

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Hamblin v. Sullivan, 2004 NSSM 48

BETWEEN:

NICHOLAS M. HAMBLIN

Appellant

- and -

MICHAEL SULLIVAN and FAYE SULLIVAN

Respondent

Adjudicator: David TR Parker

Heard: November 25, 2004 & December 7, 2004

Decision: December 20, 2004

Residential Tenancies Appeal; Damage to the premises and Contributory Negligence

DECISION

This is an Appeal from an Order of the Director of the Residential Tenancies Board. Hearings of this Appeal were held in Halifax on November 25, 2004, and December 7, 2004.

There is no dispute with the findings of the Residential Tenancies Board as it relates to cleaning of the carpets, \$284.05; damage to the vinyl flooring, \$130.00; removal of garbage, \$40.25; damage to door, \$18.00; and cleaning, \$250.00 for a

total of \$722.00 as well as rent and service charge of \$903.00 all of which was owed by the Tenant/Respondent less the security deposit and interest of \$926.18. This left the amount of \$699.12 owing to the Appellant/Landlord by the Respondent/Tenant. This amount is still outstanding.

The dispute and this appeal concerns damage that occurred to the Appellant's premises as a result of pipes freezing during the time the premises were being rented by the Respondent.

That is the sole issue before this Court. Other side issues were raised concerning pets on the premises and whether they were allowed, and extra people living on the premises and whether they were allowed. However as stated the sole issue is: was the Respondent negligent, contravene the statutory condition of the lease and therefore responsible for damage to the premise as a result of freezing pipes.

The Director of Residential Tenancies in the Order stated at paragraph 13,

"13 The evidence presented by the Landlord [Appellant herein] did not establish the tenants were in violation of section 9, Statutory Conditions Number 4, Obligations of the Tenant contributing to the freezing of the pipes and payment of the associated costs of these repairs."

Statutory Condition Number 4 states,

"Obligation of the Tenant - the tenant is responsible for the ordinary cleanliness of the interior of the premises and for the repair of damage caused by willful or negligent act of the tenant or of any person whom the tenant permits on

the premises."

Facts:

- The rent does not include heat. The Respondent was aware he was responsible for the heat and he obtained his fuel from Irving Oil. The fuel was delivered to the premises whenever the Respondent ordered same; it was not done on an automatic-fill basis.
- The Respondent noticed the oil was low in the fuel tank and placed an order with Irving on the 6th of February for delivery on February 11th or 12th.
- Snow fell on the 11th, 12th and 13th of February, 9 cm, 10 cm and a little over 1 cm respectively.
- The fuel company did not come on the 11th of February when the Respondent called them, this now being the second time.
- The company did not come on the 12th of February when called by the Respondent.
- The fuel company arrived on the 13th of February and refused to deliver oil as the driveway was not cleared and it could not get its truck up the driveway. The Respondent was informed of this.
- The Respondent did not contact other fuel companies to see if they would deliver oil nor did he clear the driveway of snow or ice.

- The Respondent is responsible for clearing the driveway pursuant to the lease and acknowledged by the Respondent.
- The Respondent put diesel fuel in the oil tank on the 13th day of February.
- On February 14th the Respondent contacted the oil company, as they were cold. The oil company "bled" and started the furnace.
- The Respondent contacted the Appellant on February 14th and told him there was no heat.

- The Appellant contacted his plumber on the 14th of February however the plumber and the Appellant did not go out until the next day.
- The plumber spent eleven hours on the 15th of February thawing ice in the pipes.
- Several of the pipes had burst and caused damage to the premises.

The Respondent acknowledges that "the oil in the tank got so low that air might have got in" and based on the evidence of the plumber that is the only conclusion that I can reach. The furnace stopped working and the addition of diesel fuel did not resolve the matter until the furnace was bled and restarted. By this time it was too late, the pipes had frozen. The pipes remained frozen on the 14th and right into the 15th of February. The plumber gave very credible testimony and with his experience and knowledge it is not difficult to conclude the oil ran out prior to the time the Irving truck driver tried to make delivery shortly thereafter.

What would a reasonable person do in like circumstances? If the Respondent was aware the tank was low on fuel on the 6th of February and you are in the coldest part of the year a reasonable person would not chance running out of fuel and

ensure the oil delivery occurred before they scheduled same, some 6 days later.

The Respondent became concerned on the 11th and more concerned on the 12th of February when Irving did not show up. The Respondent did not try other fuel companies. In his testimony he said he did not call others because if you could not rely on Irving whom could you rely on. Then later he changed his evidence to say he did try other companies, but to no avail. The Respondent decided after Irving refused to go up the driveway, as it was not cleared, to put diesel fuel in the tank. However by that time it was too late.

The Respondent also knew that he was responsible for clearing the driveway. There is more than enough independent evidence before me to show it was not cleared. A reasonable person would have his driveway cleared particularly when they knew they needed oil and proper access for the fuel truck. The Respondent breached the standard of care required of any reasonable person on three fronts, not ensuring oil was delivered earlier than requested, not having the driveway cleared, and not attempting to have other companies deliver oil when Irving would not.

While the Contributory Negligent Act was not pleaded which may cause some concerns on appeal, if that were to happen, there is an onus on the Landlord/Appellant to ensure his property is not damaged. The fact that the Appellant knew there was no heat on the 14th of February and I accept the Respondent's evidence that he told the Appellant the pipes were frozen coupled with the fact that the Appellant was aware of cold and stormy conditions, the Appellant, notwithstanding, did not show up with his plumber until the next day. Certainly there must have been further freezing of pipes over the period of time the

Appellant was informed of a problem and when he eventually arrived on the scene. The Appellant did not even send his "handyman" over to see what could be done, or to see how serious the situation was at the time. There were also no repairs to the bottom floor until the Respondent left the premises and it is possible some repair could have been avoided or lessened to some extent if done earlier.

The total repairs to the home came to \$5,877.81, which includes HST as best as I can determine from the receipt evidence submitted to the Court. For the reasons already stated I would consider the Respondent has been negligent however the Appellant also contributed to some of the damage by not attending to his premises sooner than he did. There was also some betterment done to the premises for example the Appellant's handyman indicated that he painted the house three times inside. Therefore I am going to reduce the portion of the Respondent's liability by 50% based on apportioning negligence and factoring in a reduction based on the betterment principle. The remaining part of the Director's Order will remain the same.

One final comment in the preparation and presentation of evidence and argument by Counsel on this matter. It was very apparent that both Counsels were well prepared for the benefit of their respective clients and the Court. Both Counsels produced compelling arguments for their clients and it has been much appreciated by the Court.

Dated at Halifax, on the 20 day of December 2004.

David T.R. Parker
Small Claims Court Adjudicator