Civil Resolution Tribunal

Date Issued: May 25, 2022

File: SC-2021-009343

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Trites v. Whitaker*, 2022 BCCRT 614

B E T W E E N :

KATHLEEN TRITES

APPLICANT

A N D :

DAVID WHITAKER

RESPONDENT

A N D :

KATHLEEN TRITES

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This dispute is about a damage deposit under a commercial lease.

2. The applicant and respondent by counterclaim, Kathleen Trites, entered into 2 separate lease agreements with the respondent and applicant by counterclaim, David Whitaker, for adjoining commercial spaces referred to as Lot 7 and Lot 8. Ms. Trites' lease for Lot 7 expired in 2016, and she did not renew it. Ms. Trites says that in 2021 she found a buyer for her business that was occupying Lot 8, but that Mr. Whitaker has refused to sign over her Lot 8 lease to the new tenants or to return her security deposit due to alleged damage to Lot 8. Ms. Trites denies there is any damage, and she claims $1,885.24 for return of her security deposit.

3. Mr. Whitaker says that Ms. Trites disassembled a bathroom that was located between Lot 7 and Lot 8. He says he is entitled to keep the security deposit for the required bathroom repairs, which he says are estimated to cost $5,205. Mr. Whitaker also says the Lot 8 lease entitles him to a "supervisory fee" of approximately $1,000 for the repairs (based on 20% of the repair costs), and that Ms. Trites owes him $452.57 for plumbing work done in Lot 8. Mr. Whitaker counterclaims $5,000 for the bathroom repairs, supervisory fee, and plumbing invoice. I find that Mr. Whitaker has abandoned the amount of his claim over the $5,000 Civil Resolution Tribunal (CRT) small claims limit, if any.

4. While Ms. Trites does not deny taking a bathroom apart several years ago to use the space for storage, she says the bathroom was part of the Lot 7 lease. She says Mr. Whitaker cannot keep her security deposit from the Lot 8 lease to pay for damage related to the Lot 7 lease. Because the Lot 7 lease ended 5 years ago, she says Mr. Whitaker is out of time to claim for the bathroom damage. Ms. Trites also says she should not be responsible for the full amount of the plumber's invoice because she did not authorize the repairs.

5. The parties are each self-represented.

JURISDICTION AND PROCEDURE

6. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

7. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

8. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

10. I note that while Ms. Trites framed her claim as money owed for return of a damage deposit, she submits that she also wants Mr. Whitaker to sign an agreement assigning her lease to new tenants. An order requiring someone to do something is known in law as "injunctive relief". Injunctive relief is outside the CRT's small claims jurisdiction, with limited exceptions that I find do not apply here. I find I have no jurisdiction under CRTA section 118 to provide the requested injunctive relief for Mr. Whitaker to sign over the lease. Further, as that remedy was not specifically raised in the Dispute

Notice, I find it is not property before me. For these reasons, I decline to grant that requested remedy.

ISSUES

11. The issues in this dispute are:

    a. Is Ms. Trites entitled to the return of her $1,885.24 security deposit for Lot 8?

    b. Is the damaged bathroom subject to the Lot 8 lease?

    c. If not, is Mr. Whitaker out of time to claim Ms. Trites is responsible for the bathroom repairs?

    d. To what extent, if any, is Ms. Trites responsible for the $452.57 plumbing work invoice?

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, Ms. Trites must prove her claims on a balance of probabilities (meaning “more likely than not”). Mr. Whitaker bears the same burden to prove his counterclaims. I have read all of the parties’ evidence and submissions, but I refer only to what I find is necessary to explain my decision.

13. The background facts are not in dispute. On April 1, 2011, Ms. Trites signed a 5-year lease for 2,000 square feet of commercial space (Lot 7 lease). Ms. Trites was the tenant and Mr. Whitaker was the landlord. The Lot 7 lease provided that a $1,914.38 paid security deposit would be returned to Ms. Trites at the expiration of the lease term, provided that she had complied with all terms and conditions of the lease.

14. On November 1, 2011, Ms. Trites signed a 3-year lease for 2,000 square feet of commercial space that adjoined the Lot 7 space (Lot 8 lease). Again, Ms. Trites was the tenant and Mr. Whitaker was the landlord. The Lot 8 lease provided for a $1,885.24 security deposit, with the same terms for its return as in the Lot 7 lease.

The parties signed 2 “Extension of Lease” agreements for Lot 8. The most recent extension of the Lot 8 lease was dated May 2, 2021 with a June 30, 2024 end date.

15. It is undisputed that Ms. Trites did not renew the Lot 7 lease when it expired on March 31, 2016. Sometime before that date, while Ms. Trites was leasing both lots, she admits she disassembled a bathroom located between Lot 7 and Lot 8, to use as retail space. I address responsibility for the bathroom further below. It is undisputed that Mr. Whitaker did not mention the bathroom damage when the Lot 7 lease ended.

