SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *3332394 Nova Scotia Ltd. v. McLean*, 2022 NSSM 43

ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES

Date: 20220620
Docket: SCCH 515108
Registry: Halifax

Between:

3332394 Nova Scotia Ltd.

Appellant (landlord)

-and-

Donald McLean

Respondent (tenant)

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: June 15, 2022 via teleconference in Halifax, Nova Scotia

Appearances: For the Appellant,
Ursula Prosseger, Urchin Property Management

For the Respondent,
In person

BY THE COURT:

[1] This is an appeal by the landlord from a decision of the Director of Residential Tenancies dated May 26, 2022. In that decision the Residential Tenancies Officer dismissed the landlord's application to terminate the tenancy on the ground that the tenant was in breach of the *Residential Tenancies Act* and the lease by failing to provide proof of tenant insurance.

[2] The tenant has been in this 45-unit building on Windmill Rd. in Dartmouth since December of 2018, having signed a lease with its then-owner NPR GP Inc. shortly before he moved in.

[3] The building was sold to its current owner in late February 2020. Since taking over the building, the new landlord has attempted to get new leases signed with all of the tenants, which leases include a requirement that they hold tenant insurance. It has also introduced new rules, and given the tenants ample notice of when these rules would come into effect. These rules cover a wide array of subjects, and include the requirement for tenant insurance.

[4] The right of landlords to establish and enforce reasonable rules is recognized in s.9A of the *Residential Tenancies Act:*

> **Landlord's rules**
>
> 9A (1) A copy of reasonable rules established by a landlord that apply to the residential premises shall be given to a tenant prior to executing a lease.
>
> (2) Rules may be changed or repealed upon four months notice to the tenant prior to the anniversary date in any year.
>
> (3) A rule is reasonable if
>
> (a) it is intended to
>
> (i) promote a fair distribution of services and facilities to the occupants of the residential premises,
>
> (ii) promote the safety, comfort or welfare of persons working or residing in the residential premises, or
>
> (iii) protect the landlord's property from abuse;

(b) it is reasonably related to the purpose for which it is intended;

(c) it applies to all tenants in a fair manner; and

(d) it is clearly expressed so as to inform the tenant of what the tenant must or must not do to comply with the rule.

[5] The evidence of the landlord's property manager Ms. Prosseger is that it has been trying to get all of its tenants to be covered by tenant insurance, in part because its own insurers are increasingly insisting on tenant insurance being universal, as a condition of providing its commercial policies.

[6] The evidence of Ms. Prosseger is that tenant insurance is quite inexpensive, amounting to as little as $20.00 to $25.00 per month. It may be even less than that if bundled with other insurance, such as car insurance.

[7] Mr. McLean's lease with the previous landlord in Section 13 provides that it is his responsibility for tenant insurance, but that landlord never sought proof that Mr. McLean had such insurance and apparently did not insist that it be put in place. It is noted, however, that this lease had been signed on November 30, 2018 and as such was only renewed by that landlord once before the current landlord took over.

[8] Mr. McLean testified that in his decades as a tenant he has never had tenant insurance, and he does not believe he should be forced to obtain it now. He believes it should be seen as a matter of personal choice. He also stated that he is a person of limited means and is contending with the rising cost of living and does not want to take on another financial responsibility.

[9] The Residential Tenancies Officer dismissed the landlord's application on several grounds, which can be summarized as follows:

a. The *Residential Tenancies Act* is silent on the question of tenant insurance.

b. The previous landlord did not enforce the provision in Section 13 requiring tenant insurance, in effect "waiving it," and this landlord has assumed the lease.

c. The current landlord cannot insist upon enforcing a clause that has been waived for many years.

d. Section 13 of the lease is not mandatory and only serves to clarify what is or is not included in the monthly rent.

What is tenant insurance?

[10] It is well understood that tenant insurance essentially insures contents and also acts as liability insurance for the tenant. Since the owner's insurance policy does not cover a tenant's belongings inside the property, those are required to be insured under a tenant insurance policy - if insured at all.

[11] It also covers moving expenses and alternate accommodation in case the unit becomes uninhabitable, such as after a fire.

[12] One might say that these coverages are a matter of personal choice, and the landlord is not as affected by the tenant's choice whether or not to insure his belongings. But that is not the only benefit of tenant insurance.

[13] The liability coverage is arguably more important, from the landlord's perspective. It covers situations where something inside the unit, perhaps as a result of the tenant's negligence, causes damage to the common areas of the building or other units. For example, if an electrical appliance in the unit causes fire damage to the rest of the building outside the rented space, or in case visitors injure themselves in the part of the building that is rented, it is tenant insurance that would respond - not the owner's insurance. Another example is if the tenant leaves a bathtub filling and causes a flood affecting other parts of the building, the tenant insurance would answer for the damage. Where actual negligence is involved, the tenant (unless insured) is at risk of being sued personally for causing the damage.

