Citation: *Beacon and Russell v. Young*, 2010 YKSM 2 Date: April 9, 2010
Docket: 09-S0053
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Cozens

Anthony James Beacon and
Lindsey White Russell

Plaintiffs

v.

Joyce Young

Defendant

Appearances:
Peter Sandiford — Counsel for Plaintiffs
Joyce Young — Appearing on own behalf

REASONS FOR JUDGMENT

Overview

[1] The issues in this case arise from the sale of the Defendant's residence and property at 1101 Fir Street in the Porter Creek area of Whitehorse (the "Residence") to the Plaintiff, Mr. Beacon. A contract of purchase and sale was executed on June 21, 2006 (the "Contract"). The other Plaintiff, Ms. Russell, was not a signatory to the Contract. Ms. Russell is the common law partner of Mr. Beacon.

[2] The Contract allowed the Defendant, (and Plaintiff by counterclaim but hereinafter referred to only as the Defendant), to continue to remain in the Residence for a period of time without paying rent, and required the Plaintiff Beacon to complete, without charge to the Defendant, $5,000.00 worth of work at the Defendant's Lake Laberge property.

[3] The relationship between the parties broke down and the Defendant remained in the Residence longer than originally agreed to, without paying any rent. On October 30 or 31, 2008, the Plaintiffs provided the Defendant an opportunity to enter into a rental agreement which allowed the Defendant to remain in the premises but required the payment of monthly rent, commencing November 1, 2008 until May 1, 2009 (I note that the eviction notice refers to the proposed tenancy as "…starting November 1, commencing May 1, 2009", which logically is an error and should read "ending" in place of "commencing"). The Defendant refused to enter into this agreement and the Plaintiff Russell at that time served an eviction notice on the Defendant, terminating the tenancy effective November 29, 2008.

[4] The Defendant did not leave the property, however, and the Plaintiffs filed the Claim on July 22, 2009. The Plaintiffs, pursuant to s. 92 of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, (the "*Act*"), obtained a court order on August 3, 2009 which terminated the tenancy as of November 30, 2008, and required the Defendant to vacate the premises by August 20, 2009. The Defendant vacated the Residence on August 19, 2009.

[5] The Plaintiff had completed in excess of $5,000.00 worth of work on the Defendant's Lake Laberge property as of October 30, 2008.

[6] The trial commenced on November 23, 2009 and continued the next day and again on January 20, 2010. Closing submissions were made by the Plaintiffs' counsel on January 20. The Defendant began her closing submissions on that date, but requested additional time to conclude them. I directed that she file her additional submissions in writing. The Defendant's Closing Submissions were filed February 3, 2010. The Plaintiffs filed their Argument in Reply on February 10, 2010. The Defendant subsequently provided further written submissions, a Counter Claimants Rebuttal, which, after review, I directed to be

filed on February 17, 2010. The Plaintiffs filed a further Supplemental Argument on February 22, 2010.

[7] Numerous authorities were filed by the parties and submissions made on the evidence and the applicable case law and legislation. I have reviewed and considered these in reaching my decision.

[8] On numerous occasions throughout this proceeding, I exercised my discretion to allow the Defendant to present evidence, ask questions and make submissions in a manner that was not in accord with the generally acceptable rules of procedure and evidence. At times, I provided her some latitude before intervening. I did so recognizing the difficulties that the Defendant, as an unrepresented party, may have in understanding and complying with legal requirements, and the general nature of small claims court proceedings.

[9] I appreciate that it can be difficult, and at times frustrating, for parties who have chosen to be represented by counsel to participate in proceedings such as this, where their legal counsel quite properly complies with legal requirements, while the unrepresented party does not. This frustration is no doubt sometimes shared by legal counsel in these situations.

[10] Such, however, is all too often the way it will be in order to conduct small claims court proceedings in a summary way that allows the court to make an informed decision that is just and fair, while avoiding any unfair prejudice to either party. In this case, counsel for the Plaintiffs conducted himself in accordance with the expectations of the court.

Positions of the Parties

Plaintiffs

[11] Mr. Beacon is a teacher at Porter Creek Secondary School, providing instruction in wood and metal working. He is a journeyman carpenter. Ms. Russell is Mr. Beacon's common law partner. They have a four year old son.

[12] The Plaintiffs have claimed for rent due for nine months from December 1, 2008 until August 31, 2009 pursuant to s. 42 of the *Act*. The total amount of this claim is $21,600.00, being calculated at double the estimated value of $1,200.00 rent for each month that the Defendant was an overholding tenant.

