IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Livingstone v. Fraser and Josey*, 2020 NSSM 19

Date: 20200914
Claim: No. SCP 498142
Registry: Pictou

Between:

Joe Livingstone / Karen Greencorn

Appellant

And

Holly Fraser and Thomas Josey

Respondent

Adjudicator: Raffi A. Balmanoukian, Adjudicator

Heard: September 10, 2020, in Pictou, Nova Scotia (by teleconference)

Counsel: Joe Livingstone and Karen Greencorn, for themselves, Appellants
Holly Fraser and Thomas Josey, for themselves, Respondents

Balmanoukian, Adjudicator:

[1] Hatfields. McCoys. Honey badgers. Amateurs all, compared to the parties to this appeal.

[2] Holly Fraser and Thomas Josey are tenants of Joe Livingstone. Livingstone is generally an absentee landlord. In fact, the landlord and tenant have never personally met. Karen Greencorn, although named as an applicant and appellant, is Mr. Livingstone's property manager. Properly speaking, she is not a true party to these proceedings. She is, however, enmeshed nose-and-eyes in the dispute.

[3] And what a dispute it is. The players in this appeal agree on little, except their extreme animus towards each other. If they have any common ground at all, it is likely that each would prefer they had never met the other.

[4] At first instance, the Landlord sought to evict the tenants on an emergency basis. The application was filed on April 17, 2020 and heard by the Residential Tenancies Officer ("RTO") on May 7, 2020. Although the tenants did not participate in that appeal, the learned officer dismissed the application. He focused on the inability of the landlord to access the property when there was a flood in a downstairs unit (which may have been connected to acts or omissions in the

tenants' unit) on April 6, 2020. The officer recognized that while the relationship between Ms. Greencorn and the tenants was problematic, "I do not accept that those concerns should amount to the nuclear option of having this tenant vacate."

[5] The landlord appealed. This hearing proceeded *de novo*, a procedure I had occasion to discuss recently in *Eastern Mainland Housing Authority v. Hadley*, 2019 NSSM 23. As emphasized by the Court of Appeal decisions cited therein, "the statutory appeal was a new 'proceeding' before the Small Claims Court." (*Patriquin v. Killam Properties Inc.*, 2014 NSCA 114). As I also noted in *Hadley* (at para. 20) this Court does not owe deference to any findings or analysis made in first instance by the Director.

[6] I pause to add that although an affidavit of service on file refers to Holly Fraser being "sreved," and attempted service on one "Snastasia Murphy," Mr. Josey acknowledged service at the pre-hearing conference and was prepared to participate in the appeal. His name is misspelled as "Jasey" in various documents, including the style of cause on appeal. I have effected this correction.

[7] The *de novo* hearing means that I have had the benefit of fulsome argument. As well, although not squarely at issue in either the hearing or appeal, in April 2020 two COVID-related rules were in place that are extant no longer: first, a

landlord could not evict a tenant for non-payment of rent if the tenant's income had been impacted by COVID (they could still evict for non-monetary breaches, or for monetary breaches if the tenant's income was not impacted); second, only "urgent or essential" applications were being heard, with a resultant constraint on availability of hearings.

[8] At a pre-hearing conference over which I presided on August 4, 2020 the respondent declined the Court's request for the parties to exchange documents and evidence in advance, given that the appeal would be heard by telephone. They claimed that their evidence would impeach evidence of the appellant. Accordingly, I directed that each party provide the Court with sealed copies of proposed exhibits which would be exchanged in real time by me at the time of the hearing. That was done by each side, and in turn the documentary exhibits were scanned and sent to each party by me at the commencement of the hearing. The exceptions were a CD containing police files, and a thumb drive showing an altercation between the tenants and Ms. Greencorn. The tenants were already familiar with the latter.

