

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of Holloway Lodging Limited Partnership, Landlord, and
Nancy Greenfield-Hayward and Daniel R. Hayward o/a Dan's Place, tenant;

AND IN THE MATTER of the *Commercial Tenancies Act*,
RSNWT 1988, c C-10

BETWEEN:

HOLLOWAY LODGING LIMITED PARTNERSHIP

Applicant

-and-

NANCY GREENFIELD-HAYWARD and DANIEL R. HAYWARD
o/a DAN'S PLACE

Respondents

MEMORANDUM OF JUDGMENT

[1] This is an application for judgment for rental arrears.

PROCEDURAL HISTORY

[2] This proceeding was commenced under Part III of the *Commercial Tenancies Act*, RSNWT 1988, c C-10. This Court issued a Summons for Eviction to the Respondents, upon application by the landlord, Holloway Lodging Limited Partnership ("Holloway") on February 11, 2019. Holloway subsequently obtained an Order for Possession on February 26, 2019. Under that Order, the matter of rental arrears was adjourned to a later date. It proceeded on April 22, 2020.

EVIDENCE

[3] Holloway's evidence was presented in two affidavits from its Vice-President of Operations, Mr. Chad Hope, sworn January 28 and May 7, 2019 respectively. The Respondents' evidence was provided in an affidavit sworn by Mr. Daniel Hayward on May 8, 2019.

[4] Between 2015 and 2018, Holloway leased three separate premises to Mr. Hayward in a mall located in downtown Yellowknife. He operated a second hand store, called "Dan's Place", out of them. Dan's Place was a sole proprietorship.

[5] The premises were units 130, 180 and 190. An unsigned copy of a standard form commercial lease was produced as part of Holloway's affidavit evidence; however, the parties did not ever execute a formal lease in relation to any of the spaces.

[6] Some documentation exists in relation to the rental spaces, in the form of email correspondence. Exhibit "A" to Mr. Hope's affidavit dated January 28, 2019 is an email from one of Holloway's managers to Mr. Hope setting out the arrangements she made with Mr. Hayward for unit 130. Unit 130 is not in dispute here, but the email sheds light on the arrangements for the other two spaces. Unit 130 was to be leased on a month-to-month basis for \$2,000.00 a month. The rent was broken down as \$1,237.80 as base rent and the remainder as common area maintenance charges.

[7] Beginning July 1, 2016, Mr. Hayward leased units 180 and 190 for the net amounts of \$4,000.00 and \$1,550.00 a month respectively. Again, no formal lease was executed, but an email confirming the rent is attached to Mr. Hope's January 28, 2019 affidavit as Exhibit "C".

[8] The emails are silent as to Goods and Services Tax; however Mr. Hayward deposes that he did not pay anything over and above the total rent he was charged in the case of all three spaces. I find as a fact that the rent he was charged included the Goods and Services Tax.

[9] By March of 2018, Dan's Place had fallen into arrears.

[10] On April 4, 2018 Mr. Hope exchanged email correspondence with the Respondent Nancy Greenfield-Hayward about the arrears. It is not clear why Mr. Hope did not write to Mr. Hayward directly; however, Holloway had also entered into a lease with Ms. Greenfield-Hayward for her own business. That lease is the subject of a separate proceeding which was heard concurrently with this one and there is some overlap in the correspondence.

[11] Mr. Hope pointed out that the rent for Dan's Place was unpaid and asked for an update on the plan to bring the rent into good standing. Ms. Greenfield-Hayward wrote back, ostensibly on behalf of Dan's Place. She told Mr. Hope that Dan's Place was downsizing and was expected to have cash coming in shortly. She also said Dan's Place would be out of "the small space", which I infer is a reference to unit 190, by the end of the month.

[12] Mr. Hope wrote to Ms. Greenfield-Hayward again on April 13, 2018. He advised her that Dan's Place owed \$21,500.00 in arrears and that if the rent was not up to date within sixty days, Holloway would evict Mr. Hayward and seize goods to cover the rent.

[13] Ms. Greenfield-Hayward replied on April 16, 2018 with a plan for making payments on both arrears and future rent for Dan's Place.

[14] It appears Mr. Hope sent Ms. Greenfield-Hayward an email on June 6, 2018. The contents of that email were not included in the exhibit but presumably, it was in relation to the arrears. Ms. Greenfield-Hayward wrote back on June 7, 2018 and stated, among other things, that Mr. Hayward was ill but that Dan's Place was working towards a sale of inventory to a third party and she was hopeful the arrears could be paid down.

[15] Mr. Hope followed up again on June 15, 2018. Ms. Greenfield-Hayward advised Dan's Place planned to pay a minimum of \$1,000.00 a week.

[16] On August 8, 2018 Holloway's solicitors made a demand for payment of rental arrears for Dan's Place.

[17] Ms. Greenfield-Hayward replied to the solicitors on August 20, 2018 and stated that Mr. Hayward was boxing up inventory and that as money came in it would be sent to Holloway.

