Claim No: SCCH No. 420984

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Collins v. CAP Reit LP, 2013 NSSM 61

BETWEEN:

Name	Wayne Collins Edna Collins	Appellants/ Tenants
Address	201 – 60 Charlotte Lane Halifax, NS B3M 4N3	
Phone	(902) 443-5241	
Name	CAP REIT LP	Respondent/ Landlord
Address	2338 Longard Plaza Halifax, NS B3K 5K6	
Phone		

Wayne Collins appeared on his own behalf and on behalf of his co-tenant, Edna Collins;

Stacey Lilley and Nikole Stumme appeared for the landlord, CAP REIT LP.

DECISION

This is an appeal from the Decision and Order of Residential Tenancies Officer, Roberta Wilson, dated October 16, 2012. At the conclusion of her decision, Ms. Wilson ordered the following:

"The tenant, Wayne Collins, pay to the landlord CAP REIT LP, the sum of $1979.25.

IT IS FURTHER ORDERED THAT the tenancy between the parties terminates on October 31, 2013 at which time the tenant and any occupants will provide vacant possession of the premises known as 60 Charlotte Lane, Apt. 201, Halifax, NS, to the landlord on that date."

An appeal from the decision of a Residential Tenancies Officer is not merely a review of the decision for correctness in law or procedure. It is a *de novo* hearing based on the evidence presented before the Small Claims Court Adjudicator. The evidence presented usually consists of

that presented to the Residential Tenancies Officer and, possibly, any additional evidence the parties seek to adduce.

Mr. Collins did not appear at the hearing before the Residential Tenancies Officer. Consequently, any evidence adduced by him is new evidence that would not have been available to Ms. Wilson. As a result of the evidence presented, I am satisfied that it is just and appropriate to vary Ms. Wilson's Order in such way which gives the Tenants another chance to rectify their situation without fear of eviction.

Both parties have tendered exhibits in support of their positions. While in the interests of brevity, I have not referred to all of them, each has been read and considered in my decision.

At the conclusion of the hearing, I rendered an oral decision to vary the Order. During the hearing, I indicated to the parties that any order would be subject to a review of the documents on file, most of which arrived just prior to the hearing. As a result of a more full review of the documentation, I noted a significant mathematical error in the calculation of the arrears. Accordingly, it is necessary to amend the oral decision based on the excessive amount of arrears claimed in error.

Stacey Lilly gave evidence for the landlord. She testified that the tenants have been in arrears commencing with the rent payment in August 2012. The parties' anniversary date is June 1 of each year. In the lease term running from June 2011 – May 2012, the rent was $970 per month. The rent increased to $1043 per month effective June 1, 2012. However, Mr. Collins continued to pay $970 per month by bank draft. The rent increased again in June 2013 to $1085 but Mr. Collins continued to pay $970 per month. Thus, for the 2012-13 lease term, the deficiency was $73 per month, while for 2013-14 (the current lease term), the deficiency is $115. She testified that the Collins' current arrears balance is $1949.00 up to December 31, 2013. Once the payments went into arrears, she had made suggestions to Mr. Collins that he and his mother move to more modest premises within the same building. She also sought to set up meetings with him to discuss his rent payments which he did not attend.

The tenant, Wayne Collins lives in the premises with his mother, Edna Collins. Mrs. Collins is 95 years of age and described by her son as nearly blind and gets upset dealing with business matters. She did not appear at the hearing. Mrs. Collins and her husband, the late Reverend Clyde Collins, initially resided in unit 108, 60 Charlotte Lane in 1996. Reverend Collins passed away in 2003 during Hurricane Juan. Sometime between 1996 and this hearing, Mrs. Collins and her son moved to unit 201. Initially, it was Mr. Collins' evidence that only his mother was a signatory to any lease. Indeed, a lease was signed by both Mrs. Collins and Rev. Collins for unit #108. However, as noted later in this decision, both he and his mother applied for and received a tenancy of unit 201 by an application dated June 30, 2004. A copy of this application was tendered into evidence. They have continued to live there since that time, although no lease was ever signed.

Mr. Collins testified that he is managing his mother's affairs, although I took that to be on an informal basis as no power of attorney or other document was tendered into evidence. He has been doing so for seven years as she has been legally blind. He testified that he received the notice of increase to $1085 in December 2012. He maintains that he did not receive the notice of the rental increase to take effect June 2013. Throughout his tenancy, he attempted to negotiate a reduction in rent with the landlord but was advised it was "non-negotiable", a position with which both Ms. Lilly and Ms. Stumme disagreed. I accept that rental increases have been a long standing issue for Mr. Collins as he tendered into evidence several letters dating back to 2007. In the past two years, he has been paying rent late, often by the fourth day of each month. He spoke with several of the managers respecting the condition of some of the appliances over the years. He is of the view they need replacement. He also testified to a squirrel present in the building but that problem has since been eradicated.

Findings

I have separated my findings for each issue which have been incorporated into the order.

