

1994 CarswellOnt 3734
Ontario Court of Justice (General Division)

Wiazek v. Armstrong

1994 CarswellOnt 3734, [1994] O.J. No. 2737, 51 A.C.W.S. (3d) 944

**Don J. Wiazek, Applicant/Landlord and Randy Armstrong aka
Yunker and Andrea Armstrong aka Yunker, Respondents/Tenants**

Gibson J.

Judgment: November 30, 1994
Docket: Toronto 94-LT-77952, 94-LT-81169

Counsel: D.J. Wiazek in person.
R. Armstrong in person.
A. Armstrong in person.

Subject: Property

Headnote

Landlord and tenant --- Residential tenancies — Termination of tenancy — By landlord for own occupation
Landlord and tenant --- Residential tenancies — Repairs and fitness — Landlord's obligation — Remedies — Abatement

Gibson J.:

- 1 The landlord in the first application seeks termination of the tenancy agreement and Writ of Possession, on the basis of arrears of rent, and similar relief in the second application for personal occupation by himself and his daughters.
- 2 The tenants seek a general abatement of rent and recovery of specific expenses, alleging that the premises were not in a proper state of repair.
- 3 The tenants entered into a verbal lease of the landlord's house, effective May 1, 1994, at a monthly rent of \$1,000.
- 4 Wiazek testified that he accepted \$1,500 from the tenants at the outset, for first and last month's rent, the May rent being reduced by \$500 to compensate the tenants for cleaning up and painting the house, such reduction to cover all labour and material.
- 5 In June the tenants paid \$500 and undertook that they would pay \$1,400 in July, to cover the balance of the June rent, (\$100 being agreed upon to reimburse the tenants for furnace repairs of \$25 and cockroach spray of \$65).
- 6 The tenants paid \$500 in July but have not made any payments since that time.
- 7 As of the end of November, as I calculate the arrears, they are in the amount of \$4,900, the tenants having a security deposit of \$1,000.
- 8 The landlord issued a Notice of Termination on July 26, 1994, followed by a Notice of Application (94-LT-77952) on August 18, returnable September 15.
- 9 The tenants paid into court \$400 on September 14, 1994, but when the matter came on before me on September 15, since the tenants were claiming a substantial abatement, I directed that the tenants pay into court by the end of September a further \$1,750, which was done. On the 15th of September I heard evidence as to the arrears of rent, and some of the evidence of

Mrs. Armstrong with respect to the abatement, but there was insufficient time to hear the balance of the case, so it was put over until October 25.

10 Also on the 15th, the landlord advised me that he had issued a Form 6 Notice of Termination for personal possession, and although the application had not been commenced as yet, he wished to proceed upon that ground also. With the agreement of the tenants, I directed that this second application be issued and be heard on October 25th.

11 The claim for abatement is as follows:

- 1) A general abatement of \$500 per month for the period of the tenancy.
- 2) \$1,500 for expenses of painting, including supplies.
- 3) Spraying of cockroaches (five times) totalling \$312.60.
- 4) Nursing care for their children in the amount of \$5,250.60, during the two week period between May 1 and May 16, when they had to clean up the house before they could move into it.
- 5) Babysitting expenses during this period, \$420.
- 6) An additional month's rent of \$823 in their old house because they could not move into the house because of its condition.
- 7) Pool supplies to open the pool, \$100.
- 8) Spoiled food due to a broken refrigerator, \$200.
- 9) Gas for travelling to and from the store, \$80.
- 10) Meals while house being sprayed, \$200.

12 It was the evidence of Andrea Armstrong that even though they had inspected the house before renting it (it was occupied at that time) they really had not appreciated its true condition until it became vacant and they were about to move into it. Wiazek had assured them that the house only needed a coat of paint and it would be fine.

13 The main problems were moisture and mold on the walls and ceiling, generally throughout the house, and in the bathrooms. The mold in certain areas was sufficiently bad, such as the living room, that five coats of paint had to be applied to cover the condition.

14 The tenant Mrs. Armstrong also testified there was a severe problem with cockroaches, which required five sprays over a period of some weeks.

