

**SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation: *Hassan v. Kirby*, 2021 NSSM 49**

ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL  
TENANCIES

**Date:** 20211012

**Docket:** SCCH 508385

**Registry:** Halifax

Between:

Burhan Hassan

*Appellant (Landlord)*

- and -

Arthur Kirby

*Respondent (Tenant)*

**DECISION AND ORDER**

**Adjudicator:** Eric K. Slone

**Heard:** Via teleconference on October 4, 2021

**Appearances:** For the Appellant, self represented

For the Respondent, Nora MacIntosh, counsel

**BY THE COURT:**

[1] This is an appeal by the Landlord from a decision of the Director of Residential Tenancies dated August 13, 2021. That order responded to the landlord's application seeking vacant possession of the premises, on two separate bases:

- a. The landlord contends that the lease in question, though oral, was for a fixed term ending June 30, 2021.

b. The landlord claims to require the premises for the purpose of residence for members of his family.

[2] The landlord had also sought damages against the tenant for minor damage to the property.

[3] The Residential Tenancies Officer dismissed the application in all respects. She found that:

a. The oral lease in question was month to month, not for a fixed term, and as such could not be terminated on the basis that it had expired.

b. The application to have the apartment vacated for use by family members did not succeed because she questioned the landlord's good faith and credibility.

c. The claim for damages was dismissed because of a lack of evidence supporting such a claim.

[4] The hearing before this court took place by teleconference on October 4, 2021. The landlord represented himself and was his sole witness. He filed documents in advance of the hearing which were referenced during the hearing. The tenant was represented by counsel and testified on his own behalf. His counsel also filed a book of documents which were referenced during the hearing and in argument.

[5] There is some background which is important to set out. The building in question has six units. The tenant resides in apartment 6, on the top or third floor. The landlord and members of his family, namely his wife and two teenage children, reside in apartment 5, which is the only other unit on the top floor. Both are two-bedroom units.

[6] The tenant has lived in the building since 2009, dating to long before the building was acquired by the landlord. The tenant believes he had a written standard lease at some point, though it does not appear that such a document survives to this day. The tenant describes himself as a person of very little financial means. He also has an admitted history of mental illness which appears to be controlled. He has no inclination to move, no doubt because of the shortage of affordable housing in Halifax.

[7] The landlord purchased the building in 2017.

### **The 2019 eviction**

[8] For some unexplained reason the tenant fell behind in his rent in 2019 and the landlord applied to Residential Tenancies for vacant possession. The Residential Tenancies Officer at the time so ordered, and the tenant appealed to Small Claims Court. In an order dated the 13<sup>th</sup> of June 2019, adjudicator Walter Thompson QC upheld the eviction, ordered payment of arrears of \$881.00 and ordered the tenant to vacate by June 30, 2019.

[9] Before that eviction day arrived, the tenant and landlord made a verbal arrangement that the tenant could stay so long as he kept up his rent payments and paid the arrears in agreed-upon installments. There was no convincing evidence to the effect that there was any particular type of tenancy discussed, at least not at that time. The landlord contends that it was his intention to agree to six-month fixed terms, and that this was conveyed to the tenant - if not earlier then at least by January of 2021 when, he says, he indicated to the tenant that this was the last six months he was agreeing to. The intervening two years were made complicated by the pandemic during which time there was a moratorium on evictions.

[10] The tenant testified that he was never told that this would be a fixed-term lease, and that he never agreed to such a lease.

[11] At the hearing in this court, as one of his arguments the landlord contended that the lease was over because the 2019 eviction order was still effective. His other argument was that the verbal fixed-term lease was slated to expire on June 30, 2021 and the tenant is accordingly over-holding.

### **The status of the 2019 eviction order**

[12] As for his first argument respecting the 2019 eviction order, the landlord cannot succeed. Eviction orders have a short shelf life. If a landlord begins to accept rent, unless he expressly reserves his right to insist on vacant possession, he will be estopped (legally prevented) from relying on that eviction order. Either Residential Tenancies or the court, as the case may be, will infer that a new tenancy has been created, and the eviction order is null and void.

