

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation:** *Burgess v. Fifield*, 2023 NSSM 11

ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

**Date:** 20230315

**Claim:** No. SCT519062

**Registry:** Truro

**Between:**

Nathan Burgess

APPELLANT

and

Monica Fifield (Fifeld)

RESPONDENT

**Adjudicator:** Julien S. Matte, Adjudicator

**Heard:** January 12, 2023 (via teleconference)

**Appearance:** Nathan Burgess, represented by Leona Burgess, for the Appellant  
Monica Fifield, represented by counsel Mr. Nicolas Hoehne,  
for the Respondent

**Matte, Adjudicator,**

1. This is an Appeal of an Order of the Director of Residential Tenancies denying termination of a lease and vacant possession. Nathan and Leona Burgess (referred to as the Appellants) are the owners of the property and rental unit subject to this appeal and claim that, in accordance with section 10AB of the *Residential Tenancies Act*, vacant possession of rental unit 3 is needed to complete renovations.
2. Although termed an appeal, a hearing before this Court with respect to an Order of the Director of Residential Tenancies is a new hearing. Leona Burgess (referred to as Appellant) testified on behalf of the Appellants and submitted a Book of Exhibits including 14 separate documents as well as one additional letter submitted to the Court separately. The Respondent testified on her own behalf and relied on the Order of the Director dated November 4, 2022.
3. The Appellant testified that the Appellants purchased the six unit building in 2021 as an investment property by mortgaging the Appellants' home. The building has three floors with units 2, 4 and 6 on the east side and units 1, 3 and 5 on the westside. The Respondent's unit is unit 3. Unit 5 was fully renovated while vacant between November 2021 and April 2022.
4. The Appellant testified that in May 2022, the building suffered a flood on the east side of the building that affected units 2, 4, and 6 with water crossing over to unit 1. The water penetrated the ceilings and walls. The Appellant tendered a flood damage report by Libcan, a restoration company suggested by their insurer. As noted by Libcan, the water originated in unit 6 and travelled down to unit 4 and effected "the bathroom and hallway ceiling, section of the walls, flooring and electrical panel."
5. An investigation done by the Appellant's building inspector confirmed that recent work revealed deteriorating wires in the walls of the units affected by the flood. His report was tendered by the Appellants and showed that the building was wired with NMD wiring which is noted to be susceptible to damage by rodents and overheating. The building inspector testified that he believed that the same type of wires would be found in all units and that if those wires were damaged in the same way as had been witnessed in the flooded units, they

presented an immediate fire hazard. The inspector conceded that he could not say for sure whether unit 3 would need to be vacated to allow for the renovation but offered that in his 20 years of his construction experience he couldn't think of a situation similar to this where the occupants could have stayed.

6. The Appellants' contractor also testified about the scope of work. In particular, he testified about the order of work needing to be done and the challenges of obtaining trades in these Covid and post Fiona times. The contractor testified that unit 3 would have to have the walls covering removed in order to replace all the old wiring. Based on the work required in the other units he expected a full gut of the bathroom including a fixture replacement and a window. He testified that it would be impossible to hire tradespersons, such a drywallers, to complete one unit at a time. The only way to secure tradespeople is to have them come and do the entire job at one time. The contractor testified that as a result unit 3 would need to be rewired before any drywall work could begin in the building.

7. The contractor also testified that the replacement of the heating system would interrupt heat in the building and therefore would have to be done quickly. The steps he identified were removing the oil tank and the boiler, building a secure switch room, connecting all the new circuits and testing them. In his opinion, the work of removing plaster would create too much dust to allow anyone to stay in the unit.

8. The Appellant testified that she made offers to each of her tenants to leave so that the work could be completed and provided the Court with Notices to Quit, all indicating a need to vacate due to "unsafe electrical & mold". Other than the Respondent, only the tenant in unit 5 elected to stay although unit 5 was already renovated in 2021-22. The Appellant testified that she provided the Respondent with an offer of \$3000 and an agreed upon time of vacancy, an offer that was refused as noted in a letter dated August 5, 2022. The Appellant also offered to assist the Respondent by speaking with her caseworker for income assistance. She advised that she was able to help find housing for other tenants and speak to their caseworkers.