15 A few days after they took possession, they called Wiazek to advise him that they had to stop painting because they had spent over \$600, because of the mold condition, but Wiazek was uncooperative and was not interested in trying to deal with the problem.

16 In the upstairs bathroom the tiles started to fall off the shower area.

17 Mrs. Armstrong had just had another son around March 25.

18 The tenants also have twin boys, born in June of 1989, who unfortunately have cerebral palsy, and their medical condition is such that they could not move into the house because of its disrepair. For this reason, they had to stay on in their old place for the first part of May, incurring an extra months' rent, extra nursing help to look after the children while the parents and

relatives were cleaning up the place. Wiazek was advised when they rented the place of the boys' condition and that the house had to be in good condition.

19 While the house was carpeted throughout, the carpet generally was so dirty that they got permission from Wiazek to remove it and put it into the garage. Mrs. Armstrong denied that she had agreed that they would be responsible for any damage if the carpet was removed. Once the carpet was removed it appeared that the floors were in poor condition in many areas.

20 Another complaint was that the swimming pool leaked. The ad for the house advertised that it had a pool. Wiazek had stated that they were entitled to use it if it worked, but if it did not, he would not repair it and would have it filled in. They spent monies for pool materials but it did not operate properly.

21 The tenants filed many photographs taken by them to show the condition of the house. Mrs. Armstrong's father and sister helped them clean up and paint the house, and they worked many hours in the first couple of weeks so that they could move in and make it habitable for their family.

22 Mrs. Armstrong reported the condition to the Building Department of the City of Toronto and called as a witness was Robert Foxhall, who had been an inspector with the City for some twenty years. He attended at the house on July 26. At that time he issued a deficiency notice dated the 28th (exhibit 5) comprising some nineteen items. While many of them were exterior matters — deteriorated walkways, patio and steps in the pool area, parking and driveway area — he did note that there was a leaking plumbing system, the fridge and stove required repair, and there were deteriorating walls and ceilings which needed to be repaired and refinished, together with deteriorated bathroom tiles and floors.

23 Mr. Foxhall testified that he followed up on September 14, and met with Wiazek at the house at that time. No steps had been taken to rectify the deficiency list by that date, so he issued an order to comply on September 15. Wiazek has appealed this order but I have no information as to the result of this appeal.

24 Foxhall, when he testified on October 25, stated he had been at the house the day previously, but all of the items on the order to comply were still outstanding, although Wiazek had said that he would be repairing some of them and would be filling in the swimming pool.

25 Also called on behalf of the tenants were Mrs. Armstrong's sister, Susan Yunker. She was at the house on May 2, and confirmed her sister's evidence as to the deplorable condition of the house — mold, broken refrigerator, and general condition of disrepair. Ms. Yunker helped clean up the house, scrubbing the floors, bathrooms, et cetera, as well as doing other clean up chores and painting.

26 On behalf of the landlord, Christine Bradshaw, who is the girlfriend of Wiazek, testified that she was present when the tenants first inspected the house, although she was not present when the house was actually rented.

27 It was Ms. Bradshaw's understanding that \$500 was being allowed for all of the work that the tenants might do, including any expense, in cleaning up and painting the house. The previous tenant had offered to paint before he left, but Ms. Armstrong preferred to do it herself since they would be cleaning up the house.

28 Wiazek testified that the \$500 reduction in the May rent was to include all the painting and clean up work (labour and material). As far as he was concerned, the whole house could have been cleaned up and painted for \$1,000. He maintained that he did not hide anything, displayed the whole house to them, and testified that the house could have been cleaned up and painted in three to four days. He conceded that the tenants called him, within approximately the first week, and told him that they had spent over \$600 in expenses to date, which he felt was unjustified. He pointed out the previous water damage to them and never misled them about its condition, which they were to take "as is".

29 When the bathroom tiles started to fall off he felt responsible for same and offered to have them repaired, but the tenants advised him that he should consult his solicitor and would not discuss the matter with him.

