

Claim No: SCCH - 482128

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Fisherman's Cove Development Association v. Burgess,*
2019 NSSM 3

BETWEEN:

FISHERMAN'S COVE DEVELOPMENT ASSOCIATION
as represented by MURRAY GORDON

Claimant

- and -

KELLY BURGESS

Defendant

REASONS FOR DECISION AND ORDER

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on January 8, 2019

Decision rendered on January 11, 2019

APPEARANCES

For the Claimant

Murray Gordon
Chair

For the Defendant

self-represented

BY THE COURT:

[1] The originally-named Claimant, Murray Gordon, is currently the Chair of the Fisherman's Cove Development Association ("the Association"), which is a non-profit society that manages a number of waterfront buildings in picturesque Eastern Passage, Nova Scotia. These buildings include a restaurant as well as a number of small units which are rented to artisans and others, mostly catering to tourist traffic.

[2] As the hearing progressed, it became obvious that the claim being pursued was not personal to Mr. Gordon, but rather was on behalf of the Association. As such, there being no prejudice to the Defendant, I ordered that the style of cause be amended to make clear that the actual Claimant is the Association and not Mr. Gordon personally.

[3] The Defendant is a visual artist who agreed to rent one of the units from the Association for the 2018 season. The lease was signed by her on June 1, 2018 running for a term of six months beginning June 1, and ending on November 30. The monthly rent was \$885.50, which included HST. Attached to the lease were terms and conditions, rules and regulations, which included the following:

Tenant shall not sublease all or any part of the Leased Premises, or assign this lease in whole or in part without Landlord's consent, such consent not to be unreasonably withheld or delayed. ...

[4] The interpretation of this provision will become critical as I lay out the events.

[5] Within about two months of starting, the Defendant came to realize that she was not selling enough art to viably continue in this endeavour. Knowing that she was tied in for another four months, she started to look around for a possible subtenant to take over her lease. She put a For Rent sign in her window and began using social media as well as the buy and sell website kijiji to let it be known that a sublet was available.

[6] Ms. Burgess's evidence is that the Association essentially shut down her efforts to find a subtenant, advising her that subletting was prohibited by her lease. At trial, the Association's witness testified to a slightly different version of the events. The individual involved, administrator Michelle Carbotte, testified that she only told Ms. Burgess that the Association would have to approve any subtenant. In the actual result, Ms. Burgess discontinued her efforts to find a subtenant and quietly vacated the premises at the end of July. The Association attempted to portray her leaving as a "midnight run," which characterization I believe to be unfair. She simply closed up shop at the end of a business day, packed up and left.

[7] During this time the Defendant had been in constant communication with the tenant of a nearby unit, Pumpkin Village, which was having trouble with their unit because of water damage to the floor caused by a tidal surge earlier in the year. Pumpkin Village was interested in taking over the Defendant's unit, and in fact did so about a month after the Defendant vacated.

[8] The claim brought by the Association is for three months of rent. They claim that they have suffered a rental loss of that amount, as a result of the Defendant vacating, crediting the security deposit equal to one month's rent.

The claim is for three month's rent, namely \$2,656.50. They say they made reasonable efforts to re-rent the unit in order to mitigate their losses, but no tenants were available given the lateness of the season.

[9] The Association takes the position that they do not have to account for the fact that Pumpkin Village took over the Defendant's unit, because that unit then became vacant, so from their point of view it was financially a wash - they were out three months of rent. In fact, after Pumpkin Village vacated its unit there were several weeks spent tearing up the floor and repairing damage. By then it was late in the season, and there would not have been any reasonable opportunity to re-rent that unit.

[10] In my opinion, the Claimant has fully mitigated its losses, and has no valid claim against the Defendant. By allowing Pumpkin Village to occupy the space, regardless of the fact that it had a lease on another unit, the Association essentially mitigated the rental loss that would otherwise have occurred. Looked at another way, they made it otherwise impossible for another tenant to take over the Defendant's unit, because it was occupied.

[11] Even had Pumpkin Village not come in and taken over that space, I would hold that the Association failed reasonably to mitigate its losses by preventing the Defendant from looking for a subtenant. The subletting clause attached to the lease is a standard one well familiar to lawyers and courts. It is not a prohibition against subletting; quite the contrary. It is a provision that ensures that the landlord has a right of veto, in the event a proposed subtenant is clearly unsuitable for any one of a number of reasons. But the provision is permissive and recognizes that subletting may be appropriate. I accept the evidence of Ms.

Burgess that her subletting efforts were shut down by the Association, and as such I find that the Association breached its obligations to Ms. Burgess and that alone would be enough to invalidate the claim for further rent.

[12] The appropriate response to the Defendant when she started looking for a subtenant would have been to say words to the effect: "*Great. Just make sure you let us know who you find so that we can ensure that they are suitable to the Association.*" Clearly, they communicated something very different to the Defendant with the result that they thwarted her effort to do the responsible thing and find another tenant to ensure the continuity of rent. The Defendant should not be punished, nor the Claimant rewarded, for the Association's improper interference with the subletting effort.

ORDER

[13] In the result, the claim should be and is hereby dismissed.

Eric K. Slone, Adjudicator