[13] The Plaintiffs also claim the amount of $3,106.81, being the value of the work completed by the Plaintiff Beacon at the Defendant's Lake Laberge property over and above the $5,000.00 worth of work he completed pursuant to the terms of the Contract.

[14] The Plaintiffs claim costs and pre and post-judgment interest pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128.

Defendant

[15] Ms. Young is a former businesswoman with at least 25 years business experience. She was responsible for running the business end of NorJay Construction Ltd. until she retired in approximately 1996 and sold her interest in the company. She sold a commercial lot she was an owner of in 1993. She is not unsophisticated in business dealings.

[16] The Defendant disputes the claims of the Plaintiffs and is counterclaiming for damages for breach of contract, misrepresentation and breach of promise.

[17] The Defendant's claims are based upon her position that she sold the Residence to the Plaintiff Beacon for $20,000.00 less than market value on the basis of a promise by Mr. Beacon that the Residence would only be used for a family home, and would not be subdivided and utilized to create a rental unit to provide a source of income for the Plaintiffs.

[18] The Defendant disputes the Plaintiffs' claim for compensation arising from her being an overholding tenant. She states that after the Plaintiffs delivered her the eviction notice, the Plaintiffs' delay in seeking a court order terminating the tenancy should prevent them from recovering for rent. To some extent the Defendant also takes issue with the correctness of the court order of August 3, 2009, but that is not a matter which can or will be re-opened in this proceeding.

[19] The Defendant also takes the position that she was not required to move out of the Residence until after the addition to her Lake Laberge property was completed. As the Plaintiff Beacon had not completed the addition, she was entitled to continue to remain in the Residence rent-free.

[20] The Defendant also claims damages of $400.00 for electricity used by the Plaintiff Beacon, $300.00 for a compost unit that was damaged by Mr. Beacon and $1,600.00 for a leveling unit that the Plaintiff Beacon has in his possession that belongs to her.

[21] The Defendant claims that the doctrine of estoppel applies in this case to prevent the Plaintiffs from seeking to enforce their rights under the Contract or the *Act*.

[22] The Defendant also claims costs and any other damages that are available.

Evidence

[23] The only witnesses for the Plaintiffs at trial were Mr. Beacon and Ms. Russell. The Plaintiffs filed an affidavit sworn by Rob King. Mr. King was not available for cross-examination. The Plaintiffs also provided an e-mail from realtor Vivian Tessier which provided a rental estimate for the Residence.

[24] The Defendant was the sole witness in her own defense and counterclaim. She also proffered a signed document prepared by Norm Binns. Mr. Binns was available to testify at the commencement of the trial but passed away prior to the trial continuation. The Defendant further provided an e-mail from property appraiser Jim Yamada, which indicated an estimated value for the Residence.

[25] At the outset, I find that on all matters in which the evidence of the Plaintiffs and the Defendant was inconsistent, I prefer the evidence of the Plaintiffs. The testimony of both Plaintiffs was clear, concise, and consistent both internally and with the remainder of the evidence, other than at times with the testimony of Ms. Young. I also find that the Plaintiffs' evidence accorded with common sense.

[26] I find that the testimony of Ms. Young was not so clear and concise, was at many points concerned with irrelevant or marginally relevant issues and did not undermine or cast in doubt any of the evidence of the Plaintiffs. At times throughout, the Defendant's evidence did not accord with common sense when assessed against the remainder of the evidence.

[27] With respect to the document the Defendant asserts was signed by Mr. Binns and which provides a version of events that he would have testified to had he not passed away during the trial, I accept that this document may well have accorded with his anticipated evidence. That said, the information in this

document is not of any significant probative value in resolving any of the issues before the court and as such, while considering it, I accord it little weight.

[28] I also consider the e-mail from Mr. Yamada to contribute little, if anything to this case. Although the e-mail is silent on which property Mr. Yamada was providing an estimate for, Ms. Young says it was the Residence, and I have no reason to doubt her in this regard. This is, however, an unsworn document and contains little more than a bare estimate without details. In any event, even if Mr. Yamada had testified and provided a basis for his estimate, I find that it would not have affected my decision in this case as the core of this decision is based upon the existence of a Contract and the agreed upon terms within it.

