

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES
Citation: *Graves v. Keenan*, 2017 NSSM 9**

BETWEEN:

STEPHEN GRAVES

Appellant (Landlord)

- and -

ADAM KEENAN

Respondent (Tenant)

REASONS FOR DECISION AND ORDER

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on January 24, 2017 via video-conference

Decision rendered on February 8, 2017

APPEARANCES

For the Appellant Cassandra Lilly
 Counsel

For the Respondent William Russell
 Counsel

BY THE COURT:

[1] The Landlord appeals from an order of the Director of Residential Tenancies dated October 21, 2016. That order arose from a counterclaim by the Landlord for significant damages alleged to have been caused by the Tenant's dogs during the time that the Tenant was in occupation of the Landlord's property at [...] in Bedford, Nova Scotia during 2015.

[2] The subject property is a high-end home. The parties signed a 13-month lease (in a form about which I will comment below) on April 6, 2015 at a rent of \$1,800.00 per month. The Landlord required the Tenant to provide a security deposit in the amount of \$1,800.00, which was unlawful as s.12(2) of the *Residential Tenancies Act* only permits a half-month's rent as a security deposit. It appears that the Tenant was ignorant of this provision. I cannot say the same for the Landlord as he had a professional rental agent involved in the process, who must surely have known that the security deposit was irregular. Although nothing much turns on this, I find that the Landlord was (at least) constructively aware of this unlawful demand on the Tenant.

[3] The proceeding before Residential Tenancies started as a request by the Tenant for the return of the security deposit after the conclusion of the tenancy. It was met with a counterclaim by the Landlord for significant damages. The Landlord claimed that the Tenant's two dogs severely damaged his hardwood floors and stairs, such that they require replacement at a cost of in excess of \$15,000.00. A small claim was made for the cost of cleaning up an oil spill on the driveway.

[4] The Residential Tenancy Officer disallowed most of the counterclaim. She allowed \$400.00 for depreciation to the floors and \$100.00 to clean the driveway. She ordered that the balance of the security deposit - \$1,300.00 - be returned to the Tenant.

[5] The Landlord appealed this order. During the hearing he abandoned any additional claim for cleaning up the driveway, and the \$100.00 allowance for that issue will be undisturbed.

[6] The hearing centred on the floors and stairs, both of which are hardwood. The hearing was conducted by video-conference, as the Landlord is currently in Newfoundland and the Tenant now resides in the UK.

[7] The subject premises is a 2-level townhouse containing some 2,100 square feet of living space. Much of the flooring is engineered hardwood, and the stairs are pure hardwood. The home was built in 2010 and the Landlord and his family lived therein for about four years before the Landlord was transferred to Newfoundland in 2014. The home was apparently unoccupied for some months until the Tenant and his family took occupancy in April 2015.

[8] The Landlord testified that the floors were "pretty much pristine" when he moved out. The Tenant lived there for about six months, and a subtenant lived there for another six months. Upon retaking possession after the one year plus of the tenancy, the Landlord says that he noticed considerable damage to the floors and stairs, which damage is consistent with dog scratches.

[9] The Tenant maintains that there were already many scratches on the floor when he took occupancy, and while his dogs may have added a few more, he

says that they were well trained and any minor scratches that they contributed should be considered as ordinary wear and tear.

[10] The evidence at the hearing tending to prove or disprove the claim consisted of the oral testimony of the parties and photographs taken by both parties. The Landlord also produced estimates to repair or replace flooring.

[11] The Tenant testified that he noticed that the floors were somewhat scratched when he first moved in, and as a precaution against this very type of claim he took a series of photographs. He says that he was advised to do so by the rental agent who showed him the property. He testified that he may have sent these photos to the rental agent, but cannot recall if he did. That rental agent would have been, in law, the agent of the Landlord.

[12] The Landlord disputes the authenticity of the photos, and suggests that they must have been taken after, rather than before, the Tenant took occupancy.

[13] The Landlord's photos show scratches, some of which are clearly unsightly. Others are difficult to categorize given the limitations of photography. The intensity of the scratches can be enhanced, or downplayed, depending upon how close up they were taken and the way the light hits the surface.

[14] A pivotal issue for me is whether the floors were as pristine as the Landlord contends. At face value, if the Tenant's photos are taken as genuine, the Landlord's case is severely weakened.

[15] The missing piece here would have been the rental agent, who (according to the Tenant) knew about the scratches and advised the Tenant to photograph

them. That agent, assuming he or she remembered anything, could have been decisive as to the presence or absence of scratches in April 2015. It could also have impacted upon the credibility of the Tenant.

[16] The Landlord bears the burden of proof on this appeal. I find that he has not refuted the Tenant's evidence that there were significant scratches present in April 2015. I also find that the Landlord ought reasonably to have known that the rental agent's evidence might be required. There was nothing before me indicating whether or not that person was available to be called.

[17] To accept the Landlord's evidence would require me to find that the Tenant was lying about both the agent's involvement and the authenticity of his photographs. I am not prepared to make such a finding. Overall, I found the Tenant to be a credible witness. I find that the Landlord has not proved on a balance of probabilities that the Tenant's dogs created most or all of the damage which the Landlord observed when he retook possession of the property in mid-2016.

[18] Even had I so found, I would not accept that total replacement of almost 1,000 square feet of flooring and an entire staircase would be justified, at a cost of some \$15,000.00.

[19] The measure of damages for breach of the covenant - i.e. damage that exceeds ordinary wear and tear - is not necessarily full replacement. I would have to consider whether repair, in whole or in part, is reasonable. I would also have to consider whether the damage affected the value of the property, and (if so) by how much.

[20] Injured parties are also required to mitigate their damages.

