IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Puddingstone Inc. v. Chambers,* 2015 NSSM 46

Date: 20151123
Claim: 439075
Registry: Halifax

Between:

Puddingstone Incorporated

Appellant

v.

Erin Chambers and Olivia Baxendale

Respondents

Adjudicator:	J. Scott Barnett
Heard:	November 2, 2015
Written Decision:	November 23, 2015
Counsel:	Michael Downward, agent for the Appellant
	Respondents, Self-represented

By the Court:

INTRODUCTION

[1] The Appellant, Puddingstone Incorporated ("Puddingstone Inc."), appeals from an Order of the Director of Residential Tenancies dated April 29, 2015.

[2] Among other things, a Residential Tenancy Officer denied two specific claims made by Puddingstone Inc. against the Respondents, Erin Chambers and Olivia Baxendale. First, Puddingstone Inc. unsuccessfully sought reimbursement of expenses that it incurred in order to respond to a Directive issued by the Nova Scotia Department of the Environment ("the DOE"). Second, Puddingstone Inc. made a claim related to the Respondents' failure to return their keys at the end of the residential tenancy lease between the parties.

[3] The Respondents argue that the Residential Tenancy Officer properly refused these claims and that, as a result, this appeal should be dismissed.

[4] I note that the impugned Order addresses other issues that were previously raised by the parties in competing Applications to

the Director that led to the Order in question but Puddingstone Inc. did not challenge the portions of the Order that were found in its favour and the Respondents (hereafter "the Tenants") did not file a cross-appeal of any kind.

FACTUAL BACKGROUND

[5] The parties entered into a written residential tenancy lease effective November 1, 2014 ("the Lease") with respect to a basement apartment ("the Apartment") in Puddingstone Inc.'s building at 6255 Edinburgh Street, Halifax, Nova Scotia ("the Building").

[6] The Lease is in the format of Form P, the Standard Form of Lease provided in the *Residential Tenancies Regulations*, N.S. Reg. 190/89, as amended. Monthly rent was set at $1,020 and the Tenants paid a security deposit of $510.

[7] In Section 13, there is a checkbox in front of a number of different items in a list for which a tenant can be held responsible by agreement. In the Lease in issue here, there is a checkmark in the box in front of the item which states: "locked out charges / keys not to exceed $75.00".

[8] The figure of $75.00 is typed in the blank provided. In handwriting after the typed number, one can see that the following was printed by hand: "$30 per key / $45 per call out".

[9] At the commencement of the Lease term, Puddingstone Inc. supplied eight keys to the Tenants – two keys for the deadbolt lock and two keys for the doorknob lock, all for the locks in the Apartment's front door, two keys for the entryway to the Building and two keys for access to the laundry area.

[10] The Tenants' Apartment was adjacent to the furnace room for the Building. Both Tenants had (initially) unexplained nausea and headaches after moving in. As a result of her complaints, Ms. Baxendale ended up spending little time in the Apartment towards the end of 2014; she effectively moved back into her parents' home.

[11] Although there is some dispute about the circumstances in which the Tenants gained entry to the Building's furnace room which was accessible by way of a door between the Apartment and the furnace room, it is clear that the Tenants investigated what they believed to be an oil smell by entering the furnace room on or

about January 3, 2015. They took some pictures which show the concrete furnace room floor covered with blackened debris. They subsequently informed Michael Downward, one of the representatives of Puddingstone Inc., of their discovery by email dated that same day, January 3, 2015.

[12] In relatively short order, Mr. Downward went to the Building's furnace room to investigate. He smelled oil. He called Superline Fuels who sent a technician to assess the problem. By the end of the day on January 6, 2015, a corroded fuel line, the source of the black oil staining, had been replaced and the oily debris on the floor had been removed. Neither anyone at Superline Fuels nor at Puddingstone Inc. reported any issues surrounding these events to the DOE.

[13] On January 7, 2015, the Tenants wrote to Puddingstone Inc. seeking an early termination of the Lease on the basis of, among other things, "environmental hazards, oil leak in furnace room" and "unhealthy atmosphere – poor ventilation in unit + oil fumes lead to physical illness of tenant."

