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Who is Responsible for Damage to Rental Premises Caused by Mouse Infestations – and Why?

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Case Considered: *Hometime Property Services Ltd v Girumnesh*, 2022 ABPC 172 (CanLII)

The plaintiff, a corporate landlord, sued the defendant, their former residential tenant, for almost $8,000 in damages plus costs, claiming the rental premises were infested with mice when the tenant vacated. The damages were for exterminating the mice and restoring the premises to their pre-infestation condition. The tenant, who was served personally with the landlord's civil claim, did not file a dispute note and was noted in default. Because they were noted in default and the claim was heard in Provincial Court, the tenant was deemed to have admitted the facts that were alleged in the landlord's civil claim. Nevertheless, the landlord lost; their claim was dismissed in its entirety. Why that happened is worth taking note of.

Facts

The tenant rented the premises under a residential tenancy agreement dated November 21, 2019, and occupied the premises for one-and-a-half years (at paras 1, 14). They vacated the premises on a date that is not specified in the judgment but was sometime before the pest control contractor's written report dated April 12, 2021.

The landlord's civil claim alleged that when the tenant vacated the rental premises the landlord found evidence of a long-standing mouse infestation (at para 5). The allegation was that an infestation was discovered during the tenant's tenancy (at para 18).

In addition to the facts alleged in the civil claim that were deemed to have been admitted, the landlord's property manager and a carpet cleaning contractor testified orally, and a pest control contractor's written report was entered into evidence as well. That written report stated that "the contractor found evidence of long-term mice infestation including holes in some of the baseboards with droppings and urine contamination in areas of the house … [and] heavy contamination in the ceiling between the basement and living room and kitchen area" (at para 7). Just how long the "long-term" infestation had been around was not explained in the report (at para 8).

The landlord's property manager testified that the landlord inspected the rented premises every six months, the property had been inspected three times, and nothing was discovered during those inspections to suggest a mouse infestation (at para 14). After the tenant vacated the property, the initial inspection of the premises by the property manager and a new tenant did not reveal a mouse infestation either. The new tenant discovered the mouse problem only while moving in (at para 16). When the property manager raised the issue of mice with the tenant after the new tenant discovered the problem, the tenant thought the property manager was joking; the tenant was not

aware of any mouse problem, although her daughter once said she thought she saw a mouse (at para 15).

Those facts about the landlord's inspections raise some doubts about whether the infestation occurred while the tenant was in possession of the rental premises. Normally, questions about when and why a mouse infestation occurred are the key issues in assigning responsibility for the damage to rental premises, but this was not a normal case.

The landlord sued for a total of $7,979.21 in damages for exterminating the mice and restoring the premises to their pre-infestation condition, plus $200 in costs for the Provincial Court filing fee. The $7,979.21 total was composed of bills from a pest control contractor, a property restoration specialist, a general contractor, a furnace and duct cleaning contractor, and a carpet cleaner – to which the landlord added a ten percent administration fee – plus a small amount for baseboard and wall painting and sealing that the landlord did itself (at paras 8-13).

Law

Who is responsible for keeping rental premises free from mouse infestations?

Pursuant to section 16(c) of the *Residential Tenancies Act*, RSA 2004 c R-17.1 (*RTA*), a landlord covenants that rental premises "will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations." Under section 4 of the *Housing Regulation*, Alta Reg 173/1999, an owner of premises "shall maintain the housing premises in compliance with the *Minimum Housing and Health Standards*, as approved and published by the Minister and as amended by the Minister from time to time." And under *The Minimum Housing and Health Standards*, Ministerial Order 57/2012, section 16(a), the owner of the premises must "ensure that the housing premises are free of insect and rodent infestations…".

Tenants have related obligations. Pursuant to sections 21(e) and (f) of the *RTA*, tenants covenant that they "will not do or permit significant damage to the premises" and that they will "maintain the premises and any property rented with it in a reasonably clean condition…".

The question of how those statute-based duties are to be interpreted together so as to divide the responsibility for damage from mouse infestations between the landlord and tenant was a major issue in Provincial Court Judge Jerry N. LeGrandeur's judgment.

