Group E Investments Ltd v Wansbrough, 2013 CanLII 50616 (ON SCSM)

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FILE NO.: 386/12

DATE: July 30, 2013

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT AT WOODSTOCK

BETWEEN:)
)

GROUP E INVESTMENTS LTD)
)
Plaintiff)

Richard Ennis, corporate officer

– and –		)	
		)	
BILL WANSBROUGH		)	
		)	
	Defe	)	
	ndant	)	Heather Cowan, paralegal
		)	
		)	
		)	
		)	
		)	**HEARD:** May 07 and July 02, 2013

Searle, D.J.

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[1] The plaintiff is an Ontario corporation headquartered in Oakville Ontario. It is hereinafter referred to as “E”. It owns or owned approximately thirteen “single family”, detached rental houses in Woodstock Ontario including one on Wilton Crescent, hereinafter referred to as “Wilton”. It is a “war time” 1 1/2 storey style probably constructed in 1950. It had two small bedrooms on the main floor, two on the second and only one bathroom. The local person who does and did most of the daily dealing with the properties and the tenants is Edwin Ralph Murray, often known as “Ted”.

[2] Pursuant to an initial lease in writing and some subsequent leases William or Bill Wansbrough was the sole human tenant at Wilton from early 2007 until he gave notice July 17, 2012 for August 31 and vacated in fact August 07 because he had purchased a residence. By then it was a monthly tenancy. During all of those 5.5 years of tenancy his companion in the residence was his dog, a Spitz-Border Collie mix now 12 years of age. He was the first tenant after Wilton was purchased by E from a widow known to Mr. Murray. In the various documents in the file the plaintiff’s surname is variously spelled “Wansbrough” and “Wansborough”.

[3] E now sues for $21,195.00 for damage of landscaping, interior damage by stains, odours, rusting and the like to carpeting, flooring, walls, toilet, bathtub, laundry tub, stainless steel sink and other items and areas. E also claims a loss of rental income during restoration but acknowledges holding last month's rent deposit and other rent and agrees to have the court deal with those issues. After work was done E tried but failed to sell it so eventually rented it again effective June of 2013.

[4] Mr. Wansbrough pleads E entered and re-took possession in August while he was still current with his rent and Last Month Rent Deposit (LMRD) through September 30, 2012, changed the locks and told him not to clean the carpets because E planned to "rip them up anyway".

[5] Three sections of the Residential Tenancies Act, 2006 S.O. 2006,c.17 bear heavily on the issues in this proceeding:

20.(1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

(2) Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement.

33. The tenant is responsible for ordinary cleanliness of the rental unit, except to the extent that the tenancy agreement requires the landlord to clean it.

34. The tenant is responsible for the repair of undue damage to the rental unit or residential complex caused by the wilful or negligent conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant.

[6] Precise calculation of damages, if any, is not possible in this case for many reasons. Those reasons include, but are not limited to, causation, depreciation, betterment and an intention by E to renovate or replace certain items and areas apart from any

damage or lack of cleanliness for which Mr. Wansbrough might be otherwise found liable.

[7] A major example of the last factor is a large amount of supplied and installed carpeting for the living room and new master bedroom. The supplier/installer reasonably treated both rooms as a single item in its quotation and invoice but those rooms must be treated differently by the court. Both rooms had serious carpet damage and lack of cleanliness but the living room carpet was replaced due to those reasons whereas the former master bedroom was replaced because E created a new and larger master bedroom and enlarged and otherwise changed the adjacent bathroom by tearing out two small bedrooms and the old bathroom, at a cost of about $7,000.00.

[8] The court deals first with the living room. There is a tiny foyer. The re-carpeted area is found to be 21 square meters. That is 52% of the carpet supplier/installer's invoice for carpeting of the living room and master bedroom. That 52% is $885.95, excluding HST and before reductions for depreciation *etc*.

[9] I find the carpeting in the living room when Mr. Wansbrough took possession in 2007 was "dated" but in "pristine" condition according to Mr. Murray whose evidence on the point I accept. The residence had been occupied by an elderly couple since it was new in 1950 and then by the widow who was known to Mr. Murray. A reasonable allowance for betterment or pre-2012 depreciation is 30%. If Mr. Wansbrough is liable he is liable for 70% of the replacement cost. That figure is $620.13 exclusive of HST.

