Claim No: 452285

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

Cite as: Arab v. M.B., 2016 NSSM 51

BETWEEN:

JOSEPH ARAB and GREGORY ARAB
Landlords (Appellants)

- and -

M.R.B.

Tenant (Respondent)

REASONS FOR DECISION AND ORDER

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on August 30, 2016

Decision rendered on September 8, 2016

APPEARANCES

For the Landlords	Richard Arab Counsel
For the Tenant	Dana MacSween Counsel

REASONS FOR DECISION AND ORDER

Introduction

[1] The Landlords appeal from an order of the Director of Residential Tenancies that upheld the right of the Tenant to an early termination of her lease, relying on Section 10C of the *Residential Tenancies Act*, which reads:

> **Early termination for health reasons**
>
> 10C (1) Notwithstanding Section 10, where a tenant or a family member residing in the same residential premises in a year-to-year or fixed-term tenancy has suffered a significant deterioration in health that, in the opinion of a medical practitioner, results in the inability of the tenant to continue the lease or where the residential premises are rendered inaccessible to the tenant, the tenant may terminate the tenancy by giving the owner
>
> (a) one month's notice to quit, in the form prescribed in the regulations;
>
> (b) a certificate of a qualified medical practitioner, in the form prescribed by regulation, evidencing the significant deterioration of health ....

[2] The Tenant saw her physician on February 2, 2016 and had him sign the requisite certificate which was the basis for her exercise of the right to terminate a yearly lease more than a half year before its natural expiry.

[3] This Court has had occasion to write extensively on this subject in an earlier case, *GNF Investments Ltd. v. Rossell*, 2015 NSSM 54. At the risk of being tedious, I quote the following lengthy extract from that case, as I believe it provides the framework for determination of this case.

> [15] In my opinion, s.10C is a specific application of the more general principle that contracts which have been "frustrated" need not be performed. The doctrine of frustration allows for the legal termination of a

contract due to unforeseen circumstances that prevent the achievement of its objectives, render its performance illegal, or make it practically impossible to execute. .....

[16] Whether or not a contract has been frustrated has always been a question of fact. In other words, the say-so of one party has never been conclusive. That would make it too easy to evade contractual responsibilities.

[17] The *Residential Tenancies Act* is very specific about what has to occur before a yearly or fixed term lease can be ended early. There must have been a "deterioration of health," as a result of which (in the opinion of a physician) the tenancy is no longer viable and/or the premises are no longer accessible. If there has been no deterioration in health the right to early termination does not manifest. And even if there has been a deterioration in health, however caused, the right to early termination is not engaged unless a physician concludes that the result of that deteriorated health makes the tenancy non-viable or the premises inaccessible.

[18] Section 10C has been in the *Residential Tenancies Act* since at least 1993. My attention has been drawn to several cases in this Court where the adjudicators have been critical of the form which merely required the physician to tick a box, certifying that the requirements of 10C have been met: see *Arnaout v. Ferla* 2004 NSSM 47; *Snevrk Management v. Atkinson* 2010 NSSM 1; and *Allen v. Black* 2012 NSSM 27. In all of those cases, the adjudicator was prepared to look behind the certificate to determine whether the facts justified the early termination. In 2012, there was a change to the Regulations which changed the form of the physician's certificate, making it a bit more explicit, but it appears still to require little more of the physician than to tick a box. As such, the criticisms of the adjudicators in the cases above noted still apply.

[19] In the case of *Rolle v. Rockstone Investments Ltd.*, 2015 NSSM 24, I had occasion to comment on this section and the weight which ought to be given to the (current) physician's certificate:

> [19] ..... Form H - Physician's Certificate - Termination of Tenancy for Health Reasons .... asks the physician to sign the standard form certificate, which states:
>
> "I hereby certify that I have examined the above-named tenant and that she has suffered a significant deterioration of health that ... renders the residential premises inaccessible to the tenant."