[14] On or about January 10, 2015, Puddingstone Inc. agreed, in writing, to an early termination of the Lease, effective January 31,

2015. Mr. Downward testified that the Tenants were very aggressive in pursuing a signed confirmation to this effect and had been calling him as much as hourly even though he had verbally agreed to an early termination prior to providing the written confirmation that the Tenants requested.

[15] The Tenants moved out of the Apartment well before the end of January 2015 (on January 20, 2015) with the assistance of David Backman who operates a one man moving business. The Tenants pursued Puddingstone Inc. for reimbursement of their security deposit by repeated emails and by calling and leaving numerous voicemail messages between February 2 and February 4, 2015. In addition to the return of the security deposit, the Tenants also sought a rent abatement because of the allegedly poor and dangerous living conditions in the Apartment over the prior few months.

[16] Mr. Downward viewed the repeated Tenants' inquiries as harassment and, by email dated February 4, 2015, he threatened to complain to the Halifax Regional Police if the repeated inquiries did not stop. He advised that the security deposit would be dealt with as required under the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401.

[17] The threat accomplished its immediate goal; the Tenants stopped calling anyone at Puddingstone Inc. Ms. Chambers says that, on or about February 10, 2015, she contacted the DOE in order to report what had she and Ms. Baxendale had seen. Ms. Chambers stated that the report was made because the Tenants "didn't want it [i.e. the oil issue] to come back to bite" them. For her part, Ms. Baxendale testified that she and Ms. Chambers had conducted internet searches concerning the potential need of various individuals, including tenants in residential premises in Nova Scotia, to report oil spills or oil contamination. In Ms. Baxendale's view, what had transpired was "sketchy" in terms of the clean-up. She said that she and Ms. Chambers decided that they did not want any other potential tenants to end up in the same situation as they had been in (i.e. residing in an apartment where oil fumes caused illness).

[18] Although no one from the DOE testified before me, the Tenants secured a copy of the DOE file by way of an application pursuant to the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as amended. This file was tendered into evidence.

[19] The question of which of the Tenants reported the matter to the DOE is not noted in the DOE file. The "Complaint In-Take" indicates that the "Complainant" provided the following details on February 10, 2015:

> "There is a boiler room in the front portion of the apartment. The complainant reported soot covering the walls, and the floor covered in a wet oily substance in the boiler room. Also reported there was a garbage bag sealing the vent located in the door, some exposed pipes were also visible in the floor and covered with what looked like bags of cement. The bags were also saturated in oil. There was a strong odour coming from the room. A fuel oil technician from Superline Fuels was contacted."

[20] Based on this information, a DOE Inspector began investigating the matter by contacting Puddingstone Inc. and Superline Fuels. In a record of conversations with an unidentified Superline Fuels manager (the name is presumably removed for privacy reasons) on February 13, 2015 and on February 25, 2015, the following is noted:

> "Superline Technicians completed two service calls both on January 5, 2015 one at 10:30 AM and returned at 6:00 PM. Oil staining observed in the vicinity of the oil filter and near the approx. one foot of original oil line from filter to where the line goes under the floor. Technician noted the older oil line extended under the wood floor to oil tank located on another part of the property. Technicians returned later to replace with new line and decommission the line under the floor. During the second visit they noted oil staining on the debris on the basement floor, and staining on gyproc in the area where the oil line goes under the floor. Technicians noted fumes during the initial visit and during the second visit later that day. Technician did not know the condition of the oil line under the floor."

This information was largely confirmed in subsequent typed witness statements from the Superline Fuel technicians that are contained in the DOE file materials.

[21] The Inspector spoke with the "complainant" again on February 19, 2015 and the following is recorded:

> "Noted oil floor in boiler room was covered with something like salt (absorbant material). Fumes were strong. 1st noticed odour after a couple of weeks. Access to boiler room through apartment and main entrance. Very strong odours."

