

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of Holloway Lodging Limited Partnership, Landlord, and
Danarey o/a Nancy's Place, tenant;

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

BETWEEN:

HOLLOWAY LODGING LIMITED PARTNERSHIP

Applicant

-and-

DANAREY o/a NANCY'S PLACE

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the landlord ("Holloway") for judgment for rental arrears which accumulated under a commercial lease.

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 Respondent/tenant Danarey, operating as Nancy's Place ("Danarey"), pursuant to s. 41(3). The summons required Danarey to appear and show cause (1) why an order should not be made requiring it to deliver up possession of the leased premises to Holloway and (2) why an order should not be made for Danarey to pay accumulated arrears and costs.

[3] On February 26, 2019, when the hearing pursuant to the summons took place, Holloway obtained an Order for Possession. The matter of rental arrears was adjourned to a later date and proceeded on April 22, 2020. Danarey was not represented by counsel. Ms. Nancy Greenfield-Hayward made submissions on its behalf.

EVIDENCE

[4] Holloway's evidence was presented in two affidavits from its Vice-President of Operations, Mr. Chad Hope. The first was sworn January 28, 2019 and the second on May 7, 2019. Ms. Greenfield-Hayward swore an affidavit on behalf of Danarey.

[5] On March 1, 2018, Holloway entered into a 3-year lease with Ms. Greenfield-Hayward. Only Ms. Greenfield-Hayward's signature appears on the lease; however, there is no question that Holloway agreed to be bound by its terms. The lease provided for payment of "minimum" and "additional" rent. The minimum rent was \$905.63 a month for the first year, with small increases to take effect the second and third years. Danarey paid Goods and Services Tax on top of this, for a total of \$950.91 a month.

[6] The exact amount of additional rent is not specified in the lease. Rather, it is based on an estimate of cost items, to be calculated by the landlord. The provisions with respect to the additional rent, including the charges taken into account and the tenant's ability to have the amount reviewed, are found in Article 5. It states, in part:

Additional Rent

Without limiting the generality of the preceding Section, the Tenant shall pay the Landlord as Additional Rent in each Lease year the aggregate of

- the Tenant's Proportionate Share of Real Property Taxes;
- the Tenant's Proportionate Share of Operating Costs;
- a charge for supplying electricity to the Leased Premises as calculated pursuant to this lease and as determined by the Landlord on the basis of the Tenant's consumption in a manner generally applicable to all tenants;
- a charge for supplying heating, ventilating, air-conditioning and other utilities to the Lease Premises, to the extent that any are supplied, as calculated pursuant

to this lease and as allocated by the Landlord on the basis of the Tenant's consumption in a manner generally applicable to all tenants receiving such utilities;

- all Sales Tax;
- such other amounts, charges, costs, sums or increases therein as are required to be paid by the Tenant to the Landlord pursuant to this Lease in addition to Minimum Rent and Percentage Rent.

Estimate of Additional Rent

The Landlord may, in respect of any or all of the items of Additional Rent, compute bona fide estimates of the amounts which are anticipated to accrue in the next following Lease Year, calendar year, fiscal year, or other period, or portion thereof, as the Landlord in its discretion may determine is the most appropriate period for each or all items of Additional Rent, and the landlord may provide the Tenant with written notice of the amount of any such estimate.

[. . .]

Review of Additional Rent

No party hereto may claim a readjustment in respect of any item of Additional Rent, whether paid or payable in installments or otherwise, if based on error of estimation, allocation, calculation or computation therefor, unless claimed in writing before the expiration of one (1) year from the conclusion of the period in respect of which such item of Additional Rent accrued.

[. . .]

[7] By email dated June 21, 2018, Mr. Hope advised Ms. Greenfield-Hayward that the additional rent would be \$1,150.00 a month. This was retroactive to the beginning of the lease. Ms. Greenfield-Hayward wrote back the same day and asked for the justification for the amount, noting that it was 110% of the minimum rent. Mr. Hope replied on June 27, 2018 (as written):

Hi Nancy,

Here is how it works. We estimate the [additional rent] for the year we are in and then do a true up around this time every year once we have actual numbers to go off of. For you Nancy we have another similar size space in the mall who had a very minor. . . true up . . . last year so we've based your calculation on that. They pay \$1,570 per month and is 40% larger space so accounting suggested we used that to come up with the \$1,150 per month.[. . .]

[8] Although the lease took effect in March, the business did not open until June of 2018. Ms. Greenfield-Hayward deposes that there were a number of reasons for this, including delays in the requisite inspections being done and her husband falling ill and requiring treatment in southern Canada.

[9] Danarey's minimum rent was paid for March, April, May and June, 2018. The additional rent was not paid.

[10] Ms. Greenfield-Hayward returned the key to the leased premises to one of Holloway's employees, Diane Redtman, on July 13, 2018. Ms. Greenfield-Hayward did not advise Holloway of her intention to do so in advance. She left the premises vacant. Holloway considered the premises abandoned.