> [20] This statutory form does not ask the physician to elaborate on the health condition. In my view, this represents a deliberate decision on the part of the Legislature to respect the privacy of tenants and to give weight to a physician who is prepared to certify to the conclusion that the tenant has suffered a health deterioration that renders the premises inaccessible.
>
> .....
>
> [22] In my respectful view, the Landlord and, in turn, the Residential Tenancy Officer owed a great degree of deference to the conclusion of Ms. Rolle's physician.
>
> [23] This is not to suggest that such a certificate might not be called into question, where the facts establish that the certificate ought not to have been signed, such as (but not exclusively) because of fraud.

[20] The Residential Tenancy Officer and, by extension this Court, must strike a proper balance between the rights of the tenant (here Ms. Rossell) and those of the Landlord. The tenant is entitled to have her rights and privacy respected, and to have the opinion of her physician accepted at face value. The Landlord, on the other hand, must be entitled to question whether there is any justice in forcing it to incur the financial cost associated with an abrupt disruption of its flow of rent.

[21] In my view, this balance is achieved by allowing the Landlord to raise the question: what deterioration in health have you suffered, and how are you unable to continue the tenancy, or how is my premises no longer accessible to you? These elementary questions may (and should) be asked immediately upon the landlord learning that the tenant intends to invoke s.10C, and may be renewed at the hearing before the Residential Tenancy Officer or the Small Claims Court. And these questions should be answered with enough information that would potentially satisfy a reasonable third party. Of course, there are privacy considerations, but when a tenant is potentially asking a landlord to incur significant financial costs associated with the tenant's deteriorated health, a reasonable amount of information must be provided.

[22] In my respectful view, the legislature did not intend that the physician's certificate would be a full and final answer to the question. While it was intended that the certificate carry weight, it was not intended that it be an impenetrable wall behind which no one could go. That interpretation would amount to a wholesale delegation of authority to the physician and a total derogation of authority from the Residential Tenancy Officer and this Court. I find that this was not the intention.

> [23] There are good, practical reasons why physicians should not have the final word on whether or not the requirements of s.10C have been met. Providing this certificate is analogous to the role that physicians play in certifying that their patient suffers from a disability for insurance purposes or other public or private benefits. Insurers and government departments have always had the right to look behind the medical opinion, and I believe landlords have similar, though arguably lesser, rights.
>
> [24] Physicians, especially family physicians, have a vital role to play as patient advocates and personal supports. It asks too much of them to be the final arbiters of whether or not their patients are entitled to certain financial benefits. We cannot expect physicians to fully inquire into all the circumstances, and to balance fairly the rights of their patient with those of the landlord, insurance company or the government. While we expect physicians to exercise some judgment and not to become unwitting dupes, we recognize where their allegiance lies. They will favour their patient.
>
> [25] Putting the issue another way, a landlord has the right to have its financial interests ultimately determined by someone who is unbiassed and not by someone who is at heart an advocate for the tenant.

[4] The facts in the case before me are different, but have a lot in common with the *Rossell* case, as I will explain.

The Facts

[5] The premises in question is the top floor of a 4-unit Victorian home in downtown Halifax. By the looks of it, it was nicely updated in at least some respects. The Tenant had lived there since the fall of 2014. Her latest lease was for one year, starting September 1, 2015. Monthly rent was $1,205.00. The Landlord holds a security deposit in the amount of $590.00, which was one-half of the original rent.

[6] The Landlords own upwards of 100 rental units in the Halifax area. Joseph Arab, who testified, could not say offhand how many buildings he and his brother

have, but I can infer that there are quite a few, and managing them would be a significant occupation.

[7] The Tenant had almost no problems with her unit prior to November 2015, when the roof over the kitchen area started leaking. I say almost, because earlier in the year she had a problem with a large, aggressive raccoon that took up residence on her deck, which she paid to have removed after the Landlords refused to take any measures. Also, she had a recurring issue with someone in the building encroaching on her parking spot, forcing her either to park on the street or drive to her parents' home in Bedford to stay the night. These matters were raised at the Residential Tenancies hearing, and in Court, but they do not really figure into the main issue as neither problem would have made it impossible for the Tenant to continue with her lease.

