2021 Claim No. 504754

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *MacAdams v. Inglis*, 2021 NSSM 25

BETWEEN:

DUNCAN B. MACADAMS

Appellant/Landlord

- and -

HAYLEY INGLIS, MACKENZIE CORNFIELD and KAVITA KRUEGER

Respondents/Tenants

Hearing Dates: June 23 and 30, 2021

Appearances:
Appellant – Self Represented
Respondents – Mark Culligan, Community Legal Worker, Dalhousie Legal Aid Services

ORDER and DECISION

[1] This is an appeal of an Order of the Director of Residential Tenancies dated February 24, 2021. In that decision, the Residential Tenancy Officer ordered the Landlord to pay to each of the three Tenants the sums set out in the decision, being $491.90 to Ms. Inglis, $1,333.50 to Ms. Cornfield, and $2,059.70 to Ms. Krueger.

[2] This case engages Section 10C of the Nova Scotia *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, a section that has been considered in several decisions of this Court as well as in one case from the Nova Scotia Supreme Court – *GNF*

Investments v. Vriend, 2016 NSSC 116, a decision of the Honourable Justice Suzanne Hood.

[3] Section 10C of the *Act* enables a tenant to terminate a tenancy if she has a health issue that, that in the opinion of a medical practitioner, results in the inability of the tenant to continue the lease.

[4] In this case, the Landlord takes the position that the Tenant must, before invoking Section 10C, provide the Landlord with an opportunity to remedy the issue or issues with the premises before terminating the Lease. As I will outline in greater detail below, I would find that the Landlord here effectively had such an opportunity but did not respond to it. Moreover, I am not convinced that on a proper interpretation of the provision in question, that it goes so far as suggested by the Landlord in his submissions.

[5] The Landlord also asserts that the Order under appeal double compensates the Tenants in respect of the application fees.

Analysis

[6] I start with Section 10C which reads as follows:

> ***Early termination for health reasons***
>
> *10C (1) Notwithstanding Section 10, where a tenant or a family member residing in the same residential premises in a year-to-year or fixed-term tenancy has suffered a significant deterioration in health that, in the opinion of a medical practitioner, results in the inability of the tenant to continue the lease or where the residential premises are rendered inaccessible to the tenant, the tenant may terminate the tenancy by giving the owner*
>
> *(a) one month's notice to quit, in the form prescribed in the regulations;*

> *(b) a certificate of a qualified medical practitioner, in the form prescribed by regulation, evidencing the significant deterioration of health; and*
>
> *(c) proof of service, in the form prescribed by regulation, of all the tenants in the same residential premises with a copy of the notice to quit.*
>
> *(2) Where a tenancy is terminated pursuant to subsection (1), the tenancy is terminated for all the tenants in the same residential premises, but the other tenants may enter a new landlord and tenant relationship with the landlord with the consent of the landlord, which consent must not be arbitrarily or unreasonably withheld.*
>
> *(3) Where other tenants reside in the same residential premises, the tenant seeking to terminate a tenancy pursuant to this Section shall serve all the tenants in the same residential premises with a copy of the notice to quit at least one month before the termination of tenancy.*

[7] As will be seen there are basically three requirements to invoke this Section:

1. One month's notice of termination;
2. A certificate from a qualified medical practitioner in the form prescribed by the regulation;
3. Proof of service of the termination notice on all the other tenants in the premises.

[8] All of these three requirements have been satisfied here. Therefore, on the face of it at least, Hayley Inglis had a legitimate basis to terminate the tenancy. I would note here as well that, by virtue of 10C(2), the tenancy was also terminated for all the other tenants in those premises.

[9] However, in addition to these requirements set out in the *Act*, decisions of this Court and from the Nova Scotia Supreme Court have determined that more

may be required than this. In the Supreme Court case where the section has been considered - *GNF Investments v. Vriend* - Justice Hood states:

