Claim No: 285839

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Dine v. Harnish, 2007 NSSM 77

BETWEEN:

DON DINE

Claimant,
Defendant by Counterclaim

- and -

ROBIN HARNISH

Defendant,
Claimant by Counterclaim

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 6, 2007

Decision rendered on November 22, 2007.

APPEARANCES

For the Claimant: self-represented

For the Defendant: David Morrison, Counsel

BY THE COURT:

Introduction

[1] This is a claim and counterclaim arising from a house-sitting arrangement. The Claimant seeks the balance owing of what he regarded as rent and/or contribution to expenses. The Defendant claims an amount by way of compensation for her services as a house sitter.

The Facts

[2] Many of the facts are not in dispute. The Claimant Don Dine and his wife Evelyn Burns live in a luxurious waterfront townhouse which they own, on Shore Rd. in Dartmouth, Nova Scotia. (Although this matter names only the Claimant and not his wife, for all practical purposes they should both be considered Claimants and I will refer to them as such.) They are a middle-aged couple with grown children. They own a dog named Magic.

[3] An opportunity arose in 2006 for the Claimants to spend a year or two in China, beginning in the late summer. This was very attractive to them, but it raised the question of what to do about their home and dog.

[4] Through a swimming club to which they belong, the Claimants put out the word that they were looking for someone to house sit for them. Their expectation was that someone might be willing to look after the house and the dog in exchange for what would essentially be reduced rent.

[5] The Defendant is a younger, single woman who is a member of the swimming club. She heard about the opportunity and eventually came to speak to Ms. Burns about it.

[6] It is not entirely clear to me what interested the Defendant in taking this on. She testified that she had done a lot of house sitting over the years, although all of those other stints were short ones measured in days or weeks.

[7] The Defendant owns and operates a catering business in Dartmouth. At the time this opportunity arose, she was living in a rented accommodation in Bedford, which meant that there was a significant commute to her place of work. Her apartment lease was also apparently expiring, so the opportunity seems to have fit in with her plans. I also believe that she felt that she was doing the Claimants a favour.

[8] There were a couple of meetings to arrive at terms.

[9] The Claimants appear to have determined early on what they were prepared to accept. They did some research and concluded that the rental value of their home, on the open market, would have been in the range of $1,800 to $2,000 per month, plus utilities. They were prepared to accept $1,000 per month plus utilities from a house sitter. Their concern, apart from putting their home and dog into safe hands, was to recover enough to defray their mortgage payment and thus make the trip abroad financially feasible. There was really no negotiation of the significant terms, as far as they were concerned.

[10] At one of the preliminary meetings they presented the Defendant with a handwritten note which reads as follows:

rent	*1000*	
power	*185*	*(balance refunded at the end of July)*
cable	*75*	
internet	*30*	
	1290	

[11] The comment “balance refunded at the end of July” took on some significance at the trial. Don Dine testified that this was stipulated because the power bill was based upon an equal-billing formula, calculated on the previous year’s consumption. Since there was no intention to charge the Defendant for more power than she actually used, the plan was to refund to her any balance that Nova Scotia Power in turn refunded based upon actual usage. Although it was possible that the Defendant would use more power than the plan contemplated, the Claimant believed that to be unlikely since the Defendant, as a single person, would be expected to make fewer and not greater demands upon the electricity.

[12] At trial the Defendant attempted to find support in this statement about a “balance refunded” for her claim for additional compensation, along the lines that there would be an adjustment made to compensate her for her house-sitting services. It might as well be said now rather than later that such an interpretation is simply not tenable. It is clear beyond all question that the statement referred only to a possible refund of the power bill.

[13] The Defendant testified that she was not comfortable with the amount that the Claimants were asking. She was paying $860 per month in her current apartment and was not really looking to increase her expenditure. She testified, and I accept, that she attempted to voice her position but, as she put it, was “not being heard” by the Claimants. By then it appears that there was a certain momentum to the situation; her lease was expiring and she had little choice but to move into the Claimants’ home.

[14] The Defendant appears then to have acquiesced to the terms that the Claimants were asking, and may well have had it in her mind to revisit the issue later, but I find on the evidence that she did agree to the Claimants’ terms on the basis of a verbal contract.

[15] Even so, the matter proceeded with good will on both sides. The Defendant may well have been surprised by how much work was involved, not just to look after the house and the dog, but to deal with mail, make an occasional bank deposit, take phone messages, answer emails and attend to many other details.

