

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Marson v. Graham*, 2025 NSSM 54

Date: 20250902
Docket: 544949
Registry: Halifax

BETWEEN:

Ron H. Marson

Appellant

-and-

Patrick Graham and Sonya Graham

Respondents

Adjudicator: Michael J. O'Hara
Heard: August 18, 2025
Decision: September 2, 2025
Appearances: Appellant, Self-Represented
Respondents, Self-Represented

By the Court:

[1] This is an appeal of a decision of the Director of Residential Tendencies dated July 3, 2025, ordering the Appellant to pay to the Respondents the sum of \$179.61. This amount represented the difference between \$769.60 being the rent found by the Residential Tenancy Officer (“RTO”) to be payable for the period of June 1 – 17, less the security deposit of. \$949.21.

[2] The Appellant has appealed that decision seeking rent for all of June and July, 2024 in addition to other monetary claims.

Summary of Background Facts and Parties’ Positions.

[3] The Respondents had been Tenants of the Appellant for some 13 years through a series of fixed term leases between the parties. The most recent lease was in evidence and covered the period August 1, 2023 - July 31, 2024.

[4] In early 2024, the Appellant (who I will also refer to as the Landlord) decided that he wanted to sell the subject property. He mentioned this to the Respondents (referred to herein as the “Tenants”) and after a few days they advised that they were not in a position to purchase the property.

[5] The Landlord then proceeded to put the property through a realtor and had it listed for sale. Within a relatively short period of time, the Landlord had entered into an agreement of purchase and sale with a third party. The closing date was scheduled for June 5, 2024.

[6] To facilitate the June 5 closing date, the Landlord served a Form DR2 - *“Landlord’s Notice to Quit - Purchaser to Occupy Residential Premises - Sale of Residential Premises”* giving notice to the Tenants of a termination of the tenancy effective May 31st. A Form DR2 is the form required by the Director under s. 10AA of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401 (the “*Act*”).

[7] The Tenants challenged this by filing an application with the Director of Residential Tenancies on March 18 asserting that since the tenancy in question was by way of a fixed-term lease it could not be terminated earlier than the specified end date which was July 31st, 2024. This application went before a Residential Tenancy Officer and by Order dated April 30, 2024, it was ordered that the lease in question was a fixed term lease and ran until July 31, 2024. Neither party appealed this decision.

[8] In apparent recognition of this potential outcome, the Landlord and the buyer had earlier entered into an Amendment to the Agreement of Purchase and Sale on March 25, 2024, by which they agreed as follows:

1. The seller to provide legal confirmation of the current tenants lease type at said property to the buyer on or before April 30th, 2024
2. If it is determined that the current tenants occupying said property are legally under a fixed-term lease, thereby preventing vacant possession on June 5th 2024, then the seller hereby acknowledges and agrees to the following terms:
 - a. the seller, at the seller's expense, shall credit the buyer \$5000 at closing.
 - b. Clause 2.1 of the Agreement of Purchase and Sale -closing date to be August 1st, 2024, to ensure vacant possession.

[9] As a result of the Order of April 30 and based on the Amendment to the Agreement, the closing of the transaction was rescheduled to August 1, 2024.

[10] Meanwhile, the Tenants had been seeking a new tenancy and secured new premises on or about May 15, 2024, and on that same day then issued their own Form DR2 giving notice to terminate the lease on May 31, 2024.

[11] While it was not clear when the Tenants' Form DR2 was served, I would note the following texts exchanged on May 27 and 28:

May 27 3:47 PM Text from Sonya Graham to Ron Marson

Hello Ron it's Sonya Graham. The house is almost completely vacant. We have a few things in the living room to retrieve this evening as well as mow the lawn. Then the house will be available for you.

Garbage day is Thursday. So once they come, it'll all be gone.

If we can work out a time Thursday evening to exchange the keys and deposit that would be great as it's my only night off for a little while.

Thanks

May 28 6:24 PM Text from Ron Marson to Sonya Graham

Hello Sonya, I have received your text. Please be advised that in accordance with the Residential Tenancy Directors ruling, file number 20241255 April 30/2024 time 2:30 PM signed by Sheila Briand. By vacating the premises by May 31/2024, Patrick and yourself are in violation of the Director's order. You are bound to the lease agreement, August 1/2023 ending July 31/2024. Should you have any further concerns regarding this matter, please refer this to my e-mail address. Ronnie.marson@live.ca thank you Ron Marson

[12] The Tenants were completely out of the premises by May 31, 2024.

[13] The Landlord went to the premises in early June and according to his testimony found the door unlocked and all of the furniture and other possessions of the tenants had been removed. Further, he changed the locks but, according to his evidence did that on June 17th.

