SCCH - 17- 466207

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

Cite as: Jebailey v. Nickerson, 2017 NSSM 54

BETWEEN:

ELIAS JEBAILEY

Landlord (Appellant)

- and -

JEREMY NICKERSON and MEREDITH HIGGINS

Tenants (Respondents)

REASONS FOR DECISION

Revised Decision: This decision has been corrected on February 6, 2018 and replaces the previously released decision.

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on August 30, 2017

Decision rendered on September 7, 2017

APPEARANCES

For the Landlord	Philip Whitehead, Counsel
For the Tenant	Nadia Shivji student Billy Sparks counsel

Dalhousie Legal Aid

REASONS FOR DECISION

Introduction

[1] This is an appeal by the Landlord from a decision of the Director of Residential Tenancies dated July 19, 2017, which dealt with both a claim and a counterclaim arising from a tenancy on Agricola Street in Halifax.

[2] The Landlord had been seeking significant damages following the tenancy, as a result of various repairs for which he blamed the Tenants. The Tenants had claimed a rent abatement for what they contended were deficient conditions that they had to endure. In the result, neither party was very successful before the Residential Tenancy Officer. The Landlord was awarded damages of $600.00 while the Tenants were granted a $500.00 abatement. After these two items offset each other, the Tenants were awarded the return of their damage deposit, minus $100.00, for a total order in the Tenants' favour of $500.00

[3] Although this appeal was launched by the Landlord, and no cross-appeal was filed by the Tenants, this being a *de novo* process, the matter proceeded on both claim and counterclaim, without complaint.

[4] Given the nature of the opposing claims, it is fair to say that the parties have widely different views of their respective responsibilities and the legal results that should flow therefrom. The Residential Tenancy Officer gave little credence to either party's position. With due respect to the Residential Tenancy Officer's views, I have concluded on the evidence before me that there is more fault to be placed on the Tenants, who I find did not properly exercise their responsibilities

under the lease and should bear more of the legal burden for their carelessness than was imposed upon them by the Residential Tenancy Officer.

The facts

[5] The premises in question is the lower unit in a duplex on Agricola Street in North End Halifax. It is said to be between 650 and 700 square feet. The upstairs unit is marginally larger because of an overhang.

[6] The tenancy is governed by a (mostly) standard form of lease signed April 30, 2016, for a one-year term commencing the 1st of June 2016. Notwithstanding that start date, the Tenants were allowed to occupy the unit for the month of May 2016, at a reduced rent, while certain minor improvements were being done.

[7] The lease had a so-called Schedule B headed "Additional Statutory Conditions and House Rules." The term "statutory" is misleading because these are not the statutory conditions set out in Section 9 of the *Residential Tenancies Act.* What they actually are, are house rules which the Landlord is entitled to impose, so long as they are reasonable, under s.9A of the *Act*. Statutory conditions apply whether or not they are included in the lease, and override any inconsistent rules that the Landlord may seek to apply. In this case, the house rules are mostly non-controversial. Relevant ones (for this case) include:

> 2. Garbage and recycling removal from the unit shall be the responsibility of the Tenants and may be stored in the bins provided at the front of the premises. No garbage may be kept or stored outside the unit; this includes back yard, front porch, front hail, or the basement.
>
> 3. The Tenant agrees:
>
> > a. to mow and water the lawn and to keep the lawn, garden, flower beds, and shrubbery in good condition, and to keep

> the sidewalk surrounding the premises free and clear of all obstructions including the removal of snow; and
>
> 4. The Tenants are responsible for ordinary cleanliness of the premises including the back yard and front porch. The tenants are responsible for the repair of damage caused by the willful or negligent conduct of the Tenants, or persons permitted on the premises by the Tenants.
>
> .....
>
> 6. The Tenants are responsible for keeping all smoke and carbon monoxide detectors in good working order at all times.
>
> 7. The Tenants agree that they will leave the premises and appliances in a state of good repair and cleanliness.
>
> .....
>
> 10. Upon vacating, the Tenants are responsible for emptying the unit and fridge of all personal property and contents.
>
> 11. The Landlord agrees to repair any deficiency or deterioration of the property upon notice in writing, which is due to reasonable wear and tear.

[8] I will return to some of these rules later. One significant item that is missing from these rules is any prohibition against smoking in the unit, which became an issue during and after the tenancy.

