

Claim No: SCCH 281662

Date: 20070629

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Cite as: Lague v. Killiam Properties, 2007 NSSM 58**

**BETWEEN:**

Name Mr. David Lague Appellant

Name Killiam Properties Respondent

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on September 19, 2007. This decision replaces the previously distributed decision.

**ORDER AND DECISION**

**BACKGROUND OF PROCEEDING**

- (1) This proceeding was heard on June 26, 2007.
- (2) The Appellant, David Lague (Lague), appeals the decision of the Director of Residential Tenancies dated May 23, 2007.
- (3) Sections 17C and D of the Residential Tenancies Act, R.S., c. 401, s.1, apply to appeals to the Small Claims Court from Orders of the Director.
- (4) Section 17D(1)(b) provides that the Small Claims Court may make any Order that the Director could have made. The Orders the Directors may make are contained in Section 17A of the Residential Tenancies Act.

**THE LEASE**

- (5) The Respondent, Killam Properties (Killam), and Lague entered into a residential lease on March 6, 2007, using a Standard Form of Lease.
- (6) Monthly rental was \$775.00.
- (7) There is no dispute between the parties concerning the fact that a lease was entered into as indicated and that Lague breached the lease in that the rental payments for March, April, and May in the amounts of \$560.00, \$775.00, and \$425.00, respectively, prorated for the month of March as per the terms of the lease and prorated for the month of May until the date that the unit was re-rented, were not paid by Lague to Killam.
- (8) Lague raises no issue concerning the landlord's compliance with its duty to mitigate in this case.
- (9) The only issue raised by Lague is in respect of his contention that the lease is invalid or should be declared null and void on the basis of what he describes variously as an innocent misrepresentation, a unilateral mistake, and a frustration of purpose. He also states that there was no consideration given as he placed Stop Payments on all the cheques. He asks that the Court consider rescinding the agreement and placing both parties back into the positions they were prior to the lease being signed.
- (10) Essentially, Lague's position is that the Court should declare that the lease is of no force and effect.

## **FINDINGS**

- (11) Lague and his wife contacted Killam looking for an apartment to rent for themselves and their daughter. They were shown a number of units in different buildings, all of which were unsatisfactory. This included a unit on the third floor of one building shown to Lague by Vicki Kaiser (Kaiser), representative of Killam, who testified on the appeal.
- (12) Another representative from Killam showed Lague a number of different units (neither party could recall the name of this individual), then finally showed Lague a three bedroom unit similar to one that was going to be available very shortly. Lague and his wife liked the layout of the unit, and they decided that they were ready to sign a lease for the unit that was going to be available soon.

- (13) Lague testified, and I accept his evidence, that he told the representative of Killam that it was important to them that the unit be on the ground floor because of some physical disabilities that he had and his daughter had. I also accept his evidence that it was their understanding from the discussions with the representative from Killam that the unit which they were going to be renting was on the ground floor.
- (14) The lease was signed on March 6, 2007, shortly after the viewings described above.
- (15) Lague signed the lease and provided Killam with a cheque for the security deposit and the first month's rent.
- (16) Later that day, he and his wife decided to drive by the apartment building. Upon investigation, to their dismay, they found that the unit they had just agreed to rent was on the third floor of the building. Lague contacted Killam that evening and told them that they would not be taking the unit.
- (17) Further discussions took place subsequently concerning the possibility of renting other units but no resolution was reached.
- (18) As stated, I accept Lague's evidence that he and his wife were told that the unit that they would be renting was on the first level, and Lague made it known that this was of particular concern to him. In submissions, Kaiser on behalf of Killam stated that I should draw an inference from the fact that she personally showed Lague a unit on the third floor, and he made no objection to the fact that it was on the third floor. I am not prepared, however, to make such an inference as I accept Lague's evidence as to the nature of the discussions. Lague's demeanor throughout his testimony was consistent with an honest, sincere, and truthful person.

## **THE LAW**

- (19) The law makes a distinction between an innocent misrepresentation and statements which are merely inducements to a party to enter into a contract. The former can constitute part of the contractual terms between the parties. I quote from Fridman, The Law of Contract, Fourth Edition, at page 318 as follows:

“At common law an innocent, non-negligent misrepresentation would not, and still does not entitle the victim to any relief unless the statement concerned can be regarded as constituting a term of the contract. If the statement can be regarded as more than an assertion but as a definite part of the bargain, that is, as one of the promises made by one party to get the consent of the other, then it will be a term.”

(20) I quote further from the same text as follows at page 319:

“Here is the vital point. Where what has been made is a “pure” innocent misrepresentation, that is, a non-negligent misrepresentation, then, in equity, the victim is entitled to rescind the contract, in other words to repudiate his original and apparent consent.”

(21) And, further, at page 320:

“For an innocent misrepresentation to be operative in this way, as was explained in *Alberta North West Lumber Co. v. Lewis*, following the leading English case of *Kennedy v. Royal Mail Co. of Panama*, there must be, generally speaking, a substantial difference between what the victim bargained for and what he obtained, such as to constitute a failure of consideration.”

(22) In Adams v. Canadian Co-Operative Implements Ltd. (1979), 20 A.R. 533, at page 537, it is stated as follows:

“... rescission is a remedy available for innocent misrepresentation even in the case of an executed contract, where the resulting error is an error in substantialibus, that is an error to substantial matters.”

(23) In other words, where an innocent misrepresentation arises from a positive misstatement and where such an innocent misrepresentation constitutes more than a simple inducement to enter into a contract but is of such substantial importance that it can be considered as part of the terms of the contract, then it is open to the aggrieved party to request that the contract be rescinded.

- (24) Where an innocent misrepresentation has been made and where the facts which are misrepresented are of such fundamental importance that they can be considered part of the contract and not a simple inducement to enter into a contract, then the Courts have permitted the party who relied upon such an innocent misrepresentation to rescind an executed contract.

**SUMMARY**

- (25) I find, in this case, that the innocent misrepresentation of fact made to Lague was of such importance that it was an essential condition of the lease and a part of the bargain between the parties or, put in another way, part of the promise made by Killam to obtain Lague's consent to rent premises from them.
- (26) As soon as the true state of facts were discovered by Lague, he immediately contacted Killam and advised them that he wished to rescind the contract.
- (27) At that time, both parties were essentially put back into their previous situations, Lague because he put a stop payment on the cheques for the security deposit and the first month's rent, and Killam because they were free to rent the premises to any other individual as of that same date.
- (28) The premises which Lague thought he was renting were substantially different than what it turned out he was renting. Having rented premises on a third floor would have created substantial inconvenience to him because of his stated physical disabilities and those of his daughter.
- (29) In all of the circumstances, I would exercise my discretion to rescind the terms of the contract in this case.
- (30) The appeal is allowed, and the Order of the Director is hereby vacated.

Dated at Dartmouth, Nova Scotia,  
on June 29, 2007.

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Patrick L. Casey, Q.C., Adjudicator

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Court File  
Appellant  
Respondent