However, in additional to those substantive covenants, several procedural rules were just as determinative of the outcome in this case. After noting the tenant in default, the landlord applied to the court for judgment against the tenant on the basis of an affidavit (a written statement of facts that is sworn under oath or affirmed). Such applications are called "desk applications": the judge decides the matter at their office desk based on the written evidence that has been filed with the court, rather than at a hearing with witnesses and arguments in open court. Under the *Provincial Court Civil Procedure Regulation*, Alta Reg 176/2018, when an application for judgment is made after a defendant has been noted in default, section 6(2) provides that a judge can do a number of things, including "(c) direct an assessment of damages" as an alternative to a desk application. Judge LeGrandeur directed an assessment hearing with oral testimony after he concluded that he could not accept the landlord's affidavit as proof of its claim (at para 23).

The law that really complicated matters in this case was the rule that a defendant who is noted in default is taken to admit the allegations in the plaintiff's claim (at para 25; see also S*ulef v Parkin* (1966), 57 WWR (ns 236), 1966 CanLII 638 (ABCA) at 239). Due to this rule, the tenant was deemed to have admitted the following facts:

> 1. That she rented the … premises from Hometime;
>
> 2. That evidence of a long-time mouse infestation including holes in the baseboard and drywall throughout the property with droppings and urine contamination in certain areas was found;
>
> 3. There was heavy contamination above the drop ceiling in the basement area after all external access points had been sealed and after catching 31 mice, the property was declared free of mice after 11 days. (at para 27)

Despite these deemed admissions, Judge LeGrandeur held that he could dismiss the plaintiff's action if he was not satisfied that the plaintiff had a cause of action. A cause of action is "a set of facts which are said to entitle the claimant to relief from a court" (at para 29, quoting *Sherwood Steel Ltd v Odyssey Construction Inc*, 2014 ABCA 320 at para 24). Section 3(2) of the *Provincial Court Civil Procedure Regulation* requires that every civil claim in Provincial Court must clearly state the particulars of the plaintiff's claim.

The cases that have dismissed claims because a court is not satisfied that the plaintiff had a cause of action despite deemed admissions of the facts alleged in their claims have been decided under Rule 3.37 of the *Alberta Rules of Court*, Alta Reg 124/2010. These are a different set of regulations that govern civil procedures in the Court of Queen's Bench and the Court of Appeal. However, the list of a Provincial Court judge's powers under the *Provincial Court Civil Procedure Regulation* when a defendant in a civil claim has been noted in default for failing to defend against an action by filing a dispute note is almost identical to the list of powers in Rule 3.37 of the *Alberta Rules of Court*, which apply when a defendant's fails to defend against an action in the Court of Queen's Bench. Judge LeGrandeur therefore held that the cases setting out the "no cause of action" exception to the rule about deemed admissions under the almost identical Rule 3.37 applied in Provincial Court under the *Provincial Court Civil Procedure Regulation*.

Judge LeGrandeur relied upon *Dykes v Goczan*, 38 Alta LR (3d) 425, 1996 CanLII 10367 (AB QB), and *Spiller v Brown*, 1973 ALTASCAD 76 (CanLII). Both of these cases have been cited many times for the idea that "[a]dmissions cannot create a cause of action where none exists" (*Sager v Condominium Plan No 9523979*, 2015 ABQB 549 (CanLII) at para 9, *Spiller v Brown* at para 8).

Judge LeGrandeur (at para 26) also quoted from *TLA Food Services Ltd v 1144707 Alberta Ltd*, 2011 ABQB 550 (at para 24), where Justice D. L. Shelley set out five principles to be followed after a defendant has been noted in default. For the purposes of this case, the first two principles are relevant and can be summarized as follows:

1. When a defendant is noted in default, they are deemed to have admitted the allegations in the claim; and

2. However, before granting judgment to the plaintiff, a court must still determine whether a cause of action is proven based on the deemed admitted facts in the claim and may order that a hearing be held.