[13] I find here that the 2019 eviction order is null and void.

## **Fixed term or month to month tenancy**

[14] As for the type of tenancy agreed to, the Residential Tenancies Officer found as a matter of Residential Tenancies Policy that all oral tenancies are deemed to be month to month. Residential Tenancies Policy #13, which is available to the public on the Residential Tenancies website, provides:

When entering into a written agreement to rent a unit, landlords and tenants must use the Standard Form of Lease.

If another form of written lease is used, or only an oral agreement exists, the conditions that are in the Standard Form of Lease apply and will be used to adjudicate disagreements.

If no written lease has been prepared and signed, the terms of the lease will be considered to be a month to month lease.

Following are other requirements related to the lease:

The lease should be signed by all of the parties involved, including all tenants other than children.

A copy of the finalized lease must be given the tenant at the time of signing, or at least within 10 days after the signing.

If a tenant does not receive a copy within these 10 days, the tenant has the right to end the tenancy, following the rules laid down in the Act.

Other reasonable rules, terms and conditions can be added as long as they do not conflict with the Act (with agreement from all who are involved with the rental).  
(Emphasis added)

[15] I have some questions about the legal status of this Policy. On its face it refers to “*Residential Tenancies Act: Sections 7 and 8; Regulations: Section 38.*” Section 38 of the *Residential Tenancies Regulations* was repealed in 2012 and does not currently supply any authority for the Residential Tenancies Program to enact policies that have the effect of overriding or restricting the *Residential Tenancies Act*. Section 8(5) of the Act provides:

8 (5) A landlord and tenant who have an oral tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this

Act and the standard form of lease apply.

[16] Earlier in the Act the term fixed-term-lease is defined:

2 (ac) “fixed-term lease” means a lease that is entered into for a fixed period of time, which includes the day of commencement and the day of termination stated in the lease...

[17] The Policy which the Residential Tenancies Officer relied upon, though far from unreasonable, is arguably inconsistent with the terms of the statute. The fact that a standard form of lease is deemed to apply would logically import all of the terms thereof, including the various types of tenancies that are recognized in the standard lease, including month to month, year to year and fixed term.

[18] As such I am not prepared to find as did the Residential Tenancies Officer that parties may never agree to an oral lease that is fixed term, or year to year. Assuming that the facts are clear enough, and the dates of commencement and termination are clearly established, I don't see why an oral fixed term lease may not be found to exist (unless, of course, I am wrong and the Policy has binding legal effect.)

[19] In the case here, however, I prefer to base my finding on the evidence. The landlord's evidence in favour of a fixed-term lease is simply deficient. I prefer the evidence of the tenant who says that this was never discussed. In the absence of a proved agreement providing otherwise, I find that the tenancy for this apartment is month to month.

### **Use by family members**

[20] The question which occupied most of the hearing was whether the landlord could obtain vacant possession in order to accommodate members of his family.

[21] The following sections of the Act are pertinent:

2 (abc) “family member” means, in relation to an individual, any of the following:

- (i) the individual's spouse,
- (ii) a child of the individual or the individual's spouse,
- (iii) a parent or legal guardian of the individual or the individual's spouse;

10 (8) A landlord may give to the tenant notice to quit the residential premises where ...

(i) the landlord in good faith requires possession of the residential premises for the purpose of residence by himself or a member of his family .....

[22] The landlord's evidence is that he needs the apartment for a variety of purposes. He stated that he and his wife and two children live in their two-bedroom apartment #5, while the tenant lives alone in his two-bedroom apartment at #6. He says his family could use more space. He also would like to use one of the bedrooms in #6 for a rental office. At other times he suggested his two teenage children might take over the two bedrooms. He would also like to have room to welcome guests. He seems bitter that the tenant has so much space while he and his family are crammed together.

