SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *GNF Investments v. Whitman and Lang*, 2017 NSSM 35
SCCH No.43015

BETWEEN:

GNF Investments Limited

Appellant

– and –

Dale D. Whitman and Jennifer Lang

Respondents

Adjudicator: Augustus Richardson, QC

Heard: August 22, 2017

Decision: August 30th, 2017

Appearances: Derek Brett, for the appellant
Russell Alsop, Megan Deveau, for the respondent

DECISION

[1] This is an appeal from an decision and order of a residential tenancy officer dated June 30, 2017. In the application before the officer the appellant landlord GNF Investments Limited ("GNF" or "the landlord") sought payment of money for foregone rent; the application fee; and retention of the damage deposit. The tenants in turn sought reimbursement of increased moving costs that they said had been caused by the landlord's failure to make an elevator available to them "on standby" (that is, available only to them for use for moving). The central issue was whether the respondent tenant Jennifer Lang had suffered a serious deterioration in her health that had rendered her unable to continue with the lease, pursuant to s.10C(1) of the *Residential Tenancies Act* (the "Act").

[2] At the hearing I heard the testimony of Michael Quigley, a property manager for GNF, and of Kristine Harper, a commissioned rental sales agent for GNF, both on behalf of the appellant GNF. On behalf of the respondents I heard the testimony of Ms Jennifer Lang.

The Act and Regulations Regarding Early Termination for Reasons of Health

[3] Section 10C(1) of the Act provides as follows:

> s.10C(1) Notwithstanding Section 10, where a tenant or a family member residing in the same residential premises in a year-to-year or fixed-term tenancy has suffered a significant deterioration in health that, in the opinion of a medical practitioner, ***results in the inability of the tenant to continue the lease or where the residential premises are rendered inaccessible to the tenant,*** the tenant may terminate the tenancy by giving the owner
>
> (a) one month's notice to quit, in the form prescribed in the regulations;
>
> (b) a certificate of a qualified medical practitioner, in the form prescribed by regulation, evidencing the significant deterioration of health; and
>
> (c) proof of service, in the form prescribed by regulation, of all the tenants in the same residential premises with a copy of the notice to quit. (Emphasis added)

[4] The Regulations under the Act provide for two forms, G and H.

[5] Form G is a Tenant's Notice to Quit–Early Termination of Tenancy. The form provides for three possible reasons for the notice. One relates to s.10C(1) and provides as follows: "A significant deterioration of my health has, in the opinion of my physician, resulted in my inability to continue the lease or makes these residential premises inaccessible to me (Section 10C of the Act). I am attaching a Physician's Certificate in Form H."

[6] Form H is a Physician's Certificate—Termination of Tenancy for Health Reasons. On the form are three statements. The physician filling out the form is asked to check the applicable "box" beside one or more of the statements. The two that are relevant to this appeal are these: "results in the inability of the tenant to continue the lease" and "renders the residential premises inaccessible to the tenant. that the physician."

The Facts

[7] Ms Lang and the other respondent, Ms Dale Whitman, were interested in two-bedroom units offered for rent by GNF at 56 Walter Havill Drive in Halifax. They were shown two units by Ms Harper. I pause here to note that Ms Harper is not an employee of GNF. She is a commissioned agent who acts as an independent contractor (according to both she and Mr Quigley). She is paid a commission for each lease she obtains for units of GNF.

[8] Ms Lang and Ms Whiteman viewed unit 401 and were interested in it. However, it was still full of the departing tenant's furniture. They viewed another unit, 903. The two units had the same physical layout. They decided to take Unit 903 and signed a year to year lease with a term starting February 1, 2017 for a rent of $1,695.00 per month. However, shortly before taking occupancy unit 401 became free and empty. They decided to more into that unit instead, and the lease was modified accordingly.

[9] Ms Lang was formerly an employee of the Halifax Water Commission. In 2008 she suffered a head injury. The injury resulted in her suffering from "disequilibrium." She testified that from time to time since the injury she has suffered bouts of dizziness and nausea, balance and visual disturbances, headaches and vertigo. Over the years she has received various types of treatment for these conditions. She has, according to her, "good days and bad days." She said that both she and her treating physicians and physiotherapists were "still learning about my disorder."

[10] Ms Lang testified that some time after moving into the unit she began to experience aches and pain in her feet. Her arthritis started to act up. Since 2008 she had always washed her hair in the sink, for fear of losing her balance in the shower. She testified that the sink in the unit was deep, which meant that she had to hang her head lower than she normally did, which led to neck pain. She also complained about noise coming from tenants coming and going to the gym facilities on the first floor. That, together with noise from another tenant's sleep machine (whcih

caused vibrations she could hear) led to difficulties with sleep, and hence to an increase in her chronic pain.

[11] On April 26, 2017 Ms Lang delivered to GNF a Form G Notice to Quit–Early Termination of Tenancy. As required by s.10C(1) of the Act, she gave notice that she would terminate the tenancy agreement on May 31, 2017. She checked the box on the form that said she was giving notice because she had suffered "A significant deterioration of my health has, in the opinion of my physician, resulted in my inability to continue the lease or makes these residential premises inaccessible to me ." She attached a Form H–Physician's Certificate Termination of Tenancy for Health Reasons. Her family physician, Dr Kathleen Singleton, checked the box on the form which certified that (a) she had examined Ms Lang, and (b) that Ms Lang "has suffered a significant deterioration of health that has resulted in the inability of the tenant to continue the lease."