[14] The Tenants position, as I understand it, is that the Landlord was well aware that they would be vacating by May 31st and therefore the obligation to pay rent should cease as of that date. The Tenants stopped payment on June's rent cheque.

[15] The Appellant seeks rent for both June and July and as well is claiming for the \$5000 credit paid to the buyer, some miscellaneous damages to the premises, and various costs.

Decision

[16] I start with the Form DR2 issued by the Tenants. In my opinion, that notice was invalid. I say that because the whole statutory rationale for a tenant issuing a Form DR2 is based on the landlord first issuing a Form DR2 which assumes a valid Form DR2 being issued by the landlord. The applicable provisions in the *Act* are sections 10AA(3) and 10AA(4). Section 10AA in its entirety reads as follows:

Early termination for sale of residential complex

- 10AA (1) In this Section, “residential complex” means a building in which one or more residential premises are located.
- (2) A landlord of a residential complex that contains no more than four residential premises may end a tenancy in respect of residential premises in the residential complex if:
- (a) the landlord enters into a purchase and sale agreement in good faith to sell the residential complex;
 - (b) all the conditions, unrelated to the title, on which the sale depends have been satisfied;
 - (c) the purchaser is an individual; and the purchaser
 - (i) asks the landlord, in writing, to give notice to end the tenancy on the grounds that the purchaser, or a family member of the purchaser, intends in good faith to occupy the residential premises, and

- (ii) provides to the landlord an affidavit sworn by the purchaser that the purchaser, or a family member of the purchaser, intends in good faith to occupy the residential premises.
- (3) A landlord ending a tenancy pursuant to subsection (2) must give to the tenant
 - (a) a copy of the sworn affidavit of the purchaser; and
 - (b) a notice, in the form required by the Director, to end the tenancy effective on a date that must be
 - (i) not earlier than two months after the date the tenant receives the notice,
 - (ii) the day before the day in the month, or other period on which the tenancy is based, that rent is payable under the tenancy agreement, and
 - (iii) where the tenancy is a fixed-term lease, not earlier than the date specified as the end of the tenancy.
- (4) A tenant who receives a notice referred to in clause (3)(b) may, at any time before the date specified in the notice, terminate the tenancy, effective on a specified date earlier than the date set out in the notice referred to in clause (3)(b) but at least ten days after the tenant gives notice to the landlord to terminate the tenancy.

[17] Here, the Form DR2 issued by the Landlord was erroneously based on the assumption that the lease in question was a year-to-year lease. As ruled by the Residential Tenancy Officer in the decision of April 30th, that was incorrect. The lease in question was a fixed term lease and could not be terminated under section 10AA earlier than the date specified as of the end of the tenancy (see section 10AA (3)(b)(iii)).

[18] That the Tenants' Form DR2 notice to quit was invalid was also the finding of the RTO in the Order of July 3, 2025. However, the RTO goes on to rule that the changing of the locks on June 17th 2024 effectively concluded the tenancy and, therefore, the Landlord was only entitled to rent up to June 17th. With respect, I disagree with that conclusion.

[19] In my view, whether or not the tenancy was "concluded" which is merely a synonym for "terminated", does not disentitle a landlord to damages for the loss of rent for the unexpired term. As I will explain, such a finding runs counter to the general law laid down in the seminal case of *Highway Properties Limited v Kelly Douglas And Co.* [1971] SCR 562. In addition, it runs counter to the legislative provision contained in statutory condition number 6 of s. 9(1) of the *Act*.

[20] The significant facts here were that the Tenants left approximately two months early and did not pay rent for those last two months. While they gave some notice to the Landlord that they were leaving, for the reasons given above, that notice had no legal effect. The Tenants therefore had no legal entitlement to leave earlier than the natural end date of the fixed term lease which, according to the express terms of the lease document, as confirmed by the April 30th Order of the Director, was July 31, 2024.

[21] By leaving the premises on May 31st and not paying June's rent, the Tenants abandoned the lease. This constituted a repudiation by the Tenants of their contractual obligation. The leading case in Canada regarding a landlord's rights where a tenant repudiates a lease is the case of *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., supra*. In that case Justice Laskin (as he then was) stated (page 570 of SCR):

The developed case law has recognized three mutually exclusive courses that a Landlord may take where a Tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of Landlord and Tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the Tenant that he proposes to re-let the property on the Tenant's account and enter into possession on that basis. Counsel for the Appellant, in effect, suggests a fourth alternative, namely, that the Landlord may elect to terminate the lease but with notice to the defaulting Tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period.

[Underlining added]

[22] The significant and central finding of the *Highway Properties* case is that leases of land are not only interests in land but are also contractual arrangements. As such, the breach of such a contract should entail damages akin to damages for breach of contract. Prior to the *Highway Properties* case, all of the remedies available to a landlord were seen to be merged at the point that the lease

terminated. That approach was no longer good law once the Supreme Court of Canada issued the *Highway Properties* case.

