



In The Supreme Court of Bermuda
CIVIL JURISDICTION
2012: No. 51

B E T W E E N:

R. PENNY INGRAM

Plaintiff

- and -

RACHAEL ROBINSON

Defendant

Dates of Hearing: Tuesday 7th August 2012 – Wednesday 8th August 2012
Date of Judgment: Friday 28th September 2012

R. Penny Ingram, Plaintiff in Person
Rachael Robinson, Defendant in Person

JUDGMENT

(In Court)

1. This action arises out of a lease of domestic premises dated 15 May 2011 between Mrs. Penny Ingram, the Plaintiff, and Mrs. Rachael Robinson, the Defendant. The primary claim by the Plaintiff against the Defendant is a claim for damages relating to items which the Plaintiff maintains are missing from the leased premises as a consequence of the Plaintiff being evicted by the Provost Marshal General on 3 January 2012.
2. These proceedings have taken a somewhat unusual route in that there are no formal pleadings between the parties. By an Order dated 29 March 2012, the Chief Justice ordered that formal pleadings and discovery be dispensed with and instead the Plaintiff and Defendant should file affidavits exhibiting all documents upon

which they rely and from any witnesses upon whom they intend to rely. In accordance with that order the Plaintiff filed an affidavit dated 13 April 2012 and the Defendant responded by her affidavit dated 26 April 2012. Both parties gave oral evidence at the hearing of this matter and represented themselves.

3. The background to this dispute is that under the lease agreement the Defendant agreed to lease to the Plaintiff certain residential premises on Southcote Road in Paget Parish. The lease commenced on 1 June 2011 and the Plaintiff, as the tenant, was required to pay to the Defendant monthly rent of \$5,200. The term of the lease was expressed to be "no less than two years".
4. Soon after the commencement of the lease the Plaintiff fell in arrears of the rent due to the Defendant. By end of September, the Plaintiff had only paid part of the rent due for the month of July (\$3,000) and no payments for the months of August and September. In these circumstances, the Defendant, on 22 September 2011, served a notice upon the Plaintiff to vacate the premises for non-payment of rent and required the premises to be vacated by "no later than October 22, 2011".
5. The Plaintiff failed to vacate and deliver the leased premises. As a result, the Defendant commenced proceedings against the Plaintiff in the Magistrates' Court. On 16 December 2011 judgment was awarded against the Plaintiff, as a result of her failure to make the rental payments, in the amount of \$18,448.08. Following the award of the judgment, a writ of execution requiring the Provost Marshal General to levy the judgment amount by distress and public auction of certain goods and chattels belonging to the Plaintiff, was issued on 28 December 2011.
6. On 28 December 2011, the Magistrates' Court also issued a warrant to evict the Plaintiff from the leased premises. The Plaintiff attended the hearing in the Magistrates' Court on 28 December with her lawyer, Mr. Jaymo Durham, and understood that she had to vacate the premises by 3 January 2012. The following day, 29 December, the Plaintiff was served with a notice by the Provost Marshal General notifying the Plaintiff that the Bailiff will attend the leased premises on 3

January 2012 at 10:30am to execute the eviction warrant issued on 28 December 2011. The Plaintiff accepted that certainly by this date she knew that she had to be out of the leased premises by 3 January at 10:30am and her possessions had to be removed from the leased premises by that time. Indeed, the Plaintiff's evidence is that she did try to have the possessions removed by 3 January 2012.

7. In the end, the premises were not vacated on 3 January 2012. The Plaintiff instructed her attorney, Mr. Durham, to write to the Magistrates' Court on 3 January 2012 advising the Court that "*Our client has obtained alternative accommodation, having given the Plaintiff notice to vacate on 2 December 2011 and in the circumstances, our client is seeking an extension until the 31st January 2012 to vacate the premises*". It does not appear that there was any written response to that letter from the Magistrates' Court.
8. In accordance with the notice given pursuant to the eviction warrant dated 28 December 2011, the Bailiff, Mr. Frank Roberts, arrived at the leased premises around 10:50am on 3 January 2012. In attendance, was the Defendant, her friend Denise Riviere and a truck driver from Caines Trucking. The Deputy Provost Marshall had instructed the Defendant to provide movers and a truck and drivers to remove the Plaintiff's property if needed. The Plaintiff was not present at the property at this time as she had decided to attend her place of employment at 8:30 that morning.
9. Contrary to the instruction in the eviction warrant, the Plaintiff had not removed her possessions from the leased premises. The Defendant and her friend sought instructions from the Bailiff as to what they could and should do. The Bailiff advised that the Defendant could do whatever she liked in order to remove the Plaintiff's possessions from the premises and in particular advised her that she was entitled to remove the Plaintiff's possessions and deposit them on the side of the public road on the boundary of the leased premises. The Bailiff instructed that all the possessions had to be removed from the property. A substantial amount of the possessions were indeed, in accordance with the instructions of the Bailiff,

removed from the premises and deposited on the side of the public road, just outside the leased premises. The Defendant called some of her other friends to assist in removing the possessions from the property. All this activity took place in the presence of the Bailiff.

