Werner v. *Hay River Mobile Home Park*, 2011 NWTSC 08

Date: 2011 02 24
Docket: S-1-CV 2005 000 090

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY WERNER

Appellant

- and -

THE HAY RIVER MOBILE HOME PARK

Respondent

Appeal of rental officer's decision granting compensation pursuant to s.66 of the *Residential Tenancies Act*.

Heard at Yellowknife, NT: on February 15, 2011

Reasons filed: February 24, 2011

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Appellant: Hugh Latimer

Counsel for the Respondent: Michael Hansen

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REASONS FOR JUDGMENT

[1] These Reasons for Judgment deal with an appeal brought in this Court from a decision of a rental officer pursuant to the *Residential Tenancies Act*. The rental officer's decision was made on March 12, 2005, i.e., almost six years ago. That decision was merely the latest chapter in a prolonged dispute between the parties to these proceedings over several years.

[2] In enacting the *Residential Tenancies Act*, it was the intention of the legislators to provide for the informal, inexpensive and speedy resolution of disputes between parties. In that context, the history of proceedings between these two parties, as exemplified by the comprehensive Record filed in this Court for purposes of this appeal, constitutes an irony.

[3] A proper understanding of the issues which were before the rental officer in March 2005 requires that I summarize in chronological fashion the events leading to that decision.

Chronology

[4] The chronology commences late in the last century. At some date prior to 1995, Diane Robinson (sister of the Appellant) entered into a tenancy agreement with the Respondent, allowing her to situate her mobile home and other improvements on a lot in the Respondent's mobile home park in Hay River. In 1995 the Appellant moved into the mobile home and was for the ensuing 6-7 years the occupant and paid the rent to the landlord (the Respondent).

[5] In November 1999 the Respondent sought relief from the rental officer under the *Residential Tenancies Act*, alleging non-payment of rent by the tenant Diane Robinson. The rental officer found the tenant in breach of the rental agreement and issued an order requiring the tenant to pay rental arrears, failing which the tenancy agreement would terminate on March 1, 2000.

[6] Diane Robinson, by her agent Harvey Werner, appealed the rental officer's decision in this Court. By Order of this Court on February 8, 2000, the appeal was dismissed. (CV 08610).

[7] The tenancy agreement between Diane Robinson and the Respondent terminated on March 1, 2000; however, Mrs. Robinson did not give up possession of the premises (the lot).

[8] In August 2000 the Respondent made application in this Court pursuant to the *Residential Tenancies Act* for relief against the tenant Diane Robinson who had not given up possession of the rented premises, i.e., the lot. By Order of this Court on July 26, 2002, the Court (CV 08978):

a) confirmed that the tenancy agreement had terminated on March 1, 2000.

b) ordered that the tenant Diane Robinson be evicted from the premises forthwith.

c) directed that the Sheriff put the landlord (the Respondent) in possession.

d) ordered the tenant Diane Robinson to compensate the landlord for use and occupation of the premises from March 1, 2000 to the date the landlord is put in possession.

e) ordered the tenant Diane Robinson to pay the landlord's costs in the amount of $800.00.

[9] Judgment was entered against Diane Robinson in the amount of $4,972.06 plus $800.00 costs. There is no indication that this judgment has been paid.

[10] In all proceedings before the rental officer and the Supreme Court in 1999-2002, the tenant Diane Robinson was represented by the Appellant Harvey Werner as her agent and representative. On behalf of his sister Diane Robinson, Mr. Werner filed an appeal of the Court's Order of July 26, 2002 in the Court of Appeal on August 23, 2002 (AP 2002-0016). This appeal was struck in March 2003.

[11] On August 16, 2002 the Sheriff put the landlord in possession of the premises (the lot) pursuant to the Court Order of July 26, 2002. The mobile home, contents and a vehicle remained on the lot, "in storage".

[12] On August 29, 2002 the Appellant Harvey Werner filed an application with the rental officer, now claiming to be the owner of the mobile home (he produced a letter from Diane Robinson dated July 22, 2002 indicating she had sold the mobile home to Harvey Werner on January 1, 1997) in which application he sought the return of his personal property (mobile home, contents, vehicle) to him. Under s.66 (b) of the *Residential Tenancies Act*, any "person claiming to be the owner of an item of personal property" can seek an order from the rental officer requiring the landlord to give the property to the owner.

