

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

In the Matter of the *Residential Tenancies Act*

And in the matter of the Decision of the Rental Officer
In File #10-14903

BETWEEN

NPR LIMITED PARTNERSHIP

Appellant

-and-

DOROTHY JILL WESTERMAN

Respondent

Appeal under *Residential Tenancies Act*, RSNWT 1988 c R-5

Heard at Yellowknife, NT, on June 22, 2016

Reasons Filed: September 20th, 2016

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K.M. SHANER

Counsel for the Appellant:

Alyssa Holland
Lawson Lundell, LLP

The Respondent was self-represented

R Limited Partnership v. Westerman, 2016 NWTSC 55

Date: 2016 09 20

Docket: S-1-CV-2015 000245

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REASONS FOR JUDGMENT

[1] This is an appeal from a decision of the Rental Officer. The central issue is whether a landlord is strictly liable for meeting its obligations under the *Residential Tenancies Act*, RSNWT 1988, c R-5.

BACKGROUND

[2] The facts upon which the Rental Officer based her decision in this case are not in dispute. They are summarized below, along with the Rental Officer's decision.

[3] The Appellant, NPR Limited Partnership, (“NPR”) manages an apartment building in Yellowknife in which the Respondent, Ms. Westerman, has been a tenant since October of 2014.

[4] Ms. Westerman noticed cockroaches in her unit a few weeks after she moved in. She notified NPR which, in turn, arranged for an exterminator to treat the infestation. The treatment occurred on November 18, 2014. The exterminator reported there were no visible signs of cockroaches but he recommended a further treatment to be administered fourteen days later. Ms. Westerman subsequently noticed both living and dead cockroaches in her unit and notified NPR.

[5] Several treatments followed, in December, March, April, May and June. The exterminator observed cockroaches in Ms. Westerman’s apartment during the December, March and April treatments. Although the exterminator did not see cockroaches during the May treatment, he nevertheless recommended one more. NPR complied with this recommendation. No cockroaches were noted in June and the exterminator did not recommend further treatments.

[6] Ms. Westerman’s unit was not the only part of the building to be treated. NPR had apparently been dealing with cockroach infestations in other units and common areas of the building through its exterminator for some time.

[7] Ms. Westerman went traveling in July and August of 2015. She returned in September and discovered more cockroaches in her apartment. She did not notify NPR directly, but rather, she filed an application with the Rental Officer. Ms. Westerman sought to be reimbursed for rent paid for what she said was “substandard” accommodation and the costs of storing her personal effects off-site to avoid further infestation. She also requested to be transferred to another apartment.

[8] It was upon receiving notice of Ms. Westerman’s application on September 24, 2015 that NPR became aware of the re-infestation of her apartment.

[9] The Rental Officer determined NPR breached its obligations under ss. 30(1)(a) and 34(1) of the *Residential Tenancies Act, supra*. Section 30(1)(a) requires a landlord to provide and maintain the rental premises in a good state of repair and fit for habitation. Section 34(1) provides that no landlord shall disturb a tenant’s quiet enjoyment of the rental premises.

[10] The Rental Officer may grant a variety of remedies to a tenant, set out in ss. 31(2) and 34(2), respectively, if it is determined the landlord has breached either or both of these obligations. The remedies include ordering the landlord to

compensate the tenant for losses suffered as a result of the breach. In this case, the Rental Officer ordered a rental abatement in favour of Ms. Westerman of \$800.00. She dismissed the claim for off-sight storage, finding there was insufficient evidence of the actual cost and that it was neither necessary, nor reasonable for Ms. Westerman to be compensated for same. The Rental Officer determined she did not have jurisdiction to order NPR to transfer Ms. Westerman to another unit and so denied this relief as well.

[11] The Rental Officer applied a standard of strict liability in determining NPR had breached its obligations. That is, notwithstanding the action it took to deal with the cockroach infestation and notwithstanding the infestation was not NPR's fault, it was still liable. She explained this as follows:

Section 30(1) does not contain an element of fault; it does not require that an action by the landlord caused the damage or reduced the habitability of the premises for the landlord to be found in breach of the obligation. This section requires the landlord to make sure it doesn't stay damaged or uninhabitable. What or who caused the deficiency is not at question; the persistence of the deficiency is.

Record, Tab 18, p 6

[12] Given the conclusions reached by the Rental Officer, it is reasonable to presume she interpreted s. 34(1) as imposing a strict liability standard as well.

