

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Ayaz v. Rafuse*, 2022 NSSM 48

ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES

Date: 20220916

Docket: SCBW 516412

Registry: Bridgewater

Between:

Usman Ayaz and Qudsia Javed

Appellants (tenants)

- and -

Petch Rafuse

Respondent (landlord)

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: Via zoom on August 30 and September 7, 2022

Appearances: For the Appellants, Derek Brett, counsel

For the Respondent, self-represented and Greg Rafuse

BY THE COURT:

[1] This is an appeal by the tenants from a decision of the Director of Residential Tenancies dated July 12, 2022. That application responded to complaints by both parties. The tenants had sought compliance with the lease and/or the *Residential Tenancies Act* with respect to the water quality in the home, and for consequential damages. The landlord sought the payment of money for rent which the tenants had been withholding.

[2] The Residential Tenancies Officer mostly sided with the landlord. She found that the landlord had acted reasonably in response to the complaints about the water and ordered the tenancy terminated effective July 31, 2022.

[3] The tenants appealed promptly and retained legal counsel to represent them.

[4] As the parties understand, this is a hearing *de novo* and I am not bound by any of the Residential Tenancies Officer's findings.

[5] The tenants moved out at the end of August 2022, so the question of the status of the tenancy is moot.

[6] The premises in question is a house in Blue Rocks, Nova Scotia. Like many rural properties, it derives its water from a well.

[7] The tenants rented the place on a month-to-month tenancy beginning in November 2020. Rent was \$1,800.00 per month. The landlord took a security deposit of \$1,800.00 which is double what the law permits. Security deposits in excess of a half month's rent are not "negotiable" as Ms. Rafuse seems to believe. She does not now, nor has she ever had the right to continue to hold that deposit. I will give some directions concerning that later.

[8] The tenants had just moved from Ontario and were in the process of renovating a property nearby, so needed a place to live in the interim. The landlord says that she was only expecting them to live there for a few months, which suited her as she planned to sell the property. There was nothing in the lease limiting the amount of time that the tenants could stay, but there is no doubt that the renovation project seems to have taken much longer than anyone anticipated.

[9] The tenants' family consisted of the two named tenants, who are husband and wife, and the elderly father of one of them, and two sons now aged 11 and 12.

[10] One of the two sons has serious eczema. In about March of 2021, he had a major flare-up of his condition. A doctor suggested that a possible cause was the water in the house. Mr. Ayaz testified that they had noticed the water running brown occasionally and brought it to the attention of the landlord. The landlord and her husband Greg, who is a plumber, made light of the tenants' concern and suggested that this is normal for well water. There already was a water softening system in place, and the landlord did not want to change anything.

[11] The landlord suggested that they use bottled water and even brought some 4-litre bottles over for the tenants to use.

[12] The tenants decided to have the domestic water tested and called the water specialist company Culligan to conduct the test. That test found abnormally high levels of iron and manganese in the water. The water was also noted to be discoloured.

[13] The landlord and her husband did not accept this result and purported to do their own test. They pronounced the water to be OK, though there is no evidence that a test was ever done.

[14] In the meantime, Ms. Javed took their son back to Ontario for medical attention, as they were not yet fully connected with medical specialists in Nova Scotia. This involved significant cost, which is something that the tenants hope to recover from the landlord in this proceeding. I will deal with that later.

[15] In August 2021 the landlord changed the water treatment system in the house. This seemed to resolve matters for a time. The tenants used the water for bathing but not for drinking. In fact, the tenants never drank the water from March 2021 until they left in August 2022.

[16] In February 2022, the water pressure in the house began to drop to the point where only one tap at a time would run. Although in a text exchange he seemed to indicate that this was an impossibility, Mr. Rafuse eventually did something to improve the water flow in April 2022. Almost immediately thereafter, problems with water quality began to reoccur, with the water sporadically running very brown. When the tenants complained, the response was that the landlord had no intention of doing anything, and should just move out.