[29] I consider the affidavit of Mr. King to have limited weight. Ms. Young denied much of what Mr. King states in the affidavit and he was not available for cross-examination. The essence of his affidavit evidence is that Ms. Young was trying to sell him the property at the same time she was negotiating with Mr. Beacon, for approximately the same price Mr. Beacon ultimately paid for it. This evidence is submitted to counter the claims of the Defendant that she agreed to sell the property to Mr. Beacon at less than market value based upon his promise to her that it would remain a family home. I recognize, however, that this affidavit is evidence under oath and this distinguishes it from unsworn evidence.

[30] Finally, I consider the e-mail from Ms. Tessier to also be of very limited value. It is undated, unsworn and, as was the case with the e-mail from Mr. Yamada, it contains little in the way of detail to support the conclusion.

Issues and Analysis

[31] The first issue is a determination of the terms agreed to by the Plaintiff Beacon and the Defendant.

Agreement for Purchase and Sale

[32] There had been discussions commencing in 2004 or 2005 between the Plaintiff Beacon and the Defendant regarding the possibility of his purchasing the Residence from her. The Plaintiff Beacon's father knew the Defendant through business dealings. The actual date that these discussions first occurred is not important for the purposes of this decision.

[33] There was some undisputed evidence that the initial discussions revolved around an approximate sale price for the Residence of $150,000.00, however, by June 2006 the price being asked by the Defendant had increased substantially. The parties ended up agreeing to a purchase price with a value of $230,000.00, which was comprised of a $5,000.00 deposit, $220,000.00 in cash and $5,000.00 worth of labour by the Plaintiff Beacon for the benefit of the Defendant.

[34] The Plaintiff, Beacon, provided a $5,000.00 deposit to the Plaintiff by money order dated June 2, 2006. The balance of $220,000.00 was to be paid by July 15, 2006. The Statement of Adjustments indicates that the closing date was July 14, 2006. The transaction proceeded as contemplated with respect to the transfer of title and payment of the outstanding cash balance to the Defendant.

[35] The Contract includes a reference to "House & Shop as is where is". The terms include the following:

> 3. POSSESSION: The Purchaser is to have possession subject to existing tenancies; …of the Property at 2:00 p.m. on May 31, 2007 or sooner.
>
> 5. CONDITIONS PRECEDENT:
> f) (additional conditions precedent for the benefit of Purchaser)
> - Purchaser paying Vendors fees
> - excluded portable garage & shed

- Purchase[sic] agrees to do $5000.00 worth of work @ Lake Laberge

7. THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT ABOVE, ALL OF WHICH WILL SURVIVE THE COMPLETION OF THE SALE.

[36] Both parties to the Contract were represented by legal counsel in regard to the purchase and sale of the Property. It is also clear that at some point prior to July 10, 2006, the Defendant reviewed the Contract with her legal counsel. Mr. Binns was the witness to the signatures of Mr. Beacon and Ms. Young on the Contract.

[37] The Defendant asserts that the Contract is not the full agreement between the parties.

[38] First, she states that there was a prior agreement, filed as Tab 1 of the Defendant's List of Documents, which forms part of the Contract.

[39] This unsigned document is comprised of two parts: the first in typed format prepared by the Defendant and dated June, 2006; and the second in the handwriting of Mr. Beacon.

[40] I note that much of what is contained in this unsigned document is consistent with what was agreed to in the Contract. There are, however, some minor differences, such as reference to a June 20, 2006 date for payment of the $220,000.00, rather than the July 15 date in the Contract.

[41] Of particular note are the following terms in the unsigned document:

(in the typed portion)

2. Joyce Young will continue to reside at the property, rent free and unhindered until May 31st 2007.

8. Five thousand dollars worth of carpentry work (or the "add on" of a bedroom and bathroom) is to be completed at the seller's Lake Laberge property. This work to be completed before the seller moves out of the property at 1101 Fir Street.

(in the handwritten portion)

7. portable garage to be removed

8. remove/replace shed (8' x 10') for owner to place @ Deep Creek

9. $5000 labor to be put toward house @ lake upgrades

[42] The Defendant submits that this unsigned document is of significance as it sets out the intent of the parties as ultimately agreed to in the Contract.

[43] I consider both portions of the unsigned document as representing the general intent of the parties with respect to their expectations as to what the final agreement would be. That said, the Contract is explicit in stating in Clause 7 that the Contract is the entirety of the Agreement between the parties.