[22] On February 25, 2015, the DOE issued a Directive under the *Environment Act*, S.N.S. 1994-95, c. 1, as amended. The DOE Inspector directed that, by April 10, 2015, Puddingstone Inc. "obtain the services of a Site Professional to determine if notification of contamination under the Contaminated Site Regulations is required."

[23] The aforementioned Directive was sent in conjunction with an "Inspection Report – Offsite" of the same date which noted that:

> "The Department has received information of a potential oil leak at the above referenced property. The information gathered has indicated petroleum hydrocarbon odours in the basement including the boiler / furnace room and occupied areas, as well as petroleum hydrocarbon staining on debris (and gyproc) in the boiler / furnace room and in the vicinity of the oil line(s) and filters near where the oil line(s) extended below the basement floor. It is understood that

> there are an older oil line(s) under the basement floor that have been recently abandoned or decommissioned."

[24] In order to comply with the DOE Directive, Puddingstone Inc. retained the OCL Group, Environmental Management Consultants ("OCL"). On March 16, 2015, OCL sent a letter, with an attached Form 101 (Verification for 30-Day Clean-up Exemption), with the following paragraph:

> "It was concluded a minor leakage of product had occurred on or about 4 January and which was essentially fully absorbed by bags of concrete or similar product that had been stored in the furnace room. Minor residual was absorbed using standard absorbant materials and all contamination materials were removed during the 5 January service call by *Superline Fuels*. A new feeder line was installed. The former line was tested to confirm there was no leakage under the floor or behind walls. There was no visual or olfactory evidence to warrant further site investigation."

[25] By subsequent letter dated April 10, 2015, OCL advised the DOE that it wished to withdraw its earlier submission because it

was now of the view that no notification of contamination was required given the minor nature of the oil leak:

> "We now believe that the minor loss of fuel oil does not require a Notification of Contamination due to its size, lack of contact with groundwater, absence of staining and confirmation of the tightness of the copper fuel distribution line."

[26] On April 13, 2015, the DOE closed its file – it accepted that the letter of April 10, 2015 from OCL constituted compliance with the previously issued Directive.

[27] Mr. Downward testified that Puddingstone Inc. paid OCL the sum of $862.50 for its services, that he could not rent the Apartment previously occupied by the Tenants while the matter of the oil in the Building's furnace room and the DOE Directive was being dealt with and that his estimated cost of cutting through, removing and replacing a section of hardwood floor adjacent to the furnace room in order to provide the environmental consultant with access was $150 (including both time and materials). Mr. Downward candidly admits that he did not keep any records that could substantiate this last-mentioned portion of the claim.

[28] The Tenants say that they had no idea what would happen after the initial report was made to the DOE and, with respect to the largest amount claimed by Puddingstone Inc., they say that there is no indication in the DOE file that Puddingstone Inc. was precluded from renting the Apartment after they left.

[29] I note, with interest, that the mover, Mr. Backman, says that he smelled oil when he removed the Tenants' items from the Apartment in January 2015 although he had smelled nothing of the sort when he moved them in back in September 2014.

[30] As far as the keys, the Tenants concede that they never returned them to Puddingstone Inc. They testified, however, that they were not prepared to put them in a mailbox so as to attempt to return them to the landlord since, if the keys went missing, the Tenants would be responsible for the keys.

[31] The Apartment in question has since been rented and, by necessity, Puddingstone Inc. had to incur costs associated with replacing the missing keys that the Tenants kept.

ORDER OF THE DIRECTOR

[32] The Residential Tenancy Officer addressed Puddingstone Inc.'s claim for lost rent (between early February 2015 when Puddingstone Inc. first learned that the Tenants had or were going to make a report to the DOE and mid April 2015 when the DOE accepted that Puddingstone Inc. had complied with the Directive issued on February 25, 2015). She also addressed Puddingtone Inc.'s claim for the cost of retaining OCL and for the hardwood floor removal and replacement as follows:

