IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Beukema & Nelson Property Management v. Beaver* 2013 NSSM 29

Claim: SCCH 417513
Registry: Halifax

Between:

Beukema & Nelson Incorporated Property Management

Appellant

v.

Jason Beaver

Respondent

Adjudicator: Augustus Richardson, QC

Heard: July 30, 2013 in Halifax, N.S.

Appearances: Tracy Smith, for the claimant
Jason Beaver, respondent, for himself

By the Court:

[1] This is an appeal of a residential tenancy order dated July 5, 2013. It involves the issue of whether a landlord can charge an additional fee to tenants who acquire pets (in this case, a cat) after they have entered into a lease with the landlord. The residential tenancy officer held that the landlord could not in this case do that because the rule was unreasonable. I disagree. For reasons set out below I am of the view that the rule was reasonable. However, the fee must fail because it was in effect an improper rent increase.

[2] The appeal came on before me on July 30th, 2013. On behalf of the landlord I heard the evidence of Mr Rijpke Beukema, and of Ms Lindsay Beukema, the landlord's current property manager. On behalf of the respondent I heard Mr Jason Beaver.

The Facts

[3] Mr Beaver made a rental application on August 3, 2010. The second page of the form, a few inches above Mr Beaver's signature, contained the following note in bold face: "NO PETS ALLOWED:" Book of Exhibits, Tab 1. At that time Mr Beaver did not have a pet.

[4] Mr Beaver's application was accepted. On August 24, 3010 Mr Beaver and the landlord entered into a yearly lease effective September 1, 2010: Book of Exhibits, Tab 2.

[5] Attached to the lease is a document titled "Addendum to Lease." The following clauses are relevant:

> H: **NO PETS ALLOWED.** Only permission from the Superintendent for a neutered and de-claw [*sic*] cat will be considered.
>
> I: There will be an automatic deduction from the Security Deposit for Steam Cleaning of Carpets upon Vacancy and an Additional Cost for Fumigation, if pet in unit.

[6] Mr Beukema testified that the no pets rule was a product of the landlord's experience with pets over the years. Dogs were ungovernable, caused noise and damage to the property and damaged property. As a result they were barred absolutely. Cats–at least that were not neutered or declawed–also caused damage. They tore screens, carpet and woodwork. If males, they would spray walls and carpet. If female, they attracted males cats who did the same thing. Photos were introduced to demonstrate the type of damage they did.

[7] Mr Beukema believed that the addendum was attached to the lease when it was first executed in August 2010. However, he had no direct knowledge that it was. Mr Beaver testified that the addendum was not attached to the lease. He said that a few weeks after he moved in his former wife gave him two dogs to look after for her. At point he was told by Mr Boekema that only dogs that were on the lease were permitted. He was handed the addendum and signed it. He then told his wife that he was not permitted to keep the dogs and he gave them back to her.

[8] On this evidence I am satisfied that:

a. Mr Beaver knew at the time of his application to become a tenant that the general rule was that pets were not allowed in the building;

b. The addendum was not attached to the lease he signed; but

c. Shortly after signing the lease he was provided with–and signed–the addendum to the lease, and moreover acted on its prohibitions.

[9] As noted, the lease was a yearly lease and pursuant to its terms it was automatically renewed on September 1, 2011. At this point the addendum became a part of the lease, notwithstanding that it was not part of the lease as of September 1, 2010. Mr Beaver knew of the original prohibition; he was later made aware of–and signed–the addendum; and he acted on it (by returning the dogs to his former wife). He had more than enough notice that the addendum was intended to be part of the lease, and by his actions had agreed that the addendum was–or at the very least would become–a part of the lease, if not in 2010 then in September 2011 when it was renewed.

[10] The lease renewed again on September 1, 2012. At this point the monthly rent was $565.00.

[11] In November 2012 Mr Beaver came to acquire a cat. He testified that a tenant downstairs had "a bunch" of cats that were attracting a lot of feral cats from outside. The tenant asked Mr Beaver to take one for a while until she could have it looked after by Animal Services. However, by the time they came to pick up the cat he had grown emotionally attached to it and decided to keep it. The cat has been spayed. It has not be declawed because, according to Mr Beaver, two vets (his own and another) did not believe in the practice. What he does instead is put "stickies" on the claws to prevent his cat from clawing things.

