



Court File No. SC-12-00008148-0000

Court File No. sc-12-00008148-00D1

Ontario

SUPERIOR COURT OF JUSTICE Toronto
Small Claims Court

BETWEEN:

SURAIYA KIBRIA CHOWDHURY

Plaintiff

- and -

SATVEER AND HARVEER ENTERPRISES INC.

Defendant &
Plaintiff by Defendant's Claim

- and -

SURAIYA KIBRIA CHOWDHURY; KIBRIA MOHAMMAD; KHAN
CHOWDHURY

Defendants by Defendant's Claim

Suraiya Kibria Chowdhury, self-represented, for the plaintiff & defendant by
defendant's claim

T. Walker, counsel for the defendant & plaintiff by defendant's claim, Satveer
and Harveer Enterprises Inc.

Kibria Mohammad, self-represented, for the defendant by defendant's claim

Khan Chowdhury, self-represented, for the defendant by defendant's claim .

Heard: May 14 and June 2, 2014

Per: J. Hunt, D. J.:

REASONS FOR JUDGMENT.

[1] Toronto is a city of communities. East of the Don River, along Gerrard Street, is one such community. It is south Asian. People whose countries of origin are India, Pakistan, Bangladesh and Sri Lanka have arrived, coalesced and thrived. It is a vibrant community. But it also has its tensions.

[2] What is law if not the mechanism by which those tensions are defused? I cast this judgment with an eye to that community because that is how the plaintiff would have it; not, by any means as determinative, but as instructive. The law intervenes in disputes; not with rules, but with reason. The law intervenes when called upon to do so. People in our society are free to enter into their own arrangements. If it is acceptable to them, and not contrary to public policy, it is acceptable.

[3] The plaintiff, Suraiya Chowdhury, is Bangladeshi by origin; the primary spokesperson for the defendant, Sulinder Kaur Gill, is a woman of Indian (Sikh) descent. The plaintiff invited me to conclude that bias existed and because of that bias, she was not treated fairly. This was not pleaded, but asserted during evidence. I will have none of it. I will not tolerate that approach. It is an approach intended to obscure. This case is about money; nothing more, nothing less.

A Brief Background

[4] These two disputes arise out of the commercial lease of retail space located at 1396 Gerrard Street East, in Toronto. The plaintiff and defendant by defendant's claim, Ms. Chowdhury, was the resident commercial tenant in that retail space. The other defendants by defendant's claim, Kibria Mohammad and Khan Chowdhury were co-signatories of the lease. Collectively, the three were the "tenant". The lease had a term of five years, from August 15, 2006 to August 14, 2011. ¹

A copy of the executed lease can be found in the document brief of the defendant, entered as Exhibit 1, at tab 1.

[5] The defendant, Satveer and Harveer Enterprises Inc. (S&H) is the owner and landlord of 1396 Gerrard Street East. S&H is also the owner of the adjoining property at 1394 Gerrard Street East. Ms. Gill is a director of S&H and she and her family live in an apartment unit above the adjoining premises at 1394A Gerrard Street East.

[6] Ms. Gill first met Ms. Chowdhury when Ms. Chowdhury was an employee of a business being run out of 1396 Gerrard. That was approximately five and a half years before Ms. Chowdhury purchased the business, entered into the lease in August 2006, and continued with the then existing shop named "The Little Bangladesh ". The sale of the shop was to have taken effect on August 15, 2006. The prior owner and vendor was Mrs. Kaoser Parveen.

[7] Ms. Gill testified that she rarely discussed business with Ms. Chowdhury and that their relationship was casual and friendly. Moreover, she said that "I wanted her to succeed".

[8] But Ms. Gill is also a very astute businessperson. She was aware that her prospective new tenant had no assets, no home, no car. On behalf of S&H, she required a security deposit of \$10,000.00 prior to entering into the lease with Ms. Chowdhury. This was provided by bank draft dated July 31, 2006.³ In addition annual rent was to be paid by means of post dated cheques. The monthly rent was fixed at \$3,000.00, plus GST and increased by \$200.00 per month in each of the succeeding four years, ending at \$3,800.00 plus GST per month in the fifth and final year of the lease.

The Issues

[9] These two law suits have arisen out of the claim made by the defendant on a portion of the security deposit provided by the plaintiff and

² A "Declaration" and accompanying "Bill of Sale Business" can be found at tab 8 of the Document Brief of the plaintiff, Exhibit 3.