[44] I find that Clause 7 of the Contract is significant and not at all ambiguous. In any event, even if Clause 7 were not there, I would have nonetheless considered the Contract to be the entire agreement between the parties as there is nothing in the evidence that indicates, in a meaningful way, that the terms of the Contract were to be interpreted differently than their plain meaning, or that there was another agreement or agreements between the parties.

[45] The unsigned document is at best capable of providing some limited assistance in confirming what is meant by certain terms of the Contract that are not necessarily clear, standing alone (See *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.*, 2004 BCSC 1646, paras. 102-107).

[46] An example is Clause 3 as to the date at which the Plaintiff Beacon was to have possession of the Residence. Clause 3 states that the Plaintiff Beacon was to take possession of the Residence at 2:00 p.m. on May 31, 2007 or sooner. Clause 3 reads, however, that such possession is subject to existing tenancies. In reality, as is consistent with the documents filed and the evidence I heard, the Plaintiff Beacon took possession of the Residence on or about July 15, 2006, subject to the right of the Defendant to remain in the Residence as a tenant until May 31, 2007 or sooner. It is clear to me from the documents and the evidence that the May 31, 2007 date in Clause 3 of the Contract was referring to the date by which the Plaintiff Beacon was to have actual possession of the Residence by virtue of the Defendant moving out, and not the date on which the Plaintiff became the owner of the Residence.

[47] However, any such assistance provided by the unsigned document is not necessary and does not add any further terms and conditions to the Contract, or create a different and binding agreement between the parties.

[48] I note that the Plaintiff Beacon, without charge to the Defendant, moved a shed out to the Defendant's Lake Laberge property. At first glance, this does not appear to be a term of the Contract and is a matter apparently agreed to only according to the unsigned document. However, the reference to a "portable garage & shed" in the Contract is consistent with the apparent promise to move this out to the Defendant's Lake Laberge property. I have no problem finding that the parties also initially agreed that this would be done and that the reference in the Contract confirms this.

[49] I find that the whole of the agreement between the parties for the purchase and sale of the property is contained within the terms and conditions of the Contract. The unsigned document is not part of the Contract and is a document prepared by the parties in the form of a draft in contemplation of the preparation of the final agreement, which is the Contract. While the testimony of

both the Plaintiff Beacon and the Defendant expanded on the intentions of the parties to some extent, in particular regarding the nature of the intended work to be completed at the Defendant's Lake Laberge property, I find that this testimony, in conjunction with the unsigned document, does not, however, add or detract in any meaningful way from the written terms of the Contract.

[50] In reaching this conclusion, I have reviewed commentary and case law which has considered the development of the admissibility of parol evidence from the original fundamental rule that no extrinsic parol evidence may be admitted to alter or vary the written contract. (See *Canadian Contract Law 2nd Edition*, Swan, Lexis-Nexis Canada Inc., 2009, pp. 596-608; *Gallen v. Allstate Grain Co. Ltd*., [1984] B.C.J. No. 1621 (C.A.); *Nevin v. British Columbia Hazardous Waste Management Corp.*, [1995] B.C.J. No. 2301 (C.A.); *Gutierrez v. Tropic International Ltd.*, [2002] O.J. No. 3079 (C.A.);; *Zippy Print Enterprises Ltd. v. Pawliuk et al.,* [1994] B.C.J. No. 2778 (C.A.).

Breach of Promise and/or Misrepresentation

[51] I have also considered the argument of the Defendant that the Contract was premised on the Plaintiff Beacon agreeing to occupy the Residence as a single family home for himself and his family only, and not to use it for any other purpose, including development. The Defendant argues that the Plaintiff misrepresented his interest in the Residence and, as such, she should be compensated by way of $20,000.00 for the actual value of the Residence over what she otherwise agreed to sell it for.

[52] I find that this argument must fail. There is no basis in the evidence which I accept for the existence of such an agreement between the Plaintiff Beacon and the Defendant. The pre-contractual documents filed and the Contract itself make no mention of such an agreement. The only evidence of such an agreement is that of the Defendant and I do not consider her evidence on this point to be

reliable. I find that there was no deliberate or negligent misrepresentation of fact, no breach of promise and, although not plead in the Reply but raised later, no fraudulent misrepresentation by the Plaintiff Beacon.

[53] While the Plaintiff Beacon testified that he may have made statements to the Defendant about his intentions with respect to the use of the Residence, and that over time his intentions changed, I find that these statements were not promises or representations that contributed to the parties entering into the Contract, or which in any way assist in interpreting the terms and conditions of the Contract.