[10] Mr. Wansbrough is liable for this carpet under sections 34 and 33 of the Act. His dog was nervous and was left alone and uncaged in the house for 9-10 consecutive hours five afternoons a week when Mr. Wansbrough was working in another town or traveling to and from work. In recent years it was six nights a week. The dog also had a vigorous reaction when anyone came to the door. When Mr. Wansbrough had company he found it advisable to carry the dog to the basement. At Ex. No. 2 Tab A photos 4 and 5 show some of the dire condition of the carpeting after it was removed. Photos 6 and 7 show the condition of the

hardwood under the worst dog damage to the carpeting. Photos 8, 9, 13 and 14 show the condition of carpeting in areas adjacent to the living room.

[11] There is credible evidence that after Mr. Murray or Mr. Ennis or both saw the condition of the living room carpet in place a decision was made to use the hardwood flooring. When the hardwood flooring was exposed it was found to be not only discoloured as shown but also otherwise damaged beyond reclamation. The only choice was to seal it to contain odours then have it carpeted.

[12] E is entitled to be compensated for the discolouration and other damage to the hardwood floor in the living room, all caused by the tenant and his dog. It can never be used as an attractive hardwood floor. Inevitably E will eventually sell the house. At that time E will have to disclose the damage and thereby drive down the value of the house or not disclose it and run the real risk of being sued successfully by the purchaser for a latent defect known to E and made latent by the wall-to-wall carpeting. I assess that damage at $1,000.00 with no deductions.

[13] SacWal, the company that supplied and installed the living room and other carpet, also supplied and installed new vinyl flooring in the bathroom, the kitchen and at “entrances”. The bathroom was part of the structural renovation for which Mr. Wansbrough is not liable. The court knows nothing about the kitchen and entrance areas other than the entrance very near the worst damage to the living room flooring. That foyer was carpeted before and during Mr. Wansbrough’s tenure. It had dimensions of 4’ by 3’. I am satisfied that foyer carpet was ruined, mainly by the dog. It was replaced by vinyl.

[14] On the evidence before me I cannot tell how much of the SacWal invoice should be allocated to that foyer. On sketchy evidence I allocate $100.00 exclusive of HST. After deducting 30% for depreciation *etc* the court allows $70.00.

[15] Staying with the main floor the court turns to the bathroom.. Mr. Wansbrough is rescued from liability for most of it due to the structural renovations but there is an issue with the

fixtures and their salvage. Ex. No. 2 Tab A photos 10 through 14 show the bathroom with particular attention to the toilet and bath. Those items were not reasonably salvageable due to the mold and filth. On admittedly sketchy evidence the court allows $100.00 without deduction

[16] The court turns to the kitchen sink. It is old to the extent it was probably the original sink for the house but is stainless steel. It is shown at photo 15 in Ex. No. 2 Tab A. Although photographed by Mr. Murray with probably-removable filth in some areas there is unchallenged evidence its functioning was damaged by Mr. Wansbrough installing, or attempting to install, a spray connection. It was replaced at a cost of $100.07 shown in Ex. 2 Tab I, a Home Hardware receipt. Due to its age and allowing for normal wear and tear a deduction of 50% is in order. The allowance is $50.04 exclusive of HST.

[17] Turning to the basement the only claim there is with respect to an old laundry tub pictured at Ex. No. 2 Tab A photo 16. It was replaced by a cheap plastic tub and kit that cost $40.79 exclusive of HST. Photo 16 at Ex. No. 2 Tab A shows its condition after Mr. Wansbrough's departure. To the extent it is damaged the damage appears to be from fluids, undoubtedly some containing minerals, draining into it from the water softener, furnace condensate pump and central air conditioner then out to the municipal sanitary system. In the court's understanding of the thin evidence this was an arrangement in place long before Mr. Wansbrough and not a cause of objection by the landlord. It is reasonable wear and tear for which the tenant is not responsible. According to Mr. Murray changing the taps was optional.

[18] E adduced evidence of expense for new vinyl flooring for the kitchen, entrances and bathroom. The bathroom floor had to be replaced anyway as part of the modernization renovations. There is no evidence from any source of damage to the kitchen floor or any entrance other than the living room foyer dealt with above.

[19] E adduced evidence of expense for new carpeting of two upper bedrooms, upper hallway and upper stairs to a total of $1,435.00 exclusive of HST. There is no evidence of damage done to the upper stairs or anything on the upper floor during Mr.

Wansbrough's tenure. His evidence was that he went to the upper floor about 5 times in his 5.5 years, had no beds there and his dog never went there because it is afraid of stairs. That evidence was not challenged.