³ A copy of which is located at the third page of tab 7 of the document brief of the plaintiff, entered as Exhibit 3. The security deposit, as well as a requirement for first and last month's rent totalling \$6,800.00 are also addressed on the fifth page of the lease under "Miscellaneous"; *op. cit.* at footnote 1. Both these sums were noninterest bearing.

by the defendant's claim against the plaintiff for the cost of repairing the premises at 1396 Gerrard following the plaintiffs early departure in July, 2011.

[10] Ms. Chowdhury is suing S&H for \$9,734.00 based on what she alleges is owed to her out of the original security deposit of \$10,000.00. She acknowledges only the defendant's right to \$266.00 as the "difference between GST on last month 's rent and HST".¹

[11] It must be clearly understood, however, that at no time, either in pleading or in evidence did S&H ever lay claim to the entire security deposit. Its claim was pleaded and presented as one based on remedial costs incurred in repairing the premises. The defendant held back \$3,572.07 and proffered the balance, \$6,427.93 to the plaintiff, which the plaintiff refused.²

The plaintiff insisted on her right to all of the security deposit, but for \$266.00, throughout the trial and, quite obviously, would accept nothing less.

[12] The plaintiff by defendant's claim, S&H initially countersued for \$25,000.00, but amended the claim at trial to the sum \$18,393.31. The claim is pleaded both in the defence and in the plaintiff by defendant's claim to be based on the cost of clean up, repair and replacement of necessary components (especially the electrical wiring and dry walling) to the premises at 1396 Gerrard following Ms. Chowdhry's departure. Apart from the allegations of expenditures made, the claim is also based on contract.³ That contract, in both the plaintiffs claim and the defendants's claim has three components: the commercial lease of the premises and the covenants which run with it; a promissory note in the amount of \$40,000.00 from the plaintiff and the defendant by defendant's claim Kibria S. Mohammad to the defendant S&H

¹ This admission was made in paragraph 5(b) of the plaintiff's claim and was also made during the plaintiff's testimony.

² The plaintiff pleaded in paragraph 7 of the plaintiff's claim that her refusal was based on the defendant's insistence on a release. This "insistence" never came out in evidence.

³ The lease requires that the premises "be left in the condition in which it was rented." Op. cit. at footnote 2.

and a personal guarantee of the covenants contained in the lease by the plaintiff, Mr. Mohammad and the third defendant by

defendant's claim, Mr. Khan Imrul Chowdhury. All three of these documents are dated August 14, 2006.

The Primary Witnesses

[13] It must be said that with plaintive voice and beseeching tone Ms. Chowdhry repeatedly and insistently sought the sympathy of the Court. That was essentially the basis of her claim. So, too, was it the basis of her defence to the defendant's claim; that and continued denial that she had ever done anything wrong or had ever breached any of the terms of the lease. These two stances, a quest for sympathy and a denial of breach of the lease also served as her argument at the conclusion of trial.

[14] Ms. Gill gave her evidence in a clear, crisp and candid manner. There was no posturing; no preening. I found her to be both hard-headed and warm-hearted. Ms. Chowdhury was desperate, often on the verge of tears. The distinction between the two was not only immediately apparent, but revealing.

[15] I accept the evidence of Ms. Gill that Ms. Chowdhry became increasingly upset and emotional as the term of the lease progressed.

[16] It should be noted, as well, that Ms. Chowdhry clearly, and probably sincerely, believed that she was being unfairly treated. However, her belief does not make it so. I find the contrary to be true.

[17] Rent was to be paid monthly, on the 15th of each month in advance. I accept the evidence of Ms. Gill that Ms. Chowdhry repeatedly requested a delay in the deposit of the monthly cheques. I also accept, without hesitation, Ms. Gill's oral evidence as well as her hand written record of these late payments. Between 2007 and 2010 the monthly payments were late by a total of 159 days.

⁷ Both the promissory note and the personal guarantee are attached to the lease of the premises referred to infra, at footnote 1.

⁸ Exhibit 1, tab 12 (which is accompanied by photocopies of dates of deposit). Ms. Gill compiled this hand-written list by referring to her own records; her "deposit book" which was not, itself, put into evidence. I accept the accuracy of the summary.

[18] Ms. Chowdhry stated the contrary and provided photocopies of a number of cheques and bank withdrawals.⁴ Their dates of deposit are not legible. I do not find the evidence to be credible.