[54] In any event, even were I to have found that the Plaintiff Beacon had misrepresented his intentions for the property, or breached his promise to the Defendant not to develop the property, I would not have awarded any damages as the contractual remedy of recission would not be tenable and I am not satisfied on the evidence that the Plaintiff Beacon paid the Defendant less than fair market value for the Residence.

Terms of the Contract in dispute

[55] Two terms of the Contract, and the interaction between these terms, is at the core of the remaining dispute between the parties. One term relates to the obligation of the Plaintiff Beacon to complete the $5,000.00 worth of work at the Defendant's Lake Laberge property, and the other to the date the Defendant was required to move out by.

[56] At the outset, I note that the agreement by the Plaintiff Beacon to provide the work is referred to in the Contract as a condition precedent. It was clearly not the intent of the parties that this work be completed prior to the July 15, 2006 completion date for the sale of the property and payment of the $220,000.00 to the Defendant by the Plaintiff Beacon. The "agreement" by Mr. Beacon to do the

work could perhaps be a condition precedent, but the actual completion of the work by Mr. Beacon could at best be a condition subsequent. In my opinion, nothing turns on this.

[57] The Plaintiffs' position is that although the original intention was for Mr. Beacon to perform the $5,000.00 worth of work by upgrading the existing cabin at the Lake Laberge property and by working on the addition, there was nothing in the agreement reached between the parties that strictly limited the work to only the construction of an addition.

[58] The Plaintiffs further claim that, in any event, Mr. Beacon was frustrated by the actions of the Defendant in his efforts to complete the construction of the addition and, as a result, completed other work requested by the Defendant. The value of this work to the Defendant was in excess of $5,000.00, and was sufficient to discharge the Plaintiff Beacon's obligations under the Contract.

[59] The Defendant's position is that she was not required to move out of the Residence until the Plaintiff Beacon had completed $5,000.00 worth of work on the addition to the existing cabin at her Lake Laberge property. As such, the May 31, 2007 date by which she was to move out of the Residence according to the Contract, was open-ended in nature and extended by the non-performance of the Plaintiff Beacon.

[60] Firstly, I have found that the Contract is the entirety of the Agreement between the parties. The Contract does not limit the work to the construction of an addition. Further, even the unsigned document describes the $5,000.00 worth of work to be done in a non-restrictive fashion, and does not specifically limit the work only to the construction of an addition. If anything, the plain wording supports the Plaintiffs' position that, although there was an understanding that this work was originally intended to be towards the completion of an addition, there was nothing that exclusively limited it to such work.

[61] I further find that the Plaintiff Beacon, was frustrated by the actions of the Defendant in his attempts to construct an addition onto the residence at the Defendant's Lake Laberge property. His evidence, which I accept, was that he made efforts in the summer of 2006 to begin work on the addition, but the Defendant did not make the necessary decisions that would have allowed him to complete or even substantially start the necessary work. As a result of the Defendant's non-action, that summer and fall passed without the work commencing to any significant degree.

[62] As winter is not a desirable time to work on such a project, the Plaintiff then waited until early spring, 2007. Again, his evidence, which I accept, is that the Defendant forestalled him on the basis that she did not want him to drive on the roadway on the property and create ruts. He and the Defendant then met in June, 2007 so that he could prepare a working drawing. The Defendant, however, was busy with a garage sale she intended to have and no work was done. The Plaintiff Beacon was frustrated by the delay as the summertime is his time off from teaching and the best time for him to work on other projects.

[63] As a result of other circumstances not attributable to the Plaintiff Beacon, he and the Defendant did not meet until August, 2007. At that time she wanted him to prepare a new drawing with a cost breakdown. The Defendant then went south for personal reasons.

[64] The Plaintiff Beacon went ahead and ordered the trusses for the addition. He did so due to the lengthy time period it generally took to have these constructed and made available for installation. He did not wish to risk further delaying the work on the project due to waiting for the trusses.

[65] The Defendant returned to the Yukon and then stated that she needed to take the drawings to YHC for financing approval, thus resulting in further delay.

[66] The estimated cost of the addition was in excess of $12,000.00 for materials only. The estimated materials cost for work on the existing building was in excess of $1,500.00. The Defendant agreed to pay the defendant for his work in excess of the $5,000.00 required by the terms of the Contract.