[20] Ex. No. 2 Tab K is an invoice from SBM Property Services Inc. for October 25, 2012 "cleaning services to prep empty house for new tenant as per quote." It is in the amount of $225.00 exclusive of HST. The date appears to be after all repairs, replacements, painting and renovations had been done by others. The filthiness that built up between the purchase by E from the widow and end of the tenure of Mr. Wansbrough and his dog is borderline incredible and disposes the court to be very sympathetic to this part of the claim. On the other hand the voluntary modernization renovation by E logically generated part of the cleaning task, albeit a relatively small part. The court allows $150.00 exclusive of HST.

[21] The court now turns to the exterior. The house had lawns and landscaping in the form of shrubs and other plants. Ex. No. 2 Tab A photos 1, 2, and 3, all taken by Mr. Murray, show the condition shortly after Mr. Wansbrough left. Ex. No. 3 is a real estate "comfree" listing. Among other things it shows what was left at the front of the house after clearing and trimming of overgrowth and the doing of lawn work by D. A. Downing ENT., an area business that does lawn maintenance and snow removal. The invoice totals $3,450.00 exclusive of HST and is dated September 13, 2012.

[22] The evidence does not indicate when any of the vegetation was planted or its condition during the tenure of Mr. Wansbrough. E provided a fertilization and weed control service three times *per* year at each of its Woodstock residences. Mr. Murray testified he cleaned up the Wilton "gardens" in 2011. The Downing invoice at Ex. No.2 distinguishes among "gardens", "front garden", "shrubs", "front lawn", "back lawn" and "interlock". Mr. Murray is familiar with the work of Downing and its invoice. For that reason the court finds the use of the word "gardens" by Mr. Murray refers to the gardens only and not the other categories.

[23] Mr. Wansbrough testified that when he first moved in a female neighbour took care of the "gardens" for free but that neighbour passed away. Mr. Wansbrough cut the grass with a push mower. After the neighbour died the "shrubs" became overgrown. He trimmed the shrubs "quite often" and did not think they were overgrown. The court has seen the photos of at least some of the shrubbery and does not find Mr. Wansbrough trimmed the shrubs "quite often", if at all. There is corroborating evidence that he had a push mower. The front lawn appears to have been cut from time to time.

[24] In her authorities brief Ms. Cowan produced part of Ontario Regulation 516/06 passed pursuant to The Residential Tenancies Act 2006. It has a Schedule [1] that lists useful life of various work done or things purchased. It lists 15 years for shrub replacement and 10 years for sodding. The court is reluctant to put much weight on the list when every day discloses so many contradictions and exceptions.

[25] The Downing invoice does not apportion the $3,450.00 to individual categories but describes the work done as "remove all gardens and shrubs from front and back, strip front lawn, install and mulch new front garden, repair interlock, sod entire front lawn & rear garden area, seed back lawn."

[26] "Interlock" probably refers to interlocking stone and work done on it. The court accepts Mr. Wansbrough's evidence that rain falling on the interlocking stone would pass between some of the stones, run through and erode the ground beneath and enter the basement where it made a mess. The court can find no causal connection and anything done or not done by Mr. Wansbrough *vis a vis* the interlock. The other yard categories are less clear cut and so the court turns first to the applicability of sections 33 and 34 of the Act to the yard items.

[27] Section 33 is not involved because only exterior landscaping is involved.

[28] Several issues arise involving section 34. Neither party supplied the court with any case law on these or other issues.

[29] The first issue is whether Wilton, including the yard, qualifies as a "rental unit". In this court's opinion it does. There is nothing in the Act's definition of this term that excludes the yard. The yard is exclusive to the tenant of Wilton and is not a common area. In Leesnurm v. Grenon [2000] O.RH.T.D. No. 165 the predecessor of the current Ontario Landlord and Tenant Board under the predecessor of s. 34 dealt with a rented 5.5 acre residential property. Although the digest available to me does not indicate whether that tribunal directly addressed whether a yard is part of the rental unit the tribunal found the tenant liable for damage to the well, the pool, the tractor and other items.

[30] Secondary sources do not disclose other cases on point. In fact the booklet *Maintenance and Repairs* published in February of 2012 by Community Legal Education Ontario to educate residential tenants in Ontario about repair and maintenance issues states "If you rent a house the law is not clear about who is responsible for outdoor work like lawn mowing and snow shovelling." A Quicklaw search for 2011, 2012 and 2013 offered the court no additional enlightenment.

