Claim No: 313460

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

Cite as: Formac Investments Ltd. v. Peck, 2009 NSSM 48

BETWEEN:

FORMAC INVESTMENTS LIMITED

Landlord

- and -

KELLY PECK

Tenant

PROVISIONAL APPEAL DECISION AND ADDENDUM

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 29, 2009

Provisional decision rendered on September 30, 2009; Addendum added October 20, 2009

APPEARANCES

For the Landlord - Jim Lorimer, President

For the Tenant - self-represented

BY THE COURT:

[1] This case raises an interesting and perhaps important issue under residential tenancy law, and in particular what it means when a Landlord has been directed not to withhold consent in an arbitrary or unreasonable manner.

[2] This is an appeal by the Landlord from an order of the Director dated August 31, 2009. That order effectively permitted the Tenant to convert what had been a year to year lease into a month to month one. It also denied the Landlord's request that the tenancy be deemed to have terminated because the Tenant effectively refused to renew for another year.

[3] The Landlord (specifically its president, Mr. Lorimer) and the Tenant are relatively sophisticated parties, and this tenancy concerns a high-end flat in south-end Halifax which is occupied by the Tenant and two other individuals.

[4] The original lease ran from September 1, 2007 to August 31, 2008, and was renewed for one year. About four months before the expiry of the second year, the Tenant gave a proper notice that he wished to convert the tenancy into a month to month tenancy, pursuant to the provisions of s.10A of the *Residential Tenancies Act*, which provides:

Renewal term and daily rents

> 10A (1) A lease, except for a fixed-term lease, continues for the same type of term if no notice is given pursuant to subsection (1) of Section 10 and is deemed to have been automatically renewed.
>
> (2) A fixed-term lease ends on the day specified in the lease and, if a tenant remains in possession with the consent of an owner, the lease is deemed to have renewed itself on a month-to-month basis.
>
> (3) Where a tenant gives a notice to quit three months prior to the anniversary date of a year-to-year lease and requests in writing that the term be changed to a month-to-month lease, the consent of the landlord shall not be arbitrarily or unreasonably withheld.
>
> (4) Where a tenant makes a written request pursuant to subsection (3), the landlord shall respond within thirty days of receipt thereof, otherwise consent is deemed to be granted.

[5] The Landlord responded within thirty days and refused to consent, giving his reasons why he believed that it was not in his interest to have a month to month tenancy. Those reasons will be considered below.

[6] An application by the Landlord was commenced on July 10, 2009, and came before the Residential Tenancies Officer for a hearing on August 24, 2009. A written decision was rendered a week later.

[7] The Residential Tenancies Officer stated in his reasons that based upon his reading of the *Residential Tenancies Act*, the Landlord "may not deny the tenant's request that the lease be changed from a year to year lease to a month to month effective September 1, 2009." He accordingly declared that the lease had become month to month. As a corollary to that finding, he declared that the tenancy had not been terminated, as the Landlord contended.

[8] The Residential Tenancies Officer appears to have given no consideration to the Landlord's reasons for withholding consent, and in particular made no finding that the reasons were either arbitrary or unreasonable. In so failing to consider the Landlord's reasons, I believe that the Residential Tenancy Officer erred in law.

[9] The words *"the consent of the landlord shall not be arbitrarily or unreasonably withheld"* must be given some meaning. The Act could have, but did not, make it automatic that a tenant's request to change from year to year to month to month would be given effect. It places the Landlord in the centre of a consenting process and allows the Landlord to exercise some judgment, with the constraint that it not be arbitrary or unreasonable.

[10] The concept of consent not being unreasonably or arbitrarily withheld occurs in two contexts in the Act. The other is subletting. I have not been able to locate a case where the issue was consent to conversion from yearly to month to month. Not surprisingly, there are numerous cases from across Canada in both commercial and residential contexts, where courts have had to adjudicate a dispute over whether the withholding of consent to sublet was unreasonably withheld.

[11] In a case before the Saskatchewan Court of Queen's Bench, Windsor Apothecary Ltd. v. Wolfe Group Holdings Ltd. 1996 CarswellSask 116, the judge summarized what has become the accepted law in this area:

> 3 At one time, to be considered reasonable, the withholding of consent by a landlord had to be connected to the personality of the intended sublessee or with his probable user of the property: *Houlder Bros. & Co. v. Gibbs*, [1925] Ch. 575 (C.A.) This view of the law has fallen into disfavour,

> and the modern approach is for a court to put itself into the position of the landlord and, having regard to the surrounding circumstances, the commercial realities of the marketplace and the economic impact of the sublease on the landlord, determine whether a reasonable landlord would consent to the sublease: Sundance Investment Corporation Ltd., supra; *F.B.D.B. v. Starr* (1986), 41 R.P.R. 151 (Ont. S.C.); *Lehndorff Can. Pension Properties Ltd. v. Davis Mgmt. Ltd.* , [1989] 5 W.W.R. 481 (B.C.C.A.).

