Claim No: 432254

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Keith v. Gazzola, 2015 NSSM 10

BETWEEN:

EDWARD KEITH

Claimant

- and -

DIANNE GAZZOLA

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 25, 2014 and December 8, 2014

Decision rendered on January 7, 2015

APPEARANCES

For the Claimant	self-represented
For the Defendants	Blair MacKinnon Counsel

BY THE COURT:

Introduction

[1] The Claimant is suing his former landlord for damages totalling $25,000.00 for alleged breaches of the landlord's obligations under a commercial lease. The Defendant has counterclaimed for two months' rent for the unexpired portion of the lease, plus compensation for alleged damage to the building, totalling $15,465.50.

The Facts

[2] The premises in question was a building at 301 Main Street in Dartmouth, Nova Scotia, which had a decades long history as a restaurant although it had been used for other purposes for a couple of years before the Claimant leased it in November 2013.

[3] The Claimant opened up a pizza restaurant in the premises, named "902 Pizza." He eventually closed this business and abandoned the premises in late July 2014 because of what he contends was an intractable rat problem. He blames the Defendant for failing to address needed repairs to the building, which he says created conditions which allowed rats to infiltrate the building and create a health hazard.

[4] The written lease between the parties was for the period commencing December 1, 2013 and ending October 30, 2014. The Claimant had actually

been in possession for more than a month, with a rent-free period while he got his restaurant ready.

[5] This was a standard form lease and most of the terms are not relevant. The rent was $1,900.00 per month. One important term was an option to renew, exercisable six months before expiry of the lease.

[6] Several other relevant provisions (including those concerning the state of repair) are set out hereunder:

> ADMISSION BY TENANT AS TO STATE OF REPAIRS
>
> 5.01 Except as otherwise specifically provided for herein the taking possession of the Demised Premised by the Tenant shall be conclusive evidence that at such time the Demised Premised , or portion of which possession is taken were in satisfactory condition and that the Landlord has performed up to such time all obligations hereunder.
>
> REPAIRS
>
> 5.02 The Tenant shall at all times during the Term occupy the Demised Premises in a tenant-like manner, and maintain and keep the Demised Premises in good and substantial repair, reasonable wear and tear only excepted. Without limiting the generality of the forgoing the Tenant shall repair and/or replace at its own expense, all electric light bulbs, tubes ballasts and other electrical equipment on the Demised Premises and any window glass serving the Demised Premises which become cracked or broken and any parts of the plumbing system that fails or become damaged . The Landlord may enter the Demised Premises and make necessary repairs which are the responsibility of the Tenant and charge the cost of such repairs to the Tenant as additional rent.
>
> .....

SURRENDER

5.05 The Tenant shall deliver up to the Landlord at the end of the Term, or the earlier termination thereof the Demised Premises broom clean and in good and tenant able repair, and reasonable wear and tear excepted. Without limiting the generality of the foregoing, at the option of the Landlord , the Tenant shall remove any installations or alterations made by the Tenant and shall make good any damage caused to the Demised Premises by such installation or alterations or removal thereof. The Tenant shall pay to the Landlord the amount of any expense incurred by the Landlord in removing installations or alterations which the Tenant fails to remove as required.

BUILDING STRUCTURE

6.01 The Landlord shall maintain the structure of the building in good condition so the Tenant will be able to carry out the purposed for which the Lease is granted.

.....

LEASE CONSTITUTES ENTIRE AGREEMENT

15.01 This Lease and Schedules hereto constitute the entire agreement between the Landlord and Tenant, and neither party by any representation, warranty, promise, agreement or inducement not embodied herein.

.....

(In Schedule “A”)

CLEANLINESS AND SAFETY

3. The Tenant shall at all times keep the Demised Premises in a clean, sanitary and safe condition in accordance with the laws and directions, rules and regulations of the Landlord or any governmental or municipal agency having jurisdiction. The Tenant further covenants not to cause unnecessary labour by reason of carelessness and indifference to the preservation of good order and cleanliness in the Demised Premises and in the Building.

> GARBAGE
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> 4. The Tenant shall not use any outside garbage or other containers, shall not allow any ashes, refuse, garbage or other loose or objectionable material to accumulate in or about the Demised Premises and will at all times keep the Demised Premises in a clean and wholesome condition
> .....

