Claim No: 358024

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

Cite as: MacCulloch v. Wells, 2011 NSSM 59

BETWEEN:

ERNEST H. MacCULLOCH

Landlord (Appellant)

- and -

DOROTHY WELLS

Tenant (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 8, 2011

Decision rendered on November 16, 2011

APPEARANCES

For the Tenant self-represented

For the Landlord self-represented

REASONS FOR DECISION

[1] This is an appeal by the Landlord from a decision of the Director dated October 19, 2011, which decision declared invalid a 3-month Notice to Quit issued by the Landlord. That Notice would have required the Tenant to vacate the subject apartment at 13 Hastings Drive, Unit 6, in Dartmouth, Nova Scotia, as of November 30, 2011. The Tenant has been in this unit since June 1, 2008.

[2] The Residential Tenancy Officer's rationale for setting aside the Notice was that (he found) it had been issued in retaliation for the Tenant enforcing her rights under the *Residential Tenancies Act*, and specifically because she contacted Halifax Regional Municipality By-Law Enforcement to complain about certain deficiencies in the building, including but not limited to issues in her unit.

[3] The Landlord denied that his decision to terminate the Tenant's lease was "retaliation." He testified that he had been poised to give such notice for some time for reasons that I will set out below.

[4] I paid very careful attention to the Landlord's demeanor as a witness, as his motivation and good faith were very much in question. I will say at the outset that he gave his evidence in a very straightforward and at times impassioned manner. He appears to have taken on building ownership as something of a retirement project. He impressed me as a well-meaning landlord who is doing his best and who finds the demands of being a landlord challenging at times.

[5] The issue that precipitated the problem, from the point of view of the Landlord, was the Tenant's ownership of two cats, and those cats' propensity for bothering other tenants. The written lease contains a "No Pets" clause. The Landlord insists that he did not know at the time the lease was signed that the

Tenant had a cat (she only had one at that time). The Tenant suggested that the Landlord did know about the cat, though this seems unlikely given that the lease contained this explicit clause forbidding pets. What seems most likely is that the Tenant concealed the fact that she owned a cat. There is no doubt that at some later date the Landlord learned of the cat. Also, by then the Tenant had acquired the second cat.

[6] The Landlord appears to have tolerated the cats, or at least held off taking any active objection, but at some point (by 2010 anyway) they had become a nuisance. The evidence of the Landlord, and that of another tenant in the building, Stephen Power, both of whose evidence I accept, was to the effect that the Tenant frequently left her apartment door and the back door to the building open to allow the cats access to the outdoors. At some point, one of the cats began to find its way into Mr. Power's apartment through a hole that it made in a screen window and at least once was found eating some food off the kitchen counter. Various attempts were made by the Tenant to repair the screen and prevent access by the cat, but these were not entirely successful. It does not appear that the Tenant even considered the one step that would have solved the problem vis a vis Mr. Power; that is, not to allow the cats to go outside.

[7] Mr. Power eventually complained to the Landlord, after failing to get results through lesser measures. Those lesser measures included complaints to the superintendent, Mr. Goldsworthy, who was and is close friends with the Tenant. He recently retired from being superintendent because he is ill, and neither party wished to bring him as a witness because of this fact, despite the fact that his evidence might have been helpful. It does appear that Mr. Goldsworthy's close friendship with the Tenant played a role in these events. In particular, it does not

appear that he routinely passed on complaints that either the Tenant or Mr. Power made to the Landlord, about the issues that concerned them.

[8] The Residential Tenancy Officer found that the issue concerning the cats was “resolved over a year ago,” which explains (in part) why he believed that the Notice was purely retaliatory. The evidence before me does not support this conclusion. What is more accurate to say is that the issue concerning the cats came to a head earlier in 2011 and was still an active issue when the Notice to Quit was given. It is also true that the issue of cats is (at least) temporarily academic as the Tenant found another home for one of the cats and another of them escaped and has been missing for several months. However, the Tenant appears still to hold out hope that the missing cat will be found and does not appear to consider herself bound by the no pets provision in the lease she signed.

[9] The Landlord insists that he had several reasons for wanting to end this tenancy, but the cat issue was the biggest one because he felt that the Tenant was essentially putting her own interests ahead of other tenants. He did not elaborate on all of his other issues, but did mention that he believed her leaving building doors open was a security issue. He testified that there were instances of the Tenant being noisy and abusive, which appears to have bothered him considerably. He also insisted that he had been responsive to the Tenant’s complaints, as far as he knew, and he denied that he ignored complaints to the degree that the Tenant should have felt compelled to call the by-law inspectors. He believed he was a good Landlord and that the Tenant was getting a very good deal financially speaking, as he had not raised the rents since her tenancy began.

[10] The Tenant testified that she had made numerous complaints concerning things in her apartment. In particular, she says that she was concerned about a tile floor that was chipping and that she was concerned about tripping and hurting herself, a concern that was heightened by the fact that she had just been diagnosed with a brain aneurism. She felt that the Landlord was not being responsive to her concerns, and as such she called Halifax Regional Municipality on August 19, 2011, following which a building inspector attended the next day. On August 23, 2011, that inspector issued an order that pinpointed some eight issues, both inside the Tenant's unit and elsewhere in and around the building. Items 3 and 4 concerned the broken floor tiles and a rotten floor board in unit 6. All of the other items were elsewhere in the building and were not items that the Tenant had specifically identified when she called Halifax Regional Municipality.

