Claim No: 332267

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

Cite as: Reid v. Killiam Properties Inc., 2010 NSSM 48

BETWEEN:

NANINE REID

Tenant (Appellant)

- and -

KILLAM PROPERTIES INC.

Landlord (Respondent)

DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on July 20, 2010

Decision rendered on July 26, 2010

APPEARANCES

For the Tenant self-represented

For the Landlord Tara Hood, Property Manager

BY THE COURT:

[1] This is an appeal from an order of the Director dated July 6, 2010, following a hearing on June 28, 2010. In that Order the Tenant was ordered to pay the Landlord $1,423.60, less the security deposit of $341.50, for a total of $1,082.10.

[2] The tenancy for the unit (16 Regent Drive, Unit 107) was also deemed terminated as of April 30, 2010.

[3] The facts reveal a very unfortunate situation.

[4] The Tenant is a single mother of two children currently aged about 6 and 2. After having lived with the Tenant's parents for a period of time, the Tenant rented the subject unit as of December 1, 2009, to make a new start on her own. She was actually allowed in a few days before December 1.

[5] The Tenants children had some history of medical problems, but were reasonably healthy when they moved in to the unit.

[6] Immediately upon moving in, the Tenant smelled a musty odour in the apartment and brought this to the attention of the superintendent of the building. Her concern was that there might be mould, which she knew to be unhealthy although she was not as knowledgeable about moulds as she would later, and sadly, become.

[7] Although this was doubted by the representative of the Landlord, I find as a fact that the Tenant noticed the mouldy smell and reported it. I found her to be an entirely credible witness, and her evidence was corroborated by her boyfriend

and (to an extent) by her father, who both testified. The superintendent in question (who was not in court) no longer works for the Landlord, and the representative of the Landlord says that she spoke to the superintendent who claims that she had not had any such problems brought to her attention. That is not only hearsay, which is of questionable value, but it is a version of the facts that I simply do not accept.

[8] The Tenant claims that she discussed the issue with the superintendent on several occasions. She also says, and I accept, that she never believed that she had to go above the superintendent's head and speak to someone such as Ms. Hood in order to get some action.

[9] Over the months after moving in, the Tenant faced a number of challenges. She was having employment and financial problems. But more significantly, her children started to get sick with troubling regularity. The family doctor continued to treat the children, but it did appear that she was not very knowledgeable about moulds and their possible impact on health. It only later began to dawn on the Tenant and the physician that mould might be the issue.

[10] By mid-March of 2010, the Tenant felt that her concerns were not being addressed by the Landlord and she moved her children out, taking them to her boyfriend's place. She says, and I accept, that she did so for their safety. She totally vacated the apartment on March 30, 2010. On that very day, before leaving, she brought in a qualified specialist to test the air quality in the apartment.

[11] Happy Homes Indoor Environments is part of the Maritime Testing company, specializing in private homes. Their conclusions were contained in a

report dated April 4, 2010. Essentially, they found significant amounts of mould spores in the air in the bedroom where the children had been sleeping. The conclusions in the report are:

> In general, observed mould growth is not acceptable in buildings.....
>
> These data indicate that total airborne mould spores in the house are lower in the living room than those in outdoor air and also have the same types of species found as in outdoor air. However, the air sample from the bedroom shows higher levels that those in outdoor air and the presence of Aspergillus, which was not found in outdoor air. Exposure to spores of some species of Aspergillus can elicit a variety of allergic responses as well as cause general feelings of malaise in sensitive people. The data suggest a microbial problem in this area that might not be visible as growth on walls. Instead, mould growth might be present in the wall cavity or in the carpets due to water entry issues.
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> Some additional investigation, perhaps when it is raining and the drainage patterns can be seen and a moisture meter might be more useful, would have value. Based upon what was noted then, some selected removal of drywall or carpets might be needed.

[12] This report confirmed what the Tenant had come to believe. At that point she gave a form of notice to terminate the tenancy. She admits that she did not pass on the mould report to the Landlord which, in retrospect, she probably ought to have done.

[13] The Landlord meanwhile initiated this proceeding under the *Residential Tenancies Act*. It appears to have been sceptical of the Tenant's motives and claims of mould as the reason for vacating. There had been a less than acceptable rent payment history, as the Tenant had been struggling.

[14] It was only at the hearing before the Tenancies Officer that the Landlord saw the mould report, and it reduced its claim on the spot, in recognition of the

evident problem. All it sought at that time was outstanding rent for March and April plus some incidental charges.

[15] The Tenancies Officer allowed the claim, finding that the Tenant had not provided the Landlord with evidence of the mould or of her children's health problems, sufficient to terminate the lease prior to its term.

[16] Only after this hearing did the Tenant finally have her child seen by a specialist at the Nova Scotia Environmental health Centre. A report from Dr. Jonathan Fox confirms that the health problems being suffered by the Tenant's older child were likely the result of prolonged exposure to mould.

