Citation: *Gray v. Westerlaken*, 2025 YKSM 4

Date: 20251009
Docket: 24-S0072
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Cozens

WENDY GRAY

Plaintiff

v.

SCOTT WILLIAM WESTERLAKEN

Defendant

Appearances:
Wendy Gray — Appearing on her own behalf
Scott Westerlaken — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] The Plaintiff, Wendy Gray, has brought a Claim seeking $2,400 from the Defendant, Scott Westerlaken, for damage deposits she made on the residences she shared with Mr. Westerlaken as a roommate, (thus exempting this from the jurisdiction of the *Residential Tenancies Act*, S.Y. 2025, c. 7). Mr. Westerlaken has filed a Counterclaim for $18,007.75, primarily for rent he says he was to be paid by Ms. Gray that he asserts was never paid by her. Ms. Gray then filed an Amended Reply to Counterclaim seeking $23,640 which additionally included:

- $1,457 for overpayment of rent;
- $19,000 for monies provided for the purchase of a truck and trailer by Mr. Westerlaken; and

- $603.40 interest on the security deposit.

[2] In his written submissions, Mr. Westerlaken, after taking into account some of the evidence, reduced his claim to $10,866 plus costs.

[3] The trial took place on April 30 and May 1, 2025. Judgment was reserved. This is my judgment.

[4] Ms. Gray and Mr. Westerlaken were in an on/off again intimate partner relationship that began in the spring of 2019 and ultimately ended in spring 2024.

[5] The Claim and Counterclaims, and Reply's to each, are replete with details that, while perhaps relevant to the dissolution of the relationship, and to some extent the parties' perception of each other and the claims that each are bringing against the other, are not details that in any way assist me with respect to the factual and legal issues that must be addressed in adjudicating this matter.

[6] Further, it would appear that the parties contributed funds and participated in activities in the context of their intimate partner relationship, with no clearly set out expectation at that time that there would be a debit/credit accounting made, and any subsequent apportionment of funds following the dissolution of the relationship that the parties therefore owed to each other.

[7] As such, many of the claims for contributions and benefits that occurred within the context of this on/off intimate partner relationship, are not claims for which I find there should be any compensation flowing one way or the other. In the absence of clear contractual expectations, whether oral or otherwise, I will treat these claims as

being subsumed within the relationship in a manner equivalent to that of a *quid pro quo* being exchanged. The holidays that they went on with each other, the furniture that was purchased and/or brought into the relationship and then sold, the day-to-day costs of simply living together, whether sleeping in the same bedroom or separated and sleeping in separate bedrooms, the sharing of the use of vehicles, are all aspects of the parties' claims against the other that I find are not properly the basis for a financial determination of monies owed by one to the other. The negative conduct each accuses the other of is also not relevant to the decision I must make, in particular as the evidentiary basis for many of these claims would take this Court well outside of the scope within which Small Claims Court proceedings are to be adjudicated.

[8] There was no clear understanding between the parties at the relevant time that they were "drawing a line" of demarcation, so to speak, that delineated what was "his" and "hers", and their expectation with respect to contributions made, and the expectations of each in the event that the parties' relationship ended. Retrospectively trying to establish a financial responsibility for one party to the other for items purchased and shared and general expenses, whether equally or not, in the absence of any such clear understanding or agreement is not, in my opinion, possible to be done in a fair and equitable manner.

[9] In determining whether either party is responsible to the other to pay damages, I have also considered the principle of *quantum meruit* and unjust enrichment, for circumstances that are not within any contractual relationship.

[10] One difficulty in this case is establishing what may or may not have formed a "contract" in the sense that there was a failure to comply with contractual obligations that gives rise to a cause of action. Was there an offer that was accepted, with appropriate consideration exchanged, entered into by legally competent parties, and, if a contract was entered into, was there a lawful purpose that was not contrary to public policy?

[11] There are also internal inconsistencies within the evidence of each of the parties, as well as with the evidence of the other, and an absence of comprehensive documentary evidence to support certain aspects of the claims of each, that makes it somewhat difficult to have any reasonable degree of certainty with respect to several aspects of each party's claims against the other.

[12] Both parties were at times either on disability or sick leave and at times struggled financially. Ms. Gray was also receiving social assistance. She was in therapy and counselling for a period of time. She provided documentation noting that she was suffering from trauma and mental breakdown, primarily from matters not related to her relationship with Mr. Westerlaken.