[8] The Tenant is a young, single, professional woman who was working in the financial industry at the relevant times.

[9] On November 22, 2015, water started to come through the ceiling in her kitchen, bringing down some plaster and other debris with it. She reported this to the Landlord (Joseph Arab, with whom she typically dealt), by text and phone message. From her perspective, little or nothing was ever done to remedy it. She had concerns that water might get into the electrical systems and cause short circuits, or worse. She texted photos to Mr. Arab. In late December, after a severe rainstorm on or about the 29th, she texted again to alert Mr. Arab to the further problem and demand action.

[10] A few days later, the Tenant contacted the City of Halifax Building Inspection department and an Inspector came to the unit. He noted the water

damage, as well as a couple of other minor things, and issued an order dated January 5, 2016 directed to the Landlords. The relevant part of that order reads:

> 1. The leak in the kitchen walls and ceiling must be investigated and repaired and all subsequent water damage must [be] repaired to the standard to which it was designed to be built. Care must be taken to ensure the affected areas are free of moisture which could lead to the creation of mould.

[11] The order gave the Landlords a bit more than a month to comply, namely until February 10, 2016, after which a re-inspection was promised to ensure compliance.

[12] In the meantime, from the Tenant's perspective and memory, the Landlord had engaged a roofer though she did not know the extent of what had been done. The Landlords' handyman had also been in the unit to do some drywall repairs, which she believes were minimal and ineffective. She says she still saw water coming through.

[13] As the Tenant was going through this inconvenience, according to what she said and also told her doctor, she began to develop both physical and emotional problems. Most serious was severe anxiety and depression. Physically, she developed a cough and sore throat. She was not sleeping well, which can be a serious problem for someone working long hours at a demanding job, as she was.

[14] She says that she was in such bad shape that her mother was concerned enough to insist that she see her doctor. She was accompanied to Dr. Morris Trager's office by her mother on February 2, 2016. Dr. Trager testified and brought his chart to court. His notes on that day indicated "acute anxiety,

apartment in bad condition, water in electrical panels, can't live there, ceiling in kitchen fell in, bedroom bowed out ceiling. Treatment - must move out."

[15] The Tenant's mother had come to the appointment prepared with a Form H certificate for Dr. Trager to sign, that states (as pre-printed):

> "I hereby certify that I have examined the above-named tenant and that she has suffered a significant deterioration of health that ... has resulted in the inability of the tenant to continue the lease."

[16] Dr. Trager testified that he had known the Tenant for more than 20 years as her physician, and that he had never seen her in such bad shape. He felt strongly that she had to leave the apartment. He did not prescribe any other treatment - for example, no medication or counselling.

[17] A few days later, on February 12, 2016, the Tenant presented Mr. Arab with the Form H along with a Form G giving notice that she planned to terminate the lease as of March 31, 2016. Absent such a notice, she could not legally have terminated her lease until it expired at the end of August 2016.

[18] The Tenant testified that about this time she stopped sleeping in the unit, moving gradually back in with her parents in Bedford. She gradually removed all of her belongings and handed back the unit at the end of March. The Tenant is convinced that the Landlords never actually fixed all of the problems.

[19] The Tenant conceded that she never gave Mr. Arab any advance warning that the deficiencies in the unit were adversely affecting her health, and never gave him any extra opportunity to remedy the problems in order to salvage the tenancy.

[20] The Tenant says that her anxiety symptoms gradually improved, though as late as July 26, 2016 she told Dr. Trager that she was still having most of the symptoms she reported back in February. It is noted that July 26 was four months after she completely vacated the unit.

[21] The Tenant had no prior history of anxiety, depression or sleep disturbance. This all started with the water leaks in her apartment.

