Date: 2012 04 11
Docket: S-1-CV-2011-000154

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KIRK VANDER PLOEG

Appellant

-and-

JOY STEWART

Respondent

Corrected judgment: A corrigendum was issued on April 12, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

[1] This an appeal under the *Residential Tenancies Act,* R.S.N.W.T. 1988 c. R-5, as amended, from two decisions of the Rental Officer.

[2] At the hearing I directed that the style of cause be amended to reflect only the proper parties to the appeal, namely, Kirk Vander Ploeg and Joy Stewart. The originating notice included Tracey Therrien as an appellant; however, even though she lived in the rental premises, she was not a party to the lease, nor was she a party before the Rental Officer in either of the decisions from which the appeals are taken. Accordingly, she is not a proper party to the appeal.

[3] Mr. Vander Ploeg rented a house in Hay River, Northwest Territories, from Ms. Stewart. The relationship was a relatively long-term one. Mr. Vander Ploeg initially rented a suite in the house in 2004. In 2005, he and Ms. Stewart entered in a three year lease for the entire house. Then in 2008, they entered into another three year lease, the exact term of which was November 1, 2008 to October 31, 2011.

[4] Mr. Vander Ploeg resided in the home with his wife, Ms. Tracey Therrien, but, as noted above, she was not a party to the lease.

[5] In November of 2009, Mr. Vander Ploeg and Ms. Therrien sent notice to Ms. Stewart indicating that they intended to move out at the end of December, 2010 and

purporting to terminate the lease as of January 1, 2011. This was sent to Ms. Stewart by courier on November 9, 2010. It was also sent by electronic mail on November 12, 2010. Ms. Stewart did not immediately receive the notice because she was away, but she did, ultimately, receive it on December 12, 2010.

[6] Mr. Vander Ploeg and Ms. Therrien moved out of the house on December 28, 2010. Ms. Stewart and Mr. Vander Ploeg did a "walk through" and Ms. Stewart noted a number of damaged, missing or dirty items. Mr. Vander Ploeg refused to sign the "walk through" report.

[7] There was no inspection report done when Mr. Vander Ploeg first took possession of the premises.

[8] Ms. Stewart withheld the entire damage deposit to cover the cost of cleaning, repairs, replacement of missing items and other damages. Mr. Vander Ploeg made application to the Rental Officer for return of the damage deposit. Subsequently, Ms. Stewart made an application to the Rental Officer for an order to reimburse her for lost rent up to March 2011, due to the early termination.

[9] The applications of both parties were heard together and the Rental Officer issued a decision and order, which was not appealed, on May 2, 2011. He found that Ms. Stewart failed to comply with the requirements of the Act respecting accounting for damage deposits and ordered it be returned to Mr. Vander Ploeg. The Rental Officer found that Mr. Vander Ploeg had not complied with the requirements of the Act respecting the termination of the tenancy and determined that Mr. Vander Ploeg had abandoned the property. Mr. Vander Ploeg was ordered to pay compensation to Ms. Stewart for the lost rental revenue up to and including March 31, 2011.

[10] Subsequently, on June 14, 2011, Ms. Stewart filed two applications with the Rental Officer: one for damages to the property in the amount of $17,895.22; and one for loss of rent from April to June, 2011 in the amount of $4,200.00. The Rental Officer heard both matters on August 5, 2011 and issued decisions and orders on August 30, 2011 (for the lost rental revenue) and September 2, 2011 (for the damages). He awarded Ms. Stewart $4,200.00 for lost rent and $4,927.73 for damages to the property. It is these two decisions from which Mr. Vander Ploeg appeals.

[11] Mr. Vander Ploeg was served with the orders and decisions in both matters on September 9, 2011. Subsection 87(1) of the *Residential Tenancies Act* provides that an appeal may be brought within fourteen days of the day that the party seeking to appeal is served with the order and decision This appeal was filed on October 19,

2011, twenty-six days after the appeal period expired.

[12] Subsection 87(3) expressly permits the Court to extend that time for bringing an appeal. In *Corrigan v. Scott,* [1990] N.W.T.J. No. 42 (S.C.), de Weerdt, J., considered an application to extend the time for appeal under this provision. He stated (at page 2):

> I take it to be implied in s. 87(3) that the judge must be satisfied that justice requires the extension and that the judge must exercise the discretion granted by the legislature on the basis of judicial principle and in a judicial manner, no criteria being set out in the legislation. In the absence of some good reason, the extension should not be granted since appeals are exceptional in nature and depend on the existence of statutory authority. If it were otherwise, the finality of matters subject to appeal would be seriously impaired.

[13] In *Inuvik Housing Authority v. Kendi,* 2005 NWTSC 46, Vertes, J. summarized three questions for the Court to ask in exercising its discretion (at paragraph 10):

1. Did the applicant exhibit a *bona fide* intention to appeal while the right existed?
2. Is there a reasonable explanation for the delay? and
3. Is there at least an arguable case that the decision appealed from is wrong?

[14] Affidavit evidence from both Mr. Vander Ploeg and Ms. Therrien was submitted in support of the application to extend time. Ms. Therrien cites a number of reasons that it was not advanced within the fourteen days. First, she states that Mr. Vander Ploeg "is very intimidated" by Ms. Stewart. Second, Mr. Vander Ploeg received the notices of the Rental Officer's decisions during a time when Ms. Therrien was caring for a friend who was terminally ill and so he chose to delay telling Ms. Therrien about them. Third, although she went to the court house to obtain the necessary forms for the appeal immediately after she learned of the decisions, Ms. Therrien did not understand how to proceed. She contacted approximately twenty lawyers, none of whom were able to assist her. She was finally able to obtain assistance from Legal Aid to enable her to bring the appeal herself, but by that time, the appeal period had passed.