[9] Attached to the lease is an Inspection Report initialled by both parties, which was prepared before the lease began. The condition of the unit was universally noted as in good condition. This form also noted that the Landlord was committed to installing a new washer and dryer, and to replacing a bedroom door frame. The Tenants acknowledged a missing light/fan fixture in the living room, that they “have no issue with.”

[10] The Landlord also provided the court with photos of the unit before these tenants took possession, which show the unit in a spotless condition. By the end of the tenancy, it was anything but spotless.

[11] The new washer and dryer, that the Landlord had promised, became a highly controversial issue. The appliances were a matched, stackable set which included a ventless dryer. They were installed in the living room, near the kitchen, which surprised the Tenants, although there is no evidence that suggests where else they might have fit and had access to a water supply. These appliances are compact and designed to fit in small spaces.

[12] As its name suggests, the exhausted air from the dryer is not vented to the outside but re-circulates in the apartment. The Tenants believe that this caused excess moisture in the unit which led to a major increase in their electric costs and which (they say) explains mold buildup on various walls and baseboards. They say that they had to run the heat pump on air conditioning mode for hours after every time they used the dryer, in all seasons, to take advantage of the dehumidification that such air conditioning supplies.

[13] I take notice of the fact that ventless technology does not so naively ignore the issue of humidity. These machines are designed to extract the water and condense it, using one of several technologies to do so. I must conclude first of all that either the Tenants did not understand the technology that they were using, or that they did not operate it correctly or - just possibly - that it was not working properly and they failed to do anything about it. Such machines would have been under warranty and had the Landlord known that there was a potential malfunction, I have no doubt that he would have had the dryer professionally serviced. In fact, at no time does it appear that the Tenants made any complaint or even comment to the Landlord about the washer or dryer, which reduces the credibility of any complaints made after the fact. The parties were in communication via email, and it would have been very easy for the Tenants to let the Landlord know there was a problem, had there been one.

[14] The Tenants say that because of all the extra air conditioning, during all seasons, they incurred a large increase in expected power costs, about $100.00 per month more than the prior year period, which is one of the items they claimed in their counterclaim at Residential Tenancies and before me. The Tenants also claimed an abatement in rent because the washer and dryer took up several square feet of space, making their living room and eating area less usable. Given the small amount of space taken up, I consider this latter claim basically frivolous.

[15] I reject any claims by the Tenants based on the alleged shortcomings of the dryer. As noted, there is not a shred of evidence that they made any complaint about humidity during the tenancy. This silence is all the more telling given the fact that the Landlord was a very hands-on landlord, and apart from email there would have been many opportunities to raise the issue directly, had it really been an issue during the tenancy. My sense is that the Tenants eventually woke up to realize that they were in legal jeopardy, and sought to raise this issue, among others, as a bulwark against claims by the Landlord.

[16] The other abatement claims by the Tenants concern the yard and a deck. The Tenants say that they were promised a usable yard, and also a back and front deck. They say they had been led to believe that the yard would be grassed and suitable for their dog. They say that it was basically a wasteland of dirt and weeds, and to an extent littered with junk.

[17] The lease does not make any specific promises concerning the yard. In fact, it places the onus on the Tenants to keep the (non-existent) lawn mowed. I am not prepared to allow any abatement for the inadequacy of the yard, given that the Tenants would have seen exactly what they were getting. I also note that

for many months of the tenancy, the yard would have been snow or ice covered, and it would have made no difference whether or not there was grass.

[18] The Tenants also say that the heating system was inadequate, causing them to incur extra electricity for the use of space heaters. The evidence before me was that the unit was heated by a recently installed heat pump, of the type known as a mini-split. Such a unit could very likely supply all the heat needed for a 700-square foot apartment, but it stands to reason that if rooms are closed off the heated (or cooled) air might not seem adequate, at times, at the extremities of the space. The need for occasional supplementary heating is not surprising. I accept that possibly this may not have been the best choice for the unit, though the upstairs tenant testified that his space was well heated by a similar heat pump.

[19] Again, I have questions in my mind as to whether the Tenants fully understood how to use the heating system optimally. Also, there is no evidence that they brought this to the Landlord's attention at any time during the tenancy. Had they done so, the problem (if there was one) could have been addressed. It seems fundamentally unfair to penalize the Landlord on this basis, and I reject any abatement based on inadequate heating or excess heating costs. I also have questions in my mind as to whether the comparison of heating costs to the previous year was a fair one, as the evidence was unclear as to when the heat pump was installed to replace the baseboard system which was using oil, not electricity. It is logical to expect electricity costs to increase once a system is installed that only runs on electricity.