Landlord-Tenant Relationship

I find both Wayne Collins and Edna Collins signed an application for a tenancy dated June 30, 2004 for the premises, namely 201 – 60 Charlotte Lane, Halifax, NS. However, while they did not sign a lease, they have occupied the premises since then. Mr. Collins' correspondence throughout has made reference to both their incomes, rather than merely his mother's, when seeking to negotiate a new rent. Since there is no lease signed, pursuant to s. 8(5) of the *Residential Tenancies Act*, the standard form of lease is deemed to apply and the tenancy is a month-to-month lease. This is so notwithstanding that the application was for a year-to-year lease or that the previous lease signed by Rev. and Mrs. Collins was a year to year lease as well. No issue was taken with their anniversary date being June 1 each year, which was the anniversary date of his parents' lease. I find a landlord-tenant relationship exists between Mr. Collins and Mrs. Collins and CAP REIT LP on a month to month basis. Both Wayne Collins and Edna Collins are jointly and severally liable for all obligations arising from this tenancy including the payment of any arrears.

I note that Mr. Collins' view throughout was that he was not a party to a lease but merely a caregiver for his mother. This was refuted categorically by the presence of Mr. Collins' name and signature on the application and his continued presence in the premises.

Notice of Rental Increase

The Collins' paid rent of $970 per month for 2011-2012. The landlord gave notice of the rental increase by delivering notice to their tenants personally and by requiring the tenants to sign a schedule acknowledging receipt. Alternatively, their notice was slid under the door of the

premises. Unlike tenants in a mobile home community, there is no guidance in the *Residential Tenancies Act* or its regulations specifically directing how such notices are to be served. It is Mr. Collins' evidence that the notice was not received. The records of the landlord suggest that it was slipped under the door. In his correspondence with the landlord, Mr. Collins indicated he was unaware of any increase until December 2012. In his correspondence, he acknowledges receipt of the increase to $1085 effective June 1, 2013. In spite of this increase, it is also clear from his

own documentary evidence that he continued to pay $970 per month until October 2013 when he was faced with the possibility of an application to the Residential Tenancies Officer.

I note that notices of rental increase are often served by landlords on tenants by slipping them under their tenants' doors, particularly in larger apartment complexes. However, there is the risk that the tenant may not receive it or acknowledge its receipt. In order to determine if service was effected, one must look at all of the circumstances.

In this case, the landlord sought written acknowledgement of receipt of the notice for their records. No such signature was given by either Mr. Collins or his mother. I find Mr. Collins was motivated throughout by a desire to reduce the monthly rent. He continued to pay $970 despite having received notice in December 2012 for the increase in June 2013. In spite of receiving proper notice, he continued to pay $970 per month for the first four months as well. His answers respecting the characterization of his role as a tenant or a caregiver were inconsistent and evasive. Based on the evidence presented, I find on the balance of probabilities that he received the notice of rent increase in December 2011 but simply chose to ignore it. It is possible he does not remember that, but I make these findings based on facts presented. In examining all of the evidence, I am satisfied on the balance of probabilities, that the tenants received written notice of the increases in rent for 2012 and 2013. The rent is properly charged at $1043 for 2012-2013 and $1085 for the rental period from June 1, 2013 to May 31, 2014.

Arrears

The landlord tendered into evidence a document landlord entitled *Statement of Account by Transaction Date* shows total arrears on August 1, 2012 of $832, which when added together with the remaining differences to the end of the statement (September 2013) results in a total claim of $1949.00. The arithmetic is clearly incorrect.

Further, I accept Ms. Lilly's evidence that the arrears began when Mr. Collins continued to pay the 2011/12 rent of $970 per month. If that were to have continued from June 2012 up to the date of the hearing, the total deficiency would have been $1681.00 for the 2011-2012 period. In addition, the statement shows "Late Fees" of various amounts along with two $25 NSF Service Charge fees. These fees total $104.25 for a total maximum claim of $1785.25. There is no basis in evidence for a claim of $1949.00.

Ms. Lilly testified that the rent was only in arrears effective August 1, 2012. It is not clear why the arrears began in August rather than June, however, I accept Ms. Lilly's evidence in this respect. Further, her testimony which is confirmed by copies of bank drafts provided by Mr. Collins, indicates the rent for October and November have been paid in full. There is not a copy of the December rent payment but I find it has been paid, based on Ms. Lilly's evidence.

The arrears can be calculated by applying monthly deficiency of $73 for the 2012/13 lease term from August 2012 – May 2013 or 10 months, and a $115 monthly deficiency from June – September 2013 or 4 months. Therefore the amount of arrears should be as follows:

2012/2013 Rental: 10 months x $73 per month:	$730.00
2013/14 Rental: 4 months x $115 per month:	$460.00
Total	$1190.00

In order to assess late payment fees, they must be specifically authorized by the lease or be shown to have been actually incurred as a result of default. The fees listed range from $4.30 to $11.50, all posted on August 1, 2012. There is no written reference to any authority for such payments as the parties did not sign a new lease. I reject any claim to those fees. Ms. Lilly testified to receiving cheques marked "NSF", although no written proof has been provided of any NSF fees charged to the landlord. I allow only $25.00 for these fees.

Therefore, the amount sought by the landlord is to be limited to the arrears calculated above, namely $1215.00 before any allowance for abatement.

