Claim No: 346347

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES
Cite as: Kera- Maris Investments Ltd. v. Dockrill, 2011 NSSM 35

BETWEEN:

KERA-MARIS INVESTMENTS LTD.

Landlord (Appellant)

- and -

DARLENE DOCKRILL

Tenant (Respondent)

DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 31, 2011.

Decision rendered on June 6, 2011

APPEARANCES

For the Landlord	Peter Coulthard, QC Counsel
For the Tenant	Fiona Traynor Nicholas Hoehne (student) Dalhousie Legal Aid

BY THE COURT:

[1] This is an appeal by the Landlord from a decision of the Director of Residential Tenancies dated March 22, 2011. That decision ordered the Landlord to pay to the Tenant[1] (and her Husband) the sum of $9,859.04 to compensate them for amounts that they claimed to have spent, in error, on fuel oil which ought to have been the Landlord's responsibility.

[2] The premises in question is a 4-unit building on Wentworth Street in Dartmouth. The Tenants occupied a large 2-bedroom apartment which took up most of the top floor. Two smaller apartments were below the Tenants, and a fourth apartment (# 3) was off to the side in an addition to the original building.

[3] The Tenants moved in to their unit on November 1, 2004. The lease provided that the Tenants would pay for their own heat and hot water. As they understood it, there was a separate oil tank attached to a separate furnace, which supplied their heat and hot water. A second furnace attached to two other oil tanks supplied the heat to the other apartments. The Landlord was supposed to be paying for the heat and hot water supplied to these three apartments.

[4] Over the years, the Tenants had an inkling that they were paying too much for heat, although it was not until late 2010 that they decided to investigate. They switched oil providers and began doing business on an equal billing plan with Bluewave Energy. That company offered to do a visual inspection to see if they could explain why their bills were so high.

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[1]For some reason, although the Director's order named both Darlene and Robert Dockrill as the Tenants, the appeal was commenced naming Darlene only. For purposes of this decision I will refer to them as "the Tenants" as it is clear that they were both on the lease.

[5] On December 24, 2010, a Bluewave technician (Damon Lane) attended and did some tests and made some observations. He wrote a brief report which concluded that so-called “Boiler 2" was providing heat not only to the Tenants’ apartment (# 4) but also to Apartment 3. In the matter of hot water he concluded that Boiler 2 was (appropriately) only supplying hot water to Apartment 4.

[6] As a result of this report, the Tenants became convinced that they were in fact supplying heat to Apartment 3, which was not their responsibility. They also concluded that they were inappropriately supplying heat to a front porch area associated with apartment 1 as well as to an emergency stairwell exit. They brought this complaint before a Residential Tenancy Officer, who agreed with the Tenants and awarded them one-half of what they estimated that they had spent on oil for the duration of the tenancy, thus far.

[7] The Landlord’s principal, Katerina Keramaris, represented herself at the hearing before the Residential Tenancy Officer. It is unclear what evidence she called other than her own denial that the Tenants were correct. When the decision was made against her, the Landlord appealed and did two things. She retained legal counsel, and a technician was retained to inspect the system and provide a further report to the Landlord.

[8] It is well understood that an appeal from the decision of the Residential Tenancy Officer is an appeal “de novo” in the sense that we start from scratch, hearing such evidence as the parties may call, and the Adjudicator is not bound in any way by the decision of the Residential Tenancy Officer.

[9] On the evidence that the Residential Tenancy Officer had before him, and based on the self-representation of Ms. Keramaris (for whom English is not her first language), he very likely arrived at the correct (or at least inevitable) decision. However, the case that was put before me is a very different one, and I have come to a different conclusion.

The evidence

[10] The Tenants' case rests on two alleged facts. The first is that their bills are (they believe) unaccountably high. They produced bills showing that they average about $3,000.00 per year for fuel oil. No doubt that seems high, but there are many factors which can explain high heating bills, including lack or inadequacy of insulation, inefficient windows, or an inefficient heating system. Another possible explanation was offered - theft of fuel oil - which seems a bit farfetched but is obviously possible, given that their tank is outdoors.

[11] The Tenants' theory is that the Landlord's fuel bill should be proportional to the fact that the Landlord heats three apartments. Given that the two lower apartments together are approximately equal in square footage to the Tenants' unit, the Landlord should be paying about twice what the Tenants pay.