[15] In his affidavit, Mr. Vander Ploeg deposes that he is Ms. Therrien's husband; that they lived together in the house rented from Ms. Stewart; and that Ms. Therrien was "best suited" to commence the appeal because she was residing in Yellowknife in September and October of 2011. He does not provide any explanation for not bringing the appeal sooner, nor does he address or expand on any of the reasons that Ms. Therrien provides for the delay. There is no evidence that he actually asked Ms.

Therrien to bring the appeal.

[16] The statement that Mr. Vander Ploeg was intimidated by Ms. Stewart is Ms. Therrien's opinion about his personal thoughts and feelings about Ms. Stewart. It is not admissible evidence and therefore, I cannot consider it. Similarly, Ms. Therrien's statement that Mr. Vander Ploeg chose not to tell her about the decisions because she was caring for her very ill friend is speculation about his motivation. This is not to say that her assumption is incorrect or untrue. The fact is, however, that only Mr. Vander Ploeg is in a position to explain why he did not tell her about the decisions and, more to the point, to explain why he, the party before the Rental Officer and the Appellant, did not take any steps to bring the appeal within the time prescribed by the Act. He has not done so.

[17] Ms. Therrien appears to have tried very hard to secure the assistance of a lawyer to help with the appeal. If Ms. Therrien was a party to the matters before the Rental Officer, and a proper party to this appeal, this would support a conclusion that there was a *bona fide* intention to appeal during the time prescribed and that there was a reasonable explanation for the delay. Again, however, it is Mr. Vander Ploeg who is the party responsible for bringing the appeal. The evidence does not support the conclusion that Mr. Vander Ploeg had a *bona fide* intention to appeal, nor does it provide an explanation for the delay.

[18] In *Corrigan, supra,* DeWeerdt, J. granted an extension notwithstanding that the appellant had provided "rather questionable" reasons for the delay, "because justice would be best served by granting the extension", having found "obvious inadequacies in the Rental Officer's order". That is not so in this case, however. In my view, there is not an arguable case that either of the Rental Officer's decisions should be disturbed. In other words, the appeal would fail even if an extension was granted.

[19] The standard of review of a Rental Officer's decision is reasonableness. *Kendi, supra, Yeadon v. NWT Housing Corp. et al.,* 2008 NWTSC 39 (CanLII); *Robertson, et al., v. Goertzen,* 2010 NWTSC 81 (CanLII). The Supreme Court of Canada in *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20 (CanLII) described reasonableness as follows:

> [55] A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the

> reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> [56] This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[20] The August 30, 2011 decision awarded Ms. Stewart $4,200.00 for lost rental income for the months of April, May and June. Mr. Vander Ploeg argues that the decision is unreasonable because it does not provide an adequate explanation to support the conclusions and the Rental Officer did not appropriately consider all of the evidence put forward. He also submits that the Rental Officer did not provide a standard against which measured mitigation of lost rental income.

[21] Taken in context, the August 30, 2011 decision is reasonable. The Record shows that the Rental Officer had before him Ms. Stewart's evidence on what she did to mitigate her losses for the months of April, May and June, as well as the amount of revenue she had managed to earn in that period. Mr. Vander Ploeg expressed his views to the Rental Officer that the efforts were unsatisfactory. The Rental Officer also relied on his finding in the earlier decision on loss of rental revenue, which is included in the Record and which was not appealed, where he found that Mr. Vander Ploeg had abandoned the premises, thereby terminating, pre-maturely, a fixed term tenancy agreement. The evidence before the Rental Officer was sufficient to allow him to find that the mitigation efforts were satisfactory. The decision stands up to "a somewhat probing" examination.

[22] Mr. Vander Ploeg argues that many of the findings that the Rental Officer made in the September 2, 2011 decision respecting damage to the rental premises, are unreasonable because, there being no initial inspection report, there was no evidence of the condition of the premises or an inventory of items at the beginning of the tenancy. It was also submitted that the Rental Officer's decision on the replacement of the carpet was unreasonable because the Rental Officer does not have the expertise to determine the "useful life" of a carpet.

[23] The lack of an inspection report does not vitiate the Rental Officer's ability to determine damages under section 42 of the Act. Rather, it would be but one piece of

evidence. The Record shows that the Rental Officer had before him photographic, documentary and oral evidence on the damage claims put forth by Ms. Stewart. There is a tenable basis for the conclusions he reached.

[24] With respect to the argument about the Rental Officer's lack of expertise (in this case, to determine the "useful life" of a carpet) I disagree. As Vertes J., pointed out in *Kendi,* "the Rental Officer inevitably develops some expertise simply because of the frequency with which he or she deals with recurring issues between landlords and tenants" (at para. 22). In my view, it is well within the purview of the Rental Officer to make determinations of this nature, using his judgment and common sense and accordingly, his decision on this point is reasonable.

[25] For the reasons above, the application to extend the time to appeal is denied and the appeal is therefore dismissed, with costs.

" K. Shaner"
K. Shaner
J.S.C.

Dated this 11th day of April 2012.

Counsel for the Appellant: Steven R. McCardy
Respondent, self-represented: Joy Stewart

Corrigendum of the Memorandum for Judgment

of

The Honourable Justice K. Shaner

1. The citation has been amended to read:
   Citation: Vander Ploeg v. Stewart 2012 NWTSC 30.cor1

2. Corrected date of signature from
   ... this 10th day of ...

   to
   ... this 11th day of ...

3. Corrected appearances from
   ... Counsel for the Respondent...

   to
   ... Respondent, self-represented : ...

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