

CANADA / JUDGMENT

Grace v. Leverman

2013 NSSM 14

COURT

Nova Scotia Small Claims Court

DECIDED

26 February 2013

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407683

Judge/Registrar/Adjudicator

Slone, Eric K. (Adjudicator)

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Decision

Decision Content

Claim No: 407683

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

ON APPEAL FROM AN ORDER OF THE

DIRECTOR OF RESIDENTIAL TENANCIES

Cite as: Grace v. Leverman, 2013 NSSM 14

BETWEEN:

DANIELLE GRACE

Tenant (Appellant)

- and -

JEFF S. LEVERMAN

Landlord (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on February 19, 2013

Decision rendered on February 26, 2013

APPEARANCES

For the Tenant Megan Deveau and Katie Sammon

Dalhousie Legal Aid

For the Landlord self-represented

REASONS FOR DECISION

1 This is an appeal by the Tenant from a decision of the Director of Residential Tenancies dated September 24, 2012. In that decision, the Residential Tenancy Officer ordered the Tenant to pay to the Landlord the net sum of \$2,429.09, comprised of three months of rent (\$3,000.00) less a \$502.00 security deposit and less \$68.41 for some minor items which the Tenant had purchased for the unit.

2 The basis for the order was to the effect that the Tenant had signed a lease (which the Residential Tenancy Officer found to be month to month) and had left without giving any written notice, let alone the required three months. She was found not to have paid rent for July and August 2012, during which time she (mostly) occupied the apartment, and was held responsible for one more month until the Landlord was able to re-rent the unit.

3 The Tenant had based her defence (before the Residential Tenancy Officer) largely on the allegedly poor quality of the apartment and the unresponsiveness of the Landlord to her many complaints. She decided to leave at the point where she felt the tenancy was not viable for her, and the relationship between her and the Landlord had become highly conflictual.

4 At the hearing before me, the additional argument was made on her behalf, that the lease was void because of the failure of the Landlord to obtain an occupancy permit. The Tenant relies on the decision of Kennedy C.J. of the Nova Scotia Supreme Court in *Cote v. Armsworthy* 2012 CarswellNS 53, 2012 NSSC 15, 213 A.C.W.S. (3d) 1024, in support of the proposition that where an occupancy permit is required, but not obtained, the tenancy is illegal and any lease purported to be entered into is void.

5 The history of this building is important, in order to place the occupancy permit argument in context. The structure at 55 Prince Albert Road had initially been a mixed commercial and residential building. Several years ago it suffered a fire, and the owner Jeff Leverman decided to convert the commercial units to residential apartments.

6 Mr. Leverman's main occupation is his roofing company, but he has been a construction contractor in the past and he decided to do the work himself on the building. He knew that he had to apply for a building permit from the municipality, and he did so.

7 Mr. Leverman did not seem to have a full appreciation of when and if an occupancy permit would be required, which is perhaps understandable as it appears to be a confusing area. In simplistic terms, it appears that a building permit is required to start work, and eventually when the work is completed and passes all inspections the occupancy permit signals the end of the process. However, the legislation and regulations do not precisely say that. I will try and make some sense out of the legislative scheme.

8 The Nova Scotia Building Code Act sets standards and empowers municipalities to create and enforce a permitting scheme to ensure that the standards are being met:

7 (1) The council of the municipality may pass by-laws not inconsistent with this Act or the regulations made by the Minister

- (a) prescribing permits or classes of permits for the purpose of this Act and the regulations including permits in respect of construction or demolition or any stage thereof, and for occupancy and change of occupancy of a building;

Prohibitions

8 No person shall

- (a) construct or demolish a building to which this Act applies; or
- (b) occupy or change the class of occupancy of a building to which this Act applies,

except in accordance with this Act or the regulations and unless a permit therefor has been issued by an [a] building official and the permit is in force.

9 The regulations under the Building Code Act - which are in force for Halifax Regional Municipality - create a further necessity to obtain an occupancy permit whenever a new building is being occupied or the occupancy classification of a building is changed:

- (7) Unless a municipality in accordance with Section 7 of the Building Code Act has provided other or additional regulations by by-law, an occupancy permit is required
 - (a) to allow the initial occupancy of a building or part thereof,
 - (b) when the occupancy classification of a building or part thereof is changed, or
 - (c) to allow partial demolition or alteration of a building.

10 In the Halifax Regional Municipality By-Law B-201, also known as the Building By-Law, there are provisions for obtaining a temporary or provisional occupancy permit prior to completion of the work:

2.5.1.5. Conditional Building or Occupancy Permit

- (1) The authority having jurisdiction may issue a building or occupancy permit conditional upon
 - (a) The submission of additional information not available at the time where such information is of such a nature that withholding of the permit until the information becomes available would be unreasonable.
 - (b) Completion of such work that is incomplete at the time of inspection, or application is of such a nature that no unsafe condition exists and that withholding of the permit would be unreasonable.

2.5.1.8. Occupancy Prior to Completion

The authority having jurisdiction may issue an occupancy permit, subject to compliance with provisions to safeguard persons in or about the premises, to allow the occupancy of a building or part thereof for the accepted use, prior to commencement or completion of the construction or demolition work.