[12] At the hearing before me, the Landlord produced copies of her oil bills for the entire year of 2008, and for the first four months of 2011. No explanation was offered as to why other years of bills were not produced, but the Tenants' representative at the hearing did not ask that question, so I am not prepared to draw any adverse inferences. The bills for 2008 total in excess of $6,400.00. For the months of January through April 2011, they total over $3,400.00. Based on these figures alone, it is impossible to conclude that the Tenants' bills are out

of line. The Tenants appear to have been paying amounts that are proportionate to the space that they occupied.

[13] I also heard the evidence of Roland Parsons of Rollie's Plumbing & Heating Ltd. Mr. Parsons has been servicing the heating system at this building for approximately the past 15 years. He did an extensive examination on May 9, 2011, and wrote a report on that day. He also took a short video which we watched in court. His conclusion was that Boiler 2 was only serving Apartment 4, as intended, and that there was no heat from that boiler being diverted to Apartment 3. He drew our attention to an extra pipe that appears to have been installed at some much earlier time, that could give the impression that there is a connection between Boiler 2 and the circulating pump for Apartment 3. However, he states, that pipe is essentially a dead end because there is no connection to the supply line from Boiler 1. In other words, there is no closed loop. Furthermore, there is a valve on this pipe which is in the closed position.

[14] Mr. Parsons did a series of tests, involving the thermostats and hot water taps in all of the units, to confirm that the appropriate boilers were responding to the calls for heat or hot water from the corresponding units.

[15] This report contrasted with the conclusions made by the Bluewave technician some four months earlier. The Tenants' representative stated that the Tenants were not taking issue with Mr. Parsons's report, but theorized that something may have changed in the interim. The evidence in support of that allegation was nothing more than the fact that the Landlord began to restrict access to the furnace room in early 2011, and the Tenants witnessed an individual who they believed to be a plumber, working on the furnace. Ms.

Keramaris identified that person as Larry who does her routine furnace cleaning. She stated that Larry is not qualified to modify the heating system.

[16] Mr. Parsons was specifically asked whether there appeared to have been any changes made to the heating system in recent years. He said there was no evidence of any new piping or other components, and that the system looked identical to what he had been working on over the years.

[17] I can find no credible evidence to support the Tenants' theory that the Landlord changed the furnace after December 2010. All of the evidence is to the contrary.

[18] The only real question is why Mr. Lane of Bluewave concluded as he did, and why his findings differ from those of Mr. Parsons.

[19] Mr. Lane was operating under time pressure, unlike Mr. Parsons who took about five hours to complete his inspection. It was Christmas Eve. Mr. Lane was not familiar with the building. He based his observation on the fact that when he instructed Ms. Dockrill to turn up the thermostat in Apartment 3, the burner in Boiler 2 evidently went on. As later explained by Mr. Parsons, the burners do not respond directly to the thermostats in the apartments, but rather are sensitive to the temperature of the water in the system. They are designed to keep the circulating water at a certain temperature. The circulating pumps, however, are more directly responsive to the thermostats.

[20] Mr. Lane did observe that the circulating pump for apartment 3 was activated by the thermostat in that apartment. My conclusion is that he must have been misled by the extra (inactive) pipe which suggested a connection

between that circulating pump and Boiler 2, which connection did not in fact exist. I also accept as reasonable the suggestion that it could have been a sheer coincidence that Boiler 2 went on at about the same time that apartment 3 was calling for heat. Given the time of year - late December - those burners would have been coming on and going off frequently, keeping the water up to temperature in order to respond to frequent calls for heat.

[21] On cross-examination, Mr. Lane was not able to defend his conclusions with any great amount of confidence, and I conclude that he was simply mistaken and came to the wrong conclusion.

[22] The evidence did demonstrate that the Tenants are in fact heating the emergency stairwell, but there is no evidence that this is contrary to their lease and that stairwell does connect with their apartment. On the evidence, this would account for minimal heat loss.

Conclusions

[23] In the result, the evidence strongly suggests that the Tenants were not paying to heat any space for which they were not contractually responsible, and their claim for compensation is not well founded.

[24] The appeal succeeds and the order of the Director is rescinded in its entirety.

Eric K. Slone, Adjudicator