[19] The credibility of the plaintiffs evidence may also be assessed objectively. On August 24, 2010, Ms. Gill wrote to all of the defendants by defendant's claim in a letter headed "LEGAL NOTIFCATION OF NONCOMPLIANCE OF TERMS AND CONDITIONS OFLEASE

This notice is to inform you that we have not received your rent payment which was due on this August 15, 2010. This rent payment owed is for time period August 15 to September 14, 2010.

The amount past due is \$3,800.00 plus HST in the amount of \$494.00 = \$4,294.00.

According to the terms of our rental agreement, you are also required to pay a late rent charge of \$50.00 per day. Ifpaid on August 24, 2010, the late charges for the current month is \$500.00.

As per the terms ofyour lease, you are required to provide us with 12 post-dated cheques annually without demand. Additionally, despite of (sic) many verbal reminders and requests in person by Mr. Devinder Singh Gill, and despite having received copies of2009 and 2010 commercial taxes and BIA, the following amounts remain outstanding: 2009 - \$4,230.05 and 2010 - \$4413.37.

Additionally, effective July 1, 2010 the HST came into effective

(sic). We are requesting, on behalf of the Government of Canada to collect this new tax. You owe the difference between the GST stated on your lease, and the HST, on the amount of \$3,600.00. This difference is \$468.00 minus \$216.00 which equals \$252.00.

⁴ Exhibit 3, tabs 1-6.
Exhibit 1, tab 10.

You are requested to immediately rectify this situation by providing a certified cheque for the amount of \$13,689.42. The Landlord hereby gives notice that no negotiation will be

entered into, and no further notification by the Landlord will be provided

[20] Even well in advance of this written notification Ms. Gill had written to Ms. Chowdhry pointing out that almost one year after occupancy, the necessary post-dated rent cheques had not been received. The tenant's obligation to obtain insurance and to arrange for S&H to be a named insured had not been done. The tenant's car continued to be parked behind the leased premises, which was not allowed. "Old signage was removed and replaced with new signage as per your approval . The letter was dated June 27, 2007. It was never acknowledged by Ms. Chowdhry. I have no doubt that it was received. ¹¹ Ms. Gill testified that it was hand-delivered. .

[21] Perhaps more tellingly, on April 28, 2011, the plaintiff was locked out of her shop at 1396 Gerrard St. E. in Toronto. Little Bangladesh, as tenant received a NOTICE OF DISTRESS, from Associated Bailiffs & co. Ltd. acting as agents for the Landlord, Satveer & Harveer Enterprises Inc.

[22] Distress against the goods and chattels of the tenant, pursuant to section 53 of the Commercial Tenancies Act, ¹² for non-payment of the arrears of rent in the amount of \$9,236.74, plus costs, had been issued and served.¹³

[23] The next day, April 29, 2011, the plaintiff was allowed re-entry to her shop Little Bangladesh, upon payment of \$5,284.12. In addition, the further arrears of \$4,413.37 plus Bailiff costs of \$870.00 were to be paid on or before July 15, 2011, failing which the penalty of \$500.00 would be imposed. If paid in a timely way, the penalty would be waived.

[24] This further Bailiff's agreement of April 29, on behalf of the Landlord goes on to state:

THE TENANT FURTHER AGREES TO PA Y ALL RENTAL
PAYMENTS, BIA TAXES, BUSINESS TAXES, ETC, IN
ACCORDANCE WITH THE LEASE AGREEMENT.

¹¹ Exhibit 1, tab 9.

¹² R.S.O. 1990, c. L.7 Exhibit 1, tab 13.

¹⁴ Ibid; at page 2 of tab 13; these documents were duplicated by the plaintiff in Exhibit 3 at tab 7.

[25] At the very least, two things are evident from these documented developments. These were not events which reflect the conduct of a tenant or tenants who are in full compliance with the terms and covenants of their lease;

in fact, these developments reflect the opposite. Conversely, I find that they reflect relatively flexible and patient conduct on the part of the landlord, S&H.

[26] At the outset of these reasons I identified the location within Toronto where the commercial and contractual problems reflected in this litigation arose.⁵ That location is further identified by the City as the "Gerrard India Bazaar" and is designated as a "Business Improvement Association" (BIA).⁶ As a designated BIA the area attracts not only commercial and residential taxes, but the BIA levy is collected by the City of Toronto Tax Office for eventual re-distribution to the area by means of member application for rebates based on the costs of improvements within the "Gerrard India Bazaar".

