

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Maitland v. Templeton Place Ltd., 2016 NSSM 24

2016

Claim No. 450774

BETWEEN:

Name: **GRAEME MAITLAND**

Appellant/Tenant

- and -

Name: **TEMPLETON PLACE LIMITED**

Respondent/Landlord

Hearing Date: May 12, 2016

Appearances: Appellant – Billy Sparks, Articled Clerk
Respondent – Joe Metlege, President, and
Matthew Metlege, Property Manager

DECISION and ORDER

[1] This is an appeal of a Director's Order dated April 21, 2016.

[2] Three matters were raised in the Notice of Appeal:

- (1) Whether the lease was converted from a year to year to a month to month lease under Section 10A(3) of the *Residential Tenancies Act*;
- (2) whether the Landlord properly mitigated its loss;
- (3) whether or not "prepaid" rent was a security deposit under the *Act*.

[3] With respect to the first matter, counsel for the Appellant advised that that matter was being withdrawn as a grounds of appeal. Therefore, I will not comment further on that.

[4] The second issue concerns mitigation. The evidence put forward by the Appellant does not satisfy me that the Landlord failed to take reasonable steps to mitigate their loss. In that regard, I mentioned at the hearing that the burden is on the party alleging the failure to mitigate to show that reasonable steps were not taken and that had they been taken, the loss would have been reduced. In an earlier decision – *Bond v. Hall* (2010), N.S.S.M. 31, I made some comment about the law that relates to this issue in residential tenancies. I will repeat my comments from that decision:

[8] The Residential Tenancies Act contains a statutory obligation to mitigate losses by a landlord (or sub-landlord). The section reads:

*6. Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination **to the extent that a party to a contract is required by law to mitigate damages.** [Emphasis Supplied]*

[9] I turn then to the general law of contract and the duty to mitigate. In the case of Halifax Regional Municipality v. Amber Contracting (2009), NSCA 103, Hamilton, J.A. (dissenting on another point), stated as follows (paras 61-63):

[61] In contract law, the plaintiff must make reasonable efforts in good faith to mitigate its losses upon breach of contract. In relation to bidding and tendering law specifically, a judge may discount an award of damages in a tendering case in several ways, including by considering whether the contractor took steps to reduce or mitigate its losses by seeking replacement work: see P. Sandori and W.M. Pigott, Bidding and Tendering, What is the Law, 3rd ed. (Toronto: LexisNexis Butterworths, 2004) at p. 276, cited in Port Hawkesbury, supra, at 68.

[62] However, contract law does not impose on the plaintiff the evidentiary burden to show that it mitigated its losses. Rather, the burden to show that the plaintiff failed to mitigate its losses and is trying to recover for losses that were avoidable, rests upon the defendant. In Evans v. Teamsters Local Union No. 31, 2008 SCC 20 (CanLII), 2008 SCC 20, [2008] 1 S.C.R. 661, Bastarache J. writing for the majority stated:

[99] In Red Deer College [v. Michaels, 1975 CanLII 15 (SCC), 1975 CanLII 15 (S.C.C.), [1976] 2 S.C.R. 324] at p. 322, the Court held that the burden of proving that an employee has failed to mitigate his or her damages lies with the employer. Laskin C.J. cited Cheshire and Fifoot's The Law of Contract (8th ed. 1972), to explain the nature of the burden:

... the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame. [p. 599]

As this passage suggests, the burden of proof is onerous. This is consistent with the approach to mitigation as a principle in damages more generally. As Waddams observed: "In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over - critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong" (15.140).

[Emphasis Supplied]

[10] I also refer to the case of *Sobeys Group Inc. v. Coleman* (2005), 2005 NSCA 142 (CanLII), 238 N.S.R. (2d) 47 (C.A.), where Fichaud, J.A., states:

[49] On the merits of this avoidable loss issue, in my view, Sobeys' appeal should be dismissed. The party who alleges failure to mitigate has the onus of proof. Sobeys must establish by evidence that Mr. Coleman failed to act reasonably to mitigate his losses. To satisfy the onus, it is insufficient that Sobeys merely criticizes Mr. Coleman. **It is necessary that there be evidence (a) that Mr. Coleman failed to make reasonable efforts to find other work, and (b) had he done so, he likely would have found replacement work.** England, Wood and Christie (4th ed.), 16.85. *[Emphasis Supplied]*

[11] The onus in this case therefor to prove that there has been a failure to mitigate is on the party alleging a failure to mitigate, i.e. Mr. Hall. In my view, Section 9(1)6 of the Residential Tenancies Act does not change that onus.