[12] In March 2013 Mr Beukema became aware that Mr Beaver had a cat when he was doing some minor maintenance in Mr Beaver's unit. He told Ms Beukema. She slipped a "Notice to Tenant" under Mr Beaver's door on or about March 13th. It stated as follows:

> "When we did some maintenance work in your apartment the other week we noticed that you have a cat. You will have to pay our monthly pet fee of $25. Could you please make sure to drop off these pet fees. You can make the cheques out to Beukema & Nelson Inc starting this month of March ...:" Book of Exhibits, Tab 5.

[13] Mr Beukema explained that notwithstanding the "no pets" rule the landlord did in fact permit certain pets provided certain conditions were met. He said that the landlord's pet policy was based on experience. He noted that over the years pets had caused property damage, or been abandoned to be dealt with by the landlord. As a result dogs were not allowed at all. The situation with cats was different. They are not noisy like dogs, but they could cause property damage if they were not declawed. They also cause problems (and property damage) if they are not neutered. Male cats will spray on walls and carpet. Accordingly, cats were allowed provided that they had been de-clawed and neutered. If they are, the landlord will provide permission provided that the tenant also pays a monthly $25.00 "pet fee." He testified that the other tenants in the building who had cats did pay the fee, and that no cat owner was excused from paying the fee.

[14] Ms Beukema spoke to Mr Beaver. She asked him if the cat was declawed and he said it was. They discussed the pet fee, and he agreed to pay it. He asked if he could start the payments in April and she said "yes," and that she would "take it out of your rent" which she subsequently did. Mr Beaver testified that he had agreed to pay the fee because he understood that the Animal Rescue organization would reimburse him for such fees. However, when Ms Beukema took the fee out of his rent, and gave him a receipt that showed it as being part of his rent, the organization refused to pay (because it would not pay for rent).

[15] What had happened was this. Ms Beukema considered the fee to be part of Mr Beaver's obligation as a tenant to pay rent. Because Mr Beaver owed three months of pet fee she took the fees out of his rent, which left him "in arrears of rent for $75.00." Mr Beaver objected to the suggestion that he was in arrears of rent since he had always paid his rent on time. He eventually also objected to paying for the fee, given that he could not get it reimbursed.

[16] The issue (as well as some others) ended up before the Residential Tenancies Officer by way of an application by Mr Beaver for, amongst other things, the return of the $75. On that issue the Residential Tenancy Officer ruled as follows:

> "Jason Beaver has claimed that the landlord has unreasonably and unfairly charged him $25.00 per month for 3 months, because he has a cat in his unit. The lease that Mr Beaver signed stated "NO PETS ALLOWED. Only permission from the Superintendent for a neutered and de-claw cat will be considered." Both the landlord and the tenant agreed that there are other cats within the premises. I am satisfied that this rule is unreasonable under Section 9A(3). It does not promote a fair distribution of services, and gives the landlord the unilateral right to decide who can, and can't have a cat. The rule is also unreasonable because it implies

that only a neutered and declawed cat will not cause damage, which is not the case. Based on the unreasonableness of the rule the landlord must return to Mr Beaver the $75.00 he has paid to date, and Mr Beaver may continue to have a cat upon the premises."

The Appeal

[17] The landlord appealed that part of the Residential Tenancy Officer's order dealing with its pet fee. The fee was an attempt to recover and allow for the costs associated with such damage.

[18] Counsel submitted that there were two aspects to its appeal:

a. Was the "no pets" rule reasonable, and

b. Can the landlord charge a fee to tenants for the right to have a particular type of pet (cats that are neutered and declawed) in a tenant's apartment.

[19] With respect to the first issue, counsel noted that pets can cause damage to property, both in a tenant's unit and to common areas (as well as the units of other tenants). They can disturb other tenants with their noise or faeces. On the evidence in this case she argued that it was clear that cats that were not neutered and declawed could, did and had caused damage to the landlord's property, both in the individual units and in common areas.

