

**ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)**

B E T W E E N:)	
)	
MDG NEWMARKET INC. o/a)	Mr. C. Pye
ONTARIO ENERGY GROUP)	Counsel for the Plaintiff
)	
)	Plaintiff)
-and-)	
)	
)	
STEPHEN KUNDA)	No Appearance
)	
)	Defendant)
)	
)	Heard: July 27, 2016

REASONS FOR DECISION

1. For the following reasons, the plaintiff’s claim is allowed in part and judgment is granted against the defendant for \$1,367.13 plus interest and costs.

2. By a contract dated January 15, 2014, the defendant rented a furnace from the plaintiff at a monthly price of \$69.95 plus HST. He made six monthly payments but then, for unknown reasons, stopped paying. The plaintiff sues for \$21,678.71 plus interest at 19.56%.

3. The claim is undefended. On an assessment hearing the plaintiff bears the onus to establish its entitlement to the requested judgment as a matter of fact and law: *Grand River Natural Stone Ltd. v. Armour Masonry*, [2011] O.J. No. 5707 (Sm. Cl. Ct.), at para. 5-16.

4. On the initial hearing of this matter counsel appeared without a witness or affidavit evidence. I adjourned the matter to give the plaintiff another chance to prepare for the assessment hearing. At the adjourned hearing, the plaintiff's evidence consisted of copies of documents and the oral evidence of a collection employee. There was no first-hand evidence of the actual events; for example the salesperson who solicited and signed the contract was not called to testify. As such the evidence of the transaction is entirely hearsay, which may be admitted in Small Claims Court but is generally entitled to discounted weight: *Central Burner Service Inc. v. Texaco Canada Ltd.* (1989), 36 O.A.C. 239 (Div. Ct.).
5. An original of the contract was not produced. Instead a copy of two pages was filed (Exhibit 1, Tab 1), consisting of a single-page signed contract ("the Contract") with a second page called "Terms and Conditions". The latter is printed in quite small type and is presented on the basis that it was the back of the Contract, but it bears neither signatures nor initials. A fax banner line on the former is absent from the latter. This presentation creates doubt as to the authenticity of the two items as a pair.
6. The Contract provides for a monthly rental price of \$69.95 plus HST but fails to address the duration of the agreement.
7. The Contract provides that a \$1,300 fee for delivery, installation and equipment removal would be waived by the plaintiff provided the account was in good standing on the fifth anniversary of the installation date.
8. The Terms and Conditions provide in article 2 that the agreement is contingent on several things including whether installation of the furnace "is economically rational." It then provides in small type that the customer agrees "to rent the equipment from OEG starting from the date this agreement is signed and for the useful life of the equipment estimated to be about 15 years."

9. Another interesting aspect of this agreement is the plaintiff's submission that it provides for an automatic annual price increase of 3.8%.
10. The Contract clearly identifies the monthly price as \$69.95. Then there is reference buried within a paragraph of additional verbiage to an "annual increase limited to 3.8%." The minuscule Terms and Conditions then state in part of article 2:

I understand that on each annual anniversary of my installation date, my monthly payment [sic] is limited to an annual increase of 3.8% of the amount payable in the preceding year or in accordance with the Consumer Price Index published for the preceding calendar year, whichever is greater, unless I am otherwise notified.

11. Despite the clear identification of the monthly price as \$69.95 twice in handwritten entries on the Contract, and no lease term, the plaintiff now claims based on the unpaid balance of 15 years of payments with annual increases of 3.8% each year. The result would be that \$69.95 would cease to be the price after the first of 15 years and the actual price would almost double by the end of that period.
12. The furnace was installed on January 20, 2014.
13. An "Invoice" was generated dated January 21, 2014 (Exhibit 2). It appears to be an invoice for the furnace, in the amount of \$5,768.08 with no HST. In a box entitled "Terms" it indicates "Home Trust". The facts behind this document were not addressed in the evidence. Possibly it is not an invoice at all but only an indication that a third party paid the plaintiff for the equipment and that amount was built into the monthly payment agreement between the parties. There is no evidence that the defendant paid this invoice and the agreement makes no provision

for such a payment.

14. After installation the defendant made only six monthly payments and then stopped. There is no evidence as to why.
15. Almost two years later, the plaintiff sent the defendant an “Invoice” dated June 10, 2016 (Exhibit 1, Tab 2), for \$40,332.68. That was comprised of \$16,210.85 plus HST for the balance of monthly payments for the 15 years including annual price increases of 3.8%, plus interest at 1.5% per month totalling \$19,481.79 plus HST. Interest was charged on payments due in the future through to the year 2029.
16. Three days later on June 13, 2016, the plaintiff sent the defendant another “Invoice”, this time for only \$2,663.44, representing two years’ worth of arrears (subject to the 3.8% increases) plus \$300 in NSF charges, plus interest at 18% per year, plus HST (Exhibit 1, Tab 3). No explanation was provided to the defendant as to why there were two invoices in such dramatically different amounts only three days apart.
17. In submissions before me, the plaintiff conceded that there is no contractual basis for interest exceeding the *Courts of Justice Act* rate nor for an NSF fee of \$50 per returned item. Therefore by its own admission the plaintiff’s “Invoice” dated June 10, 2016 was exaggerated by more than 100% (prior to consideration of the claim for annual increases at 3.8%). It is difficult to see how that invoice could have been delivered in good faith.
18. I find the plaintiff’s treatment of this transaction lamentable. The terms and format of the contract documentation appear designed to obscure from the customer the framework of the agreement as it was presented to the court over two years later. In particular, the striking lack of clarity as to the duration of the agreement and as to the claimed annual price increases lead

me to conclude that these represent material ambiguity at the very least, which warrant application of the *contra proferentem* doctrine. If the price was to increase each and every year by 3.8%, without further notice, and for 15 years, the contract should have said so. Reference to the possibility of annual increases “not exceeding 3.8%” did not state the plaintiff’s position on the price of this contract at all fairly to the customer.

19. If the Terms and Conditions were found to be part of the agreement, they simply refer to an estimated lifespan of the equipment. I have no evidence of the basis or accuracy of the 15-year estimate. One can only speculate as to the actual useful life of the furnace and therefore as to the actual term of this agreement had it not been breached by the defendant.
20. Given the evidence before the court including the absence of an original version of the contract, the lack of evidence concerning its form when executed by the defendant and the lack of initials on the Terms and Conditions document and the form and hearsay nature of the copy produced, I am not prepared to accept on a balance of probabilities that it is a true copy of the back of the document signed by the defendant. Therefore I decide this matter without reference to those Terms and Conditions.
21. In the absence of any agreed duration of the agreement, the law would imply a mutual right to terminate on reasonable notice. That would be 30 days in my opinion. Here the defendant gave no specific notice but simply stopped paying. I find that he is liable for an additional two months’ rent before the plaintiff ought to have surmised that he had terminated the agreement. Three months at \$69.95 plus HST is \$237.13.
22. In addition the plaintiff is entitled to some part of the charge for delivery, installation and removal in the amount of \$1,300, since the account was not in good standing on the fifth anniversary of

the installation date. The evidence is that the plaintiff has not recovered the furnace and does not intend to do so. I would allow the installation component of these charges which is \$1,000, plus HST.

23. The plaintiff's claim is allowed in part. Judgment is granted against the defendant for \$1,367.13 plus prejudgment interest at 1.0% from September 1, 2014. Costs fixed at \$300.00 limited to disbursements only given the plaintiff was unprepared for the first assessment hearing.

July 29, 2016

Deputy Judge J. Sebastian Winny