30 Wiazek maintained that he did not agree to the removal of all of the carpet, or the partition in the living room, or the sliding bathroom glass doors.

31 On October 25 Wiazek did not have any opportunity to look at the various bills filed by Mrs. Armstrong as exhibit 7, and when the matter resumed on November 25 (to hear the personal occupation application) Mr. Wiazek had had a chance to look at the bills but could only examine Randy Armstrong, since Mrs. Armstrong did not attend as she was at work (some of these items had been waived by Mrs. Armstrong).

32 Randy Armstrong readily conceded that many of the bills were not properly claimable, such as wallpaper, curtains, et cetera.

33 After carefully reviewing the bills with Messrs. Armstrong and Wiazek, it would appear that the actual claim for painting supplies (which the tenants maintain is properly in addition to the \$500 reduction in the May rent) is approximately \$440.

34 I will now deal briefly with the evidence in respect of personal occupation.

35 Wiazek testified that he had purchased the house in 1979 after his return from Alberta, and lived in it with his wife and family until the spring of 1992. At some point in time, he and his wife separated, and since the spring of 1992 he has been living with Christine Bradshaw at her home at 27 Medway.

36 He has three daughters, but they all went their own way and did not live with him and Ms. Bradshaw.

37 He first rented the house in the spring of 1992 to another tenant.

38 His oldest daughter, Kim, presently aged 25, moved to Vancouver about three months ago and may visit him in Toronto on an occasional basis.

39 His second daughter, Tanya, aged 22, is presently in her third year of a nursing course at McMaster University in Hamilton.

40 His third daughter, Gisella, aged 19, has been on her own for several years, and has lived with her boyfriend for the past three years.

41 Wiazek stated that he desires possession of the house to try to re-establish his relationship with his daughters, which in the case of at least one daughter (Gisella) had been strained because of his relationship with Ms. Bradshaw. His plan, if he gets possession, is that he will move back into the house and live there, together with Gisella and her boyfriend. In addition, Tanya, when she is not at school, will have a place to stay, and depending on where she can obtain employment upon graduation, she would also move into the house.

42 Wiazek conceded that while he will be at the house, as he puts it, on a full-time basis, since he is presently out of work, he would be continuing his relationship with Ms. Bradshaw and so will be spending some of his time at her house.

43 Gisella Wiazek testified that she has been wanting to move back into the house since 1992, when it was first rented. While she has been distant from her father on a personal basis, (which is apparently due to his relationship with Ms. Bradshaw, and she will not reside in the same house with Ms. Bradshaw) she wants to regain her previous close personal relationship with her father. She and her boyfriend would move into the house, and while she presently is between jobs, they have some tentative plans to purchase the house in the future.

44 Tanya Wiazek confirmed that she would like to reside in the house when she is not at school (Christmas, weekends, reading weeks, et cetera). She is presently sharing a place in Hamilton with four other girls but has to pay for a whole year's residence even though she only attends school eight months of the year. On graduation, next April, she would, if she can obtain employment in Toronto, like to move back into the house.

45 The tenants understandably have no real evidence to contradict the evidence of Wiazek and his daughters, but submitted that the evidence on behalf of the landlord was not sufficient to entitle him to possession, and that since Wiazek is in violation

of his obligations under the *Landlord and Tenant Act* to maintain the demised premises in a proper state of repair, in law he should not be granted termination and possession for the alleged personal occupation.

Arrears

46 As of the end of November, I find that the arrears of rent are \$4,900, subject to the tenants' entitlement to a credit for the security deposit of \$1,000 and the appropriate interest thereon. Costs of the application are fixed at \$45.00.

Abatement

47

1) There being no evidence that any repairs have been effected by Wiazek, and on the basis of the evidence of the tenants and Foxhall, I find that there has been a condition of disrepair (defective refrigerator, and a general condition of disrepair in the house) which was to some extent rectified by the efforts of the tenants to clean up and paint the house. I allow a lump sum of \$1,500.