[27] I have also indicated earlier in these reasons that the disputes among the parties are about the lease, about money and nothing more.¹⁷ It will be useful to set out some select terms of the lease:

THE TENANT shall pay rent on the 15th day of each and every month without prior demand and without any deduction, abatement, set off or compensation by means of twelve postdated cheques for each and every year. . .

TENANT COVENANTS with the Landlord to pay rent and no partial payment by the Tenant which is accepted by the Landlord shall be considered as other than partial payment on account of rent owing and shall not prejudice the Landlord's right to recover any rent owing. . .

AND to pay all business taxes and B.I.A. taxes in respect of the business carried on by the Tenant in and upon or by reason of the Premises hereby demised on a monthly basis. . .

AND IT IS FURTHER HEREBY AGREED by and between the said Landlord and Tenant that no sign, advertisement or notice shall be inscribed, painted or affixed by the Tenant, or any other person on the Tenant's behalf, on any part of the inside or the outside of the building in which the Premises are located unless the sign,

⁵ Infra, at paragraph [1].

⁶ As reflected in the Toronto Tax Bills reproduced at tabs 2 & 3 in Exhibit 1. Infra, at paragraphs [31 and [4].

advertisement or notice has been approved in every respect by the Landlord.

The Tenant shall, at his own expense, if requested by the Landlord, remove any or all additions or improvements made by the Tenant to the Premises during the Term and shall repair all damage caused by the installation or the removal or both; this also applies to the signage. . .

THE Tenant hereby covenants to pay for all utilities (including but not limited to gas, electricity, water, heat, air conditioning) used by the Tenant in the demised Premises. . .

AND the Tenant further covenants, promises and agrees with the Landlord that none of the goods or chattels of the Tenant at any time during the continuance of the term hereby created on the said Demised Premises shall be exempt from levy by distress for rent in arrears by the Tenant. . .

The Tenant shall carry public liability and property damage insurance in which policy the Landlord "SATVEER AND HARVEER ENTERPRISES INC." shall be a named insured and the policy shall include a cross-liability endorsement; a copy of the insurance policy to be provided to the Landlord within 30 days of acceptance of lease. . .

THE Tenant agrees to pay for normal water consumed on the said Premises. . .

AN Act of Default has occurred when:

- 1) the Tenant has failed to pay rent for a period of 10 consecutive days, regardless of whether demand for payment has been made or not;

 - 2) the Tenant has breached his covenants or failed to perform any of his obligations under this Lease; and
- a) the Landlord has given notice specifying the nature of the default and the steps required to correct it; and
 - b) the Tenant has failed to correct the default as required by the notice. . .

Further, a certified cheque in the amount of \$10,000.00 is required as a security deposit at all times. .

. . . all rents past due (including GST payments) will incur a penalty of \$50 per day . . . if the Landlord seeks legal advice and notice is subsequently served to the Tenant regarding any violation of any covenant of this Lease, then the Landlord's legal expenses incurred plus the amount needed to correct any violations is payable by the Tenant.

The Claim of the Plaintiff

[28] The breaches by the plaintiff and her co-tenants of the terms of the lease are many and manifest. The failure to comply with the tenant's covenants have been set out at some length in these reasons. Ms. Gill, in fact seems prescient in having required a security deposit in addition to first and last month's rent.

[29] I find that virtually none⁷ of the allegations in the plaintiff's claim are supported by the evidence.

[30] I find as a fact that the plaintiff has largely failed in her claim; not in the sum which remains notionally owing to her; but in terms of her honesty and integrity.

[30] Ms. Chowdhry departed the leased premises a month early, on July 14, 2011. Sometime shortly thereafter, the defendant tendered the sum of \$6,427.93 as the balance due to the plaintiff and remaining out of the initial

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\$10,000.00 security deposit.⁸ The defendant held back the sum of \$3,572.07, which I find to be inordinately generous, under the circumstances.

[31] I make this finding because the late rent payments alone, amounting to 159 days⁹ could have triggered a late charge of \$50 per day amounting to a

⁷ With the exception only of paragraphs 1, 2, 3 and 5 (b) of the plaintiff's claim.

⁸ The break down and tender is contained in Exhibit 4.

⁹ *Infra*, at paragraph [17] and footnote 8.

