Caledon Hills Realty Ltd. v Rosario, 2018 CanLII 3444 (ON SCSM)

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Claim No. SC-84/15
85/15D1

Superior Court of Justice
(Central West Region)
Orangeville Small Claims Court

Between

CALEDON HILLS REALTY LTD.

Plaintiff

and

WENDY ROSARIO and ARNEL ROSARIO

Defendants

And Between

WENDY ROSARIO and ARNEL ROSARIO

Plaintiffs by Defendants' Claim

and

CALEDON HILLS REALTY LTD.

Defendant by Defendants' Claim

Trial heard: July 11, September 5, 14, 29, 2017

Counsel for the plaintiff: A. Adams
Representative of the defendant: V. Chagnon

Reasons for Judgment

INTRODUCTION

1. Caledon Hills Realty Ltd. brings this Claim for damages totalling $3551.92 against former tenants of the building it owns at 70 Mill Street, Orangeville. The damages are comprised of unpaid rent for the last month of the tenancy, unpaid utility costs, costs of repairing unreasonable damage left behind and one month rent while the apartment was repaired and could not be rented.

2. The tenants, Wendy and Ariel Rosario, defend on the grounds that they paid the last month rent when they first rented a unit in the building and that they left the last-occupied unit in good condition. They admit liability for $148.14, their share of the utilities from December 18 to 31, 2014. They bring a Defendant's Claim for damages totalling $10,754.00 for direct expenses, loss of use of amenities, abatement of rent and punitive damages all based on alleged failure of the landlord to maintain the rental unit, plus a small contract claim.

3. There are preliminary issues concerning the jurisdiction of this court to hear these two claims, and I shall deal with those first.

JURISDICTION

The Claim

4. The main Claim is brought under sections 33 and 34 of the *Residential Tenancies Act,* [1] which impose responsibility on a tenant for reasonable cleanliness and repair of undue damage:

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 tent 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.

5. Section 89(1) provides one remedy for section 34 infractions:

89 A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex and the tenant is in possession of the rental unit.

6. Section 168(2) confers jurisdiction on the Landlord and Tenant Board:

168(2) The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

7. This grant of exclusive jurisdiction means that if the Board has jurisdiction over the application the Small Claims Court, and for that matter the entire Superior Court, does not. [2] There is no gap in jurisdiction however, in which no court or tribunal can entertain the application: either the Board has jurisdiction or the Court does, but not both.

8. The Board is granted jurisdiction over claims under section 34 by section 89 “if the tenant is in possession of the rental unit.

9. Therefore, the Landlord and Tenant Board cannot entertain an application under section 89 commenced after the tenant has vacated the rental unit. This Claim was filed May 14, 2015. The tenants vacated the apartment on December 31, 2014. Therefore on the date on which the Claim was filed the Board did not have jurisdiction to hear the case.

10. But what if the landlord could have brought an application before the Board while the tenant was in possession but failed to do so? Can the landlord then make a Claim in this Court? Some cases in this Court have held that if a landlord could have discovered the basis of the Claim through reasonable diligence, specifically through use of the right of inspection in section 27 of the *Residential Tenancies Act*, then the Claim could have and should have been brought by application to the Board: *Merlihan v. Hunter* [3]; *Athanassiades v. Lee* [4]; *Grewal v. Behling*. [5] In *Merlihan* the landlord was before the Board seeking early termination and could have added the claim for repair costs to that application if he had inspected and discovered the damage. In *Athanassiades* the very claim before the Court had been advanced before the Board and dealt with. In *Grewal* the landlord and the tenant had been before the Board on other issues, the landlord applied for a review of the Board’s decision and on that review made a claim for repair costs, all while the tenant was in possession. The Board would not consider the repair cost issue without a proper application which had not been brought. Those circumstances might well justify the results in each of those cases, but I decline to attach a general non-discoverability requirement to landlords’ claims for compensation in this Court.

11. In the first place, there is no language in the Act which imports such a requirement. In claims based on section 34, such a requirement overlooks the specific wording of the section. The responsibility of the tenant is to repair the damage. Damage does not automatically trigger a right to reimbursement by a section 89 application. Only if the tenant fails to repair the damage herself

can the landlord apply to the board. A landlord may apply for eviction of a tenant who has wilfully or negligently caused damage under section 62, but then the tenant has 20 or more days to effect or pay for the repair. (Section 63 provides another avenue when the damage was wilful, and gives no opportunity to repair.) A landlord who inspects after receiving notice of termination and discovers damage cannot succeed on an application under section 89 without waiting a reasonable time for the tenant to make the necessary repair herself. Until then the landlord hasn't incurred any cost and isn't going to incur any cost. Almost always under those circumstances, (i.e. a short time before termination of the tenancy), a reasonable time within which to effect the repairs will be prior to the tenant vacating. And once she has vacated without making the repair, the jurisdiction of the Board has ended and only the Court may entertain the Claim. Imposing a non-discoverability requirement on landlords for repair cost claims would require this Court to determine whether it would have been possible and reasonable to inspect, whether such an inspection would have revealed the damage, what would have been a reasonable period to wait for the tenant to make the necessary repair and whether an application under section 89 could then have been commenced before the tenant vacated the rental unit. That is a lot of fine retrospective determinations upon which to extinguish absolutely a landlord's right to compensation. A positive finding on the last question would lead to a ruling that the courts have no jurisdiction because the Board used to have jurisdiction, which would mean that no tribunal had jurisdiction once the tenant gave up possession. Such a situation cannot be created by the courts. Some tribunal must have jurisdiction over the claim at every point unless the legislature says otherwise.

12. The cases cited above hold that a landlord should use its right of inspection under section 27(1) of the Act once notice of termination is received.

