IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Framark Investments Ltd. v. Hodge, 2007 NSSM 15

Date: 20070514
Claim: SCCH 278597
Registry: Halifax

Between:

Framak Investments Limited

Appellant

v.

Simon Hodge, Craig Ryan and Talal Wadi

Respondents

Adjudicator: W. Augustus Richardson, QC

Heard: May 8, 2007 in Halifax, Nova Scotia.

Appearances: Robert Schnare, for the Appellant
Simon Hodge, Craig Ryan and Talal Wadi, Respondents

By the Court:

[1] This is an appeal of a Residential Tenancy Decision and Order dated March 6, 2007. It raises the issue of whether a tenant whose conduct is such as to warrant early termination of the lease pursuant to s.10(7A) of the *Residential Tenancies Act*, RSNS 1989, c.401, as amended (the "*Act*") is liable to pay damages by way of lost rent to the landlord (subject to the latter's duty to mitigate). For reasons set out below it is my opinion that he or she is so liable.

The Order Under Appeal

[2] Pursuant to the Decision and Order of the Residential Tenancies Officer under appeal, the appellant landlord was required to pay to the respondent tenants a total of $1,215.86, comprised of:

a. the return of a damage deposit of (including interest) $703.60, subject to a deduction of $120.00 for cleaning expenses which the tenants admitted to, and

b. a rent rebate of $632.26.

[3] The landlord appealed the award of both these amounts. For reasons which follow I am satisfied that the appeal must be allowed with respect to the rent rebate, but not the damage deposit.

Background Facts

[4] The three respondents moved into Apt 3 at 5231 Smith Street in Halifax pursuant to a standard year-to-year lease, which took effect September 1, 2006. Pursuant to the terms of the lease they were required to pay the landlord:

a. a security deposit of $700.00, and

b. a monthly rent of $1,400.00, payable on the first of each month.

[5] The evidence of Mr Schnare, and the evidence and partial admissions of the tenants, makes clear that the respondents were what could be charitably called "noisy tenants." The landlord received frequent complaints from other tenants about the noise emanating from the respondents' apartment. The tenants had loud and rowdy parties. They were served with a written notice of complaint from the landlord on or about November 11, 2006, after "many verbal warnings" about "excessive noise and loud music." Mr Hodge himself admitted that the police were called to the premises no less than 8 times to respond to noise complaints from other tenants or neighbours; that at least one charge had resulted from these visits; and that they might not have been "the best of tenants."

[6] This state of affairs continued until some time in early January 2007. The landlord received a complaint from a tenant living upstairs from the respondents that the latter had threatened them and even entered their apartment during an argument over noise levels. The landlord, believing that the physical safety of its other tenants and its property were now at risk, served a five-day notice to quit, effective January 13, 2007. The notice was served pursuant to s.10(7A) of the *Act*, which permits a landlord to serve such a notice "where a tenant poses a risk to the safety or security of the landlord or other tenants in the same building on account of the contravention or breach by that tenant of any enactment."

[7] (I should note in passing that with respect to the alleged incident involving the other tenant I accept the respondents' evidence that the incident did not happen as portrayed by the other tenant (who did not give oral evidence in any event). However, as detailed below, I am of the view that the respondent tenants' general conduct was nevertheless sufficient to warrant the s.10(7A) application.)

[8] The landlord filed an application with the Residential Tenancies Board on January 8th, 2007 for an order terminating the tenancy. The hearing was scheduled to be heard January 18th, 2007.

[9] The tenants initially refused to depart on the date provided for in the notice. However, I am satisfied on the evidence that they did subsequently enter into an agreement with the landlord

to depart on January 17, 2007. Their evidence, which I accept, is that they agreed to do so following the landlord's agreement to return to them their security deposit without deduction. They had already paid their January rent, but agreed that they would not seek any rebate of rent. As a result of that settlement agreement the hearing did not go ahead.

[10] The tenants moved out of the building on January 17th, 2007, without cleaning the apartment before they left. A short while later they received a cheque from the landlord for $5.84, not the expected $700.00.