> *[6] The role of the adjudicator is to assess the evidence and not just accept the opinion of the medical doctor. The adjudicator can go behind it and the landlord has a right to question it. I agree with Adjudicator Slone when he said in GNF v. Rossell, supra, at para. 22:*
>
> > *[22] In my respectful view, the legislature did not intend that the physician's certificate would be a full and final answer to the question. While it was intended that the certificate carry weight, it was not intended that it be an impenetrable wall behind which no one could go. That interpretation would amount to a wholesale delegation of authority to the physician and a total derogation of authority from the Residential Tenancy Officer and this Court. I find that this was not the intention.*
>
> . . .
>
> *[10] ...The purpose of the Residential Tenancies Act is to provide an efficient and cost-effective means of settling landlord/tenant disputes. There must be a balance between the health effects to the tenant of continuing the tenancy and the landlord's right to have the contract, that is the lease, continue.*
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> *[11] As Adjudicator Slone said in GNF v. Rossell at paras. 20 and 21:*
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> > *[20] The Residential Tenancy Officer and, by extension this Court, must strike a proper balance between the rights of the tenant (here Ms. Rossell) and those of the Landlord. The tenant is entitled to have her rights and privacy respected, and to have the opinion of her physician accepted at face value. The Landlord, on the other hand, must be entitled to question whether there is any justice in forcing it to incur the financial cost associated with an abrupt disruption of its flow of rent.*
> >
> > *[21] In my view, this balance is achieved by allowing the Landlord to raise the question: what deterioration in health have you suffered, and how are you unable to continue the tenancy, or how is my premises no longer accessible to you? These elementary questions may (and should) be asked immediately upon the landlord learning that the tenant intends to invoke s.10C, and may be renewed at the hearing before the Residential Tenancy Officer or the Small Claims Court. And these questions should be answered with enough information that would potentially satisfy a reasonable third party. Of course, there are privacy considerations, but when a tenant is potentially asking a landlord to incur significant financial costs associated with the tenant's deteriorated health, a reasonable*

amount of information must be provided.

[10] As I view it, the basic principle that emerges from Justice Hood's comments and the approach to be taken in these cases is that the Form H physician's certificate is not to be considered as impenetrable but, on the other hand, the details of the patient's condition are to be limited to a fairly narrow area of inquiry relating to the deterioration of health and how that relates to the inability to continue the tenancy. I will state here that I consider that the evidence of Ms. Inglis, in this Court, and below, satisfactorily addresses the requirement to assess the evidence in this regard.

[11] However, as alluded to above, the Landlord takes the position that there was a duty on a Tenant to give the Landlord an opportunity to attempt to rectify the problem and salvage the tenancy and this did not occur here. The Landlord relies particularly on the Small Claims decisions of *Arab v. MB*, 2016 NSSM 51 and the case of *GFN Investments Limited v. Rossell*, 2015 NSSM 54.

[12] I have carefully reviewed those decisions and respectfully, cannot adopt the finding that there is such an obligation to provide the landlord with an opportunity to remedy the premises. Further, I do not read Justice Hood's decision in ***Vriend*** as endorsing such a duty. I recognize that she does refer approvingly to paragraph 21 from the *Rossell* case which refers to the landlord asking questions as soon as he or she learns that the tenant intends to invoke Section 10C. However, that, in my view, is separate and distinct and does not go so far as imposing a duty on the tenant to give the landlord an opportunity to remedy.

[13] In my respectful opinion, importing such an obligation reads too much into the legislation.

[14] The exercise of statutory interpretation has been referred to in many court cases. One of the leading statements is found in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, where the Supreme Court of Canada stated as follows:

> [21] *Although much has been written about the interpretation of legislation [...]Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:*
>
> > *Today there is only one principle or approach, namely,* ***the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.***
>
> [Emphasis added]

[15] Another source of guidance is the Nova Scotia In*terpretation Act,* R.S.N.S. 1989, c. 235, specifically s. 9(5), which reads:

> *9 (5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters*
>
> *(a) the occasion and necessity for the enactment;*
>
> *(b) the circumstances existing at the time it was passed;*
>
> *(c) the mischief to be remedied;*
>
> *(d) the object to be attained;*
>
> *(e) the former law, including other enactments upon the same or similar subjects;*
>
> *(f) the consequences of a particular interpretation; and*
>
> *(g) the history of legislation on the subject.*

[16] I would note particularly clause (f) of Section 9(5) of the *Interpretation Act*, the "*consequence of a particular interpretation*". When one considers the consequences of what is being suggested by the Landlord here, a number of questions arise.

[17] For example, if there were such a duty to advise by the tenant, is such a notice to be given verbally or in writing? It is to be recognized that in nearly every instance where a notice is to be given by one of the parties under the *Act*, it must be given in writing.

