

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Al-Khawaji v. Sinha*, 2015 NSSC 212

**Date:** 20150608

**Docket:** Hfx No. 434547A

**Registry:** Halifax

**Between:**

Ali M. Al-Khawaji

Appellant

v.

Sanjay & Madhuri Sinha

Respondents

**Revised Decision:** The text of the original decision has been corrected according to the attached erratum dated August 26, 2015.

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** June 8, 2015, in Halifax, Nova Scotia

**Written Release  
of Decision:** July 22, 2015 (**Orally: June 8, 2015**)

**Counsel:** Susan Young, Megan Deveaux, Community Legal Worker and Graeme Maitland, law student, for the appellant Sanjay Sinha and Madhuri Sinha, self-represented respondents

**Robertson, J.:** (Orally)

[1] This is an oral decision. I will reduce it to writing if you request it. The facts of the situation are that the parties entered into a year-to-year lease which commenced on October 1, 2012. We know that there was renewal of this lease after a year, but that the relationship between the parties seemed to fall on some rocky ground in November 2013 when there were some complaints in the condominium corporation about whether Mr. Al-Khawaji and his guests damaged an elevator. Mr. Al-Khawaji decided for whatever reason that he was going to leave these premises and he abandoned the premises in December 2013.

[2] The matter went before the Residential Tenancies Board to the director. Then the matter went to the Small Claims Court and it is Adjudicator David T.R. Parker's decision that is being appealed today.

[3] I will deal with each issue raised on appeal. First issue:

Did the Adjudicator of the Small Claims Court err in determining that the Respondent did not increase the rent within the first twelve months in violation of the *Residential Tenancies Act*?

[4] Stated in another way, did the adjudicator err in recognizing that there had been an incentive of reduction of rent for the first six months?

[5] These are matters of fact and interpretation that were open to the adjudicator when he had all of the documentation before him. I agree that quite clearly on the lease as he read it he could see that there was an incentive of \$25 reduction in rent per month and that the parties signed to that effect so that the rental of \$1,025 would then ensure from month six onward. And as well the security deposit reflected the half-a-month's rent at a monthly rental of \$1,025. So I am not going to interfere with the adjudicator's determination. I agree that there was no increase of rent within the first twelve months in violation of the *Residential Tenancies Act*.

[6] Now the second issue before me is:

Did the Small Court Adjudicator err in determining that the Respondent is entitled to rent from the Appellant for any months subsequent to January 2014?

[7] And the question to answer is:

Do the Appellant's obligations under the lease continue after the unit was re-rented?

[8] Now we know the landlord has the duty to mitigate pursuant to the terms of the *Act*. And we know that the tenant has a duty to pay his rent pursuant to the terms of the lease and the contract that he has signed. And we know that there was an abandonment of the lease here. However, the common law does come into play in the absence of clearer terms in the residential lease. And I would agree that the two cases – those of *Ozmond v. Young*, [1980] O.J. 3563; 28 O.R. (2d) 225; 109 D.L.R. (3d) 304, and *Raymond v. Byrapaneni*, 2001 NBCA 8, come into play and correctly state some principles of law that are relevant here. So it is really the result of the tenant's abandonment what duties exist and to what extent that a party to a contract is required to mitigate and what are the options available to the landlord in these circumstances. *Raymond, supra*, as determined by Robertson, J.A. of the New Brunswick Court of Appeal outlined the four following remedy options at paras. 15-18:

15 First, the landlord may insist on strict performance of the terms of the lease and then sue for rent as it falls due on the basis that the lease is still in force. In short, the landlord may refuse to accept the tenant's offer to "surrender" the lease thereby indicating that he or she has no intention of seeking a replacement tenant.

16 Second, the landlord may accept the tenant's offer to surrender the lease and sue for rent and damages to the date of termination, that is, the date of surrender: see generally *Goldhar v. Universal Sections and Mouldings Ltd.*, [1963] 1 O.R. 189.

17 Third, the lease may contain a clause that the landlord will act as agent of the tenant in finding a replacement tenant. The clause goes on to provide that the tenant will remain liable for any deficiency in the rent that would have been paid, but for the repudiation, and the rent received from the replacement tenant.

18 Fourth, the lease may contain a clause to the effect that the tenant is liable for prospective losses that flow from a tenant's abandonment of the leased premises. ...

[9] Well, we do not have those clauses as contained in the third and fourth options stipulated by *Raymond, supra*.

[10] So in this circumstance, what should the landlord have done? I would agree that at common law the landlord was simply unable to sublet the premises and continue to keep Mr. Al-Khawaji obligated to pay the rent. The landlord accepted the surrender of the premises and took the premises back. And indeed rented them for the months of February, March and April. So, to that extent I would say that

relying on both the *Raymond* case and supported by the law articulated in the *Ozmond v. Young, supra.*, the adjudicator has erred in law and his order requiring the payment of rents for the months of May through September – the amount of \$4,100 – pardon me, the months June through September. Accordingly there should be an amendment of the order to reflect that this obligation ceased upon the landlord accepting the surrender of the tenancy.

[11] Third Issue: Is the appellant entitled to an abatement of the rent for two weeks in January 2014, when the landlord effected extensive repairs, in the absence of the adjudicator finding that the premises were rendered uninhabitable by the actions of the tenant himself and required these repairs? I would agree that for those two weeks in January the tenant could not have quiet enjoyment of the premises and could not have lived there because there were more significant renovations made to the premises for purposes of future rent. The renovations went beyond wear and tear and made the premises not habitable or available to the tenant, the quiet enjoyment of which is a necessary if he was to have an obligation to pay rent for that entire month.

[12] I would also then alter the adjudicator's order to award the appellant \$462.90 as an abatement of the rent for the period of January 17 to January 31, 2014. And I find the tenancy ended on January 31, 2014. I recognize the appellant also concedes that he owes \$146.41 to Nova Scotia Power for November and December 2013, \$80 for parking space December 2013 and \$1,025 for rent January 2014.

[13] We have not really spoken of the security deposit. The adjudicator's decision favoured the landlord and I would not disturb that finding.

[14] I would ask that the appellant prepare the order for signature and send it to the court and provide a copy to the respondents as well. I would also recommend Mr. Sinha in the future, amend the lease agreement if you are dealing with other parties so that you have the right of agency to sublet on the tenant's behalf. Speak to your own legal counsel and provide for terms in any written contract that you use in the future to deal with this thorny issue of mitigation and the continuing obligation to pay rent.

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Al-Khawaji v. Sinha*, 2015 NSSC 212

**Date:** 20150608

**Docket:** Hfx No. 434547A

**Registry:** Halifax

**Between:**

Ali M. Al-Khawaji

Appellant

v.

Sanjay & Madhuri Sinha

Respondents

**Judge:** The Honourable Justice M. Heather Robertson

**Heard:** June 8, 2015, in Halifax, Nova Scotia

**Erratum:** **August 26, 2015**

**Written Release  
of Decision:** July 22, 2015 (**Orally: June 8, 2015**)

**Counsel:** Susan Young, Megan Deveaux, Community Legal Worker  
and Graeam Maitland, law student, for the appellant  
Sanjay Sinha and Madhuri Sinha, self-represented  
respondents

**Erratum:** **Change “Graeam” to “Graeme”**