²¹ *Op cit*, at footnote 19.

total of \$8,350.00. Instead, the defendant deducted only \$750.00 for late payment. The breakdown of what was tendered is as follows:

● Difference between paid and owing on BIA and business	\$144.95
● Difference between GST on last month's rent and HST.	\$266.00
● Sign cleanup	\$140.00
● Legal advice	\$565.00
● Water & sewage	\$1,706.12
● Penalty for late rental payments	\$750.00
● Amount due	\$3,572.07
● Deposit paid	\$10,000.00
● Balance	\$6,427.93

[32] The rejection by the plaintiff of the tendering of the defendant's view of what remained of the security deposit ostensibly arose out of the defendant's insistence that its acceptance be accompanied by the execution of a simple release:

I, tenant, (known as The Little Bangladesh) for Satveer & Harveer Enterprises, as per the lease from Aug. 15th, 2006 to July 14, 2011, do agree that both in my personal capacity and as tenant acknowledge and accept the above sume (sic) as full and final settlement of return of deposit for rental of the premises. Ifurther acknowledge that this agreement is binding for allparties that I signfor

Proposed signatures and date for all three tenant signatories to the lease; (it remained unsigned)

The administrator of S&H, Mr. B.J. Singh (Ms. Gill's brother) was even authorized to offer an additional \$300.00 to Ms. Chowdhry if that would resolve the issue; to no avail.

[33] Given the plaintiffs conduct throughout the term of the lease and given the instances of breach of the terms of the lease, I do not find this requirement by the defendant, for a release, to be unreasonable. I find the opposite. Ms. Gill testified to and emphasized her leniency and on-going efforts to accommodate Ms. Gill. This was clear from her decision to allow the plaintiff to re-enter the premises after the locks had been changed and Associated Bailiffs retained, but before the full arrears of rent had even been paid,¹⁰ as well as my view of the manner in which she dealt with the security deposit. A head for business should not be cause for condemnation.

[34] It was not to be. But for \$266.00, Ms. Chowdhury wanted the return of the balance of the security deposit, \$9,734.00. That's what she sued for; she's not going to be awarded that sum.

[35] Just before leaving this area of the litigation, I should point out that the lease clearly and unequivocally allows the Landlord to be fully indemnified for legal expenses incurred, essentially, in enforcing the lease. However, there was neither invoice, receipt nor solicitor's letter to support the claim for that component of the hold-back. Nevertheless, I allow it. I allow it because of my view of Ms. Gill's honesty and integrity and also because of the contents of the letters to Ms. Chowdhry.¹¹

[36] I infer that they were written with some legal assistance and the sum, given the arrears and the conduct of the plaintiff does not seem to me to be at all unreasonable. In any case my subsequent observations and conclusions will render this point moot.¹²

¹⁰ *Infra*, at paragraphs [211 to [251].

¹¹ *Infra*, at paragraphs [191 & [20].

¹² *Supra* at paragraphs [501 to [541].

The Claim of the Plaintiff by Defendant's Claim

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[37] S&H has reduced its claim for the cost of repair to the premises at 1396 Gerrard, following Ms. Chowdhury's departure from \$25,000.00 to \$18,393.31.25

[38] The claim is based on the lease and on a departing tenant's obligations. The relevant provision in the lease bears repeating:

A certified cheque in the amount of \$6,800.00. is due upon commencement of this lease, which includes the first and last month's rent. . . further, a certified cheque in the amount of \$10,000.00, is required as a security deposit at all times. . . the security deposit will be returned thirty days after the end of the term of the lease, providing there are no outstanding charges and the premises is vacated in the condition in which it was rented.¹⁴

[39] As noted,¹⁵ the plaintiff departed the premises a month early, July 14, 2011 and so the return of the security deposit was not technically due until thirty days after the "expiry of the term" which would have put it at September 14, 2011.

[40] In the intervening two months, S&H was unable to rent the premises because of the condition they were left in. This is the evidence of Ms. Gill, and once again, I accept it as true and prefer it to the evidence of Ms. Chowdhry. Ms. Gill's evidence has the support, as well, of a series of photographs¹⁶ showing the condition of the vacated premises at 1396 Gerrard. Significant work was clearly required.

[41] A little further background will, I believe, be helpful. S&H acquired the property in 1999 and spent approximately \$ 15,000.00 renovating the unit at

¹³ This reduction was effectively by way of motion at trial, which I accepted; *infra*, at paragraph [12].

