SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES
Citation: *B.D. v. Northpoint Properties Limited*, 2021 NSSM 31

Date: 2021-08-02
Docket: SCCH 506078
Registry: Halifax

Between:

B.D. and T.L.

Appellants (Tenants)

- and -

Northpoint Properties Limited

Respondent (Landlord)

Adjudicator: Eric K. Slone

Heard: July 7, 2021 in Halifax, Nova Scotia via zoom

Appearances: For the Appellants, self represented

For the Respondent, A.J. Kemp

BY THE COURT:

[1] This is an appeal by the tenants from a decision of the Director of Residential Tenancies dated April 23, 2021, respecting an apartment in the south end of Halifax.

[2] I have decided to use initials to identify the tenants because there was a significant amount of sensitive medical information discussed.

[3] In that decision, the Residential Tenancies Officer allowed the landlord's

application for the payment of additional rent owing as a result of the tenants' premature termination of the lease. The Residential Tenancies Officer found that the tenants' attempt to terminate the lease for medical reasons under s. 10B (1) and 10C (1) of the *Residential Tenancies Act*, on the basis of B.D.'s alleged deterioration of health, was not validly exercised.

[4] The Residential Tenancies Officer allowed the landlord one month of additional rent in the amount of $1,599.00 plus $15.99 for an NSF cheque and $31.15 for the cost of commencing the Residential Tenancies application, for a total award of $1,646.14.

[5] The tenants have appealed on the ground, they say, that the decision was unreasonable and that they met all of the conditions of the Residential Tenancies Act to avail themselves of the early termination provision.

[6] This appeal was heard via a zoom videoconference over about three hours on July 7, 2021. The court heard from the two tenants, as well as their respective male friends. On behalf of the landlord there was testimony from Mr. Kemp who described himself as the person in the company responsible for tenant satisfaction.

[7] By way of background, the apartment in question is one unit in a 16-unit building in south end Halifax. The landlord has a portfolio of some 300 units in the Halifax area, and I believe it is fair to say that this landlord caters significantly though not exclusively to students and other young people. The tenants here are young working people.

[8] The lease in question was for a fixed term from September 1, 2020 to August 31, 2021, with rent payable at $1,599.00 per month. The tenants supplied a damage deposit of $799.50 which the landlord continues to hold. For reasons that are not entirely clear, the Residential Tenancies Officer did not deal with the security deposit in her decision. I indicated to the parties that I would address the issue of the security deposit in my decision.

[9] It is not disputed that the tenants served a Form G: Notice to Quit and Form H: Physician's Certificate on January 7, 2021, which (if valid and effective) would have had the effect of terminating the lease as of the end of February 2021. The tenants had hoped to get the notices served in time to end their lease at the end of January, but they did not get the certificate in time to

meet that date.

[10] The landlord succeeded in re-renting the premises effective May 1, 2021 and had claimed for two months' rental loss in its application to Residential Tenancies. The Residential Tenancies Officer only allowed one month of rental loss, finding that the evidence to support a greater loss had not been presented. The landlord did not appeal the decision or any aspects of it on its own accord, which it would have been entitled to do.

The law concerning early termination for medical reasons

[11] The tenants did not seem to be well-informed about the applicable law that has emanated from this court as well as from the Nova Scotia Supreme Court, interpreting the early termination provisions of the *Residential Tenancies Act*. Their attitude seemed to be that they followed the literal requirements of the *Residential Tenancies Act*, and that the termination of the lease ought to have been virtually automatic.

[12] Mr. Kemp on behalf of the landlord candidly stated that the landlord was contesting this termination by the tenants because in his experience it has become too easy to get a doctor to sign the applicable certificate, and that this is unfair to landlords.

[13] The concerns of this landlord have been expressed by others before and have been the subject of comment by several Small Claims adjudicators. Bluntly

put, just having a doctor sign the requisite form and serving a Notice to Quit is not always sufficient, and the result is far from automatic.