10. During this exercise, it occurred to the Defendant that some of the possessions could be sold in order to satisfy the judgment debt against the Plaintiff. With the consent of the Bailiff, the items which were capable of being sold were loaded on a the truck for the purposes of being moved into storage in a warehouse. Included in those items was a jewellery box which contained various items of jewellery belonging to the Plaintiff. The loaded truck was taken to a warehouse at St. John's Road, Pembroke and those possessions remain in storage to this date.
11. It appears that during the eviction process, it started raining heavily. As a result, the Bailiff suggested that the Defendant could simply change the locks and store the remaining possessions in the leased premises. The Defendant followed this instruction. As a result, on 3 January 2012, some of the Plaintiff's possessions were placed on the side of the public road on the boundary of the leased premises, some of the possessions were taken to a warehouse at St. John's Road and the remainder were stored in the leased premises.
12. On 4 January 2012, the parties appeared in the Magistrates' Court before the Worshipful Juan Wolffe. The Learned Magistrate ordered, inter alia, that the Plaintiff and the Defendant should carry out an inventory of the items which were still on the premises of the Defendant and that the Plaintiff should take any and all reasonable steps to sell the items on the premises as well as items listed in the writ of execution and the sale proceeds should be applied to satisfy the judgment debt. In any event, it does not appear that an agreed inventory of the items remaining in the leased premises was prepared.

The Claim for Missing Items

13. The Plaintiff claims that on 4 January 2012, she prepared, at the suggestion of her lawyer, a list of her possessions which she believed were in the leased premises on 3 January 2012 when the Bailiff attended to effect the eviction. It should be noted that the list is not the result of a physical inspection of the premises. The list was prepared by the Plaintiff from her memory.
14. On 27 January 2012, the Plaintiff attended the St. John's Road warehouse to inspect her possessions which had been stored there since the eviction on 3 January 2012. As a result of that inspection, the Plaintiff had taken the position that some of the items stored in the warehouse had been damaged and other items are missing. The complete list of the damaged and missing items is exhibited to the Plaintiff's affidavit dated 13 April 2012. In relation to the damaged items, the Plaintiff has claimed the original purchase price. Some of the items are 5 to 8 years old and in the circumstances, a claim for the purchase price is clearly unsustainable. The Plaintiff recognised that and abandoned the claim for the damaged goods and confined herself to the claim for missing items. A significant part of the claim for missing items, in terms of value, relates to the Plaintiff's assertion that some of her jewellery is missing. The Plaintiff maintains that all her jewellery was stored in the jewellery box which was removed from the leased premises on 3 January 2012 and eventually stored in the warehouse at St. John's Road. The Plaintiff maintains that when she inspected the jewellery box on 26 January 2012, she found that certain items were missing. In these circumstances, the Plaintiff claims that the Defendant is liable for the missing items and must pay damages to the Plaintiff to make good her loss.
15. The parties did not address the Court as to the legal underpinnings of any such claim or the possible defences to it. It seems to me that any claim by the Plaintiff for missing items must be based upon the legal proposition that by taking possession of the Plaintiff's goods, the Defendant assumed the position of a bailee and if goods are lost whilst in her possession as a bailee, the Defendant must show that any loss was not due to her failure to exercise the care required by law (Port

Swettenham Authority v T.W.Wu and Co. (M) Sdn. Bhd. [1979] A.C. 580, PC).

On the facts of this case, I do not consider that such a claim can succeed against the Defendant.

16. First, on the facts here, I am unable to conclude that the Defendant did indeed become a bailee in respect of the alleged missing items. In this regard, there are three factors which need to be taken into account.

16.1 As set out above, the list of the Plaintiff's possessions, which formed the basis for the claim for missing items, was not prepared as a result of a physical inspection of the premises. The list was prepared from memory.

16.2 It is possible and indeed probable, that some of the missing items may have been deposited at the edge of the leased property on the public road. The Bailiff and the Defendant are entitled to clear the premises and put the contents out on the street without incurring any liability to the Plaintiff (see Scotland and Another v Solomon and Another [2002] EWHC 1886 (Ch.), para. 14). There can be no claim as a bailee in respect of items deposited on the side of the road.