[17] As of the beginning of May the tenants began to withhold rent, and what had been a relatively civil relationship became highly conflicted.

[18] I do not normally condone rent strikes, though I understand that sometimes tenants feel they have no other way to engage a landlord's full attention.

[19] At this point the tenants stopped using the domestic water supply for bathing, as well as cooking or washing.

[20] Around this time the landlord cancelled the wi-fi system which had been included in the lease. This appears to have been done purely as retaliation for the rent strike.

[21] The tenants decided to test the water in mid-June 2022. They used an approved sample bottle from Nova Scotia Environmental Services and submitted a sample. The result dated June 16, 2022, revealed levels of copper almost three times the safe limit, iron over 20 times the safe limit, lead of 14 times the safe limit and manganese twice the approved limit. All other minerals were within safe limits. A test for bacteria was negative.

[22] Copper and lead are particularly dangerous in drinking water.

[23] The tenants consulted Culligan who recommended a reverse osmosis system to address the water quality problems. The landlord dismissed this suggestion because of the high cost.

[24] The tenants decided to do another test, choosing a time when the water appeared to be at its clearest. That test showed high iron levels while all other minerals were within normal ranges. While this was mildly reassuring the tenants did not resume full use of the water because it was unpredictable.

[25] The tenants stopped raising the issue with the landlord because she had made it clear that they were not prepared to do anything. In their view, the water was "potable." In fact, the landlord took to filling and stockpiling small water samples which they believe shows the water to be running clear at the time the samples were collected. The tenants concede that the water sometimes ran clear, but they had a concern about what was in the water, not just how it looked.

[26] I will observe that there is no evidence that lead or copper shows up as discolouration. Iron and manganese are common causes of brown water.

[27] The tenants felt stuck and moved out when they finally had another place to move into.

[28] The tenants provided photos and videos of the discoloured water, taken on various occasions. It very graphically shows a water supply system that was, at least at times, totally unfit for human habitation.

[29] The landlord and her husband Greg Rafuse both testified, though their evidence was hard to follow and was mostly argumentative.

[30] They dispute that the water was problematic and speculate that the tenants deliberately only tested the water or took videos when it was at its brownest. They even accused the tenants (with no evidence to back it up) of deliberately contaminating a water sample to achieve a negative report. They also accused the tenants of not allowing the water to run long enough before taking the sample. Even if this criticism has some merit, the presence of lead and copper (even once) in the water reveals a serious problem.

[31] The landlord never did any of her own testing while the tenants were in occupation. They have apparently run a recent test, but those results were not available at the time of the hearing.

[32] The Rafuses suggest that perhaps the brown water was only occurring during the backwashing cycle of the system, and they suggest that brown water is simply an occasional normal occurrence of water softening systems.

[33] The landlord says that the tenants' complaints about the water were in response to her requests to vacate, and she believes the tenants are acting in bad faith.

Discussion

[34] In terms of credibility, I generally favour the tenant Mr. Ayaz over either of the Rafuses. (Ms. Javed did not testify.) I found Mr. Ayaz to be fair and reasonable in his testimony. The testimony of the Rafuses was, in contrast, disorganized and rife with wild speculation and personal animus. The Rafuses both accused Mr. Ayaz of lying repeatedly. I do not accept that characterization, and in fact I find that both of the Rafuses were careless with the truth.

[35] As such, on the facts it is Mr. Ayaz's version of events that I accept.

[36] This is not to say that I accept all of the arguments made by or on behalf of the tenants.

[37] I find as a fact that the house in question had a problematic water system

that did not, at many times, deliver safe water for domestic use. The problem with a system that delivers intermittently bad water is that it can never be trusted.

[38] I find that from at least March of 2022 the tenants did not have usable water, and the landlord was in breach of her statutory duty to provide habitable premises. In this day and age, safe running water is a necessity of life.