[13] It is also clear from some of the materials filed that the parties were in significant conflict at times, with each making serious accusations against the actions and conduct of the other. The vast majority of these accusations were not relevant to the issues that I am required to resolve in this case but do serve to underscore the nature of the somewhat hostile attitude they each have had towards the other, and to some extent still do, and their perspective on the actions of themselves and the other party. If too

much attention is paid to these essentially collateral issues, it is easy to become bogged down in unresolvable aspects of the case and to lose sight of the core matters that must be resolved.

[14] I have attempted to restrict my recitations of the evidence as much as possible to what I consider relevant and necessary for context, while still ensuring the parties that each of their positions was fully heard. In order to do so, I have reviewed the Claims and Counterclaims, as well as the Reply's to each, the Affidavits of the parties, the documentary evidence, my trial notes, the Digital Audio Recording System recordings from the trial, and the parties' written submissions, in an attempt to be respectful of the parties' evidence, submission, and positions, and to attempt to come to a just and fair decision.

[15] In doing so, I keep in mind s. 3 of the *Small Claims Court Act*, RSY 2002, c. 204, which states:

> Subject to this Act and any other Act, the Small Claims Court <u>shall hear and determine in a summary way all questions of law and fact</u> and may make any order that is considered just. [emphasis mine]

Issues

[16] I find that the following are the primary substantive issues that need to be resolved:

1. Is Ms. Gray entitled to receive the damage deposit monies back that she paid and, if so, is this to be in their entirety or only partially;

2. Is Mr. Westerlaken entitled to receive unpaid "rental expenses and truck/camper" monies from Ms. Gray and, if so, in what amount. With respect to this aspect of the proceeding, the issues of whether there was an unconscionable agreement, and/or circumstances amounting to *quantum meruit* and unjust enrichment, must be considered; and

3. Is Ms. Gray to be compensated for overpayment of rent and any monies that she paid to assist Mr. Westerlaken with his expenses, in particular those related to the purchase of the truck and camper.

Summary of the Evidence

[17] Although aspects of the parties' evidence makes it difficult to be absolutely certain of specific timelines, as best as I can determine the following is what I piece together from the evidence.

[18] Mr. Westerlaken was the only tenant on the lease agreement between himself and the landlords at the residence in Porter Creek, Whitehorse (the "Residence"). He had moved into a basement suite in the Residence prior to his relationship with Ms. Gray commencing.

[19] In October 2019 (at one point Ms. Gray stated February 2020), Ms. Gray moved into the basement suite of the residence with Mr. Westerlaken. Ms. Gray agreed to pay approximately one-half of the monthly rent, an amount of $525. Ms. Gray provided no deposit. She asserts that she was not required to pay for any of the utility etc. costs.

[20] There is some conflicting evidence that puts the monthly figure at $550, however Mr. Westerlaken's evidence states $525 as the amount he expected from Ms. Gray, so I will proceed on that basis.

[21] Ms. Gray paid the $525 per month, until April 2020, a total of $2,625. There is an alleged shortfall in this portion of her obligation of $525 with respect to December 2019, however she states that she had no obligation to pay rent for December, as she was living in Dawson City.

[22] In May 2020, (there was some evidence that it was June), Ms. Gray agreed to pay Mr. Westerlaken the amount of $2,400 or $2,500 per month to cover rent (including utilities), and to help him with the purchase of a truck and camper that were purchased in his name only. Mr. Westerlaken asserts that this was also to assist him with the payment of other expenses. In her testimony under cross-examination, the figure put to Ms. Gray and agreed to by her was $2,400, not $2,500. There is a dispute about how much of this monthly payment was actually paid by Ms. Gray, although it would appear that she failed at times to fully make a contribution to this payment every month. The rental price for the Residence remained at $1,100 per month.

[23] In February 2022, due to a change in Ms. Gray's financial circumstances, Mr. Westerlaken and Ms. Gray agreed that she would pay a reduced monthly rent of $1,100, and an additional $100 for being added to Mr. Westerlaken's cell phone plan. She also provided the amount of $1,100 for a security deposit. Again, the rental price for the Residence remained at $1,100 per month.

[24] In December 2022, as Mr. Westerlaken's son was coming to live with him, Ms. Gray agreed to continue to live with Mr. Westerlaken, however they moved to the larger upstairs suite, for which the rent was $2,700. The damage deposit of $1,100 for the downstairs suite was now short $1,600. Mr. Westerlaken paid $300 of this amount, and Ms. Gray provided the additional $1,300.

[25] The intimate partner relationship initially ended in fall 2022, although it was somewhat intermittently on and off until February/March 2024. There is some dispute between the parties as to the nature of the relationship after the initial breakup. It is clear, however, that the final termination of the relationship was marked by considerable animosity between the parties.