> "5. The landlord seeks $3,200.00 in lost revenue. He testified that he was unable to rent the unit in February, March and April 2015 because an Environmental Assessment was being carried out. His position is that the tenants should be responsible for his losses because they initiated the Environmental Assessment. He is also seeking $862.50 for the cost of the Environmental Report and $150.00 to repair the floor damaged during the assessment.
>
> "No documentary evidence such as the Report or receipts were provided to support the claim. The tenancy terminated on January 31, 2015. Therefore, the tenants are not

> responsible for revenue losses that occurred after that date. I am not satisfied, based on the evidence presented, that the tenants are responsible for the cost of the Environmental Report or the floor repair. Based on the foregoing the landlord's claims for lost revenue, the Environmental Report, and the floor repair totaling $4,212.50 are dismissed."

[33] With regard to the claim for the replacement of keys, the Residential Tenancy Officer reasoned as follows:

> "8. The landlord seeks $240.00 to replace keys. No receipts provided.
>
> "The tenants did not return the keys. Based on the foregoing I will allow the landlord's claim. However, without receipts I find the claim to be excessive and I will allow $50.00."

STANDARD OF REVIEW

[34] Residential tenancies appeals to this Court are heard as hearings *de novo* – the Small Claims Court does not review the decision of a Residential Tenancy Officer for correctness, for reasonableness or by any other standard but rather makes its own

decision based solely upon the evidence presented to it: *Crane v. Arnaout*, 2015 NSSC 106 and *Opus 3 Investments Ltd. v. Schnare*, 2009 NSSM 12.

[35] To that end, after hearing and considering the evidence and submissions of the parties before it, the Small Claims Court can make any order that the Director of Residential Tenancies could have made in the first instance: Section 17D, *Residential Tenancies Act, supra*.

ANALYSIS

[36] I am satisfied that the disposition contained in the Order of the Director concerning the claim for expenses and lost rent is correct but the Order needs to be varied because the claim for the unreturned keys charge should be allowed to a greater extent than permitted by the Residential Tenancy Officer. My reasons for this conclusion follow.

(a) Claim for Expenses and Lost Rent

[37] I will first deal with the claim for loss of revenue (rent) in February, March and April 2015. Puddingstone Inc. argues that

the Tenants, as a means of retaliation, made a false report to the DOE and that this caused Puddingstone Inc. to lose the ability to rent the Tenants' former apartment during the noted timeframe and caused it to incur the costs of hiring an environmental consultant and other related expenses because of the issuance of the DOE Directive.

[38] As a means of assessing this claim, I have considered the law pertaining to claims for injurious falsehood as being the closest legal equivalent to the claim being made by Puddingstone Inc. in this case.

[39] As noted in Remedies in Tort (looseleaf) at Volume I, Chapter 9, paragraph 12, the following elements must be proven by a person who says that another has caused him or her harm as a result of maliciously communicating one or more falsehoods to others:

> "(i) publication of a false statement or statements concerning the plaintiff or the plaintiff's property to a third party or parties;
> (ii) malice; and
> (iii) actual damage."

[40] I point out here that "publication" does not mean publication in the sense of written communication – it merely means the making of a statement, whether orally or in writing, to one or more third parties (i.e. persons other than the person making the statement and other than the person or their property about whom or what the statement is made).

[41] The critical elements in this case relate to whether or not Puddingstone Inc. has proven that one or both of the Tenants maliciously made statements to the DOE, whether any such statements were false and whether any damage or harm was sustained by Puddingstone Inc. as a result of any such statements.

[42] Ms. Chambers admitted that she made a report to the DOE. Ms. Baxendale did not say that she spoke with anyone at the DOE although she was clearly involved in the decision about whether to make a report to the DOE by reason of having had some discussion with Ms. Chambers about what to do (or not do.) The actual name of the "complainant" has been expunged from the DOE file that was tendered into evidence so I am unable to say that Ms. Baxendale actually made any statements to the DOE; it is more

likely than not that Ms. Chambers was the one who spoke with the DOE based upon her admission in that regard.