[20] The inadequacy of the back deck and entrance was the one item for which the Residential Tenancy Officer allowed an abatement, to the tune of $500.00.

On this point I find myself in total disagreement with the Residential Tenancy Officer.

[21] As the tenancy was concluding, the Tenants called the municipality to ask for an inspection of the unit. An inspector attended and made an order on June 20, 2017, ordering the correction of a number of deficiencies. Five deficiencies were noted:

a. A missing smoke alarm.
b. Dampness and mold growth inside.
c. Inadequate heating system.
d. An unspecified electrical problem.
e. Rear deck not bolted to house and structurally unsound.

[22] I will say more about items a. through d., but it was item e. that led to the Residential Tenancy Officer allowing a $500.00 abatement.

[23] The problem with this claim is that the Landlord and Tenants had a side agreement in December 2016 that the Tenants would fix it. The evidence of the Landlord was to the effect that he and Mr. Nickerson discussed it and arrived at a financial amount to compensate the Tenants for what was anticipated to be a small job. The structure had been disconnected at the request of the municipality, which was doing some street work that required the structure to be moved. The Landlord believed it would be simple to reattach it, and Mr. Nickerson seemed agreeable to doing it. This amount - possibly as little as $25.00 - was deducted from the rent. The evidence of Mr. Nickerson was that he only agreed to <u>try</u> and reattach it, and that it was too heavy to lift and so he did not proceed with the repair.

[24] I have two problems with the Tenants' position. Firstly, they received financial compensation in a negotiated amount to repair the very thing they complain of. It is not credible that the Landlord would have agreed to forego any amount of rent simply for an attempted repair. He reasonably believed that the Tenants would repair it. Secondly, at no time did the Tenants explain that they could not complete the repair. They never asked the Landlord to attend to it himself. I believe it is hypocritical of the Tenants to turn around and claim an abatement for the loss of this amenity. I disallow this claim by the Tenants.

[25] The other items in the municipal report suffer from similar problems. The noted lack of a smoke alarm is not the Landlord's fault. There was one there when the tenancy began. The Tenants in the lease terms quoted above agreed to maintain the smoke alarms. At some unspecified time, they disconnected a smoke alarm, evidently did not replace it, and never told the Landlord about it.

[26] The dampness and mold issue was real, but what the inspector would not have known (and arguably did not need to know) was that the Landlord had brought this to the attention of the Tenants on more than one occasion, based on his inspections, and had cautioned them to keep the interior less cluttered and to clean areas where mold seemed to be growing. There is no evidence that the Tenants did anything of the sort. Logically, mold growth occurs in high humidity conditions, but also occurs in areas where air is not allowed to circulate. The photos taken by the Landlord show the unit to have been extremely cluttered and in significant disarray.

[27] There is not a shred of evidence that the Tenants complained to the Landlord about this. I conclude that the Tenants did nothing to help themselves, such as by engaging in rigorous cleaning of the interior of the unit.

[28] Any claim based on the inadequacy of the heating system suffers from the same issue. It was never brought to the attention of the Landlord, who was given no opportunity to rectify it.

[29] In summary, I find no merit in any of the Tenants' abatement claims.

The Landlord's claims

[30] The Landlord's claims, as set out in a summary marked as exhibit 9, are fairly ambitious. As I will elaborate upon, I find some merit, but will allow much less than the Landlord is asking for.

[31] The entire unit was repainted after the Tenants vacated, in part because of yellowing from smoking. The Landlord claimed that there was a verbal understanding that the Tenants would only smoke outside. The Tenants deny this. On all of the evidence, I am satisfied that the Landlord neglected to put a no-smoking clause in the lease, which he could have done, and as an afterthought expressed a hope that the Tenants would restrict their smoking to outside. Given that the lease is silent on the issue of smoking, I find that the Tenants were under no such legal obligation, though it does appear that they sometimes smoked outside, which ironically created a problem for the upstairs neighbour because the smoke drifted upward and infiltrated their unit.

[32] To the extent that painting was necessary because of smoke, I disallow any claims.

[33] Other painting and repair to trim and drywall was necessary because of the mold. Once the Landlord regained possession, and partly in response to the order from the municipality, he pursued remediation. The following costs appear to have been related strictly to mold:

"Mold remediation by Matt"	$500.00
Baseboard trim replacement	$757.22

[34] I will allow these expenses.