[26] Ms. Gray was on social assistance or long-term disability for portions of her time living with Mr. Westerlaken. Her Reply to Counterclaim includes documentation from spring 2023 that noted some issues that, as this is a published decision, I will not repeat, however denote a certain personal vulnerability under stress.

[27] Ms. Gray's initial Claim is premised on the $1,100 and $1,300 she provided for the damage deposit which was not returned to her by Mr. Westerlaken. Ms. Gray's position is that the damage deposit had been returned in almost its entirety to Mr. Westerlaken, with only a deduction for fuel, which she asserts was solely Mr. Westerlaken's responsibility.

[28] Ms. Gray's evidence as to having paid the damage deposits was not disputed by Mr. Westerlaken, although he claims that Ms. Gray's actions, in part for damage she caused, should deprive her of the return of these monies.

[29] Ms. Gray moved out of the residence on June 17, 2024.

[30] Mr. Westerlaken was evicted from the Residence effective June 24, 2024.

[31] Mr. Westerlaken was not in the Residence at this time as a result of a no-contact order between himself and Ms. Gray. Ms. Gray moved out on June 17, 2024, to ensure that Mr. Westerlaken was able to come into the Residence in order to prepare to move out.

[32] Mr. Westerlaken filed a spreadsheet which set out what he claims are the monies paid by Ms. Gray pursuant to the agreements between them, and includes times for those payments which he asserts were not made.

2019	Paid	Owing	Shortfall
October to December ($525 per month)	$1,050	$ 1,575	-$ 525
2020			
January to April ($525 per month)	$2,100	$2,100	$0
May to December ($2,500 per month)	$10,000	$20,000	-$10,000
2021			
January to December ($2,500 per month)	$11,000	$30,000	-$19,000
2022			
January ($2,500 per month)	$1,000	$2,500	-$1,500
February to December ($1,200 per month)	$12,420	$13,200	-$780
2023			
January to December ($1,200 per month)	$30,664	$14,400	+$16,264
2024			
January to July ($1,200 per month)	$7,097	$8,300	-$1,203
Dumpster Invoice	$0	$393.75	-$393.75
	$75,331	**$92,468.75**	**$17,137.75**

[33] Mr. Westerlaken also claims for an additional amount of $870 for unspecified payments he says he made to Ms. Gray at times from December 2022 to May 2024, thus bringing his total Claim to $18,007.75.

[34] Mr. Westerlaken only has partial documentation to support monies he says were paid, and not paid, to him by Ms. Gray. His documentation commences in September 2022. He provided no documentation prior to that date.

[35] In the course of the trial, Mr. Westerlaken agreed that his spreadsheet is in error in several spots. Ms. Gray identified as many as eight such different spots where monies she provided were not included in the spreadsheet.

[36] In his written submissions, Mr. Westerlaken provided specific calculations for expenses that had not been introduced with such specificity as evidence at trial, other than to some extent in a general way. In fairness, I cannot accept at this stage of the proceeding evidence that was not properly adduced at trial. This said, I am aware that Mr. Westerlaken had, during trial, mentioned that he was paying for many expenses without any direct contribution from Ms. Gray, and I can take, in a general way, that into account.

[37] From May 2020 to January 2022, the agreement that Ms. Gray pay Mr. Westerlaken $2,500 a month resulted in an expectation from him that she contribute $1,975 over and above the normal rental amount that she had been previously paying. Mr. Westerlaken's rental obligation to the landlord remained at $1,100 throughout. Therefore, the result is that over the course of the approximate 21 months, Ms. Gray was expected to pay to Mr. Westerlaken a total of $41,475 towards the purchase price

of the truck and trailer, and possibly other household expenses, in addition to $11,025 in rent, a total of $52,500. These figures are closely approximate, as there is some uncertainty with respect to the monthly amount and actual start date, whether May or June 2020.

[38] Mr. Westerlaken's calculations are that Ms. Gray paid only $22,000, therefore leaving a shortfall of $30,500. Ms. Gray disputes Mr. Westerlaken's calculations, yet was unable to produce comprehensive supportive documentation herself for portions of time after June 2022. Ms. Gray only has partial documentation to support her position that she did not fail to make expected payments, and that Mr. Westerlaken's figures are inaccurate. As stated, Mr. Westerlaken's documentation is also incomplete.

[39] Ms. Gray asserts in her Reply to Counterclaim that between March 1, 2020, to June 17, 2024, she paid Mr. Westerlaken $35,202.67 more than she was required to, noting that this was calculated by reference only to an obligation to pay $525 monthly in rent from March 1, 2020, through to June 30, 2022, and then $1,100 monthly from July 1, 2022, to June 13, 2024.