[13] Following a hearing on January 21, 2003 the rental officer issued his decision on January 28, 2003:

> "Pursuant to section 66(b) and 83(2) of the *Residential Tenancies Act*, the respondent shall return personal property consisting of a mobile home and motor vehicle to the applicant upon payment in full of storage costs which shall be calculated at $4.93/day, accruing from July 26, 2002 to the date the property is removed

> from the premises, less $200 which has previously been paid to the respondent. The applicant shall arrange and pay for a contractor to remove the property from the premises and shall not enter the premises himself. No other conditions shall be required by the respondent for the return of the property."

[14] Mr. Werner appealed the rental officer's decision in this Court. The appeal was dismissed on March 7, 2003. Mr. Werner was ordered to pay costs of $350.00 (CV 2003-0063).

[15] On July 7, 2003 the Appellant filed another application with the rental officer, seeking unspecified relief or compensation pursuant to s.66 of the Act:

> 66. Where, on the application of a person claiming to be the owner of an item of personal property, the rental officer determines that the landlord has wrongfully sold, disposed of or otherwise dealt with an item of personal property, the rental officer may make an order
>
> (a) requiring the landlord to compensate the owner for the wrongful sale, disposition or dealing;
> or
>
> (b) requiring the landlord to give the property to the owner.

[16] At the time of the July 7, 2003 application, the personal property remained on the premises (the lot). In this application the Appellant was alleging that the Respondent was breaching the Act by failing to adequately protect his personal property (the mobile home, contents, vehicle) from damage and was seeking unspecified compensation. In Reasons for Decision of September 29, 2003, the rental officer stated that the application was premature and he dismissed the application. *Inter alia*, the rental officer stated:

> "... In my opinion, this matter can not be determined until the personal property is removed from the land by the applicant [Werner] or disposed of by the Respondent [landlord].
>
> ... The remedy pursuant to s.66(b) has already been applied. The only remaining remedies lie within s.66(a). The landlord has not sold the property or disposed of it. The landlord has not removed the property from the premises and is not required by the Act to do so. Whether the term "dealing" can relate to the safe storage of

> the goods or whether the Act requires safe storage if the goods have not been removed are both questions to be considered but no compensation can be *finally* determined until either the landlord disposes of the goods or the owner takes possession. Until such time the determination of any damages would be interim.
>
> I am not prepared to consider authorizing the disposal of the goods until the respondent [landlord] has removed the goods from the premises in accordance with section 64."

[17] On October 8, 2003 the Respondent moved the mobile home, contents and vehicle to the town dump. The Respondent did not receive prior permission of the rental officer to do so.

[18] On December 18, 2003 the Appellant filed another application with the rental officer, seeking compensation under s.66 of the Act, alleging that the mobile home, contents and vehicle were wrongly disposed of by the landlord. He sought compensation in the amount of $58, 590.00 from the Respondent.

[19] The rental officer held a hearing regarding the Appellant's application on July 8, 2004. He issued Reasons for Decision on July 28, 2004. He reviewed the Respondent's evidence to the effect that:

a) Werner had failed to pay the required storage costs,

b) Werner had failed to make any arrangements to move the mobile home,

c) the mobile home had been vandalized and constituted a fire and safety hazard, and

d) the Respondent had sought permission from the rental officer to dispose of the property but had not received a response.

[20] In his Reasons of July 28, 2004 the rental officer made a finding that Mr. Werner had ample opportunity to remove his property.

[21] In his Reasons of July 28, 2004 the rental officer, impliedly, made a finding that the Respondent landlord had "wrongfully disposed" of the Appellant's property

within the meaning of s.66 of the Act. However, he also held that the Respondent's only fault was his failure to obtain the permission of the rental officer before disposing of the property. The rental officer stated that;

> "Mr. Werner's loss does not flow directly from the landlord's failure to obtain the permission of the rental officer but more directly from his own failure to take reasonable action, in the face of an eviction, to protect his property."

[22] The rental officer's conclusion was that an award of compensation pursuant to s. 66(a) "is not reasonable", and he dismissed Mr. Werner's application.

[23] Mr. Werner appealed the July 2004 decision to this Court. (CV 2004-0278). In reasons delivered from the bench on September 14, 2004, the Court found that the rental officer "erred in not considering the claim for compensation on its merits". The Court further stated:

> "The actual merits of the claims for compensation are something that must be assessed on the basis of all of the evidence to be presented, both as to the condition of the property, the circumstances under which it was removed, and what value, if any, the property had at the time that it was removed."

[24] The Court sent the matter of Mr. Werner's application for s.66 compensation back to the rental officer for reconsideration.