[22] Mr. Arab testified that he actually responded promptly to the problem, when reported by the Tenant. He understood that he needed to have a roofer look at the roof and make repairs. He called around to several roofers that he typically uses. None were immediately available, and winter weather conditions made it challenging to work on the roof. Eventually, a roofer named Bob McCarthy did a major roof repair which included re-shingling a large portion as well as removing two skylights, replacing one and re-installing the other. Mr. McCarthy billed $3,000.00 plus HST for his work. Once the roofing work was done, in January, Mr. Arab dispatched one of his employees to repair the interior damage, which included removing the affected (wet) areas, patching them, priming and painting. Mr. Arab insisted that the issue was resolved by about the time the Tenant served him with the Notice to Quit. He noted, which appears to be the case, that the Inspector must have been satisfied that the problem was rectified as no further action was taken.

[23] Mr. Arab conceded that the Tenant later brought to his attention an area of discolouration in the plaster ceiling that developed after the work was done. He speculated that there may have been a little bit of water that had gotten inside the roof cavity during the repairs, which eventually found its way through. He said

that the discoloured area was not wet and actually only needed re-painting. This was after the Tenant had given her notice, and was no longer sleeping in the unit.

Findings

[24] I must try and bring some neutral perspective to this situation. Some of my impressions are:

a. The Landlords did not ignore the problem, when it was reported, but did a poor job of providing the Tenant with information and reassurance.

b. The Tenant's concerns about electrical problems and the possible development of mould were rational, though likely somewhat overblown. The extent of the leaking and damage to the plaster or drywall (as shown in the photos) was relatively minor, compared to the disasters that sometimes occur, and which make homes or apartments uninhabitable.

c. The inability to get a roofer to immediately repair the roof and staunch any further leaking has been credibly explained. I accept that the combination of bad weather and time of year can make it very difficult to secure a competent roofing company to do a job that was as extensive as this appeared to be. Even so, the Landlord did a poor job of keeping the Tenant informed of his efforts and reassured that it would be fixed.

d. I believe that the Tenant's experience of anxiety, sleep disturbance and depression were legitimate in the sense that she was not faking the symptoms. I would characterize them as an extreme emotional response to what was on its face a moderately stressful situation, namely living in an apartment with a leaky roof, and not being kept informed by the Landlord as to what was being done to restore the secure environment that she had previously been experiencing.

e. I say that the Tenant's reaction was extreme, in the objective sense that many people would have gone through the same situation without suffering such a panoply of symptoms. It is possible that the Tenant was simply a more susceptible individual, either by nature or because of other stressors in her life. She did mention that she was putting in very long hours at her job, which made it all the more important that she get proper sleep. It is common knowledge that stress can be cumulative.

f. There is no evidence that the physical symptoms that the Tenant reported, such as cough and sore throat, resulted from mould or anything associated with the physical condition of the apartment. There are other more credible explanations, such as a stress reaction or viral infection.

g. Dr. Trager's advice to the Tenant to get out of the apartment as soon as possible was sensible advice, since it was obvious that the current conditions in the apartment had triggered the symptoms that the Tenant was experiencing.

h. I have no trouble accepting the Landlord's evidence that the leak was eventually fixed, and the interior of the unit was repaired, perhaps with a few minor hiccups. In other words, the diminished habitability of the unit was temporary.

[25] The ultimate question is whether I am satisfied with the physician's conclusions, as reflected in the certificate, that:

a. The Tenant had suffered a (significant) deterioration of health, and
b. This rendered the Tenant unable to continue with the lease.

[26] In arriving at my decision, I appreciate that I owe some considerable deference to the physician. But that deference belongs in the area where the physician has expertise.

[27] As such, I defer to Dr. Trager's conclusion that the Tenant had suffered a significant deterioration in her health. I also do not quarrel with his conclusion that the remedy for what was presenting as an acute situation was for her to get out of the environment that was making her sick.

[28] However, it is clear that Dr. Trager never fairly turned his attention to the question of whether or not the problems in the apartment were only temporary. Based on his notes and testimony, he was given a fairly exaggerated version of the event - i.e. "the ceiling in the kitchen fell in" - that might have caused him to conclude that his patient was being asked to live in Third World conditions. To conclude that the Tenant needed a respite from the apartment was one thing; to conclude that the Tenant was "unable to continue with the lease" is entirely something else.