[23] With due respect, the landlord cannot blame the tenant for the choices that he has made about how to live.

[24] He also says that he expects to be receiving various members of his extended family from Afghanistan at some unspecified point in the future. He submitted copies of passports for his mother, a brother, an uncle, his uncle's wife and daughter, and his brother's wife and son. He says that they have all applied under the Canadian Government's new program which promises to settle 40,000 Afghan refugees or other vulnerable people in Canada.

[25] While such a program exists, and I accept that members of his family have applied to enter Canada, there is no indication that anyone has been approved for entry to Canada. These people may, or may not, meet the criteria for entry. Even if they are approved, there is no indication when this might happen. It could be months, or even years, before any of the landlord's family members arrives in Halifax. On that basis, the application to terminate the tenancy to accommodate family members is premature. It must also be recognized that the only member of the landlord's family currently in Afghanistan who qualifies under the definition of family member in the Act would be his mother. His siblings, in-laws and nieces and nephews do not meet the terms of the Act. His own children in Halifax would qualify, but he has not established to my satisfaction that he has an actual plan to move his children into the apartment currently occupied by the tenant.

[26] Like the Residential Tenancies Officer I have some serious questions about the landlord's good faith. I found his evidence to be unconvincing, in part because

it was tainted by his strong personal animus against the tenant. I am reluctant to force the tenant out under such circumstances.

[27] Having said that, if the landlord's drive to bring his mother to Halifax is legitimate and actually pans out, the tenant may well find himself on the receiving end of a Residential Tenancies application that could succeed, and he should be mindful of that possibility.

### **Damages to property**

[28] The landlord raised the issue of several items of damage with the Residential Tenancies Officer who rejected the claims for a lack of evidence. No doubt in response to that criticism the landlord attempted to fashion an invoice which he introduced in evidence before this court. This so-called invoice is utterly self-serving and lacking in credibility.

[29] Some of the items which the landlord claims are almost trivial, and it is not clear that the need for repairs was anything more than ordinary wear and tear. The tenant admits that he damaged a door several years ago while in an intense phase of his illness, but it is currently functional and he is not complaining. Other items such as a loose kitchen drawer and broken toilet seat are arguably just wear and tear in an apartment that has not been renovated any time recently. Nothing in the unit cries out for immediate repair.

[30] The landlord is also attempting to claim for the cost of a taxi ride to the hardware store to obtain quotes on materials, and for his own labour for making repairs. These claims lack credibility.

[31] All in all, there is insufficient credible evidence to hold the tenant responsible for damage at this time. If and when this tenancy ends, the landlord may renew his claim with an application to Residential Tenancies after the tenant vacates, at which time the legitimacy of such claims can be evaluated.

### **Other issues**

[32] The landlord attempted to raise some issues about the tenant's behaviour, which I decline to consider because they were not raised before the Residential Tenancies Officer and it appears the behaviours allegedly occurred several years ago and should be considered to be stale.

[33] The landlord attempted to blame his failure to raise these issues before Residential Tenancies on the fact that there was not enough room to include them on the online application form. Frankly, such an excuse is absurd. Even if he ran up against a lack of space, all he had to do was either shorten his wording in other areas to make room for a brief mention of behavioural issues, or make a further (second) application to be dealt with at the same time.

[34] What became obvious to me at the hearing is that the landlord is terribly frustrated with his inability (so far) to get what he wants. He appears to have a personal animus toward the tenant which is getting in the way of an orderly relationship and which is making this a toxic tenancy. Nevertheless, the landlord must stand or fall on what he was able to present in court and his case fell far short of satisfying me that he is entitled to any of the relief he seeks at this time.

### **Conclusion**

[35] For all of the above reasons, the order of the Director of Residential Tenancies is confirmed and the appeal is dismissed.

**Eric K. Slone, adjudicator**