[25] The re-hearing of the Appellant's application for compensation took place on November 14, 2004, January 13, 2005, February 17 and February 18, 2005. The rental officer issued a 17 page decision on March 14, 2005. In the result, he ordered the Respondent to pay to the Appellant compensation in the amount of $1,738.23 pursuant to s.66(a) of the Act.

[26] On March 29, 2005 the Appellant filed an appeal of the rental officer's decision in this Court. On March 30, 2005 the Respondent responded by filing its own appeal (CV 2005-0094) of the rental officer's decision. Neither appeal document indicates any grounds of appeal.

[27] On May 3, 2005, the rental officer, pursuant to the Rules of Court, filed in this Court the Record of Proceedings before the rental officer. It consists of three volumes, totalling approximately 800-900 pages.

[28] There was inordinate delay on both appeal files in having the appeals brought on for hearing. The appeals were eventually heard in this Court on February 15, 2011.

The Rental Officer's Decision Under Appeal

[29] In his Reasons for Decision of March 14, 2005, the rental officer considered Mr. Werner's claim for compensation on the merits, as directed by the Court's decision of September 14, 2004. Pursuant to the Court's direction, the rental officer assessed all of the evidence presented by the parties, in particular, the condition of the property, the circumstances under which it was removed in October 2003, what value it had in October 2003, and also what costs ought to be recovered or set off, by the landlord against any compensation award under s.66.

[30] The rental officer reviewed the evidence in detail in determining a value for each of a) the trailer, b) the contents of the trailer, and c) the vehicle.

[31] As to the trailer, Mr. Werner provided the rental officer with a copy of an appraisal done by a professional appraiser Doug Henderson on June 28, 2002. That appraisal set the trailer's value at $10,000.00, and this figure was accepted by the rental officer. The rental officer properly rejected the Kincaide Contracting written estimate of $18,730.00 for constructing additions to the trailer as irrelevant in the determination of the value of the trailer.

[32] **Off-setting of Relocation Costs:** The rental officer noted that as at October 2003 Mr. Werner would have had to re-locate the trailer from the Respondent's lot in order for it to have *any* value to Mr. Werner. The rental officer had before him considerable evidence regarding the cost of removing a 30 year old trailer and setting it up on another lot. The rental officer found, on the evidence, that the costs of removing this trailer from the Respondent's lot to another location, and setting it up in the new location as a residence as it existed in October 2003 would have exceeded the trailer's appraised value of $10,000.00. This was a reasonable finding open to the rental officer on the evidence before him.

[33] As to the vehicle, the rental officer accepted an appraisal provided by Mr. Werner in the amount of $3,950.00.

[34] As to the trailer's contents, Mr. Werner had provided the rental officer with a list of contents which Mr. Werner valued at $25, 783.00. The rental officer noted that some of these amounts were current replacement costs, and had not been adjusted for age, condition or depreciation. Some of the values were based on quotations from local retailers, others were simply Mr. Werner's own estimates. With respect to certain valuable personal items, the rental officer noted that Mr. Werner did not provide any appraisal, insurance or other evidence to substantiate the stated values. With respect to some of the items, the rental officer made a specific finding that Mr. Werner's testimony was not credible. In the end, the rental officer as fact finder determined the value of the contents of the trailer as at October 2003 to be $8,918.00.

[35] Upon a careful review of the voluminous evidence, and the rental officer's Reasons for Decision, it cannot be said that the rental officer's determination of values was unreasonable, and accordingly it is not for this Court on appeal to intervene or second guess.

[36] **Mitigation**: The rental officer dealt with the issue of "failure to mitigate" in detail in his Reasons for Decision. He reviewed the evidence of steps taken/not taken by Mr. Werner to mitigate his losses. He found on the evidence that Mr. Werner failed to make arrangements to remove his property, in particular, smaller or specific items of property that could have been easily retrieved by Mr. Werner by making reasonable arrangements. In the result, the rental officer did not deny all compensation to Mr. Werner as a result of failure to mitigate, but rather reduced the compensation level by a specific dollar figure related directly to those small or specific items. This was a finding, and a methodology, open to the rental officer on the evidence before him. I find that on the evidence before him it was also open to the rental officer, on grounds of failure to mitigate, to deny *any* compensation to Mr. Werner; however, I am not the fact-finder of first instance - the rental officer is the fact finder, and the decision to award partial compensation was reasonable and within the discretion of the rental officer as fact-finder.