16. The evidence shows that in about June 2021, Ms. Trites advised Mr. Whitaker that she wanted to assign her Lot 8 lease to another business, and that Mr. Whitaker drafted an “Assignment, Assumption, and Amendment of Lease and Landlord’s Consent” agreement (lease assignment agreement). However, the evidence shows Mr. Whitaker refused to sign the lease assignment agreement or refund Ms. Trites’ claimed $1,885.24 security deposit until she restores the disassembled bathroom.

Is Ms. Trites entitled to the return of her $1,885.24 security deposit for Lot 8?

17. Ms. Trites says she is entitled to return of her paid security deposit under the Lot 8 lease because she says the bathroom was part of the Lot 7 lease, and there is no damage to Lot 8.

18. The difficulty for Ms. Trites is that, as noted, the security deposit is only refundable at the expiration of the Lot 8 lease term, which is June 30, 2024. While Mr. Whitaker has agreed in principle to assign Ms. Trites’ lease to new tenants, given he has not signed the lease assignment agreement, I find her Lot 8 lease remains in effect.

19. As noted, I do not have jurisdiction to order Mr. Whitaker to assign the lease to effectively bring the Lot 8 lease to an end and trigger his obligation to return the security deposit. Since the Lot 8 lease has not expired or been assigned, I find that determining whether Ms. Trites is entitled to return of the security deposit is premature. In the circumstances, I exercise my discretion to refuse to resolve Ms.

Trites' claim under CRTA section 11(1)(b), as the requested resolution does not disclose a reasonable claim at this time.

20. However, in light of my conclusion below that Ms. Trites is not responsible for repairing the bathroom damage, nothing in this decision prevents Mr. Whitaker from signing the lease assignment agreement and refunding the Lot 8 security deposit.

Is the damaged bathroom subject to the Lot 8 lease?

21. The only evidence before me showing the bathroom's location is a simple drawing that I infer Mr. Whitaker created. As Ms. Trites did not dispute the drawing, I accept it is generally accurate. The drawing shows 2 adjoining rectangular boxes labelled Lot 7 and Lot 8, with a small hallway near one end connecting the 2 lots. Along the hallway is a bathroom that both lots can access. Mr. Whitaker says that the building was built before each business was required to have its own designated bathroom, so the tenants in both lots historically used the same bathroom. On that basis, Mr. Whitaker says that both lots were responsible for the bathroom.

22. Ms. Trites says that Mr. Whitaker never mentioned that the bathroom in question was a shared bathroom. She says it was generally used by the tenants in Lot 7, as Lot 8 had its own bathroom, which Mr. Whitaker does not dispute. Ms. Trites says that when she started leasing both lots, she did not need 2 bathrooms, so she removed the drywall and fixtures in the bathroom in question, to use it as retail space. Further, she says when her Lot 7 lease ended, a restaurant moved in and installed its own bathrooms within Lot 7. So, Ms. Trites says she continued to use the disassembled bathroom space because the restaurant did not need it, which Mr. Whitaker also does not dispute.

23. Neither the Lot 7 lease nor the Lot 8 lease specifically mentions the bathroom or the hallway, and the parties did not provide any evidence about who was responsible for cleaning and maintaining these areas. Mr. Whitaker's drawing in evidence does not show the layout or what was included in the leased "premises" for each lot. I also find the parties' submissions show they did not have a meeting of the minds about

whether either lease, or both leases, included responsibility for the bathroom in question. In the absence of an express agreement, I find it unlikely that the tenants accepted joint responsibility for cleaning and maintaining a common bathroom.

24. On balance, I find the bathroom and hallway were not part of either Lot 7 or Lot 8. Rather, I find that the bathroom and hallway comprised a common area between the 2 lots. The evidence shows that Mr. Whitaker employed a building manager, and I find it likely that the building manager was responsible for cleaning and maintaining these common areas, given there is no other evidence that the tenants bore this responsibility.

25. So, I find the common area, including the bathroom, was not part of the leased "premises" under the leases for either Lot 7 or Lot 8. This conclusion is consistent with Mr. Whitaker's final reply submissions for his counterclaim, in which he says the bathroom was not part of either lease, but was intended as a "communal bathroom". Therefore, while the tenants in both lots were entitled to use the bathroom, I find that the leases' terms do not apply to the bathroom.

26. This means that Mr. Whitaker cannot rely on the Lot 8 lease terms to hold Ms. Trites responsible for the bathroom repairs, and I find he is not entitled to keep the security deposit paid under the Lot 8 lease for the bathroom repairs. Rather, I find Mr. Whitaker is restricted to a claim for intentional property damage under common law.

Is Mr. Whitaker out of time to claim for intentional property damage?

27. As noted, Ms. Trites says that Mr. Whitaker is out of time to bring a claim for the bathroom damage. The *Limitation Act* applies to disputes before the CRT. A limitation period is a period within which a person may bring a claim. If that period expires, the right to bring the claim ends, even if the claim would have been successful. The burden of proving the applicable limitation period and whether it has expired is on the party seeking to rely on it, which here is Ms. Trites.

28. Section 6 of the *Limitation Act* states that a proceeding in respect of a claim must be started within 2 years of when it was "discovered". Under section 8 of the *Limitation*

Act, a claim is discovered when the applicant knew or reasonably ought to have known they had a claim against the respondent and that a court or tribunal proceeding was an appropriate way to seek a remedy.

