1988
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No.61767
88-0391

IN THE COUNTY COURT
for District Number One

Between:

ROBERT LEGG

Applicant

- and -

ANNE LANCELOTT

Respondent

Mark David, Esq., Counsel for the Applicant/Landlord.
Thomas Pittman, Esq., Counsel for the Respondent/Tenant.

1989, January 4th, Palmeter, C.J.C.C.:- This matter involves a notice of objection filed by the applicant to a report of the Halifax and County West Residential Tenancy Board dated the 9th day of November, A.D., 1988. This is a supplementary report to a previous report by the same Board dated June 7th, 1988 and this was requested by this Court by Order dated August 30th, 1988. The objection was filed pursuant to Section 10C(4) of the **Residential Tenancies Act.**

The tenancy involved a property at 6135 Duncan Street in the City of Halifax. The tenant moved in during May of 1986 and the lease was renewed in the standard form beginning May 1st, 1987 on a year to year basis at a monthly rental of $1,000.00. A security deposit of $500.00 was also paid. On September 8th, 1987 the tenant advised the landlord that they had purchased a house and would be sub-letting the premises as of October 1st, 1987. On October 1st, the tenant moved out but a sub-tenant had not been found. The October rental was paid.

The premises had still not been sub-let by November 1st and on November 2nd the landlord requested the rental from the tenant. On November 12th the landlord received part payment of the November rent with advice that the security deposit of $500.00 would pay the balance. The landlord at that time also started to advertise the premises for rent. On November 25th a prospective tenant was introduced to the solicitor for the landlord by solicitor for the tenant by way of letter. Also enclosed

was a cheque for $425.00 representing a security deposit and a cheque for $425.00 representing one-half the new rental for December. The prospective tenant was apparently prepared to rent the premises for $850.00 a month commencing December 15th, 1987. In the letter from the tenant's solicitor was the following comment:

> "Our client considers her obligations pertaining to this matter to be at an end and, should you wish or your clients wish to pursue this matter further, I suggest we deal through the Residential Tenancies Board."

A credit check was instituted on the tenant's prospective tenant. As the rent offered was $850.00 per month the landlord also had an offer from a prospective tenant who was prepared to offer $925.00 per month. On December 4th the landlord's prospective tenant cancelled out and the tenants prospective tenant was called. On December 5th the prospective tenant advised she would not be renting.

The landlord called his prospective tenants and suggested a rental of $895.00 per month. They agreed subject to January 15th, 1988 commencement and paid a deposit of $447.50. On January 7th these tenants advised they were not able to rent the premises and paid the balance of the month of $447.50. The landlord continued to advertise the property in an attempt to mitigate his damages and finally obtained a new lease for one year commencing April lst, 1988 at a monthly rental of $900.00.

The landlord claims the sum of $4,252.00 covering rental monies lost and other expenses. At the first hearing before the Board the tenant testified that she always intended to pay the differential in rental between her prospective tenant's rental of $895.00 per month and the agreed rental of $1,000.00. The landlord denied ever being advised of this and the letter from the tenant's solicitor of November 25th, 1987 certainly indicates to the contrary. The Board at that stage seemed to accept the tenant's evidence and recommended that the landlord's claim be dismissed as the landlord did not deal with the tenant's prospective sub-tenant promptly.

The matter was sent back to the Board for a supplemental report for a finding whether or not the tenant had agreed to pay any rent differential. The

supplemental report of November 9th, 1988 does not really assist. Two lay members of the Board feel that the tenant had agreed. The Chairman of the Board, a lawyer, felt that the letter of the solicitor for the tenant was conclusive that the tenant would have no further liability.

This is not an appeal. The Board merely acts as a referee for this court to hear evidence and make recommendations. This court is not bound by the report or recommendation and by virtue of Section 10C (5) of the **Act** can accept, vary, reverse or decide any questions with or without any additional evidence. Normally this court will not disturb a recommendation of the Board unless there is some apparent error in law, denial of natural justice or excess of jurisdiction. However, there is wide discretion under Section 10C (5) of the **Act.**

There are really three matters to be considered as follows:

1. Did the tenant agree to pay the differential in rental?
2. Did the landlord act unreasonably or less than promptly in dealing with the tenant's proposed sub-tenant, and,
3. Did the landlord do everything possible to mitigate his damages?

First of all, on the basis of the evidence submitted by the Board, it is my opinion that the tenant did not undertake to pay rent differential. Although the Board was not able to reach consensus, the letter from the tenant's solicitor dated November 25th, 1987 is, in my opinion, conclusive evidence that at that time the tenant did not consider herself further liable. In my opinion, the two members of the Board erred in law in misapprehending the evidence before them.

Secondly, did the landlord not act promptly in dealing with the prospective sub-tenant. I agree with submissions by both counsel when they refer to the case of **Cowitz v. Seigel,** [1955] 1 D.L.R. 678 (Ont. C.A.), at page 679:

> "The question whether or not a consent to an assignment of lease is withheld unreasonably is a matter that essentially depends upon the circumstances in each case."

Again, I find the Board erred when they recommended that the landlord did not act promptly in dealing with the tenant's prospective sub-tenant.

In my opinion, the evidence is overwhelming to the contrary. The original lease was for $1,000.00 per month. The prospective sub-tenant offered $895.00. I have found the tenant did not agree to make up any differential. The duty was on the landlord to mitigate his damages. He had a party who was considering $925.00 per month. He had to do a credit check on the tenant's prospect. He had a duty to deal with the highest prospect first. In my opinion, he acted properly and promptly; and when he found the other prospect not interested he immediately contacted the tenant's prospect. Under the circumstances I find the landlord acted reasonably and promptly in dealing with this prospect.

Thirdly, did the landlord act reasonably in mitigating his damages. Based on the evidence before me, I find that he did. He made every effort to mitigate and was really not able to enter into a full lease until April 1st, 1988. I find the landlord is entitled to recover rental to April 30th, 1988 together with expenses as claimed in the amount which I fix at $427.14 less any monies received during the period December 1st, 1987 to April 30th, 1988.

The landlord would be entitled to recover from the tenant, rental as follows:

| | | |
|---|---|---|
| December 1st, 1987 | - | $1,000.00 |
| January 1st, 1988 | - | $1,000.00 |
| February 1st, 1988 | - | $1,000.00 |
| March 1st, 1988 | - | $1,000.00 |
| April 1st, 1988 | - | $1,000.00 |
| TOTAL | - | $5,000.00 |

Deducted therefrom would be monies received as follows:

| | | |
|---|---|---|
| November 25th, 1987 | - | $ 425.00 |
| January 1st, 1988 | - | $ 895.00 (prospective new tenants) |
| April 1st, 1988 | - | $ 450.00 (which is rental of $900.00 less cost of rental of $450.00) |
| TOTAL | - | $1,720.00 |
| BALANCE | - | $3,280.00 |

Accordingly, I find that the landlord is entitled to receive from the tenant the sum of $3,707.14 and I am prepared to sign an order giving effect to such decision.

As our Court of Appeal has determined that no costs can be awarded on applications under the **Act** there will be no costs in this matter.

A Judge of the County Court
of District Number One