

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Nadeau, Kent v. Legere*, 2023 NSSM 103

ON APPEAL FROM AN ORDER OF THE DIRECTOR OF
RESIDENTIAL TENANCIES

Date: 20231214
Docket: 527616
Registry: Halifax

Between:

Stacy Nadeau and Matthew Kent

Appellants (tenants)

v.

Greg Legere

Respondent (landlord)

Adjudicator: Eric K. Slone

Heard: November 22 and December 8, 2023

Counsel: Tenants -self-represented
Landlord – self-represented

By the Court:

[1] On August 5, 2023, the skies opened up over Dartmouth, dropping an extraordinary amount of rain in a short period of time. This event caused widespread flooding of homes and basements. In the case before me, the lower-level flat leased by the tenants was hit by an influx of water through the front door, wetting everything in its path and essentially making the unit uninhabitable.

[2] Neither the tenants nor the landlord have insurance coverage for flooding. They both insist that they tried to acquire such coverage but were told it is no longer available in Nova Scotia. I have to accept that this is true, at least in their case. In the absence of insurance, the parties must absorb the costs of natural disasters on the basis of the applicable legal principles.

[3] The main issue before Residential Tenancies, and on appeal before this court, is to allocate the financial fallout from this flood.

[4] The lease in question was year to year, commencing on April 1, 2020, at a current rent of \$900.00 per month. The landlord holds a security deposit of \$440.00. Rent for the month of August 2023 was paid.

[5] When the landlord saw the damage caused by the flood, he understood immediately that the unit would be uninhabitable for the foreseeable future. He took the step on August 9 of serving a Notice to Quit: Form F, seeking vacant possession on August 13, 2023. The tenants had taken temporary shelter elsewhere on the day of the storm, but did not conclude until a few days later that they would have to move.

[6] When served with the Form F, the tenants did not immediately begin to clear out their belongings but instead made an application to Residential Tenancies seeking return of the security deposit, and various other items of relief.

[7] The landlord counterclaimed for various items of relief including termination of the lease and damages.

[8] The matter was not heard in Residential Tenancies until October 5, 2023, which is unfortunate because precious time was lost preventing the parties from seeking practical solutions to the problems that they faced.

[9] When it became obvious to the landlord that the tenants were not relating to their possessions and the state of the interior, he took the very sensible step of renting a storage locker and moving most of the tenants' furniture and other

belongings into it. He seeks (among other things) the cost of the storage locker rental, and compensation for having to pack it up and transport it.

[10] That process still left a lot of ruined items and garbage still in the unit, which needs to be cleared out in order for renovation and restoration to begin. There are now quotes for that work, and the tenants concede that there is nothing of value belonging to them left in the unit.

[11] The Residential Tenancies Officer gave her decision on October 11, 2023, and ordered the tenants to clear out the storage unit by October 31, 2023, and awarded the landlord the net sum of \$4,139.58 in compensation for various items. The tenants appealed, stating that they should not be held liable for any of the financial consequences, in part because the landlord did not communicate with them (they say).

[12] I do not propose to examine the Residential Tenancies Officer's methodology because this is a hearing *de novo*, and because I propose to return to basic principles.

[13] I will say at the outset that I part ways with some of the conclusions of the Residential Tenancies Officer, and her underlying reason to reject some of the landlord's claims. Unlike her, I do not place much weight on the tenants' alleged

difficulty in reaching the landlord, or the landlord's alleged failure to contact the tenants. The landlord told the tenants in no uncertain terms that he had to terminate the tenancy. Knowing this, the tenants ought to have known that they had to deal with their belongings and not leave all of the work to the landlord.

[14] The appeal first came before me for hearing on November 22, 2023. On that date I heard the evidence of Ms. Nadeau and Mr. Legere. Mr. Kent did not attend either hearing.

[15] As of November 22, the landlord was in control of the storage locker, paying the rental and holding the keys. The unit was still full of ruined property, and the landlord did not know what it would cost to clear it out. He was unclear whether he had the authority to do so, and looked for guidance from the court.

[16] After the evidence had been heard, but before legal argument, I allowed the parties an adjournment of approximately two weeks to allow for the storage locker to be transferred to the tenants, and for estimates to be obtained for emptying out the unit and disposing of the items at the dump. That had been done by the time we resumed the hearing on December 8, 2023.

What should have happened?

[17] Let me state at the outset that this was a crisis atmosphere where people were not necessarily thinking straight, and for various reasons the lines of communication were not as open as they ought to have been. So not all actions taken, or neglected to be taken, were as they should have been.

[18] A flood of this magnitude rendered the unit uninhabitable, in the same way as a fire might have done. The legal effect was to frustrate the contract.

[19] In the case of *Johnson v. Sarty*, 2019 NSSM 17, I applied the doctrine of frustration to a situation where a house suffered a severe mold outbreak:

[67] In the case of *Johnson v. Sarty*, 2019 NSSM 17, I applied the doctrine of frustration to a sit Nova Scotia does not have a specific statute defining frustrated contracts, as some other provinces do. For example, in Ontario, the *Frustrated Contracts Act* applies to “any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged.” The doctrine developed at common law to excuse parties from performing their contracts when performance has become impossible. It is a no-fault provision. Contracts which have been “frustrated” need not be performed. The doctrine of frustration allows for the legal termination of a contract due to unforeseen circumstances that prevent the achievement of its objectives, render its performance illegal, or make it practically impossible to execute.