9. The Respondent testified that she did not believe there had been a flood in May 2022 and believed that damages from an earlier flood were long resolved. Further, the work noted in the

inspection report consists of what appeared to be minor renovations in the nature of fixing a window, a toilet and a fixture. The Respondent believed that her and her 11 year old child could remain in the apartment during the renovations and noted she could move her belongings out for a period of two to three weeks to allow the work to be done. The Respondent expressed concern about maintaining her eligibility for income assistance which she testified could be in jeopardy if she lost a home address entirely. The Respondent testified that the Appellants were not acting in good faith and were simply trying to evict her as shown by having pursued more than one proceeding against her. The Court accepts that more than one proceeding was initiated by the Appellants but neither party provided any further evidence on the nature of those proceedings.

10. On cross examination of the Appellants' witnesses, the Respondent counsel obtained admissions from both the general contractor and the building inspector that they could not say with one hundred percent certainty that vacant possession was required for the needed repairs to be done.

11. Respondent's counsel noted the Respondent was relying on paragraphs 6-8 and 10 of the Order of the Director dated November 4, 2022.

### **Analysis**

12. Section 10AB of the *Act* governs whether the Appellants are entitled to terminate their lease with the Respondent and obtain vacant possession of unit 3 of their building. The applicable section of the *Act* reads:

**(3) In an application under subsection (2), the landlord shall satisfy the Director that the landlord has all the necessary permits and approvals required by law and that the landlord in good faith requires possession of the residential premises for the purpose of**

**(b) making repairs or renovations so extensive as to require a building permit and vacant possession of the residential premises.**

13. In summary, the Appellant must show that there exists a need for renovations that require vacant possession. At a minimum the Appellant must also show that required permits were obtained and that they are acting in good faith in pursuing the renovations.

14. Neither party is suggesting that no renovations are required. The Court accepts that a flood occurred on a top floor unit causing damage to the eastside of the building with some water migrating to the other side at the lower level. The Court accepts that in renovating the affected units, it was discovered that some of the sheathing around the wiring in the walls had deteriorated. The Court also accepts that on a balance of probability, the entire building is wired with the same type of NMD wiring, wiring susceptible to rodents and overheating. The Court also accepts that while it is not known whether unit 3 had defective wiring, it is wired with NMD wiring.

15. The Court accepts that the Appellants obtained a wiring permit from Nova Scotia Power and a building permit from Colchester County. The application for the permits were not provided. The re-wiring of an entire building is not a small job. An estimate obtained by the Appellants for addressing all issues in each unit, on a per unit basis, was \$55,000. Although unit 3 did not suffer damage from the flood, at a minimum the walls and possibly the ceilings will have to be opened up to remove and replace the wiring. Whether the wiring is found to be damaged or not, in unit 3, does not change the scope of work, only its urgency.

16. The Court finds that the Appellant had no choice than to upgrade their building's wiring given the damaged outdated wiring found in the flooded units. The Court also finds that the rewiring could not be done without obtaining a permit from Nova Scotia Power. Further the Court finds that given the intrusive nature of the rewiring and the outdated heating system, a system that frequently failed, the Appellant's decision to replace the boiler with heat pumps is reasonable. The Court finds that the replacement of the boiler and associated plumbing updates required a permit from Colchester County and that the permit was obtained.

17. The Court finds that the renovations undertaken by the Appellants are needed and the necessary permits were obtained.

18. In order to obtain vacant possession, however, the Appellant must demonstrate that possession of the unit is necessary for the needed renovations to be completed. In doing so, the Appellant must show that they are proceeding with the renovations in good faith.

19. The Appellants point to an offer made to the Respondent of \$3000 and an orderly date to vacate in addition to help with finding alternative accommodation and liaising with the Respondent's caseworker as showing evidence of good faith. The Respondent points, on the other hand to other proceedings before the Director of Tenancies and this Court as well as frequent interruption to the heating as evidence of bad faith.