[9] At the opening of the hearing on September 10, 2020, I reviewed the procedural course the Court would be taking, the requirement for each party examining to ask questions rather than argue or make speeches (except at

summation), and for the party testifying or being cross-examined to present relevant evidence in a courteous and truthful way. I impressed on all present the need to treat each other and the Court with respect and to observe basic rules of civility and decorum. For the most part, all did so, although naturally there were moments of agitation. They did not descend into anarchy. For this restraint, I am grateful.

[10] I return to the 'exchange' of exhibits. As to the police CD, I consider it relevant only to the extent that it underscores the toxic relationship between Ms. Greencorn and the tenants. To date, while there may be pending charges, I understand there have been no relevant convictions. The presumption of innocence applies and I make no comment that could weigh on the outcome of independent proceedings with a different burden of proof.

[11] The balance of exhibits were texts and email exchanges, and certain Facebook posts. There was no 'smoking gun' or 'gotcha' moment in them, and each document had either been created by or was known to the other party (except, perhaps, for some Facebook posts that Ms. Fraser says were not created by her). I say this as the respondents said, at the hearing, that they had only their phones and had difficulty opening/reading the exhibits. They were, however, on notice as to how these materials were going to be distributed and in fact the methodology was a

result of their pre-hearing request. In any event, they had no difficulty following the proceedings, vociferously answering the questions raised from various emails/texts, and finding their own copies in their records. I reiterate, there was no "gotcha" in either side's exhibit package; the methodology insisted upon by the respondent (and paralleled by the appellant) served no meaningful purpose aside from underlining the distrust and animosity between the landlord and tenant.

[12] I will, usually, refer to these exhibits in general terms. I have reviewed them and the fact that I do not refer to each and every document or action simply means that I do not need to eat a whole egg to know that it is rotten. An overall synopsis will usually be adequate for the purposes of these reasons, and will keep to the 14 day timeline for disposing of this appeal pursuant to Section 17D(1) of the *Residential Tenancies Act*, RSNS 1989, c. 401 (the "RTA"). To that end, I now turn to the evidence.

Joseph Livingstone

[13] Joseph Livingstone testified first for the appellant. As noted, he brought limited personal knowledge to the proceedings. He described in general terms the tenants' late payment history, refusal to allow entry even on 24 hours' notice,

change of locks, and the problems that the property manager, Ms. Greencorn, had relayed to him as to foul language, harassment of other tenants, possible damage and drug use/smoking, late-night noise, and the like. He also said that he had to lock access to the electrical / utility room as he suspected the tenants were changing wiring, possibly to facilitate welding that Mr. Josey was doing on the deck.

[14] On cross examination, his most common response was "Karen [Greencorn] would know more about that," as indeed was the case. He also indicated that a prior eviction notice had been ignored.

[15] He testified about several instances of vandalism and damage in and about the property which were coincidentally on the heels of adverse encounters, but he had no evidence of the tenants' involvement, other than the circumstantial timeliness of such events and the lack of other history of damage to the property. Although I share this suspicion that such events do not pass the "smell test," suspicion alone is inadequate to affect the rights or obligations of the parties. It is not necessary to make any findings in this regard, and I do not do so.

[16] As noted, Mr. Livingstone and the tenants have never actually met in person.

Karen Greencorn

[17] Ms. Greencorn's role in this narrative has already been described. In her evidence, which took up about half of the 4.5 hours of the hearing, she took the Court through a comprehensive – and at times exhausting – review of the manager-tenant relationship. Included in that was a thick printout of emails, texts, and Facebook screenshots. She also presented photos of the recent state of the property.

[18] The written exchanges are mutually unprofessional, vulgar, unconstructive, toxic, and in many cases irrelevant to the topic under discussion. I emphasize that this criticism is mutual. It seems at many junctures, Ms. Greencorn's objective was to "poke the bear" and inflame the situation, referring to Ms. Fraser as "sweetie" and "obsessed with my life." Ms. Fraser gave as good as she got; and then some.