[68] The mold outbreak, coupled with the finding of asbestos, amounted in my opinion to frustrating events. The Tenants cannot be expected to have waited indefinitely for the situation to resolve. The matter appeared serious enough that the Tenants made the reasonable decision to live elsewhere.

[69] I have already rejected the contention that the water supply, not

being ideal for drinking, was a ground to label the premises unfit.

[70] Frustration of contract does not occur unless one or both of the parties declare the contract frustrated. The Tenants did not communicate their position unequivocally until September 11, 2018 when they started their Residential Tenancies proceeding. I find that this is the effective date that the contract became frustrated.

[20] In the case here, the landlord took the position that the tenancy had been frustrated on or about August 8. The tenants implicitly accepted that position when they applied two days later to Residential Tenancies to get their security deposit back.

[21] At this point, the tenants fell under a duty to move their belongings out of the unit. Vacant possession includes all of one's belongings. By refusing or neglecting to empty out the unit, they made it impossible for the landlord to get on with cleaning out the unit and getting it ready for remediation.

[22] The landlord acted reasonably in renting the storage locker. The tenants should be held responsible for the costs associated with that. The tenants should reimburse the landlord for five months of storage fees of \$304.69 per month, or \$1,523.45.

[23] The landlord seeks compensation for his and his helper's labour in packing up and moving the belongings. He claimed 20 hours at a rate of \$60.00 per hour. The Residential Tenancies Officer allowed those hours at minimum wage. I

believe it is unrealistic to value this work at minimum wage. It is equally unrealistic to remunerate the landlord on the basis of what he earns in his employment. I consider a more reasonable rate of remuneration to be \$25.00 per hour, essentially a handyman's rate, for a total of \$500.00.

[24] The tenants failed to remove their ruined items. I do not understand what they expected of the landlord, or why they thought it was his responsibility. In their original application to Residential Tenancies, they appeared to be seeking to hold the landlord responsible for the damage to all of their possessions. That is not a reasonable proposition. It was their responsibility to clear everything out, and the landlord ought not to have had to wait almost four months for the go-ahead to do so. I find that the tenants are responsible for the cost of cleaning out the unit. He lesser of the two quotes for that is \$517.50.

[25] The biggest ticket item that the landlord claims is the additional cost of remediation that the landlord expects to incur, because of the tenants' delay in removing their stuff. The landlord's theory is that the moisture has continued to wick up the walls, resulting in the necessity to remove a much greater amount of drywall, namely 4 feet instead of 4 inches. The evidence from Servicemaster (dated September 11, 2023) puts that difference at \$8,679.09.

[26] The Residential Tenancies Officer allowed the landlord half of that amount, namely \$4,339.55, on the stated theory that there was joint responsibility for the delay.

[27] I have a bit of trouble with the landlord's theory. It presupposes that there was a reasonable likelihood that a contractor could have been engaged within days of the flood to remove 4 inches of drywall. Given the widespread flooding in Nova Scotia it is likely that contractors were extremely busy, and by the time someone could have been hired it is likely that the moisture would have been more widespread than it was after just a few days.

[28] Another way to view the question, and the more tangible one in my view, is to regard the tenants as having overhired their tenancy. They should be held responsible for rent for the balance of August and the months of September, October and November. By the time of the first hearing on November 22, the landlord was on notice that he had the green light to empty the unit. August was already paid, so I award the landlord three months' rent in the total amount of \$2,700.00.

[29] There are a number of other items that the landlord claims which I will consider below.

Garbage Bags for Packing Tenants' Belongings	\$19.53
Gas for Truck to Transport Items	\$30.00
Clean up in Backyard	\$120.00
Residential Tenancies Fee	\$31.15
Printing and USB Stick for Hearing	\$45.48
Misc Items Total	\$246.16

[30] These are reasonable and I allow them.

Door replacements - \$3,181.61

[31] The landlord claims for two damaged doors. The evidence of the tenants, which I accept, was that the entry door was damaged by the flood water. The interior door was damaged by Ms. Nadeau when she fell against it while removing items from their room. I allow the landlord \$517.20 for the interior door, but disallow the claim for the exterior door.

Pest control - \$569.25

[32] The tenants allowed a cockroach infestation to get totally out of control. I have frankly never seen anything like it. The photos in evidence show squashed bugs all over the walls and other surfaces. There are glue traps around the unit with hundreds of dead bugs. I do not accept their excuse that they tried to tell the landlord but found him hard to communicate with. They had at least several

occasions when they could have mentioned it, or they could have contacted a pest control company on their own. Instead, they allowed it to get totally out of hand. I hold them responsible for the cost of dealing with this abnormally serious problem.

[33] In sum, I allow the following:

Storage Locker (5 months)	\$1,523.45
Packing and Transportation of Belongings	\$500.00
Quoted Cost to Clean out Unit	\$517.50
Three Months' Rent	\$2,700.00
Misc Items	\$246.16
Door Replacement	\$517.20
Pest Control	\$569.25
Credit Security Deposit	(\$440.00)
	\$6,133.56

Order

[34] IT IS ORDERED that the order of the Director of Residential Tenancies dated October 11, 2023, is varied to provide that the tenants shall pay to the landlord the sum of \$6,133.56.

Eric K. Slone, Small Claims Court Adjudicator