20. While questioning the necessity of the renovations, the main thrust of the Respondent's argument was in fact that the Appellants had failed to show that the Respondent needed to vacate for the renovations to proceed.

21. Both the contractor and building inspector testified that the work could not be done with the Respondent or her belongings present citing control of the plaster dust from the removal of the wall coverings as being unmanageable. The contractor also testified that due to trade shortages, each step of the construction process would have to be done at the same time for the entire building extending the time needed to renovate unit 3. Further, he questioned whether his liability insurance would allow him to work on an occupied unit in these circumstances.

22. Under cross examination, both the contractor and the building inspector conceded that it was not impossible for a tenant to stay during the renovations although the only bathroom for the unit would not be available for a period of time.

23. The Respondent testified that she has lived in the unit for seven years with her 11 year old child. She testified that she could leave temporarily for a period of 2-3 weeks and given the uncertainty of her tenancy, she had already packed her belongings and could move fairly quickly. The Respondent questioned whether there had been a recent flood but recalled another flood which she described as extensive. The Respondent noted she was willing to work around renovations. The main issue she identified was her need to maintain her eligibility for income assistance by retaining her address.

24. With respect to the time needed for renovations, the written estimate of time given for the work in the entire building was 12-16 months although much of the wiring work has already been completed at the time of the hearing. The Appellant testified that unit 5 took approximately 5 months to renovate. In addition to the work needed to be done in unit 3, the contractor testified that the oil tank and boiler would have to be removed, heat pumps installed in the units, a new electrical room built in the basement, a switch station installed, each circuit connected, tested and approved by Nova Scotia Power.

25. In considering whether vacant possession is needed, the standard to be applied is not whether it is impossible to renovate without vacant possession but whether on a balance of probabilities it is possible to complete renovations while a tenant continues to occupy the space. Given the highly intrusive work of completely replacing old wiring throughout the walls and ceiling of unit 3 while losing the use of the only bathroom, there is little doubt that continued possession is not feasible while the renovations are ongoing. The evidence is also clear that renovations of the unit and a changeover of the building heating and electricity will take much longer than the time the Respondent indicates she can leave and stay with family. The renovations are required to keep the building's occupants safe, there is no indirect evidence of bad faith.

26. With respect to direct evidence of good faith the Court notes the uncontested evidence that the Respondents was offered the sum of \$3000 (an amount greater than prescribed by the *Act*) and assistance with finding a new apartment and liaising with the Respondent's caseworker in exchange for accepting an orderly move from unit 3. While the Respondent may have had reasons to decline the offer and clearly expressed worry about her income assistance status, the offer itself is an indication of good faith.

### **Conclusion**

27. Section 10AB of the *Act* exists to prevent abuses of the *Act* through so-called renovictions. The application of this provision in the current climate of rising rents is an integral part of the protections afforded by the *Act* to tenants in this province. Here, a flood in a third floor unit

caused damage to the building which helped uncover old, worn and dangerous wiring, wiring that must be replaced throughout the building. This unfortunate set of events may ultimately ensure the safety of not only the Respondent and her child but that of all future occupants of the building. It is hoped that the parties and related government agencies can work together to ensure that the Respondent is able to relocate to a suitable and safe home.

## **Order**

28. Pursuant s.10AB(2), the landlord is entitled to the termination of the lease and vacant possession no sooner than 3 months of the Order of the Director made on November 4, 2022. Given the circumstances, the Court orders vacant possession by 6:00 p.m. on February 18, 2023 or as otherwise agreed to by the parties.

29. In the event that rent for November 2022 through February 2023 has been paid by the Respondent, and pursuant to s. 10AC(2)(a) of the *Act*, the Court orders the Appellant to pay the Respondent the equivalent of a minimum of three months rent or \$1,912.50. If rent has not been paid for the same period, no amount is owed by the Appellant.

The Appeal is allowed.

Julien S. Matte, Adjudicator