27(1) A landlord may enter a rental unit in accordance with written notice given to the tenant at least 24 hours before the time of entry under the following circumstances:

1. . . .

2. . . .

3. . . .

4. To carry out an inspection of the rental unit, if,

1. the inspection is for the purpose of determining whether or not the rental unit is in a good state of repair and fit for habitation and complies with health, safety, housing and maintenance standards, consistent with the landlord's obligations under subsection 20(1) or section 161, and

2. it is reasonable to carry out the inspection.

13. Note that a landlord is only entitled to inspect to determine whether the condition of the unit is consistent with the landlord's section 20 duty to maintain the unit and NOT to determine whether the tenant has caused damage. A landlord who uses section 27(1) to enter when his real purpose is to discover whether the tenant has caused any undue damage is acting disingenuously and abusing the right of inspection. Yet that is exactly what the cases cited above encourage, indeed mandate.

14. Those cases betray an underlying notion that landlords who wait until the tenant has vacated to bring a Claim in the Small Claims Court for damage repair costs are somehow abusing the system and gaining an advantage. I don't see it. These landlords are waiting longer than is perhaps necessary to receive their compensation, and they are required to proceed in the more expensive, time-consuming, formal courts, but what is the harm in that to anyone except themselves? I don't see any iniquity in bringing a claim in the Small Claims Court when you could have brought it, had you proceeded with all deliberate speed and given no quarter, before the Landlord and Tenant Board. Adding a requirement of non-discoverability to landlords court claims under section 34 would only encourage premature, unnecessary and hurried applications to the Board.

15. Even a landlord who has incurred repair costs and demanded reimbursement from a tenant, but who has been content to wait for that reimbursement until the tenant has vacated and all hope is

lost of receiving it need not be penalized for waiting. The purpose behind the creation of the Board is in part to provide a low-burden forum for adjudication of landlord-tenant disputes. Considerably more access is provided to that forum for tenants than for landlords. A landlord whose patience costs him access to the Board has lost something, not gained some advantage.

16. Section 33 claims for cleaning costs aren't covered by section 89 so no jurisdiction is given to the Board over such claims and they may only be brought in the Court. That seems to me to be a recognition by the legislature that such claims could only arise when the tenant vacates without having complied with her responsibilities under s. 33. There is much to be said for hearing claims under sections 33 and 34 together.

17. Sections 87, 89 and 90 are the sections permitting applications to the Board by landlords for compensation and all of them require that the tenant be in possession when the application is made. There is no language in the Act which would support the imposition of a requirement that a landlord make an application to the Board before the tenant vacates if he could possibly do so. The legislative intention appears to be to cut off landlord access to the Board once the tenant is out and to leave the landlord to his remedies in the courts. The Board is given jurisdiction over landlord applications for compensation only if the application is made while the tenant is in possession. That doesn't mean that landlords have to invoke that jurisdiction. I do not see any public policy reason to prevent landlords who are aware during the tenancy of grounds for an application to the Board from waiting until the tenant has vacated and turning to the courts instead. If landlords want to wait longer for their remedy and use the more formal, expensive, time consuming and slower court process, let them. There are no grounds to believe that landlords are more likely to be successful in the courts than before the Board.

18. Some cases cite *Efrach v. Cherishome Living* [6] as authority for the proposition that if an application could have been made to the Board, the Board has exclusive jurisdiction, and that may be part of the genesis of the line of reasoning cited above. But Horkins, J. was dealing there with a claim alleging negligence on the part of the

landlord for leaving a next-door apartment insecure resulting in the theft of the tenants' property. Following *Mackie v. Toronto (City)* [7] she ruled that, regardless of the way the claim was framed, the substance of the claim was a matter between landlord and tenant, specifically the landlord's duty to maintain, and so in that sense the matter could have been taken to the Board under section 29 and the Board's jurisdiction ousted that of the court. The question of whether, if the landlord could have discovered tenant damage and commenced an application to the Board before the tenant gave up possession, the court lacks jurisdiction did not arise. It couldn't arise as the case involved a tenant application.

19. In the analysis which follows I find that the plaintiff entered the rental unit in mid to late December and might have seen the conditions which gave rise to the cleaning and repair cost claims. I also find that he notified the plaintiff that at least cleaning was necessary. In those circumstances, even if he had noticed the damage, the plaintiff would have had no cause of action until the defendant vacated without completing that cleaning or repairing such damage. But even if he could have started an application to the Board before the tenants' possession ended there is nothing in the Act and no public policy reason to require him to do so and to extinguish his claim if he doesn't. Therefore the claims under sections 33 and 34, including the claim for lost rent resulting from the need for cleaning and repairs, are within the jurisdiction of this Court to hear and determine.

20. Similar considerations apply to the claim for unpaid rent. There is no evidence that the plaintiff thought during December that the rent for that month remained unpaid. But even if he did, it would not be in the interests of justice to penalize a landlord who waited until the tenant vacated without paying the last month rent to bring an action. We would be punishing in some cases the more reasonable landlords in the province who are understanding about late payment of rent and are satisfied if they get it at some point during the month or even later. Again we would have to assess whether a reasonable time for the landlord to wait for the rent expired before the tenant vacated the premises, and we would

deprive of any remedy the landlord who was more than reasonable.

21. Therefore, in my opinion, a landlord may file a Claim in this Court if the tenant is no longer in possession of the rental premises, regardless of when the grounds for the Claim were or could have been discovered, with few exceptions. Of course, if the substance of the Claim has already been the subject of an application to the Board the matter cannot be re-litigated in this Court. And if the grounds for the Claim were known to the landlord and could have been included in a prior application to the Board by the landlord, this Court would have to examine whether the landlord is abusing the Court's process by splitting its claims [8] and dragging the tenant through two processes instead of one, or whether there is a sensible reason for proceeding in that manner, for example the discovery that damage is more extensive than first believed.