- [5] There was evidence here that the Landlord undertook its usual procedures and did in fact re-lease the premises, effective April 1.
- [6] In all events, the Appellant has not satisfied its burden as discussed above.
- [7] The third item involves the issue of prepaid rent. The evidence, agreed to by both sides, was that this Tenant was required to not only submit a security deposit representing one-half of the first month's rent, but was also required and did pay what amounted to three months' rent, which sum was referred to as prepaid rent.
- [8] Nowhere was this requirement to pay this sum of three months' rent documented in writing.
- [9] The Landlord characterizes this three months' payment as prepaid rent. He asserts it is neither an application fee nor a security deposit. The Landlord explained that this amount, representing three months' of rent, is applied to the last three months, whenever they might be, of the Tenant's tenure.

[10] In my view, the Nova Scotia *Residential Tenancies Act* does not allow a landlord to demand or accept pre-paid rent because, for the reasons I will develop, under the Act it is deemed to be a security deposit. Calling it “prepaid rent” does not change its nature. In form and substance it is a security deposit.

[11] Section 12 of the Act deals with security deposits. It reads:

Security deposit

12 (1) *Where a landlord obtains from a tenant any sum of money or other value that is in addition to the rent payable in respect of the residential premises the sum of money or value is deemed to be a security deposit.*

(2) *No landlord shall demand, accept or receive from a tenant as a security deposit a sum of money or other value that is in excess of one half of the rent per month that is or would be required to be paid for the residential premises.*

(3) *Subject to subsection (6), a security deposit or the proceeds thereof shall be held in trust by the landlord and deposited in a trust account in a chartered bank, trust company or credit union or invested in such securities as are authorized by regulation and may be applied to outstanding rent or to expenses incurred in respect of damage to residential premises that is the responsibility of the tenant.*

(4) *The landlord shall credit interest to the tenant on the full amount or value of the security deposit at the rate per annum determined by the Governor in Council from time to time by regulation with respect to any period of time, whether before or after the coming into force of this subsection, while the security deposit is held by the landlord.*

(5) *Subject to subsection (6), the security deposit, together with interest, shall be returned to the tenant within ten days of the date of the termination of the lease.*

(6) *Where the landlord seeks to apply all or part of the security deposit and interest to outstanding rent or to expense incurred in respect of any damage for which the tenant is responsible and the tenant does not consent in writing the landlord may make an application under Section 13 in the form prescribed in the regulations.*

(7) *An application pursuant to subsection (6) shall be made within ten days of the date of termination of the lease and, if no application is made, the security deposit shall be returned in accordance with subsection (5).*

(8) *A landlord shall from time to time file such reports as may be required by the regulations of the amount of the security deposit or proceeds thereof which are held in trust.*

NOTE - *Subsections (9) to (12), enacted by Section 6 of Chapter 31 of the Acts of 1992, have not been proclaimed.*

(13) *An owner, partner or director of a company which owns or manages residential premises is personally liable for any breach of the Act or the regulations governing security deposits.*

(14) Upon trusteeship, receivership, bankruptcy, sale, transfer, abandonment, foreclosure or sale of land under execution, the security deposits of the tenants held by the landlord are deemed to have been transferred to the receiver, trustee, mortgagee in possession or the new landlord and that receiver, trustee, mortgagee or landlord is responsible for the tenant's security deposits.

(15) A claim for damages from a security deposit shall not include any costs associated with ordinary wear and tear of the residential premises.

(16) Notwithstanding Section 23, any landlord who violates this Section is guilty of an offence punishable on summary conviction and upon conviction is liable to a fine of not more than five thousand dollars.

[12] Subsection (1) of Section 12 tells us what a security deposit is:

Where a landlord obtains from a tenant any sum of money or other value that is in addition to the rent payable in respect of the residential premises the sum of money or value is deemed to be a security deposit.

[Emphasis added]

[13] So, any sum of money (or other value) obtained by the landlord in addition to the rent payable is deemed to be a security deposit.