[18] Mr. Hayward deposes that he returned the keys to the rental spaces. He does not say on what date that took place; however, he states unequivocally in his affidavit that as of September of 2018, he was no longer in possession of the keys. He says he tried to give them to the General Manager. The General Manager refused to accept them. Sometime later, Mr. Hayward gave a set of keys to one of Holloway's maintenance workers because access was required to fix a water leak. He subsequently gave the other set to the head maintenance worker. Mr. Hayward says that as of September, 2018, he no longer had the keys in his possession.

[19] In his May 7, 2019 affidavit Mr. Hope states that the keys were never returned.

[20] Holloway says that arrears totaling \$54,372.50 are owing from March 2018 to the date the Order for Possession was made on February 26, 2019. This is calculated based on a monthly rental rate of \$5,500.00 for each of March and April, 2018 and a rate of \$4,387.25 for the months of May, 2018 until February, 2019, with credit for a payment of \$500.00. It is not clear where the amount of \$4,387.25 comes from.

[21] In submissions, Holloway's counsel proposed that if the Court accepts that Mr. Hayward returned the keys in August, the undisputed arrears are \$26,500.00. This is based on a monthly rental rate of \$5,500.00 for units 180 and 190 for March and April, and \$4,000.00 for the remaining unit for May to August, 2018, less credit for a \$500.00 payment.

ISSUES

[22] As a preliminary matter, I will deal with Ms. Greenfield-Hayward's liability in this proceeding. Although Mr. Hope dealt with her on matters relating to the lease agreements for Dan's Place, there is no evidence that she was ever a party to those agreements. Accordingly, the application against her is dismissed.

[23] That leaves two issues to be resolved: first, when did Holloway get possession of the premises and second, the rental rate.

ANALYSIS

When did Holloway get possession of the premises?

[24] The evidence conflicts on whether and at what point Mr. Hayward returned the keys to Holloway. Resolving this is important. The lease agreements were month-to-month and if Mr. Hayward vacated the premises and handed over the keys in August as he said he did, the rental arrears could not accumulate past that point.

[25] Mr. Hayward's recollection of his attempt to return the keys, as well as how they wound up in Holloway's possession, is very specific. He says he first tried to give the keys to the General Manager. As noted, the General Manager refused to accept them. Mr. Hayward says the General Manager indicated this by putting his hand up in the air and telling Mr. Hayward it was not his responsibility. Mr. Hayward says he then turned one set of keys over to an unnamed maintenance person because of a water leak. Finally, he said he gave the other set of keys to the head maintenance person.

[26] Mr. Hope deposes that the keys were not returned. This is not surprising. Mr. Hope was not in Yellowknife and it is unlikely he would be involved in day-to-day details like collecting keys. I note, however, that there is no evidence that Mr. Hope or others followed up with Mr. Hayward to return the keys at any point. Similarly, there is no evidence that Holloway followed up with the individuals Mr. Hayward named in his affidavit to confirm whether or not the keys were returned.

[27] The fact that Mr. Hayward was packing up the store's inventory as at August 20, 2018 also supports the conclusion that he intended to – and did – vacate the premises by the end of that month. Again, there is no evidence that Holloway took any steps to confirm whether Dan's Place was still occupying the premises.

[28] Holloway's evidence on this point is, at best, equivocal. On a balance of probabilities, I find that Mr. Hayward returned the keys and that he had done so by the end of August, 2018. I also find he delivered vacant possession of the premises at that time. Holloway is thus entitled to arrears of rent to the end of August.

What was the rent?

[29] In Holloway's statements of account the rent is reflected as \$5,500.00 a month for the two spaces for March and April and \$4,387.25 a month starting in May of 2018, after Dan's Place had moved out of the smaller space. There is no dispute about the \$5,500.00, but it is not clear how the rate of \$4,387.25 is derived. The additional \$387.25 a month is more than what the GST would be and it does not reflect the round number, net rent figures that were previously negotiated.

[30] In my view, the rent should be set at \$4,000.00 a month for the purpose of calculating the arrears the accumulated from May to August of 2018. This is consistent with the approach the parties took in their earlier dealings on rent. Accordingly, I accept Holloway's proposal that the rental arrears be set at \$26,500.00.

CONCLUSION

[31] Holloway is entitled to recover arrears in the amount of \$26,500.00.

[32] I exercise my discretion to direct that each party bear their own costs because success was divided. Although Holloway was successful in obtaining judgment for arrears, it was awarded roughly half of what it initially sought. Relatedly, it sought arrears which it said accrued to February 26, 2019, when it obtained the Order for Possession. Given that it already had vacant possession, no arrears accumulated in that time period.

[33] Accordingly, I make the following order:

- a. Holloway shall have judgment against Daniel Hayward, operating as Dan's Place, for rental arrears in the amount of \$26,500.00;
- b. Holloway's claim against Nancy Greenfield-Hayward is dismissed;
- c. The parties will bear their own costs.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT
this 19th day of May, 2020.

Counsel for the Applicant:

Faiz-Ali Virji

The Respondents were self-represented

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MEMORANDUM OF JUDGMENT OF
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