

**Lyman v. 637568 Alberta Ltd., 1999 ABPC 74**

Date: 19990817  
Action No.: P98-0384

**IN THE PROVINCIAL COURT OF ALBERTA  
CIVIL DIVISION  
JUDICIAL DISTRICT OF GRANDE PRAIRIE**

**BETWEEN:**

**CHERYL KATHRYN LYMAN**

**Plaintiff**

**-and-**

**637568 ALBERTA LTD., operating as EMGLO APARTMENTS**

**Defendant**

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**REASONS FOR JUDGMENT**

**OF THE HONOURABLE ASSISTANT CHIEF JUDGE DONALD E. PATTERSON**

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[1] The Plaintiff is a former tenant of the Defendant landlord. She has sued for recovery of the security deposit of \$600.00, together with the return of a portion of her final month' rental amounting to \$135.00. What provides an unusual twist to these proceedings is the Plaintiff's admission that (via the actions of her boyfriend) she is responsible for some \$20,000.00 damages to the Defendant's building.

[2] Not surprisingly, the Defendant has filed a Counterclaim. It is in the sum of \$3,881.00. However, the amount recoverable against the Plaintiff is problematic.

[3] The tenancy began on the 1st day of November, 1996. It was granted pursuant to a Lease Agreement dated the 5th of October, 1996. Pursuant to s. 15.2 of the *Residential Tenancies Act*, the parties completed a check-in inspection list. The lease contained a prohibition against the keeping of pets or animals of any sort on the premises. The Plaintiff disclosed that she wished to keep creatures known as geckos. Alvin Pall, on behalf of the Landlord, agreed, on the basis of his understanding that geckos were a form of lizard confined to an aquarium. I am satisfied that Mr. Pall was not advised that the geckos' diet consisted of live crickets.

[4] On the 27th of December, 1996, the City of Grande Prairie suffered a total loss of its water supply. It was not restored until December 30th. Either the Plaintiff or her boyfriend left the kitchen tap open, and when service resumed, the water filled the sink and went on to flood the kitchen, dining room and living room area of the Plaintiff's suite. The water then began running into the two suites below. The Plaintiff was not at home at the time. Her boyfriend was, but he was oblivious to the ongoing inundation.

[5] The Defendant contacted its insurer. The insurance policy covered much of the Defendant's loss but, due to various exceptions, fell short of providing the funds necessary to restore the premises to their former condition. In addition, there was a \$500.00 deductible which the Defendant was obliged to absorb.

[6] In due course, pursuant to its right of subrogation, and in the name of the Defendant, the insurer commenced an action in the Court of Queen's Bench against the Plaintiff and her boyfriend. The claim was for the damages occasioned by the flood, and was framed in breach of the lease and tort. The amount claimed was \$19,939.06. Although there is no breakdown of the claim, I am satisfied that it did not include the extra money expended by the Defendant to restore the premises beyond that provided for in the policy of insurance or his deductible of \$500.00. Indeed, from what was presented to me, it would appear that the claim did not include the entire expenditures of the insurer. The foregoing is probably irrelevant. For reasons unexplained, the insurer's solicitor agreed to a Consent Judgment of \$2,500.00 against the Plaintiff. The action against her boyfriend was discontinued. There is no evidence as to the extent, if any, of the Defendant's involvement in the compromise of the claim.

[7] The Plaintiff paid the Judgment debt of \$2,500.00. As indicated, she now seeks a refund of her security deposit. In its defence, and as part of its Counterclaim, the Defendant has claimed that portion of the loss from the flood which was not paid by the insurer.

[8] At the risk of redundancy, I will repeat what I said several times at the trial. When the insurer commenced the action for its losses arising from the flood, it was bound to include the losses suffered by the insured which were not covered by the policy. There

can be only one action arising from this delict. Any other lawsuit is barred by the doctrine of *res judicata*. My opinion is unaltered by the contrary view expressed by the Claims Examiner of the insurer in his letter of October 2nd, 1998.

[9] Therefore, the Defendant's claim for damages arising from the flood is dismissed. However, there are other matters arising in this case with which I must now deal.