[43] I am mindful of the Tenants' position, as voiced by Ms. Baxendale, that the making of the report to the DOE was motivated by altruistic aims. I must say that I am not convinced that altruism was the motivating factor given the timing of when the report was made to the DOE and when Puddingstone Inc., via Mr. Downward, advised the Tenants that it would not be immediately returning the security deposit and that it did not want to be bothered with further inquiries in that regard. Puddingstone Inc. did not return the security deposit to the Tenants on or before February 10, 2015 in accordance with the *Residential Tenancies Act* (see Section 12(5)) and that happens to be the very day that Ms. Chambers made a complaint to the DOE. This seems to be an unlikely coincidence.

[44] That being said, it appears to be generally accepted that proof of malice equates with proof that a person has made an untrue statement "out of spite or ill-will in order to harm" and with an absence of "*bona fides*": Fridman, The Law of Torts in Canada, (3rd ed., 2010) at pages 786-7. Malice can include a circumstance in which a person acts recklessly in making a statement – i.e. when the person making the statement is indifferent as to whether or not

the statement is true or false and whether or not it will injure the person about whose property the statement was made. Such a statement "may be treated as if [the person who made the statement] acted with intent to cause the plaintiff injury": *ibid*, at page 788.

[45] The Tenants tendered into evidence copies of Government of Nova Scotia webpages that they reviewed prior to making a complaint to the DOE. The content of these pages include the statement that: "Releases must be reported immediately by **any person** who discovers or becomes aware of the release. See the environment act and environmental emergency regulations for those reportable releases defined within the regulation." [emphasis in original]

[46] The webpage in question also notes the distinction between the reporting requirements for a contaminated site versus a release:

> "Contaminated sites must be reported once it is determined that the release has caused contamination exceeding applicable standards, and other factors such as the type of soil, land use, groundwater use, and the chemical or compound. Full details on the triggers for reporting are

> described in the notification of contamination protocol. The person reporting would be a site professional, owner, or other person responsible for a contaminated site."

[47] There is no evidence in this case of a "reportable release" as defined in the applicable regulations or statute but one can see how a person unversed in the law generally or in environmental regulation specifically could believe in the existence of a broader reporting requirement than there might actually be. Even though the Tenants could have been motivated to make a report to the DOE because of their difficulties with Puddingstone Inc., I accept that the Tenants reviewed the information on the Nova Scotia government website and concluded that they might have a legal duty to report and that they might be held responsible in some fashion if they did not make a report. This reasonably held interpretation on its own provided enough motivation to Ms. Chambers to make a report and thus it cannot be said that there is a complete lack of good faith on her part.

[48] As noted in Brown on Defamation (2nd ed., looseleaf) at paragraph 28.1(8), pages 28-26 and 28-27:

> "A person who is acting honestly and in a bona fide pursuit of what he or she believes is his or her duty is not acting maliciously. The mere fact that the defendant might incidentally injure the business of the plaintiff is not critical."

[49] In the circumstances, I am not satisfied that Puddingstone Inc. has proven malice on the part of Ms. Chambers or Ms. Baxendale.

[50] In addition to the foregoing, it has not been proven that Ms. Chambers actually made any false statements to the DOE. The details provided by the "complainant" in the DOE file are generally consistent with the other information that the DOE collected from Superline Fuels and its technicians.

[51] Of course, a great deal of the documentation in the DOE file constitutes hearsay and some regard must be given to the proper weight that can be accorded to such information. However, the majority of the information in the file probably falls within the business records exception (Section 23 of the *Evidence Act*, R.S.N.S. 1989, c. 154, as amended) and/or the *Ares v. Venner* common law exception to hearsay. In any event, in residential tenancy appeals, this Court is not strictly bound by the rules of law

respecting evidence applicable to judicial proceedings: Section 17C(7), *Residential Tenancies Act*, *supra*. I am therefore prepared to consider and rely upon the contents of the DOE file in coming to the conclusion that Ms. Chambers did not make any false statements to the DOE concerning what she says she saw in the Building's furnace room.