11 Despite the somewhat byzantine legislative scheme, of which I have only reproduced a small sample, it appears that (stated simply) there is an intention that owners only undertake significant work under the auspices of a building permit, and that buildings not be occupied (by owners or their tenants) until or unless the municipality has given its approval in the form of a temporary, provisional or final occupancy permit.

12 Mr. Leverman believed he was doing what was required of him. He obtained a permit and commenced the work renovating the formerly-commercial space to create two new residential units. He understood that the two new units would have to be built to current standards, while the five untouched older units did not as they were “grandfathered.” One of the distinctions was that the new units required a mechanical ventilation system, otherwise known as an air exchange or HRV, while the preexisting units did not need to be retrofitted with the HRV.

13 The unit which was rented to the Tenant here was not really complete, in a number of respects. The major unfinished item was the HRV. The ducting was roughed in, but Mr. Leverman was short of money and hoped to pay for the actual HRV machine out of rental moneys. There were a few other unfinished items, such as missing wall plug covers, incomplete paint job, some protruding nails in the hardwood floors, no unit number on the building and no mailbox. There was also a problem with the furnace exhaust being too close to the bedroom window, which was not only a Code violation but made it unsafe for the Tenant’s bedroom window to be opened. The window issue would have been less concerning, but for the fact that the HRV was not yet in place and summer weather had arrived. As such, the Tenant found the air in her bedroom to be stifling.

It should be mentioned that even though the heat may have been turned off, the oil furnace also heats the hot water for the building, so exhaust would be a year-round issue.

14 In the normal course of things, all of these deficiencies would have been addressed and, no doubt, have since been resolved. However, by the time that the Tenant decided to end her tenancy prematurely, most of these issues were still unresolved and no occupancy permit was yet issued. Mr. Leverman appeared to be convinced that the only thing standing between himself and Halifax Regional Municipality was a problem with the deck on one of the units (which had nothing to do with the Tenant). He also seemed to believe that the fact that he might have asked for a provisional or temporary occupancy permit meant that the occupancy was legal.

15 I believe he was incorrect in this opinion. I believe that the scheme requires an owner to seek out a temporary or provisional permit, which request would likely trigger an inspection prior to the request being considered. I also believe that the final occupancy permit is not issued until a final inspection is requested and, in effect, the permit is also requested.

16 I note that even at the date of the hearing before me, the occupancy permit was still not issued though Mr. Leverman was expecting it shortly.

17 I expect that it is probably the case in cities such as Halifax Regional Municipality that not all construction work is the subject of a permit, as required by law, and that there are probably many buildings occupied without all of the proper permits. Most everyone knows or has heard about illegal conversions and other construction that is undertaken “under the radar,” so to speak, and which can appear to go on indefinitely without being detected by the authorities. There is probably an attitude among many people that failure to follow all of the dictates of municipal law is not as serious as might be the failure to observe provincial or federal law. Although I have no evidence on this, I expect that compliance with the Building By-Law is less universal than it probably could and should be.

18 Nevertheless. It stands to reason that if it is a breach of statute, regulation or bylaw to allow a premises to be occupied, then a contract (lease) which seeks to do just that, is an illegal contract. And courts do not typically enforce illegal contracts, as a matter of public policy.

19 This is not precisely what happened in the aforementioned case of *Cote v. Armsworthy*. In that case there was a finding to the effect that the apartments in question were truly in substandard condition, including some violations that made occupation of the premises unsafe. The tenants had sought a return of their rents paid, but the Adjudicator had allowed the Landlord to keep the rents already received. The Chief Justice disagreed, and stated:

41 Having decided that the leases were void and illegal - having found that the Premises, at time relevant, were not in compliance with Statutory Condition 1 of s. 9(1) of the Residential Tenancies Act - having found that no further rent was owing, the adjudicator should have ordered the return of the rents paid by the Tenants.

42 To allow the Landlord to retain the rents paid, under these void leases, for premises that were subsequently determined to have safety issues would be to disregard statutory obligations in place to insure the safety of unsuspecting tenants.

43 By so doing he is ignoring the manifest intent of s. 9 of the Residential Tenancies Act that rental properties be safe to live in.

44 The adjudicator's finding not to return the rent money paid was motivated significantly by his concern that the Landlord had paid for heat and utilities to the benefit of the Tenants during their occupancy. He stated at p. 24 of the decision:

Even if the court were to find there was non-compliance with the legislation, in my opinion it was not of such a nature that would demand having all the rental payments paid during the Tenants' occupancy, use and enjoyment of the premises, returned to them. In my opinion, this would result in an unjust enrichment to the Tenants and would seem grossly misappropriate to the breach, bearing in mind the facts in this case.

44 This issue was addressed at the hearing when counsel for the Tenants agreed that this Court might allow the Landlord to retain his demonstrable costs related to the period of occupancy.

45 I find this to be a fair compromise. It is my understanding that there was not going to be any difficulty in determining and apportioning these costs.