[10] Not long after the tenancy commenced, other tenants in the building began to complain of the presence of live crickets in their apartments. Since these insects are rather notorious for their lively nocturnal chirping, it is safe to assume that the other tenants found this distressing. When Mr. Pall found that the Plaintiff was feeding crickets to her geckos and was the source of them, he asked her to get rid of them. She did not.

[11] In addition, Ms. Lyman's rent cheques for October, 1996, December, 1996 and April, 1997 were dishonoured by her bank. They were made good in due course, but were a source of aggravation and bank charges to the Defendant.

[12] On February 9th, 1998, the Defendant served a Notice to Vacate, based on a substantial breach of the Tenancy Agreement. Its right to do so was not challenged, and the Plaintiff vacated the premises on the 20th of the month. Once again a check-out was performed. However, the Defendant did not send the Plaintiff a statement of account concerning the damages to the premises as required by s. 39(1) of the *Residential Tenancies Act*. Ms. Lyman demanded return of her security deposit or accounting by letter, and the Defendant still did not reply in writing. Mr. Pall did have one telephone conversation with her in which he advised her that the carpets had to be replaced. He told her "the cost was way over the damage deposit".

[13] The failure of a landlord to comply with the requirements of s.15.2 of the *Residential Tenancies Act* will foreclose his right to deduct from the tenant's security deposit [s.39(4.10)]. However, the failure to deliver a statement of account does not preclude a judicial determination of damages suffered by the Landlord.

[14] S.39(2) of the Act states:

If a landlord fails to return all or part of a security deposit to a tenant in accordance with subsection (1), then, whether or not a statement of account was delivered to the tenant, the tenant may commence an action in a court to recover the whole of the deposit or that part of the deposit to which the tenant claims to be entitled. (Emphasis mine).

S.39(3) goes on to state that the Court shall determine the amounts that the landlord is entitled to deduct from the security deposit in accordance with the conditions agreed to by the tenant.

[15] The Defendant alleges that the carpet was stained with oil and urine and could not be cleaned. He actually brought the offending rug to the Court House in his truck, although no one accepted his invitation to go down and inspect it. The Plaintiff denies that she was responsible for the condition of the carpet. However, there are a number of references to oil and other stains in the check-out list. Moreover, at some point Mr. Pall discovered a rabbit in a cage was in the premises. I accept the evidence of Mr. Pall that the carpet had to be replaced. The cost was \$1,183.03.

[16] I am prepared to allow the Landlord \$20.00 for each of the rent cheques dishonoured by the bank, but not the charge of \$10.00 per day for late payment.

[17] The claim for cleaning the bathtub in the sum of \$75.00 and Mr. Pall's personal claim in the sum of \$480.00 are not supported by the check-out, and are not allowed. The \$75.00 expended in an effort to clean the carpet is reasonable.

[18] Returning to the Plaintiff's claim, she is entitled to a credit on her February rent for the period from the 23rd (the expiration of the Notice) to the end of the month.  $5/28 \times \$635.00 = \$113.39$ . I fix the Defendant's damages at \$1,318.03. The Plaintiff's claim for the return of the security deposit of \$600.00 is dismissed. The rent refund of \$113.39 will be set off against the damages, for a net Judgment in the sum of \$604.64 in favour of the Defendant. Had the sent a statement of accounts to the Plaintiff, this action might have been avoided. There will therefore be no costs to either party.

DATED at Grande Prairie, Alberta this 17th day of August, 1999.

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**D. E. PATTERSON**  
**Assistant Chief Judge**  
**Provincial Court of Alberta**

**TO:**

**CHERYL KATHRYN LYMAN, Plaintiff**  
**Box 122**  
**FAIRVIEW, Alberta**  
**T0H 1L0**

**AND TO: ROBERT S. POLLICK,**  
**Barrister & Solicitor**  
**#200; 10006-101 Avenue**  
**GRANDE PRAIRIE, Alberta**  
**T8V 0Y1**  
**(Solicitor for the Defendant)**