IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Staples v. Nicholson*, 2017 NSSM 93

Claim No: SCCH 466930

BETWEEN:

GARY STAPLES and BARBARA STAPLES

Appellants/ Landlords

-and –

DAVID NICHOLSON and
JODI (KENNEY) NICHOLSON

Respondents/ Tenants

Gary Staples and Barbara Staples, Landlords – Self Represented.

David Nicholson and Jodi Nicholson, Tenants – Self-Represented.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) This is an appeal of the Decision and Order of Residential Tenancies Officer, Jason Warham, dated August 1, 2017.

(2) Both parties appeared at the hearing before Mr. Warham. Mr. Warham accepted the Tenants' Notice to Quit as valid and allowed for early termination. The Tenants also acknowledged at Residential Tenancies and before me that they are responsible for certain damage.

(3) An appeal from the decision of a Residential Tenancies Officer is a new hearing based on the evidence presented before the Small Claims Court Adjudicator. The evidence presented usually consists of that presented to the Residential Tenancies Officer (in whole or in part) and any additional evidence the parties seek to adduce. An adjudicator may confirm the Order of the Residential Tenancies Officer or vary it as he or she considers just and appropriate based on this evidence.

(4) After hearing all of the evidence, I reached a different decision than Mr. Warham based on a different finding on some items of damage and regarding a significant deterioration of health. There have been several significant cases reported on that issue. Thus, further commentary is appropriate.

The Facts

(5) The parties entered into a year-to-year lease commencing June 1, 2012. The rent was $1250 per month. They provided a security deposit of $625. The tenants lived there with their three children. They vacated the premises on December 1, 2016. The parties prepared the Notice to Quit and Physician's Certificate, namely Forms G and H, on October 24, 2016. It is clear the anniversary date was June 1 each year, thus, vacancy without further liability could only be sought with Notice to Quit on or before March 1, unless a request for month to month lease had been made or if an early notice is sought. The premises were not rented again until March 2017. The landlords seek rent for December, January and February, along with certain items for damages.

The Evidence

(6) Barbara Staples testified that she and her husband had a good relationship with the tenants. Thus, she was surprised when she received an e-mail from the tenants on October 11, 2016, indicating they have an opportunity to purchase a new house and needed to vacate by December 1, 2016. She testified the premises were vacated on December 4, 2016. She exchanged e-mails with the tenants over the course of two days. There was no indication of any health issue for either of the tenants or specifically, their daughter.

(7) They were served with Forms G and H on or about October 24, 2016. There was no further communication until December 4, 2016.

(8) Mrs. Staples was advised by the tenants their daughter's asthma was triggered by dust in the carpets. Her comments were to the effect there were no carpets in the house, but noted that, in fact, there were carpets in two bedrooms upstairs and in the basement. The upstairs carpets have hardwood floor beneath them.

(9) She tendered the e-mails between into evidence. There was no mention by the Nicholsons of their daughter's asthma or any other health concerns. The communication at that time concerned the opportunity to buy a home.

(10) In October and December 2016, the landlords posted ads on Kijiji to rent the premises. The premises were finally rented effective March 1.

(11) Ms. Staples tendered into evidence an extensive list of items of damage for which she seeks compensation. I have addressed each of those in my findings below.

(12) Under cross examination, Ms. Staples acknowledged that she had not been in contact with the tenants after they left. Further, the parties conducted neither an “in” inspection nor an “out” inspection.

(13) David Nicholson and Jodi (Kenney) Nicholson testified that they moved into the premises in June 2012, planning to eventually purchase their own home. Their daughter, Ameliah, was not diagnosed with asthma until 2013. Mrs. Nicholson arranged doctors’ appointments for their daughter. At the hearing, the Nicholsons testified that Ameliah is approximately six years of age, meaning she was two or three years old at the time of the diagnosis. She was prescribed puffers and the couple gave away their cats.