[67] In the fall of 2007, the Plaintiff Beacon, at the Defendant's request completed some work on the cabin and deck at the Lake Laberge property, including installation of flashing, styrofoaming the exterior and cribbing the cabin and strapping it for the installation of siding.

[68] The Plaintiff Beacon obtained a quote for siding from Kilrich Industries Ltd. in Whitehorse and another supplier, but the Defendant, feeling the quotes were too high, stated she would pick up matching siding from down south, resulting in further delay.

[69] The Plaintiff Beacon was able to start some work in October, 2007. It became apparent to him that the Defendant would not be prepared to move out of the Residence that winter as she had not taken steps to pack. His expectation as a result was that she would move out in spring, 2008.

[70] In the spring of 2008, the Defendant indicated that she would be packing up to leave and stated her intentions to have a second garage sale. The Plaintiffs offered to provide her with assistance but the Defendant did not accept his offers.

[71] At the Defendant's request, the Plaintiff Beacon took the necessary steps to transport a shed from the Residence to the Lake Laberge property, and re-cribbed and shingled it as well as installing the flashing. The Plaintiff Beacon further installed two prefabricated sheds which were constructed by students at Porter Creek Secondary School.

[72] The total amount of work done by the Plaintiff Beacon for which he invoiced the Defendant was $3,217.27 in 2007 and $3,865.54 in 2008. In addition, the Plaintiff Beacon invoiced the Defendant the amount of $1,024.38 for the trusses. The trusses include a delivery charge of $45.00 which, as the trusses have not been delivered, is for services yet to be performed but which, as I understand it, Kilrich Industries Ltd. required payment for as part of the total purchase price in anticipation of delivering them. The total claimed after deducting the $5,000.00 contractual obligation is $3,107.19 (a mathematical error in the Plaintiff Beacon's invoice and repeated in the Claim calculates this as $3,106.81).

[73] The plans the Plaintiff Beacon drew, the materials he ordered, the work he did do and the time frames within which these events occurred are consistent with his testimony as to his attempts to do the work on upgrading the existing cabin and on building the addition in a timely fashion. I do not accept the evidence of the Defendant which attempts to lay the blame for the non-completion of the addition on the Plaintiff Beacon.

[74] The Defendant argues that she should not have to pay for the trusses. She also has raised some arguments in opposition to some of the Plaintiff Beacon's invoiced charges, including but not limited to travel time and additional labour. I have considered her claims, but on the evidence, I find that the Plaintiff Beacon's invoiced costs are reasonable.

[75] In particular, I find that the ordering of the trusses was a reasonable and necessary part of the work on the addition and were ordered by Mr. Beacon as part of his continuing efforts to complete the requested addition. As his inability to complete the work was a direct result of the actions, or inactions, of the Defendant, he should not bear any costs associated with the trusses. This includes the $45.00 delivery charge. Should the trusses not be delivered and

other arrangements made to utilize them, the Defendant can sort out this cost with Kilrich Industries Ltd. directly.

[76] As such, I find that Mr. Beacon has completed $8,107.19 worth of work on the Defendant's property at Lake Laberge. He has fulfilled his obligation under the Contract and is to be compensated for any monies over and above the $5,000.00 worth of work he was obliged to contribute.

[77] The Plaintiff Beacon stated that his contribution to the work on the Lake Laberge property would have cost the Defendant approximately $15,000.00 if she had hired a contractor to do it. His evidence was that he undercut the amount he would normally charge substantially, and that he passed onto her the discounts for materials he was given by suppliers, something not necessarily normally done by contractors hired to complete a building project. I accept his evidence and find that the Defendant received more than fair value for the $8,107.19 worth of work the Plaintiff Beacon invoiced her for.

[78] The fact that this amount is comprised of both materials and labour does not affect my finding. While I would agree that the Plaintiff Beacon could not have discharged his responsibility under the Contract by simply purchasing $5,000.00 worth of materials and dropping them off at the Lake Laberge property, in the circumstances, he made every reasonable effort to perform his obligations under the Contract. In any event, the Plaintiff Beacon provided more than $5,000.00 worth of labour and I further find that labour charges for others who assisted the Plaintiff Beacon are also reasonable and should be included.

[79] Even if the Contract had been specific in limiting the work to the construction of an addition, and I find it was not so limited, the actions of the Defendant in frustrating the Plaintiff Beacon's attempts to perform would have entitled him to have contributed the $5,000.00 worth of work in another fashion. This could have included a cash payment of $5,000.00.