[21] All hardwood floors tend to scratch, to a degree, whether because of dogs, moving furniture, or other activity. People live with such scratches (sometimes strategically placing carpets) until they become so intolerable that either sanding and refinishing, or total replacement is necessary. There is no evidence before me that the property's rental value, or even resale value, has been affected by any of the scratches which might be attributable to this Tenant.

[22] I also find that the Landlord knew that the Tenant had dogs, and must have known that some scratches were likely to occur. This risk might well have been reflected in the amount of the rent.

[23] In the result, I cannot quarrel with the finding of the Residential Tenancies Officer that some amount for depreciation was appropriate, and nothing more. She chose \$400.00. I will not quarrel with that assessment.

The form of lease

[24] Though academic in light of the result, one of the issues in this case concerns the enforceability of the lease provisions concerning pets. The lease here contains a so-called "Pet Owner Agreement Terms and Conditions" attached to the lease as the final page, and which is referred to on a previous page which purports to include under statutory conditions a section that reads "*Pets - Pets permitted per terms and conditions of Pet Owner Agreement attached to this lease.*" In the "Pet Owner Agreement" the Tenant is said to agree to "*assume all liability, and are financially responsible for any cleaning*

required and damage(s) to property interior and exterior that is caused by our pet(s)."

[25] Reading the lease, one would conclude that the Statutory Conditions contained in the *Residential Tenancies Act* contain a provision dealing with pets, and that there is a further statutory document that establishes (among other things) strict liability for damage to residential premises done by pets.

[26] In fact, the Act contains the following:

9 (1) Notwithstanding any lease, agreement, waiver, declaration or other statement to the contrary, where the relation of landlord and tenant exists in respect of residential premises by virtue of this Act or otherwise, there is and is deemed to be an agreement between the landlord and tenant that the following conditions will apply as between the landlord and tenant as statutory conditions governing the residential premises:

Statutory Conditions

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.
2. Services - Where the landlord provides a service or facility to the tenant that is reasonably related to the tenant's continued use and enjoyment of the premises such as, but not so as to restrict the generality of the foregoing, heat, water, electric power, gas, appliances, garbage collection, sewers or elevators, the landlord shall not discontinue providing that service to the tenant without proper notice of a rental increase or without permission from the Director.
3. Good Behaviour - A landlord or tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants, respectively.
4. Obligation of the Tenant - The tenant is responsible for the ordinary cleanliness of the interior of the premises and for the repair of dam- age

caused by wilful or negligent act of the tenant or of any person whom the tenant permits on the premises.

5. Subletting Premises - The tenant may assign, sublet or otherwise part with possession of the premises subject to the consent of the landlord which consent will not arbitrarily or unreasonably be withheld or charged for unless the landlord has actually incurred expense in respect of the grant of consent.

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.

7. Entry of Premises - Except in the case of an emergency, the landlord shall not enter the premises without the consent of the tenant unless

(a) notice of termination of the tenancy has been given and the entry is at a reasonable hour for the purpose of exhibiting the premises to prospective tenants or purchasers; or

(b) the entry is during daylight hours and written notice of the time of the entry has been given to the tenant at least twenty-four hours in advance of the entry.

8. Entry Doors - Except by mutual consent, the landlord or the tenant shall not during occupancy by the tenant under the tenancy alter or cause to be altered the lock or locking system on any door that gives entry to the premises.

9. Late Payment Penalty - Where the lease contains provision for a monetary penalty for late payment of rent, the monetary penalty shall not exceed one per cent per month of the monthly rent.

[27] The subject lease reproduces these conditions verbatim, although without numbering them, and goes on to provide several purported conditions including what would be the tenth, namely the one dealing with pets.

[28] One can only conclude that the drafters of this lease took it upon themselves to add terms and conditions to the lease, disguising them as Statutory Conditions, which they are not.

[29] What is puzzling is that the Act does allow for the addition of terms that are not within the Statutory Conditions. Section 8 (1) provides:

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.

[30] In addition, s.9A permits landlords to make rules:

Landlord's rules

9A (1) A copy of reasonable rules established by a landlord that apply to the residential premises shall be given to a tenant prior to executing a lease.

(2) Rules may be changed or repealed upon four months notice to the tenant prior to the anniversary date in any year.

(3) A rule is reasonable if

(a) it is intended to

(i) promote a fair distribution of services and facilities to the occupants of the residential premises,

(ii) promote the safety, comfort or welfare of persons working or residing in the residential premises, or

- (iii) protect the landlord's property from abuse;
- (b) it is reasonably related to the purpose for which it is intended;
- (c) it applies to all tenants in a fair manner; and
- (d) it is clearly expressed so as to inform the tenant of what the tenant must or must not do to comply with the rule.

[31] The Tenant here testified that he assumed this was a standard pets clause that was "statutory" in the sense that it was part of the *Residential Tenancies Act*. The Landlord says that it was his rental agent that prepared the lease, and that he assumed it was regular.

[32] It is essentially unexplained as to why the lease was put together this way. On the face of it, there is an element of deception. On the other hand, the same result could have been provided for using a term that did not purport to be "statutory," or by attaching a set of Landlord's Rules. These alternate methods may have given less of an impression that they were immutable. I can see how a prospective tenant may have believed that the term was non-negotiable, because it was "statutory." For what it is worth, I find this lease to be irregular, although in light of the Landlord's lack of success, nothing turns on the point.

Result

[33] In the end, I dismiss the appeal and the Landlord is ordered to return the Tenant's damage deposit of \$1,800.00, minus the damages of \$500.00, for a total return to the Tenant of \$1,300.00.

Eric K. Slone, Adjudicator