[23] The *Highway Properties* case has been referred to and applied in a number of cases in this Province. See for example: *Innotech Aviation v. Skylink Express Inc.*, 2018 NSSC 93; *Action Management Inc. v. Archibald*, 2011 NSSC 358; *AFG Glass Centre v. Roofing Connection*, 2010 NSSC 108; *Fisher v. MacKenzie*, 1996 NSCA 36; *Arton Holdings Ltd. et al. v. Gateway Realty Ltd.*, 1991 CanLII 2707 (NS SC); *Vinland Holdings Ltd. v. Wisniowski*, 1990 NSCA 7; *Queen Square Development Ltd. v. Financial Collection Agencies Ltd.*, 1989 CanLII 1481 (NS SC).

[24] In the *Fisher v Mackenzie* case, *supra*, which notably, involved a residential tenancy, Chipman, J.A. states:

It is clear from *Highway Properties* that a landlord may accept repudiation of the lease and retake the premises and still reserve the right to seek damages for losing the benefits flowing from the lease over its unexpired term.

[25] As well, statutory condition no. 6 of the Nova Scotia *Residential Tenancies Act*, and contained in section 9(1) is relevant. It reads:

9(1) 6. **Abandonment and Termination** - If the Tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the Landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

[26] This provision contemplates a continuing right to damages for loss of rent after the termination of a tenancy. The mitigation referred to in the legislation can only be in relation to the loss of the benefit of the lease over its remaining term since those would be the only damages “caused by the abandonment or termination”. Any other losses, such as existing rental arrears for example, would not be capable of being mitigated.

[27] Here the term of this lease ended July 31, 2024. The Tenants paid rent to May. They moved out prior to May 31st. They paid no rent for June or July. The Landlord did not consent to their leaving. The text of May 28th makes that very clear. The unilateral decision by the Tenants to vacate prior to May 31 can be viewed as an abandonment or possibly as a termination. The better view may be that the termination only “crystalized” when the Landlord retook possession on June 17th. Whether viewed as an abandonment or a termination, the Landlord was obliged under Statutory Condition 6 to mitigate his losses and in order to do so would have to retake possession, which he did.

[28] Typically, where a tenant vacates before the end of the lease term mitigation entails seeking a new tenant or tenants to take over the space. However the situation here was somewhat unique since the Landlord was under an agreement of purchase and sale by which he was selling the subject property with a

closing date of August 1st. This meant that the Landlord could only have offered up the property for a two months (or less) rental. It is unrealistic to suppose that any proposed renter would have had an interest in such a short term rental. The Landlord cannot be seen as failing to mitigate in these circumstances.

Claimed amounts

[29] In addition to the rent for two months, the Appellant also puts forward the following claims:

<u>Amendment to Buyer of Home</u>		\$ 5,000.00
<u>Damages (physical)</u>		
Paint	129.98	
Sods	88.32	
Lock for house	<u>90.74</u>	
	309.04	309.04
<u>Costs</u>		
Application fees (2)	62.30	
Court fees	33.00	
Bailiff fees	342.00	
Parking	<u>9.45</u>	
	446.25	446.25
Rent for June and July		<u>2886.00</u>
Total Claim Amount		\$ 8,641.79

[30] First, as to the \$5000 claim for the amendment with the buyer, this shall be dismissed. There is no causal link between this amount and the fact of the Tenants leaving early. And, the Tenants cannot be responsible to the Landlord for asserting

their rights to confirm that a fixed term lease was in place and that the end date was July 31st.

[31] Under the damages heading, the landlord has not proven the claims for the sods or the paint. The fact that payments were made does not prove that there were damages caused by the tenants. And, with respect to the photos of the interior, while I appreciate that the condition does not look very good, it is to be kept in mind that these Tenants were in the premises for approximately 13 years and there would have been “reasonable wear and tear” commensurate with that length of tenure.

[32] With respect to the claim for the change of the lock, this appears to be an expense that would have been incurred by the Landlord in any event including if the Tenants had remained in the premises up to July 31st.

[33] Finally, I refer to the claim for various costs. The *Act* only permits the ordering of the application fee of \$31.15 and the Court fee of \$33.00 for a total of \$64.15 (sections 17A(k) and 17D(2)).

[34] In summary I will allow the following:

Rent for two months	\$2,886.00
Costs	<u>64.15</u>

	\$2,950.15
Less security deposit	-949.21
Net amount owing by Respondents	\$2,000.94

[35] It is hereby ordered that the Respondents pay to the Appellant the sum of \$2,000.94.

Michael J. O'Hara, Small Claims Court Adjudicator