Claim No: 435772

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

Cite as: *Rolle v. Rockstone Investments Ltd.*, 2015 NSSM 24

BETWEEN:

ALFRED ROLLE and MEGAN ROLLE
Tenants (Appellants)

- and -

ROCKSTONE INVESTMENTS LIMITED
Landlord (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on March 17, 2015

Decision rendered on March 19, 2015

APPEARANCES

For the Tenants — self-represented

For the Landlord — Layton Richards, Resident Manager
Angela MacDonald, Property Manager

REASONS FOR DECISION AND ORDER

1[] This is an appeal by the Tenants from a decision of the Director of Residential Tenancies dated January 21, 2015, which followed a hearing on January 7, 2015. There were two applications before the Residential Tenancy Officer. The first in time was that of the Tenants, seeking the return of their damage deposit and a refund of a so-called "leasing fee" or "break lease fee" of $500.00. This was followed shortly thereafter with a counter-application by the Landlord for arrears of rent and late payment penalties.

2[] The Residential Tenancy Officer allowed the Landlord's claims and dismissed those brought by the Tenants. The net result was an order requiring the Tenants to pay the Landlord the net amount of $3,619.57 (after crediting the damage deposit).

3[] The pivotal issue was whether the Tenants had lawfully terminated their tenancy in September 2014, by virtue of a "Notice to Quit - Early Termination of Tenancy" under the provisions of s.10(C) of the *Residential Tenancies Act*, which provides:

> **Early termination for health reasons**
>
> > 10C Notwithstanding Section 10, where a tenant or a family member of a tenant in a year-to-year tenancy has suffered a significant deterioration in health that, in the opinion of a medical practitioner, results in the inability of the tenant to continue the lease or where the residential premises are rendered inaccessible to the tenant, the tenant may terminate the tenancy by giving the owner
> >
> > (a) one month's notice to quit; and

(b) a certificate of a qualified medical practitioner evidencing the significant deterioration of health.

4[] The Residential Tenancy Officer disallowed the Tenants' reliance on medical grounds. He gave fairly detailed reasons for doing so, which included questions about the bona fides of the Tenants, and a finding that the medical grounds were being used as a pretext for an early termination which (he found) the Tenants had already decided to pursue.

5[] As a result of the medical ground being rendered inapplicable, the Tenants were found to be still liable for the accruing rent on the still vacant unit. That unit has since been re-rented since the hearing before the Residential Tenancy Officer, and the rent arrears would have to be adjusted downward, assuming I agreed with the general thrust of the Residential Tenancy Officer's findings.

6[] For the reasons that follow, I respectfully disagree with the Residential Tenancy Officer and find that the medical termination was valid and effective.

The facts

7[] The unit in question is a high-end loft-style apartment in Dartmouth, Nova Scotia. The downstairs contains the living room, kitchen, bathroom and a room that could be used as a bedroom or study. The Tenants did not consider it a bedroom, in part because it has no window and would not be properly considered a bedroom under zoning laws because it lacks a means of egress to the outside.

8[] On the second level, up a fairly narrow set of stairs, is the master (really the only) bedroom. There is no bathroom upstairs.

9[] On the downstairs level there is a storage area which is only accessible via a fixed ladder. These Tenants used it for, among other things, the storage of some food items, although there was also a small pantry in the kitchen

10[] The Tenants had lived in this unit, paying $1,425.00 per month, plus $40.00 for parking, for four years under a series of year to year leases, ending on July 31, 2014. They stated, and I have no reason to doubt, that they enjoyed living there.

11[] In about May of 2014, the Tenants faced the question of whether or not to renew for another year. They had some doubts. They were beginning to toy with the idea of buying a home. They asked the Landlord if they could be considered for a month to month tenancy. The Landlord refused, saying that they would have to renew for a year. The Tenants decided to renew, and signed the new lease on May 5, 2014, to be effective for a year, commencing August 1, 2014.

12[] The evidence of the Tenants, which I accept, is that sometime in June they discovered that Megan was pregnant with their first child. Ms. Rolle already had an underlying health condition, which created additional risks for her pregnancy and for her health overall. Within the first month of learning about her pregnancy, she suffered some symptoms that suggested she was at heightened risk for a miscarriage.

13[] The Tenants began to be concerned that the unit they were living in would be problematic during the pregnancy, for a number of reasons. Probably the most significant problem was a lack of a bathroom on the same level as the bedroom, as Ms. Rolle was anticipating having to need use of a bathroom more frequently overnight. She was concerned about having to navigate the steep, narrow staircase overnight. Also, she found the concrete floors problematic. She also did not want to have to climb the ladder to access the storage space.