[12] I believe the same considerations as apply to subletting would apply to the changing of the term of the lease. Based on this, the task for me is to ask whether or not, *"having regard to the surrounding circumstances, the commercial realities of the marketplace and the economic impact of the [conversion] on the landlord,* a "reasonable Landlord" would withhold consent to the conversion of a year to year to a month to month tenancy.

[13] The reasons of the Landlord here are that, in his experience, this particular flat is much more difficult to lease out at any time of the year other than September 1, which has become almost a standard moving day in south end Halifax, in part because that is the start day for most student apartments. The flat in question is a large 3-bedroom that appeals mostly to individuals sharing rather than to families, although it is not necessarily attractive to students. The Landlord produced evidence to corroborate that the last time the apartment was on the market over the winter, it stood vacant for many months.

[14] I can envision other scenarios where it would be inconvenient and potentially costly for a Landlord to have to administer a month to month tenancy. For example, a Landlord may reside overseas and not want to have to deal with a vacancy except at a predictable time when he or she can plan to be on hand. There are no doubt other factors that might

reasonably incline a Landlord to want to insist that a tenancy remain year to year.

[15] I do not believe that the intent of the *Residential Tenancies Act* is to make such conversions automatic, or virtually so. What it does is make them possible and, in most cases, difficult to resist.

[16] An arbitrary decision would be one that is random or based on purely personal whim. An unreasonable one would have no credible rationale behind it. I am unwilling to say that this Landlord was being arbitrary or unreasonable in refusing consent. It is, after all, his building and the financial consequences of a long vacancy will be borne by him. He is entitled to make a reasonable business decision and not be second guessed by tenants, Residential Tenancy Officers or Adjudicators simply because they do not agree with the Landlord.

[17] In the result, I allow the appeal and declare that the tenancy has not been converted into a month to month tenancy, because the Landlord refused his consent in a timely manner, for reasons that were neither arbitrary or unreasonable.

Remedy

[18] Unfortunately, for reasons beyond the control of either the Landlord or the Tenant, they have been operating in a state of uncertainty, not knowing the status of the lease. The practical effect of either possible result could work a hardship on either or both of them, disproportionate to their actions.

[19] Were I to declare that the tenancy had been renewed for another year, it would place a hardship on the Tenant and put him into a lease that he does not want, and believed he had avoided. If I declare that the tenancy has been terminated and the tenant is, in effect, over-holding, then the Landlord may have to contend with a vacancy precisely when he believes the market will have become soft.

[20] As I indicated at the hearing, my inclination is to defer making a finding as to the state of the tenancy for a short period of time, to allow the parties to negotiate a suitable compromise. As such, I will give them one week from the date that this decision is communicated to them. If after that week they have not reached an understanding, which they would be directed to convey to the court, then I will complete my findings and determine the existing state of the tenancy.

Eric K. Slone, Adjudicator

ADDENDUM

[21] The parties were unfortunately unable to come to an agreement on the issue of when this lease would terminate. I must therefore decide the issue, with aid of their written submissions.

[22] The Landlord wants the lease to terminate on August 31, 2010, but to alleviate hardship he has unconditionally undertaken to accept an early

termination on any date from May 31, 2010 (his undertaking refers to 2009, but I believe that is a typo) until August 31, 2010.

[23] The Tenant asks that an earlier date be set, given that he has acted in good faith and had no way of knowing that his effort to convert the tenancy into a month to month would be thwarted.

[24] The Landlord is concerned that, if I set an earlier date, the effect of my decision would, in effect, be neutralized and he would be exposed to the very financial risk that he seeks to avoid.

[25] I recognize that there is potential hardship, no matter which result pertains. Both parties have acted in good faith.

[26] However, my function here is to make the order that the Residential Tenancies Officer ought to have made when the matter came before him. By then, it was already too late to avoid hardship. Had he ruled in favour of the Landlord at that time, the Tenant would have been faced with the same situation, or perhaps he would have had the option to vacate immediately. The fact that it took two steps to arrive at a final result is no one's fault.

[27] I have decided that for my decision to have any real meaning, the legal result must flow from the decision. That is, the lease has been renewed for one year and expires on August 31, 2010. The Tenant has the advantage of the Landlord's undertaking to accept an early termination. Also, the Tenant has the ability to sublet, if and when he determines that he wants to leave early.

[28] In effect, the risk of vacancy falls on the tenant. In the unique circumstances of this case, it is appropriate that the Tenant and not the Landlord incur that risk.

[29] Of course, it is speculative as to whether there will be any period of vacancy or any financial consequences, but the parties at least understand now what is required of them.

Eric K. Slone, Adjudicator