Claim No: 404660

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

Cite as: Tanner v. Murley, 2012 NSSM 56

BETWEEN:

ARTHUR TANNER

Landlord (Appellant)

- and -

ALAN MURLEY and QUAO ZHEN

Tenants (Respondents)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 23, 2012

Decision rendered on October 29, 2012

APPEARANCES

For the Landlord	self-represented
For the Tenant	Daniel McMillan Articled Clerk

REASONS FOR DECISION

[1] This is an appeal by the Landlord from a decision of the Director of Residential Tenancies dated July 9, 2012.

[2] The original application had been brought by the Landlord, seeking the following items:

a. one month's rent in the amount of $1,450,
b. the cost of filling in the oil tank in the amount of $900,
c. the cost of painting the house in the amount of $2,500, and
d. the cost of cleaning the house after the Tenants had left in the amount of $500.

[3] In the final result, the Tenancy Officer rejected all of the claims and ordered the Landlord to refund a security deposit in the amount of $675 plus accrued interest, totalling $689.20.

[4] The Tenancy Officer gave lengthy reasons for why he rejected all of the Landlord's claims. It is axiomatic that I am not bound in any way by these findings.

[5] One matter that should be disposed of at the outset is this: at the hearing before me, the Landlord attempted to increase the amount he was claiming for loss of rent. He contended that not only had he lost one month's rent, but that he lost $200 a month for the balance of the year because he re-rented the place at a lower rent. The representative for the Tenants objected to this attempt to claim a head of damages that had not been sought in the original application. In his view, it was unfair because the Tenants had no notice that this was going to be

claimed against them. I agree. The Landlord made his claim and this is what the Tenants responded to. It would be unfair to allow the Landlord to make additional claims. The Small Claims Court is a court of appeal from the Director of Residential Tenancies, and has no original jurisdiction to hear claims. Such a claim would be new and therefore cannot be entertained by this court.

The facts

[6] The parties entered into a year-to-year lease effective June 1, 2010, for a property at 388 Cobequid Road in Lower Sackville, which the Landlord had recently acquired. The rent was agreed upon at $1,350 per month. A security deposit in the amount of $675 was accepted by the Landlord.

[7] It is agreed that the very little occurred in the first year of any consequence.

[8] Approximately three months before the expiry of the first year, in April 2011, the Landlord had a meeting with the Tenant, Mr. Murley, at which time he advised that he intended to raise the rent to $1,450 for the second year. The parties differ as to what was said and agreed at this point. The Landlord says that Mr. Murley indicated that he was not prepared to sign for another year, and that he wished to be allowed to leave upon giving two months notice. The Landlord says that he agreed that this was acceptable, but that the rent for July 2011 and thereafter would be at the new higher rate of $1,450. Both parties agree that Mr. Murley gave Mr. Tanner two cheques representing June and July rent. Mr. Tanner said that he had been expecting a supply of postdated cheques, consistent with what had occurred the year prior, but accepted the two cheques.

[9] Mr. Murley gave a slightly different story. He says that at this meeting he indicated to the Landlord that he and his wife would be vacating in three months. He only gave two cheques because that was all he had at the time.

[10] On or about August 4, 2011 the parties had a phone call. According to the Landlord, this was his first indication that the Tenants were planning to leave at the end of August. According to Mr. Murley, this had been the intention all along. He acknowledged that he owed August rent, and it's agreed that at some point he gave Mr. Murley a bank draft in the amount of $1,450 to bring the rent further up to date.

[11] The Landlord claims that there should be an additional month's rent owing because he was not able to re-rent the house until the 1st of October, and moreover he claims that he had to do so at a reduced rate of $1,250, and therefore lost $200 per month for the balance of the year. It is this additional shortfall which he claimed before me, and which I have found cannot be raised at this hearing.

[12] Upon the Tenants vacating, according to the Landlord the Tenants left the place dirty and in need of a repainting job, for which he has sought reimbursement. He also claims that the Tenants left the oil tank empty, and that under the lease they had been given a full tank of oil and they committed themselves to leaving the oil tank full upon terminating the tenancy. He seeks compensation for this as well.

The claim for rent

[13] The first issue for me to decide is whether or not the Tenants owed any additional notice, or whether the three months notice was given and accepted, as contended by the Tenants. The Tenancy Officer addressed this question squarely and sided with the Tenants. He did so, in large part, because he pointed out that the Landlord ought to have given four months notice of a rent increase, and that such notice also ought to have been in writing. As such, he found that it was probable that the trade-off at the April 2011 meeting was that the Tenants would agree to pay the additional $100 per month rent, but that they would be gone by the end of August 2011.

[14] On this issue, I respectfully disagree with the reasoning of the Residential Tenancy Officer. The method of raising the rent may well have been illegal, but there was no evidence that the Tenants even knew that, nor was there any evidence that there was any form of trading occurring. Had the understanding been that the Tenants were vacating in three months, I find it improbable that the Landlord would have accepted only two months rent. Even if Mr. Murley was short of cheques, I believe it is more probable that a third cheque would have been sought and provided long before August.

[15] I believe it is a given here that the Tenants did not want to tie themselves down to another full year. It would have been within their rights to have the tenancy converted to a month-to-month tenancy, which in turn would have given them the right to terminate on one months notice. The Act is clear that the Landlord cannot refuse arbitrarily to allow the tenancy to be converted to a month-to-month. Even if the Tenants had agreed to give two months notice, this would be unenforceable against them as section 10(1) of the Act specifies that the prescribed periods of notice apply “notwithstanding any agreement between the Landlord and Tenant respecting a period of notice.”

