Izumi v Skilling, 2020 CanLII 20510 (ON SCSM)

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Court File No. 1320/18 (Kitchener)

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

B E T W E E N:	)
	)
JAMES IZUMI and JANET IZUMI	) Mr. T. Ellis
	) Paralegal for the Plaintiffs
Plaintiffs	)
-and-	)
	)
	)
SHAUNA SKILLING	) Mr. M. Janveau (friend)
	) Agent for the Defendant
Defendant	)

)
) Heard: March 4, 2020
)

REASONS FOR JUDGMENT

1. Judgment was reserved at the end of the day for further consideration of the issues and evidence. For the following reasons, the plaintiffs' claim is allowed in part and judgment is granted against the defendant for $4,434 plus costs.

Nature of the Dispute

2. The plaintiffs' amended claim seeks $35,000 for alleged damage to the residential property which they rented to the defendant from June 2011 to June 2017, including lost rent while remedial work was underway. The amended claim also sought punitive damages but that claim was not pursued. The damages amount claimed in closing submissions was $25,085.

3. The defendant denies liability and denies having caused any damage whatever to the property. In her evidence she testified that the property was "spotlessly clean" when she moved out. Significant credibility issues are presented by the evidence.

Jurisdiction

4. While jurisdiction was not challenged by the defence, I accept that this court has jurisdiction over the matter based on the authorities cited by Mr. Ellis: *Capreit L.P. v. Griffen*, 2016 ONSC 5150 (CanLII), [2016] O.J. No. 7338 (Div. Ct.); *Brydges v. Johnson*, 2016 CanLII 4942 (ON SCSM), [2016] O.J. No. 609 (Sm. Cl. Ct.), affirmed

(June 24, 2016), (Ont. Div. Ct.) [unreported]. I am aware of *Kiselman v. Klerer*, [2019] O.J. No. 5857 (Div. Ct.), which reaches the opposite conclusion but without reference to those two prior cases. Faced with clear conflict amongst the Divisional Court authorities on point and until such time as the issue is resolved by the Court of Appeal, I must choose between them. I prefer to follow those earlier authorities.

Applicable Legal Rules

5. Under section 33 of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, tenants are responsible for the "ordinary cleanliness" of rental units. As for damage to rental units, section 34 provides as follows:

> 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. Tenants are not responsible for "ordinary wear and tear". While that expression does not appear in section 34, it amounts to the opposite of "undue damage": *Doucette-Grasby v. Lacey*, [2013] O.J. No. 6355 (Sm. Cl. Ct.), at para. 44.

7. Tenants are not liable for ordinary wear and tear: *Kamoo v. Brampton Caledon Housing Corp.*, [2005] O.J. No. 3911 (Sm. Cl. Ct.), at paras. 14-17; *Caledon Hills Realty Ltd. v. Rosario*, [2018] O.J. No. 544 (Sm. Cl. Ct.), at para. 73. Some cleaning, repairs and maintenance is very common if not inevitable on a change of tenancy. The fact that a landlord has incurred such costs is not in itself evidence that the tenant is liable for them: see *Boardwalk*

General Partnership v. Fraser, [2013] O.J. No. 963 (Sm. Cl. Ct.), at para. 29; *Doucette-Grasby*, *supra*, at para. 45.

8. The plaintiffs bear the onus to prove their allegations on a balance of probabilities. The three essential elements of liability under s. 34 are these:

(i) undue damage;
(ii) wilful or negligent conduct of the tenant or another occupant; and
(iii) the wilful or negligent conduct caused the undue damage.

9. The plaintiffs also bear the onus to prove damages. Sometimes in this general type of case, undue damage to the rental unit may occur which causes no actual loss to the landlord. For example, if a carpet had already outlived its normal life expectancy and was due for replacement in any event when it is found to have also sustained undue damage, it could be found that the undue damage caused no loss to the landlord. Breach of the tenant's responsibility for repair under s. 34 does not translate into an award of money damages if the breach causes no pecuniary loss to the landlord.

10. Betterment also requires consideration in these cases. Returning to the carpet example, if the carpet sustained undue damage causing it to need replacement when it was half-way through its normal life expectancy, the landlord would normally be entitled to half of the replacement cost. Failing to make such an adjustment would overcompensate the landlord, effectively requiring that the unit be restored to a condition better than when

it was rented to the tenant: *Futures Gymnastics Centre v. Alanbrad Construction Ltd.*, [2002] O.J. No. 4092 (Div. Ct.), at para. 10.