[52] There is an interesting question concerning causation and whether or not Ms. Chambers' statements to the DOE caused Puddingstone Inc. to incur the cost of hiring an environmental consultant and other costs allegedly associated with the DOE Directive. As is obvious from the DOE file, the DOE did not issue a Directive simply on the basis of what the "complainant" reported – the DOE conducted an investigation and made contact with at least three different people at Superline Fuels who provided information to it. While it is not free from doubt, one wonders if a Directive would necessarily have been issued had the information from the various individuals at Superline Fuels completely contradicted or, at the very least, failed to support the information provided by the "complainant." Given my prior findings of an absence of any maliciously false statements having been made, there is no need to decide if the costs incurred by Puddingstone

Inc. were the "direct and natural result" of any statements made in connection with the DOE complaint.

[53] Moreover, there is no proof whatsoever that Puddingstone Inc. was precluded from advertising the availability of the Apartment or that Puddingstone Inc. would have been precluded from renting the Apartment to any tenants. The DOE Directive certainly did not stipulate that the Apartment was uninhabitable or could not be rented.

[54] For all of the foregoing reasons, Puddingstone Inc. has not established a viable basis upon which this Court could order that the Tenants pay to it any sum of money associated with any costs associated with responding to the DOE Directive or for loss of rent.

(b) Keys

[55] The second issue relates to the keys that the Tenants concede were never returned to Puddingstone Inc. as required after the Lease ended.

[56] Puddingstone Inc. did not present any receipts to this Court concerning the cost of replacing the keys that the Tenants did not return. However, it relies on the terms of the Lease and, in particular, the portion of the Lease that states that there is a charge of $30 for each key lost or not returned.

[57] There is no question that parties to a contract (of which the Lease is merely one example) can agree on a stipulated remedy for a breach (here, the Tenants' failure to return the keys) without a need for any specific proof of damages following such a breach. Despite the agreed upon arrangements of parties, Courts nevertheless maintain the ability to police these types of arrangements. A distinction is drawn between realistic and genuine pre-estimates of liquidated damages (that will be enforced by the Court) and extravagant, extortionate or unreasonable penalties (that will not be enforced by the Court): see, e.g., *Canadian Elevator Industry Education Program v. Gilby*, 2012 NSSC 274 at paragraphs 27 to 32 and *Walker v. Rouvalis*, 2007 NSSC 137 at paragraphs 20 and 21.

[58] The question of whether or not the charges stipulated in the Lease for lost or unreturned keys constitute unenforceable penalties or enforceable pre-estimates of the damages that the

landlord will incur when keys are either lost or unreturned at the end of a lease must be considered in light of the terms of the Lease.

[59] In that regard, I note that while Puddingstone Inc. argues that it is entitled to $240 ($30 a key for each of the 8 keys that were not returned), the Lease actually states that the maximum agreed upon fee for the loss of keys is $75.00.

[60] Generally speaking, I do not believe that a charge of $30 for a lost or unreturned key is unconscionable. The result of a lost key will either be the purchase and cutting of a new key or the re-keying of a lock by a locksmith, both of which include some expense to the landlord in not only money but also time and general inconvenience, the latter particularly where a new key is needed right away.

[61] If there had been no caveat, however, regarding a maximum stipulated fee, I believe that a charge of $240 for the loss of eight keys, all at the same time (as opposed to the periodic loss of eight keys, one key every once and a while over a period of time), would have been unconscionable. The maximum charge of $75.00 provides relief, however, from that worst case scenario and it is not unreasonable.

[62] As noted, the Residential Tenancy Officer allowed Puddingstone Inc. to recover a fee of $50.00 for the loss of eight keys. In my view, the contractual terms in the Lease should be respected, subject to concerns such as, for example, unconscionability and the Court's general oversight over contractual terms that can be considered to be penalties.

CONCLUSION

[63] The Order of the Director needs to be varied in a relatively small way in order to reflect that Puddingstone Inc. is entitled to recover the sum of $75 in connection with lost key charges instead of the $50 allowed by the Residential Tenancy Officer. In all other respects, the Order can be confirmed. There shall be no order as to costs in favour of any party.

[64] An Order will be issued accordingly.