[31] If Mr. Wansbrough is responsible for the condition of various categories of the yard when he occupied Wilton it must be by contract or a responsibility imposed on him by the Act. In *Montgomery v. Van* 2009 Carswell Ont 7106, 256 O.A.C. 202, 2009 ONCA 808 the Ontario Court of Appeal held that under the statutory regime of Ontario, a contractual provision for services by a tenant must create an obligation that is severable from the tenancy agreement.

[32] In the case at bar the tenancy agreement contained no term for the provision of such services by Mr. Wansbrough. The oral evidence of Mr. Murray and Mr. Ennis averages out to a hope or expectation that Mr. Wansbrough would look after the yard because the landlord supplied fertilizer and herbicide and tenants usually take pride in the appearance of their rented premises. The court cannot find a contract and must turn to s. 34 of the Act.

[33] If there was wilful or negligent conduct by Mr. Wansbrough *vis a vis* the yard it was conduct in the sense of not

doing something, namely yard work. A tenant persistently wilfully or negligently not closing a window during rainy weather and thereby damaging the landlord's floor may be held liable for inaction. In this court's opinion there is no meaningful difference between that and standing idle while the components of a yard become irretrievably overgrown.

[34] The interlock work by Downing has already been canvassed. The Downing invoice describes a front "garden" and a rear "garden". No doubt the front garden was a flower garden and the back one could have been a flower or vegetable garden or a combination of the two. The work associated with the gardens consisted of "removal" of both. That was surely a minimum of work, especially with equipment. The rear garden was then sodded over and rendered history at a point in time when E's intention was to sell. A new front garden was created by Downing. The front lawn was stripped and sodded in its entirety. The rear lawn was seeded, apparently without stripping.

[35] The invoice describes removing shrubs. There is no mention of any other shrub work but the comfree listing includes a tiny post-Downing picture of the front of Wilton with what appears to be a hedge in front of about 50% of the house. It is probable the hedge is a possibly-overgrown hedge cut back.

[36] In this court's opinion Mr. Wansbrough is not responsible for the lawn. E fertilized and did weed control and Mr. Wansbrough cut it. If it in fact required stripping and sodding it is most likely it was old and tired and not the responsibility of the tenant.

[37] The first 3 photos in Ex. No.2 Tab A show various tall plants and shrubs grossly out of control and overgrown and in need of tearing out. That condition is not consistent with what the court has heard about the owners before Mt. Wansbrough's tenure and finds the overgrowth occurred during that tenure.

[38] The lack of apportionment of the Downing invoice forces the court to reluctantly turn to s. 25 of the Courts of Justice Act that mandates this court to make orders that are considered to be just and in good conscience. The court finds Mr. Wansbrough

responsible for 1/3 of the Downing work. That is $1,150.00. Betterment is involved, particularly involving the interlock and the new front lawn. The court deducts the estimated full cost for the interlock and otherwise 30% for betterment and arrives at damages of $705.00, exclusive of HST.

[39] Mr. Murray did a lot of work and repairs after Mr. Wansbrough vacated and acted as the general contractor for both the compensable work and non-compensable renovations. He contracts with E as a sort of property manager in normal times but did a lot of extraordinary work at Wilton from about August 08 to sometime in October of 2012. He contracts as 151474 Ontario Ltd. O/A Ted The Toolman. The hourly rate is $30.00 plus HST. His invoices are found at Ex. No.2 Tab A but the work is not apportioned in detail among the various projects.

[40] Some of the work consisted of painting and wallpapering but there is no evidence of when the residence was most recently painted and papered. It was not done in at least 5.5 years. The $1,800.00 cost for “tear out the basement” has nothing to do with Mr. Wansbrough. The same may be said for quotes and work on bathroom, “new roof”, paint for basement, compiling information and pictures “for lawyer”, painting various, filing court papers, part of dumpster charges, purchase of paint, exterior painting, installation of new door handles, plumbing, upstairs work, closet racking, basement waterproofing, shortening and re-drilling doors for new hardware, filing of additional court papers and photos and material to renovate a basement entrance. These are all included in Mr. Murray’s Ted The Toolman invoices to E.

[41] The court can find a maximum of $600.00 exclusive of HST that is the responsibility of Mr. Wansbrough.

