

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Butcher v. Westgate Builders & Rentals Ltd., 2004 NSSM 1

BETWEEN:

Name Susan J. Butcher & Judith E. Lawlor Appellants/Tenants

Name Westgate Builders & Rentals Limited Respondent/Landlord

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 3, 2006. This decision replaces the previously distributed decision

DECISION

Appearances: Susan J. Butcher & Judith E. Lawlor, on their own behalf;
Sadie Francis, on behalf of the Respondent/Landlord
Westgate Builders & Rentals Limited.

- [1] This matter came on before me on November 9, 2004.
- [2] I heard the evidence and submissions of the Appellants/Tenants Susan Butcher and Judith Lawlor, and those of Ms. Francis on behalf of the Respondent/Landlord. I also heard the evidence of the superintendent, Mr. Fredericks, as well as the evidence and submissions of Mr. Francis, the owner of the Respondent/Landlord company.
- [3] This is an Appeal of a Residential Tenancies Order dated August 26, 2004. The Order under appeal was that the Respondent/Landlord could retain the security deposit that had been paid by Ms. Butcher and Ms. Lawlor to the Respondent/Landlord.
- [4] On June 20, 2004, Judith Lawlor and Susan Butcher signed a Standard Form of Lease with the Respondent/Landlord Westgate Builders & Rentals Limited.
- [5] Pursuant to the terms of the Standard Form of Lease, the "tenancy is to commence or take effect on the 1st day of July, 2004, and this shall be the anniversary date as defined in the Act". Ms. Butcher and Ms. Lawlor also gave a security deposit, in the amount of \$297.50, to the Respondent/Landlord on June 20, 2004. Clause 11 of the Lease provided that they were to deposit that security deposit with the Respondent/Landlord, and that the security deposit was to be deposited for the Appellants/Tenants by the Respondent/Landlord "in a trust account within three

days of its receipt, and it will be returned to the Appellant/Tenant in trust within ten days of the termination of this lease". Clause 11 of the Lease went on to provide that "the Respondent/Landlord shall file a claim for unpaid rent and/or damages within ten days for the termination of the Lease if the deposit is not returned".

- [6] The Respondent/Landlord did not give any key to Ms. Butcher or Ms. Lawlor, and they took no possession of the apartment, on or after June 20, 2004.
- [7] On June 22, 2004, there was a family emergency that required Ms. Butcher to return to Ontario. Ms. Butcher and Ms. Lawlor together decided that they would not be able to take the apartment as a result. They called Mr. Frederick, and advised him that they would not be taking the apartment, and asking for their security deposit back.
- [8] Mr. Francis gave evidence that he understood as of June 22, 2004, or shortly after that point, that Ms. Butcher and Ms. Lawlor would not be proceeding with the Tenancy Agreement, and he immediately started to make attempts to re-rent the premises. His attempt was to re-rent it as of July 1, 2004, if possible, but as it turned out, he was only able to obtain a new tenant as of August 1, 2004.
- [9] On July 21, 2004, Ms. Lawlor and Ms. Butcher filed an Application with the Residential Tenancies Office for:
 - a. termination of tenancy;
 - b. payment of money; and
 - c. disposition of the security deposit.
- [10] It was served by them on July 23, 2004, with a Hearing date set of August 23, 2004.
- [11] On August 6, 2004, the Respondent/Landlord filed an Application for a security deposit claim. The Application was served on Ms. Butcher and Ms. Lawlor at the Hearing on August 23, 2004.
- [12] At the Hearing, the Tenancy Officer found that:
 - a. Ms. Butcher and Lawlor owed the Respondent/Landlord \$595.00 rent for the month of July; and that
 - b. the Respondent/Landlord could retain the security deposit.

[13] The Tenancy Officer accordingly ordered that the Respondent/Landlord could retain the security deposit.

[14] On this Appeal, which is really a Hearing *de novo*, Ms. Butcher and Lawler submitted that:

- a. while they had signed the lease, they were not and never were “tenants” within the meaning of the *Act* because they had never taken any possession of the apartment in any way;
- b. a landlord who wanted to retain a security deposit had to comply with the provisions of s. 12 of *The Landlord and Tenant Act*, and that had not been done; and
- c. because they had never been tenants, there was no “outstanding rent” against which the security deposit could be applied, and accordingly they ought to be able to obtain the return of the security deposit.