[16] It is not clear exactly when the Defendant first indicated to the Claimants that she was looking for some sort of adjustment. One thing she did, which was clearly <u>not</u> contemplated in the arrangement, and which eventually came to the attention of the Claimants, was to bring in a sub-tenant, or roommate, to help defray some of the cost.

[17] It does not appear that the Defendant asked permission to bring another person into the home, which would have been at least the polite (if not the legally required) thing to do, given how meticulous the Claimants were

about their home. This tenant was not someone the Defendant knew, but was someone she found through advertising in the paper. This individual lived in the home for eight months paying $700 per month, thus defraying her expense to the tune of $5,600 for the year.

[18] By the spring of 2007 it was clear that there were problems with the arrangement. The Defendant's cheque for April's rent bounced. At or about the same time the Claimants had communicated the fact that they were not staying on for the extra year, and would be back in late July 2007 and would be looking to move back into the house by September 1. The Defendant had decided also to hold back her rent for May and June, pleading some vague financial difficulties, which she later conceded was essentially an excuse to justify holding back money because of her unhappiness with the arrangement.

[19] The Defendant's position was summed up in a July 10, 2007 email to the Claimants, in which she made the following statements:

> In regards to rent, I don't have the finances to pay what you are asking. It has been a very difficult year for me financially. In defence, I have house sat (this is what I have been doing whether you recognize this or not) many times. In this case I have taken very good care of YOUR items, YOUR home, YOUR dog and YOUR mail. I have answered YOUR phone messages (and there have been many), met and have accommodated YOUR son with his needs and have also accommodated YOUR needs. I have respected both of YOU in my management YOUR home environment and social environment (even though I am severely disappointed in the financial arrangement, I HAVE BEEN VERY RESPECTFUL OF YOU). I have never once been asked to PAY to take care of OTHERS STUFF!!! YOU SHOULD BE PAYING ME FOR HEAVEN'S SAKE!!

> "My agreeing to coming here was to save money for MY future. That is why I had offered not only MY friendship, MY loyalty, and MY finances (this last to my regret). Before our last meeting in August, my agreement with Eve, was clearly that this would be a trade, and I did agree to make a small financial contribution. But I feel swindled. When I do speak to my community about this the response from my family and peers is that I am indeed being swindled.
>
> You have been making very good money overseas. You have had the security of knowing that your home is safe. You did not have any other means of filling your home and I was a FRIEND to you. Please respect me by appreciating what I have done for you and allowing me to save a bit of money for my future."
>
> (Emphasis in original)

[20] This email is quite telling for what it says and what it doesn't say. The Defendant was clearly unhappy with the amount of work that was involved. She felt that she was doing a good job, safeguarding the Claimants' home and was not being adequately compensated. Her statement: *"I have never once been asked to pay to take care of others stuff!!! You should be paying me for heaven's sake!!* is consistent with someone looking to renegotiate rather than someone looking to enforce an existing contract.

[21] This communication did not cause the Claimants to change their position. It appears to have ended any sense of good will or friendship that might have existed up to then.

[22] The Claimants moved back into their home on September 1, 2007, and in the absence of any reconciliation with the Defendant, they commenced this action claiming an amount, since amended to $4,184.86, to cover the missing payments and some utility bills. The Defendant does not really dispute the legitimacy of what is claimed, but rather has counterclaimed for

10½ months of house sitting fees at $900/month, which totals $9,450. The Counterclaim is based on alternate theories of implied contract, *quantum meruit* or unjust enrichment. If this Counterclaim were to succeed, the Claimants would owe the Defendant approximately $5,265.

Discussion and conclusions

[23] The evidence very clearly establishes that there was no express agreement that the Defendant would receive some additional stipend to compensate for her services. It is very clear that the Claimants regarded the reduced rent as the compensation. By their reckoning this represented compensation of between $800 and $1,000 per month.

[24] Had there been any agreement to pay an additional amount, it is unlikely that it would have been structured by having the Defendant pay $1,000 per month, and then get a rebate at the end of the term. It is beyond all doubt that the Claimants established what they were willing to accept and offered no more. Whether this was a good or bad deal for the Defendant was not their concern, although I believe it is fair to say that the Claimants had no reason to suspect at the outset that it was unfair or unattractive to the Defendant.

[25] A binding contract results when both parties are of the same mind and accept a common set of terms. Courts can imply reasonable terms if the parties did not turn their minds to them, but it is not for the court to rewrite the contract the parties have entered into with eyes wide open, except in very limited circumstances to which I will refer below.

[26] I am obliged to find on the evidence that the Defendant understood the terms being set by the Claimants and agreed to them, at least by all outward appearances. Whatever doubts she may have harboured as to whether or not it was a good deal, she kept to herself.

