaning, repairs or upgrading done by the tenant, provided he approved the work beforehand. He is adamant that there was never any agreement to pay for the labor of the Defendant himself for any such work. If the Defendant wished to expend his own time to do the work, it was for his own benefit and of his own choice and the Plaintiff denies he ever agreed to pay him for such labor.

[20] The Defendant has the burden of proving to the Court on a preponderance of evidence that which he asserts was the arrangement between he and the Plaintiff. In this case, despite the fact that he believes such a contractual arrangement was made, the evidence does not satisfy me to the requisite degree necessary that such is the case. Despite the lack of pre-authorization, the Plaintiff does not dispute the bills presented, only the labor charged by the Defendant. Accordingly, the Defendant is entitled to setoff against the rent owing, the sum of \$1,541.03 as specified by Exhibit #3 which is the amount of the invoices, less the labor claim of the Defendant.

Return of Personal Goods

[21] Certain of the Defendant's personal goods as described aforesaid which were located in the quonset hut were removed by the Plaintiff and have been retained by him since December of 1996. The Defendant seeks an order returning those goods to him.

[22] It is clear on the evidence that the Plaintiff has no lawful right to retain those goods. His refusal to return the same is actionable in tort law. This Court does not have the jurisdiction to make an order for the return of goods in such an instance, but only to award damages arising from their conversion. The Defendant led no evidence as to the value of the goods retained by the Plaintiff, as he seeks their return.

[23] Given the circumstance, it is my view that this matter can best be dealt with by adjourning this aspect of the Defendant's counterclaim for a period of time to allow the Plaintiff to return the subject goods to the Defendant. In the event the Plaintiff has not made the goods available for return to the Defendant, at the Defendant's convenience within thirty (30) days from the date of this judgment, the Defendant may thereafter, if he chooses, bring the matter back before this Court, with proof of the value of the goods and seek an order for damages against the Plaintiff. Given all the circumstances, I believe the issue of punitive damages would be at large as well, should the matter come back before this Court. The Defendant may reinstitute the proceedings by notifying the Clerk of the Court that all the subject goods or any of the subject goods have not been made available to him during the requisite time period and that he wishes to continue the hearing in that regard, in which case the Clerk will fix another date for continuation of the trial with respect to this matter.

[24] Although the issue of damages with respect to the value of the goods wrongfully retained by the Plaintiff has been adjourned to be dealt with on another date if necessary, the Defendant has presented some evidence with respect to damage sustained as a consequence of the wrongful possession of his goods by the Plaintiff. The Defendant has presented testimony indicating that he made four trips back to the subject residence to obtain the return of the goods held by the Plaintiff, obviously to no avail. The Defendant did not articulate the distance travelled with respect to such trips, nor did he particularize any specific losses relative to the trips. Nonetheless, the Court may, where it is clear that a loss has occurred even in the absence of satisfactory evidence quantifying the same, award a nominal sum in damages. Given the number of trips involved and the inconvenience that would be related thereto regardless of distance, the Defendant shall have nominal damages for such inconvenience and travel in the amount of \$100.00.

Summary of Judgment

[25]	1. The Plaintiff is entitled to receive five months rent at \$500.00 per month (5 x \$500.00)	\$2,500.00
	2. The Defendant is entitled to setoff the sum of \$1,541.03 being the cost of materials and work done to the premises excluding the Defendant's personal labor	-\$1,541.03
	3. The Defendant is entitled to nominal damages relative to inconvenience and travel arising from the Plaintiff's wrongful retention of his personal effects	-\$100.00
	<hr/> TOTAL:	\$858.97

[26] The Plaintiff shall have judgment against the Defendant for the net sum of \$858.97, which judgment shall be stayed pending return of the goods by the Plaintiff to the Defendant as described aforesaid, or until such time as the balance of the trial with respect to damages for failure to return the goods is complete, in the event such is necessary. In the event the Clerk of the Court has not received word otherwise within thirty (30) days from the date of this judgment, the Court will presume, with respect to the issue of the stay, that the goods have been returned, and the Clerk will issue a Certificate of Judgment in the amount of \$858.97 in favour of the Plaintiff.

Interest

[27] Neither the Plaintiff nor the Plaintiff by counterclaim made any claim for interest in these proceedings. Accordingly no interest is granted.

Costs

[28] Given the success of both parties, and excluding the issue of costs arising with respect to any further proceedings in this matter, no costs are awarded to either party as at this point.

DATED at the City of Lethbridge, in the Province of Alberta, this 17th day of April, A.D. 1998.

Jerry N. LeGrandeur
Judge of the Provincial
Court of Alberta

JNL/sk