

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Newell v. Prestwick Apartments Ltd.*, 2023 NSSM 75

Date: 20231114

Docket: 527326

Registry: Halifax

Between:

Eva Mae Newell

Tenant/Appellant

v.

Prestwick Apartments Ltd.

Landlord/Respondent

Adjudicator:	Michael J. O'Hara
Heard:	October 30, 2023, in Halifax, Nova Scotia
Decision:	November 14, 2023
Appearances:	Eva Mae Newell, for the Tenant/Appellant Michael Levin, counsel for the Landlord/Respondent

By the Court:

[1] This is an appeal of an Order of the Director of Residential Tenancies dated September 29, 2023. The Tenant had applied for, essentially, permission for her son to live in the residential premises she leased. He is not a tenant and is not named on the written lease as an authorized occupant. The Landlord filed its own application seeking compliance with the lease by having the son move out. The Director ordered the Tenant to comply with the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, and the lease by ensuring the unauthorized occupant move out no later than October 15, 2023.

[2] The Tenant's appeal alleges unfair treatment at the Director's hearing, failure to disclose facts, and discrimination against a service dog, all of which would result in the Tenant's son, John Newell, being homeless.

[3] Before me the Tenant, Eva Mae Newell, testified, as did her son, John Newell. For the Landlord, Michaela Smith, Property Manager, testified. I will refer to the evidence as it arises in the following analysis.

Analysis

[4] The basic issue here is whether the Tenant’s son, John Newell, should be added as an occupant of the tenancy or, as requested by the Landlord, whether he should be required to leave the premises. John Newell is the adult son of the Tenant, Eva Mae Newell. She is the only named tenant on the written lease.

[5] This case engages the issue of the status of an “occupant” in the residential premises regulatory scheme and arises because under the terms of the standard form written lease, only named occupants are allowed to live in the premises (apart, of course, from the named tenant or tenants).

[6] Articles 1 and 2 of the standard form lease, which it should be noted are prescribed under the *Residential Tenancies Regulations*, N.S. Reg. 190/1989 am. to N.S. Reg. 319/2022, Form P, read as follows:

Parties

1. This agreement is made in duplicate between

Landlord

name (first name, initial, last name or company name)

*civic address
(required)*

*P.O. box (if
applicable)*

city

postal code

phone (bus.)

phone (res.)

-and-

Tenant(s) _____

name(s)

name(s)

name(s)

Occupants

2. Other adults or children who will occupy premises

Only those tenants and occupants named are allowed to live in the premises without written consent of the landlord.

[Emphasis added]

[7] The term “occupant” is not defined or dealt with in the Act. In the case of *Pierce v. Westphal Court Limited*, 2020 NSSM 13, in a different context, Adjudicator Slone commented as follows about occupants (paras. 28-30):

What is an occupant?

[28] The distinction between an occupant and a tenant is a tricky one. The Residential Tenancies Act does not define the term "occupant" and only uses the term once, as far as I can tell, in a context that is unhelpful. The Standard Form of Lease under the Residential Tenancies Regulations also has a section that states:

Occupants

2. Other adults or children who will occupy premises

Only those tenants and occupants named are allowed to live in the premises without written consent of the landlord.

[29] Even so, the term occupant is not defined.

[30] Colloquially, the term occupant may be used to describe a variety of people, such as minor children of a tenant, roommates and short-term boarders, who for a variety of reasons may not be suitable or eligible to be tenants, or who do not intend to assume the legal obligations of a tenant.

[8] In the Order under appeal here, the Residential Tenancy Officer found that there was no power to add an occupant to a lease and further, that a landlord was not constrained in any way in refusing to add an occupant to a lease. With respect, I do not share those views. There is a broader obligation imposed on the landlord which arises from the very fact that discretion to add, or not add, an individual as an occupant conferred by the standard form of lease is prescribed by the regulation, as well as a matter of contract.

[9] Hence, in my view, in determining whether a person is to be added as an occupant to a lease, a landlord does not have unrestricted authority. Rather, the decision to add or not to add must be made “reasonably.” In making such a decision, the law views a landlord as exercising a discretion under a contract. Here, I take note that a lease agreement is, in addition to being a property interest, a contract (*Highway Properties v. Kelly Douglas*, [1971] S.C.R. 562).

[10] It is well recognized that where a party to a contract has a discretion-exercising power, that power must be exercised reasonably. This rule has been

applied in a number of cases in the courts of this Province (see, for example, *Gateway Realty v. Arton Holdings* (1991), 106 NSR (2d) 180 (SCTD), aff'd at (1992) 112 NSR(2d) 180 (SCAD); *Dudka v. Smilestone*, 1994 CanLii 4325 (NSSC)) and numerous cases from other superior courts across Canada. It was recently reaffirmed by Justice Cromwell in the Supreme Court of Canada case of *Bhasin v. Hrynew*, 2014 SCC 71. The obligation to exercise a discretion is one of the traditional rules of good faith performance of contracts, or as stated by Justice Cromwell, the organizing principle of good faith.