[27] Her later rationale - that she should be paid for house sitting because she always had been paid in previous engagements - ignores the fact that short term assignments are very different. In all but one prior occasion the Defendant had not actually given up her own home or apartment, so having a place to live was no real benefit in itself. People needing their houses sat for a few days or weeks can hardly expect to find someone willing to house sit at or near the rental cost.

[28] The Claimants placed into evidence some information obtained over the internet to establish what is the prevailing understanding of the term house-sitting. This material is more supportive of their position than it is of the Defendant's view of house-sitting as a paid occupation. I do not place a lot of weight on this material, except to the extent that it demonstrates that there are probably many variations on the concept, and there is no one model that is so ingrained that everyone would be deemed to know it and that every arrangement should be interpreted accordingly. In the end, what determines the matter is what the parties have agreed to.

[29] I find on the evidence that the Defendant agreed to the arrangement but her attitude hardened over time because she realized that this was not a great deal for her. Both the amount of work and the amount of responsibility were perhaps more than she expected. She simply came to

regret the deal she had made, and came to believe that she was owed an adjustment.

[30] Her action in bringing in a tenant or roommate was a somewhat bold act. She ought to have known that the Claimants would not have been happy and might not have agreed in advance. However, she did it, without provoking any major dissent from the Claimants, and succeeded in mitigating her year's expenses by some $5,600. That should probably have been enough to bring the financial result close to what she had come to believe was fair. Prorated over the 10½ months that brought in $533/month, and reduced her net cost from $1,290 to $757.

[31] As noted, the arguments advanced on behalf of the Defendant were implied contract, *quantum meruit* and unjust enrichment.

Implied contract

[32] As indicated above, there is no basis to imply terms when the express terms of the contract were clear.

Quantum Meruit

[33] *Quantum meruit* applies where there is an agreement to pay but no amount or rate stipulated. That concept also has no application here because there simply was no agreement to compensate the Defendant for her services, over and above the reduced rent that she would be paying.

Unjust enrichment

[34] Unjust enrichment is a more flexible concept designed to capture situations where one party has benefited at the expense of another, and where there is no good reason to allow that to stand. Put another way, it is designed to provide redress where one party has unjustly received a windfall at the expense of another. The concept was fleshed out more than fifty years ago by the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942), [1943] A.C. 32 (U.K. H.L.):

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution"

[35] The important Canadian case of *Becker v. Pettkus*, [1980] 2 S.C.R. 834 at 848 (S.C.C.) made clear that there are three requirements to be satisfied for unjust enrichment:

A. There must be an enrichment,
B. There must be a corresponding deprivation, and
C. There is an absence of any juristic reason for enrichment.

[36] The concept may be broadly available to courts, but its is used somewhat sparingly, and I believe that the reason most often relates to the third requirement. Many fact situations would satisfy the first two. Any contract

that turns out better for one party than the other could be said to result in an enrichment and a corresponding deprivation. It is the "lack of a juristic reason" that distinguishes a meritorious case from all of the rest. Basically that means that the enrichment should not stand unless there is a clear legal reason that justifies it. The simplest and probably most common example is that there was a legally enforceable contract.

[37] The unjust enrichment remedy is not intended to make *post facto* adjustments to contracts that do not work out to one party's expectations, or to account for that party's miscalculation.

Unconscionability

[38] Even so, that is not the final word because a contract may be circumvented where a court considers it to have been grossly unfair or unconscionable. The concept is rooted in the understandable desire of courts not to become the instrument by which a strong party takes shameless advantage of a weak one. But for such a result to pertain, it must have been clear from an objective point of view, at the outset, that the contract was unconscionable.

[39] I am unable to say in the case before me that the contract was so one-sided as to have been unconscionable. The enrichment, such as it was, occurred because it was what the Claimants contracted to receive from the Defendant. It was not unjustly received or retained. I am not convinced that there was an enrichment of any great significance, nor a corresponding deprivation, considering that the net cost to the Defendant

(after factoring in the $5,600 in rent from her roommate) was only $757 per month - less than she had been paying in her previous apartment.

Summary

[40] In the result, the Counterclaim cannot succeed on any of the grounds advanced, and it must be dismissed.

[41] The Claimant will accordingly have judgment against the Defendant for $4,184.86, plus the filing fee of $85.44, for a total judgment of $4,270.30. No other costs have been claimed or proved. In my discretion I would not allow any prejudgment interest.

Eric K. Slone, Adjudicator