IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation*: MS v. SC*, 2022 NSSM 28

Claim No: SCCH 22-512400

BETWEEN:

MS

Appellant/
Tenant

v.

SC

Respondent/
Landlord

MS appeared on his own behalf

SC appeared on her own behalf

DECISION

This is an appeal of a Decision and Order of the Director of Residential Tenancies rendered by Residential Tenancies Officer, Gerard Neal, dated January 19, 2022.

Such appeals constitute a hearing *de novo,* which means it is a "new" hearing in which I can consider any evidence, as well as the record before the Officer, and render any decision I find to be confirmed by the evidence.

Ms. C filed a claim with the Director seeking money for losses she says were sustained because the tenant did not advise her of a bedbug infestation, which were awarded by the Officer as follows:

- Retention of the security deposit of $850.00 (allowed)
- Pest control - $3519 ($1265 for a heat treatment for the unit, and $2,254.00 to fumigate the surrounding units) (allowed)
- Two months rent - $3,400.00 ($1,700 X 2) in lost income because the new tenants could not move in (allowed)

- The amount of $1,974.25 for hiring a management company to find new tenants (not allowed)
- The filing fee of $31.15 (allowed)

In total, Mr. Neal issued an order that Mr. S pay Ms. C a total of $6,100.15.

Mr. S filed this appeal after an extension of time to do so was granted, on April 6, 2022.

I am reversing the decision of Mr. Neal in its entirety. There is not evidence on a balance of probabilities that supports the Officer's attribution of responsibility for the bedbug infestation to the tenant.

Issue:

The issue in this case is whether the Ms. C is entitled to the amounts claimed. Although not stated, the claim appears to be based upon the position that the above monies are owing due to an alleged violation of the *Residential Tenancies Act* Statutory Conditions, specifically 9 (1) (3).

Legislation:

The *Residential Tenancies Act* creates Statutory Conditions governing tenancy which require good behaviour:

> Statutory conditions 9 (1)
>
> Notwithstanding any lease, agreement, waiver, declaration or other statement to the contrary, where the relation of landlord and tenant exists in respect of residential premises by virtue of this Act or otherwise, there is and is deemed to be an agreement between the landlord and tenant that the following conditions will apply as between the landlord and tenant as statutory conditions governing the residential premises:
>
> Statutory Conditions
>
> 3. Good Behaviour - A landlord and tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the other tenants, respectively.

Chronology of Events:

Ms. C and Mr. S both gave evidence before me, describing the following chronology:

1. The Respondent Ms. C owned a condominium unit at 5221 Cornwallis Street, Unit 208;
2. A year-to-year Lease was entered into by the Ms. C and Mr. S and NK, with a term of August 1, 2020 to July 31, 2021.
3. Notice to Quit was given by the Tenants in February of 2021.
4. The evidence confirms that the Tenants vacated Unit 208 on July 31, 2021, Mr. S having returned to British Columbia some eight days earlier than his roommate.
5. On August 26, 2021 the Ms. C was informed by email from the property manager that bed bugs had been found in the unit and the condominium corporation "felt" "this unit is the source of the problem".
6. An investigation was conducted by BBD Pest Services, who recommended heat treatment, on September 13, 2021, for what was described as a "heavy infestation", with weekly follow ups..
7. On September 21, 2021 Ms. C received a copy of a report from the property management company for the condominium, Mr. Joe Oleary of Podium Properties, saying "BBD has provided this report and recommend heat treatment of your unit since it is the most severely infested".
8. The heat treatment invoice from BBD, referencing a "heavy Infestation", is dated September 27, 2021 and is for $1265.00 for a heat treatment.
9. Ms. C contacted Mr. S on October 1, 2021. She told Mr. S that a bedbug spray can had been found in the front hall closet of unit 208, and that the bedbug infestation had caused her to cancel her new tenants before they had moved in. She requested that he pay the bill for the heat treatment, or she would take the matter to residential tenancies.
10. Mr. S refused, saying on October 13, 2021 that if there had been bed bugs, he would have disclosed them, as "we don't want to get allergies from bed bugs and nobody can sleep with bed bugs".
11. There were no tenants in the unit for September and November, 2021
12. On October 21, 2021 Mr. Oleary contacted Ms. C saying "After the last Board meeting it was decided that the unit responsible must be held accountable for the loss", for a total of $2,254.00. He described her paying this amount as "only fair". Ms. C paid this amount.
13. Ms. C sold the unit in November of 2021.

Decision:

The Legislation:

Section 9.1.1 of the Residential Tenancies Act states,

> *Condition of Premises – The Landlord keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing.*

The Act, by that section, requires that a Lordlord address issues such as vermin, sanitation and safety. I find that that section encompasses a landlord's requirement to eradicate bedbugs, and the only grounds for seeking compensation from the tenant would require something more than a usual bedbug infestation, that being, that the tenant knew of a bedbug infestation, and did nothing to address the issue, with the result that the tenant knowingly made the situation worse.

There must therefore be some act or omission sufficient to transfer liability for the expenses that follow from bedbug infestations, to the tenant.