46 I find that the adjudicator erred in law in his determination that the Premises was "not unfit for occupancy" and that therefore the rent monies paid need not be returned to the Tenants.

47 The Tenants will have their rent monies returned less the demonstrable Landlord costs which I restrict to heating and utilities during the period of occupancy.

20 I am not sure that the Chief Justice ever made clear in that case that it was the failure to obtain the occupancy permit per se that made the leases illegal. His reasons tend more to support a view that it was the breach of the statutory conditions in the lease - i.e. the obligation to provide a safe premises "fit for occupancy" - that was the problem.

21 Even so, I believe that the proposition put forward by the Tenant's representatives is correct, in law. The lease between the Landlord and Tenant was void.

22 The lack of an occupancy permit was more than just a technicality. Tenants have no easy way of knowing if a building is safe and meets the applicable standard, and the laws are in place (in part) for the protection of tenants. Declaring the lease void serves two purposes. It shows the court's disapproval of the practice of renting out premises that are not ready for occupancy, and it may help to deter others who would seek to do the same by removing any possible financial incentive.

23 Courts will not (as a rule) lend their names to an attempt to enforce an illegal contract. In the B.C. Court of Appeal case of *Top Line Industries Inc. v. International Paper Industries Ltd.* [2000] 3 W.W.R. 496, 184 D.L.R. (4th) 534, the headnote summarizes the law:

No reason existed to depart from the rule of law that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract which is illegal, if the illegality is duly brought to the notice of the court. The landlord was not entitled to occupation rent as its claim was based on a consent that was given only by virtue of an illegal lease. As the landlord convinced the court that no personal rights should be implied that would permit the tenant to obtain indirectly what it could not obtain directly, such as the right to occupy the property, the same should apply to the landlord so that it should not be permitted to obtain rent indirectly that it could not obtain directly.

24 While that case dealt with a commercial tenancy, where it was the landlord himself who was arguing illegality in order to escape a disadvantageous lease, the principle is sound. The Landlord is not entitled to benefit from entering into an illegal lease.

25 The situation might be different, if the Tenant had known of the situation and knowingly participated. In such a case, the court would be disinclined to help either party and the Tenant would have a difficult time persuading a court to refund any of the money already paid. But that is not the situation here.

Other problems with the unit

26 There is no need to write at length about the other problems that the Tenant experienced. I have noted that there were some minor deficiencies, but in my view these would not have reached a threshold of making the unit unfit for human habitation. At most these things might have supported a small rent abatement. The apartment was well on its way to becoming a quality unit.

27 Some of the Tenant's frustrations had nothing to do with the condition of the unit. Less than two weeks after moving in, she began to have problems with noise caused by another tenant in the apartment. The police were called on that occasion, and they recommended that the Tenant also contact the Landlord, which she tried to do. The Landlord was unresponsive to her call as it was on a weekend when his daughter was getting married. He also appeared to believe that a noisy tenant was not his responsibility.

28 On this latter point, he is mistaken. Tenants have a right to quiet enjoyment, as well as a duty to behave reasonably so that other tenants are not disturbed unduly. The Landlord has the duty to enforce the lease against a noisy tenant. It is not just a matter for the police; indeed, I suggest that the primary responsibility rests with the Landlord. The Tenant here had a legitimate complaint and a potential case to terminate the lease or claim an abatement.

29 There were also personal issues between the Tenant and the Landlord. The Tenant felt personally intimidated by the Landlord. I am in no real position to say whether this perception was legitimate, but it certainly appears that the Landlord was dismissive of the Tenant's complaints and concerns and may well have allowed his anger and frustration to spill over in a way that the Tenant found intimidating.

30 There is no real need to discuss other problems with the apartment, including the unfortunate fact that the electrical meter for this unit was also being used to pay for power to the furnace and the basement, which should not have been the responsibility of this Tenant.

31 In the result, I declare that the lease was illegal and void, and the Tenant accordingly had the absolute right to terminate without notice. The Landlord is not entitled to benefit to any degree from renting the unit illegally, and must refund to the Tenant all of the money that she paid.

32 The Tenant has also claimed \$75 for additional moving costs which she says she had to pay because of the behaviour of the Landlord on the day she moved out. She had to keep her movers occupied for an extra hour because (she says) the Landlord was harassing her and was only restrained after the police were called. The Landlord appeared not to appreciate that he was behaving badly. I find that his behaviour did increase the Tenant's costs and the claim is justified.

33 The total to be paid by the Landlord to the Tenant consists of:

May rent (pro-rated)

\$741.93

June rent

\$1,000.00

Security deposit

\$502.00

Hardware supplied by Tenant

\$60.41[1]

Extra moving cost

\$75.00

Cost of the appeal plus service and FOIPOP

\$107.09

Total

\$2,486.43

34 The Landlord will accordingly pay the Tenant the sum of \$2,486.43.

Eric K. Slone, Adjudicator

[1]I believe the Residential Tenancy Officer's calculation was wrong and this is the correct amount.

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Prepared on 28 October 2026 · Esheria