Date: 1998 04 03
Docket: CV 07484

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *RESIDENTIAL TENANCIES ACT*
R.S.N.W.T. 1988 CHAPTER R-5, AND AMENDMENTS THERETO;

AND IN THE MATTER OF THE ORDER OF THE RENTAL OFFICER
DATED NOVEMBER 14, 1997;

BETWEEN:

GREENWAY REALTY LTD.

Appellant

- and -

N. C. ROY

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an appeal from the Rental Officer's order directing the return of the respondent's security deposit in full with accrued interest. There was a further direction for reimbursement of some parking fee charges but that formed no part of this appeal.

[2] The Rental Officer based his decision primarily on deviations in the lease used in this case from the standard form of lease annexed as a schedule to the *Residential Tenancies Act*. He held that there was an "improper alteration" of the form of lease which impaired the tenant's understanding of the required period for notice of termination. While he did not expressly say so, I think the Rental Officer was invoking the well-recognized principle that an ambiguity in the lease is to be interpreted so as to favour the tenant, the lease having been prepared by the landlord.

[3] In my opinion the form of the lease is not the determinative factor in this case. All the terms of the schedule, as indeed all the statutory conditions respecting tenancies, are

deemed to be part of the lease. Any argument by the tenant that he did not know what the required notice period was is defeated by the other well-recognized principle that ignorance of the law is no excuse. The real issue in this case is whether the landlord is entitled to retain the security deposit as compensation for the tenant's failure to give adequate notice.

[4] The Act stipulates that even in a fixed-term tenancy the tenant must give 30 days' notice of termination on the date fixed by the lease: s.51(1). If the tenant fails to give the required notice he is deemed to have "abandoned" the premises: s.1(3). Where a tenant abandons the premises then the tenant is liable to compensate the landlord for "loss of future rent that would have been payable under the tenancy agreement": s.62(1). In this case, because the notice period was 30 days, the loss of future rent is loss of rent for those 30 days. Hence the appellant here says it is entitled to keep the security deposit since the amount of the deposit is equal to one month's rent.

[5] The Act defines a "security deposit" as money paid by a tenant as "security for the repairs of damage caused by a tenant to the rental premises or any *arrears of rent*": s.1(1). The emphasis on *arrears of rent* is mine. A landlord may object to the return of all or part of the deposit on the grounds that the tenant "has caused damage to the rental premises and repairs are necessary or the tenant is in *arrears of rent":* s.18(3). In such case certain steps have to be taken by the landlord.

[6] Nowhere in the Act is the landlord authorized to retain a security deposit as compensation for loss of future rents. That is an economic loss claim. A security deposit may be retained for *arrears of rent* but that is not the same as future rent. The term *arrears of rent*, as used in the Act, clearly means rent that was due at a fixed time and that time has now lapsed without payment being made. It is rent behind, not in the future. To hold otherwise would not only distort the plain meaning of the words used in the statute but could also be viewed as conflicting with the express statutory prohibition on taking a security deposit as security for the first or last month's rent: s.14(5).

[7] This interpretation also accords with the notion that compensation for loss of future rent is monetary damages. The Act provides that on an application for compensation due to abandonment the Rental Officer may make an order requiring the tenant pay compensation: s.62(2). The use of "may" implies a degree of discretion in the Officer's decision-making. One of the points that the Officer would have to consider, as one has to in any breach of contract case, is that of mitigation. The Act requires mitigation: s.5(1). Therefore the damages for loss of future rent is not a liquidated claim, such as arrears of rent would be since the arrears are known and quantifiable.

[8] Therefore I conclude that the landlord is not entitled to retain the security deposit as compensation due to the failure of the tenant to give the required notice of termination.

[9] The landlord also sought to deduct expenses claimed as the cost of repairs to damage caused by the tenant. The Rental Officer said that he found no evidence that the premises were either left in an unclean state or that damage was caused by the tenant's negligence. I agree. There was no inspection report done at the commencement of the tenancy as required by s.15(1) of the Act. It seems to me that if a landlord seeks to charge for repairs then it must at least provide (a) evidence as to the condition of the premises at the beginning of the tenancy, and (b) facts so as to differentiate between "damage" and ordinary "wear and tear" (since the latter is excluded by s.42(2) of the Act). Further, as I stated previously, the landlord, if it wants to retain any part of the security deposit, must satisfy the conditions stipulated in s.18(3) of the Act. Those conditions were not satisfied in this case.

[10] For these reasons, the appeal is dismissed. The directions set forth in the Rental Officer's order are confirmed. There will be no costs.

[11] There is one final point to be made. In this case I heard evidence called on behalf of the appellant. The appellant did not appear at the hearing before the Rental Officer. I accept that such non-appearance was accidental. However, litigants in these types of proceedings should not assume that they would be entitled to automatically present evidence on an appeal. The Act says that the court may receive evidence on the appeal: s.87(5). That does not mean that the court would or should receive evidence in any particular appeal. As stated by de Weerdt J. in *Galtee Mountain Holdings Ltd. v. Wilson*, [1991] N.W.T.R. 230 (at page 236): "...to routinely accept evidence for the first time on appeal is contrary to the plain intention of the Legislative Assembly in providing for the speedy and informal disposition of residential tenancy disputes before a rental officer." I echo those sentiments.

Dated this 3rd day of April 1998.

J.Z. Vertes,
J.S.C.

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