[42] Exclusive of HST the assessed damages are $3,365.17. Ms. Cowan for Mr. Wansbrough argued E is not entitled to HST because the business can recover that HST. She produced no legal authority for that and Mr. Ennis for E, whose books are kept by another person, simply did not know. In the court’s opinion the HST paid by E cannot be recovered because it was for repairs and replacements to residential housing rental that does not attract HST and so there can be no input tax credit. There is no HST on the general damages

of $1,000.00 allowed for the hardwood floor and so the court allows HST at the rate of 13% on $2,365.17. The result is $307.47.

[43] Although no Defendant's Claim was brought, not unusual in this court, Ms. Cowan seeks relief in the form of a refund of the Last Month's Rent Deposit (LMRD) and part of the August 2012 rent paid by post-dated cheque. E did not object to the attempt. It is agreed by the parties that on July 17, 2012 Mr. Wansbrough gave notice of intention to vacate August 31. It is also agreed the notice given cannot be effective before the last day of September. Ms. Cowan argues E went into possession during the second or third week of August by physically entering and by changing the lock or locks and therefore Mr. Wansbrough was under no obligation for rent after that time.

[44] The court finds E kept the post-dated rent cheque for August and appropriated the LMRD to apply to damages. On or about August 07 Mr. Wansbrough vacated completely except for a push mower. Within a day or two Mr. Murray came to the property and coincidentally met Mr. Wansbrough outside speaking with a neighbour. Mr. Wansbrough confirmed he had vacated, offered the keys and said he was thinking about having someone in to clean the carpets and clean, something that could be better done when the place was vacant. Mr. Murray declined the keys because he knew he would be having the locks changed and told Mr. Wansbrough not to have the carpets cleaned because E was planning to replace the carpet with the existing hardwood floor or laminate. A week later Mr. Murray had the locks changed because his tools were by then in the residence.

[45] The court finds having the carpeting cleaned crossed Mr. Wansbrough's mind but also finds, based on his history, he would not have done so. Further, it is a fantasy to think cleaning would restore the badly damaged carpeting. The court also finds the plan for E was to use the hardwood, a plan that was abandoned when the carpeting was stripped and exposed damage to the hardwood.

[46] The court finds the work done to the residence, exclusive of the structural renovations that cost about $6,000.00 or more when painting and carpeting are included, would have necessarily taken six to seven weeks. If Mr. Wansbrough insisted on exclusive

possession to the last day of August Wilton could not be listed for sale or rent until mid-October and he would have been responsible for damages equal to rent for about ½ of October. If he insisted on exclusive possession until the end of September he would have been responsible for damages equal to rent for all of October and ½ of November.

[47] E was amenable to re-entering as soon as Mr. Wansbrough vacated and Mr. Wansbrough was agreeable. It worked for the benefit of Mr. Wansbrough and there will be no refund of rent.

[48] Ms. Cowan claims Mr. Wansbrough is entitled to statutory interest on his LMRD. Mr. Wansbrough's evidence is that he did not know whether it had been paid to him. Mr. Ennis testified he did not have the bookwork but E's bookkeeper routinely paid it annually when she sent tenants the rent receipts each February, presumably for income tax purposes. The court finds the interest was paid.

[49] There will be judgment for Group E Investments Ltd for damages of $3,657.54, payable by Bill Wansbrough.

[50] Pre-judgment interest is payable on $3,657.54 at the Courts of Justice Act from October 01, 2012 to the date of judgment. The Clerk is asked to make that calculation and add it to the formal judgment.

[51] Turning to costs the court observes E sued for more than $20,000.00 representing almost all expense for Wilton, except possibly a roof, whether reasonably attributable to Mr. Wansbrough or not. It recovered less than 20% of that. Mr. Wansbrough was certainly justified in defending. In the absence of an Offer to Settle the court would allow E for costs the sum of $225.00 for entry fee, listing fee and preparation and delivery of pleadings.

[52] A bundle of sealed documents is now opened and is found to contain only one Offer to Settle. It is by the defendant and was served December 19, 2012. In it the defendant offered to pay $2,000.00 and drop its claims for August rent, the LMRD of

$1,050.00 and interest on the LMRD. It is not capable of affecting the disposition of costs because it fell short and because it, by its terms, expired before the commencement of trial.

J.D. Searle, D.J.

Released: July 30, 2013.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Copy and Paste from Table Style of Cause DELETE EXTRA LINE SP ACE IF APPLICABLE

REASONS FOR JUDGMENT

Judge

Released: [Click and Type Date]