(14) Mr. Nicholson described their relationship with the landlords as positive. He was surprised when they asked to vacate that their relationship “turned formal”.

(15) Jodi Nicholson consulted with the Residential Tenancies office to determine their options. It was at that point, they learned of s. 10C. She testified that she and her husband did not know it was possible to leave on those terms. They did not wish to make an issue out of their daughter’s asthma. They had intended to work something out that was acceptable to both sides. Their new premises do not have carpets and Ameliah’s condition has calmed down.

The Law

Section 10C of the *Residential Tenancies Act* states as follows:

10C. 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; and
(c) proof of service, in the form prescribed by regulation, of all the tenants in the same residential premises with a copy of the notice to quit.”

(16) Regulations 4D and 4E require the Notice and Certificate to be in the prescribed Forms, G and H. The regulations prescribing these forms were passed in 2012. Prior to that, the legislation was silent on the content of the forms.

(17) Form G provides the Notice to Quit and provides the tenant the option to select one of several reasons including:

“A significant deterioration of my health has, in the opinion of my physician, resulted in my inability to continue the lease or makes these residential premises inaccessible to me (Section 10C of the Act). I am attaching a Physician’s Certificate in Form H.”

(18) There is no reference in Form to a minor child living in the premises suffering from a deterioration of health. However, given the reference in s. 10C to a “family member residing in the same residential premises”.

(19) Form H is prepared by a physician. The form contains the following instruction:

"**Physician information:** This form requires you to certify that your patient has a significant deterioration of health that prevents them from continuing to reside in their residential premises. **By signing this form, you are providing evidence that will permit your patient to terminate his or her lease.**"

(20) It then provides the physician the opportunity to select one of the following options:

"I, , hereby certify that I have examined the above-named tenant, _____, and that s/he has suffered a significant deterioration of health that:

(check applicable box)

□ has resulted in a reduction of the tenant's income so that the tenant can no longer pay his/her rent in addition to the tenant's other reasonable expenses.
□ results in the inability of the tenant to continue the lease.
□ renders the residential premises inaccessible to the tenant.

Date: Physician's signature:"

(21) There is no room for further commentary on either form. The language is unequivocal. At first glance, it would appear the original purpose of Form H as it is written was to establish the limited evidence that was required to prove a significant deterioration of health. A landlord's only recourse would have been to subpoena the doctor and potentially incur further witness fees to find out details of the condition. It was necessary to curb a number of shortcomings or perceived abuses in the process. What followed was a series of court decisions which effectively informed that process.

(22) The most authoritative case is *GNF Investments v. Vriend*, 2016 NSSC 116, where Justice Suzanne Hood of the Supreme Court of Nova Scotia, quoted with approval the following from Adjudicator Eric Slone in *GNF Investments Ltd. v. Rossell, 2015 NSSM 54*:

"[10] The purpose of the *Residential Tenancies Act* is to provide an efficient and cost-effective means of settling landlord/tenant disputes. There must be a balance between the health effects to the tenant of continuing the tenancy and the landlord's right to have the contract, that is the lease, continue.

[11] As Adjudicator Slone said in *GNF v. Rossell* at paras. 20 and 21:

> [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.

[12] In my view, there is nothing in the legislation which would lead me to conclude that there must be some problem associated with the physical premises before s. 10C can apply. The wording of s. 10C is not to that effect.

(23) A recent case, *Fei v Liu*, 2017 NSSM 44, involved an audacious plan by the landlord to uncover a situation where the doctors signed Form H's largely on request. Adjudicator Slone stated as follows:

"I believe that a physician being asked to sign such a certificate must perform due diligence. He or she must inquire into the causes of the patient's illness and - before signing the certificate - must conclude that there is something inherent in the premises or the tenancy that "frustrates" the lease. Termination of the lease is not a first resort. The physician has a duty to consider whether the tenancy is truly the problem, or is merelybeing used as a convenient scapegoat. The physician should not sign every certificate onrequest."