11. The undue damage allegations in this case result in a total damages claim in the amount of $19,835 (subject to reduction for betterment) (Exhibit 1, Tab 8, first page). Of that amount, the sum of $10,703 is for work done by AllProProperty (invoice at Tab 8, second page), $3,980 is for carpet and $1,474 is for flooring. The balance consists of various items purchased by the plaintiffs. In addition they claim to have spent over 400 hours of their own time working on the remediation but no amount is claimed for that time. Three months of lost rent at $1,750 is claimed on the basis that the property's re-rental was delayed by the need for remediation of the alleged undue damage caused by the defendant.

12. Having reviewed the applicable rules and basic nature of the case, I will now proceed to review the evidence and make findings of fact below under the headings indicated.

Issue 1: AllProProperty Invoice

13. The principal of AllProProperty, Mr. Jeff Czech, testified. His company managed this rental property during the entire course of the six-year tenancy and performed the work evidenced by its invoice dated August 14, 2017 (Exhibit 1, Tab 8, second page). The invoice consists of six entries which I will address in turn.

14. The first entry is $2,725 for "demolition removal and prep work" (all invoice figures are prior to HST).

15. As noted above Ms. Skilling testified that the condition of the property as she left it on June 30, 2017, was “spotlessly clean”. She testified that all items of personal property were removed as were two interior walls which she admitted to having installed during the tenancy. I am unable to accept those aspects of her evidence.

16. Mr. Szech described the renovation work that was required. His company’s work took over a month and involved in part the removal of such a large volume of debris and material that it measured in tons. The plaintiffs also produced an insurance adjusting estimate prepared by the Paul Davis company, dated August 2, 2017, which estimated the volume of debris as at July 23, 2017, at 5 to 7 tons (Exhibit 1, Tab 5, page 2, line 1).

17. The plaintiffs also produced photographic evidence. There is a photograph of items left in the garage which include what appears to be a fishtank owned by the defendant (Exhibit 1, Tab 3, last page, upper left). Mr. Czech testified that the photographs at Tab 3 were taken between June 26 and July 11, 2017. I note that he was led on that point and did not seem to have a clear independent recollection of the dates. That evidence will be weighed with that in mind.

18. Considering all of the evidence and particularly those aspects just reviewed, on a balance of probabilities I cannot accept the defendant’s evidence and I prefer Mr. Czech’s evidence concerning the volume of material which required removal. That being the case, several other aspects of Ms. Skilling’s evidence must be rejected. For one thing I reject her suggestion that the condition of the property on her departure was “spotlessly clean”.

19. Mr. Czech testified that when the defendant departed, two interior walls which had been installed by her were left in place – one forming a separate room in the garage and another forming a separate room in the basement (see photographs at Exhibit 1, Tab 3, first page, upper left; second page, middle centre).

20. Ms. Skilling admitted to having built those walls. I find that to be a clear violation of clause 14E(i) of the Lease (Exhibit 1, Tab 1, page 2); it also displayed a high level of disrespect to the landlords. Tenants should not need to read a lease to understand that they are not at liberty to renovate a property that is not theirs.

21. Mr. Janveau submitted in closing argument that Ms. Skilling had obtained consent from the property manager's employee, Jennifer (who did not testify), for the building of those walls. That suggestion is unpleaded despite the length and detail of Ms. Skilling's Defence dated September 5, 2018, and what is stated by a party's representative from the counsel table is not evidence. Clause 14E(i) required such consent to be obtained in writing. In any event I prefer the evidence of Mr. Czech and find as a fact that the construction of these walls was unauthorized and a clear breach of clause 14E(i).

22. Equally, I reject Ms. Skilling's evidence that the walls were removed by June 30, 2017. I prefer Mr. Czech's evidence that they required removal and were part of his company's work as reflected in his invoice. His evidence on this point is also consistent with the evidence of the volume of material that needed removal including the Paul Davis estimate.

23. The defence called four friends of the defendant to testify to the condition of the property when they had visited. Only one (Ms. Calloway) said she was present during the move-out process, but her evidence did not help on the question of the presence or absence of the two walls as at June 30, 2017.

24. I also note the three witness statements suggesting that the defendant had boarders (Exhibit 1, Tab 7, especially second to third pages). Ms. Skilling herself admitted that she had one student boarder during the lease, followed by a second and a third. Subletting without consent constituted a clear violation of clause 16 of the Lease and tends to indicate that the defendant was not forthcoming with the plaintiffs or their property manager in that regard.