The Defendants' Claim

22. All of the defendants' claims except one invoke the landlord's duty to maintain the premises in section 20 of the Act. Whether they claim damages for loss of amenities, abatement of rent, reimbursement of expenses incurred or compensation for destroyed property they are all based on the allege failure of the landlord to maintain the building as required by section 20.

23. The jurisdiction of the Board over these tenants' claims is defined by section 29:

1. 29(1) A tenant or former tenant of a rental unit may apply to the Board for any of the following orders:

1. An order determining that the landlord has breached an obligation under subsection 20(1) or section 161.

2. . . .

2. 29(2) No application may be made under subsection (1) more than one year after the day the alleged conduct giving rise to the application occurred.

24. Here there is no qualification upon the jurisdiction of the Board as there is in sections 87, 89 and 90; tenants and former tenants may apply. There is a limitation period imposed on the tenant/applicant but that is a different thing. For instance it applies even while the tenant remains in possession. It is designed to prevent tenants from laying in the weeds until such time as they're in default themselves, and then bringing up old complaints with which they were content to live and about which the landlord may have had no notice. The limitation period does not limit the jurisdiction of the Board, it provides, like all limitation periods, a defence to the application.

25. *Mackie* and *Efrach*, along with *Latestu* make clear that the Small Claims Court has no jurisdiction over tenants' or former tenants' claims under section 29(1). Therefore I cannot decide any of the claims brought by the Rosarios except one.

26. In paragraph 13 of the Defendants' Claim they allege that the landlord asked them to clean out the basement of the building and remove property left by former tenants. This is a contract claim independent of the relationship of landlord and tenant, and one over which the Landlord and Tenant Board is not given jurisdiction. I will consider that part of the Defendants' Claim.

27. I will now deal with the evidence on the original Claim and that part of the Defendants' Claim over which I have jurisdiction.

THE EVIDENCE

The Claim

28. The evidence for the plaintiff was given entirely by Clark Adams, the owner and principle of Caledon Hills Realty Ltd. He recounted that Wendy Rosario took over Apt. 4 in the building from an earlier tenant, Evangeline Tabsing, with whom she'd been staying for a while, on April 1, 2009. In the fall of 2011, Mrs. Rosario requested to move downstairs to Apt. 2 in the same building, so that her children would have easier access to the outdoors. Mr. Adams believes that Mrs. Rosario knew well the vacating tenant in Apt. 2, had been inside the unit and was familiar with its condition. He agreed to the request and Mrs. Rosario, her husband Arnel

Rosario who by this point had joined her in Canada, and their children moved into Apt. 2 on November 1, 2011. Mr. Adams says that he received no information from her about any problems with the condition of the apartment at that time. She signed a "General Terms of Renting" effective November 1, Exhibit 1, which stipulated that a one year lease must be signed before the tenant moves in. None was ever signed. Attached to that document was an application containing information about the proposed occupants of the unit, and a "Notice to Applicant" which stated that keys to the apartment will not be released to the tenant until payment of first and last months' rent had been received. The "General Terms of Renting" says the same thing. Rent payments were to be delivered to the office of Evans and Adams, Barristers and Solicitors, on Broadway Ave. In Orangeville. Mr. Adams was a retired member of that firm. The rent was the same as for Apt. 4, $850.00 per month.

29. Mr. Adams testified that he received notice from Mrs. Rosario on November 6, 2014 that the family would vacate the apartment on December 31, 2014. While this notice is, under the terms of the Residential Tenancies Act, six days late, Mr. Adams did not consider that a material defect and accepted the notice for December 31. The informal notice, Exhibit 2, concluded: "We are very thankful to you."

30. Mr. Adams says that he then advertised the apartment for rent in two local papers and entered once to show it to a prospective tenant in December. However, upon entering the back porch, he found it to be so cluttered with furniture and other personal effects that he and the prospect did not even enter the unit itself. He understood that the Rosarios would vacate by December 18 but says that he did not enter Apt. 2 until December 30 to clean it up. He described his reaction to its condition as "appalled" and "disgusted." He produced photographs which he says he took on December 31.

31. Exhibit 3 is three photographs which show extensive scratching, which has been filled, on an interior door, the precise location of he could not specify; the bathroom cabinet with a spill

and splashes on its shelf; and the toilet and sink in that bathroom which appears to need some cleaning.

32. Exhibit 4 is three photographs of the kitchen. One shows the open oven with what Mr. Adams called a broiling pan inside. The item is actually a cookie sheet, and is covered in baked on residue. The other two show the interior of the cabinet under the kitchen sink manifestly in need of cleaning. Exhibit 5 shows a living room wall with a dark material on the lower part, the bathtub with orange staining and some dark, mildew-like material in the joint between the tub and the wall, and a bedroom with a stuffed tiger on the windowsill. Exhibit 6 is photographs of one wall of the living room showing wallpaper peeling off above a baseboard heater, a wall in the kitchen with what was described as “MacTac” on it and the bathtub with a dark orange stain beneath the faucet. Exhibit 7 shows what is said to be a hole in a wall in one of the bedrooms which has been filled, some clothing items in the closet and on the floor of a bedroom and the kitchen wall with the “MacTac.” Exhibit 8 is photographs of the porch leading to unit 2 with a set of shelves, some bags of garbage and some other items strewn about; some items, mostly toys, on the floor in a bedroom; and the wall and floor behind the stove. Exhibit 9 is three photographs showing cleaning products and other items on the porch and on shelves under the stairs leading to an upstairs unit. Exhibit 10 is photographs of the floor under the refrigerator, the bathtub with the extensive orange staining at the faucet end and some material left on the living room floor.