[14] Section 2(g) defines rent as follows:

“Rent” means money or other value payable in consideration of the right to possess or occupy residential premises.”

[15] The Lease entered into here provides for monthly rent in paragraph 7. While it actually states that it is \$995 per month, that amount was reduced by a \$500 per month incentive, for an effective monthly rent of \$495.

[16] The monthly rent of \$495 was the “rent payable” for purposes of s. 12(1). Therefore, any amount in addition to that \$495 is deemed to be security deposit.

[17] The Landlord obtained from the Tenant \$1,786.54 on August 2, 2013, in respect of a lease which commenced on September 1, 2013. On September 1, 2013, it received \$495 for September's rent. On the Landlord's Tenant Ledger Card Details, the amounts are set out and described as follows:

Posting Date	Description	Year	Month	Receipt No.	Check No.	Charge Amount	Payment Amount	Balance
Aug 2, 2013	Deposit-Damage Deposit-Graeme Maitland	2013	Aug			\$247.50	\$0.00	\$247.50
Aug 2, 2013	Deposit-X-06-Prepaid June-Graeme Maitland	2013	Aug			\$495.00	\$0.00	\$742.50
Aug 2, 2013	Deposit-X-07-Prepaid July-Graeme Maitland	2013	Aug			\$495.00	\$0.00	\$1,237.50
Aug 2, 2013	Deposit-X-08-Prepaid Aug-Graeme Maitland	2013	Aug			\$495.00	\$0.00	\$1,732.50
Aug 2, 2013	Credit Card Fee	2013	Aug			\$54.04	\$0.00	\$1,786.54
Aug 2, 2013	Payment			16685	Credit Car	\$0.00	\$1,786.54	\$0.00
Sep 1, 2013	Rent	2013	Sep			\$495.00		\$495.00
Sep 1, 2013	Payment <i>EFT Transfer-Graeme Maitland</i>			17595			\$495.00	\$0.00

[18] The amount of \$1,732.50 was in addition to the rent payable of \$495. By virtue of s. 12(1), it is, therefore, deemed to be a security deposit.

- [19] Section 12(2) limits a security deposit to one-half of the monthly rent. This Landlord has *prima-facie* offended s. 12(2) by demanding, accepting, and receiving three and one-half times the monthly rent.
- [20] The Landlord was entitled to a security deposit of \$247.50 being ½ of the monthly rent amount of \$495.00. It was not entitled to accept the additional \$1485.00.
- [21] Let me return again to the Landlord's argument that the payment of three month's rent is not a security deposit but is simply prepaid rent. Apart from the deeming provision of s. 12(1) which I have already discussed, such an interpretation would mean that an unscrupulous landlord could seemingly avoid the prohibition of 12(2) by simply calling the additional monies something else and charging any amount that the market could then bear. That would wholly defeat the legislative intention of s. 12(2).
- [22] I note in subsection 12(3) that owners, partners and directors of companies are personally liable for any breach of the *Act* governing security deposits. This is the only subject area where the *Act* imposes personal liability.
- [23] I also note that under subsection 12(16), the fine for a breach of Section 12 is set at a maximum of \$5,000. This is to be contrasted with Section 23 for other breaches of the *Act* which are limited to a fine of \$1,000.
- [24] These provisions lead me to conclude that the Legislature had a particular concern about security deposits and the potential for abuse that might be visited on tenants.
- [25] The Regulations made under the *Act* contain detailed provisions governing security deposits:

Security deposits

5 *For the purposes of subsection 12(4) of the Act, the landlord shall credit interest to the tenant on the full amount or value of the security deposit on, from and after*

- (a) January 1, 1985 at the rate of seven percent per annum;*
- (b) January 1, 1992 at the rate of three percent per annum;*
- (c) January 1, 1995 at the rate of one percent per annum; and*
- (d) January 1, 2013, at the rate of zero percent per annum;*

compounded annually, while the security deposit is held by the landlord.

6 *Every landlord shall keep a record which is clearly distinguishable from the record of money received and disbursed on his own account, and which shows for each tenant*

(a) any money received as a security deposit, any disbursements, and the undisbursed balance thereof; and

(b) any other value received and delivered as a security deposit, any disbursements and the undisbursed portion thereof held in trust.