[15] With respect to the first submission, in my view it cannot succeed. Whatever the position of Ms. Butcher and Ms. Lawlor would be under the general law of landlord and tenants, under s. 3(2)(b) of *The Landlord and Tenant Act* the

“relation of landlord and tenant is deemed to exist. . . between an individual and a person when an individual. . . makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent.”

[16] In my opinion, s. 3(2)(b) applies to a situation where an individual is granted “the right to possess” a residential premises, notwithstanding that the right might not be exercised until a future date (as in this case).

[17] I next turn to the second two submissions made by Ms. Butcher and Ms. Lawlor.

[18] Security deposits are governed by sections 12(5) - (7) of *The Landlord and Tenant Act*. They provide as follows:

“12(5) Subsection to subsection (6), the security deposit, together with interest, **shall be** [*emphasis added*] returned to the tenant within ten days of the date **of the termination** [*emphasis added*] of the lease

- (6) Where the landlord seeks to apply all or part of the security deposit and interest to outstanding rent or to expense incurred in respect of any damage for which the tenant is responsible and the tenant does not consent in writing, the landlord may make an application under s. 13.

- (7) An application or a complaint pursuant to subsection (6) shall be made within ten days of the date of termination of the lease, and, if no application or no complaint is made, the security deposit shall be returned in accordance with subsection (5)."
- [19] The provisions of s. 12(5) of the *Act* are mandatory: the security deposit "shall be" returned to the tenant within ten days of the date of the termination of the lease.
- [20] A landlord under the *Act* is permitted to retain the security deposit only when "there is outstanding rent" or property damage to the residential premises: s. 12(6). Since the tenants never took possession, there was no damage to the premise. Accordingly, the landlord's entitlement to retain the security deposit depends on whether or not there was any "outstanding rent".
- [21] The Respondent/landlord's position was that there was outstanding rent, for the month of July, 2004. I do not agree.
- [22] As of June 22, 2004, the Appellants/Tenants had, in effect, told the Respondent/Landlord that they were repudiating their obligations under the Lease. They would not be taking possession and they would not be paying rent. The Respondent/Landlord, in effect, accepted this repudiation, in the sense that it thereupon commenced a search to find a new tenant, hopefully to take occupancy by July 1, 2004, but if not, by whatever date they could obtain (which in this case, turned out to be August 1, 2004). In other words, the Respondent/Landlord itself accepted that it had no obligation to provide the premise to Ms. Butcher and Ms. Lawlor as of July 1, 2004.
- [23] In my opinion, the effect of Ms. Butcher's and Ms. Lawlor's repudiation of the Lease on June 22, 2004, and the Respondent/Landlord's subsequent acceptance of that repudiation (which it was required to do in order to mitigate its damages, as it was obligated to do) is this:
- a. As of July 1, 2004, there was no rent owing by the Appellants/Tenants to the Respondent/Landlord; but
 - b. The Respondent/Landlord had a right of action to claim damages for breach of the Lease Agreement, which damages were to be measured by the number of months the apartment remained vacant after July 1, 2004 (provided the Respondent/Landlord took steps to mitigate its loss).
- [24] In other words, what was "outstanding" as of July 1, 2004, was not rent, but was rather a claim for damages.

- [25] Since there was no “rent outstanding” there was nothing against which the Respondent/Landlord could apply the security deposit, and accordingly nothing to stay the effects of s.12(5) of the *Act*.
- [26] I emphasize here that this is a relatively unique situation. In most cases involving security deposits, tenants have taken occupancy of the residential premises, and accordingly, have acquired an obligation to pay rent in exchange for that occupancy. In such cases, there would be “outstanding rent” were the tenant to move out before the termination date of the Lease.
- [27] Accordingly, I am of the view that the Order of the Residential Tenancy Officer must be set aside, and the Respondent/Landlord must return the security deposit. I emphasize, however, that nothing in this decision affects any right the Respondent/Landlord has to claim against the Appellants/Tenants for the full measure of any damages it has sustained by reason of the Appellants/Tenants repudiation of the Lease on or about June 22, 2004. That is a different matter and a different claim, which I understand is, or will be before the Residential Tenancies Office.

Dated at Halifax, Nova Scotia this
15th day of November, 2004

)
)
)
)

ADJUDICATOR

W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)