SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Allen v. Southwest Properties*, 2017 NSSM 34

SCCH No.43015

BETWEEN:

Alissa Allen

Appellant

– and –

Southwest Properties Ltd

Respondent

Adjudicator: Augustus Richardson, QC

Heard: August 15, 2017

Decision: August 29th, 2017

Appearances: Gordeon Allen, for the appellant
Scott Layton, for the respondent

DECISION

[1] This is an appeal from an decision and order of a residential tenancy officer dated April 25, 2017. The order had found the appellant tenant liable to the respondent landlord for various amounts, including lost rent, totalling $3,978.00.

[2] On behalf of Ms Allen I heard her testimony as well as that of Ms Betty Cahill. On behalf of the respondent I heard the testimony of Scott Layton, and of Julie Doiron, the respondent's housekeeping supervisor.

[3] The appellant Alissa Allen ("Ms Allen") is a real estate agent. She also operates a high-end residential leasing business under the name "Perfect Places Rentals." The business involves renting apartments, condominium units and homes, furnishing them with quality furniture, and then sub-letting them to short- or indeterminate term tenants, such as business people or visitors to the city. She does not herself occupy the units she rents and then sub-lets under the name Perfect Place Rentals. She operates about 85 units in this way.

[4] On January 19, 2016 she entered into a year to year lease with the respondent Southwest

Properties Ltd for a monthly rent of $2,900.00. The lease was for unit 246 at 1475 Lower Water Street, otherwise known as "Bishop's Landing." The lease commenced February 1, 2016. The respondent was aware that she would be sub-letting the unit as part of her Perfect Places business.

[5] On November 17, 2016 Ms Allen emailed the respondent to say that "Perfect Places wishes an 'early' termination of its contract." She explained that the problem was that "we see the unit as 'unrentable' because of noise from the restaurant below." One of her previous tenants "left early because of the noise leaving me no option but to cover November's rent out of my own pocket." She said she had shown the unit "to various prospective tenants and no one will take it because of the hustle and bustle below." She explained that she did not have "the funds to continue paying for an apartment we consider 'unrentable.'"

[6] Ms Smith for the respondent responded on the same day. She advised that there were only two options:

a. A buyout equal to one month's notice plus the equivalent of two month's rent, or

b. Ms Allen find someone to sign a new one year lease starting December 1, 2016 or January 1, 2017.

[7] Ms Smith pointed out that the first option—equal to three month's rent—was essentially what remained on the lease. The only difference was that she "would have to move everything out by the end of November and still pay equivalent to 2 months."

[8] Ms Allen did not respond to this email.

[9] On November 30th Ms Allen spoke to Scott Layton. She complained about the noise. She also now complained that the unit had mice. This latter complaint was news to Mr Layton, noting that there had not been any complaints about rodents in the unit up to that point. Mr Layton told her that he would advise his pest control company to visit the unit and take the appropriate measures. In an email sent November 30th he also told her that as of December 1st the housekeeping staff would visit the unit daily to inspect for signs of mice, and that they would place traps under sinks, behind refrigerators and under appliances. He noted that if Ms Allen gave notice that she would be showing the unit to a prospective tenant his staff would refrain from visiting the unit.

[10] I should note at this point that the testimony of the various witnesses did satisfy me that mice had been seen on occasion in the parking garage; and as well that the respondent did have a pest control system in place that involved monthly inspections and, when necessary, the placement of traps to control mice. However, there was no evidence of any mice in the unit until Ms Allen raised the issue in her conversation with Mr Layton on November 30th.

[11] On December 1, 2016 Ms Allen showed the apartment to Ms Betty Cahill, who was looking for a short-term rental for members of her extended family who would be coming to Halifax for two months for a family reunion. The rent quoted to Ms Cahill by Ms Allen was $3,500.00 per month, which she thought "was fair for it [the unit] being on the water and with totally high end furniture," overlooking the water. She would have taken the unit except for one thing. On their inspection of the unit the two of them came across a dead rat in the living room. The rat was not in a trap; it was just lying on the floor. Nor was there any evidence of rat droppings in the unit, or of any means of access by rodents into the unit. Nevertheless, and nor surprisingly, the discovery put Ms Cahill off, and she decided not to rent the unit. She was not interested in any other units that Ms Allen had at Bishop's Landing because they were not on the water.

[12] In the end the unit remained empty for the balance of the term. Ms Allen moved her furniture out. The respondent then commenced its claim for outstanding rent of $5,245.00 for the balance of the term to January 31, 2017; $151.85 for propane use that had not been paid by the tenant; and $31.15 for the application fee.

[13] Mr Allen submitted that Ms Allen was entitled to terminate the lease because the respondent landlord had breached statutory condition 9(1)-1—that a residential premises had to be "in a good state of repair and fit for habitation during the tenancy." He said she was entitled to a return of her damage deposit. He also submitted that she was entitled to set-off her lost rental income. Sub-letting was her business. The respondent was aware of that business. She had not been able to rent the unit because of either or both the noise and the "rodent problem." That being the case she should be able to set-off against anything she might otherwise owe the respondent her lost rent.

[14] I was not persuaded by these submissions.

[15] First, Ms Allen is clearly an experienced real estate agent and "landlord" in her own right. She also engaged in short-term rentals that, on the evidence, might not match the terms she herself had entered into. She leased unit 246 at Bishop's Landing knowing that it was over a

restaurant. Noise may not have been a problem when she rented it in the winter since the restaurant's business would have been conducted indoors.. But she can also be taken as knowing that the restaurant had a patio business; and that the water front in Halifax is busy during the summer and fall months. She thus accepted a risk that she might have some difficulty sub-letting the unit during those months because noise from the restaurant or the waterfront might put some prospective tenants off.

[16] Second, a just as one swallow does not a summer make, so too does one rodent (even a rat) not in and off itself make a unit unfit for habitation. I note here that there was no evidence of any rodent problem in the unit prior to December 1st; that Ms Allen's initial complaint was solely about noise (not mice); and that in any event the respondent landlord responded quickly and appropriately once it was advised that there was some issue.

[17] Finally, since I was not satisfied that the respondent had breached any condition of the lease then Ms Allen was not entitled to early termination. Moreover, the fact that she showed the unit to Ms Cahill (as a potential tenant) on December 1st indicates that she had not abandoned the unit (even though it was vacant) and that she was still trying to exercise her rights as a tenant to occupy (that is, sublet) the unit. Since Ms Allen (or rather her furniture) was still occupying the unit, and since she was still trying to rent the unit the landlord cannot be faulted for any potential failure to mitigate.

[18] The claim for set-off must also be dismissed. It is not clear to me Ms Allen's claim is one that could be maintained under the Residential Tenancies Act. Even assuming that it could, it cannot stand where the landlord had not breached any of its obligations under the lease, and where Ms Allen was still exercising control over the unit.

[19] The appeal is dismissed. I will make an order to that effect.

DATED at Halifax, Nova Scotia
this 29th day of August, 2017

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Augustus Richardson, QC
Adjudicator