IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Densmore v. Lidstone, 2008 NSSM 48

2008 Claim No. 296089
Date:20080908

BETWEEN:

Name: **Ken Densmore**

Appellant/Landlord

- and -

Name: **David Lidstone, Cindy Lidstone, Larry Gaudet, Christine Campbell, Donald Campbell, Stephen Gauthier**

Respondents/Tenants

DECISION

[1] This is an appeal of a Residential Tenancies Order dated May 9, 2008, and came before the Court on July 29, 2008, in Halifax.

[2] At the hearing, the Appellant/Landlord, Ken Densmore, was present. As well, Christine Campbell, David Lidstone and Stephen Gauthier were present. They were the three Tenants of the subject premises on this appeal - 98 Coronation Avenue, Halifax, Nova Scotia. The other three Respondents were "co-signers" on the lease and all were served with notice of the appeal. Affidavits of service were filed in this regard. None of the co-signers attended personally at the hearing.

[3] I will deal initially with the evidence and claim of the Landlord in respect of alleged damages to the lower unit, that is, the unit below the subject premises. The Landlord presented evidence of damage to the walls and ceiling which he alleges were caused by the Tenants in this proceeding.

[4] That issue was not in the original claim, was not dealt with at the hearing before the Residential Tenancies Officer and was not part of the appeal document filed in this matter and served on the six Respondents. I cannot adjudicate on an issue that was not even known to the parties prior to the hearing or disclosed in the appeal documents. To do so would be a breach of natural justice - particularly to the three Respondents who were not present.

[5] Further, it is my view that the jurisdiction of this Court on an appeal is restricted to the matters dealt with by the Residential Tenancies Officer and contained in the Notice of Appeal. In this regard I refer to Section 17C (4) of the Nova Scotia *Residential Tenancies Act* which reads:

> *(4) The Small Claims Court shall conduct the hearing* ***in respect of a matter for which a notice of appeal is filed****.* [Emphasis Supplied]

[6] For these reasons therefore, I am not going to deal with that issue in this decision.

[7] I turn to the issue of the flooring. The first question is the issue of liability. On this subject there was a dispute in evidence - the Landlord's position was that the water leakage was due to dishes left in the sink which caused an overflow from the discharge from the portable washing machine. It was not entirely clear whether the Landlord's position was that this happened once or more than once. There was also reference by the Landlord to the Tenants or one of the Tenants, advising him that the washing machine had been left on and that they had left for university and that was when it overflowed.

[8] The Tenants' evidence was that they never told the Landlord that the overflow was due to dishes left in the sink but rather was due to a kink in the hose and that the first few times it happened they did not know why it was happening. There was a general reference to this having happened some four or five times before the reason was discovered. The position

of the Tenants appear to be that since the overflowing was caused by a kink in the hose that that was not their fault but rather was attributable to the Landlord.

[9] Upon consideration of this issue, my conclusion is that on either version, the Tenants are responsible. It seems to me that even if the overflowing was caused by a kink in the hose, that the Tenants had a legal responsibility to not let an overflow occur and go on to the floor and cause damage. It seems to me that someone should have been present for the operation of this unit which, is only set up on a portable basis and could and should be considered as potentially leading to leaks. If someone had been present, I would think that any overflow would be very minimal and would not have caused the degree of damage that ultimately resulted. I infer therefore that when the washing machine was set into operation, the individual Tenant who did so, left and there was no else at home.

[10] It is to be emphasized here that the Landlord really has no control over how the Tenants operated the portable washing machine and what other actions they take in that regard. The Landlord is largely at the mercy of the Tenants to act reasonably and responsibly.

[11] I find that the Tenants are responsible for the water leakage and the resulting damages.

[12] I turn then to the calculation of the damages. The specific issue that arises in this case is that although the area of damage was a limited area around the entryway to the kitchen, due to the fact that the existing laminate flooring was no longer available and there was no replacement that could properly fit with the existing flooring (primarily from a physical point of view) the Landlord had to purchase entirely new flooring for all of the hallway and livingroom. The Landlord's position is that the fact of the unavailability of the flooring is not his fault and the damage is the Tenants' fault and therefore they should pay for the entire replacement.

[13] The Tenants' position, apart from denying liability for the reasons stated above, is that they should not be responsible for the discontinuance of the flooring.

[14] Obviously neither party has any control or responsibility over whether or not the existing flooring was no longer available. The legal question then becomes how to properly allocate the damages. The general principle and that which the Landlord would assert is to make him "whole" as the loss is attributable to the Tenants. On the Tenants' side, their position would include arguments that not only are they not responsible for the discontinuance of the flooring, but the Landlord gets the benefit of an entirely new floor, possibly of higher value, and they have not damaged the entire floor.

[15] It seems to me that both parties here can legitimately argue that it is inequitable for them to cover (or not be covered) for the full cost of the replacement of the floor. Therefore it comes down to a balancing of interests between the parties in order to attempt to do justice between them.

[16] An issue that can be seen to arise deals with the remoteness of damages in contract. Typically reference is made to the English case of ***Hadley v. Baxendale*** (1854), 9 Exch. 341, and the following quote:

> *Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it.*

[17] It seems to me that in the normal course of events flooring is replaceable with identical product. On the same lines, I would observe that it may well be that the Landlord purchased the previous flooring from a firm which carries discontinued lines at budget prices. There was no specific evidence on that but there can be an inference drawn from the fact that within a year or so of its purchase it is no longer available. The decision to

purchase such product is that of the Landlord and one of which the Tenants have no control.

[18] In light of these considerations, I am going to allow the Landlord one-half of the cost of the entire floor replacement.

[19] The submitted evidence was that the cost of the materials for the flooring comprised:

Flooring:	$ 484.91
Transitional Molding:	22.59
2 Reducers	45.18
Underlay	54.24
Total:	**$ 606.92**

[20] I allow one-half of that - $303.46.

[21] I turn then to the labour which was the labour of the Landlord and which he has indicated as 37.50 hours at $12.00. The issue of charging for one's own labour in these cases is always problematic. Legitimate questions arise about how much time was actually spent and whether or not the rate is appropriate. The 37.5 hours strikes me as somewhat excessive and that this would amount to basically a full week five day week of 7.5 work days. I am going to allow a total amount of $300.00 which will be reduced to $150.00, apply the 50% referred to above.

[22] Therefore the total amount for the flooring, materials and labour, is $453.46.

[23] Damages to the windows and refrigerator were established and they are $122.96 and $147.97, respectively. The total damages therefore are:

Floor (materials & labour)	$ 453.46
Windows	122.96

Refrigerator	147.97
Total:	**$ 724.39**

[24] The Landlord also claimed for costs and had receipts for cost of service in Prince Edward Island and FedEx charge. That amount is $220.75, and I believe it appropriate to include that amount with the total, therefore being $945.14.

[25] The total amount of $945.14 will be reduced by the damage deposit which I round up to $475.00.

$ 945.14
- 475.00
$ 470.14

[26] The net amount owing as shown is $470.14 and I hereby order that the Respondents pay to the Appellant the sum of $470.14.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on September 8, 2008.

Michael J. O'Hara
Adjudicator

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