Claim No: 349051

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

Cite as: Robinson v. Rygiel, 2011 NSSM 47

BETWEEN:

LEANNE ROBINSON

Landlord (Appellant)

- and -

SARAH RYGIEL

Tenant (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on June 21, 2011

Decision rendered on June 27, 2011

APPEARANCES

For the Landlord	self-represented
For the Tenant	Fiona Traynor Andre Cain (student) Dalhousie Legal Aid

REASONS FOR DECISION

[1] This is an appeal by the Landlord from an Order of the Director dated May 11, 2011, arising out of two applications - one by each party.

[2] The Order effectively did these things:

a. The tenancy for 35 Frederick Avenue, Unit A, Halifax, Nova Scotia, was deemed terminated as of February 1, 2011, at the request of the Tenant who had moved out on or about that date, despite giving no notice of her intent to vacate. As such the Landlord was denied rent for any period of time thereafter.

b. The Order denied the Landlord's claims for damage to the living room floor, cleaning and garbage removal costs, cost to change the locks and the cost of having a pest control company attend, which had been requested by the Tenant. The stated basis was a lack of evidence to support the claims.

c. The Tenant was awarded compensation in the amount of $610.51 for electricity used to heat water for an upstairs unit, which had not been her responsibility, plus $78.20 for an inspection that revealed this fact.

d. The Tenant was denied certain other compensation claims, most notably being a requested rent abatement because her apartment had allegedly been unbearably cold during the winter months.

[3] In the net result, the Landlord was ordered to pay the Tenant the sum of $1,149.67, which included the return of the security deposit in the amount of $460.96.

[4] The Landlord did not appeal against the findings that were favourable to her, obviously, and chose not to appeal against the finding that the Tenant should receive compensation for the extra electricity used. The Tenant did not launch her own appeal, and accordingly is not entitled to have revisited any of the claims upon which she was unsuccessful.

The claim for termination of the tenancy

[5] The evidence reveals that this was a year to year tenancy which began on the 1st of September 2008. The property in question is part of a pair of duplexes, side by side. The Landlord herself lives in one of the units and was at pains to point out that she is not a professional Landlord and has always tried to deal with her tenants on an informal, personal basis.

[6] It appears that there were some bumps along the road, from the perspective of both parties, which culminated in the Landlord advising the Tenant in early 2011 that the tenancy would not be renewed for a fourth year, when it came around for renewal in 2011. From this point forward the relationship became severely conflicted.

[7] Although there was not a lot of evidence directed toward this issue, because it was not part of the appeal, it appears that one of the Tenant's biggest concerns was the amount of money that it cost to heat her unit. She felt it was

way too high, and that the apartment was even then too cold for her to get full use of all of the rooms. The Landlord's attitude was that this is a 70-year old building, and there is not much you can do about it short of a major renovation which she was in no position to do.

[8] During the early part of January 2011, there was a good amount of emailing back and forth about the heating, as well as other issues including an alleged problem with water quality and a smoke detector. The relationship had so deteriorated by late January that the Tenant filed a police complaint about harassment, and also she had called the Halifax Regional Municipality and made a complaint about alleged building deficiencies.

[9] As of January 12, 2011, the Tenant had not indicated that she had any intention of vacating the premises. There had been emails about her possibly vacating before the anniversary date, perhaps subletting, but this was never acted upon. On January 12, 2011 the Tenant emailed the Landlord and stated:

> "I am not going to screw you over and leave in the middle of the night but I am looking around to see what else is out there. You will have ample time and notice and it will be done in accordance with the tenancy act SHOULD I find something suitable."

[10] On January 24, 2011, the Tenant says she first learned that she had been paying the electricity to heat hot water not only for her unit, but also for the unit above her. She had assumed that there were separate hot water heaters, but it turns out that one of them was not actually connected. She emailed the Landlord about it, but the relationship appears to have been so troubled by then that there was no attempt to resolve it.

[11] Instead, the Tenant simply decided to move out on February 1, 2011. She did exactly what she said she would not do - which was the equivalent of a midnight run. Part of what she later sought from the Residential Tenancy Officer was an order terminating the tenancy as of that date, effectively ratifying her leaving without notice, on the basis that the premises were allegedly unfit for habitation, and that the Tenant had been improperly paying for hot water for the upper unit. The Residential Tenancy Officer disagreed that the premises were unfit, but allowed early termination of the tenancy on the other ground, namely that the Tenant had been put to this additional expense.

[12] The Landlord has appealed against this finding, making several arguments. First of all, she testified that the Tenant was told at the outset that she would be paying for this expense, although she conceded that this was not mentioned in the lease. The Tenant disputed this. I make no finding in this regard.

[13] More convincingly, the Landlord argued that an order that the Tenant be repaid slightly more than $600.00 after approximately 30 months of occupation meant that this additional cost was all of $20.00 per month. She put it to the Tenant in cross-examination, to the effect “do you mean to suggest that you had the right to terminate a tenancy because of an additional cost of $20.00 per month?” to which the Tenant replied that she believed she had a right to terminate the tenancy because the Landlord was in breach of the lease.

[14] In my opinion, the Tenant took a major calculated risk in simply vacating without notice, and hoping that a Residential Tenancy Officer would later ratify her decision. At the time that she did so, the Tenant had a number of serious complaints which she eventually pleaded at the Residential Tenancy hearing,

which - had they been upheld - would have amounted to a serious breach by the Landlord. She claimed that the premises were uninhabitable, and she was claiming thousands of dollars in compensation for the fact (she claimed) that the premises were unreasonably cold much of the time. In the end, the Residential Tenancy Officer did not find in her favour on any of these points, although she succeeded in her claim for extra electricity used for hot water.