[20] Counsel pointed to two decisions that she submitted supported her position that there was nothing unreasonable about a "no pets" rule. In *Briand v. Metropolitan Regional Housing Authority* [2002] NSJ No. 258 the landlord owned a high-rise apartment building. It had a "no dogs" rule. The tenant was aware of the rule when he signed the lease. The tenant moved in with two dogs and made no attempt to make other arrangements for them. The evidence was that the dogs had to be taken in the elevator to be taken for walks; that they barked at the windows of the unit at people passing below; and that the dogs were relieving themselves on the entrance door canopy that was immediately below the tenant's second floor unit. The landlord applied for termination of the lease. A Residential Tenancy Officer denied the application on the grounds that the rule was unreasonable. On appeal to the former Residential Tenancies Board, the order was reversed and termination was ordered. The tenant's appeal to the Supreme Court in Chambers was dismissed on procedural grounds, though in passing the Chambers Judge thought

that the Board's decision was reasonable on the facts. On further appeal to the Court of Appeal leave to appeal (again, on procedural grounds only) was granted.

[21] *Walker v. Rouvalis* [2007] NSJ No. 196 was concerned with whether a landlord could retain a "holding deposit" as liquidated damages when prospective tenants refused to move in when they realised that the landlord had a no pets policy. The tenants ultimately succeeded in recovering their deposit, primarily on the grounds that no lease in fact existed. However, MacDougall, J said in passing at para.29 that it was incumbent on the prospective tenants "to make the necessary enquiries to the appropriate people in order to seek permission to bring their pets onto the premises" and for that reason denied them costs.

[22] Turning to the fee, counsel submitted that there was nothing in the *Residential Tenancy Act* that prohibited fees of this type. Nor did it prohibit a landlord from charging a fee for the privilege or service of having a pet on the premises. A tenant needed permission to have his or her pet in their unit and on the premises. The amount of the fee was reasonable because Mr Beaver had agreed to the figure, at least initially.

[23] Mr Beaver in his submissions said that the fee was unreasonable in amount because there was no proof that his cat had or would damage anything; or that it might cause (for example) $300.00 worth of damage over the course of a year. He also submitted that his rent was set under the lease and the landlord was not permitted to unilaterally increase his rent (by way of a pet fee) without proper notice under the *Act*.

Analysis and Decision

[24] In my view there are indeed two distinct though overlapping issues in this appeal, as follows:

a. Is a rule that prohibits pets except for neutered and declawed cats a reasonable one? And

b. If such a rule is reasonable, can the landlord charge a monthly fee to permit tenants to have a neutered, declawed cat on the premises with them.

A: Is the "No Pet" Rule Reasonable?

[25] Section 9A of the *Residential Tenancies Act* deals with landlord rules. It provides as follows:

> 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.
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> (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,
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> (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;
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> (b) it is reasonably related to the purpose for which it is intended;
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> (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. 1993, c. 40, s. 7.

[26] The beginning point is s.9A(3), which deals with the first condition that a rule must satisfy if it is to be considered "reasonable" within the meaning of the *Act*. There are two points to note here.

[27] First, the sub-section focusses on *intent*, not on fact. In other words, it is the underlying intent, not whether or not the rule effectively achieves that intent, that is important. Of course, a rule that is so far removed from the condition that it is intended to remedy as to be wholly ineffective might negative intent. But in ordinary course if a rule is intended to achieve a particular end, and the behaviour enforced by the rule would in ordinary course go some ways towards achieving that end then one may conclude that the necessary intent exists.

[28] Second, the sub-section requires a finding that *one* of three sub-conditions is met. The sub-conditions listed in s.9A(3)(a) are disjunctive, not conjunctive. The word "or" rather than "and" is used to join them. Thus all that is necessary is to establish that the landlord *intended* the rule promote a fair distribution of services, *or* to promote safety *or* to protect the landlord's property from abuse.

[29] I am also of the view that the rule in question–whether as a "no pets" or as a "no pets except neutered and declawed cats" rule–satisfies the conditions of sub-sections 9A(3)(b), (c) and (d), which are conjunctive. It is reasonably related to the purpose; it applies to all tenants in a fair manner; and Mr Beaver had clear notice of it (and in fact had earlier agreed to it).