33. Mr. Adams testified that he filled the hole in the wall in Exhibit 7 which he estimated to be about eight by ten inches, along with 86 other holes in that and other walls, apparently made by nails, screws or tacks. He and his wife did all the necessary cleaning themselves except for the refrigerator and stove which he alone cleaned. They also removed the “MacTac” from the kitchen wall and painted the entire apartment. As I understood it their labour totalled 34 hours which he is claiming at $25 per hour. In addition, Mr. Adams rented a floor sander, Exhibit 11, to refinish the living room floor which he says had overspray from spray painting of the walls which he believes the Rosarios did. The rental cost $125.14 and he claimed his own time, 5 hours at $25 per hour.

34. Mr. Adams does not know when or by whom the “MacTac” was applied to the kitchen walls. He does not recall when he last refinished any of the floors in unit 2, though he has done it since he bought the building 40 years ago. He does not know what was the condition of Apt. 2 when the Rosarios moved into it. The prior tenant had occupied that unit for a few years. He does not know when he last painted Apt. 2. He painted it when necessary due to tenants leaving “a mess.” As for the paint spray he says was on the living room floor, he could only say that it looked like spray paint. He has no idea when the Rosarios spray painted the wall. As he put it in cross-examination: “They moved in, they did what they wanted.” He also stated that the Rosarios did not bring up the need for any painting or other work in Apartment 2 before they could move in. Mr. Adams provided zero evidence as to when he might last have been inside Apt. 2.

35. Mr. Adams testified that he made four trips to the dump with a trailer containing all the items he found in the apartment and on the porch and filed Exhibit 12. He claimed $28.25 as the fee paid to dump each load and 7 hours of his own time at $25 per hour to transport the loads.

36. The plaintiff filed an Amended Claim on June 16, 2016 adding a claim for the cost of a tub surround which Mr. Adams believed was required to cover the stained area on the wall of the bathtub, $212.44, Exhibit 13, his time installing that, 3 hours at $25 per hour and cleaning and other supplies, $26.20.

37. All this work, Mr. Adams says, took until the end of January to complete so he lost a month of rent for January.

38. Mr. Adams insisted that all the left-behind items he photographed were in the apartment or on the porch on December 31 and that he took them all to the dump.

39. Mr. Adams testified that Mrs. Rosario claimed to have paid the last month’s rent when she took over Apartment 4, but “I went over my books with them and there was no proof they had paid.” Also, Mrs. Rosario could not produce a receipt for the payment. He confirmed that normally all the rent is paid to a secretary at the

law firm who keeps track of the payments. He did not produce any records kept by that person. No one asked him, and he did not comment about whether or not the records contained a notation of the first month's rent in Apt. 4 having been paid by Mrs. Rosario. He stated that he generally insists on first and last month's rent before handing out keys but occasionally waives that requirement.
40. Mr. Adams told the court that he did not know how old the kitchen floor was. He said that he was able to clean the bathtub but not the wall shown in Exhibits 5 and 10 and so had to purchase a new surround. He described what was on the wall as "like soap scum, brown stuff." When he was in the apartment to replace a part of the bathroom floor he noticed that the tub was stained orange, but only about half as bad as at the end of the tenancy. He considered that: "their problem. Why should I clean it up?"

41. Mr. Adams agreed that he normally would have a notice sent to any tenant who had failed to pay their rent on time. It seems to be undisputed that no notice was sent to the Rosarios about the December, 2014 rent before they vacated the apartment.

42. I will now recount the evidence called by the defendants on the issues in the main Claim. I will deal with the counterclaim later in this judgment.

43. Both Mr. and Mrs. Rosario testified. Mrs. Rosario stated that before she assumed Apt. 4 from Mrs. Tabsing, the two of them met there with Mr. Adams. She says that she gave Mr. Adams $1700.00 cash for her first and last months' rent. She says that when she moved the family to Apt. 2 she paid her last month's rent for Apt. 4 and carried over her last month's rent deposit to Apt. 2. She testified that when she paid Mr. Adams in cash he undertook to bring or send her a receipt but she never received one.

44. Both the Rosarios testified that they never used the oven. Mrs. Rosario said that she doesn't know how to cook and can only stir fry and boil water for rice, both of which she did on the stovetop. Mr. Rosario said the same thing. The oven, they said, and Mr. Adams confirmed, was replaced during their tenancy.

45. Mrs. Rosario said that her family moved into their new home on December 12 or 14 and that her husband was responsible for most or all of the moving of their property out of Apt. 2 over the following weeks. She was somewhat ill at the time. On December 22 her husband told her that he was almost done moving their effects. On December 26 Mr. Adams called her and said that there was a lot of garbage and junk in the unit and she said that she would have the unit cleaned up by December 31. She went to the apartment on December 30 and found Mr. Adams there. She doesn't know what he was doing. She cleaned on December 30 and 31, including the refrigerator and stove and the bathtub as well as she could, and then toured the apartment with Mr. Adams. According to her, Mr. Adams did not raise any concerns about the condition of the unit except the rusted baseboard heater in the master bedroom and mould in the bathroom. She says that Mr. Adam asked her why the oven was clean and she explained to him that she didn't know how to cook and didn't use the oven. She stated that she gave him the keys to the apartment on December 31. Mrs. Rosario says that she and her husband removed everything from the apartment that belonged to them. Anything they left behind was not theirs, having been left by some prior tenant of one of the units.

46. Exhibit 17 and pages 7 to 9 of Exhibit 18 are a series of photographs of various items, and piles of items, in the new home of the Rosarios. What they show, to cut to the chase, is that practically every item claimed by Mr. Adams to have been left behind at the house and photographed by him, with the exception of a barbecue and a number of things left on the porch which the Rosarios say do not belong to them, ended up in the Rosarios' new home. The photographs were taken by the Rosarios after the plaintiff's photographs were given to them. Mrs. Rosario stated that all the items in Exhibits 17 and 18 were moved to their new home by either December 22 or 31.