25. Ms. Skilling testified that Jennifer had seen the existing walls where the two added walls had been after their removal, and told her not to repair the sections were those two walls had previously joined with the existing walls. I reject that hearsay evidence and note that in law the landlord would in any event not be required to accept the tenant's personal repair of damage for which she would otherwise be responsible.

26. Mr. Janveau submitted that the amount claimed was excessive and he claimed to possess relevant expertise. However, what he said from the counsel table is not evidence.

27. I find as a fact that that defendant caused undue damage which caused the plaintiffs to sustain damages in the amount of $2,725 plus HST. Inasmuch as the two walls were deliberately

installed, I find this undue damage was wilful within the meaning of s. 34.

28. The second item is $1,200 for “prepare and paint all ceilings”. There is evidence of prior mold damage to ceilings (Exhibit 1, Tab 2, first page). However this was remediated during the tenancy and nothing was claimed before this court for that issue. There was evidence of a basement ceiling tile being damaged (Exhibit 1, Tab 3, first page, lower left) but Mr. Czech’s evidence did not address any specific cost for that tile, while the Paul Davis report estimated that cost at $668 before overhead, profit and HST (see Exhibit 1, Tab 5, page 12, line 204). There was no specific evidence of the age of that tile so I infer it was original to the construction of the house in 1999, making it about 18 years old in June 2017.

29. The other specific evidence of ceiling damage was Mr. Czech’s evidence of a crack in part of the main floor ceiling (Exhibit 1, Tab 3, third page, lower right). The crack is hardly if at all visible in the photograph. Mr. Czech pointed to the correlation between the location of that part of the ceiling and water damage to the upstairs bathroom floor.

30. On a balance of probabilities I find the claim for this item ($1,200 plus HST) to be not proved. The evidence does not establish that the alleged ceiling damage constitutes undue damage caused by the tenant’s wilful or negligent conduct.

31. The third item is $3,680 for “prepare and paint all walls with 2 coats of premium paint”, Mr. Ellis fairly conceded in closing argument that a betterment allowance should be applied to this

item and he suggested a reduction of 50%. The defence did not suggest any competing reduction but simply denied liability.

32. Based on the evidence of Ms. Izumi concerning the age of the carpets, I infer that the age of the paint was the same: upper floor was new as at 2011 (6 years old), ground floor was original from 1999 (18 years old) and basement was painted a "few years" before the plaintiffs moved out which I would estimate at 2010 (7 years old). There is no specific evidence of the normal lifespan of paint or in other words at what interval fresh paint would normally be applied by a reasonable landlord in general or these landlords in particular.

33. In his submissions Mr. Ellis referenced the chart of lifespans enacted by regulation under the *Residential Tenancies Act, 2006*, as a guide for normal lifespans. The Schedule to O.Reg. 516/06, lists in Table 8, s. 19, the useful life of interior paint as 10 years. That Schedule is not determinative for purposes of civil liability because it is a guide only for the purpose of determining landlords' requests for rent increases based on capital expenditures. But is has been considered in these situations – not as a substitute for evidence but merely as a rough guide or comparator: *Boardwalk General Partnership v. Ali*, [2009] O.J. No. 369 (Sm. Cl. Ct.), at paras. 11-14; *Stamm Investments Ltd. v. Contant*, [2016] O.J. No. 353 (Sm. Cl. Ct.), at paras. 18-19.

34. The evidence of damage to walls includes the damage left from the removal of the two interior walls built by the defendant. There is also some serious gouge damage at the bottom of the main staircase (Exhibit 1, Tab 3, second page, lower left and lower middle). There is damage from a baby gate having been screwed

into the wall beside the rear door (Exhibit 1, Tab 3, fourth page, upper left).

35. Based on the whole of the evidence I am satisfied that the just-mentioned gouge marks and screw-hole damage are significant enough to constitute undue damage caused by wilful or negligent conduct of the defendant. However screw-hole damage can be filled and covered over in the course of a re-paint without amounting to any increased pecuniary loss to the landlords if a paintjob was being done anyway. The gouge marks are plainly more serious but may or may not cause any increased pecuniary loss. There is no estimate specifically for the cost of repairing those gouge marks.

36. Based on the evidence I find that the paint was near the point at which it would require a re-paint simply due to age or wear and tear. I appreciate Mr. Ellis' concession that a 50% betterment factor should apply and certainly compared to the positions taken by landlords in the many similar cases I have seen that proposed reduction appears quite reasonable. But in this particular case in my view even a 50% reduction would amount to overcompensation given the apparent age of the paint in this house.