[19] Her more helpful evidence recounted that the landlord entered into a month-to-month lease with the respondents for the unit in question, at $1000.00 per month including heat, lights, and lawn care. The tenants are responsible for garbage removal, tenants' insurance, late payment fees, and snow removal. Two parking spots were included. The lease specified no smoking, and no pets.

[20] At some point at or near the beginning of the lease, the tenants wanted use of a shed on the property. It was agreed that if the tenants cleaned it up/out, they could use it. There was a dispute over whether this "use" was for Mr. Josey's tools, or for broader purposes.

[21] Eventually, the landlord discovered that the shed was full of garbage, of disputed origin. Ms. Greencorn testified that there were bags with "pull up" diapers in them, and accordingly they must belong to the tenants as none of the other tenants had children of corresponding age. There was a dispute over whether the tenants were entitled to reimbursement for cleaning and vacating (they claimed a credit of $300 for this), which was eventually resolved. Ms. Greencorn's testimony is that they paid a contractor, Scott MacNeil, $100 to remove the garbage. The lock was changed and, as alluded to above, mysteriously vandalized shortly thereafter.

[22] Rent was generally late, but within the "curative" period set out in the RTA s. 10(6) (that is, a landlord may not evict until it is at least 15 days past due, and the tenant has a minimum of 15 days thereafter to make payment in full, voiding the applicable "eviction for non-payment").

[23] To the tenants' thinking, the deprivation of the shed was a "discontinuance of a service" and thus a prohibited rental increase (RTA, s. 11(5)); and as long as the rent was paid within the curative period, it was not "late." This was recounted both in the documentary exhibits presented by Ms. Greencorn, and the tenants' evidence to which I will turn in due course.

[24] The tenants also complained of uneven water temperature in their shower. There was vague evidence of whether the tenants attempted their own investigation; however, the landlord's only response was apparently to determine that the temperature of the oil hot water system could not be adjusted at source without undue hardship to the other tenants.

[25] This is important as matters came to a head on April 6, 2020. On that date, the unit below the tenants' flooded. There was some indication that the water source was from the lower unit ceiling (that is, the respondents' floor), and Ms. Greencorn sought entry to the Josey/Fraser unit.

[26] It is, again, not necessary to go through the subsequent events in excruciating detail. It is adequate for current purposes to say that on April 13, 2020, Ms. Greencorn provided notice of entry for two days hence (the morning of April 15). Ms. Fraser turned her down flat – "no you are not coming in my house."

[27] There was a dispute over what happened next. The notice provided for 0800 on April 15; the plumber arrived at a disputed different (but close) time on that date, and following an altercation between Ms. Greencorn and the tenants (and a call to the police), the plumber was permitted to enter the premises. The plumber was not wearing Personal Protective Equipment (PPE) although he apparently had it available if needed. Ms. Greencorn was clothed with PPE.

[28] There was disputed evidence of how far Ms. Greencorn got into the house.

[29] Ms. Greencorn's daughter, Chantel, videotaped the event. It is in evidence. From what I saw, Ms. Greencorn made it to the top of the interior entry steps, but there is no indication beyond that (it does, however, contradict Ms. Greencorn's assertion that she did not go beyond the second step and her assertion that "I haven't been in your home since October"). What is clear is that Ms. Fraser was extremely agitated, saying, "get the fuck out of my house" several times and at top volume. At one point, she added "you dumb bitch." Upon being told that she had been given 24 hours' notice, she responded "I don't give a fuck." There is no mistaking the tone.

[30] Conversely, someone calmly told the plumber "you're allowed in." He entered and does not appear to have been impeded.

[31] The video also captures at least part of a phone call from Ms. Fraser to police authorities, asking for police presence, outlining that Ms. Greencorn "forced her way into my house" and asking that charges be laid. During at least this part of the encounter, Ms. Greencorn remained on top of the steps and does not appear to be making further effort to make ingress. Ms. Greencorn alleges she was shoved twice by Ms. Fraser. The video is indeterminate on that point.