[7] The parties gave very different accounts of what was understood at the outset and what occurred during the term of the tenancy. I will review some of the evidence.

[8] The Claimant testified that he knew that this was an older building, but that the Landlord appeared unwilling to do anything to keep the building in good repair. Sometime in the spring of 2014, he discovered that there was a major rat problem. He testified that he personally killed 60 rats in that many days. He says that he eventually called in a pest control company, and received an oral quote of $7,000.00 to fix the problem. He says that he brought this to the attention of the Defendant in or about May 2014 with a view to having the Defendant undertake this repair. The Defendant declined.

[9] The Claimant eventually called in the provincial Department of Agriculture, which has responsibility under the *Nova Scotia Health Protection Act* and the *Nova Scotia Food Safety Regulations*. The Inspector issued an order dated July 23, 2014, which the Claimant interprets as having closed down his business until the rat problem was rectified by a pest control company. The Defendant's position is that this order did not have the effect of immediately closing the business - only that the building was subject to being closed down. Regardless of which view is correct, the Claimant decided to shut down his business and vacate the premises, rather than attempt any corrective action.

[10] The evidence is quite clear that, by the time the rat problem was fully manifest, there were multiple means for the rats to breach the building envelope and travel freely through the structure to get to places where food was present. The Claimant testified that these were structural issues that the Defendant ought to have remedied.

[11] It is also quite evident that the Claimant's practice of filling an outside dumpster with food scraps and other edible material created a magnet for animals, including but not necessarily limited to rats. It is notable that the lease did not permit such a dumpster, as set out above in paragraph 4 of Schedule A, although one wonders how a restaurant could have functioned without some form of garbage containment.

[12] The Claimant says that he lost a great deal of money by having to vacate early. He says that he discarded over $1,000.00 worth of food. He abandoned fixtures and appliances that he had installed for purpose of operating his business. He had spent money on decor and signage. He had printed promotional material that was of no value once the business closed. He says that he sold equipment at a loss. He claims to have lost profits. Without going into precise detail, it is fair to say that these items - if proven - would total or exceed $25,000.00.

[13] On cross-examination, the Claimant made several telling admissions. He admitted that he had a full opportunity to inspect the premises, but says that he could not inspect what he could not see. He blamed this on winter conditions, which is preposterous considering that the lease was signed in October and it was more than a month before he actually started paying rent.

[14] The Claimant also admitted that he had already decided that he would not renew the lease, and that his option to renew had expired, before he began to experience the rat problem. In fact, he says he knew within three months of opening that he would not renew, because he regarded the Defendant as a slum landlord. It appears that he formed this opinion as a result of some repairs that he had asked the Defendant to do, which the Defendant regarded as the obligations of the tenant. These repairs have nothing to do with the rat problem.

[15] The Defendant herself did not testify, because the person with day to day involvement with the building and the tenant was her ex-husband, Victor Gazzola. This building had been in his family for more than 50 years. Starting in the early 1950's it had been a restaurant called Main Street Lunch, operated by his parents. In about 2001 it was rented to a tenant who operated a place called “Pizza Joe” until it closed in about 2011. Between 2011 and when the Claimant took it over, it was being used as a facility for dog day care.

[16] Mr. Gazzola testified that the Claimant was given a month of free rent so he could do his leasehold improvements. He says that they talked about the condition of the building at the outset and there were a few things, such as replacing a back door, that the Claimant wanted done.

[17] Mr. Gazzola first became aware of a rat problem in about May 2014, when the Claimant called him and told him that the Defendant would have to pay $3,600.00 (not $7,000.00) to a pest control company. He says that he told the Claimant that this was his issue to address, not the landlord’s, as the lease contained no such obligation on the landlord.

[18] Mr. Gazzola further testified that after the Claimant moved out, he had the building inspected and there are no structural problems. He was concerned with the condition that the Claimant left behind, about which I will say more later. He also testified that he called in a pest control company who dealt with the rats at a minimal cost.

[19] A considerable amount of testimony from both parties was directed to the supposed condition of the premises when the Claimant vacated. The Claimant testified that he left it clean and intact. Mr. Gazzola's evidence was otherwise.