47. Mrs. Rosario testified that the scratched door in Exhibit 3 is actually the door of Apt. 4. She says that the front and back doors of Apt. 2 are shown in Exhibits 8 and 9 and are not the same as the door in Exhibit 3. She says that there were no other doors in Apt. 2

like the one in Exhibit 3. She said that the floor in Exhibit 8, said to be the floor behind the range is not the kitchen floor in Apt. 2, which was linoleum while the floor in Exhibit 8 appears to her to be something else. She added that the electrical cable to her range didn't come out of the floor as the one in Exhibit 8 appears to do. She disputed a number of the other pictures as well as being from some other apartment, because of colours or finishes.

48. Mrs. Rosario stated that when they moved in she and her husband thoroughly cleaned Apt. 2 and painted it. The only things she couldn't completely clean were the bathtub and some of the mould and the rusting baseboard heater in the master bedroom. She said that the apartment was in such bad condition on November 1 that she called Mr. Adams and he came over. He agreed it had to be cleaned up and gave them $100 for paint. She said that the family stayed with the new tenant in Apt. 2 for a week while the cleaning was going on, and paid $200 for that accommodation.

49. Arnel Rosario testified that he came to Canada in 2010 and occupied Apt. 4 with his wife and children. He was working two jobs. He stated that when the family went to move into Apt. 2 it was such a mess that they called Mr. Adams and he came over. He said it was their problem to clean up the mess since they were going to live there, but he gave them $100 for paint, which covered the cost of the primer. They stayed in Apt. 4 for a week until Apt. 2 was habitable. They paid the new tenant of Apt. 4 $200 for that favour.

50. Mr. Rosario stated that his wife cleaned the apartment regularly and that he did the cooking. He would prepare lunch and dinner before going to work, and his wife only had to cook some rice to go with it. He only used the stovetop as he didn't know how to cook anything in the oven.

51. Mr. Rosario testified that before the family took up occupancy of their new home he moved a first load of their property on December 13 with the help of Scott Glassford and his trailer. They first slept in the new home on December 16. He took another big load out of Apt. 2 on December 17 and a third on December 19, after which only small things remained to be moved. He also went by the apartment every night after work and took out what he

could in his car. He took his last load of property as well as all the garbage on December 22.
52. He says that he found Mr. Adams inside the apartment on two occasions in December, the 17th and the 21st. Mr. Adams told him he was just checking the place. He told Mr. Adams that he was not done moving yet. He says that Mr. Adams did not mention any unpaid rent.

53. Mr. Rosario stated that the bags of garbage in one of the photographs in Exhibit 8 are his, and that they were removed by December 22. He told the court that he took the photographs in Exhibits 17 and 18 referred to above.

54. Looking at Exhibit 3, the scratched door, Mr. Rosario stated that they had only one door of this type in Apt. 2, the front door leading to the porch, and that this scratched door is not that door. (It is obvious that they are not the same door, the entrance door has a deadbolt above the latch, the scratched door does not.) He does not think that the wall with the filled hole in Exhibit 7 is a wall in Apt. 2 because it does not appear to be white. He does not believe that the oven in Exhibit 4 is their oven. He stated that the "MacTac" shown in some of the pictures was there when he and his family moved in.

55. Evangeline Tabsing testified that Mrs. Rosario took over Apt. 4 when she vacated it, that Mr. Adams came to the apartment to talk about that and that Mrs. Rosario gave money to Mr. Adams. She does not know how much money nor can she remember any discussion about how many months were covered by the payment. She did use her own rent deposit to pay for her own last month.

56. Scott Glassford testified that he owns a pickup truck and a 15 foot trailer and that he has provided a lot of assistance to residents of 70 Mill Street over the years, including the Rosarios. He stated that on one occasion he assisted Mrs. Rosario by removing some tires from the basement storage area. Later he assisted the family with their move to their new home taking an estimated two full loads. He and Mr. Rosario carried everything. After his assistance ended there were only a few smaller things remaining to be moved which would fit in a car.

57. Mr. Adams was re-called in Reply, or in defence of the Defendant's Claim. He denied meeting with either of the Rosarios on December 31 at the apartment. He confirmed that he was there, saw the mess and took the pictures which have been referred to. He insisted that all his pictures were of Apt. 2. Asked to explain how the property he photographed could now be in the Rosarios' home he speculated that since he removed all those things on December 31 and left them in a trailer in the parking lot, and first took them to the dump or recycling centre on January 21, the Rosarios could have retrieved their property during that three week period from the trailer. He confirmed that he sanded the floor in the living room because of paint; there was no water damage on it. He denied meeting Mr. Rosario at the building on any day in December, reiterating that he was there once with a prospective tenant, who declined the place upon entering the porch. His statement was that he did not recall seeing Wendy or Arnel Rosario at the house in December.

58. In cross-examination he did not agree that he received the keys from Mrs. Rosario on December 31 stating that he doesn't think he ever got the keys. He confirmed that it was three weeks after loading the trailer that he went to the dump, on January 21, and that he took all the junk left behind in the apartment and outside. He was referred to Exhibit 12, the first page of which is a Visa statement for January, 2015 on which he has highlighted three charges to GFL Environmental for $28 and some cents each on January 2. Asked if these are the trips to the dump on which that part of his claim is based he answered: "I guess so." In re-examination he said that his last trip to the dump was on January 21.