37. In my view the most appropriate disposition is to apply a betterment reduction of 80%. This results in an award of $832 inclusive of HST.

38. The remaining three items on this invoice are for painting of doors and closet doors ($600), painting of cabinet doors and

drawer fronts ($627) and preparing basement, living room and dining room floors for flooring ($640).

39. I find the latter item should be addressed below with flooring and carpets.

40. The doors, closet doors and cabinet doors and drawer fronts are not the subject of any clear evidence of damage caused during the tenancy. A basement closet door was left unattached (Exhibit 1, Tab 3, second page, upper middle; fourth page, lower left; Exhibit 11, photograph 41), as was admitted by the defendant and I am prepared on the evidence to find that this amounts to undue damage caused by wilful or negligent conduct, but would estimate the pecuniary loss to the plaintiffs at $50 plus HST. Those items are otherwise dismissed.

41. Therefore, subject to the deferral of the $600 item, the claim based on the AllProProperty invoice in the total amount of $10,703 inclusive of HST is allowed in part, in the amount of $3,968.

Issue 2: Flooring and Carpets

42. The preparation component of this claim is $600 plus HST as mentioned above. New carpet was purchased and installed for $3,980 inclusive of HST (Exhibit 1, first page and supporting Factory Flooring Carpet One invoice dated September 9, 2017) and new flooring for $1,474 inclusive of HST (Tab 8, first page and supporting Source Flooring invoice with receipt dated August 31, 2017). Mr. Ellis conceded that those two items should be reduced for betterment by a factor of 50%.

43. O.Reg. 516/06 puts the useful life of carpet and of the most common types of flooring at 10 years. In this case the evidence of Ms. Izumi puts the age of the existing carpets (see above at para. 31) at 6, 18 and 7 years old. In these circumstances one could say that if one level of the house needed redoing anyway, the landlord might have advanced the timing to redo the other two, or might have replaced one level now and waited a few more years to do the other two. There is no evidence either way of the landlords' intentions in this case. Or one could take an average of the three ages and conclude that the actual pecuniary loss is zero, or alternatively minimal if one found that a few more years could have been had of two levels but for undue damage caused by the tenant's wilful or negligent conduct.

44. The evidence of damages in this case includes clear staining of the basement carpet (Exhibit 1, Tab 3, first page, middle row), and there is an area where the defendant admitted she had kept first one and then another entire litter of puppies (Tab 3, second page, upper right). I find it clear that this damage amounts to undue damage caused by wilful or negligent conduct, with the exception of the carpet stain by the window where water intruded during the tenancy. As to the latter stain I find that is not proved to be the tenant's responsibility.

45. There is also evidence of flooring damage in the upstairs bathroom (Exhibit 1, Tab 3, fifth page, middle left and middle centre). The plaintiffs' theory appears to be that a prior toilet leak was not properly reported by the tenant resulting in water damage to the under-flooring going undetected until after the tenant vacated. I appreciate that the theory is rational. However water damage to bathroom underflooring is common and one might say

inevitable over a sufficient period of time. The bottom line for this particular item is that I find it is not proved on a balance of probabilities that this damage was caused by wilful or negligent conduct on the tenant's part.

46. The photographs of the remedial work while underway (Exhibit 1, Tab 4) do not assist in determining what flooring or carpeting was unduly damaged by the tenant so as to need replacement. Similarly, I find almost all of the defendant's photographs (Exhibit 11) to be unhelpful as they depict mostly items that are not in issue.

47. The court's duty is to determine what if any undue damage was caused by wilful or negligent conduct by the tenant, and to assess pecuniary damages flowing therefrom. Based on the evidence I find that the tenant caused undue damage to the basement carpet through wilful or negligent conduct. That carpeting was about 7 years old, and was partially damaged near the window by water intrusion that was not the tenant's responsibility.

48. Doing the best I can with the evidence provided, I would allow part only of the items for carpet ($3,980 inclusive of HST) and preparation ($600 plus HST). Estimating that the basement cost one-third of those amounts reduces those figures to $1,553. Applying a betterment factor of 70%, I would allow this item in the amount of $466.

Issue 3: Garden

49. The parties appear to agree that the tenant was required to mow the lawn and the defendant testified that she did so. But the health of a garden is subject to a myriad of variables other than the quality and frequency of maintenance: each of precipitation, earth quality and nutrients, insects, birds, sunlight, air quality and other factors can have a potentially significant independent effect on the condition of a garden or back yard.