Discussion

[20] The Claimant did not present a very compelling case. (I have attempted to look beyond the fact that his presentation was unstructured and confusing.) He appeared not to be familiar with the lease that he had signed, and did not appear to understand the scope of the landlord's (as opposed to his) obligations. He evidently concluded that he would not be renewing his lease long before the rat problem became serious, yet blames the rat problem for the fact that he had to close his business. Whether or not the rat problem had actually begun before he made that decision - and rats are a fact of life in the restaurant business - according to his evidence it was other issues (about which he was vague) that had convinced him that the landlord was a slum landlord.

[21] The significance of that decision not to renew is that many, if not all, of the losses and costs that he incurred in leaving were inevitable, even had the rat problem not developed. He cannot blame the landlord for losses that he

suffered by having to leave in July, when he would have suffered the same losses by leaving voluntarily at the end of his lease two or three months later.

[22] Much of the Claimant's case pivots on the question of whether or not the Defendant was responsible for the rat problem. Based on some of the photos placed in evidence, it appears that the Claimant's waste disposal practices were deficient and, very likely, in breach of the lease. There appears to have been both a garbage dumpster and green bin in place, outside. Some photos show the dumpster overflowing with food waste, suggesting that it was either not being emptied often enough, or that it was being used inappropriately. With food waste strewn on the ground, it is no wonder that rats were attracted in such numbers. It is also not surprising that some of them would be tempted to get into the building where food was being served.

[23] The Claimant also appears to have kept empty food boxes stacked along the back fence, which could have added to the problem by creating an ideal rat habitat.

[24] As for the building itself, it is by no means clear that the rat problem became a "structural" issue that would have been the landlord's responsibility. Most of the obligations under the lease, respecting the condition of the premises, were the tenant's responsibility.

[25] At most, once the rats became established, there would have been a small structural component to the problem in those areas where the rats may have breached the foundation. Once inside the building, all of their burrowing

through walls would have been a maintenance issue within the tenant's area of responsibility.

[26] Given the circumstances, it is hard to be critical of the Defendant for refusing to agree to pay $3,600.00 or $7,000.00, whichever it was. The Claimant had already concluded that the Defendant was a slum landlord, which suggests that the relationship was a bit dicey. The Claimant did not present the issue in a professional manner, such as by offering a report or even a written estimate. It was all verbal, and likely confrontational. From the Defendant's perspective, the Claimant had accepted the state of the building and any damage done by rats was the Claimant's responsibility.

[27] Had the Claimant provided the Defendant with proper documentation showing that it was at least part of the Defendant's responsibility, and had the Defendant still refused to do anything, then the Claimant would have had to face the choice of whether to:

a. Abandon his business and suffer all of the losses he claims, or
b. Pay for the repair himself and negotiate (or sue) for compensation.

[28] Clearly, the less expensive choice would have been the latter.

[29] Where a party takes a more expensive option, the law regards that party as having failed to mitigate his damages and only the lesser amount would be recoverable. What that means is that the Claimant's recovery, even if he had made out a case, would be restricted to the cost of filling in the holes where the rats were getting in.

[30] Under all of the circumstances, I find that the Claimant has not proved that the Defendant breached the lease. I was unimpressed with the Claimant's general credibility. I am left in some considerable doubt as to his motives. He provided no evidence to the effect that his business was making money, and his claim for loss of profits is highly suspect. Many of his other financial claims were undocumented, because (he says) he operated on a cash basis.

[31] His decision to call the health inspectors and invite them to close down his business is also suspect.

[32] I find that the Claimant has not proved that the Defendant breached any legal obligations to him. It is therefore unnecessary for me to elaborate further on the many deficiencies in the damage claims advanced, which called many of them into serious question.

The counterclaim

[33] I find that the Claimant abandoned the tenancy with two months' rent owing, in the amount of $3,800.00.

[34] The balance of the counterclaim referred to items that the Defendant said were left in poor repair, which would have to be repaired. Mr. Gazzola also testified that the building was likely to be sold, in which case these repairs would not need to be done as the new owner would do whatever he, she or it needed to do. I find that no other damages have been proven.

Conclusion

[35] The Claimant's case against the Defendant is dismissed. The counterclaim is allowed in the amount of $3,800.00 plus costs in the amount of $64.10.

Eric K. Slone, Adjudicator