14[] The Tenants did not know, at this time, that they might have legal grounds for ending their lease early.

15[] They decided to look for a house to buy, and placed an offer on a home that was accepted on August 21, 2014. They then turned their attention to the problem of the lease on the apartment, which was just into the first month of its one-year term.

16[] They understood generally that they could sublet, and considered attempting that. On August 22, 2014, they went to see Mr. Richards, the Resident Manager, to discuss their options. He explained to them that the Landlord had two options for "breaking the lease," as set out in the lease. These two options were:

a. Pay $500.00 to the Landlord, which would then make efforts to rent the apartment. The Tenants would be released from the lease upon the unit being re-rented.

b. Pay three months' rent, and be released immediately.

17[] The Tenants opted to pay the $500.00 fee, and signed an Agreement that same day, August 22, 2014.

18[] Sometime after that date, within two weeks at the most, the Tenants spoke to someone at Residential Tenancies, who informed them that tenants could get out of a year to year lease early, on medical grounds, or (in the words of the *Residential Tenancies Act* - "where a tenant ... in a year-to-year tenancy has suffered a significant deterioration in health that, in the opinion of a medical practitioner, results in the inability of the tenant to continue the lease or where the residential premises are rendered inaccessible .... (my emphasis).

19[] On September 10, 2014, Ms. Rolle visited her family physician, who signed a "Form H - Physician's Certificate - Termination of Tenancy for Health Reasons." The form asks the physician to sign the standard form certificate, which states:

> **"I hereby certify that I have examined the above-named tenant and that she has suffered a significant deterioration of health that ... renders the residential premises inaccessible to the tenant."**

20[] This statutory form does not ask the physician to elaborate on the health condition. In my view, this represents a deliberate decision on the part of the Legislature to respect the privacy of tenants and to give weight to a physician who is prepared to certify to the conclusion that the tenant has suffered a health deterioration that renders the premises inaccessible.

21[] It appears that this form, and the accompanying Form G signed by the Tenant, were not actually served until some two weeks later, on September 26,

2014, which delay was not explained but which, I find, to be irrelevant in the result.

22[] In my respectful view, the Landlord and, in turn, the Residential Tenancy Officer owed a great degree of deference to the conclusion of Ms. Rolle's physician.

23[] This is not to suggest that such a certificate might not be called into question, where the facts establish that the certificate ought not to have been signed, such as (but not exclusively) because of fraud. In the case here, the Residential Tenancy Officer was not prepared to give any effect to the certificate because of a number of factors, stated in his reasons:

a. The physician did not attend to view the premises, nor did she see photographs of it.

b. The medical condition - pregnancy - is inherently a temporary condition.

c. The Tenants' new home was not that different from the subject unit.

d. The medical grounds appeared to be a pretext for getting out of the lease, given that the Tenants had already purchased a home.

24[] The Residential Tenancy Officer determined, in the result, that the Notice to Quit should be set aside, which left the Tenants on the hook for accruing rent.

25[] As I have stated, I disagree with the Residential Tenancy Officer in his decision to set aside the Notice to Quit. I will answer his concerns in order.

The physician did not see the premises

26[] Although the physician did not see the unit, the uncontradicted and wholly credible evidence of Ms. Rolle is that she described the premises to her physician, after which discussion the physician was prepared to put her professional reputation on the line and provide the certificate. I believe it is dangerous for Residential Tenancy Officers or Small Claims Adjudicators to begin to second-guess medical practitioners, absent strong evidence that the certificate had been fraudulently or otherwise improperly obtained.

27[] After the Residential Tenancies hearing and the resulting order, Ms. Rolle again saw her physician and asked her to write an explanatory letter. The Residential Tenancy Officer obviously did not have the benefit of this elaboration, but I did. The operative part of the letter reads:

> I had initially see (sic) Megan on Sept 10th 2014. At this time she had concerns regarding her loft apartment. From the discussion I had shared her concerns regarding the set up of the stairs and ladder in her apartment, with respect to her pregnancy. We were both concerned that as the bedroom was upstairs, she would have to access it by going up curved flight of stairs. As her pregnancy continued, (and she would be getting up frequently to urinate), I was concerned re falls, as the flooring is cement, and she would have to go up and down this flight of stairs to get to the washroom. Also, she would have to go up a ladder to get to the storage area. We agreed that she would find it difficult to go up and down the stairs as the pregnancy progresses, or through the night or with a new born. Early in her pregnancy, she was also experiencing some bleeding which might have represented a miscarriage, and she was advised to rest. This caused further concerns. Six months prior to the pregnancy, she had been treated for [an unrelated, but serious medical condition][1] ... and it is possible that pregnancy can exacerbate this condition.