THE PARTIES' POSITIONS

[13] NPR says the Rental Officer erred in determining that fault played no role in determining whether it breached its obligations under the Act. NPR argues further that even if the Rental Officer did not err in her interpretation, she nevertheless erred in the remedy. Specifically, the Rental Officer should have taken NPR's attempts to resolve the problem into account and determined no compensation should be granted to Ms. Westerman.

[14] Ms. Westerman argues the Rental Officer's decision respecting NPR's liability should be undisturbed; however, she submits the amount awarded to her in compensation is inadequate and should be increased. The latter was not brought before the Court by way of a formal motion. It was included as part of Ms. Westerman's written submissions.

THE ISSUES

[15] The issues are:

- a. What is the standard of review against which to assess the Rental Officer's decision?
- b. Did the Rental Officer err in finding NPR was strictly liable for breaching its obligations under the Act?
- c. Did the Rental Officer err in granting Ms. Westerman a rental abatement?
- d. Did the Rental Officer err in not granting Ms. Westerman a greater abatement of rent?

ANALYSIS

a. The Standard of Review

[16] The two standards of review are correctness and reasonableness. In those matters where correctness applies, the reviewing court need not afford deference to the decision maker. The decision maker has to have come to the "right" conclusion and if it has not, the reviewing court must undertake its own analysis of the question and substitute its own conclusion. The correctness standard applies to questions of jurisdiction and to general questions of law outside the decision-maker's area of expertise. *Dunsmuir v. New Brunswick*, 2008 SCC 9 paras 50 and 60; [2008] 1 SCR 190.

[17] Where the question is one of fact, discretion or policy the reasonableness standard applies. "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." *Dunsmuir, supra* at para 47.

[18] In applying the reasonableness standard, the reviewing court must exercise deference towards the decision-maker. In other words, so long as the decision is "reasonable", the reviewing court must not substitute its own opinion for that of the decision-maker, even if the reviewing court might have reached a different conclusion.

[19] Ms. Westerman did not take a position on the applicable standard of review. NPR submits the standard of review is reasonableness and cites this Court's decision in *Inuvik Housing Authority v Alunik*, 2014 NWTSC 37 at para 14 as authority.

[20] Reasonableness is the appropriate standard to apply in this case with respect to the question of statutory interpretation. As NPR pointed out in its oral and written submissions, although the main question is a legal one, that is, the Rental Officer's interpretation of the *Residential Tenancies Act*, *supra*, that act is the legislation which governs the Rental Officer's authority. The Rental Officer's interpretation of such legislation must be afforded deference on judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34; [2011] 3 SCR 654; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para 62; [2003] 3 S.C.R. 77.

[21] The matter of Ms. Westerman's compensation is a factual determination which should also be reviewed on a standard of reasonableness.

b. Did the Rental Officer err in determining NPR was strictly liable?

[22] It is useful to start by illustrating how the standards of strict and fault-based liability differ in this context.

[23] In fault-based liability, a party is responsible for damages arising out of its wilful or negligent conduct. The application of that standard in this context would mean NPR would be required to deal with the cockroach infestation diligently once it was brought to its attention, but, so long as it acted diligently in dealing with the infestation going forward, it would not be responsible for any damages or losses occasioned by Ms. Westerman. This is premised on the view that the infestation was not the landlord's fault.

[24] Under a strict liability standard, a party is responsible for the damages arising out of a breach of its obligations, despite exercising diligence in carrying out its responsibilities or in taking steps to ameliorate the problem. Being diligent may serve to reduce the extent of the compensation to which the wronged party is entitled, but it will not absolve the offending party of responsibility, even if it did not cause the problem through a wilful or negligent act or omission.

[25] This Court has not considered whether landlords are strictly liable for breaches of the obligations set out in ss. 30(1) and 34(1) of the Act or if fault, either through wilful conduct or negligence, is required.

[26] NPR's counsel directed the Court to two decisions from the British Columbia Residential Tenancies Branch,¹ dated May 29, 2012 and May 30, 2014, in which a fault-based approach was applied. Her materials also included a case from the Ontario Landlord and Tenant Board, dated May 27, 2015,² which, she suggests, applied a fault-based standard. The standard of liability was not squarely addressed in that case, however, and it is noteworthy that previous decisions from the same tribunal have imposed a strict liability regime on landlords in respect of the covenant of quiet enjoyment and the requirement to provide a premises fit for habitation: *Guest v Grouleau*, 2002 CarswellOnt 3747 (Ont Rental Housing Tribunal); *Re TST-00035*, 2007 CarswellOnt 8942 (LTB).