[18] I would further note that many of these are required to in prescribed forms. It would seem that one of the themes of this legislation is that by giving notices in accordance with prescribed forms, there is less chance of ambiguity or lack of clarity in the information being communicated from one party to another. One presumes that the intention of that is to eliminate or reduce disagreement about what was actually communicated.

[19] I would note that there are several other provisions for early termination in the *Residential Tenancies Act*, including early termination upon income reduction as outlined in Section 10B, early termination upon acceptance into a home – Section 10D, early termination for domestic violence reasons – Section 10F. These provisions are all premised on either a certificate from medical practitioners or proof of acceptance in a nursing home or a certificate from the Director of Victim Services. There are features in common between all of these provisions with an overall theme of efficiency being evident. Surely that is a factor to be considered in arriving at the appropriate balance between the tenant's rights and the landlord's rights, as noted by Justice Hood in *Vriend* at para. 10.

[20] A further question is how long does would the Landlord have to remedy the supposed issue? While one would potentially answer that rhetorical question with a "reasonable amount of time," what is reasonable in the circumstances? Would it vary in different cases with different circumstances?

[21] Then, if the Landlord does take some steps to remediate the issue causing the deterioration in health, what if it is not done satisfactorily? What if there continued to be detrimental effects on the health? Should a tenant be forced to wait and potentially suffer through a two or three month, or a longer period while the landlord attempts to remedy the issue, bearing in mind that the *Act* itself mandates a one-month notice period.

[22] A related question - what if the evidence showed that it was highly unlikely that any remediation by the landlord would have made a difference to the tenant's health issues. In such a case, if the tenant failed to give the suggested notice to the landlord, how would justice be served by denying the tenant the statutory right to early termination in s. 10C?

[23] It would seem that if there were such an obligation as argued here, the landlord should be required to prove that, had he known, he could have solved the issue and in short order.

[24] In this present case, the landlord has not proven that he could have solved the rodent issue to a level that would have ameliorated the Tenant's health issues. Indeed, in his written submission, he states:

> *As for the mouse infestation, the issue was already being addressed by a pest control expert, and would <u>eventually</u> have been rectified.*

[25] There are two difficulties with this statement. First, the evidence did not establish the assertion. Secondly, even if accepted, I don't consider that an "eventual" solution meets the standard intended by s. 10C, which as already pointed out, provides for a one month notice of termination.

[26] A further question relates to situations where the premises in question do not have any issues that would be considered defective but rather, happen to have some feature of the interior or exterior of the premises, or surrounding environmental conditions, which contributes to the tenant's deterioration in health. Would the tenant be required in those type of cases to give notice to remedy? Indeed in the *Vriend* case, Justice Hood dealt with such a case and stated(para.12):

> *[12] In my view, there is nothing in the legislation which would lead me to conclude that there must be some problem associated with the physical premises before s. 10C can apply. The wording of s. 10C is not to that effect.*

[27] One can imagine a number of other thorny issues that could arise in implementing this supposed obligation.

[28] The significant point that emerges from the foregoing comments and in discussing and addressing these type of issues, is that the Court is effectively stepping into the shoes of the legislator. That is not the Court's role. The Court does not make legislation. The Court interprets and applies legislation.

[29] I do not accept that that there is a general duty for a tenant to give the landlord an opportunity to remediate in these type of cases.

[30] If I am wrong in my conclusion on that issue, and if there is such a requirement, in my view, it was satisfied here.

[31] First, there is the Tenants' letter of October 16th which clearly raised a number of issues and was sent by registered mail to the proper address of the Landlord. Mr. MacAdams says he never received the letter. But, given that it was sent to the correct address in accordance with the terms of the lease should that affect the legitimacy of the giving of the notice? And, on the Landlord's own evidence, he never advised the Tenants of a different address. I consider the Tenant did all that was legally required to effectively transmit the letter to the attention of the Landlord.

[32] In addition to that letter, it is clear that the Landlord was aware and has been aware of a rodent issue for a considerable period of time. While Mr. MacAdams gave high praise to his pest control contractor, the reality is that Ms. Inglis had mice crawling around her bedroom to such an extent that she kept a flashlight with her every night, she frequently could not sleep, on one occasion she accidentally walked over or kicked a mouse in her room (killing it in the process), and on many occasions found mice droppings either in her bedroom or in the other rooms. This caused her great anxiety which, until she saw Dr. Awalt, was not a term or condition that she had herself considered.

[33] I should also state here that I consider Ms. Inglis' evidence to be very credible. And, she was not really challenged on any of the effects and statements that she made with respect to the rodent and other issues.