50. The plaintiffs' photographic evidence concerning the condition of the rear garden after the defendant's departure suggests that the grass was in rough shape and perhaps the weeds had taken over to some extent. But there are no photographs provided to permit a before-and-after-tenancy comparison.

51. No authority was presented dealing with the standard of care required to be exercised by a residential tenant to maintain the garden or yard of leased premises. It would seem axiomatic that any such standard of care would be that of a layperson and not a professional. In any event, on this evidence I am unable to find that the overall condition of the back yard at the conclusion of the six-year tenancy amounted to undue damage, nor that it was caused by wilful or negligent conduct.

52. The item within this claim which gives greater pause is the cost for removal of a tree ($565). It is alleged that because the defendant erected a fence within the back yard which was attached to the tree by nails, the tree was damaged and required removal (see Exhibit 1, Tab 3, third page, upper right, middle left, middle right, lower left and lower centre). The defendant admits to installation of the fence and failing to remove it, but counters with

hearsay evidence from an arborist indicating as a generality that a few nails don't kill a tree (Exhibit 10).

53. Looking at the relevant evidence objectively I find it impossible to conclude that the tenant caused this tree to die or require removal. No expert opinion is presented to support such a conclusion and in my view accepting the plaintiff's theory would amount to speculation. This claim is dismissed.

Issue 4: Other Items

54. With respect to all other items claimed (Exhibit 1, Tab 8, first page), and not specifically mentioned above, I find that those items are not proved to be the defendant's responsibility.

Issue 5: Lost Rent

55. The plaintiffs ask for the months of July, August and September 2017 to be paid by Ms. Skilling on the basis that they recovered no rent for those months due to the work that was required. There are several problems with this claim.

56. First, no evidence was led by the plaintiffs, or by the defendants on cross-examination of Ms. Izumi, on the question of the efforts made to re-rent the property nor as to the timing of such efforts. This was so despite the settlement conference judge's endorsement identifying as one of the issues between the parties, "Timing of advert for re-rent".

57. Second, the period of three months for the work that was done appears facially excessive. Mr. Czech's company did a substantial amount of the work and he said that work took over one month. The plaintiffs then continued work themselves for what was stated to be over 400 hours. The court must assume that had they contracted out that work it would have been accomplished more quickly.

58. Third, there is no evidence as to the normal delay to re-rental following a termination of tenancy. In that case the evidence is that the termination occurred on relatively short 30-day notice (and there is no claim arising from that short notice). There is no evidence as to the state of the rental market as at June 2017.

59. Fourth, there is no specific evidence to suggest that the items for which the defendant has been found responsible, or for that matter all of the claimed items, could not reasonably have been completed within about one month or so. Given there is no evidence to suggest that one month would be an unusually lengthy period to find a new tenant, the evidence appears at least capable of supporting a conclusion that any additional work for which the defendant was responsible would not have increased that one month period, and that the items for which she is not responsible would have caused a one-month delay in any event.

60. Based on the evidence presented, I am unable to find on a balance of probabilities that the re-rental of this property was delayed by the need to repair damages for which the defendant has been held responsible. This claim is dismissed.

Conclusion

61. The plaintiffs' claim is allowed in part and judgment is granted against the defendant in the amount of $4,434.

62. Since there was no demand or formal notice of the plaintiffs' allegations prior to litigation, there will be no prejudgment interest.

63. On reserving judgment I advised the parties that I proposed to make a provisional costs disposition as part of the judgment, subject to potential costs submissions in the event any offers to settle might be alleged to warrant changing the provisional disposition. I was advised there were no offers made.

64. This was a one-day trial with the successful plaintiffs represented by an experienced paralegal. The pleaded claim was for $35,000 which was reduced to $25,085 in closing submissions and less than one-seventh of the pleaded claim was awarded. The situation could warrant a no costs order. However it appears the trial would have been a one-day affair regardless of the division of success and I consider that Mr. Ellis' efficient conduct of the trial definitely kept it to one day where it would probably have needed another half-day had he been less economical in his examinations. Costs will follow the event, but with a representation fee that is reduced to reflect the divided success.

65. The plaintiffs' disbursements are fixed at $600 and a representation fee is allowed at $600, for a total of $1,200 all-inclusive payable by the defendant.

March 10, 2020

Deputy Judge J. Sebastian Winny