IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Hage Investments Ltd. v. Fakhra*, 2017 NSSM 19

Claim No: SCCH No. 461373

BETWEEN:

Hage Investments Limited — **Appellant/ Landlord**

v.

Hazem Fakhra and Emma El-Amassi — **Respondents/ Tenants**

Date of Hearing: March 30, 2017

Date of Decision: March 31, 2017

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

Jamil Hage appeared on behalf of the Appellant/Landlord.

The Respondents/Tenants, Hazem Fakhra and Emma El-Amassi, appeared on their own behalf.

DECISION

This is an appeal of the Decision and Order of Residential Tenancies Officer, Jason Warham dated March 8, 2017.

Background

The parties entered into a lease of Apartment […], […] Langbrae Drive, Halifax. There is no dispute concerning the termination of the tenancy. The tenants paid the rent up to the date they left the premises. The tenancy ran from June 1, 2015 to December 31, 2016. Their lease provides that monthly rent was $1200 and a security deposit of $600. There are also two additional fees which could well be part of the security deposit, which I have referenced below.

When the Tenants moved out, the Landlord noted damage within the premises. It provided a breakdown and a cheque for the balance of $158.70 to the Tenants. The Tenants made an

application to the Director of Residential Tenancies seeking the return of the security deposit. The Tenancy Officer allowed the Landlord the opportunity to make a claim.

It should be noted that in undertaking the process in this way, the Landlord is in breach of the *Residential Tenancies Act*. Section 12 of the *Act* deals with the distribution of security deposits. Subsection 12(5) and (6) require the Landlord to return the security deposit to the tenant within 10 days of termination. If the landlord seeks to apply any of the security deposit to outstanding rent or expenses in respect of damage, it must seek the Tenant's consent in writing. Where, as here, such consent would not have been forthcoming, the Landlord must make an application to the Director. In this case, the Landlord unilaterally made that determination and the application was brought by the Tenants at their own expense. Regardless of the outcome of the appeal, the Landlord shall be liable for the application fee, $31.15.

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 and any additional evidence the parties seek to adduce. As a *de novo* hearing, the Court has the discretion to confirm or vary the decision of the Director of Residential Tenancies.

Position of the Parties

Jamil Hage is the sole shareholder of the Landlord, Hage Investments Limited. He provided photographs and invoices noting damage and estimates of cost to repair the damage. The Tenants are husband and wife and provided documents and photographs in evidence as well.

There is also in evidence a Rental Unit Condition Report which was prepared and signed by Mr. Fakhra and the building superintendent, whose name appears to be Danny Hainge.

The Law

The relevant provisions of the *Residential Tenancies Act* are as follows:

Section 9, Statutory Condition 4 provides as follows:

"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."

Section 12(15) states as follows:

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

The onus to prove a breach of the Act falls upon the party making the claim, in this case the Landlord, Hage Investments Limited.

The Evidence

Both parties gave equally emphatic and documented evidence. However, I find Mr. Hage was not present for an inspection of the unit immediately before the Tenants' tenure or at the time Mr. Fakhra and the Superintendent conducted the out inspection. Of the three witnesses before me, only one of the Tenants (Mr. Fakhra) were present for those inspections. The superintendent's evidence would have been very useful. Thus, where the evidence is not consistent, I favour that of the Tenants.

Mr. Fakhra and Ms. El-Amassi testified that when they moved in on June 1, 2015, there was no "in" inspection conducted. The previous tenant had moved out on May 31, 2015. Thus, they only conducted an "out" inspection on December 23, 2016, when he vacated the premises. Presumably, the previous tenants also went through an "out" inspection. If so, that evidence would have been helpful as well. Other than the claim for damage to the washer, there was nothing to corroborate the Landlord's evidence that the remaining damage was caused by the Tenants. It is essentially, Mr. Hage's word against the Tenants'. As noted previously, since Mr. Fakhra was present on both occasions and Mr. Hage was not, I favour the Tenants' evidence. In those cases, the onus is not discharged.

Ms. Fakhra also tendered into evidence photographs of the apartment after they left. Apparently, he knows the current tenant as well. Despite retaining the funds from the damage deposit, he submits that the work has not actually been done. I accept that is the case.

Mr. Hage urges me to find that by signing the Rental Unit Condition Report, Mr. Fakhra and Ms. El-Amassi "signed off" on the damage.

The form is pre-printed by Service Nova Scotia and Municipal Relations. It contains several codes to note whether certain features in the rooms of residential premises are "Clean" or "Good" or otherwise "Broken", "Damaged", etc. It contains two columns to note conditions in the rooms for the beginning of the tenancy and at the end of the tenancy. At the top of the page are the instructions:

"Use this report to create a detailed description of the condition of the premises at the start and the end of the lease. It will benefit both the landlord and the tenant at the end of the lease agreement."

At the end of the form are signature lines for each of the beginning and end dates. There is a note beneath the lines:

"If a room or feature is not covered in this form but you think this important, then include it on an attached page or on another copy of this form. For example, furniture."