[32] The landlord applied to the RTO on April 17, 2020, with the outcome previously noted.

[33] There have been other disputes which can be classified globally as "passive aggressive" by both parties. The tenants complain that they are not allowed pets, while another unit has a pet; that they have been called upon to provide proof of tenants' insurance (which apparently has not been delivered) when they don't know if other tenants have been asked as well; that vehicles are in the wrong spot (with or without the consent of other tenants); that green bins are misplaced or ill-kept; that the area around the oil tank is cluttered; that cars have been on the lawn (slightly or not-so-slightly); that there is garbage on the deck; that both the tenants and Ms. Greencorn are "stalking" each other with drive-bys and on social media; and generally making each other's lives miserable. At least one email from Ms. Fraser refers to Ms. Greencorn as "petty." I will return to this in my disposition.

Chantel Greencorn and Courtney Greencorn

[34] Ms. Greencorn's daughters' testimony may conveniently be considered together. Both were on the premises on April 15, 2020. Chantel Greencorn created the video noted above and recounted that the plumber was not wearing PPE but Karen Greencorn was (mask and gloves, both clearly visible). On cross-examination, Chantel Greencorn said she "thinks" she was the one who told the plumber he could go in.

[35] Courtney Greencorn remained in the Greencorns' car as a witness and, if necessary, to call police. She ultimately did call the non-emergency police line – when asked on cross-examination about why she did so if tempers were so elevated instead of the emergency 911 line, she replied, "nobody's life was in danger."

Holly Fraser

[36] Ms. Fraser is, of course, one of the tenants and the protagonist from the tenants' perspective.

[37] She opened her testimony by apologizing for her "cursing" and that she had been "dealing with a lot of drama."

[38] With respect to the hot water in the shower, she explained that she said that she wanted it fixed, not that Mr. Josey would "open it up." Ultimately, as will become clear, this does not matter in terms of the right of the landlord, on notice or in case of emergency, to access the unit.

[39] Ms. Fraser's testimony was that "things changed when Karen said 'you may have won the hearing but you haven't won the war'." She also alleged that Ms. Greencorn had fully entered the premises on April 6 (the date of the downstairs flood), spending ten minutes at the rear of the unit, discussing the back yard and drainage issues. She said that she, Fraser, let Greencorn in "because it was an emergency."

[40] On cross-examination, Ms. Fraser admitted that rent was usually late (although disputing what 'late' meant, discussed above); she emphasized that on the first occasion, she offered an extra $100 as an apology which the landlord had declined to accept; she took this as a waiver for subsequent occasions, and thus took umbrage when the landlord wanted a $10 (1%) late fee later. Again, there are agitated emails/texts in evidence on this point.

[41] She maintained that the shed was "included" in the lease.

[42] When asked “did we have civilized conversation” on April 15, Ms. Fraser’s answer was, “yes, I calmly asked you to get out.”

[43] She denied calling Ms. Greencorn’s place of employment. She had a Facebook post to the contrary; she went on to say “my Facebook is none of your business, but I didn’t call your employer.” She later took umbrage at this surveillance, as Ms. Greencorn, her family, “and everyone close to you” had been blocked by Ms. Fraser and that she should “leave me alone.” At one point in cross examination, she exclaimed, “why are you following my life?”

[44] She denied some postings, as “anyone can make up a Facebook account.”

[45] She denied interfering with an attempt by Ms. Greencorn to rent another unit in the building to one Katelyn Kirk. When presented with emails telling (not asking) Ms. Greencorn to “find someone else,” and that Ms. Greencorn “can’t put her in below me” because “I don’t like her,” she said that it was “reverse psychology” since she in fact liked Ms. Kirk.

[46] She also denied any complaints from or about other tenants, including guitar playing in another unit (“only at first”), dog feces on the property (“It wasn’t an official complaint, I was just talking to you”), or that there were problems with allocation of parking facilities.