7 *Every landlord shall keep a record which shows*

(a) a comparison made monthly between the total of the undisbursed balances of monies held in trust for tenants by the landlord and the total of the balances held on deposit in the trust account, together with an explanation for any difference in the totals; and

(b) a consolidated list of all other value held in trust for tenants.

8 *Every landlord shall keep a bank statement and pass book of the trust account containing the security deposits of each tenant.*

9 *Every landlord who receives a security deposit from a tenant in money shall have at least one deposit account which shall be*

(a) in a chartered bank, credit union or trust company authorized by law to receive money on deposit;

(b) designated both in the records of the landlord and of the bank, credit union or trust company as a trust account; and

(c) kept separate and apart from any deposit account containing monies belonging to the landlord.

10 *Money held in trust for or on account of a tenant in respect of a tenancy shall be kept in the Province and,*

(a) upon receipt of a security deposit in money for or on account of a tenant, every landlord shall pay the money into the landlord's trust account not later than the third banking day following the day of receipt thereof by the landlord; and

(b) upon receipt of a security deposit in other value for or on account of a tenant, every landlord shall be liable for its safekeeping.

11 (1) *No money shall be withdrawn from a landlord's trust account except as provided in the Act or these regulations.*

(2) *Notwithstanding sub section (1), money deposited in a landlord's trust account by mistake, accident, or which belongs to the landlord, may be withdrawn.*

12 *Every cheque drawn on a trust account shall be marked as a trust account cheque and be payable to a named payee, and no money shall be withdrawn from the trust account on behalf of the landlord except as provided in the Act or these regulations.*

13 *No landlord shall at any time*

(a) deposit money in, draw on, or otherwise use his trust account for business or personal use; or

(b) permit his trust account to be overdrawn as a whole, or with respect to the funds held on account of any tenant.

14 Nothing in these regulations shall deprive a landlord of any recourse or right, whether by way of a lien, set-off, counterclaim, charge or otherwise, against money in a trust account, or against other value held by a landlord as a security deposit.

15 (1) A landlord may invest money held as a security deposit in government backed guaranteed investment certificates.

(2) Where other value is held as a security deposit, no landlord may sell or otherwise convert the other value into money or invest the proceeds thereof in securities or in any other manner unless the tenant for or on behalf of whom the security deposit is held consents in writing.

16 Any interest earned in excess of the rate determined by the Governor in Council for security deposits shall become the property of the landlord.

17 Charges associated with the setting up and normal operation of a trust account are the responsibility of the landlord.

18 Every landlord shall at all times maintain a sufficient balance on deposit in his trust account which together with undeposited money in trust for or on account of a tenant is sufficient to meet all of the obligations of the landlord with respect to security deposits.

19 Every landlord shall, within ten days from the receipt of a written request from the Director of Residential Tenancies, file a certificate signed by a public accountant and satisfactory to the Director as to the financial position of his trust account.

Section 20 repealed: O.I.C. 2003-32, N.S. Reg. 20/2003.

21 Upon the sale or transfer of a rental property, a landlord shall transfer his trust account to the new landlord, together with all records and statements of the trust account.

22 Upon trusteeship, receivership, bankruptcy, abandonment, foreclosure or sale of land under execution, a landlord shall transfer his trust account to the trustee, receiver, mortgagee or new landlord, together with all records and statements of the trust account

[26] The degree of detail and comprehensiveness of these provisions show the particular significance that is to be accorded to the subject of security deposits.

[27] I return to the Act. As already stated, I have concluded that the Landlord here was in breach of the prohibition in s. 12(2) to not demand, accept, or receive more than one-half of the monthly rent as a security deposit.

[28] The sum of \$1485 was received and deposited by the Landlord. Given that it was a security deposit, the statutory requirements were that:

-it was required to be held in trust (s. 12(3));

-it was required to be returned, with interest, within 10 days of the termination of the lease (s. 12(5)), unless the Landlord has applied to retain all or part of the funds to outstanding rent or expense incurred in respect of damage (s.12(6)).

[29] The Landlord did not apply to retain the full amount of the security deposit.

[30] Another area of concern is that the requirement for the three months' rent does not appear anywhere in writing. This conflicts with the Act: Section 8 reads:

8 (1) In addition to the statutory conditions, a landlord and tenant may provide in a standard form of lease for other benefits and obligations which do not conflict with this Act.