[14] It is quite understandable that commercial insurers prefer a building to be 100% covered by tenant insurance, as it guarantees that they have recourse against another insurer rather than being left to the vagaries of an individual tenant's ability to answer to a judgment for damages.

[15] I accept the uncontradicted evidence of Ms. Prosseger that commercial insurers are insisting on tenant insurance being in place for buildings that they insure. I also find that it is <u>reasonable</u> for landlords to require such insurance. The question then becomes, is it <u>legal</u> to require tenants to have it?

The Residential Tenancies Officer's reasoning

[16] As to the Residential Tenancies Officer's points referred to above, she is correct that the *Residential Tenancies Act* itself is silent on the question of tenant insurance, much as it is silent on many things. However, it is mentioned in the Standard Form of Lease (in Section 13) which signals that the legislators or regulators have recognized it as something which may be involved in the tenancy.

[17] It is quite possible to read Section 13 of the lease as not mandatory. One of its main functions is to clarify "who pays for what." However, the fact that it appears where it does in the standard list, as something that the tenant either is, or is not responsible for, can more convincingly be read as a direction that the tenant should have such insurance if it is checked off in the lease. Other items in the list, such as lawn care, snow removal and garbage removal, appear in both the tenant's and landlord's lists. Whose responsibility these things are depends on whether it is checked or not. Tenant insurance does not appear in the list of things that the landlord may supply under the list.

[18] As such, I believe the better interpretation is that if this item is checked off, the parties are agreeing that the tenant will carry tenant insurance. A tenant who fails to abide by this provision is in breach of the lease.

[19] Equally, if the requirement is imposed by the landlord's rules, then so long as the rule is not unreasonable the tenant is in breach of the rules and can face legal consequences.

[20] As to whether the previous landlord did not enforce the provision in Section 13 requiring tenant insurance, in effect "waiving it," there are several things to say. First of all, there is no evidence that the previous landlord did not expect the tenant to have such insurance. All we know is that the tenant did not acquire such insurance and apparently suffered no consequences. We know nothing about that landlord's state of knowledge.

[21] Moreover, this was a tenancy of only about 15 months duration before the new and current landlord acquired the building. If there was a waiver, it was not a longstanding waiver. The Residential Tenancies Officer's statement that the current landlord cannot insist upon enforcing a clause that has been waived for <u>many years</u>, is incorrect.

[22] Even if there was something amounting to a waiver, the proposition that a legal term becomes unenforceable forever is contrary to basic legal principles.

[23] I believe the more accurate legal term is promissory estoppel, not waiver, although the terms are sometimes used interchangeably. In either case, the basic

principle is that the party who has failed to enforce or indicated that they will not enforce a legal right, is estopped (prevented) from enforcing that legal right without giving reasonable notice that they intend to rely on the right.

[24] The case of *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499 in the Ontario Court of Appeal succinctly sets out what promissory estoppel is:

> **Promissory estoppel**
>
> [67] Promissory estoppel typically involves a promise by one party not to rely on its strict contractual rights. Where such a promise has been made with an intention that the other party will rely on it, and that party relies on the promise to his or her detriment, the party who made the promise is estopped from acting inconsistently with it. As with a shared assumption, although the promise does not vary the terms of the contract, the party who made the promise may be precluded from resiling from it to the extent necessary to protect the position of the party who has relied on the promise to his or her detriment.
>
> [68] The classic case is *Central London Property Trust v. High Trees House*, [1947] K.B. 130. In that case, in the context of a 99-year lease, a landlord agreed to accept reduced rent from a tenant for an indefinite period of time as a result of reduced demand during WWII. Lord Denning held that the landlord's dispensation came to an end when full occupancy resumed but could also have been terminated at any time by notice. That is, the landlord could require the terms of the lease to govern future payments but was estopped from recovering past rent he had promised to discount.

[25] What this means here is that the landlord can reinstate its contractual right to enforce the requirement for tenant insurance upon giving reasonable notice of its intention to rely on its strict right.

[26] I find that four months of notice was reasonable.

[27] On two separate bases, therefore, the landlord is justified in insisting that the tenant carry tenant insurance. Basis one is that the waiver/estoppel has ceased to operate because reasonable notice was given. The other is that the landlord has given notice of a new rule, as it is permitted to do so long as that rule is reasonable.

Is the requirement for tenant insurance reasonable?

[28] I cannot think of a single reason why it might be seen as unreasonable for tenants to carry tenant insurance. Granted, there is a small cost burden placed on tenants, but that cost is minimal when one considers the benefits the coverage provides. Tenants of limited means are precisely the people who are least well-equipped to withstand the financial impact of a disaster, such as a fire or flood, that renders their unit uninhabitable or damages their possessions.