[37] **Off-setting of Diane Robinson Unpaid Judgment**: The rental officer considered the submission of the Respondent landlord that the monies owing by Diane Robinson under the Court Order in CV 08978 (see paragraphs 8-9 of these Reasons) ought to be deducted from any compensation award. The rental officer declined to do so, and it was open to the rental officer to make this determination in Mr. Werner's favour, on the evidence before him.

[38] **Off-setting of Landlord's Costs:** As directed by the Court's decision of September 14, 2004, the rental officer considered what costs were recoverable by the Respondent landlord, to be offset against any compensation award. The rental officer made two such deductions against the compensation award:

a) outstanding storage fees owing to the Respondent landlord as at October 8, 2003 pursuant to the rental officer's decision of January 28, 2003 (see paragraph 13 of these Reasons).

b) outstanding Court costs owing by Mr. Werner to the Respondent in related Court proceedings, i.e., CV 2003-0063 (see paragraph 14 of these Reasons).

[39] These deductions were open to the rental officer to make on the evidence before him, and were reasonable.

Grounds of Appeal

[40] As indicated earlier, the Appellant did not state any grounds for his appeal when it was filed on March 29, 2005. Arguments in support of the appeal appear in the Appellant's Brief filed February 4, 2011, and in counsel's oral submissions on the hearing of the appeal on February 15, 2011.

[41] **The Kincaide Estimate of $18,730.00:** The Appellant argues that the rental officer erred in rejecting the Kincaide document when determining the value of the trailer as at October 2003. The Kincaide document is a "quote" dated November 10, 2003 and purports to estimate the cost of constructing two additions to a trailer, and an 8' x 8' shed.

[42] As the rental officer noted, the "two additions" to the trailer were already included in the Henderson appraisal of $10,000.00 done on June 28, 2002. The rental officer correctly held that the Appellant cannot recover twice for the same trailer additions.

[43] The Kincaide document did not give a breakdown of the cost of each of the additions, and the shed - just a bald figure of $18,730.00 In the absence of other evidence, the rental officer assessed a value of $800.00 for the shed which was on the lot, and removed with the trailer in October 2003.

[44] There is no merit to the Appellant's submissions that the rental officer wrongly rejected the Kincaide estimate.

[45] **Off-setting of Re-location Costs:** The Appellant submits that the rental officer was wrong in setting off the cost of re-locating the trailer against the value of the trailer in calculating the compensation award. This argument is based on the Appellant's assertion that the Appellant had the option of selling the trailer where it was - that he did not have to re-locate it. There is no basis for this assertion, and thus the argument must fail. The evidence before the rental officer was clear and un-equivocal - the Appellant did *not* have the option of selling the trailer where it was. If Diane Robinson was the owner of the trailer, she had no right to have it there, as her tenancy agreement had expired. If Mr. Werner was the owner of the trailer, as he says, he had no right to have it there, or to sell it in situ, as he never had any tenancy agreement with the landlord. The Henderson appraisal of June 2002 was made on the basis of the trailer being relocated. The rental officer's decision of January 28, 2003, granting Mr. Werner's request for the return of his property, directed him to make arrangements to remove the trailer from that lot. Given the evidence and the factual history, it is specious to suggest that Mr. Werner could have sold the trailer in situ.

[46] No error was made by the rental officer in his consideration of the removal expenses in his determination of the net actual value of what was lost by Mr. Werner

[47] **Appellant's Attempts to Mitigate Losses:** The Appellant argues that the rental officer erred in finding that the Appellant failed to mitigate his loss, and also in applying a "mitigation reduction" against the compensation award. In

particular, he asserts that he "tried to pay storage charges" but that this was refused or rebuffed by the Respondent landlord. This is the sole assertion of the Appellant in answer to the "failure to mitigate" issue.

[48] With respect, any attempt to pay monies to the landlord in 2002 as rent, compensation for use and occupation, or storage charges is a red herring. It is the rental officer's decision of January 28, 2003 that is the reference point on this issue. January 28, 2003 is the date when Mr. Werner was successful in his claim to be the owner of the subject property, and was successful in obtaining an order for the return of that property to him, on reasonable terms. The issue is whether Mr. Werner mitigated his losses, subsequent to January 28, 2003 and before the landlord disposed of the property on October 8, 2003.

[49] In the rental officer's decision of July 28, 2004 he found that subsequent to the January 28, 2003 decision, Mr. Werner had ample opportunity to remove his property under the terms of the January 28, 2003 decision, but failed to do so. In that July 28, 2004 decision, the rental officer found that Mr. Werner had failed to take reasonable action to retrieve his property.