[14] A line of cases mostly from 2015 through 2017, in both the Nova Scotia Small Claims Court and Nova Scotia Supreme Court, gives considerable guidance on the subject. Although there are some statements in earlier cases that are relevant, and there are a few more recent cases, the ones that I would draw attention to are *GNF Investments Ltd. v. Rossell*, 2015 NSSM 54 (CanLII); *GNF Investments v. Vriend*, 2016 NSSC 116 (CanLII); *Rolle v. Rockstone Investments Ltd.*, 2015 NSSM 24 (CanLII); *Arab v. M.B.*, 2016 NSSM 51 (CanLII); *GNF Investments v. Whitman and Lang*, 2017 NSSM 35 (CanLII); *Fei v. Liu*, 2017 NSSM 44 (CanLII).

[15] In *GNF Investments Ltd. v. Rossell*, this adjudicator made clear that the process of terminating a lease on medical grounds was a two-way process:

> [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.
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> [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.

[16] These paragraphs were cited with approval by Justice Hood of the Supreme Court in *GNF Investments v. Vriend* (above), which appears to be the only case in

the Supreme Court so far to have considered the issue. That case was itself an appeal from the Small Claims Court.

[17] In *Arab v. M.B.*, I made it additionally clear that the landlord is not only entitled to know what the problem is with the tenancy, but must be given an opportunity to address the problem and possibly salvage the tenancy:

> 45 My opposite conclusion (to that of the Residential Tenancy Officer) is based on my belief that the words "unable to continue the lease" (for health reasons) has everything to do with the environment that the

> residential unit provides. I would not limit this to purely physical problems with the unit. I can imagine where issues like noise or air quality in the neighbourhood might become obstacles to a tenant continuing with a lease, where the tenant's deteriorating health has made intolerable that which was tolerable at the outset of the lease. As I have also stated in Rossel, where a tenant seeks to rely on this reason for terminating there is a duty to inform the landlord and give them an opportunity to accommodate the new limitation.

[18] Adjudicator Richardson in *GNF Investments v. Whitman and Lang* (above), in a case that was extensively quoted by the Residential Tenancies Officer in this decision under appeal, also made clear that there is a duty to discuss the issue with the landlord to see if the problem can be rectified:

> [18] Section 10C(1) of the Act is not intended "to provide a tenant with a way to break a lease where the deficiency in the unit is temporary and fixable:" *Arab v. M.R.B.* 2016 NSSM 51, per Adjudicator Slone at para.45.
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> [19] Neither a residential tenancy officer nor an adjudicator is obliged to accept a Form H that has been signed by "ticked" (sic) by a doctor as proof that the tenant has suffered a significant deterioration that renders him or her unable to continue in the apartment unit: *Amaout v. Feria* [2004] NSJ No. 606 at para.6; *Allen v. Black* [2012] NSJ No. 381 at paras.12-13. The form and the doctor's signature on the form is entitled to some deference—but that does not mean that the landlord cannot challenge or question the form: *GNF Investments v. Vriend* 2016 NSSC 116 at para.6. The balance between the tenant's right to privacy with respect to his or her medical condition, and the interest of the landlord in securing his or her lease, is to permit the latter to question "whether there is any justice in forcing it to incur the financial cost associated with an abrupt disruption of
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> its flow of rent:" *GNF Investments Ltd v. Rossell* 2015 NSSM 54, per Adjudicator Slone at para.20. To that end the landlord may ask "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:" ibid, para.21.

[19] Lastly, in *Fei v. Liu* (above) I had before me an unusual situation which vividly illustrated how easy it can be for some tenants to get a doctor to sign the

Form G: Certificate. It is a sad fact that these provisions can be abused. Family doctors may well see themselves as patient advocates and supports, which is well and good but can be problematic when attempting to balance the interests of landlords and tenants. In *Fei* the tenant went to a walk-in clinic and had a doctor sign a certificate, with (likely) few or no questions asked. After receiving her tenant's notice to quit, the suspicious landlord herself took the unusual step of visiting that same clinic pretending to be a tenant looking to get out of her lease. The ease with which she obtained that same doctor's signature (upon payment of a small fee) was frankly shocking. In that case I stated:

> [14] I believe that a physician being asked to sign such a certificate must perform due diligence. He or she must inquire into the causes of the patient's illness and - before signing the certificate - must conclude that there is something inherent in the premises or the tenancy that "frustrates" the lease. Termination of the lease is not a first resort. The physician has a duty to consider whether the tenancy is truly the problem, or is merely being used as a convenient scape goat. The physician should not sign every certificate on request.