Eviction

A landlord has different obligations for giving notice to quit residential premises to the tenants depending upon the reasons. These are set out in s. 10 of the Act and ss. 4-4J of the Residential Tenancies Regulations. The form referred to in s. 10(5) can be found in s. 4A of the Regulations and Form D, *Landlord's Notice to Quit for Rental Arrears*.

Sections 10(3A) – 10(5) provide as follows:

(3A) A landlord shall not give to the tenant a notice to quit residential premises except in accordance with this section.
(4) A notice to quit residential premises shall be in writing and shall contain the signature of the person giving the notice or his agent, a description of the residential premises and the day on which the tenancy terminates.
(5) A notice to quit must be in the form prescribed by regulation.

That form describes for affected tenants their specific right to restore the rental claim and eliminate any arrears within 15 days of service. It also advises the tenants that any failure to respond, either through payment of the arrears or the filing of an objection to the Residential Tenancy Director, results in a deemed acceptance of the statement that the rent is in arrears, for which the Director or a Small Claims Court Adjudicator can order vacant possession.

I find Mr. Collins was ill and did not attend the hearing before the Tenancy Officer for valid reasons. Further, if he had paid the amount sought, $1949.00, rather than the amount calculated above, he would have overpaid to a significant degree. In my view, this renders the order for vacant possession a nullity. Even if I am wrong on this interpretation, I find an eviction in these circumstances would be very harsh and unwarranted at this time.

Both Mr. and Mrs. Collins should be given an opportunity in the circumstances to make current their account with the landlord and if possible, develop an alternative solution to their problem. Based on what I have viewed before me, I am certain that is possible.

Therefore, I have stayed the order for vacant possession. A stay means an order can be reinstated. In this case, that is appropriate in the event of default and I do so order.

Abatement

Mr. Collins testified that there were troubles with his appliances in his unit as well as difficulties with squirrels, raccoons and birds. I find the landlord attended to the concerns with the squirrels and raccoons in a timely manner. However, the appliances had not been in a state of good repair for several years such that they have affected his enjoyment of the property. A one-time modest abatement is in order. Upon reflection, I fix this amount at $250.00.

Therefore, the tenants are liable to the landlord in the amount of $965.00. As indicated at the hearing, the arrears can be retired through monthly payments. I set this at $85.00 per month commencing January 1, 2014 and ending November 1, 2014. The tenants shall pay $30.00 on December 1, 2014. All obligations shall be expunged on payment of this amount in full. The tenants may choose to do so earlier if they wish. In either case, the landlord shall provide a written receipt with each payment. Any default in payment will render the amount payable forthwith and the landlord shall be free to make a motion to this court for vacant possession of the residential premises.

Position of Edna Collins

Throughout the conduct of this matter, Mr. Collins spoke on behalf of both himself and his mother. Unfortunately, it is not clear that she is aware of the terms of the order or the possible outcome of these proceedings or indeed, the proceedings before the Residential Tenancies Officer. Further, there is no evidence that she is currently unable to manage her affairs. As a result, I order that a copy of the order in this matter be sent to her separately. Further, should any proceedings to enforce the order be required, service of all documentation shall be made personally upon Edna Collins. This condition is subject to the filing with this court of an original or notarized copy of a valid power of attorney executed by Edna Collins, an Order of the Supreme Court of Nova Scotia pursuant to the *Incompetent Persons' Act* for her guardianship or a note from her physician that she is incapable of participating.

Costs

As success is about equal in this matter, each party shall bear their own costs at this level and before the Residential Tenancies Officer.

Conclusion

In summary, the following order shall issue:

- Wayne Collins and Edna Collins are confirmed as tenants of the premises and are jointly and severally liable for all obligations arising from the tenancy. The tenancy is month-to-month with the anniversary date being June 1 of each year;

- The Order terminating the tenancy and requiring the Tenant to provide vacant possession of the premises effective October 31, 2013 is stayed;

- The Landlord shall have judgment against the Tenant as follows:

Rental arrears as of December 31, 2013:	$1215.00
Abatement:	($ 250.00)
	$965.00

- The arrears shall be repaid on a monthly basis. Specifically, the Tenant shall pay to the Landlord the sum of $85.00 on the first day of every month commencing January 1, 2014 until November 1, 2014, and a payment of $30.00 on December 1, 2014, in addition to any rent owing for that month. The Landlord shall provide to the Tenant receipts on their payment;

- The rent for the current term, June 1, 2013 – May 1, 2014, is confirmed at $1085.00 and may be increased in accordance with the *Residential Tenancies Act*.

- In the event of default of payment of arrears, the arrears shall become payable forthwith and subject to execution. The Landlord shall be free to bring a motion to this Court for enforcement including an order for vacant possession of the premises;

- A copy of this Order shall be mailed separately to the Tenant, Edna Collins, at the address above;

- Each party shall bear their own costs of this appeal and of the Application to the Director of Residential Tenancies.

Order accordingly.

Dated at Halifax, NS,
on December 16, 2013;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Appellant(s)
Copy: Respondent(s)