[16] I believe it is clear that there was no intention that this continue as a year-to-year lease, and as such that it became a month-to-month lease. The question then becomes: when did the Tenants give notice of their intention to vacate?

[17] On all of the evidence, I cannot find any clear notice by the Tenants, whether written or oral, that predates the August 4 phone call. It may well be that there was a misunderstanding, since the Tenants were virtually out of the premises by then, but I find the Landlord to have been credible on this point. He genuinely did not know that the Tenants were planning to be out. Indeed, I believe the evidence supports a finding that the Tenants were hoping not to pay even August rent. However, upon being pressured to do so they did come up with the money.

[18] The only reason that they might not be responsible for September rent would be if it could be shown that the Landlord failed to mitigate his loss. There was some suggestion that the new tenant might have been available earlier, but for the fact that the Landlord wished to do some long overdue work waterproofing the lower level of the house. I cannot take this as proven, and the onus of proof of a failure to mitigate is on the Tenants. The Landlord testified that the new tenant himself had to give notice to terminate his existing tenancy, and as such could not have moved in by September 1.

[19] On the face of it, the Tenants are responsible for September rent. However, there is the fact that the notice of rent increase was not properly given. The law requires four months written notice of any rent increase. Since that notice was not given, the most that the Landlord could collect for June through September 2011 would be $1,350 per month. I find that he owes the Tenants a

refund of $100 per month for the three months that he collected, and that he is only eligible to be paid $1,350 for September. As such, the amount collectible under this head of his claim is $1,050.

Claim for cleaning costs

[20] The Landlord testified about how he found the state of cleanliness, and put into evidence several photographs which he claimed showed the dirty condition of the house upon the Tenants vacating. I find this evidence to be rather unconvincing. It is well-established that the obligation of the Tenant is to leave the premises in a state of “ordinary cleanliness.” It is not a state of pristine cleanliness. It is to be expected that Landlords may wish to perform additional cleaning at the end of a tenancy, in order to make a good impression on prospective tenants. However, this they may not do so at the expense of the prior Tenants. I am in agreement with the Residential Tenancy Officer on this item.

Painting the interior

[21] Again, I find no merit in this claim. The Landlord produced some photographs showing some minor holes in the wall and scuffed areas. At best, they point to the need for some minor touch up. Given that the Tenants were in place for only about 14 months, and that they do not appear to have engaged in unusual activities that might have damaged the house, it is difficult to see how their occupancy could have been the cause of such a deterioration in the paint job that they should be held responsible for the costs claimed. Moreover, upon the inspection sheet which the Tenants filled in upon taking over the house, it was noted “paint marked up in places.” This suggests to me that the paint job

was either not new, or poorly done, and there is no principled reason to hold the Tenants responsible.

The oil tank

[22] The Residential Tenancy Officer dismissed this claim, despite finding that it was the Tenants' responsibility to leave a full tank of oil, because the Landlord did not actually fill the tank for his new tenants. As testified by the Landlord, he chose to make the new tenants responsible for supplying their own oil.

[23] The Residential Tenancy Officer was also critical of the Landlord because he did not produce evidence of the cost of oil.

[24] The Landlord produced a photograph in evidence, showing the gauge on the oil tank to be at the empty position. In his evidence, Mr. Murley testified that he thought the oil tank might have been one quarter full when he vacated. He claimed to be unsure that it was his responsibility to fill the tank. On this question I found him to have been vague and evasive. He knew or ought to have known that it was his responsibility. It is written in very clear words as part of paragraph 10 of the lease, which first provides that the Landlord will supply a tank of oil, and that the "tenant to have full when move out."

[25] I understand that the tank holds 900 litres. The evidence of the Landlord was that at that time, fuel oil cost 79.18 cents per litre. The going rate for fuel oil, and other such energy products, is notorious and does not need elaborate proof. It would have been better had the Landlord been able to produce an invoice from the oil company showing precisely how much it cost to fill the tank, but his choice of leaving it to the next tenant to fill the tank should not penalize him to

the extent of disallowing this claim entirely. I take notice that tanks can sometimes read “empty” even though there is still a little oil in the tank, and also that oil companies routinely leave a little airspace at the top of the tank in order to prevent spillage. As such, I am willing to reduce the Landlord’s recovery on this head of the claim to 700 litres of fuel oil at a cost of $.75 per litre, for a total of $525.

Conclusions

[26] In conclusion, I find that the Tenants owe the Landlord $1,050 in additional rent, plus $525 for fuel oil that they ought to have left behind when they vacated. I find them not to be responsible for any cleaning or painting.

[27] From the $1,575 which would otherwise be owing to the Landlord, there must be deducted the security deposit which, at the time of the hearing at Residential Tenancies was calculated to be $689.20. According to the evidence before the Residential Tenancy Officer, the Landlord did not actually have a trust account in which he ought to have placed the security deposit. As such, the accrual of interest is entirely notional. In order to do proper although rough justice, I am prepared to find that the security deposit of $675 ought to be notionally increased to $700 as of the date of this order. As such, the amount owing by the Tenants to this Landlord is $1,575 minus $700, for a total of $875. The order of the Director is varied accordingly.

Eric K. Slone, Adjudicator