[40] Ms. Gray also asserts that she provided significant funds to Mr. Westerlaken throughout the course of their relationship, including to assist him with expenses related to his children.

[41] As noted, Ms. Gray was unable to provide documentation to support much of what she says she provided in funds to Mr. Westerlaken, although she had some partial documentation for certain funds. For example, Ms. Gray did provide documentation to

support a $19,000 payment on September 25, 2023, to Mr. Westerlaken, whereas his spreadsheet notes that only an $18,000 payment was made.

[42] Ms. Gray also provided a text message from Mr. Westerlaken in June 2024 in which he tells her that she owes him over $9,000, yet his spreadsheet shows that he believes she owed him over $18,000 at that time, a difference of $9,000.

Decision

[43] With respect to the totality of the evidence, I am left somewhat in a void as to what was clearly expected of the other party with respect to financial obligations, other than rent, and what was actually done with respect to financial contribution, in particular through the incompleteness of documentation.

[44] It is important that a principled approach be applied in determining what the legal liability of each party to the other is. In the absence of a clear pathway to doing so, then it is my obligation to, in consideration of all the evidence, come to a decision that I consider just.

[45] Firstly, I find that at trial both parties conducted themselves in court in a respectful and even-handed manner, despite the issues in play. I find that neither party was attempting to be deceitful or untruthful. I find that each party simply has a view of what has taken place that they honestly believe, but that is at odds with what the other party believes.

Security Deposit

[46] I have no difficulty finding that Ms. Gray should have an initial entitlement to the entirety of the security deposit monies of $1,100 and $1,300 that she paid for the two separate residences. I find that there is no credible and reliable evidence that any of her actions caused monies to be retained by the landlords from the damage deposits. Ms. Gray filed text message exchanges with the landlords for the Residence that support her position that she had left the Residence in good condition.

[47] The evidence supports a finding that, other than a top up of the oil tank, for which I am satisfied Ms. Gray is not responsible, Mr. Westerlaken received the security deposit monies back.

[48] This said, I must consider whether there is to be a set-off of these monies made for any liability Ms. Gray has to Mr. Westerlaken.

Dumpster Rental

[49] I also am not prepared to attribute any liability to Ms. Gray for the amount of $393.75 for dumpster rental. There were other sub-tenants who had left some items. Further, the evidence is deficient with respect to establishing that Ms. Gray left any significant amount of items behind and that she should bear any responsibility in this regard.

Agreement to Increase Rent for Purposes, including Truck and Camper Purchase

[50] The bulk of Mr. Westerlaken's claim is premised on the agreement by Ms. Gray that she would pay him the $2,400 or $2,500 a month to assist him with the purchase of

the truck and camper. The evidence is clear that Ms. Gray made this agreement with Mr. Westerlaken. However, I have serious concerns about the legal enforceability of this agreement, on the basis that this agreement was an unconscionable one.

[51] As stated in ***Zaidi*** v. ***Syed, Estate of, et al***, 2023 ONSC 1244, at para. 59:

> ...As a legal doctrine, unconscionability traditionally had three elements. The traditional elements of unconscionability were: (1) pronounced inequality of bargaining power; (2) substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff. Recently, the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, revised and, in effect, broadened the scope of equity's and the common law's capability to intervene on the grounds of unconscionability. In *Uber*, the Supreme Court held that unconscionability requires proof of only two elements, namely: (a) an inequality of bargaining power; and (b) a resulting improvident bargain. Inequality of bargaining power exists whenever a party cannot adequately protect their interests in the contracting process and the inequality may relate to personal attributes or characteristics of the weaker party (e.g. illiteracy) or the stronger party (e.g. wealth, knowledge and experience), or it may arise from situational circumstances that impair the weaker party's ability to contract freely and autonomously.

and in ***Woods*** v. ***Woods***, 2022 BCSC 2269, at para. 63:

> *In Uber Technologies Inc. v. Heller*, 2020 SCC 16, the Supreme Court of Canada discusses the test for unconscionability: 1) there must be an inequality of bargaining power between the parties; and 2) there must be an improvident bargain. With respect to the first element of the test, the court stated that an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both. An example of an inequality of bargaining power is where, only one party could understand and appreciate the full import of the contractual terms: *Uber* at paras. 66, 68 and 71. With respect to the second element of the test, the court stated that a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Where the weaker party did not understand or appreciate the meaning and

> significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. The court cautioned that one must take a contextual approach dependent on the circumstances: *Uber* at paras. 74-75. The court summarized the doctrine of unconscionability as follows:
>
>> [79] Unconscionability, in sum, involves both inequality and improvidence (Crawford, at p. 143; Swan, Adamski and Na, at p. 986). The nature of the flaw in the contracting process is part of the context in which improvidence is assessed. And proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests. It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power.