[11] The Tenant received her copy of this report on August 25, 2011. The Landlord received his copy shortly thereafter.

[12] On August 29, 2011, the Landlord gave the Tenant her Notice to Quit.

Was it retaliation?

[13] The Residential Tenancy Officer found that the Notice to Quit was retaliatory and set it aside. As is customary, his reasons were very brief and somewhat conclusory.

[14] The *Residential Tenancies Act* contains the following provisions to protect tenants from retaliatory action by landlords:

Consequence of retaliatory action by landlord

> 20 The Director or the Small Claims Court may refuse to exercise, in favour of a landlord, the powers or authorities under this Act or may set aside a notice to quit if the Director or the Small Claims Court is of the opinion that a landlord has acted in retaliation for a tenant attempting to secure or enforce the tenant's rights under this Act or the Rent Review Act.

[15] The wording of this provision suggests that it is not mandatory. The use of the word “may” suggests that there is a discretion to be exercised, and that a finding of retaliation does not necessarily lead to the result that the Notice would be set aside.

[16] In exercising that discretion, there are a number of factors to consider and policies to bear in mind.

[17] The protection against retaliatory action is vital to ensuring that tenants can confidently enforce their rights - including the right to a safe living environment - without fearing that they will be punished by immediate eviction.

[18] It must also be recognized, however, that tenants in Nova Scotia do not have security of tenure until they have been in possession of the premises for five years. The Tenant in this case had been in this unit for just over three years when the Notice was given. Because the lease is month to month, this would normally give the Landlord the right to terminate the tenancy on three month’s notice - without necessarily specifying a reason. This right is only tempered by s.20 (as noted above) and by other statutes, most notably the *Human Rights Code,* which would prevent a Landlord from denying someone accommodation for reasons that amounted to unlawful discrimination.

[19] Put another way, a landlord in Nova Scotia has some freedom to decide who he or she wants as a tenant, and this right should not be ignored.

[20] In my opinion, Residential Tenancy Officers and Adjudicators ought to be careful not to allow s.20 to be used as a device for establishing early tenure. This would be a real possibility if a tenant - especially one in a conflictual relationship with the landlord - could simply commence some form of process under the *Residential Tenancies Act* or (as here) with municipal authorities, and essentially insulate herself from termination of the tenancy because such action (even if delayed) could be attacked as retaliatory.

[21] Were I to uphold the decision of the Residential Tenancy Officer and set aside the Notice to Quit, it is difficult to see how this Landlord could ever serve another one successfully on this Tenant. Any attempt to do so would be deemed suspicious, and by the time June 2013 came around this Tenant would have obtained tenure. In the exercise of my discretion I must take into account not only the right of the Tenant to be free of retaliation, but also the right of the Landlord to choose who he wishes to have as his tenant.

[22] In my view, the fact that the Tenant called the building inspectors was known to the Landlord, and was a factor but far from the only factor or even the paramount factor in his thinking. I accept his evidence that he had been considering serving her with a Notice to Quit for some time, but was hesitating - in part because the Tenant has been very good to Mr. Goldsworthy, who is ill.

[23] I believe that the Landlord's action was not free of retaliation, but was not primarily retaliation. I disagree with the Residential Tenancy Officer's conclusion that the Notice to Quit should be set aside. I am satisfied that there were

sufficient other reasons motivating the Landlord, such that he should not be deprived of his right under the *Residential Tenancies Act* to control who is a tenant in his building. As noted above, I do not believe that the small element of retaliation present here should allow the Tenant essentially to achieve tenure through the back door.

[24] Events subsequent to the Residential Tenancies hearing must also be mentioned. Since then, the Tenant has called by-law inspectors to complain about other matters in and around the building, leading to further orders with which the Landlord is being forced to contend. The Tenant appears to be on something of a campaign to blow the whistle on the Landlord for every transgression, however minor, that she can come up with. The Landlord has expressed that these events are terribly stressful for him, and he regards this Tenant as someone with whom he is in serious conflict and would simply prefer not to have her as a tenant in his building. He believes that there are many other apartments in the area that could suitably house the Tenant.

[25] The Tenant says she does not want to leave, although it cannot be pleasant to remain in such a conflictual relationship with her Landlord. This is not a large building, and the Landlord is a hands on landlord.

[26] In all of the circumstances, I do not believe that I should exercise my discretion and set aside the Notice to Quit. Clearly there is a practical issue given that the Notice sought vacant possession as of the 30th of November, which is far too soon under the circumstances to be fair to the Tenant who quite properly sought adjudication of her rights under the *Residential Tenancies Act* and, until this point, had been successful. When I pointed this problem out to the

Landlord, he volunteered that he would be quite content to have the notice suspended for two or even three months.

[27] I am accordingly setting aside the Order of the Director and instead ordering that the existing notice be deemed to be valid, but that it's effect be suspended for two months, which is approximately the time that it has taken to have this matter adjudicated. The effective date of the Notice is accordingly January 31, 2012. As is her right, the Tenant may leave earlier on proper notice to the Landlord, or as they may privately arrange.

Eric K. Slone, Adjudicator