[20] To summarize, then, termination of a lease upon presenting a doctor's certificate is not automatic. The certificate is merely a step in a process. If the landlord does not question the attempted termination, then it may well be the last step in the process. But the landlord is entitled to question whether termination of the lease is justified, and must be given a fair opportunity to salvage the tenancy.

[21] In many situations, the tenant has already made known their issue and has tried to address it directly with the landlord. The landlord in such a case will have already had the opportunity to keep the tenancy alive, even before the tenant takes the step of obtaining a doctor's certificate. But in a case such the one before this court, where the tenant has not signalled that they have deteriorating health nor

meaningfully made known their problem with the tenancy, the landlord must still be afforded the right to fix any problems that may be causing the tenant to experience deteriorating health. If the tenant takes the position that it does not have to give the landlord such an opportunity, they risk a finding that the attempted termination of the lease is ineffective.

Factual background

[22] This lease was signed on August 12, 2020 and the tenancy started on September 1, 2020. B.D. testified that there was no pre-tenancy inspection or cleaning done, though I am doubtful that this has any bearing on the ultimate issue. Mr. Kemp on behalf of the landlord testified that the unit was professionally cleaned before the tenants were given occupancy, which would be standard practice. I suspect that Mr. Kemp was relying on the fact that it is his company's standard procedure to clean apartments between tenants, rather than having any specific knowledge of this instance. Perhaps such cleaning was not done, or not done as thoroughly in the present case, but either way it does not likely affect anything that came after.

[23] The first indication of any problem with the unit was communicated in an email dated November 3, 2020, where the tenants alerted the landlord to a leak in the ceiling above the bathtub. According to Mr. Kemp, this occurred because of a spill or overflow in the unit directly above the subject unit. He testified that he dispatched his maintenance people with instructions to do whatever was necessary to address the water issue above and repair the ceiling in the subject unit. He was not sure if that required cutting out the wet drywall, or just patching the damaged area with drywall mud. He left that to the discretion of the maintenance workers. The evidence of the tenants supports the fact that it was patching only, which they did not seem to believe was adequate. The evidence before me does not allow for any finding, one way or another, as to whether the repair was adequate.

[24] Nevertheless, the tenants testified that this led to them being frustrated with the landlord, to the point where they did not bring some of the other issues to the landlord's attention because they felt there was no point. This, I find, was a somewhat self-defeating strategy.

[25] Both of the tenants testified that they began to experience significant health issues around the time of the ceiling leak. They testified that around this time, they noticed that the water coming out of the taps was slightly discoloured. They produced a photo of brownish water in the bathtub. This did not appear to be related in any way to the ceiling leak, but rather seems to have been an issue with the water supply. One might think that this would have prompted the tenants to call Halifax Water or the landlord, to find out if there was a problem that could be addressed. But no such communication occurred. I accept the landlord's evidence that it had no idea that there was an issue with the water

supply in the apartment. I also accept the landlord's evidence that no one in any of the other 15 units in the building lodged a complaint about water quality.

[26] The tenants also testified that the water was starting to leave a residue on dishes, and in particular their pets' water bowls.

[27] The tenants also testified that they began to notice mould growth in various places, including on the floor, around door fixtures and in the toilet. They also noticed pink alga growth in plumbing fixtures. This was (at least in part) reported to the landlord in an email dated December 6, 2020 and was eventually responded to although it is not clear from the evidence how promptly the issues were addressed.

[28] The tenants came to believe that there might be a problem with lead in their water supply, based on their research to the effect that there are lead pipes still servicing many buildings in Halifax. They admitted that they never had the water tested because they were told that the Department of Health would not do a test since the tenants were committed to leaving the building. This suggests that the tenants did not pursue a lead test soon after they developed their concerns, but only much later. There is no evidence before me to substantiate this theory of lead poisoning. Nor is there any inference to be drawn that discoloured water is a sign of the presence of lead.