Thomas Josey

[47] Mr. Josey, the co-tenant, gave evidence which added some detail to the dispute. While he was not the author of the email/text spitballs, he was present for most of the substantive disputes.

[48] His assertion was that the shed was "included" in the rent and that the verbal contract was "you can use it if we cleaned it up." Only one bag of garbage, according to him, belonged to him and there "were no rules about what we could use it for." He reiterated his view that "they unlawfully took my shed from me" and this constituted a rent increase.

[49] The tools (and admitted welding equipment) are now on their deck – along with garbage – because the shed is denied them. He says that his welder is a low-voltage one, that he uses a decommissioned dishwasher for on-deck welding and has flash guards for the welding he does in the driveway. He denies interfering with the wiring in the house, although he takes the view that he is wrongfully denied access to the "common area" that houses the utilities. He blames the frequent tripped circuit breakers on air conditioning units in other apartments.

[50] He further denies smoking, sabotage, or bad relations with other tenants. He believes the present application is to make the apartment available for the downstairs tenant, who at least at one time expressed an interest in switching units.

[51] He describes Ms. Greencorn's access attempts as a "power grab" and that she is "picking on us" for such items as the green bin, driving on the lawn, etc. He says "if we could find a decent place in our school district, we would."

[52] On cross-examination, he reiterated this last sentiment. There had been a tentative agreement to move by September 30, which he referred to as "murky waters" and that he would happily "leave the property and YOU [Greencorn] if we could."

Analysis

[53] Everyone involved in this dispute needs to grow up.

[54] In *Colley v. Metro Regional Housing Authority*, 2019 NSSM 24, Adjudicator Richardson was faced with a vulgar, obnoxious tenant and discussed whether this constituted a violation of the "good behavior" statutory condition in the standard form of lease. He had little hesitation in finding that it did. I agree.

[55] There is clear and convincing evidence that this is a toxic relationship; that the tenants are staying because they feel they "have to, not because they want to." The sheer volume and pettiness of emails and texts make this patent.

[56] I respectfully differ with the RTO that this is not a situation which calls for the "nuclear" remedy of eviction. There is a clear violation of not just one, but several statutory conditions.

[57] Good behavior is one of them. In saying this, I am in no way making a finding of "who started it" or excusing Ms. Greencorn's failure to take the high road. Both are mudwrestling and I wouldn't want to do business with any of them. I am also satisfied that at least some of the items at issue – such as $10 late payment fees and placement of green bins – are petty and minor and intended to inflame and agitate rather than to provide peace, order, and good property management. This is a property, not a kindergarten.

[58] However, it is equally clear that the tenant is under several misapprehensions in fact and in law, and these have constituted violations of the lease.

[59] These include ordinary cleanliness (condition 4) – while the condition refers to the "interior of the premises," I am satisfied from the photographic evidence that

the tenant has also created havoc in and around the premises, including a vehicle in various states of (dis)repair, garbage on the deck, etc. The fact that the condition refers to the "interior" does not entitle a tenant to make the exterior of the property a disaster area.

[60] The tenant has also violated condition 7 (b). This allows the landlord to enter for any reason on 24 hours' notice. This is not limited to emergency situations, repairs, or marketing. It is also not "paused" during the COVID-19 pandemic unless there is a public health order to the contrary. If landlords or tenants have safety or distancing concerns, it is incumbent upon them to have appropriate arrangements in place with respect to being in different places and/or having appropriate PPE at the time of any access. It is telling that Greencorn, clad in PPE (and a health care worker) was barred entry but the plumber was not so clad, nor so denied.

[61] The tenant has also not denied changing locks without the landlord's consent (condition 8).

[62] I also find that the tenant has a convenient, and often incorrect, understanding of the tenants' rights and obligations. I have discussed access and good behavior already.

[63] They are also incorrect that rent is not "late" as long as it is paid within the curative period. Late is still late – the landlord simply does not have a right to serve a notice of eviction for late payment until it is at least 15 days late, and it cannot be effective for at least another 15 days (and is void if the rent is paid up to date by the end of the notice period).