59. Mr. Adams confirmed that the bathroom, at the time of his visit to fix the floor, was in the same state as in his photographs. He said that he didn't fix the bathtub at that time because the floor was his problem, the bathtub was not his responsibility, its condition was caused by Mrs. Rosario's bad housekeeping. He once again stated that he didn't know which door in Apt. 2 bore the scratches he photographed.

60. It is common ground that at some point during her tenancy of Apt. 2 Mrs. Rosario became the superintendent of the building. The arrangement was that her rent would be reduced by $100 and she would do general cleaning and maintenance of the common areas and supervise the place. She ceased to perform these functions in November, 2014.

61. The first factual issue is whether or not Mrs. Rosario paid first and last months' rent when she took over Apt. 4 and then carried over the deposit to Apt. 2. I find that she did. Mr. Adams gave no evidence about whether or not he met with Mrs. Rosario and Ms. Tabsing as they recounted, and no evidence about any payments by Mrs. Rosario when she took over Apt. 4, despite it having been pleaded that she paid first and last months' rent at that time. He relies entirely on his claim that: "I went over my books with them and there was no proof they had paid" and the fact that the defendants cannot produce a receipt. They could only produce a receipt if he gave them one. He did not see fit to produce his books so that we might all see what he claims they show. He did not even mention what else was or was not recorded in his books: the payment of the first month's rent for Apt. 4, for example, the waiving of the last month's rent deposit, for another example. His own material given to tenants states twice that keys will not be provided until first and last months' rent is paid, and while he might occasionally waive that requirement he did not testify to any recollection of having done so in this case. To use the absence of a record of an event as evidence that the event did not occur one produces the record along with evidence about the production of the record. While it isn't always necessary in this court to comply with all the requirements of s. 35 of the *Evidence Act* [9] that section provides a good and logical template of the things it is necessary to demonstrate in order to have the absence of a record of an event accepted as evidence of the non-occurrence of the event. Claiming that your written records demonstrate some essential fact known to be in dispute without producing those records when they are within your power to produce invites an inference that such records as exist do not substantially support your position. And the bald claim that the records contain no proof

that the defendants had paid, without any evidence about who keeps the records and how, what records exist or what records were examined leaves open the corollary that the records contain no proof that the defendants hadn't paid. All we've been told is that rent payments are normally received by a secretary at the law office. There is no evidence about what books and records are kept or how. The evidence of Mrs. Rosario, on the other hand is clear, straightforward, logical, consistent with the lease arrangement and supported in part by Ms. Tabsing and I find it to be true. The evidence I accept leaves open the distinct possibility that because the payment was made in an unusual way it never got recorded in whatever records were kept. But that is not a necessary finding, as there is practically no evidence that Mrs. Rosario did not pay the last month's rent deposit.

62. The next evidentiary issue concerns the personal property and garbage alleged by Mr. Adams to have been left behind by the Rosarios. I accept the undisputed evidence of the Rosarios about the items which did not belong to them which they left behind. And every significant item owned by them ended up in their new home. That too is undisputed. What I have on the one hand is the version of the Rosarios that they moved all of their things over a couple of weeks before their lease ran out against the admitted speculation of Mr. Adams that they removed their property from the trailer in which he'd placed it outside. His speculation was based on his claim that the trailer sat there for three weeks with their property in it before he made four trips to the dump. He told the court in his reply testimony that he loaded all the junk on to the trailer on January 21, that that was the date of his first trip to the dump. Then he "guessed so" that he'd actually made three trips to the dump on January 2. Clearly he doesn't know when he transported the defendants' property to the dump or how we can square the presence of the property in their home with his claim that it was all in Apt. 2 on December 31. I don't find his purported recollection of these dates at all reliable.

63. As for other potentially critical dates, Mr. Adams stated that he'd only been to the building once in December before the 31st, to show Apt. 2 to a prospective tenant. He said that he did not recall seeing Mr. or Mrs. Rosario at the property during December. He

said that he doesn't think that he ever got the keys back from Mrs. Rosario. This is to be compared to the positive statements of the Rosarios about the dates on which they saw Mr. Adams at the property and the dates on which they removed their property. There is no evidence that Mr. Adams ever requested the keys to Apt. 2 after December 31 which supports the evidence of Mrs. Rosario that she handed them over on that date. Mrs. Rosario testified that Mr. Adams called her on December 26 to tell her to clean up the apartment. The defendants were not challenged in cross-examination on their narratives of these events. I also consider the fact that Mr. Adams chose not to call a witness who was not only available but present in the courtroom, his wife, who he says was involved in the cleanup of Apt. 2 and might be able to shed light on the issue of dates. Combined with the undisputed evidence that all of the property of the Rosarios has ended up in their home I am persuaded that the Rosarios removed all their property before the termination of their tenancy on December 31. I find that the photographs in Exhibits 7 to 10 were taken earlier in December when, according to the evidence of Mr. Rosario which I accept, Mr. Adams was at Apt. 2. I accept Mrs. Rosario's evidence that Mr. Adams called her about the condition of the apartment, which supports the inference that he'd seen the place and was not happy about its condition. It would have been natural to take some pictures at that point.

64. The final evidentiary issue concerns the dispute over whether the oven, Exhibit 4, the door with the scratches, Exhibit 3, and the wall with the patched hole in it, Exhibit 4, are actually from Apt. 2. There is no evidence before me about whether Mr. Adams was in any of the other apartments in the building, in which he might have photographed these scenes, during December, 2014. The photographs are not dated, nor are they presented in a manner which would demonstrate that they were taken in a particular order on a certain day. I understood, perhaps assumed, that the photographs were taken with a smartphone. If so, information about the date and time at which they were shot would be readily available. None of the three disputed pictures contains any context demonstrating exactly where they were taken. Mr. Adams was entirely unable to specify which door in Apt. 2 was the scratched door. Mr. Adams was not cross-examined about this issue on which

the defendants obviously intended to contradict him. The Rosarios were just as general in their denials, though it must be allowed that they are no longer in a position to provide pictures of all the doors in Apt. 2, or the area behind the stove or all the walls, and they were not cross-examined on this issue either. Mrs. Rosario did say that the oven in Apt. 2 connected to an outlet on the wall and that the scratched door is the door to Apt. 4. The evidence on this subject is in a deplorable state, on both sides of the issue, but for the purpose of what follows I will assume that the disputed photographs described above were taken in Apt. 2. There were other positions taken by the Rosarios about whether the walls or floors were actually those in Apt. 2 but those are not material.