[29] The tenants' evidence was that over the months of November and December, both of them began to experience health issues that they attribute to the physical environment of this rental unit. It must be noted that both of the tenants have underlying health issues, especially B.D. who was being treated for conditions related to her mental health. Both of their boyfriends, who spent significant time in the apartment but did not live there, also complained of not feeling well. The tenants also testified that their pets, and in particular a puppy, began to show abnormally aggressive behaviour which they suspect may be as a result of drinking the water in the apartment.

[30] It should be noted at this point that the tenant T.L. did not have her doctor sign a Form H. The Form H that is before the court is the one signed on behalf of B.D. T.L. bases her right to terminate the lease on the Form H signed on behalf of her co-tenant. So, her alleged deterioration in health is only relevant to the extent, if any, that it corroborates the evidence of B.D. T.L. has no independent legal right to terminate the lease on her own behalf.

[31] On January 5, 2021, the physician for B.D. signed a Form H, certifying that the patient has suffered a deterioration of health that has resulted in an inability to continue the lease and that has resulted in a reduction of the tenant's income such that she can no longer afford to pay the rent. (The issue of reduced income will be discussed later.)

[32] The tenants have described the symptoms that they say they have experienced as a result of conditions in the apartment. They say in one of their documents that they experienced "headaches, dizziness, nauseousness, vomiting, depleted energy, high levels of depression and lack of concentration." They blame mould and, less definitely, possible lead poisoning.

[33] The Form H does not contain any useful (i.e. personal) information. The physician is literally only required to check certain boxes on the form, which process has been criticized by courts in the past for its lack of rigour.

[34] However, the physician's clinical notes for that day, January 5, 2021, were produced in this litigation. They are extraordinarily revealing for what they show, and what they do not show.

[35] One would expect that the physician would record the patient reporting the various above-mentioned symptoms that B.D. later testified to. Instead, she reported that the patient has been *"very stressed lately"* and that she was *"not eating well - anxiety is high - some panic feeling."* B.D. evidently reported on problems with her work situation, where she was expected to perform a *"high volume of perfect work"* and that she had experienced a bad outcome as a result of a mistake that she made.

[36] B.D. also told the doctor that her roommate had an aggressive puppy that she did not trust.

[37] The doctor then writes that B.D. reported that *"the apt costs a lot more than she expected and that is stressful - is hoping to get out of lease and move home to her mom's to reset and save money."* The doctor notes that the patient *"would have EI coverage only if off work."*

[38] There are a number of other notes that concern B.D.'s pre-existing health conditions and the plans to address those.

[39] While I can accept that the physician was hearing that her patient was suffering deteriorating health, there is nothing in the notes that suggests that the deteriorating health was as a result of some aspect of the tenancy, or that the tenant was unable to "continue the lease." For example, the physician did not mention water quality, the presence of mould, or something related such as poor air quality - as contributing to her patient's deteriorating health. The general thrust of the desire to get out of the lease appears to have been financial.

[40] I do not want my comments to be read as suggesting that B.D.'s stress and anxiety were not real and a source of considerable suffering. But there still must be a logical connection to the tenancy before the landlord has to absorb some or all of the financial cost of the tenant's medical issues.

[41] Because there is no logical connection proved between B.D.'s deteriorated health and the tenancy itself, the tenants' ability to terminate the lease on that ground must fail, and I believe the Residential Tenancies Officer was correct in so finding.

[42] As for the second ground of termination, the *Residential Tenancies Act* does allow for a remedy where a tenant suffers a significant deterioration of health as a result of which their income is "so reduced" that they cannot pay the rent as well as their other reasonable expenses. This is contained in s.10B (1) of the *Residential Tenancies Act*:

> 10B (1) Notwithstanding Section 10, where the income of a tenant, or one of a group of the tenants in the same residential premises, is so reduced because of a significant deterioration of a tenant's health that it is not reasonably sufficient to pay the rent in addition to the tenant's other reasonable expenses, or if there is more than one tenant, the tenant's portion of the rent and other reasonable expenses, the tenant may terminate a year-to-year or fixed-term tenancy by giving the landlord (a) one month's notice to quit, in the form prescribed by regulation; (b) a certificate of a medical practitioner, in the form prescribed by regulation, evidencing the significant deterioration of health; and (c) proof of service, in the form prescribed in the regulations, of all the tenants in the same residential premises with a copy of the notice to quit.