(24) As noted above, there is nothing in the Form to suggest a requirement of due diligence, other than the cautionary instruction in Form H. Adjudicator Slone's comments , essentially reading in the requirement of diligence, are both appropriate and sensible. In my view, these shortcomings necessitate a review and possible amendment of the Forms to reflect the Supreme Court's decision in *GNF Investments v. Vriend*, and several subsequent decisions.

(25) The principles to be applied in considering s. 10C were succinctly summarized by Adjudicator Augustus Richardson, QC, in *GNF Investments v. Whitman and Lang*, 2017 NSSM 35:

"[18] Section 10C(1) of the *Act* is not intended "to provide a tenant with a way to break a lease where the deficiency in the unit is temporary and fixable:" *Arab v. M.R.B.* 2016 NSSM 51, per Adjudicator Slone at para.45.

[19] Neither a residential tenancy officer nor an adjudicator is obliged to accept a Form H that has been signed by "ticked" by a doctor as proof that the tenant has suffered a significant deterioration that renders him or her unable to continue in the apartment unit: *Amaout v. Feria* [2004] NSJ No. 606 at para.6; *Allen v. Black* [2012] NSJ No. 381 at paras.12-13. The form and the doctor's signature on the form is entitled to some deference—but that does not mean that the landlord cannot challenge or question the form: *GNF Investments v. Vriend* 2016 NSSC 116 at para.6. The balance between the tenant's right to privacy with respect to his or her medical condition, and the interest of the landlord in securing his or her lease, is to permit the latter 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:" *GNF Investments Ltd v. Rossell* 2015 NSSM 54, per Adjudicator Slone at para.20. To that end the landlord may ask "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:" *ibid*, para.21.

[20] So, for example, a high-risk pregnancy wherein a doctor opined that the tenant should avoid stress, and stair climbing, both of which might risk pre-term labour, were found to satisfy satisfy s. 10C(1) in *Allen v. Black, supra*; see also *Rolle v. Rockstone Investments Limited* 2015 NSSM 24 to the same effect. So too continuous water leakage problems that exacerbate a tenant's breathing problems may satisfy s. 10C(1): see *Suevrk Management v. Atkinson*, 2010 NSSM 1.

[21] However, the stress associated with worrying about water leaks, or the presence of a large, aggressive raccoon on the deck, at least where the landlord took steps to rectify the problems, is

not: *Arab v. M.R.B., supra*. Nor is smoke that wafts into the apartment from another unit: *Amaout v. Feria, supra*; or smoke or pet dander from other units, at least where the tenant fails to give the landlord any chance to deal with the problem: *GNF Investments Ltd v. Rossell, supra.*

[22] The last point is important. A tenant who has suffered a serious deterioration is expected to discuss the problem with the landlord. After all, the landlord may be able to remedy the problem. And if the landlord can remedy the problem it can no longer be said that the deterioration in the tenant's health renders him or her unable to continue in the unit. Expecting a tenant to provide the landlord with that opportunity will also go some way towards establishing the merits of the tenant's claim that his or her condition has deteriorated to such an extent that he or she can no longer live in the unit.

[23] The upshot of it then is this. Section 10C(1)will permit an early termination of a lease for medical reasons where there is evidence

a. Of a significant deterioration in the tenant's health, and

b. The significant deterioration renders the tenant unable to continue with the lease.

[24] It must be borne in mind that it is not the existence of a medical "condition" that enables access to s. 10C(1). Many people—including Ms Lang—have chronic conditions that make their life difficult. They may suffer chronic pain, or be especially sensitive to chemical smells or fumes, or have physical impairments that make "normal" life difficult. Had the Legislature intended that the existence of such a condition was sufficient to allow a tenant to apply for early termination it would have said so. But it did not. It spoke instead of a "significant deterioration" in the tenant's health. In doing so the Legislature expected and intended that tenants with chronic conditions could and should be expected to inspect a premises before renting to determine whether they could live there with their condition the way it was. If not, they would not rent. If they could, then upon renting the premises they could not later complain (at the expense of the landlord) about the premises *unless* their physical condition later suffered a serious deterioration.