2) I am not satisfied that it has been demonstrated by the landlord on the evidence that the arrangement was that the \$500 reduction in rent for May was to cover both the tenants' labour and any expenses they would incur in the clean up and painting of the house. I allow the tenants their painting expenses which I have calculated at \$440.

3) I allow the tenants the cost of the sprays for the cockroaches of \$312.60.

With respect to items 4 and 5, unfortunately for the tenants, in my view these claims are too remote in law to be recoverable as an abatement claim in a landlord and tenant application and nothing can be allowed in these areas.

6) On the basis of the tenants' evidence that the premises were not in a proper state of repair as of May 1, 1994, so as to move in, and they had to remain in the previous house, I allow the \$823.

7) I accept the landlord's evidence that he had no responsibility for the pool, and in any event the materials for the pool are not the landlord's obligation in law, so I make no allowance in this area.

8) On the evidence of the tenants and Foxhall, the fridge door was defective. However, there is no clear evidence as to how much spoiled food was lost, and I allow \$100.

9) I am not satisfied that the tenants are entitled to such expense, and I make no allowance in this area.

10) Again, there is no clear evidence with respect to this, but in view of the fact that there were five sprays required, and there were small children, obviously there would be some dislocation and I allow the sum of \$100 for expenses in this area.

Costs

48 Witness fee to R. Foxhall — \$53.00.

49 I therefore allow the abatement claim at \$3,778.60 (inclusive of costs).

Personal Possession

50 The authorities make it quite clear that the burden is upon the landlord to establish, on the balance of probabilities, on credible evidence, that he genuinely requires possession of the premises for occupation by him or certain members of his family, which, of course, would include his daughters.

51 Clearly, Kim, from a practical standpoint, is not involved. Tanya could only be on a part-time basis, and if upon graduation she did not obtain employment in Toronto, she would only be living in the house on an occasional basis.

52 The evidence of Gisella is that she would like to live in the house, together with her boyfriend, however it is only her position that must be considered in law, since her boyfriend is not within the category of people for whom the landlord can obtain possession for their occupation.

53 Wiazek, while he testified that he would live in the house on a full-time basis, I find it hard to accept this evidence at its full face value. He conceded that he will be continuing his relationship with Ms. Bradshaw (as is clearly their privilege) and that he will be with her on some basis, however I really do not feel that he will be in effect living in his own house on a fulltime basis, which would mean that he does not "require" the premises for his own personal living needs. I sympathize with his personal desire to re-establish a close personal relationship with his daughters, and this seems to be something both Gisella and Tanya desire also. One thing that concerns me is that there is no evidence as to why this desire manifested itself at the end of July (which is when he served the second Notice of Termination) as distinct from some earlier time. Wiazek had commenced the application with respect to arrears of rent, as clearly his relationship with the tenants had resulted in an impasse. He had served the Notice of Termination for arrears on the same date, but did not see fit to go ahead with the application in respect of personal possession, only for arrears. Wiazek did not give any evidence in this area, and I am left with the somewhat unsettling feeling that he was using the application for personal possession as a back-up position in the event he was not successful on the arrears situation, and once he saw that the tenants were determined to defend the application for arrears, he then advised me that he wished to proceed with the application for personal possession.

54 Considering all of the evidence, I am not satisfied that the landlord has demonstrated, on the balance of probabilities, that he "genuinely requires" his home for occupation by himself and Gisella. She has her own place to live in, as he does, and while I think there is an element of credibility to his desire to reestablish his relationship with his daughters, such is not sufficient to evict a family who have experienced considerable trials to put his house into better condition so as to make it a place for them and their children to live in comfortably.

55 The landlord's application for personal possession will therefore be dismissed, without costs, as I feel, in all the circumstances, it would not be unfair to the landlord to do so, considering the disrepair situation.

56 The landlord will have judgment for the arrears of rent and costs of \$4,945. To be set off from that amount will be the amount of the abatement award of \$3,778.60. The net amount owing to the landlord at this time is \$1,166.40.

57 The monies in court (\$2,150), together with any accrued interest, shall be paid out of court forthwith to the landlord, to be applied to the above net judgment, and rent due on December and January next.