[1]Details omitted due to privacy concerns.

28[] Whatever lingering doubts might have remained about the doctor's understanding, or her conclusions, are put to rest by this letter.

29[] Furthermore, I believe it is unrealistic to expect a physician to inspect a patient's rental unit, or to expect the patient to bring photographs. It should be left to the physician to decide what information he or she needs to sign the certificate.

Pregnancy is temporary

30[] While pregnancy may be a temporary condition, it certainly lasts long enough for someone to be seriously impacted by being unable to function in her own home. It is perhaps a matter of degree. Suppose that someone suffered an illness or injury that required him to be bedridden for a couple of weeks. It might be said that s.10C of the *Residential Tenancies Act* was not meant to cover such an event. The tenant in that circumstance might have to set up temporarily on the main level, or take up residence elsewhere, until his mobility resumed. But suppose, on the other hand, that he became a paraplegic and was in a wheelchair. In that case, a unit with the bedroom on a different level, with no washroom on that level, would be inaccessible.

31[] The pregnancy of Ms. Rolle, with the additional complications of early bleeding and her preexisting serious medical condition, would appear to fall squarely on the side of the dividing line that would allow her to rely on s.10C. Her health had deteriorated (from a mobility standpoint) which made the unit significantly inaccessible.

The new home is also two-storey

32[] The new home that the Tenants acquired is also a two-storey, but it has a washroom on the same level as the bedroom. The floors are hardwood, rather than concrete. I am satisfied that this is a significant enough, if not dramatic, difference.

Good faith

33[] The question of the Tenants' good faith is certainly a valid consideration, but I am satisfied with their explanation that they were motivated to buy their home because the apartment was no longer suitable for Ms. Rolle. I am also satisfied that they did not pursue the medical route initially, because they did not know that such an option existed. All in all, I do not find any bad faith on their part.

34[] What clearly happened is that, not knowing of the medical exemption, they looked for the least expensive way to break the lease and paid out the $500.00 to have the Landlord attempt to rent it on their behalf. Sometime thereafter they appear to have gotten the advice - incorrectly, in my opinion - that the Landlord was not legally permitted to charge more than $75.00 for breaking the lease. In fact, the *Residential Tenancies Act* does provide that a Landlord may not charge more than $75.00 as a fee for subletting. What the Landlord was doing here was not facilitating a sublet. It was offering a full surrender of the lease, which would have excused the Tenants from any further legal liability. This was a valid legal agreement, and the Tenants had no basis to complain about it, or ask that it be invalidated.

35[] Once they learned about the possibility of a medical exemption, the Tenants came to realize that they were better off giving the one month's notice rather than waiting for a new tenant to come along who would get them off the hook. I find nothing objectionable in them taking advantage of that legal right, so long as it was properly supported by a medical certificate.

36[] Either the medical ground was valid, or it was not. It does not matter if it was discovered late, and became an expedient ground. To use a playing card analogy, it was like a trump card in their hand that they had overlooked. It lost none of its potency by having been overlooked. It was still a trump card.

Conclusion

37[] In the result, I find that the Tenants gave a proper notice under s.10C of the *Residential Tenancies Act* in September 2014, that their tenancy would end as of October 31, 2014, and the Landlord had no further right to hold them liable for rent after that date, notwithstanding that the unit was not re-rented until sometime in January 2015.

38[] The Tenants paid rent up to the end of October, and became entitled at that point to receive their damage deposit and key fob deposits, plus interest, which the Residential Tenancy Officer calculated to be $743.43.

39[] I also find that the Tenants should be entitled to receive their Residential Tenancies Application fee of $30.25, plus their cost of commencing this Appeal in the amount of $96.80.

40[] These items total $870.48.

41[] As already indicated, the Tenants have no legal basis to recover the $500.00 “break lease” fee, as I find this was a valid legal contract, and the Landlord acted entirely in good faith in accepting the payment and proceeding to try and rent the apartment. That never came to fruition as other events, namely the medical termination, intervened.

42[] As also indicated, the Landlord is not entitled to any of the items of relief that it was awarded by the Residential Tenancy Officer. Specifically, it is not entitled to any rent, late payment charges, nor any of the bank fees it incurred as it tried to collect rent from the Tenants. It is not entitled to its costs of the Residential Tenancies application, as it was unsuccessful there (in the final result).

43[] Given the result, it is not necessary to consider the Tenants’ argument that the Landlord did not reasonably mitigate its damages by overpricing the apartment.

44[] All in all, the appeal is allowed and in lieu of the order of the Director, an order is made that the Landlord pay to the Tenants the sum of $870.48.

Eric K. Slone, Adjudicator