[50] In his March 14, 2005 decision, the rental officer found that Mr. Werner had failed to make arrangements to remove his property, in particular smaller or specific items of property that could have been easily retrieved by Mr. Werner by making reasonable arrangements. All of these findings were open to the rental officer on the evidence.

[51] There was no error by the rental officer on the issue of mitigation of loss.

[52] **Trespass, Conversion and Punitive Damages:** The Appellant's Brief alludes to an entitlement to damages for trespass and conversion, including punitive damages. There was no claim for punitive damages before the rental officer. The claim was for compensation under s.66 of the Act for the wrongful disposition of property, i.e., an assessment of damages which would put the claimant owner in the position he was in before the property was lost. The rental officer made a determination under s.66 that the Respondent had wrongfully disposed of the Appellant's property, in particular, that the Respondent's fault was in not obtaining the "permission" of the rental officer under the Act prior to the disposition of the property.

[53] I note that there was evidence that the Respondent landlord actually made several written requests of the rental officer, between March 2003 and October 2003, for permission to sell or dispose of the property, requests that, for the most part, went unanswered.

[54] In any event, the rental officer, in determining under s.66 that the Respondent landlord had wrongfully disposed of the property, based that determination on the failure to obtain rental officer's permission prior to disposal, in both decisions of the rental officer on July 28, 2004, and, following the re-hearing, on March 14, 2005. Having made that determination under s.66 of the Act, the rental officer went on to determine what compensation, if any, was to be awarded to Mr. Werner (as directed by the Court's decision of September 14, 2004).

[55] To reiterate, there was no claim for punitive damages before the rental officer, and it is not open to the Appellant to seek such relief on this appeal

[56] **Off-setting of Landlord's Costs** (see paragraph 38 of these Reasons): The Appellant argues that the rental officer erred in off-setting the outstanding storage fees in the compensation award, on the basis that the landlord cannot recover the storage fees if the landlord is not in a position to return the property. The logic of this argument escapes me. As at the date of the disposal on October 8, 2003, Mr. Werner owed the storage fees. If the object of the compensation award is to put him back in the position he was in on October 8, 2003, the outstanding storage fees must be included in the calculation of the compensation award.

[57] The Appellant also challenges the set-off of $350.00 costs awarded against Mr. Werner in CV 2003-0063 by stating "those are from another action". Again, a specious argument. The Record is clear, as summarized in paragraphs 12 to 18 of these Reasons, that CV 2003-0063 concerned the same *lis* between the same parties. There were a series of three applications by Mr. Werner under s.66 of the Act, all dealing with the same property. The costs award of $350.00 arose from the first of those applications; the set-off of $350.00 was made in the third of those applications.

[58] **External Inquiry by Rental Officer:** In oral submissions on the hearing of his appeal, the Appellant complains that in his Reasons for Decision, at page 12, the

rental officer stated that he had made his own inquiries of a Hay River contractor as to the estimated cost of relocating a trailer, and stated the results of those inquiries. The Appellant submits this is improper and a serious error by the rental officer.

[59] Reference was made to section 73-84 of the Act which sets forth the duties and powers of the rental officer, and procedures to be followed by him or her, and in particular Counsel's attention was drawn to s.82:

> 82. In making a decision, a rental officer may consider any relevant information obtained by the rental officer in addition to the evidence given at the hearing, provided that the rental officer first informs the parties of the additional information and gives them an opportunity to explain or refute it.

[60] Appellant's counsel's response was that "the parties weren't told of these outside inquiries".

[61] However, an examination of the transcript of the hearing before the rental officer (at page 301) indicates that the rental officer did precisely that - he disclosed to the parties the details of the inquiry he had made, and the results of the inquiry.

[62] Thus, there is no foundation to this additional complaint made against the rental officer's decision, raised during oral submissions.

[63] **Interest Issue:** The Appellant seeks interest on his compensation award under s.66. Upon the filing of his appeal of the rental officer's decision of March 14, 2005, the rental officers's decision was stayed, pursuant to s.88 of the Act. No interest accrues on the compensation award during the stay (i.e., from March 29, 2005 to the date of filing of these Reasons) where the stay was initiated not by the payor but rather by the payee.

Conclusion

[64] For the foregoing reasons, I find there is no merit to this appeal.

[65] The appeal is dismissed. The Appellant shall pay the Respondent's costs of the appeal, which I hereby set at $2,000.00, inclusive of disbursements

J. E. Richard,
J.S.C.

Dated at Yellowknife, NT, this 24
day of February 2011
Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent: Michael Hansen

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