¹⁴ *Infra*, at paragraph [271 (Exhibit 1, page 5, under "Miscellaneous").

¹⁵ *Infra*, at paragraph [32].

¹⁶ There are six colour reproductions, found at tab 14 of Exhibit 1.

1396 Gerrard. This work included plumbing and wiring. The evidence was uncontested.

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[42] Because of the membership of S&H and Ms. Gill in the Business Improvement Association, they had also made application¹⁷ for assistance in the improvement of the store front facades at 1394 and 1396 Gerrard, which abut. They spent \$25,000.00¹⁸ and received a \$10,000.00 rebate through BIA. Again, this evidence is uncontested. There had been only two tenants in 1396 Gerrard before Ms. Chowdhry and occasional necessary and predictable repairs and routine maintenance were carried out by S&H both before and during the term of Ms. Chowdhry's tenancy.³¹

[43] I do not consider these expenses to be part of the defendant's claim, but rather expenses incurred to maintain the rental premises and part of the landlord's on-going responsibilities to deal with normal wear, tear and deterioration.

[44] The premises were acceptable when Ms. Chowdhry and her co-tenants executed the lease in August of 2006. The condition of those premises was unacceptable after her departure. Ms. Gill did not actually physically visit the premises until approximately two months after mid-July, 2011.

[45] A full inspection of the interior of 1396 Gerrard did not take place until approximately two months after Ms. Chowdhry's departure and that inspection was visual only and revealed, as is confirmed by the photographs, holes in the walls, wires hanging down from the ceiling, doors falling off their hinges, a carpet that was beyond cleaning; the full extent of the damages was not known "until the contractors came in".

[46] It was evident, upon further and closer inspection that, during the tenancy of Ms. Chowdhry substandard electrical work had been done. It was not up to code and created a danger. It had to be replaced. The ceiling and drywall repair was substantial and formed the largest single component of the

¹⁷ Exhibit 8. Photographs illustrating the "before" and "after" of the facade improvement can be found in the defendant's supplementary, supplementary book of documents, (sic), Exhibit 6, tabs 9 & 10.

¹⁸ See Exhibit 7 for the facade improvement to 1396 Gerrard Street East.

³¹ see Exhibit 2, tabs 9, 10, IOA, 13, 14 & 15.

defendant's claim. I accept as a fact that this work was necessary and that the need arose during and because of the tenancy of the plaintiff.

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[47] The defendant's claim is not fanciful and anticipatory; it is real. The money has been spent.¹⁹ The total expended by S&H in having this necessary remedial work done was \$16,741.06.²⁰ It should be noted that the defendant conceded at trial that some of the electrical work constituted betterment and should not form part of the remedial work.²¹ This sum is \$445.00, thereby reducing the total expended to \$ 16,296.06.

[48] The work was performed, or at least invoiced and paid, between December 2011 and June 2012. It is to be noted that loss of rental income during this period was not advanced, nor does that head of damages form part of this claim.²²

The Consequences

[49] When Ms. Chowdhry cross-examined Ms. Gill, she clearly suggested that the defendant's claim was vindictive and retaliatory. I don't think so. There is merit in the defendant's claim; sufficient merit that S&H will succeed.

[50] When I first began to consider the issues presented by this case, both during and after trial, I was concerned with the legal ramifications of the failure on the part of the plaintiff to plead the Limitations Act, 2002.³⁶ This concern arose because of the water and sewage component of the tendered sum out of

¹⁹ Exhibit 1, tabs 3, 4 & 6.

²⁰ Ibid, plus tab 7, and Exhibit 2, tabs 17, 19, 20 & 21.

²¹ This "betterment" component is reflected in the invoice for electrical work found at tab 7 of Exhibit 1.

²² Counsel for S&H helpfully submitted a memorandum of fact and law at the conclusion of the trial which raised, among other issues, the question of mitigation. In doing so, the decision of the Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675, by which I am obviously bound. However, the only circumstances under which mitigation would be an issue, at least as my reasons have emerged, would be if there had been a claim for loss of rent; and there was not. The decision, clearly binding, does not apply in this case. % S.O. 2002 CHAPTER 24, SCHEDULE B ³⁷Exhibit 5.

the security deposit. It was a five year cumulative total.³⁷ Arguments could be made, but they need not be made; the tendered sum was never accepted.

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[51] Similarly, the defendant never raised the question of set-off, legal or equitable, either in its defence or in its claim as plaintiff by way of defendant's claim.