[11] In the *Law of Contracts* (3d), Irwin Law, Professor McCamus reviews this body of law dealing with good faith at some length. At page 937 he states:

In sum, these cases establish the proposition that where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred.

[12] In the landlord/tenant context this means that when considering whether to allow an individual to be added as an occupant and therefore allowed to live in the premises, a landlord must act reasonably which, in general terms would require acting honestly, not arbitrarily, and consistent with the purposes of the power in question. It is worth mentioning that, as a by-product of this obligation, the duty which is owed to the tenant is to be exercised having regard not only to, at least,

the interests of the tenant, but also the landlord, and through the landlord, the interests of other tenants of the premises.

[13] Returning to the specific facts in this case, when John Newell began living in the subject premises in the early part of April, 2023, the Tenant should have requested the Landlord to add John as an occupant. What would have been the result had she done so is not known and cannot be known at this stage. What we do know is she did not make the request and because no written permission has been granted for John to be an occupant, she has effectively been in breach of the article 2 of the written lease since then.

[14] In the application to the Director under appeal here, the Tenant is essentially requesting that John be added as an occupant. The question therefore is whether or not the Landlord here has exercised its discretion reasonably in refusing to add John as an occupant.

[15] For the reasons that follow it is my opinion that the Landlord has done so.

[16] In considering this question I emphasize that the essential question here is whether John Newell should be added as an occupant. This is to be contrasted with a situation where an individual has been already approved as an occupant but for some reason the landlord subsequently wishes to revoke that approval and have

the person ejected from the premises. Such a scenario may well call for a different approach which I will not deal with in this case. Further, I would add this - the fact that Mr. Newell's occupancy was not known to the Landlord should not somehow benefit his status in this case.

[17] To be clear on this point, in my view, a landlord in dealing with a request to add an individual does not in any manner have to establish the sort of misconduct by which a tenant would be judged in regards to an alleged breach of statutory condition 3 of Section 9(1) of the *Act*. To conflate those two questions would be an error.

[18] Rather, the proper approach here should be the same approach as if the Landlord were considering a request to add John Newell in early April when he began living in the premises. Of course, at that point the Landlord did not have the information it now has concerning John, the several complaints that have been made about him and his conduct. These include the complaints of speeding in the parking lot, smoking on the balcony, not picking up after his dog, the dog barking excessively, and the dog acting aggressively in regards to another tenant (who is apparently confined to a wheelchair and is almost certain to feel particularly vulnerable in such a circumstance). And, again, as emphasized above, I note these

complaints do not have to reach the same level of proof or materiality as would be the case in seeking to terminate a tenant for misconduct.

[19] This question thus can be viewed with the same lense that would have applied if this information had been available to the Landlord in early April, when the request ought to have been made.

[20] In my view, with the benefit of such information, declining the request would not have been unreasonable then, nor is it now. Nor would it have been dishonest or inconsistent with the purposes of legislative or contractual grant of the discretion to add or not to add, an “occupant. “

[21] Also, as to whether or not the Director (or this Court on appeal) has the power to order a person to be added an occupant, I find that such a power is found in Section 17A (a) of the *Act* which reads:

17A An order made by the Director may:

- (a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act.

[22] From that, then, the Small Claims Court is likewise authorized to make the order adding or refusing to add an “occupant” by virtue of Section 17D(1)(b) of the *Act*. Under that provision, the Small Claims Court can make “any order that the Director could have made.”

[23] As referred to above, a landlord has a discretion to give, or withhold, the written consent referred to in paragraph 2 of the lease. The legal obligation which I have explained above is to exercise that discretion reasonably. In my view, section 17A(a) authorizes the Director or this Court to order a landlord to comply with this lease obligation.

[24] The Tenant has alluded to the *Service Dog Act*, SNS 2016, c. 4 and regulations and alleges discrimination on the part of the Landlord. I reject that suggestion. I have reviewed that *Act* and regulations and it appears to be clear that the rights of a service dog team are contingent on the human member of the team “*maintaining control of the team dog*” (Section 11(1)). The evidence here did not satisfy me that John Newell maintained control of his service dog.

[25] Further, by no means was the issue of barking for which there were several complaints and aggressive behaviour towards the other tenant the only issues of complaint regarding Mr. Newell. Again, I emphasize that these other issues do not in any event have to approach the level of misconduct or proof that would have to be satisfied against a tenant. Rather, they are issues that any landlord, properly exercising its discretion, would have a concern about and could reasonably cause a landlord to deny consent to a prospective occupant of an existing tenant.

[26] Therefore, for the above reasons, I confirm the decision of the Director. I will, however, modify the Order somewhat and, in the circumstances here, provide a lengthier period for John to vacate.

Order

[27] The decision of the Landlord to deny permission for John Newell to be an authorized occupant of the premises known as 303-79 Prestwick Close, Halifax, Nova Scotia, is hereby affirmed.

[28] The Tenant shall comply with the lease by causing John Newell to vacate the premises known as 303-79 Prestwick Close, Halifax, Nova Scotia no later than January 31, 2024.

Michael J. O'Hara, Small Claims Court Adjudicator