[11] Through counsel, Holloway argued that it is entitled to rental arrears of \$20,889.78, representing the unpaid minimum and additional rent from the time the lease took effect until it obtained the Order for Possession on February 26, 2019. Alternatively, it argues that it is entitled at a minimum to the amount of arrears that accumulated between the time when the lease took effect and when Ms. Greenfield-Hayward returned the key in July of 2018. Holloway also seeks costs on an indemnity basis and interest at a rate of 24% per annum, pursuant to the lease.

ISSUES

[12] At the outset it should be noted that this is not an action for contractual damages, including future rent, arising from a breach of the lease. It is an application for relief under s. 41 of the *Commercial Tenancies Act*, limited to the question of arrears.

[13] There are two issues. The first is the time period for which Holloway can claim arrears. More precisely, the question is whether Holloway can claim arrears from March 1, 2018 until it obtained the Order for possession on February 26, 2019, or whether arrears are limited to when the key was returned on July 13, 2018.

[14] The second issue is the rental rate at which the arrears accumulated and in particular, whether the amount of the additional rent Holloway purported to charge Danarey under the lease is enforceable.

ANALYSIS

Time period over which arrears accrued

[15] Holloway is entitled to rental arrears that accumulated to the end of July, 2018 and no further.

[16] On July 13, 2018, Ms. Greenfield-Hayward repudiated the lease. She returned the key and Holloway's staff in Yellowknife confirmed it had vacant possession of the premises. For unknown reasons, this fact was not put before the Court at the time the application was made. In any event, on the facts before me now, the application for a Summons for Eviction was unnecessary.

[17] Alternatively, if the application was necessary, there was an unacceptable delay in bringing it forward. Holloway gave no reason for the approximate seven month delay between when it demanded the unpaid rent and when it applied to this Court for the Summons. Danarey cannot be held financially responsible for Holloway's failure to proceed within a reasonable time.

The amount of additional rent

[18] The provisions in the lease respecting additional rent are in what may be termed "standard form" and, having signed the lease, Ms. Greenfield-Hayward agreed to pay additional rent. Nevertheless, I conclude Ms. Greenfield-Hayward is not required to pay the \$1,150.00 Holloway charged as additional rent. This is because Holloway did not give sufficient information to Ms. Greenfield-Hayward about how it calculated the amount of additional rent. This rendered the term too uncertain to be enforceable.

[19] As set out above, the lease calls for Holloway to calculate "bona fide estimates" of the anticipated cost of each or all items listed as additional rent, such as property taxes, electricity and heat. These are to be allocated "in a manner generally applicable to all tenants". The tenant has a corresponding right to seek a review to have the amount of that estimate re-adjusted, based on "error of estimation, allocation, calculation or computation". This necessarily implies that Ms. Greenfield-Hayward would be provided with information sufficient to allow her to gauge the reliability and reasonableness of Holloway's estimate. At a minimum, she would need the rationale for the anticipated cost of those additional rent items, most likely in the form of the historical costs, and she would need to know the method used to calculate and apportion the costs to Danarey's rental premises. Without that information, there is no basis upon which a tenant could effectively exercise the corresponding right to ask for a review and re-adjustment.

[20] What Holloway provided fell far short of this. It gave Ms. Greenfield-Hayward the costs for another tenant in a space 40% larger than Danarey's, along with its accounting department's "suggestion" that the additional rent be set at

\$1,150.00. Holloway provided no explanation for how it arrived at that amount. It is not arithmetically connected to the difference in size between Danarey's and the other tenant's space. There was no reference point, such as past costs for a similar size space or for the space itself. What was provided was, on its face, an arbitrary figure.

[21] Holloway's counsel suggested that the Court could set the additional rent at \$942.00 a month. This is based the Danarey space being 60% of the size of the space Holloway used to estimate the additional rent, ie. 60% of \$1,570.00. Respectfully, I disagree. That estimate suffers from the same paucity of information underpinning Holloway's initial estimate of additional rent, making it impossible to gauge either reliability or reasonableness.

CONCLUSION

[22] Danarey paid minimum rent for the months of March, April, May and June, 2018. The minimum rent was \$950.90 a month, including Goods and Services Tax. No rent was paid for July. Danarey repudiated the lease and Holloway had vacant possession on July 13, 2018. Holloway's application for eviction was unnecessary and arrears did not accumulate past July of 2018. The terms respecting additional rent are, in these circumstances, unenforceable. The arrears are set at \$950.90.

[23] With respect to interest, it is perplexing that Holloway waited some seven months to bring the claim for relief forward. No explanation is provided for the delay. Again, Danarey should not be financially responsible for Holloway's inaction. That said, the lease provides for interest and some interest is warranted because Holloway could not have acted immediately. In the circumstances, it would have been reasonable to expect Holloway could act on this within sixty days of the key being returned and the premises abandoned. Accordingly, pre-judgment interest will be limited to two months at the rate set out in the lease, being 24%.

[24] Given my findings and Holloway's very limited success, each party shall bear its 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 Respondent was represented by Nancy Greenfield-Hayward

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MEMORANDUM OF JUDGMENT OF
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