(2) An additional benefit or obligation under subsection (1) is void unless it appears on both the landlord's and tenant's copies of the standard form of lease.

(3) Any alteration of or deletion from provisions that a standard form of lease is required by regulation to contain is void.

(4) On or after the first day of February, 1985, a landlord and a tenant who enter into a written tenancy agreement or renew a written tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.

(5) A landlord and tenant who have an oral tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply

[31] I note particularly s. 8(2) which essentially says that modifications to the standard form of lease are void unless in writing and on both copies of the lease document.

[32] The practice of this Landlord of requiring an additional three months' rent conflicts in several respects with the statutory requirements of the Act. It exceeds the one-half limit for security deposits, it is not held in trust, no application to retain it is made, and the terms of the payment are not in writing.

[33] The failure to comply with the Act could have one or more of three conceivable remedial outcomes. First, an order that the amount be repaid by the Landlord to the tenant.

Secondly, a summary conviction proceeding being taken. Thirdly, a punitive award being made against the landlord by the Director or this court on appeal.

[34] Counsel for the Tenant did indicate that they were seeking a penalty. While there is authority for doing so, I do not see where this had previously been mentioned or formally sought. In my view, it would not be procedurally fair to the Landlord to consider such at this stage and I am not prepared to do so in this case.

[35] With respect to a summary conviction proceeding, that is not a matter within the purview of the Small Claims Court.

[36] As far as ordering the amount to be repaid, the fact is the Tenant owes more to the Landlord than the Landlord owes to the Tenant. One approach therefore would be to simply net the respective amounts and order the net amount to be paid by the Tenant. This is, in effect, what the Director ordered. The difficulty I have with this approach is that the Landlord will benefit from its non-compliance with the Act.

[37] Under the Act, this Court can make any order that the Director could have made (s. 17D (1)(b)). The Director's powers are in s. 17A:

17A An order made by the Director may

- (a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act;
- (b) require a landlord or tenant not to again breach a lease or an obligation pursuant to this Act;
- (c) require the landlord or tenant to make any repair or take any action to remedy a breach, and require the landlord or tenant to pay any reasonable expenses associated with the repair or action;
- (d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;
- (e) terminate the tenancy on a date specified in the order and order the tenant to vacate the residential premises on that date;
- (f) determine the disposition of a security deposit;
- (g) direct that the tenant pay the rent in trust to the Director pending the performance by the landlord of any act the landlord is required by law to perform, and directing the disbursement of the rent;
- (h) require the payment of money by the landlord or the tenant;
- (i) determine the appropriate level of a rent increase;
- (j) require a landlord or tenant to comply with a mediated settlement;
- (k) award to a successful party to an application the costs of an application fee paid to the Director, but no other costs associated with the application;
- (l) set aside a notice to quit given by a landlord under subsection

10(6), (7), (7A) or (7B) or clause 10(8)(a), (b), or (c) or by a tenant under subsection 10F(1)

- [38] I note clause (f) particularly. It is appropriate that an order be made requiring the return by the Landlord to the Tenant of the \$1485 security deposit.
- [39] The Tenant owes rent of \$2,600.00 for the period up to and including March 31, 2016. In the Director's Order of April 21, 2016, a full credit for the prepaid rent, so called, and security deposit was given, leaving a balance owing of \$973.50.
- [40] Given the significant status of security deposits, it is appropriate in this case to make a separate and independent order to return the security deposit without netting it off. I will therefore order the wrongfully retained amount of \$1485 be paid to the Tenant.
- [41] The \$247.50 will be applied to the outstanding rent of \$2600 is since it was received as a legitimately received security deposit and the Landlord did apply to retain it. Thus the Tenant will owe the Landlord \$2,252.50. This obligation will be stayed pending the Landlord first paying the Tenant the \$1485.

ORDER

[42] It is hereby ordered that:

- i) The Landlord pay to the Tenant \$1485.00;
- ii) The Tenant pay to the Landlord \$2,252.50 but this obligation shall be stayed until the Landlord has first paid the Tenant the full amount of \$1485.00.
- iii) There shall be no costs to either party.

DATED at Halifax, Nova Scotia, this 30th day of May, 2016.

Michael J. O'Hara
Adjudicator