[25] Moreover, the fact that a tenant has suffered a significant deterioration in his or her medical condition does not automatically mean that he or she is entitled to early termination under s. 10C(1). There must be something about the interaction between the tenant's medical condition and the unit that, as a result of the deterioration in that condition, makes it impossible for the tenant to continue on in the unit. But where the premises' problematic condition can be remedied, such that the tenant can continue to live there even given his or her deteriorated medical condition, then early termination under s. 10C(1) may not be available." (underlining mine)

(26) As Adjudicator Slone indicated in *GNF Investments v Rossell*, the types of inquiries one makes when a significant deterioration of health is alleged are at an "elementary level". Nevertheless, they must be made. An explanation is required from the tenant, whether from their doctor or on their own. Furthermore, I note the observations of Adjudicator David T. R. Parker, QC, in *Suevrk Management v. Atkinson*, 2010 NSSM 1:

"A physician's report is only one indicator that a tenant has suffered a significant deterioration in health to the point it results in an inability of that tenant to continue the lease. Other indicators might be information gleaned from the tenant in their testimony and from exhibits presented."

Findings

(27) I have had the opportunity to hear the testimony of the witnesses. I believe both the tenants and the landlords with respect to their experiences generally.

(28) The Staples' response to this situation is completely justified and understandable, at least as it relates to the allegation of a significant deterioration of health. In October, they were asked to allow the Nicholson's out of the lease to take advantage of an opportunity to buy a house. The lease was not due to end until May 31. A tenant is liable for the balance owing on the lease, subject to the various requirements of the Act including the landlord's requirement to mitigate. They were being asked to take much less. Most landlords would, to use Mr. Nicholson's words, "turn formal" and insist on their rights under the Act. The allegation of a significant deterioration at the eleventh hour raises a suspicion.

(29) I find Amelia has developed asthma since moving into the house which was not diagnosed until 2013. Furthermore, I accept that her symptoms persisted throughout the period of the tenancy. The evidence that the carpets are the cause of Ameliah's asthmatic symptoms derives from hearsay. While this is acceptable as evidence, it is not sufficient to prove that point on a balance of probabilities. In making the inquiries of their doctor, their family physician believed the condition of the premises caused a significant deterioration of health. I am prepared to find that something in the house caused the conditions to persist. During that time, Ameliah experienced a significant deterioration of health.

(30) As Adjudicator Richardson indicated, in the underlined portion above, the next step is crucial, there must be an interaction between the deterioration of health and the premises. If the condition can be remedied, then the right to terminate the tenancy may not be available.

(31) It is interesting that the tenants had no intention of pursuing the issue of serious deterioration of health until Mrs. Nicholson's discussions with Residential Tenancies. The tenants did not want to use their daughter's condition as the reason to leave. It did not occur to them until they discussed it with their physician in October. Part of the reason, I find was they were able to live with the conditions such as they were without making any efforts to alleviate the conditions, such as temporarily removing the carpeting or making other arrangements. I am not satisfied the Tenants have met the requirements of s.10C. The landlords are entitled to a portion of their rent.

Mitigation

(32) Statutory Condition 6 found in s. 9 states as follows:

Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

(33) The law requires any party suffering a loss to reasonably mitigate their losses. The landlords posted two notices posted on Kijiji, one in October and another in December. In my view, this is not sufficient to mitigate their losses. In my view, they ought to have advertised the vacancy for at least four of those months once they

received notice in October. I allow one month's rent or $1250.

Damages

(34) The provisions governing claims for damage to premises are found in Statutory Condition 4:

"Obligation of the Tenant - The tenant is responsible for the ordinary cleanliness of the interior of the premises and for the repair of damage caused by wilful or negligent act of the tenant or of any person whom the tenant permits on the premises."