[52] With respect to the second aspect of this test, whether there was an improvident bargain that clearly favoured one party over the other, I find that this aspect of the test is somewhat satisfied. I say this in consideration of the preponderance of the evidence pointing to the truck and camper purchase being the main reason for the agreement, and household expenses, even if part of the increase, is less a factor.

[53] Under this agreement, even taking into account the monies Ms. Gray failed to pay, she contributed a significant amount of money primarily towards the purchase of a truck and camper, that she has no ownership interest in. She benefited at times from the occasional use of the truck and camper in the context of the intimate partner relationship, but hardly to the extent of her total monetary contribution during this period, which, according to Mr. Westerlaken's figure of a $22,000 contribution, was at least $10,975, after deducting the amount of $525 monthly for rent. Mr. Westerlaken provided a somewhat off-the-cuff estimate of $10,000 equity in the truck and camper, which he has full ownership of, without any supportive documentation to establish the

accuracy of his estimate. He subsequently conceded at trial that Ms. Gray should receive a figure of $2,000 for her equity in the Truck and Camper.

[54] The consideration that Ms. Gray received is far from what could be described as anywhere close to equitable. I find that Mr. Westerlaken was, to some extent, and certainly would be if awarded the damages he claims, unjustly enriched if Ms. Gray was held legally liable for the agreement that she and Mr. Westerlaken made.

[55] With respect to the first aspect of the test for unconscionability, while the evidence is somewhat lacking in this regard, I have concerns about the equality of the parties with respect to bargaining position. This is not a business transaction between two arms-length parties; this agreement took place in the context of an intimate partner relationship, where there can be said to be, generally, an underlying expectation or hope, that there is an ongoing sharing in the building of the relationship. The “nuts and bolts”, so to speak, of the finer details of expectations, responsibilities, and obligations are less clear than in a pure business transaction. There is a greater likelihood that parties will agree to something, without fully considering the potential ramifications of the agreement if the intimate partner relationship dissolves.

[56] This is further exacerbated when considering the mental health issues Ms. Gray has struggled with for years.

[57] Contractual arrangements made in the context of intimate partner relationships should be clear and unequivocal, ideally with the assistance of independent legal advice. How parties view the behaviour and responsibilities of the other party during the intimate partner relationship, following a contentious dissolution of the relationship, are

often less than reflective of the truth of the situation, from an objective perspective. Regardless, it is also important for there to be an accurate record kept of the expectations and performance of the parties, if there is to be any realistic expectation that a subsequent decision-maker can sort out the details and come to a just and fair conclusion.

[58] Therefore, I find that the agreement between Ms. Gray and Mr. Westerlaken is unenforceable with respect to founding a basis for there to exist any present obligation on Ms. Gray arising from unpaid monies. Therefore, I find that Mr. Westerlaken's claims for compensation arising from this agreement must be dismissed.

[59] This said, there was reliance by Mr. Westerlaken on this agreement as to decisions he, and Ms. Gray, made for their lives, within the context of the intimate partner relationship. I assume that Ms. Gray derived some benefit within the context of the relationship, at least in part, as a result of her monetary contributions. I find that it would be unfair to expect Mr. Westerlaken to repay Ms. Gray any of the monies he received from her during the relationship.

[60] Therefore, subject to resolving the issue of the security deposits and any set-off, I find that each party's claims against the other must be dismissed.

[61] As I have dismissed Mr. Westerlaken's claims for compensation, there is strictly no set-off to be made.

[62] This said, in resolving the issues that have arisen in the context of the complexity of the dissolution of this intimate partner relationship, and in consideration of the

summary nature of Small Claims Court proceedings, I must strive to determine a just and fair result. As stated earlier, there was some sharing by each of the parties with the other in their relationship, a perfect balancing of which one contributed or received the most cannot be strictly quantified. I find that the security deposit monies fall to some extent within this consideration and an apportionment should be made

[63] I find that in the interests of determining a just result that Mr. Westerlaken pay Ms. Gray an amount of $1,200 for security deposit monies he retained.

[64] There shall be post-judgment interest commencing January 1, 2026, pursuant to the *Judicature Act*, RSY 2002, c.128.

[65] No costs are to be awarded.

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COZENS T.C.J.