[80] As such I award the Plaintiffs the claimed amount of $3,107.19 for labour and materials provided for the benefit of the Defendant over and above the $5,000.00 the Plaintiff Beacon was required to provide in accordance with the terms of the Contract.

Overholding Tenancy

[81] I find that the Defendant was a tenant of the Residence and the Plaintiffs her landlords. The tenancy was clearly terminated effective November 30, 2008. The Defendant did not vacate the Residence until after the Plaintiffs sought and obtained the August 3, 2009 court order.

[82] The Defendant claims that the Plaintiffs are not entitled to compensation for the period of time from December 1, 2008 until she vacated the premises on August 20, 2009. She argues that the Plaintiffs inaction in seeking to obtain a court order determining the tenancy disentitles them to such compensation.

[83] I do not accept this argument. Firstly, s. 95(3) of the *Act* states that the burden of proof lies with the tenant to show that the landlord has waived a notice of termination of tenancy, has reinstated the original tenancy or has created a new tenancy. The Defendant has not met her obligation in this regard. The lack of immediate or more prompt action by the Plaintiffs to act upon the notice to terminate tenancy does not amount to proof that the Plaintiffs decided not to terminate the tenancy. If anything, the court order of August 3, 2009 demonstrates that the Plaintiffs considered the tenancy to have been terminated as of November 30, 2008 at the latest.

[84] As such, it is clear, and I find, that the Defendant was a wilfully overholding tenant from December 1, 2008 until August 19, 2009. This is a total of 261 days which is .715 of a 365 day calendar year.

[85] Section 42 of the *Act*, which applies to residential tenancies by virtue of s. 59(2) of the *Act*, provides that a wilfully overholding tenant is obligated to pay the landlord double the annual value of the land for the period of time the tenant has continued to detain the land. The value of the land in these circumstances is the value for which the Residence could have been rented to a tenant for the period in question.

[86] The evidence concerning the rental value of the Residence proximate to the time in question consists of firstly, a brief and undated letter from Ms. Tessier to the Plaintiffs' counsel which states the value to be $1,200.00 per month, and secondly, a tenancy agreement for the Residence which shows that as of September 1, 2009, the Plaintiffs were able to rent the Residence to a tenant for $1,200.00 per month, exclusive of electricity, heating, cable or phone.

[87] The letter from Ms. Tessier is not persuasive evidence of the rental value of the Residence during the period the Defendant was an overholding tenant. However, when I consider what the Residence actually was rented for as of September 1, 2009, and the lack of any persuasive contradictory evidence, I am satisfied that the best estimate of the rental value of the Residence during the time the Defendant was an overholding tenant is $1,200.00 per month.

[88] As such, subject to my consideration of issues that will be discussed afterwards, I find that in accordance with the *Act*, the Plaintiffs are entitled to receive compensation as a result of the Defendant being an overholding tenant. This compensation amounts to $20,592.00. In the circumstances, I will not award compensation for the period from August 21, 2009 to August 31, 2009. In declining to do so, I am aware that the Plaintiffs were deprived, for all practical purposes, of having any realistic possibility of obtaining rental income until September 1, 2009. I expect, however, that those 11 days may well have provided the Plaintiffs an opportunity to prepare the Residence for occupation by a tenant.

[89] Certainly the Plaintiffs could have proceeded more quickly to obtain the court order which terminated the tenancy than they in fact did. It could be argued that the Plaintiffs should not benefit from the delay by way of obtaining double the rent they would otherwise have been entitled to for a number of those months.

[90] I find, however, that the Plaintiffs did not deliberately delay seeking the court order in order to increase their potential return and, further, that they were not careless or negligent in not proceeding more expeditiously than they did. I find that throughout their interactions with the Defendant, the Plaintiffs went out of their way to avoid confrontation with the Defendant in the hope that the matters between them would be more or less amicably resolved, and that the period of time after the Defendant failed to vacate the Residence at the end of November 2009 is no different. Ms. Russell testified that she and Mr. Beacon hoped that the Defendant would choose to move out on her own in the spring of 2009 and that, had she done so, they might not have pursued any further action for recovery of rent. The Defendant, however, did not move out and the Plaintiffs felt that they had no recourse but to commence legal action.

[91] The Defendant cannot simply refuse to act on a valid notice to terminate tenancy and then attempt to transfer responsibility for the results of her refusal to the Plaintiffs. In the circumstances, she must bear the consequences of her own inaction.