[35] The Landlord claimed $3,754.25 to replace all of the laminate flooring. He said that the pieces abutting the baseboards were moldy, and could not simply be replaced because it is impossible to match them. Even though I hold the Tenants mostly responsible for allowing the mold to flourish unchecked, I find that the degree of this expense is not foreseeable, and will allow only $500.00 for flooring.

[36] The Landlord also claimed the cost of deck repairs and related shingle repairs, totalling just under $500.00. I accept that the Tenants agreed to attempt a repair, and that the Landlord may have believed that it would be done for a small amount of money. I also accept that the neglect of the repair likely led to the cost increasing. But there is blame to be shared, because the Landlord know or ought to have known that the Tenants were not going to look after it, and ought to have taken steps long before he did. I hold the Tenants responsible for $100.00 of this repair.

[37] The Landlord claimed $400.00 for debris and garbage removal. The Residential Tenancy Officer accepted $100.00 of this. I am satisfied that the Tenants left the premises in poor condition, which included debris and garbage. Some of it apparently predated this tenancy. As such, there is blame to be shared. It probably does not ask too much of the Tenants to undertake to get rid of some trash on the deck and in the yard, even though it was not of their making. The wording of paragraph 2 of the House Rules bears repeating:

> 2. Garbage and recycling removal from the unit shall be the responsibility of the Tenants and maybe stored in the bins provided at the front of the premises. No garbage may be kept or stored outside the unit; this includes back yard, front porch, front hail, or the basement.

[38] The Tenants did not fully observe this condition. On the other hand, the Landlord must have known that this stuff was not being moved. They appear to have been engaging in a game of “chicken” waiting for the other to do something about the garbage in the back yard, which may well have been there for more than a year before the Landlord eventually moved it out. Under the circumstances, I believe the Tenants should bear $200.00 of this cost.

[39] There is also a claim for pest control services. In a nutshell, the evidence established that the upper unit experienced an incursion of mice, which the Landlord attended to at his own expense. Ideally the lower unit ought to have been inspected and dealt with at the same time, but the Tenants were away and did not want the Landlord entering their unit. In the end, the Tenants’ unit was not treated until after they left.

[40] Again, it appears that there was significant mouse incursion in the Tenants’ unit, of which they never complained. Mr. Nickerson claimed that they did not notice any evidence of mice. If true, this speaks to the Tenants’ poor

observational skills and lax cleanliness standards. Even so, I do not believe the Landlord incurred any significant costs due to action or inaction on the part of the tenants. I believe that the Landlord would inevitably have incurred this expense, regardless of what the Tenants did or did not do. I do not believe the Landlord has succeeded in proving that the mice were only attracted to the building because of the way that the Tenants kept house, or left debris in the yard, none of which appears to have been food-related such that it might attract mice.

[41] By far the largest component of the Landlord's claim is for lost rent. He claims four months at a rate of $1,550.00 per month. It is his position that the Tenants left the premises in such poor shape that it took that long to clean it up and find a new tenant. Indeed, the new tenant is not yet in possession.

[42] I am willing to accept that the Landlord needed some time to clean, repair and paint the unit. I find four months to be excessive. A party such as the Landlord who incurs damages has a duty to mitigate those damages, by acting promptly. The evidence fell far short of convincing me that the unit needed to sit empty for four months. Part of this may be due to the fact that the Landlord was seeking to increase the rent considerably. This additional cost is not foreseeable. I am prepared to allow the Landlord one month at the rate that the Tenants were paying, namely $1,200.00.

[43] The last item in the Landlord's list of claims is $1,500.00 for a rent abatement that he proposes to extend to the upstairs tenant, who he believes has been significantly inconvenienced by the actions and inactions of the Tenants. This amount is not recoverable, because it has not actually been paid or even requested by the upstairs tenant. The Landlord may feel some moral obligation

to reward that tenant for his forbearance, but there is no legal obligation attached to that.

[44] In summary, I have allowed the Landlord the following damages:

Mold remediation	$500.00
Baseboard trim replacement	$757.22
Flooring	$500.00
deck repair	$100.00
Garbage removal	$200.00
Lost rent	$1,200.00
Total	$3,257.22

[45] As noted, I have disallowed all counterclaims by the Tenants. As there is a $600.00 security deposit, I find that the Landlord may retain this deposit and the Tenants shall pay to the Landlord $2,657.22. In light of mixed success, there will be no costs payable by either party.

Eric K. Slone, Adjudicator