[27] The Court was also referred to *Boardwalk Rental Communities v Ravine*, 2009 ABQB 534; 2009 CarswellAlta 1471, in which Veit, J., of the Alberta Court of Queen's Bench concluded a standard of strict liability applied to the landlord's obligation to provide a tenant with peaceful enjoyment of a rental premises where the apartment was infested with bedbugs. This was provided by NPR's lawyer as part of her brief. Her candor and thoroughness in doing so, thus providing the Court with a balanced picture, is appreciated. I note courts in Saskatchewan, Manitoba, Nova Scotia and Ontario have reached the same conclusion as that in the *Boardwalk* decision: *Saretzky Holdings Ltd v Bear*, 2012 SKQB 151, 2012 CarswellSask 263; *Hagan v M Bergen Ltd*, (1984) MJ No 72 (Co Ct), 1984 CarswellMan 85; *Milne v Metropolitan Regional Housing Authority*, 2010 NSSM 5; 2010 CarswellNS 42; *Bramar Holdings Inc v Deseron*, [1996] OJ No 1013 (OCJ), 1996 CarswellOnt 1185. No judicial authorities were presented to support the opposite view.

[28] The Rental Officer's finding that NPR failed to maintain the rental premises in a good state of repair and fit for habitation, as well as her finding that the presence of cockroaches interfered with Ms. Westerman's quiet enjoyment, is not a unique or anomalous conclusion. Judges and administrative decision makers in other jurisdictions have made the same finding. For example, in *Hagan v M Bergen Ltd*, *supra*, Glowacki, J., determined a bedbug infestation rendered a rental premises unfit for habitation. The same conclusion was reached in *Boardwalk Rental Communities v Ravine* and in *Milne v Metropolitan Regional Housing Authority*, *supra*. In the last two cases, the courts found the tenant's right to quiet enjoyment was breached as well.

¹ The decisions must be cited by date as the names of the parties are suppressed in publically available copies. No file numbers are provided.

² The parties are unnamed. The file number of the decision is TE T -53368-14.

[29] NPR advances an argument based on statutory interpretation. It submits the Rental Officer's application of the strict liability standard is unreasonable because it is inconsistent with modern principles of statutory interpretation, produces an absurd result and disturbs the balance of interests the *Residential Tenancies Act, supra*, seeks to achieve.

[30] The "modern principle" of statutory interpretation calls for words in legislation "to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intentions of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at 41, citing Driedger, Elmer A., *Construction of Statutes*, (2nd ed Toronto: Butterworths, 1983). NPR also cites s. 10 of the *Interpretation Act*, RSNWT 1988, c I-8. It provides all statutes are to be construed as remedial and "given such fair, large, and liberal construction and interpretation as best ensures the attainment of [their] objects".

[31] The *Residential Tenancies Act, supra*, regulates the relationship between landlords and tenants. It mandates the form and content of the lease³ and in doing so, incorporates the statutory obligations of each party, including the landlord's obligations to maintain the premises in a good state of repair, fit for habitation, and to not disturb the tenant's right to quiet enjoyment. It also incorporates the tenant's statutory obligations to pay rent, maintain the premises in a state of ordinary cleanliness and to repair damages caused by the wilful or negligent conduct of the tenant or his or her guests. The Act provides a dispute resolution system which can be accessed by either party should there be breaches of the lease or the Act and, as noted, there is an array of remedies which can be applied to compensate the wronged party.

[32] NPR submits the Act is, among other things, intended to strike a balance between the interests and obligations of both landlords and tenants, rather than favouring one over the other. Thus, it must be interpreted in a manner consistent with this legislative goal. Imposing strict liability, it argues, skews the balance because it burdens landlords with a disproportionately high degree responsibility without regard to efforts they have made to address an apparent breach. NPR uses the example of a tenant who brings bedbugs into a rental premises but fails to inform the landlord until the infestation is well underway. The landlord would not

³ 10. (1) A tenancy agreement is deemed to include the provisions of the form of a tenancy agreement set out in the regulations and, subject to subsection 12(1), any provision of a tenancy agreement that is inconsistent with the provisions of the form of tenancy agreement set out in the regulations has no effect.

know of the infestation and could not treat it. Yet, the landlord would, following the Rental Officer's interpretation in this case, be liable to compensate the tenant. NPR also argues insect infestations are, in many cases, difficult and time-consuming to treat. The problem cannot be eliminated immediately, even with the greatest diligence. It is unfair to penalize the landlord for something which is out of its control.

[33] The interpretation urged by NPR – that the landlord's liability should be based on fault - is not without some merit. With respect, however, I am not persuaded it is the appropriate one, given the overall scheme of the legislation and the interests it seeks to protect. The strict liability standard adopted by the Rental Officer is more consistent with the objectives of the Act. Moreover, it is a reasonable interpretation.