[15] In my opinion, not every breach of a lease by a Landlord would justify a Tenant in treating the tenancy as terminated. The law requires that the breach by one party be significant - perhaps even “fundamental” - before the other party is excused from performance. I do not believe that the fact that the Tenant was improperly being charged $20.00 per month, or any such amount, amounts to a significant, let alone fundamental breach. Had this been the only ground motivating the Tenant, it hardly seems likely that she would have felt entitled to skip out of her tenancy. Upon learning that she was improperly paying this money, the Tenant ought to have put the Landlord on notice that she was seeking an adjustment, failing which she would bring the matter to Residential Tenancies. One way or another, it would have been a simple matter to resolve.

[16] I believe the Residential Tenancy Officer erred in allowing the tenancy to be terminated as of the day that the Tenant skipped out. This was not a significant enough breach of the lease to excuse the Tenant from her obligations under the lease and under the *Residential Tenancies Act*.

[17] As such, I find that the Tenant is liable for rent for the month of February, in the amount of $900.00. The Landlord also claims to be allowed to keep the security deposit because she did not rent the unit right away, but it appears that before the Residential Tenancy Officer her claim was for February rent only, and

it is this amount that I am allowing. The evidence before me of precisely when the unit was re-rented was vague. It was the Landlord's obligation to mitigate the loss, and I am not satisfied that she could not have had a new tenant in by March 1, 2011.

Other claims

[18] The Landlord claimed $500.00 for alleged damage to the living room floor. She described it as a series of gouges in a 4" X 4" area. She produced an estimate to sand and refinish the flooring. She was unable to produce any picture which would have given me a good sense of these scratches.

[19] The Tenant denied knowledge of any such damage. She further claimed that the floors were old and not in great shape when she rented the unit in 2008. She also stated that she had used a rug in that room virtually the whole time and could not understand how any gouges could have been caused.

[20] The Landlord concedes that she cannot hold a Tenant responsible for routine wear and tear, but contends that this exceeds that threshold.

[21] On balance, I do not have enough proof that the Tenant caused this damage to order her to pay for it. I am also unimpressed with the one very terse estimate produced by the Landlord. I am not satisfied that the repair could not be done less expensively. As such, I am denying this claim.

[22] The Landlord also claims $150.00 for cleaning the unit, which amount includes hauling away junk that the Tenant left sitting at the side of the building. There were photos to back up the fact that the Tenant left items outside the

building, including (it appears) a large mattress. I find that this is a reasonable expense and I am satisfied that it was necessary. With due respect, I do not believe the Tenant when she testified that she took great pains to leave the apartment clean and tidy. I believe it is far more probable, given her attitude being revealed in all of the emails that I received in evidence, that she did what she thought was the bare minimum.

[23] There is a disagreement over whether the Tenant left behind the keys. The Tenant says that she left them in the Landlord's mailbox. The Landlord testified that the keys were never returned, and as a result she had to have a locksmith change the locks at a cost of $70.73. I very much doubt that the Landlord would have gone to this trouble and expense if the keys had, in fact been returned to her, and I find it more probable than not that the keys were not returned.

[24] The last item concerns the cost of Braemar Pest Control. Apparently, there had been an issue all along with spiders in the unfinished basement, and earwigs (somewhere) but what prompted the Tenant to act was that there were allegedly maggots from the Landlord's green bin finding their way into her kitchen. On August 9, 2010, the Tenant emailed the Landlord (when relations were still relatively civil), stating:

> "... would it be possible to rearrange the garbage area? I'm not sure but I think that I had a maggot looking thingy on my kitchen window .... and now I am finding then on the floor by the computer desk ..."

[25] The Landlord responded by having her son move the green bins. Nevertheless, the Tenant decided to call Braemar the next day. There was no discussion then about who would pay for it, but in a later email the Tenant stated

that she knew the Braemar bill would be $75.00 and asked the Landlord if she was willing to split it? The Landlord agreed.

[26] Later, the bill directed to the Landlord came in at $230.00, and the Tenant has not paid any of it.

[27] The Landlord claims that she agreed to pay $37.50, and the Tenant should pay the rest.

[28] There are some conflicting values and principles here. The Landlord has an obligation to provide habitable premises, but it is not a given, in my view, that the Tenant can simply call a pest control company on the Landlord's account, giving them carte blanche, without allowing the Landlord to have a part in that decision.

[29] There seems to be no doubt that the Tenant anticipated a smaller bill, and I believe the fairest result overall is that each party should pay one half, more or less consistent with their thinking at the time. Granted, neither of them was expecting to pay $115.00, but it is not fair that either of them should bear the greater part of the expense.

Summary

[30] In summary, I find that the Tenant is liable for one month's rent of $900.00 for February 2011, and is liable for $150.00 for cleaning and removal, $70.73 for changing the locks and $115.00 toward the pest control bill.

[31] The Tenant is entitled to a credit in the amount of $610.51 for electricity, and the credit of $78.20 for inspection of the electrical, as allowed by the Residential Tenancy Officer, and is entitled to credit for her security deposit in the amount of $460.96. The following is the state of the account:

February rent to Landlord	$900.00
Cleaning and junk removal to Landlord	$150.00
Locksmith charge to Landlord	$70.73
Baraemar Pest Control to Landlord	$115.00
credit for electricity to Tenant	($610.51)
credit for inspection to Tenant	($78.20)
credit for security deposit to Tenant	($460.96)
Net owing to Landlord	$86.06

[32] In the result, the Order of the Director is varied and in its place an order will issue ordering the Tenant to pay to the Landlord the sum of $86.06.

Eric K. Slone, Adjudicator