[30] I am accordingly of the view that the Residential Tenancy Officer fell into error when he suggested that the "no pets" rule failed because it did "not promote a fair distribution of services" and also because "it implies that only a neutered and declawed cat will not cause damage." His analysis ignored the other two sub-conditions and, moreover, ignored that it was the intent of the rule that mattered, not whether the rule would always achieve its goal. In this instance I am satisfied that on the evidence it is clear that cats that are not neutered and not declawed will cause damage, both to the tenant's unit and to common areas of the building: see too, for e.g., *MacCulloch v. Wells* 2011 NSSM 59. A rule limiting pets to cats that are neutered or declawed would tend to protect the landlord's property from abuse, as well as promote the comfort or welfare of other tenants. The fact that the rule might not achieve that goal perfectly does not mean that it was not intended to promote or protect those ends.

[31] The other error lies in the Residential Tenancy Officer's objection that the rule "gives the landlord the unilateral right to decide who can, and can't have a cat." The landlord is entitled under the *Act* to put in place "reasonable" rules. Reasonable rules, by definition, give the landlord

a “unilateral right” to restrict a tenant’s use and occupancy of a unit. Nor does the rule “decide” who can or cannot have a cat. Rather it simply provides that only certain types of pet–that is, neutered and declawed cats–are permitted. Every tenant in the building can have a cat, so long as it is neutered and declawed.

[32] I am accordingly satisfied that there is nothing inherently unreasonable about a “no pets” rule. Landlords are entitled to enact “reasonable” rules and to expect tenants to comply with them on pain of being evicted if they don’t. This of course is not to say that all “no pet” rules are reasonable. Such rules will always depend on the circumstances. A rural property with a lot of land around it might not support a “no dogs or cats” rule. An urban high-rise, on the other hand, might support such a rule.

[33] In this case the evidence was that the landlord’s property was a multi-unit one. The landlord’s experience with cats and dogs in the past had led it to bar dogs absolutely; and to permit only those cats that had been neutered and declawed. On the evidence I am satisfied that the rule was reasonable in the circumstances. I note in this regard that Mr Beaver had had more than adequate notice of the “no pets” rule and so cannot complain about its imposition on him.

B: Is the Monthly Pet Fee Reasonable?

[34] Section 2(g) of the *Act* defines “rent” as “money or other value payable in consideration of the right to possess or occupy residential premises.” “Rent” is the only fee payable by a tenant for occupancy of the residential premises that is under the lease. Once the rent is paid the tenant is entitled to occupy and use the premises as he or she sees fit, subject of course to any reasonable rules and the tenant’s own obligations as a tenant. There is nothing in the *Act* that speaks to–or authorizes–the imposition of a monthly fee for the right to occupy the residential premises in a particular way–that is, with a certain type of pet. Such a fee is different from the fees that might be levied for use of parking or storage spaces. Those fees constitute payment for the right to use property other than the residential premises that the tenant has leased. But what is before me is a an additional monthly fee to occupy the residential premises for which the tenant and landlord have already agreed to rent for a specific amount.

[35] In my opinion such a fee can only be characterized as “rent.” Indeed, the landlord here in fact treated it as rent, as was evident in the testimony of Ms Beukema. Such a fee, if charged, must accordingly be treated as a rent increase. Proper notice under the *Act* of a rent increase is needed, and none was given in this case. Hence the $75.00 must be returned to Mr Beukema, not

because the rule is unreasonable, but because it was an attempt to levy an increase in rent without proper notice under the *Act*.

[36] Nor can such a fee be justified as a form of liquidated damage clause, or an addition to the damage deposit. Tenants are already liable for any damage they–and their pets–do to their unit or to the landlord's property. A damage deposit exists to provide for such damage. And indeed, the addendum contains a clause–I–that enables the landlord to deduct from that deposit the cost of the cleaning and fumigation that is often a consequence of having pets in an apartment building.

Conclusion

[37] For the above reasons I have concluded that the rule in question–that no pets other than cats that have been neutered and declawed–was in the circumstances of this case a reasonable one. Mr Beaver, by keeping a cat that has not been declawed, is in breach of this reasonable rule and may be .

[38] However, the landlord's attempt to levy a fee in respect of cats that were permitted under this rule was in law an attempt to increase rent without proper notice. That being the case the fee was improper and has to be returned to the tenant.

[39] I accordingly rule and order that the landlord/appellant return to the tenant Mr Beaver the $75.00 paid by him in respect of the monthly pet fee. If such a fee is to be charged it must be by way of proper notice of rent increase under the *Act*.

DATED at Halifax, this 10th day
of September, 2013.

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Augustus Richardson, QC
Adjudicator