The Problems with the Evidence:

Adjudicator Sloane of this Court, in *Fancy v. Midtown Construction*, 2017 NSSM 11, points out that the relaxation of the rules of evidence in Small Claims Court, does not remove the necessity for the evidence provided to be "both admissible and probative":

> [16] This is the type of case that is very challenging for adjudicators. As much as we take pride in our court's ability to provide inexpensive and timely "access to justice" - which is an issue that has caught the attention of governments and courts across the country - we are limited by the necessity to reach decisions based on evidence that is both admissible and probative. Judges of the Supreme Court of Nova Scotia (considering appeals from our judgments) have repeatedly reminded us of this obligation. We can relax the rules of evidence, but not so much that we cease to be a court of law.

In other words, while the rules of evidence in this Court are relaxed, they are not absent. Proof that will satisfy on a balance of probabilities must be provided to support key assertions of the parties.

(i) The evidentiary gap between the tenancy and the discovery:

In this case, Mr. S moved out of the apartment on July 25th, 2021, and his co-tenant left the unit by July 31st, 2021. After that, there is a gap of at least 25 days (August 25, 2021), during which there is no clear evidence of who exactly was going in or out of the unit during that time. However, it is clear that there were maids, building management, and, from the evidence of the new lease entered into with the incoming tenants, that they may also have been in the apartment, as they were directed to return the keys and remote and remove items from their storage locker. This unit was far from hermetically sealed. That space of time, and the presence of others, leaves open the probability that bed bugs arrived, after the tenants left.

(ii) The provenance of the "can of bedbug spray":

There was no evidence at the hearing either by way of a photograph of the can in question, or evidence from those finding the object as to whether it was in fact something called "bedbug spray", whether it was full or empty, where it was in the closet, looked old or new, or any other details that would lead to the conclusion that it belonged to the tenants, and to remove the possibility that it may predate, or postdate their tenancy.

Ms. C relies upon the finding of this "bedbug spray can" as proof that the tenants were delinquent in failing to advise her of a bedbug issue. The can, I find, cannot be proven to be linked to the tenants. In fact, there is little evidence of its existence at all, and not enough to satisfy the balance of probabilities.

(iii) The discovery of the can by the Landlord:

In the alternative, even if the can could be linked to the tenants, it does not necessarily lead to a finding of liability. If Ms. C knew about this can some time after the end of the tenancy, and attached any significance to the existence of the can, why were no actions taken to confirm whether or not there were bed bugs in the unit? There had clearly been no answer from Mr. S's roommate (who told her to contact Mr. S), but no evidence anyone did so.

In fact, nothing was done until on August 25, 2021, when building managers informed her that bed bugs were present, almost a month after the tenants had left, and too late to clearly link the bed bugs to the tenants.

(iv) Even the existence of the can does not make the Tenants negligent:

In the alternative, even allowing that "bed bug spray" was found in the apartment, I do not take that as necessarily proof that the tenants were negligent or in violation of their responsibilities under the lease.

There is nothing in the lease which requires tenants to report to Ms. C that they are treating bed bugs in their apartment. There is no evidence that they were told to do so.

If the tenants (including the co-tenant with or without Mr. S's knowledge) utilized bed bug spray, I see no reason why the tenants could not have thought this dealt with the issue.

That they could have thought so was largely confirmed by the fact that what was eventually found in that unit by the investigating company, was dead insects, and that the vendor hired to deal with eradication (who also did not testify before me, but whose invoices and reports were put in evidence) speculated that the use of chemical repellants may have driven them to other units.

I find it is unreasonable to expect a tenant to be an expert on bed bugs any more than a normal lay person, or for them to understand that the use of chemicals was not the best solution.

Conclusion on the tenant's responsibility for the bed bugs:

All in all, on the evidence before me, I find that it is more probable than not that Mr. Swas unaware of the presence of bed bugs in the unit.

If his co-tenant was aware, (which I cannot find on the evidence to be the case, based upon how slim the evidence of the presence of a can of "bed bug spray" was), I will say that it is more probable than not, that the bed bugs having been abated, the reasonable conclusion was that there was nothing to report.

As a result, I find that there is no evidence sufficient to transfer responsibility for eradicating bed bugs, from the landlord to the tenant.

Addendum on Amounts awarded by the Officer:

I will add, even if I am wrong in this conclusion, on the quantum of compensation sought from the tenant, I see no grounds for awarding the damage deposit of $850 (which the Landlord had already returned to the Tenant, minus some costs of repairs), and I see no grounds for the assignment to the Tenant, of the amounts the

Landlord paid to the condominium for abatement in other units, including the guest suite at the hotel.

It is clear from Ms. Castanedo's correspondence with Mr. O'Leary representing the condominium corporation, that the Corporation had concluded that it was "only fair" that Ms. Castenado pay for the eradication not only in her unit, the adjoining unit, and the guest unit above.

Whether or not it was "only fair", or required by virtue of the terms of her legal relationship as a property owner within this condominium, is not answered by the evidence before me. As a result, I find that it is an *ex gratia* payment made by the Landlord, for which the tenant cannot be held responsible.

In summation, I conclude that there is nothing in the evidence that can overcome the responsibility of the Landlord to maintain the unit in a habitable condition. As a result, I reverse the decision of the Officer in its entirety.

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Dale Allane Darling, QC

Adjudicator

Dated at Halifax, Nova Scotia on July 5th, 2022