[34] There was also the issue of the mold in the second bathroom which was verbally communicated to Tim Hickey, an employee of the Landlord. When this evidence was initially given, the Landlord responded in strong terms that there would be evidence to the contrary from Mr. Hickey, yet, Mr. Hickey was not called at all. In light of that I make an inference that Mr. Hickey's evidence would

not have been favourable on this point. I conclude that Mr. Hickey did have notice of the mold issue for some considerable period of time and did nothing about it. The mold issue also contributed to Ms. Inglis' level of stress and deterioration in health.

[35] For all these reasons I find that the termination of the Lease, pursuant to s. 10C of the *Residential Tenancies Act*, was valid.

[36] I also note that the allegation on the Notice of Appeal that the decision under appeal awarded double compensation for the deposit is not well founded. The amounts requested in 2020 for the 2020-2021 Lease are set out in an email dated May 1st from Brita Young to Hayley Inglis. In that email the requirement was to pay $670, representing half of the September rent less the $75 deposit. Doing the math, $1490 divided by 2 equals $745, less $75, equals $670.

[37] The evidence clearly showed that Ms. Inglis did in fact pay $670 on May 31, 2020, and she had previously paid $75 on April 3, 2020.

[38] In the Residential Tenancy Officer's decision, reference is made to Section 6(1) of the *Residential Tenancies Act* which sets out an absolute prohibition against charging of application fees:

> ***APPLICATION FEE***
>
> *Prohibition*
>
> *6 (1) No person shall demand, accept or receive, from an individual who may, or applies to, become a tenant of that person, a sum of money or other value in consideration of or respecting the application by the individual to become a tenant of that person.*

[39] The $75.00 fee was an application fee. It must be re-paid.

[40] The Residential Tenancies Officer also refers in para. 24 to what she refers to as the charging of the first month's rent prior to commencement of the tenancy. The way the Landlord explained it is that, in effect at least, under his leases, which are typically for a 12 month fixed term, the tenant pays double the regular rent for the first month, the regular rent for months 2 – 11 and $1.00 for the 12th month. This is explained in the email dated June 14, 2019, sent to Ms. Inglis. It reads:

> *The lease term will run from September 2019 through August 2020 and is valued at $8,341. Your rent includes water, HW, heat and power. There is complementary WIFI and a coin laundry in the building.*
>
> *Therefore, on signing the lease, you should provide:*
>
> - *Payment of $967.50 representing $695 which is half of your September rent, plus your $347.50 security deposit, less the $75 deposit which you provided with your application;*
> - *payments (11) of $695 for each of September 2019 (balance) through July 2020; and*
> - *Payment (1) of $1.00 for August 2020.*

[41] What came out and it is clear based on the evidence is that the Landlord's rental arrangement, as shown in this email to Ms. Inglis, contemplated "rent" of $1,390 for September, 2019, $695 for each of October, 2019 – July,2020, and rent of $1.00 for August, 2020.

[42] The Landlord required one-half of the "regular" monthly rent of $695, being $347.50 for a security deposit, plus one-half of the September rent in

advance, which is equivalent to a full months regular rent, $695. As correctly pointed out in paragraph 24 of the decision of the Residential Tenancy Officer, this is prohibited under Section 12(1) and 12(2) of the *Act*.

[43] Those provisions read:

> *12 (1) Where a landlord obtains from a tenant any sum of money or other value that is in addition to the rent payable in respect of the residential premises the sum of money or value is deemed to be a security deposit.*
>
> *(2) No landlord shall demand, accept or receive from a tenant as a security deposit a sum of money or other value that is in excess of one half of the rent per month that is or would be required to be paid for the residential premises*.

[44] The Landlord asserts that there is nothing in the *Residential Tenancies Act* which prohibits charging unequal amounts of monthly rent. However, the difficulty with what the Landlord is doing here is that it effectively operates to provide him with a security deposit of 150% of the regular rent. This contravenes Section 12(2) of the *Act* which limits the security deposit to one-half, or 50%, of the monthly rental.

[45] The law looks to substance, not form. In my view, by calling the extra payment for the first month "rent" does not, change the substance of the transaction. It is an additional security deposit.