[34] The overall object of the *Residential Tenancies Act, supra*, in regulating relations between landlords and tenants is to ensure the parties get what they have bargained for and that each does what they have promised to do to give effect that bargain. The essence of the bargain for the landlord is the rent received from the tenant. For the tenant, it is landlord's provision of quiet enjoyment of a premises which is fit for habitation. The Act cannot be interpreted in a way that allows either of the parties to escape responsibility for delivering what they have promised.

[35] In this context, the rationale for granting relief to a tenant even where the problem, be it an infestation, flooding or some other difficulty, has not arisen through any fault of the landlord and where the landlord has acted diligently, is clear. The tenant is not getting what he or she is paying for, that is, quiet enjoyment of a premises fit for habitation. If the landlord cannot provide this, the tenant is entitled to relief. *Bramar Holdings Inc v Deseron, supra*, paras 51-53; *Boardwalk Rental Communities v Ravine, supra*, para 20; *Saretzky Holdings Ltd v Bear, supra*, paras 11-13.

[36] The relief to which a tenant will be entitled will depend on the extent to which the premises is not habitable or the tenant's quiet enjoyment is disturbed. In *Boardwalk Rental Communities v Ravine, supra*, Veit, J., explained:

[21] The problem of bedbugs in residential tenancies is one which appears to be treated in the case law as a matter of degree. Case law may establish that where a landlord is making reasonable attempts to deal with the problem, although a tenant will be entitled to an abatement of rent and perhaps damages to compensate for the breach of the obligation of quiet possession, a tenant will not be able to terminate the tenancy. It may be that it is only in the most serious situations of

infestation that cannot be dealt with relatively promptly or where the landlord refuses to act reasonably that bedbugs can provide a basis for the termination of a tenancy. . .

[37] The Act deals with the NPR's concern about the landlord being strictly liable for breaching the covenants in ss. 30(1)(a) and 34(1) in the event the tenant does not bring a problem, such as an infestation, to its attention. Section 30(5) requires the tenant to provide reasonable notice to a landlord of any substantial breach of the landlord's obligations. In this case, the Rental Officer took into account Ms. Westerman's failure to give notice of the last infestation to NPR in determining the appropriate rental abatement. Ms. Westerman's compensation was reduced accordingly.

[38] The Rental Officer's decision on the standard of liability is well-supported by the legislation. It is reasonable and should not be disturbed.

c. Did the Rental Officer err in granting Ms. Westerman a rental abatement?

[39] NPR submits the Rental Officer ought not to have granted a rental abatement to Ms. Westerman for those periods when it was taking reasonable steps to resolve the infestation. Respectfully, I disagree for reasons just set out. NPR was required to provide Ms. Westerman with quiet enjoyment of a premises fit for habitation. It did not do so. Ms. Westerman was therefore entitled to compensation and the Rental Officer deemed rental abatement to be appropriate in the circumstances. Again, it is not a matter of fault. The right to compensation arises because the landlord did not meet its contractual and statutory obligations.

d. Did the Rental Officer err in not granting Ms. Westerman a greater abatement?

[40] Ms. Westerman feels the compensation she received by way of rental abatement is "woefully inadequate".⁴

[41] The Rental Officer calculated the rental abatement taking into account a number of factors. These included the time Ms. Westerman was denied quiet enjoyment of her unit and the fact she did not provide notice of the last infestation directly to NPR. The Rental Officer applied a methodology consistent with awards she has made in similar situations in the past, which she explained in her reasons. She also gave cogent reasons for why certain of Ms. Westerman's claims were

⁴ As noted, Ms. Westerman did not bring this forward by way of a formal notice to which NPR could respond; however, it is appropriate to explain why the Rental Officer did not err in determining the amount of compensation.

denied, including the off-site storage fees and her request to be assigned to another unit.

[42] Doubtless this experience has been upsetting and frustrating for Ms. Westerman. Nevertheless, the Rental Officer's decision on compensation must stand. While the compensation awarded to Ms. Westerman fell short of what she sought, it was ultimately determined in an intelligible and transparent manner. The result is a reasonable one in the circumstances.

CONCLUSION

[43] The appeal is dismissed.

[44] Ms. Westerman prevailed and she is thus entitled to costs in accordance with Rule 606.1 of the *Rules of the Supreme Court of the Northwest Territories*.

K. M. Shaner
JSC

Dated in Yellowknife, NT this
20th day of September, 2016

Counsel for the Appellant:

Alyssa Holland
Lawson Lundell, LLP

The Respondent was self-represented

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