[29] While I am sympathetic to the Tenant's situation, I believe she chose the wrong remedy, or if s.10C was the appropriate remedy, did so prematurely.

[30] The annals of Residential Tenancies proceedings are full of claims and counterclaims to the effect that residential units are deficient. Residential Tenancy Officers regularly order landlords to make needed repairs, and in appropriate cases grant rent abatements to compensate the tenant for the inconvenience and recognize that they have not received everything that they were promised. In the case of a serious enough deficiency, the tenancy may be found to have ended on the basis of a frustration of contract. The Tenant could, and should, have started a proceeding in the Residential Tenancies system to force the issue of repairs and deficiencies.

[31] The Tenant had already availed herself of the Halifax Bylaw Inspection service, but did not wait for it to play out. The Landlord had been given until February 10, 2016 to complete the repair. The Tenant obtained her doctor's certificate on February 2, 2016.

[32] I have already stated that Mr. Arab did a poor job of keeping the Tenant informed, and may not have moved as quickly as he might have, but at no time did the Tenant communicate to the Landlords that her health was being affected and that she might have to terminate the lease if the problems were not rectified. I believe, as I have stated in other cases including *Rossell* (above) that the landlord has a right to know of an impending problem and a right to try to preserve the tenancy by making sure that the premises remain accessible and the tenancy remains viable. I stated in that case:

> [48] I believe that in the situation where a tenant has suffered a significant deterioration of health that she believes makes her unit "inaccessible" or the tenancy otherwise non-viable, the tenant has an initial duty to advise the landlord of the problem and give them the opportunity to look into and, if possible, fix that problem. In many cases, there will be nothing that can be done. For example, in *Rolle* (above) the tenant became unable to climb stairs because of a high risk pregnancy, and there would have been nothing that the landlord could do to adapt the multi-level apartment to suit.

[33] In *Rossell* the tenant claimed that there were people (unlawfully) smoking on their balconies, causing smoke to drift toward her apartment, which was aggravating her asthma. That tenant also (later) found herself in an extremely agitated state, requiring medication, because of her emotional reaction to the landlord's unwillingness to allow them to terminate their lease prematurely. I found that the tenant had not given the landlord an opportunity to enforce the no smoking policy with other tenants, which might have directly solved the problem that started the dispute.

[34] I also cautioned against the use of s.10C to allow for early termination of a lease because of anxiety or health problems arising from the very fact of being in a dispute with the landlord:

> [51] I do not make light of Ms. Rossell's emotional and psychological distress, especially after the Landlord made known that it did not accept the early termination. It is a given that the Tenants wanted to get out of their lease, but the real reason remains a mystery. Perhaps it was too expensive, or inconveniently located. The prospect of being trapped in an unwanted lease could be a source of great stress, and I do not question the bona fides of Ms. Rossell's suffering. But I do not think that s.10C was intended to allow a tenant to terminate a lease because of the stress of a dispute with the landlord over the tenant's attempt to terminate the lease. There must be something inherently problematic about the physical premises on a go-forward basis.

[35] I will say it again. There must be something inherently problematic about the physical premises on a go-forward basis in order for a conclusion to be drawn that a tenancy is no longer viable, in the context of the tenant's deteriorating health.

[36] Dr. Trager was uniquely situated to find a deterioration in his patient's health, but he did not have sufficient information to know whether the tenancy was inherently problematic. All he knew was that his patient had to leave the premises for some period of time, in order to recover her health. Perhaps it asks a lot of physicians to turn their minds to this additional question, but we must not lose sight of the fact that the physician's conclusion on the lack of viability of a tenancy (no matter how factually incorrect) penalizes a landlord (who the physician does not know and has not heard from) to the tune of potentially thousands of dollars. I do not believe that the Legislature intended to invest physician's with such power.