[39] I also find that, as far back as March 2021, the water in the home was unsuitable for drinking or cooking.

[40] A lack of suitable water is deserving of a rent abatement and some consequential damages.

The son's eczema

[41] I do not fault the tenants for being cautious with their child's medical condition. However, the connection between the water supply in the house and the flare-up of eczema is in the realm of speculation. There is no expert evidence that makes the connection. I can accept that water quality is a possible cause, but not a probable cause. As such, I do not allow the tenants recovery of any of the considerable cost of taking the child back to Ontario for medical treatment.

Abatement

[42] Mr. Brett for the tenants suggests that the appropriate abatement is to return to the tenants all of the rent that they paid since the beginning of the lease, amounting to \$21,600.00. To that he adds that I should absolve the tenants of paying anything for the last four months after they stopped paying rent.

[43] I do not believe the authorities support such a drastic remedy. Nor would such a result be fair, in my opinion.

[44] The evidence shows that the water problems started in about March 2021 and lasted for about six months, and then again in 2022 the water was not usable for another six months. I am prepared to allow a 15% rebate for the months that they could not drink the water in 2021, and a further 35% for the six months that the water was unsuitable for most uses in 2022. This translates into abatements of:

2021 - 15% X \$1,800 X 6	\$1,620.00
2022 - 35% X \$1,800 X 6	\$3,780.00

total abatements	\$5,400.00
------------------	------------

[45] I am also prepared to allow the following consequential claims:

bottled water from Sobey's	\$851.15
4 months of wi-fi	\$469.75
Water tests	\$160.67

Residential Tenancies filing fee	\$31.15
Small Claims appeal fee	\$199.35
Total	\$1,712.07

[46] The total that the landlord owes the tenants is \$7,112.07. It is admitted that the tenants have withheld \$7,200.00 in rent. These amounts almost offset each other. Actually, the tenants owe \$87.93.

[47] The landlord also holds an \$1,800.00 security deposit.

[48] The correct way to adjust these are as follows. The landlord must refund one-half of the security deposit immediately. It is, and has at all times, been unlawful for the landlord to have retained it. From that the landlord may deduct the \$87.93, for a total refund of \$812.07.

[49] I am allowing the landlord to retain the other \$900.00 as a genuine security deposit, pending the results of a claim for damage allegedly caused by the tenants.

[50] At the original Residential Tenancies proceeding the landlord indicated that it had damage claims to make, but it wanted to await vacant possession to quantify those damages. As such the Residential Tenancies Officer did not attempt to assess damages, and neither did I. But the matter is still open.

[51] The landlord has a decision to make. If she brings a claim for damages with Residential Tenancies within ten days of receiving this decision, she may hold onto the security deposit pending that determination. If she does not bring such a claim, the tenants are entitled to have their \$900.00 returned to them. If the landlord does not proceed with the damage claim and fails to return the deposit, I will retain jurisdiction to make a further order.

ORDER

[52] This court accordingly orders as follows:

a. The order of the Director of Residential Tenancies dated July 12, 2022, is set aside and in its place an order is made as follows:

(a) The tenants are owed the sum of \$7,112.07 by the landlord,

representing a rent abatement, damages and costs.

- (b) The tenants owe the landlord the sum of \$7,200.00 for arrears of rent.
- (c) The landlord shall immediately refund to the tenants one-half of the \$1,800.00 security deposit, minus \$87.93, for a total of \$812.07.
- (d) The landlord may continue to hold the remaining \$900.00 security deposit pending a hearing at Residential Tenancies respecting alleged damage to the residential unit. If the landlord does not commence such an application to the Director of Residential Tenancies within ten days of receiving this order, then she shall return the security deposit to the tenants in full.
- (e) If the landlord fails to make such an application, this court retains jurisdiction to make such further order as may be required concerning the security deposit.

Eric K. Slone, Adjudicator