Application of Law to the Facts

Under section 16(c) of the *RTA*, a landlord must make sure their rented premises are free of insects and rodents, but the landlord's liability is not unlimited. Under section 21(e) of the *RTA*, tenants cannot do or permit to be done any significant damages to the rented premises. How should these two statutory provisions be reconciled? Looking at the *RTA* as a whole, Judge LeGrandeur decided that the landlord is responsible for ensuring that the premises are maintained in a clean and sanitary condition at the beginning of and throughout a tenancy, so that if a mouse infestation occurs during the tenancy the landlord must take action to return the premises to a clean and sanitary condition, unless the infestation was caused by the tenant's wilful act or the wilful act of another person that the tenant is responsible for (at para 31). For example, if the tenant initiated the infestation, or failed to notify the landlord that an infestation that was not their fault had occurred, the tenant could be liable for the resulting damage to the premises (at para 32). As another example, if a landlord does nothing in response to a tenant's notification of an infestation, then the landlord would be liable (at para 32).

This summary of who is responsible for damage caused by something like a mouse infestation could be clearer. Judge LeGrandeur wrote that a landlord has an "absolute responsibility to maintain the premises in a clean and sanitary condition" (at para 31, emphasis added). However, his comments that follow make it clear that the landlord's responsibility is not absolute and the landlord is not responsible if the infestation was caused by the tenant or someone the tenant is responsible for. A second problem is that he described the tenant's liability as being dependant on a "wilful act of the tenant" or the tenant "wilfully allowing another person to cause the infestation" (at para 31), or the tenant "wilfully not notif[ying]" the landlord of an infestation (at para 32). Wilful acts are generally acts done deliberately and intentionally, and not accidently. But what about reckless or negligent actions by a tenant? The line between when the landlord and the tenant are responsible is unclear.

Nevertheless, in this case the landlord did not prove that the tenant was liable. Based on the facts deemed to be admitted in the landlord's claim and the evidence given on behalf of the landlord at the assessment hearing, Judge LeGrandeur found no cause of action had been made out against the tenant (at paras 35-36). The landlord's evidence showed that once the holes in the baseboard and drywall were sealed and the mice already in the premises were caught, the infestation was over (at para 34). The landlord was responsible for sealing the holes. The tenant would only be responsible if the tenant knew of the infestation and failed to notify the landlord (at para 35). However, the landlord's evidence about finding no mouse infestation during its inspections at the beginning of the tenant's tenancy, during that tenancy, and just after that tenancy ended indicated there was no reason to think the tenant knew of any infestation. No failure to notify the landlord had therefore been proven or admitted.

Conclusion

Ignoring a landlord's lawsuit is a very risky thing for a tenant to do, even if they know themselves to be blameless for the harm alleged. If the tenant ignored the lawsuit because they had faith in our legal system, that faith was justified this time because Judge LeGrandeur insisted on a hearing rather than making do with a desk application, delved into the case law that allows a court to dismiss a plaintiff's claim even when the facts alleged in their claim are deemed to be admitted, and paid close attention to the facts that the landlord did prove about the infestation. It would be nice to think that all of our Provincial Court judges are as knowledgeable about the various substantive and procedural laws that affect such a fundamental aspect of human experience as the need for shelter and a place to call home, and as protective of parties' legal rights whether those rights are claimed or not.

Is it likely that Judge LeGrandeur's adoption of the superior courts' rule that a court must still determine whether a cause of action is proven even when the facts in a civil claim are deemed to be admitted after a defendant fails to defend against an action will be followed by other Provincial Court judges? Or by Tenancy Dispute Officers at the Residential Tenancy Dispute Resolution Service (RTDRS)?

In the Provincial Court, other judges could also rely upon section 3(2) of the *Provincial Court Civil Procedure Regulation*, which requires that every civil claim must clearly state the particulars of the plaintiff's claim. If the facts set out in the claim which are deemed to be admitted do not give rise to a cause of action, that provision may be enough. The idea that admissions cannot create a cause of action where none exists is compelling; people fail to defend for many reasons and not all of those reasons are connected to failing to live up to responsibilities owed to the people suing them.

However, the vast majority of residential tenancy disputes are heard by the RTDRS. The rule about failures to defend a claim being deemed an admission of the facts alleged in the claim appears to have no place in proceedings before this administrative tribunal. All applications to the RTDRS that are not refused for one of the reasons set out in section 7 of the *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006, are given a hearing date pursuant to section 6(3). Hearings are held whether or not the respondent makes a counter-application, files evidence, or attends. According to section 6(2), parties' applications do not need to set out a cause of action; instead, the focus is on the remedy parties want. If there is no place for a rule about deemed admissions, there is no need for the exception adopted by Judge LeGrandeur in this case.

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