The parties' positions

[17] The basic position of the Tenant is that she was entitled to a habitable premises and that the Landlord's failure to provide such was an outright breach of the applicable statutory condition of the lease. She says that she ought not to be charged <u>any</u> rent for the time spent in this apartment, and she seeks further damages for moving costs, the loss of personal items that she discarded because of the fear that they were contaminated, and some other costs that I will outline below.

[18] The Landlord says that it had no knowledge that the premises was unfit for habitation, and that as a responsible Landlord it would have acted if it had been properly informed. Moreover, it says that at most the conditions were unfit for these children who were likely more vulnerable than the general population.

[19] The Landlord says that it should be paid rent for the period up to when the lease was terminated, essentially on consent, and that the Order of the Director was correct and should stand.

Discussion

[20] I find that there is merit to both parties' positions, and that the correct result ought to give credit where it is due. The trick is to find the correct balance. With due respect, I do not believe that the Order of the Director properly strikes that balance.

[21] It is my finding that the Tenant brought the potential mould problem to the attention of the Landlord by raising it with the superintendent who, I also find, did not take it seriously enough to bring to the attention of her employer and as a result did not take the steps that ought to have been taken.

[22] Ms. Hood on behalf of the Landlord argued that this Landlord cannot undertake exhaustive testing every time a tenant complains of mould, as it would be doing such testing constantly. I am sure she did not mean to suggest that all of their apartments have a musty smell, or that many of their tenants imagine a smell where no mould exists. While it is not my job to tell this or any other Landlord how to conduct their business, perhaps this experience may bring it more potently to their attention that mould problems can be devastating in the case of vulnerable persons, such as children with already challenged health.

[23] The *Residential Tenancies Act* has provisions for terminating a tenancy before the expiry where the health of the tenant makes it impossible to continue with the tenancy:

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
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> (a) one month's notice to quit; and
>
> (b) a certificate of a qualified medical practitioner evidencing the significant deterioration of health.

[24] It appears that the Residential Tenancies Officer regarded this provision as the one most applicable to the situation here. As such he had a basis to question whether the Tenant had properly invoked her rights, by providing the proper notice and/or forms in a timely manner.

[25] With respect, I do not believe that this provision is the only basis that the Tenant had for terminating the lease. Statutory Condition 1 states:

> 1. Condition of Premises - The landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.

[26] Where a contractual arrangement is subject to a “condition,” it means that the other party has a right to cancel the contract if the condition is not met. There are no specific formalities for invoking such a right.

[27] On the other hand, invoking the right to cancel a contract for breach of a condition does not necessarily invalidate the contract from the outset, or

invalidate things that were done while the contract was apparently in effect. The obligation to provide habitable premises is an ongoing one, and the condition may be met at some times and not others.

[28] I believe that it was not established until March 30, 2010 that the subject premises were unfit. I do believe that the mould report establishes that this unit was not healthy for anyone, and not just a vulnerable person. While a sensitive or vulnerable person may show symptoms sooner and suffer worse consequences, certain moulds are harmful *per se*, in anything more than trivial concentrations. The Tenant was not just using her child's health as a basis to terminate a tenancy. Her position, which I accept as correct, was that the tenancy was no longer viable because of a breach of the Statutory Condition.

[29] I find that the tenancy ended on March 30, 2010, and not on April 30, 2010 as found by the Tenancies Officer. In law it does not change anything just because the Tenant did not share all of her information with the Landlord at that time. The essential position had been communicated and the condition invoked. As such, there should be no rent payable for the month of April.

[30] I also find that the Tenant is entitled to some of the expenses that she incurred as a result of what, in law, was a breach of contract by the Landlord.

[31] Damages for breach of contract are permitted where they flow naturally from the breach and are reasonably foreseeable. Those that I believe satisfy those requirements are:

a. Moving expenses of $265.15
b. Storage costs of $501.37

c. Replacement of possibly contaminated beds, of $309.71

d. The cost of air testing in the amount of $367.25

[32] On the other hand, I do not believe that the Tenant can recover the cost of more expensive housing, nor is she entitled to a refund of all of the rent paid while the lease was in effect. In the case of the extra rent, it has not been established to my satisfaction that the Tenant could not find an apartment for the same price as was being paid to this Landlord.

[33] As for the refund of rent that she seeks, in my view the law does not support the theory that rent should be forgiven for the period of time before the condition was invoked and the Tenant clearly indicated that she was no longer bound by the lease.

[34] The Order of the Director required the Tenant to pay $1,082.10. The adjustments that I am making are these:

Order of the Director	$1,082.10
rent for April not owing	($680.00)
Moving expenses	($265.15)
Storage costs	($501.37)
Replacement of possibly contaminated beds	($309.71)
air testing	($367.25)
OWING TO TENANT	($1,041.38)

[35] In the result, I find that the Landlord owes to the Tenant the net sum of $1,041.38, and the Order of the Director is varied accordingly.

Eric K. Slone, Adjudicator