Conclusion

[37] In a nutshell, I find that the Tenant experienced a health crisis - involving both physical and emotional symptoms - because of the discomfort and insecurity of living in an apartment that took too long to repair, but that was not irreparable. She also developed a belief (largely untrue) that her Landlord was not making a bona fide effort to fix the problem, which appears to have contributed to the health crisis. Had she approached Residential Tenancies with a request to order repairs and possibly grant an abatement, I believe she might have been received positively. But to seek to terminate the tenancy on the basis that it had become unsustainable was not, in my view, a supportable or even logical conclusion.

[38] The Residential Tenancy Officer heard the claim and counterclaim, and upheld the Tenant's position. With respect, I disagree, for several reasons.

[39] The Residential Tenancy Officer found (as have I) that the Tenant had experienced the health problems as described, and went on to state that "since she vacated she says these problems have ceased." This finding is at odds with the testimony of the Tenant and also that of Dr. Trager, whose notes state that even as of the 26th of July, some four months after she vacated, the Tenant was still experiencing these symptoms, though to a lesser degree than on February 2, 2016. This casts real doubt, in my mind, as to whether it was solely the physical state of the premises that was at the root of the Tenant's problems.

[40] The Residential Tenancy Officer stated that he had reviewed the pictures, from which he appears to have jumped to the conclusion that the Tenant had established that she could not "continue with the lease." With respect, I do not draw the same inference from what are likely the very same photos. Although the photos taken immediately after the first leak show some water damage, which might well have rendered the place difficult to live in, the later photos show what I would characterize as "maintenance items" that were in the process of being repaired, and which (had the Tenant waited) would have been completely fixed. There is nothing in the photos, nor in any other evidence, to the effect that the problems with water leaks were a major concern after the roofing repairs and interior work was completed sometime in February.

[41] In the result, the Residential Tenancy Officer ordered the Landlords to return the Tenant's security deposit of $590.00, plus the application fee of $31.15, for a total of $621.15.

[42] The Landlords' counterclaim was dismissed.

[43] What the Landlords had been claiming were:

a. One month's rent, $1,205, for April 2016.
b. $615.00 spent on a rental agent to find a new tenant.
c. $31.15 to commence the counterclaim.

[44] The Landlords also claim the cost of launching this appeal, namely $99.70.

[45] My opposite conclusion (to that of the Residential Tenancy Officer) is based on my belief that the words "unable to continue the lease" (for health reasons) has everything to do with the environment that the residential unit provides. I would not limit this to purely physical problems with the unit. I can imagine where issues like noise or air quality in the neighbourhood might become obstacles to a tenant continuing with a lease, where the tenant's deteriorating health has made intolerable that which was tolerable at the outset of the lease. As I have also stated in *Rossel*, where a tenant seeks to rely on this reason for terminating there is a duty to inform the landlord and give them an opportunity to accommodate the new limitation.

[46] I do not believe s.10C was intended to provide a tenant with a way to break a lease where the deficiency in the unit is temporary and fixable. Even the fact that the Act requires the tenant to give at least one month's notice is some recognition that the contractual aspects of the problem are not the same as the practical, health problems. The Tenant in this case was medically advised on February 2 to get out immediately, which she partially did by starting to sleep at

her parents' home. The contractual question was whether the lease should terminate almost two full months later. I believe that question involves a consideration of whether it is foreseeable that the tenant's health is and will be incompatible with the unit itself.

[47] I note that many tenants resolve their contractual problems by assigning or subletting their leases. The Tenant here made no effort to do either.

ORDER

[48] In the result, the decision of the Residential Tenancy Officer will be reversed, and the counterclaim will succeed. The Landlords are entitled to the relief, as asked. The Tenant shall pay the Landlord:

One month's rent for April 2016	$1,205.00
cost of rental agent to find a new tenant	$615.00
Less security deposit	($590.00)
Cost to commence the counterclaim	$31.15
Cost of the appeal	$99.70
TOTAL	$1,360.85

Eric K. Slone, Adjudicator