16.3 There were four separate occasions, following the eviction on 3 January 2012, when the Plaintiff or agents removed the contents of the house. First, on 3 January 2012, the Plaintiff's son, Erin Simons, attended the house and removed one car load of contents from the house. Secondly, on 9 January 2012, the Plaintiff's son, daughter and attorney (Mr. Durham) attended the house and removed two car loads of its contents. On neither of these occasions was an inventory prepared of the items which had been removed from the house. Thirdly, on 24 January 2012, the Plaintiff attended the house and removed some of the items. Finally, the Plaintiff attended on 26 January and removed further items in a car. In these circumstances, it is not possible to say, with any degree of certainty, that the missing items which the Plaintiff complains of, ever came into the possession of the Defendant

and in particular whether they were taken to the St. John's Road warehouse for storage.

17. Secondly, even if the Defendant became a bailee of the allegedly missing items, the Defendant has, in my judgment, discharged the relevant duty of care. Even if the Defendant became a bailee, the obligation on the Defendant was to do what was right and reasonable in all the circumstances (Scotland v Solomon, para. 23). In considering whether the Defendant discharged the burden of doing what was right and reasonable in all the circumstances, the Court is entitled and indeed bound to take into account all the relevant factors. These factors, in my judgment, are as follows:-

17.1 The Plaintiff knew since 19 December 2011 that she was required to vacate the premises by 3 January 2012. From a previous eviction proceeding, the Plaintiff knew that she was required to give vacant possession and remove all her belongings from the leased premises. The Plaintiff's understanding accords with the legal position: "*A tenant cannot be said to give vacant possession unless she removes all her belongings so as to give the landlord undisturbed enjoyment*" (Cumberland Consolidated Holdings v Ireland [1946] 1 All ER 284; Norwich Union Life Insurance Society v Preston [1957] 1 WRL 813). The Plaintiff knew that unless she voluntarily vacated the leased premises, the Bailiff would execute the eviction warrant on 3 January at 10:30am.

17.2 There was nothing which prevented the Plaintiff from securing and removing her belongings from the leased premises prior to 3 January 2012. Indeed, her evidence is that she had started to make arrangements to remove her belongings. Some of her belongings had been packed for removal by her.

17.3 The Plaintiff elected to absent herself from the formal eviction executed by the Bailiff on 3 January 2012. Had she remained at the leased premises at

the scheduled time for the eviction, she could have secured her belongings and this entire issue could have been avoided. As the Learned Judge (David Kitchins QC) remarked in Scotland v Solomon, another case where the landlord was being sued as an involuntarily bailee, at para. 30, "*If at trial it is established that the Solomons did encourage the Scotlands to remove their goods on the day of the eviction and did provide reasonable access to the Scotlands for the purpose thereafter, then I believe it is very likely that the Scotlands will fail in their claim*".

- 17.4 The Plaintiff had no legal right to leave her belongings at the leased premises beyond 10:30am on 3 January 2012. To the extent that the Defendant became a bailee of the Plaintiff's possessions, this was a case of involuntarily bailment.
- 17.5 The legal process involved on 3 January 2012 was the execution of the eviction warrant by Frank Roberts, the Bailiff. The Bailiff, as an officer of the Court, was carrying out the terms of an order of the Court. All the actions of the Defendant or her agents were carried out either at the instructions of the Bailiff or with his consent. This included depositing some of the Plaintiff's belongings on the edge of the public road adjacent to the leased premises; and loading other possessions on the removal truck for storage in the St. John's Road warehouse.
- 17.6 The trucker used for transporting contents of the leased premises had been in the trucking business for at least 15 years. The warehouse on St. John's Road was a secure warehouse. The facility has never been broken into and only the family members, who own the warehouse, have access to the keys.
18. In the circumstances, even if the Defendant took possession of the Plaintiff's belongings, by storing them in the St. John's Road warehouse, I consider that she has discharged the duty placed on her to do what was right and reasonable in all

the circumstances. In my judgment, the Plaintiff's claim for damages in respect of the damaged and missing items accordingly fails.