There is nothing additional added.

The purpose of the inspections at both the beginning and end of the tenancy is the protection of both parties. There is nothing written on the document to infer that signing it is an admission of liability, only that the noted condition is accurate. The fact that something is damaged does not automatically impose liability on either party. The Landlord must still establish that it was

caused by the tenant's wilful or negligent conduct. There is no evidence that the parties intended any notation to mean otherwise.

Findings

I have addressed each claim in the same order as the Tenancies Officer:

1) *Washer* – The washer which is included in the lease is estimated to be 12-14 years old. It was making excessive noise which attracted the attention of the person below. The machine became unstable and unlevel. Mr. Hage testified that the person performing the repair attributed the damage to overloading the washer. I accept the landlord's evidence that the washer was overloaded and this caused it to be unbalanced thereby requiring the service call. Such action is an example of negligent conduct. I find this the cause of the tenants and order them to pay $71.30.

2) *Kitchen Cabinets* – There is a hole through the bottom of a kitchen cabinet to allow microwave cords to pass through to a socket. The Tenants claim it was pre-existing. It is not mentioned on the condition report. The Landlord has not discharged its onus to prove the damage was caused by the tenants. I disallow that portion of the claim.

3) *Wall Damage and Fixtures* – The Landlord claims $75 to repair the wall and fixtures. I find the damage to the wall was ordinary wear and tear. I have some misgivings with the Tenants' assertion that the fixtures were missing when they moved into the premises. That is the type of item that gets mentioned for rectification. However, the evidence is not sufficient to show they removed them either. If I had found for the Landlord on this issue, I would have found the value of the fixtures to have been far less than $75 as it was in used condition. I find the damaged fixtures to be pre-existing. I disallow that portion of the claim.

4) *Door Replacement* – Once again, this is an item that the Tenants say pre-existed their arrival. The Landlord states that it was caused by the Tenants. There is no evidence to support the Landlord's assertion. I disallow this claim.

5) *Flooring* –I find the damage was pre-existing. It is likely the result of ordinary wear and tear by previous tenants.

As for the Tenants claim, when a tenant vacates residential premises in a year-to-year or month-to-month lease, the tenant is liable for the full term of the lease. The Landlord has an obligation to mitigate its losses. The Tenants vacated on December 23, 2015. Mr. Fakhra seeks compensation for one week's rent. This leaves the holiday week to try to let the unit which is not a reasonable time to attempt to re-let the premises for that duration. I decline the Tenants' claim for $300 for one week's rent. Further, I do not find the evidence supports a claim for $20 of his power bill.

In summary, I confirm the finding of damage made by the Residential Tenancies Officer. I vary his order to assign liability for the application fee and for credit for $158.70 already paid to the Tenants. The Landlord's only success came in rectifying a mathematical error, a mistake the Tenancies Officer could have made on his own motion. Otherwise, the result was the same

except for my finding on the application fee. This is an appropriate case for each party to bear their own costs of the appeal.

Security Deposit – Garage Opener and Keys

While the issue was not raised before me, I feel obliged to comment on section 14 of the lease. It provides as "additional obligations" a garage door opener deposit and extra key deposit. It is noteworthy the lease includes one parking space for the tenant, which presumably required the garage door opener.

The total for these two deposits was $80, in addition to the security deposit of one-half month's rent, $600, paid by the Tenants.

Reference is made to s. 12(2) of the *Residential Tenancies Act*:

"(2) No landlord shall demand, accept or receive from a tenant as a security deposit a sum of money or other value that is in excess of one half of the rent per month that is or would be required to be paid for the residential premises."

A security deposit is described in subsection (1):

"(1) Where a landlord obtains from a tenant any sum of money or other value that is in addition to the rent payable in respect of the residential premises the sum of money or value is deemed to be a security deposit."

It is possible that these items would be found as a security deposit, and thus, in excess of that permitted by the Act. Such excess payments may be claimed over and above any claims for damages. Subsection (13) of the Act imposes personal liability for any breaches of the Act relating to security deposits.

A comprehensive and fulsome review of the purpose and effect of section 12 of the *Act* is found in the decision of Adjudicator Michael J. O'Hara, QC, in the recent decision of *Maitland v. Templeton Place Ltd.*, 2016 NSSM 24. While not binding on me, I am in full agreement with my colleague's analysis.

As a matter of procedural fairness, I am not prepared to make any findings at this time. In addition to being unfair to the Landlord, to make a finding at this point would deny the parties the finality which I believe would be beneficial to both parties. However, the possibility does exist for potential liability if enforcement of the judgment becomes an issue.

Summary

The Landlord currently holds $680 as security deposit. The amount to be paid to the Tenants is as follows:

Amount in Trust:	$680.00
Application Fee:	$ 31.15
Less:	($71.30)
Less:	($158.70)

Total Judgment **$481.15**

An order shall be issued accordingly.

Dated at Halifax, NS,
on March 31, 2017;

_____
Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)