[46] I dealt with a somewhat similar issue in the case of ***Maitland v. Templeton Place Ltd.***, 2016 NSSM 24. In that case the Landlord was charging three months "pre-paid rent". I will quote at some length from that decision as I consider it instructive to how the Tenants were being charged under this present case:

[7] The third item involves the issue of prepaid rent. The evidence, agreed to by both sides, was that this Tenant was required to not only submit a security deposit representing one-half of the first month's rent, but was also required and did pay what amounted to three months' rent, which sum was referred to as prepaid rent.

[8] Nowhere was this requirement to pay this sum of three months' rent documented in writing.

[9] The Landlord characterizes this three months' payment as prepaid rent. He asserts it is neither an application fee nor a security deposit. The Landlord explained that this amount, representing three months' of rent, is applied to the last three months, whenever they might be, of the Tenant's tenure.

[10] In my view, the Nova Scotia Residential Tenancies Act does not allow a landlord to demand or accept pre-paid rent because, for the reasons I will develop, under the Act it is deemed to be a security deposit. Calling it "prepaid rent" does not change its nature. In form and substance it is a security deposit.

. . .

[20] The Landlord was entitled to a security deposit of $247.50 being ½ of the monthly rent amount of $495.00. It was not entitled to accept the additional $1485.00.

[21] Let me return again to the Landlord's argument that the payment of three month's rent is not a security deposit but is simply prepaid rent. Apart from the deeming provision of s. 12(1) which I have already discussed, such an interpretation would mean that an unscrupulous landlord could seemingly avoid the prohibition of 12(2) by simply calling the additional monies something else and charging any amount that the market could then bear. That would wholly defeat the legislative intention of s. 12(2).

[22] I note in subsection 12(3) that owners, partners and directors of companies are personally liable for any breach of the Act governing security deposits. This is the only subject area where the Act imposes personal liability.

[23] I also note that under subsection 12(16), the fine for a breach of Section 12 is set at a maximum of $5,000. This is to be contrasted with Section 23 for other breaches of the Act which are limited to a fine of $1,000.

[24] These provisions lead me to conclude that the Legislature had a particular concern about security deposits and the potential for abuse that might be visited on tenants.

[47] I return to the main issue at hand and confirm that the appeal herein is to be dismissed and the decision of the Director affirmed.

[48] As noted above and in reference to Section 10C(2), the Lease was also terminated for the other Tenants. The date of termination for the three named Tenants was December 31, 2020. In each case therefore they have overpaid.

[49] I set out below the calculations of the amount owing to each of the three Tenants. These are almost identical to that in the Director's Order except for a $2.70 difference between the calculated overpayment amount for Kavita Krueger.

[50] The calculation for the three Tenants' overpayments are as follows:

Hayley Inglis

Payment made April 3,2020 (Application Fee)	$ 75.00
Payment made May 31,2020 (one-half of September rent)	$ 670.00
Payment made 2019 (Original security deposit)	$ 347.50
Overpayments for Sept, Oct, Nov, 2020, rent (3 * $36.1)	$ 108.30
	$ 1,200.80
Less rent owing for December	$ 708.90
Net owing by Landlord to Tenant	**$ 491.90**

Mackenzie Cornfield

Payment made April 6,2020

(Application Fee)	$ 75.00
Payment made May 25,2020 (one-half of September rent)	$ 675.00
Payment made 2019 (Original security deposit)	$ 337.50
Overpayments for Sept, Oct, Nov, Dec 2020, rent (4 * $61.5)	$ 246.00
Net owing by Landlord to Tenant	**$ 1,333.50**

Kavita Krueger

Payment made April 3,2020 (Application Fee)	$ 75.00
Payment made 2019 (Original security deposit)	$ 342.50
Overpayments for Sept, Oct, Nov, Dec 2020, rent (4 * $41.3)	$ 165.20
Payment taken January 13,2021	$ 740.00
Payment taken February 1, 2021	$ 740.00
Net owing by Landlord to Tenant	**$ 2,062.70**

ORDER

[51] It is hereby ordered as follows:

(1) The Landlord pay to the Tenant, Hayley Inglis, the sum of $491.90;

(2) The Landlord pay to the Tenant, Mackenzie Cornfield, the sum of $1,333.50;

(3) The Landlord pay to the Tenant, Kavita Krueger, the sum of $2,062.70;

(4) The Landlord pay to the Tenants the filing fee of $31.15.

[52] **DATED** at Halifax, Nova Scotia, this 9th day of August, 2021.

MICHAEL O'HARA
ADJUDICATOR