[92] I note further that the Defendant remained in the Residence without paying rent from June 1, 2007 until November 30, 2008, a period of 18 months. I find that this additional period of tenancy beyond the May 31, 2007 Contract date was due to the actions or inactions of the Defendant, and that she has received a benefit from the Plaintiffs. I find this to be a factor when considering the Plaintiffs claim under s. 42 of the *Act*.

[93] I find that the court order of August 3, 2009 was limited in its scope and application and does not preclude the Plaintiffs from seeking a remedy in this proceeding under s. 42 of the *Act* for compensation resulting from the Defendant being an overholding tenant. While the Plaintiffs could have chosen to seek the damages under s. 42 of the *Act* in that proceeding, they were not required to do so. I note that Part 2 of the *Act*, in which s. 42 is located, sets out a procedure in s. 45 for a Landlord to make an application to a judge to conduct an inquiry into whether a writ of possession should be issued. Section 52 states, however, that "nothing in this Part shall require a landlord to proceed under this Part instead of bringing an action". Section 42 states that recovery from an overholding tenant shall occur by "…action before a judge…".

[94] I further note that s. 95 of the *Act* provides that "a landlord's claim for arrears of rent or compensation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced by action or on summary application as provided in section 96".

[95] In fact, it is likely that a decision to pursue damages in the s. 92 proceeding would have considerably protracted that hearing, without any substantial impact on the present proceeding, as much of the evidence may well have been duplicated. Further, the same amount would have been claimed in any event. From a purely practical point of view, the most appropriate forum for seeking this remedy is in this proceeding where the entirety of the circumstances are before the court, rather than in the s. 92 proceeding.

[96] In the end, I am satisfied that the Plaintiffs claim for compensation should be granted and I award the Plaintiffs $20,592.00 for the period of time they were deprived of the use of the Residence due to the overholding status of the Defendant.

Estoppel

[97] I have considered the evidence in this case and the authorities filed by the parties. I do not consider that there is any basis in law on the evidence I accept to apply the principles of promissory estoppel to deny the claims of the Plaintiffs. I have found that there was no promise or representation made by the Plaintiff Beacon that induced the Defendant to act in a particular way and, as such, no breach of any promise or representation.

Other claims

[98] The Defendant claims $400.00 for the Plaintiff Beacon's use of electricity that she paid the bill for. The Plaintiffs do not dispute that Mr. Beacon plugged into the Defendant's power source for some of the work he undertook for his own purposes. There is, however, no documentary or other evidence in support of the amount of the Defendant's claim and no evidence that sets out the extent of the Plaintiff's usage. The Defendant bears the burden of establishing the nature and extent of the Plaintiff's usage of electricity and the actual cost. She was the recipient of the electrical bills and could have provided such evidence. As such, I will award only the token amount of $50.00 for this claim.

[99] The Defendant also claims $300.00 for damage done by the Plaintiff Beacon to her compost unit. Again, no reliable evidence in support of this estimate of the costs associated with repair or replacement of the compost unit is before me. The Plaintiff Beacon testified as to the Defendant removing the wood stove from the Residence and the missing welder receptacle and breaker, all of which he had understood formed part of the fixtures which would remain with the Residence. In considering the above and the other circumstances in this case, I am not prepared to award the Defendant any monies for her claim for the damaged compost unit.

[100] I am satisfied that the Plaintiff Beacon's possession of the leveling unit belonging to the Defendant was at least in part, if not entirely, due to her request for him to try to sell it for her. As I understand, he is in a position to return this leveling unit to the Defendant in the same condition it was in when he took possession of it. I order that he make arrangements to have it returned to the Defendant.

Summary as to Order Made

[101] The Plaintiffs are awarded $20,592.00 as compensation for the Defendant being an overholding tenant.

[102] The Plaintiffs are further awarded the amount of $3,107.19 for labour and materials provided by the Plaintiff Beacon to the Defendant.

[103] From the total of $23,699.19 is deducted the amount of $50.00 for electricity used by the Plaintiff Beacon. Therefore the total judgment is for the amount of $23,649.19.

[104] The Plaintiffs shall have costs in the amount of $100.00 for the preparation and filing of pleadings as well as $150.00 for counsel fee at trial.

[105] Pursuant to the *Judicature Act*, the Plaintiffs shall have pre-judgment interest from September 1, 2009, and post-judgment interest.

COZENS T.C.J.