[11] The landlord also filed a Security Deposit Claim, filed January 23, 2007, claiming:

a. carpet cleaning of $193.80;

b. cleaning costs for apartment of $120.00;

c. bathroom repairs of $70.00; and

d. repair of kitchen floor of $312.36

[12] The landlord claimed that it had incurred cleaning costs of $120.00. The tenants accepted and agreed that this deduction from the amount they had agreed upon with the landlord (*i.ei* the return of the security deposit) was appropriate since they had moved out without cleaning the apartment.

[13] However, the landlord also claimed repair costs it said were necessary because of damage to the premises caused by the tenants. The tenants disputed the repair charges on the grounds that the damage the landlord had repaired was damage that had existed when they moved into the apartment; or was based on estimates rather than actual repair costs.

[14] Believing that the landlord had breached the terms of the agreement they had entered into when they moved out by failing to return the security deposit, the tenants made an application to the Residential Tenancy Board on February 8th, 2007 for:

a. return of the security deposit, and

b. a rebate of $700, representing half of January's rent.

[15] Both applications were heard March 1, 2007.

A: Return of the Security Deposit

[16] The Residential Tenancy Officer concluded that the landlord's evidence did not support the claim for repairs and damage to the premises. In this I agree with the Residential Tenancies Officer. The landlord did not establish on a balance of probabilities that the damage it complained about was caused by the tenants, as opposed to previous tenants, or as normal wear and tear.

B: The Rent Rebate

[17] The Residential Tenancy Officer also concluded that the tenancy had terminated on January 17th pursuant to s.10(4) of the *Residential Tenancy Act* and that the tenants were entitled to a rent rebate of $632.26 for the period January 18-31, 2007. He appears to have come to this conclusion because:

a. the landlord's application to retain the security deposit did not include "any claim for future rents;" and,

b. he appears to have been of the view that because the parties agreed to terminate the lease pursuant to s.10(4) of the *Act* as of January 17th there was no entitlement to keep rent beyond that date.

[18] With respect, I do not agree with this conclusion for the following reasons.

1: The Failure to Include a Claim for Future Rents

[19] The fact that the application to retain the security deposit did not include a claim for "future rent" is, at worst, simply a function of the application form itself. The form addresses *only* the issue of the security deposit, a lump of money which is separate and different in nature from rent. As a result the form is not set up to include a claim for lost or future rent. It provides for "deductions" from a damage deposit (which future rent would not be in any event).

2: The Tenants As Well As the Landlord Are Bound by Their Settlement Agreement

[20] On the evidence before me it is clear that the parties had agreed between them that the balance of the January rent would not be sought by way of rebate when the tenants agreed to move out on January 17th. Such an agreement is not in my view contrary to s.3(1) or 9(1) of the *Act* (which, generally, prohibit agreements which detract from the rights and obligations set ou in the *Act*). It was an agreement based on the settlement of a litigated dispute, the consideration for which was the agreement of both parties settle their differences rather than proceed to a hearing.

[21] The fact that the Landlord may have breached its side of the bargain by failing to return the security deposit does not release the tenants from their own bargain: not to claim a rebate of the rent. Accordingly, they were not entitled to make an application for a rent rebate since they had already agreed to waive it.

[22] This conclusion would end the inquiry. However, even if the January settlement agreement was rendered null and void by reason of s.3(1) or 9(1) of the *Act* (on the grounds that the agreement purported to waive rights otherwise available under the *Act*), and even if the Residential Tenancy Officer (and hence this Court) was free to consider all the facts and issues

leading up the application, I am satisfied that the tenants were not entitled to a rebate. They were not entitled because they were in breach of their own obligations under the lease.

3: Tenants Were in Breach

[23] Section 10(4) of the *Act* (relied upon by the Residential Tenancy Officer) speaks only to the form of the notice to quit that must be given. It says nothing about the rights or obligations of the parties pursuant to a notice to quit. Nor does it deal with the circumstances under which notice, whether early or normal, can be given. The Residential Tenancies Officer appears to have concluded that it did not matter whether or not the lease could have been terminated early, but in my view it does.