[43] For this section to operate, there need not be shown that the deteriorated health is as a result of the tenancy itself. It could be for any

reason.

[44] There does not appear to be any case law interpreting this provision. As a matter of common sense, however, this section would not apply to every situation where a tenant suffers some loss of income as a result of deteriorated health. Many people have available to them both private and public income supports, such as but not limited to short-term and long-term disability insurance or EI sick benefits. Many illnesses are of short duration. I believe that the rather drastic remedy of terminating a lease would be reserved for tenants who are facing an income loss of indefinite or medium-to-long term duration, with a reduction in income that is significant enough to make the continued tenancy non-viable.

[45] On the facts of this case, it is hard to see how B.D. qualifies. One of the main reasons for her visit to her physician was to get a medical note that would allow her to go on short-term disability. The doctor suggested that she put B.D. off for eight weeks. In the end, she was off work for about three months.

[46] While I would not minimize the seriousness of a three-month disability, what was missing from the evidence was any indication that B.D. suffered a loss of income or, if so, how much. It is a matter of common knowledge that many disability insurance plans - particularly short-term benefits - are reasonably generous in terms of replacing income.

[47] The Residential Tenancies Officer in her decision was critical of B.D. for not providing any evidence that her income had been reduced to the point where she was no longer able to afford her rent. It was on this basis, a lack of proof, that the attempted early termination failed on this ground. Having experienced such criticism, I would have expected that if there was any compelling evidence of an income loss, B.D. would have brought it out during the appeal. She did not.

About all I have to go on is the fact that B.D. told her physician that the apartment was more expensive than she expected, and that she was highly stressed and was hoping to save money by moving home. And we have the evidence that she was off work for a period of time, on short-term disability.

[48] In my respectful view, this is not enough evidence to establish that B.D. met the terms of s.10B (1) of the *Residential Tenancies Act.*

[49] Accordingly, I find that on both claimed grounds the tenants have failed to justify the early termination and the landlord has been successful in its challenge to the early termination.

Rent owing

[50] As noted above, the Residential Tenancies Officer awarded the landlord $1,599.00 plus $15.99 for an NSF cheque and $31.15 for the cost of commencing the Residential Tenancies application, for a total award of $1,646.14.

[51] She stated in her decision that *"the landlord offered no evidence of a loss of rental income beyond March 2021. In the event he did and wishes to advance further application in that regard, he would be free to do so pursuant to the Residential Tenancies Act Section 13 Application to Director."*

[52] The landlord did not appeal from this finding by the Residential Tenancies Officer. Had it done so, I could have considered the evidence that to the effect that there was, in fact, a loss of two months' rent. I would also have had to consider whether the landlord reasonably mitigated its damages; in other words, with a bit more diligence could the unit have been rented for April 1 rather than May 1?

[53] This appeal was launched by the tenants, not by the landlord. In my view, which may not be shared by all of my fellow adjudicators, in order for the landlord to come out better from the tenants' appeal, it needed to have included its own appeal, or cross-appeal.

[54] The rationale for my thinking is this. Even though this is something of an appeal by way of "hearing *de novo*," as a matter of elementary justice the appellants do not face jeopardy for a worse result unless they have some advance notice that they may face additional financial exposure.

[55] As such, I feel compelled to leave the relief ordered by the Residential Tenancies Officer where it stands.

[56] The exception concerns the damage deposit. The Residential Tenancies

Officer did not explain why she was not allowing the damage deposit to be offset against the amount owing to the landlord. This is simply a loose end that should be closed off. It benefits no one to force the landlord to take additional steps to retain the deposit. Nor does justice require that the landlord return the deposit and then seek to enforce its judgment for the higher amount.

[57] As such, I am ordering that the damage deposit of $799.50 be deducted from the amount otherwise owing by the tenants ($1,646.14), with the result that the tenants shall pay to the landlord the net sum of $846.64.

ORDER

[58] In the result, the appeal from the decision of the Director of Residential Tenancies is dismissed, and the order is confirmed with the sole variation that the landlord is entitled to retain the security deposit and the tenants shall pay the landlord the net sum of $846.64.

Eric K. Slone, Adjudicator