19. I should add that had the claim for damaged and/or missing items succeeded, I would have confined the claim to missing items of jewellery. The Plaintiff conceded that the claim based upon purchase price of the damaged goods was unsustainable. I also consider that the claim for purchase price in relation for other items, except in the claim for jewellery, is also unsustainable. These goods have clearly depreciated over time and the claim for the purchase price is accordingly inappropriate. Having regard to the evidence, I would have considered that the claim for the purchase price was appropriate in relation to the following items only:-

14kt gold baby ring	\$165.00
1 pair 14kt gold bangles (acorn head)	\$3,000.00
Silver Tiffany & Co. heart necklace and bracelet set	\$1,600.00
Diamond stud earrings	\$1,500.00
Diamond tennis bracelet	\$1,900.00
Orange topaz/diamond pendant & earrings	\$700.00
Aquamarine pendant & earrings	\$350.00
Bermuda paradise pendant & earrings	\$400.00
Rainbow pendant & earrings	\$250.00
14kt gold "dome style" earrings	\$200.00
14kt gold Omega necklace	\$400.00
Diamond/Mother of Pearl watch	\$250.00
14kt gold chocolate diamond eternity band	\$500.00
14kt gold Mother's ring	\$480.00

Tri-colour water pearl necklace earrings & bracelet set	\$180.00
Various white pearls & earrings	\$300.00
Crystal glasses	<u>\$1,800.00</u>
TOTAL	\$13,975.00

Return of Security Deposit

20. The Plaintiff also claims the return of the security deposit of \$5,200 primarily on the basis that she should have been given the opportunity to carry out the remedial work herself. The Plaintiff also takes issue with an item of \$2,600 claimed as rent for storing the Plaintiff's possessions on the premises. In all the circumstances, I consider that it was reasonable for the Defendant, as the landlord, to carry out the remedial and restoration work herself in order to have the premises ready for rental as soon as possible.

21. I also consider that the Defendant is entitled to retain the security deposit pursuant to the terms of the lease. Under clause 1(b)(ii), the lease agreement provides that if the lease is terminated prematurely, the tenant agrees to forfeit the deposit if the landlord so requests. There is no requirement that the landlord serves any formal notice of any such request. In the circumstances, it is clear that the landlord has, by her actions, exercised the right pursuant to clause 1(b)(ii) of the lease. In this connection, it should also be noted that under clause 5(c), the lease agreement provides that if the tenant shall commit any breach of the lease by reason whereof the landlord shall incur any outlay of fees or expenses (including legal fees and court costs) either before or after termination of the tenancy, the same shall be recoverable by the landlord from the tenant on a full indemnity basis and without any deduction for any reason as if the same were rent in arrears. In the circumstances, the Defendant is able to apply the security deposit in respect of the expenses set out in the Condition Report. However, I do not consider that the

"rental" of \$2,600 for storing the Plaintiff's possessions for 24 days is appropriate either because the rental was never agreed, or that it is not an appropriate expense. I would allow the Defendant to set off the expenses of \$7,779.74.

Loss of Water

22. The Plaintiff also makes a claim in the amount of \$5,456.12 arising out of the loss of water due to a leak in the water tank in the leased premises. The bulk of the claim (\$5,021.12) represents charges by Watlington Water during the period of occupancy of the leased premises by the Plaintiff.
23. The Defendant accepts that a leak in the tank was discovered in November 2011 and in the circumstances accepts responsibility for the lost water. However, the Defendant argues that the claim should be substantially reduced due to the fact that the Plaintiff frequently allowed the tank to overflow resulting in unnecessary wastage. It is the uncontested evidence of Mr. Robinson, on behalf of the Plaintiff, that he was called on at least eight occasions, during the Plaintiff's occupation of the leased premises, with reports of water overflowing from the tank. Mr. Robinson says that he attended the premises personally on at least three separate occasions and asked others to attend and assist on other occasions.
24. The parties recognised that it was difficult to apportion a loss of water with respect to these competing causes. Doing the best I can, I would allow 50% of the sum claimed by the Plaintiff, ie. the sum of \$2,728.06. This sum is to be set off to the extent of \$2,579.74 against the outstanding expenses set out in the Condition Report (after applying the security deposit) and the balance of \$153.32 against the judgment debt of \$18,448.08.

Conclusion

25. In conclusion, the Plaintiff's claim for damages in respect of the damaged and/or missing items and the return of the security deposit fails and is hereby dismissed. The Plaintiff's claim in respect of the loss of water succeeds to the extent of

\$2,728.06 and that sum is to be set off against the outstanding expenses set out in the Condition Report and the balance against the judgment sum.

26. In terms of costs, my provisional view is that this is a case where each side should bear their own costs. However, I will hear the parties in relation to costs if they so wish.

DATED THIS 28th day of September 2012.

Narinder K. Hargun, Assistant Justice