[24] On the evidence before me I was satisfied that the respondent tenants had on repeated occasions breached statutory condition 3 of their lease. Statutory Condition 3, which is a deemed condition of every residential lease by virtue of s.9(1) of the *Act*, provides as follows: "3. Good Behaviour – A landlord or tenant shall conduct himself in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants, respectively." Loud noise that results in visits from the police and noise complaints from other tenants represents a clear breach of that condition. The ongoing repetition of this breach justified in my opinion the landlord's eventual resort to an application for an early termination of the lease under s.10(7A) of the *Act*.

[25] In my opinion tenants who force an early termination because of their poor conduct are really in no different a position than, for example, tenants who move out early without notice. A tenant who moves out early without notice is bound to pay damages by way of lost future rent to the landlord (subject to the latter's duty to mitigate) by reason of that breach. I do not see why the same result should not apply where a tenant's conduct requires early termination of a lease. In both cases, the tenants are in breach of their obligations; and in both cases, that breach denies to the landlord what it would otherwise have been entitled to: 12 months of rent under the lease.

[26] The real issue then that would have been before the Residential Tenancies Officer had the landlord's original application been heard was whether the landlord was entitled to give short notice pursuant to s.10(7A) of the *Act*. In particular, the question the Officer ought to have considered was whether such conduct constituted "a risk to the safety or security of the landlord or other tenants in the same building on account of the contravention or breach by that tenant of any enactment."

[27] In normal course, a landlord can only give notice to terminate a one-year lease three months prior to the anniversary date: s.10(1)(a) of the *Act*. A landlord can serve early notice if the ongoing breaches of the tenants constituted conduct proscribed by s.10(7A). Such early termination would not absolve the tenants of their breaches; indeed, it is premised on them. Nor would it negate the fact that any such breach had caused damage (by way of the loss of the balance of the year's rent under the lease) to the landlord.

[28] I am satisfied on the evidence that the tenants were in continuing breach of their own implied obligations under the lease, by reason of their loud music and rowdy conduct. Such conduct constituted a breach of their own implied obligations under the lease to conduct themselves in a reasonable way and in particular, in such a manner as not to disturb other tenant's use and enjoyment of their own apartments.

[29] Moreover, I am prepared to find and do find that such conduct constituted "*a risk* to the safety or security of the landlord or other tenants in the same building on account of the contravention or breach by that tenant of any enactment" (emphasis added). The tenants admitted that the police had been called 8 times. One of these visits had resulted in charges of violations of the City's anti-noise bylaw. These facts strongly support a conclusion that the tenants had been and were continuing to violation the City's anti-noise bylaws. The loud music and rowdy behaviour constituted violations of an "enactment" and posed a "risk to the safety or security of the landlord or other tenants in the same building." The conduct not only justified the landlord's application under s.10(7A), it constituted a breach of the tenants general obligation under the lease not to interfere with other tenants' use and enjoyment of their own premises.

[30] This leaves us with the fact that the tenants were in breach of their own obligations under the lease. The breach warranted a s.10(7A) early termination. It also resulted in damage to the landlord, by reason of the loss of rent (subject to the duty of mitigation). In this case the respondent tenants were not entitled to a rebate; indeed, they might have been liable to pay even more by way of damages had the landlord not been able to find replacement tenants.

[31] I am accordingly satisfied that the tenants in this case were not entitled to the rebate they claimed. They were (as noted above) entitled to a rebate of the security deposit (subject to the cleaning cost of $120.00), but no more.

[32] I will make an order requiring the landlord to pay to the tenants $583.60, being the amount of the security deposit and interest, minus the cost of cleaning the apartment. I will not order costs, since the landlord was in breach of the agreement it had entered into with the tenants when they agreed to move out without a hearing.

Dated at Halifax, this 14th day of May, 2007

Original: Court File)
Copy: Claimant)
Copy: Defendants)

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W. Augustus Richardson, QC
ADJUDICATOR