The Defendants' Claim

65. Mr. Adams was asked about the basement cleanup in cross examination. The basement storage area was so full of junk that one could barely move around down there and his insurer insisted that it be cleaned out. He said that he rented a garbage bin and told Mrs. Rosario to get her things out of there. She responded that none of the junk was hers. Mr. Adams says that he cleaned it up himself. At first he said, when asked if he asked Mrs. Rosario to clean it up: "Yeah, she was the superintendent. I asked her if it was her stuff and to get it out." Later he stated that when Mrs. Rosario said none of the junk was her he cleaned it out himself with the help of his grandchildren.

66. Mrs. Rosario testified that Mr. Adams in June, 2013 told her to clean the basement out and put all the junk in a dumpster he supplied. It took her about a month to complete the job. She told him that she couldn't do it all herself and he told her to ask somebody to help her and he would pay for that. She says that Scott Glassford came to help, carried out four tires and disposed of them himself. She paid him at some point $150 for his expenses. It wasn't clear to me whether that included compensation for his help with the move in December, 2014 but it was clear that he didn't request payment. She never notified Mr. Adams about that payment. She hired a couple of young boys who lived upstairs to help her and paid them $50 each. Mr. Glassford confirmed that he assisted with the tires and described how difficult that was. Mrs.

Rosario stated that she did not expect to be paid for her effort to clean the basement because she was the superintendent at that time. She only expected to be reimbursed for what she paid to the two boys. She did not submit a bill to Mr. Adams for that. Mr. Rosario testified that he worked on the basement clear-out, that they paid Scott Glassford $100 and the two boys $50 each for their help. He said that he expected to be compensated for his work. He earlier stated that Scott Glassford with his truck and trailer helped with the cleaning out of Apt. 2 when they first moved in.

67. On this issue I prefer the evidence of Mrs. Rosario. Mr. Adams purports that he did the whole job with his grandchildren, but I believe Mr. Glassford when he says that he removed the tires. I don't buy Mr. Adams' version in which he asked Mrs. Rosario to do the cleanup because she was the superintendant and then did it himself because she said none of the junk was hers. That does not ring true. I find that Mr. Adams agreed to pay the people Mrs. Rosario hired. She did not hire Mr. Glassford; he helped her out of the goodness of his heart. She may well have given him money, but he'd done a lot for this family and that gratuitous payment presumably was to cover his expenses for everything. He didn't mention getting paid, and she didn't specify when she paid him. She did hire the two boys and I accept that she paid them $50 each.

68. Those issues having been decided, I proceed to an analysis of the legal effect of the evidence.

ANALYSIS

69. Given my finding that Mrs. Rosario paid the last month's rent deposit, the claim for the rent for December, 2014 must fail.

70. Given my finding that the Rosarios removed all the property that belonged to them from Apt. 2 on or before December 31 the claim for the expense of transporting and disposing of that property must fail. As discussed above, the property which was disposed of by Mr. Adams did not belong to the Rosarios and so they are not liable for the costs of disposal.

71. That leaves the cost of repairs, cleaning and painting and the lost rent for January, 2015 while that work was undertaken.

72. The *Residential Tenancies Act* imposes limited responsibilities on tenants and provides a remedy for breach of those responsibilities:

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 tent 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.

73. The first thing to be noted about these sections is that a tenant is only liable for undue damage. Ordinary wear and tear and minor damage caused by ordinary, reasonable use of the premises is not undue damage. I have previously held [10] that hanging pictures and posters and other decorations on walls is not undue damage. Nor is wear to the floor and wall finishes caused by the traffic of occupants. A tenant is not required to leave the unit in the same condition as it was in at the start of the tenancy. A tenant is entitled to live in and use the unit and some deterioration is inevitable, expected and permitted.

74. The second feature of the cited sections of the Act is that only undue damage wilfully or negligently caused by the tenant, other occupants or invitees of the tenant is actionable.

75. With that in mind, and considering the undisputed evidence about the lack of inspection of Apt. 2 between tenants, or ever, the position taken by Mr. Adams concerning his cleaning and repair costs is, frankly, outrageous. Mr. Adams has no idea when he was last in Apt. 2. He swears that he had no idea what was the condition of Apt. 2 when the defendants moved in. The prior tenant was there for some years, he has no recollection how many. He considered the condition of Apt. 2 when the defendants moved in to be their problem. He didn't look and he didn't care. He now brings this claim on the premise that the condition of Apt. 2 as of December 31 is entirely the responsibility of the defendants, the last tenants. He offers no evidence that any of the defects about

which he complains were not present when the defendants moved in. He doesn't know. Yet he wants them to pay for removal of some "MacTac" on the kitchen wall which has been there for no-one-knows-how-long. He claims for the cost of painting the kitchen cupboards though he stated no reason why painting was necessary or when it was last done. He wants them to pay for filling 86 small holes and scratches on a door which were put there by an unknown number of successive tenants. He wants them to pay to paint the place when he can't even hazard a guess as to when he last painted it. He blames them for some paint on the living room floor which he says necessitated the rental and use of a floor sander when he has no idea how long that paint has been on that floor and stated no reason for his decision to sand it. He was unable to clean the bathtub walls but argues that the defendants should have been able to clean off some staining of unknown age. He complains about the condition of the floor under the appliances in the kitchen and the cabinet under the sink but could specify no point in time when he cleaned or even inspected that floor or cabinet. It seems entirely likely to me that the Rosarios left the apartment in a condition very similar to that in which they found it.