[64] A utility area, or other area that is not "part of an apartment" does not automatically become a "common area" available to all. It simply means that it is not under the exclusive sovereignty of one tenant or another.

[65] I need not make any finding on whether the shed was "included" or not, or what the scope of permitted use was to be. At best, it would have been prudent for the parties to address this in the lease. Were I required to make such a finding, it is more likely than not that the shed was an "add on" after the parties had reached their agreement on the unit itself.

[66] Lastly, while I again have a great deal of difficulty with Ms. Greencorn's conduct and approach, and she is incorrect as to the level of her entry on April 15, 2020 (second step versus top of steps), some of Ms. Fraser's and to a lesser extent, Mr. Josey's testimony is simply incredible. I do not believe her "reverse psychology" assertions for one minute – I believe she considered the entire

structure to be her fiefdom to do with as she sees fit, including who can and cannot live in other units. Her tone and speech on April 15, 2020 telling Ms. Greencorn repeatedly to "get the fuck out of my house" does not meet any definition of "I calmly asked you to get out."

Disposition

[67] As noted, I owe no deference to the RTO. I have, however, considered his decision and reasons, and I have done so with respect. He does not appear to have had the benefit of all of the evidence and submissions as have I, nor the same level of opportunity to hear all of the witnesses and to hear them subject to cross-examination.

[68] His characterization of eviction as a "nuclear" remedy may be apt. This relationship, however, is more akin to another cold war stratagem, namely that of mutually assured destruction. There is no room for détente. And the demised premises will never be Hofdi House.

[69] Section 17D(1)(b) of the RTA empowers me to "make any order the Director could have made." Those powers, in turn, are set out in Section 17A.

[70] Among other things, I can order one party or another to comply with the lease or a condition at law. I can order one party or another to cease and desist – in effect, to "sin no more." I can order the payment of money. I can order repairs. I can order compensation "as a direct result of the breach." And I can order termination of the lease "on a date specified in the order."

[71] Having found breaches by the tenant, I am satisfied that in this instance the relationship is irreparable. If anything, it continues to deteriorate. No finger wagging or sermonizing by me will have a reasonable prospect of bringing peace in our time. Perhaps the most candor of all was contained in Mr. Josey's assertion that if they could move and "leave the property and YOU," they would.

[72] Mr. Livingstone says, correctly, that any particular requirements (as to location, pricing, school districts, etc.) of the tenant are "not his problem." That said, however, I disagree that his request for "a five day eviction" is reasonable in the circumstances.

[73] It would have been helpful and probably welcome to all if the originally mooted scenario under which the tenants would vacate by the first month of the school year had come to pass. It did not. I am mindful that one of the infant occupants has special developmental needs. However, I am also mindful that the

current educational regime is in flux, to put it mildly, and various schooling arrangements – including distance education - are in place as health and safety protocols evolve.

[74] I believe that an order to vacate on or before October 31, 2020 fairly balances the equities – and inequities – at hand in this case. While I have concluded that eviction is the only reasonable remedy here, I am cognizant that the landlord's manager has not been without sin.

[75] I also note that this would be the one year anniversary of the lease. Had the landlord possessed the prudence to have entered into a fixed-term rather than periodic lease, a one-year fixed term lease would have made moot any issues of tenure. It simply would have come to an end and I'm quite confident would not have been renewed; an absence of acceptable alternatives to the tenant would be of no concern to or obligation of the landlord. I also note that if the tenant was able to move in without scholastic interference in November, presumably the same can be said for moving out.

[76] For clarity, the parties' rights and obligations under the lease including payment of rent, good behavior, access, etc. remain in place until October 31, 2020. I also order the tenant immediately to remove the locks they switched out,

or to provide the landlord forthwith with a full set of working keys, at the tenants' expense.

[77] I only have jurisdiction over costs insofar as it pertains to filing fees. I order none.

Balmanoukian, Adj.