

**SMALL CLAIMS COURT OF NOVA SCOTIA**

*Gill et al. v. Zwicker, 2023 NSSM 78*

**Date:** 202301031

**Docket:** 523899

**Registry:** Truro

ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL  
TENANCIES

**Between:**

Jessica Gill and Kyle Pearce

*Appellants*

v.

Jeremy Zwicker

*Respondent*

**Adjudicator:** Julien S. Matte

**Heard:** October 23, 2023 (via teleconference)

**Appearances:** Kyle Pearce, self-represented for the Appellant  
Jeremy Zwicker, self-represented for the Respondent

**By the Court:**

[1] The Appellants signed a month-to-month lease beginning on October 1, 2020, at the rate of \$1075 per month which included oil heat but not electricity. The parties agree, however, that during the tenancy, unbeknownst to the Claimants, the Claimants were also paying for electricity used to heat the water for the other two units in the building including the Respondent's apartment. In addition, outside building plugs and power used to run the heating fan for the building's heating system were wired to the Appellant's electrical panel. The Claimants also claim damages for the oil running dry and leaving them without heat on more than one occasion.

**Liability**

[2] The Respondent was unequivocal in his admission that he misled the Appellants but justified it by suggesting that the rent was set lower than the market rate to account for the additional costs to the Appellants. The Respondent admits that he did not disclose to the Appellants that given the building's wiring they would pay for the hot water for all three units. The Respondent went as far as accepting that his actions were shady, and he might better be referred to as a "shady landlord" rather than the moniker of slumlord suggested by the Claimants during cross-examination. The Respondent also accepts that he let the oil tank run dry, leaving the Claimants without heat for one week on one occasion a day or so more than once.

[3] The Court finds that the Respondent intentionally misrepresented the state of affairs and induced the Appellants into signing a lease, knowing that the terms of the lease did not reflect the reality of the building's wiring. As a result, the Appellants paid for the costs of heating hot water for two other units including that of the Respondent as well as electricity used for outside plugs and the building's heating fan.

### **Damages**

[4] As the Court in *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2009 NSSC 404 at para. 125, noted,

“The correct approach to assessment of damages for fraud is quite uncontroversial. The award of damages is to put the respondent in the same position as if the deceit or fraud had not been committed”

[5] Each of the parties presented spreadsheets of calculation with each relying on assumptions about relative electricity use between the units and average hot water use to attempt to arrive at fair compensation for the Claimants.

[6] Starting with the parties' positions before the Director of Tenancies, each accepted that over the period of the tenancy, the Claimants spent a total of \$4,224.15 (since updated to \$4,913.56). The Director accepted the Claimant's position that the Claimant should be compensated 75% or, \$2566.50 (adjusted to \$3685.17). In addition, both parties agree that the Respondent let the oil run out of the oil tank on

more than one occasion. The Director calculated the loss at \$164.50. The Director rejected the Claimant's claim for interest in the amount of \$3,687.49 on the basis that it has not been claimed on the application filed and that no supporting documents were filed.

[7] At the hearing, the Claimant sought 75% of the total electricity bills (\$4,913.65) plus 15% of all rent paid (\$5,043.96) and interest at the rate of 1% monthly (\$1,744.30). The Respondent provided the Court with a spreadsheet using average hot water consumption as the primary basis for calculating the excess electricity bill that was paid by the Claimants. The Respondent's table calculated how many liters of water might have been used by other tenants and converted the cost of heating each liter into the units of electricity to arrive at a total cost of \$1799.76. The Respondent did not provide his power bill which may have shown the actual usage and cost for his unit.

[8] The Court notes that the Respondent did not object to the Director's method of calculating the amount awarded based on 75% of total usage but later advanced positions of \$1100 as fair compensation. Further, the Respondent did not question the evidence put forward as to the Claimant's overall usage, only the Claimant's assertion of a 75% rate attributable to the all the other units. The Court finds that using actual consumption rather than reconstructing usage from average statistical data is preferable but not without its problems.

[9] The Court notes that use of the 75% is based on pictures of the three meters for the three units showing one unit with quarter of the consumption of the Claimant's unit and the other unit with about half the consumption. No evidence was given as to whether the meters all started at zero at the same time. Although the

meters relative consumption totals provide some indication about the Claimant's overall consumption, it is far from determinative.

[10] While each parties' submissions were helpful, gaps remain to obtain usage totals by the other units leaving the Court to approximate, not uncommon for courts trying to calculate damages flowing from deceit or misrepresentation. As quoted in *Geophysical Services Inc* at para 136, precision in calculating damages is not always required:

...Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty.

[11] The Court finds that considering the shortcomings of each side's calculations, 66% of total electricity spent (\$4,913.65), roughly accounts for the hot water used by the other two units as well any electricity used by the heating fan and outside plugs. The Court awards \$3,275.73 or about \$100 per month reduction during the thirty-two-month tenancy period. This also leaves an electricity bill for the Claimant's unit of about \$50 per month.

[12] Based on all of the evidence, the Court awards, \$200.00 for the intermittent periods where the Respondent failed to ensure that oil was sufficient to heat the building contrary to his obligations under the lease.

[13] The Court finds that the Claimants' claim for the recovery of 15% of the rent paid is not supported by the evidence. Without market data showing the cost of rental at the time, the suggested method of calculating damages is not appropriate. In any event, the award of both the estimated overpayment of electricity and a market rental adjustment would amount to double recovery and is not permitted.

[14] The Claimant also seeks interest on the money the Claimant says could have been saved. Interest is not punitive or an award in lieu of general damages. Interest reflects the cost of money. Given that the Claimants were deprived of their money by the Respondent's misrepresentation, an award of interest is appropriate. The Court takes notice that interest rates have gone up significantly during the period of the tenancy.

[15] The Court finds that interest is appropriate at a rate that both reflects the Court's discretion and the circumstances. Pursuant to s.16 of the *Regulations* the Court orders 4% interest back to the date of the breach calculating the interest based on the full amount for total interest of \$404.01.

### **Order**

[16] The Appeal is allowed in part. The Order of the Director is varied, and the Respondent is ordered to pay the Claimants \$ 3,910.89 inclusive of costs.

Julien S. Matte, Small Claims Court Adjudicator