76. A slightly different case might be made concerning the hole in the wall and the oven and refrigerator. The defendants deny that there was any hole in any wall in Apt. 2. Assuming that there was one, and Mr. Adams filled it, we still don't know who caused it. The thing might speak for itself if Mr. Adams had conducted an inspection at any point in history and could point to date when the hole did not exist. But he did not. I don't know where on the wall this alleged hole was, or whether it went all the way through the wall or only part way or how noticeable it might have been to a tenant. I've only been shown how it looked when patched. It has not been proven that the defendants caused that hole.

77. The oven, according to the defendants, was replaced while they occupied Apt. 2. Assuming that it contained a cookie sheet with baked-on residue, since we have no evidence about whose cookie sheet that was, it can be thrown away. The cleaning of the oven and refrigerator by the landlord would be necessary whenever a tenant vacated. Only if the those appliances were especially dirty would it

violate the responsibility of the tenant for ordinary cleanliness. I cannot tell from Exhibit 4 how bad the oven is. I was not told what measures were required to clean the appliances. If they were only the measures which any responsible landlord would take between tenants the tenant is not liable. The plaintiff has not proven that anything other than routine cleaning of the oven and refrigerator was required.

78. Mr. Adams should consider himself lucky that he got away with not cleaning the apartment before the defendants moved in and should not be surprised that the apartment needed extensive cleaning and painting when he finally entered it.

79. I also find that 86 small nail or tack holes in the walls is not undue damage. The apartment would have had to be painted anyway after an unknown number of years, (at least 5 on the evidence) and filling the holes doesn't add anything significant to that job. General cleaning is always required by a landlord before a new tenant moves in, including cleaning of the bathroom and the oven. If the alleged hole in the bedroom wall had been shown to have been caused by the defendants the deficiencies in the evidence about it cited above would have left me unable to determine that the additional effort and cost of filling his hole in a wall about to be painted anyway was significant.

80. Any reasonable landlord ought to anticipate and must accept a brief hiatus between tenants. Unless the landlord can get access to the unit to begin the necessary cleaning and decorating before the tenancy terminates, and tenants are under no obligation to permit access for that purpose, that work will have to be done after termination. If, as is usually the case, a tenancy terminates on the last day of the month, the cleaning will have to be done in the first few days of the next month. Most tenancies start on the first day of the month, so it is entirely to be expected that a new tenant will not be in place until the first of the next month, even if the unit is ready for occupancy by the 2nd or 3rd of the month. Of course it may sometimes be possible to have a tenant start on a date other than the first and shorten the vacancy period. But whether or not that happens is not the responsibility of the vacating tenant unless it can be shown that the unit would have been rented before the

first of the following month but for the breach of section 33 or 34 by that tenant. In that connection I also have been provided with no explanation of why the work done by Mr. Adams and his wife totalling 39 hours took until the end of January to complete as he claimed.

81. For these reasons the Claim is dismissed except the claim for a share of utilities for the period December 18 to 31, which has been agreed to be $150.14 and which was conceded by the defendants in their defence, with a slight adding mistake.

82. The Defendants' Claim is dismissed for lack of jurisdiction except for the contract claim for reimbursement of the amount paid to the two young men who helped her clear out the basement storage area which totalled $100. Mr. Adams and Mrs. Rosario entered into an oral contract under which she could hire some help with the basement cleanup and he would reimburse her.

ORDER

83. The Rosarios jointly shall pay to Caledon Hills Realty Ltd. $150.14.

84. Caledon Hills Realty Ltd. shall pay to the Rosarios jointly $100.00.

85. The latter amount will be set off against the former, with the result that the Rosarios will pay to Caledon Hills Realty Ltd. $50.14.

86. Absent some powerful reason to do otherwise I would be inclined to make no order as to costs in either Claim. However, if either party wishes to make submissions on costs they should serve and file their submissions by January 19, after which the opposing party may reply by January 26. Upon receiving notice from both parties that no submissions will be made or following the receipt of submissions, I will endorse a formal judgment. Please send notice or submissions to me by email at: jim@marentette.ca

87. I thank both representatives for their assistance with this case and for their very reasonable approaches to the issues. I apologize for the long delay in producing these reasons but other obligations

and the need to listen to the recordings of the trial, as well as the length of these reasons, took up a lot of time.
Monday, January 8, 2018

James Marentette
Deputy Judge

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[1] S.O. 2007, c. 17

[2] *Fraser v. Beach* 2005 CanLII 14309 (ON CA), [2005] O.J. No. 1722, 75 O.R. (3d) 383 (C.A.)
Latestu Estate v. Ritlyn Investments Ltd. [2017] O.J. No. 2835, 2017 ONCA 442

[3] [2009] O.J. No. 5936 (Sm.Cl.Ct.)

[4] [2010] O.J. No. 4605 (Sm.Cl.Ct.)

[5] 2013 CanLII 84115 (Sm.Cl.Ct.)

[6] [2015] O.J. No. 293, 2015 ONSC 472

[7] [2010] O.J. No. 2852, 2010 ONSC 3801

[8] see for example *Mascan Corp. and Ponzi* 1986 CanLII 2836 (ON SC), [1986] O.J. No. 1038, 56 O.R. (2d) 751 (Div.Ct.)

[9] R.S.O. 1990, c. E.23

[10] *Boardwalk General Partnership v. Fraser, [2013] O.J. No. 963*