[52] The numbers will explain why both these questions are moot.

[53] I have found that S&H has sustained damages of \$16,296.06. They still hold the entirety of the initial security deposit of \$10,000.00, none of which they will be ordered to part with, leaving the net sum of \$6,296.06. Think of the security deposit as an advance payment against their proven loss. But not all of it.

[54] S&H, although it still holds and effectively owns the entire security deposit, it sustained earlier losses due to breaches of the lease by the plaintiff for which I find it to be entitled to indemnification. Those losses amounted to \$3,572.07, the amount initially held back in the effort to resolve the security deposit issue.³⁸ In other words, the defence of S&H to the plaintiff's claim succeeds.

[55] This leaves a net security deposit amount of \$6,427.93 in the hands of S&H and is to be viewed as a "credit" against the sustained remedial damages of \$16,296.06 providing a net loss to S&H of \$9,868.13, and I so find.

[56] I will make one further observation. Ms. Chowdhry's defence to the de facto counterclaim of S&H was a three and a half page, single spaced narrative lament of hardship, unfairness, suffering and unrewarded hard work." I harbour little doubt that she will be devastated by this judgment. I wish simply to emphasize, once again, that this litigation is not about her; but about the lease of 1396 Gerrard Street East and about the condition of those premises upon her departure.

[57] I must cite the lease one last time:

³⁸ Infra, at paragraphs [281 to [311.

³⁹ This observation is also clearly reflected in a series of hand written letters from Ms. Chowdhry to Ms. Gill found in Exhibit 2, at tabs 1, 2, 3 & 4.

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As there are more than two Tenants bound by the same covenants herein contained, their obligations shall be joint and several.²³

[58] The two additional defendants by way of defendant's claim, Kibria S. Mohammad and Khan Imrul Chowdhury, along with Suraiya Kibria Chowdhury, jointly executed a personal guarantee of the performance, as co^w tenants, of the leased premises at 1396 Gerrard Street East. In addition, Suraiya Kibria Chowdhury and Kibria S. Mohammad both executed a promissory note for \$40,000.00. Both gentlemen gave evidence and confirmed their signatures and their understanding of the documents they had signed,²⁴ although Mr. Chowdhury did state that the personal guarantee had only to do "with the lease". Unfortunately, so do the repair and remediation costs.

Conclusion

[59] Although Ms. Chowdhury was notionally owed the sum of \$6,427.93 in August/September, 2011, she refused to accept it. Her entitlement to it quickly disappeared as has been made apparent in these reasons. It would be unfair, illogical, unjust and inconsistent with the purposes and mandate of this Court to give with one hand, and take with the other.

The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.²⁵

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every

²³ Op cit, Exhibit 1, tab 1, page 6; infra, at paragraph 4.

²⁴ Infra, at paragraph [121.

²⁵ Courts of Justice Act, R.S.O. 1990, c. C.43, s. 25. ⁴³

Ibid, O. Reg. 258/98, r. 1.03 (1).

proceeding on its merits in accordance with section 25 of the Courts of Justice Act.43

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[60] In the result, the claim of the plaintiff, Suraiya K. Chowdhury, is dismissed. My order as to costs will follow.

[61] The plaintiff by defendant's claim, Satveer and Harveer Enterprises Inc. is successful and shall have judgment for the sum of \$9,868.13. Suraiya Kibria Chowdhury, Kibria Mohammad and Khan Chowdhury are jointly and severally liable, plus the order for pre and post judgment interest and costs to follow.


[62] S&H did not specify a date from which they wish interest to run. Therefore, I order pre and post judgment interest on the judgment at the rate of the Courts of Justice Act from the date of issue of the defendant's claim, April 15, 2013.

[63] S&H was successful both in its defence and in advancing its claim. It was represented by a solicitor. Nevertheless, as my discretion allows, I do not believe that this case calls for the maximum. I award S&H \$2,200.00 costs, inclusive of disbursements.

[64] This costs award may be considered contingent to enable the parties to make submissions in writing if they so choose. All four parties have ten days from the date of this judgment to exchange their submissions, with copies to this Court, to my attention, by fax, and five days thereafter to reply, each to the other, and again with copies to this Court, to my attention. If I have heard nothing by that time, my order in paragraph [63] will be final.

Judgment accordingly.

Dated at Toronto, July 28, 2014



Per: J. Hunt, D.J.