(35) Furthermore, s. 12(15) states:

"A claim for damages from a security deposit shall not include any costs associated with ordinary wear and tear of the residential premises."

(36) Any provisions of the lease contrary to these provisions are void.

(37) In their evidence, the Staples' submitted a lengthy list of alleged damages totalling $2665.70. I find much of it cannot be substantiated. My reasons for allowing certain items are similar to those of the tenancies officer. I have disallowed others. I have stated them in the same order they appear on their listing.

Heating Oil – The evidence has established that the tenants arrived with one-quarter tank of oil. I allow $150.00.

*Power/*Water– I am not inclined to allow three full months of power or water as the premises were vacant and not being used.

Keys/Locks – The tenants acknowledge the keys were not returned requiring the locks to be changed. I allow $61.00.

Carpet Cleaning – The lease is silent on the requirement for the tenants to clean the carpet. Nevertheless, the tenants have acknowledged owing for carpet cleaning. I allow $114.59.

Clean Fridge and Stove – There is no evidence the fridge and stove were dirty beyond a standard of ordinary wear and tear.

Replace Front Screen Door – The Landlords argue the screen door was broken from the beginning of the tenancy, perhaps as the result of the tenants' dogs. There is no evidence the tenants caused the damage. There is no evidence the Landlord had attempted to fix it at any time during the tenancy. I do not find this was caused by the tenants. I disallow this portion of the claim.

Service Heating Agreement – This is an item of breach of contract. The lease provides the tenants will purchase a service heating agreement to cover maintenance on the furnace. The tenants did not do this. Indeed, there is no evidence they attempted to. I

do not think it appropriate to require tenants to purchase a service agreement for equipment owned by the landlord. It is not clear the furnace would have been able to be covered by any service agreement. This is overhead and, perhaps, ought to have been built into the rent. After five years of tenancy, the work done to “clean, replace filter & nozzle, bleed furnace”, would be ordinary wear and tear. I disallow this item.

Remove Garbage from Unit – There is no evidence the landlords were required to haul the garbage. They did not offer evidence that the garbage was unacceptable for curb side collection. Furthermore, I accept the tenants’ evidence that some of the garbage may have been pre-existing. I disallow this item.

Crusher Dust/Lawn – The tenants hauled crusher dust in for a play area for their children. The tenants acknowledge this was required to be removed. The fees amount claimed by the landlord is reasonable. I allow the amount claimed, $285.33.

Replace Window Sill, deck posts, holes in the wall – The tenants acknowledge they owe $100 to repair the sills. I do not find they proved damage to the deck posts were caused by the tenants. Likewise, I do not allow anything for the holes in the wall which I find were the result of ordinary wear and tear.

Washer and Dryer – These appliances were left behind by a previous tenant who did not want to move them. They were still in working order when the tenants moved in. They agreed to keep them in the unit and used them. They have since stopped working and, according to the landlords, cannot be repaired. I do not find the damage the result of wilful or negligent actions of the tenants. I do not allow anything.

Advertising Costs – The landlord would have been required to advertise for the premises if notice had been properly given at any time of year. This item is disallowed.

Costs

(38) Typically, costs follow the event which means the tenants would be responsible for the costs of appeal together with the application fee before the Director.

(39) I find much of the claim for damages was exaggerated due to the landlords’ hurt feelings. Much of it was not based in fact. Accordingly, I decline to award the Landlords their costs on appeal or the application fee before the Director of Residential Tenancies.

Conclusion

(40) In summary, I award $1250 in rent and $710.92 in damages. The security deposit of $625 shall be deducted. In summary, the tenant shall owe the landlord $1335.92. Each party shall bear their own costs before this court and before the Director of Residential Tenancies.

Dated at Halifax, NS,

on September 22, 2017;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Landlord(s)
Copy: Tenant(s)