Is this a rental increase?

[29] One last point to consider, though not raised by either party, is whether the imposition of a new rule requiring tenant insurance may amount to a rent increase. If so, combined with another direct rental increase, it may run afoul of the law limiting the amount of rental increases.

[30] In my opinion, it does not amount to a rental increase within the meaning of the *Residential Tenancies Act.*

[31] The basic provisions covering rent increases are found in s.11:

> **Restrictions increasing rent**
>
> 11 (1) A landlord shall not increase the rent to a tenant for the twelve-month period following the commencement of a week-to-week, month-to-month, year-to-year or fixed-term lease.
>
> (2) Where a landlord intends to increase the rent payable after the first twelve-month period, the landlord shall give the tenant a notice in writing stating the amount and effective date of the increase in the case of
>
> (a) a year-to-year lease, four months prior to the anniversary date;
>
> (b) a month-to-month lease, four months prior to the anniversary date;
>
> (c) a week-to-week lease, eight weeks prior to the anniversary date;
>
> (d) a manufactured home space lease, seven months prior to the anniversary date,
>
> and in no case shall a landlord increase the rent to the tenant more than once in a twelve-month period and without proper notice prior to the anniversary date in each subsequent year.

.....

> (3) In the case of a fixed-term lease, the lease shall indicate the amount and effective dates of any increases and in no case shall the rent be increased to a tenant more than once in a twelve-month period.
>
> (4) The deletion or withdrawal of a service is deemed to constitute a rental increase.
>
> (5) Where a landlord discontinues a service, privilege, accommodation or thing and such discontinuance results in a reduction of the tenant's use and enjoyment of the residential premises, the value of such discontinued service, privilege, accommodation or thing is deemed to be a rent increase for the purpose of this Section.

[32] The notion that withdrawal of a service is a deemed rental increase is also found in s.9 (1) 2 of the Act:

> 9 (1) 2. Services - Where the landlord provides a service or facility to the tenant that is reasonably related to the tenant's continued use and enjoyment of the premises such as, but not so as to restrict the generality of the foregoing, heat, water, electric power, gas, appliances, garbage collection, sewers or elevators, the landlord shall not discontinue providing that service to the tenant without proper notice of a rental increase or without permission from the Director.

[33] I do not think that requiring tenant insurance amounts to withdrawal of a service. The Act does not equate every rule that may have a financial cost to a rental increase. I acknowledge that the effect is to increase the financial burden on the tenant, however minimally. But the landlord is not withdrawing a service that it has been supplying. It never did, and probably cannot, supply such insurance coverage.

[34] It is worth noting that the application to Residential Tenancies included a request by the landlord that the tenant comply with the lease and the Act. In other words, the landlord was seeking approval from the Director for its requirement of tenant insurance. This is precisely what Section 9 (1) 2 asks of a landlord: seek permission from the Director.

[35] In this matter before me, I have all of the powers of the Director and part of my order is that, to whatever extent the requirement for insurance may be seen as a rental increase, I grant permission for the landlord to impose it.

The effect of this order

[36] The primary relief that the landlord sought in its application to Residential Tenancies was an order for vacant possession.

[37] While such an order may be a necessary last resort for a tenant who refuses to comply with a rule, in a situation like this it should not be the first resort. The tenant held a sincere belief that he is not legally obligated to have tenant insurance. I have found otherwise. I believe he should be given an opportunity to comply with the requirement before resorting to more coercive measures. As such, I will order that the tenant provide the landlord with proof of tenant insurance within 30 days of the date of this order. If the tenant complies, then this order would be deemed to have been satisfied.

[38] If the tenant fails to provide proof of suitable tenant insurance by the date indicated, the landlord may ask the court to convene a further hearing at which time I would hear submissions on an appropriate date to end the tenancy, as well any other relief that may be appropriate.

ORDER

[39] In the result, the order of the Director of Residential Tenancies dated May 26, 2022, dismissing the landlord's application to terminate the tenancy on the ground that the tenant was in breach of the *Residential Tenancies Act* and the lease by failing to provide proof of tenant insurance, is set aside and in its place an order is made as follows:

a. The court declares that the tenant is in breach of his lease by failing to provide proof of tenant insurance.

b. The tenant is ordered to obtain and provide proof of tenant insurance within 30 days of the date of this order, failing which the landlord may ask the court for an order to terminate the tenancy, and for such other relief as may be appropriate.

c. The landlord is entitled to its costs of the proceeding before Residential Tenancies in the amount of $33.15, plus its costs of this appeal in the amount of $33.00, for a total of $66.15 which the tenant is hereby ordered to pay to the landlord.

Eric K. Slone, Adjudicator