29. In the Dispute Notice for Mr. Whitaker's counterclaim, he stated that he became aware of the damaged bathroom in approximately July 2015. He also submits that when he discovered the damage, he told Ms. Trites she did not have permission to take the bathroom apart and should fix it, but she denied responsibility. Therefore, on Mr. Whitaker's own evidence, I find the latest date that he discovered his claim for intentional property damage was July 31, 2015.

30. Under section 24 of the *Limitation Act*, the limitation period will be extended if a person acknowledges liability for a claim before the limitation period expires. However, there is no evidence before me that Ms. Trites acknowledged liability for the bathroom damage in the 2-year period after Mr. Whitaker discovered the damage.

31. While not raised by the parties, I note that section 22 of the *Limitation Act*, says that if a legal proceeding has been started within the limitation period, a "related claim" such as a counterclaim, can be started even after the limitation period for the counterclaim has expired. I found above that Ms. Trites' claim for return of her security deposit under the Lot 8 lease is premature, so it was clearly started in time.

32. However, I find Mr. Whitaker's counterclaim for property damage is not a "related claim" for the purposes of the *Limitation Act*. While Mr. Whitaker's defence is that he was entitled to keep the security deposit to pay for the bathroom damage, I have found that the bathroom was not part of the leased Lot 8 premises. Therefore, I find Mr. Whitaker's claim for the cost of the common area bathroom repairs is not a true counterclaim, as it is unrelated to Ms. Trites' claim for return of her Lot 8 security deposit.

33. So, I find Mr. Whitaker's claim for the bathroom damage expired by July 31, 2017, which was well before Mr. Whitaker filed his CRT application on December 4, 2021. For these reasons, I find Mr. Whitaker's claim for bathroom damage is out of time and

statute-barred by the *Limitation Act*. On this basis, I dismiss his claim for bathroom repairs.

Is Ms. Trites responsible for the $452.57 plumbing work invoice?

34. Mr. Whitaker provided a January 16, 2020 invoice totalling the claimed $452.57 for plumbing work. The invoice shows charges for a service call, new kitchen faucet, materials, and one hour of labour to install the new faucet. The job name on the invoice is "Mosaic Market", which I infer is the name of Ms. Trites' business. I find that this invoice relates to plumbing work done within the Lot 8 premises and does not relate to the common area bathroom discussed above.

35. Ms. Trites does not specifically dispute that the plumbing work was done in Lot 8 while she was the tenant, or that she is responsible for it under the Lot 8 lease. I find the Lot 8 lease says that as the tenant, Ms. Trites was responsible for costs and expenses to repair and maintain the premises, including plumbing equipment and fixtures within the premises.

36. Ms. Trites provided an email statement from EB, who I infer was Ms. Trites' employee, explaining what she recalled about the plumbing work. EB stated that the building manager, K, called a plumber to fix a leak in the sink "in the back room", and the plumber told EB the tap needed replacing. EB said she told the plumber Ms. Trites was out of town and she could not authorize the tap replacement, so the plumber called K for her authorization. I accept EB's evidence about the circumstances of the plumbing work, as there is no contradictory evidence before me.

37. Ms. Trites argues that she should not be responsible for the full cost of the plumbing invoice because she was entitled to choose the repair person and was not provided that opportunity. I infer that she means she could have repaired the tap for less. However, Ms. Trites did not provide any evidence to support her submission on this point. While there is limited evidence before me about the nature of the leak, I find it reasonable to replace a leaky tap as soon as reasonably possible. In the absence of

any evidence that the plumbing work was unnecessary or the amount unreasonable, I find that Ms. Trites is responsible for the claimed $452.57.

38. The *Court Order Interest Act* applies to the CRT. Mr. Whitaker is entitled to pre-judgement interest on the $452.57 from January 16, 2020, the date of the invoice, to the date of this decision. This equals $7.89.

39. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Ms. Trites was unsuccessful and so I dismiss her claim for CRT fees and dispute-related expenses. I note that Ms. Trites' claimed expenses were for legal fees, and under CRT rule 9.5(3), such dispute-related legal fees are only recoverable in extraordinary circumstances, which I find are not present here. So, I would not have awarded Ms. Trites reimbursement of this expenses in any event.

40. I find Mr. Whitaker was partly successful in his counterclaim, so it is appropriate to reimburse half of his CRT fees, which is $62.50. He did not claim any dispute-related expenses.

ORDERS

41. Within 30 days of the date of this decision, I order Ms. Trites to pay Mr. Whitaker a total of $522.96, broken down as follows:

    a. $452.57 in debt for the plumbing invoice,

    b. $7.89 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $62.50 in CRT fees.

42. Mr. Whitaker is also entitled to post-judgment interest, as applicable.

43. I dismiss the balance of Mr. Whitaker's counterclaims.

44. I refuse to resolve Ms. Trites' claim for return of the Lot 8 security deposit. I dismiss the balance of Ms. Trites' claims.

45. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision.

46. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Kristin Gardner, Tribunal Member