[12] At some point thereafter Ms Lang went to GNF's rental office to request that one of the building's two elevators be made available for the exclusive use of her movers on May 28th. She testified that she was told then that the office would contact her "closer to the date" about the use of the elevator, but that May 28th "was booked." However, on May 24th Ms Lang found a notice posted at the elevator stating that "over the next few days we are conducting our annual maintenance of the elevators; therefore, one of the elevators will be temporarily out of service." On May 28th, as it turned out, one of the elevators was indeed out of service. The other elevator could not then be put "on call" for Ms Lang's movers. They were initially told that they should use the stairs. However, Mr Quigley then told them that they could use the elevator that remained in service, but that they would have to share it with other tenants—it could not be put "on call." Ms Lang testified that as a result the move took longer than it would have had one elevator been available for the exclusive use of the movers. Her move to 56 Walter Havill Drive had taken the movers 2.5 hours, but it took them 6 hours to move to her new residence on May 28th. She claimed the difference, which worked out to $434.00.

[13] Mr Quigley testified that no complaint had been made to him about the unit prior to Ms Lang's delivery to him of her Notice to Quit. GNF's practice in such situations was always to speak to the tenant to find out what the problem was "and see if we can fix it." He spoke to Ms Lang "to find out her reasons, and she was adamant about not telling us what the problems were." He heard nothing from Ms Whitman.

[14] GNF's standard practice, in the absence of a letter from a tenant's doctor (as opposed to the Form H) was to contest a decision by a tenant to invoke s.10C(1). As a result GNF applied to

the Residential Tenancies Office on May 4th. The hearing took place on June 6 and 7, 2017. At the hearing Ms Lang submitted a letter dated May 19, 2017 from her physiotherapist, one Janice Palmer. The letter, which I read with care, outlined Ms Lang's condition since she had been referred to Ms Palmer "in 2010 for disequilibrium." There is absolutely nothing in the letter to suggest that Ms Lang's condition had deteriorated—whether significantly or at all—since February 2017. Ms Lang also provided a report by Ms Palmer to Dr Singleton dated March 10, 2010; a report from a neurologist to Dr Singleton dated May 10, 2010; and a report from another neurologist dated April 26, 2012. Obviously none of those reports spoke to Ms Lang's condition after February 2017.

[15] At the hearing before me Ms Lang put into evidence a new report, this one signed by Dr Singleton, dated July 20, 2017. Counsel for GNF objected strenuously to the introduction of this report. He argued that the report was prepared after the decision now under appeal. However, appeals of residential tenancy orders in this court are treated as hearings *de novo*. Moreover, Adjudicators may accept evidence that would not normally be accepted in the Supreme Court of Nova Scotia. In normal course objections go to weight, not to admissibility.

[16] In her note Dr Singleton states as follows:

> "The above [Jennifer Lang] vacated her previous apartment due to excessive noise, fumes and dust from the HVAC system. This exacerbated her chronic vertigo and migraine and interfered with her sleep.
>
> "In addition walking on cement floors had exacerbated her back and foot pain.
>
> "The above conditions are much improved since her move."

[17] Ms Lang testified that the residential premises into which she moved at the end of May 2017 was the main level of a large house. She said that she "felt much better." The floors were "softer" than the laminate covered, concrete floors of her former unit. There was an old sink so that she could wash her hair more easily. It was a smaller space, "bright and sunny, with no small children, no big dogs." She woke up "every day without worrying about being in pain." She testified that she woke up "every day feeling my normal level of sickness and my normal level of pain, not the extra pain."

The Law

[18] Section 10C(1) of the Act is not intended "to provide a tenant with a way to break a lease where the deficiency in the unit is temporary and fixable:" *Arab v. M.R.B.* 2016 NSSM 51, per Adjudicator Slone at para.45.

[19] Neither a residential tenancy officer nor an adjudicator is obliged to accept a Form H that has been signed by "ticked" by a doctor as proof that the tenant has suffered a significant deterioration that renders him or her unable to continue in the apartment unit: *Amaout v. Feria* [2004] NSJ No. 606 at para.6; *Allen v. Black* [2012] NSJ No. 381 at paras.12-13. The form and the doctor's signature on the form is entitled to some deference—but that does not mean that the landlord cannot challenge or question the form: *GNF Investments v. Vriend* 2016 NSSC 116 at para.6. The balance between the tenant's right to privacy with respect to his or her medical condition, and the interest of the landlord in securing his or her lease, is to permit the latter to question "whether there is any justice in forcing it to incur the financial cost associated with an abrupt disruption of its flow of rent:" *GNF Investments Ltd v. Rossell* 2015 NSSM 54, per Adjudicator Slone at para.20. To that end the landlord may ask "what deterioration in health have you suffered, and how are you unable to continue the tenancy, or how is my premises no longer accessible to you:" *ibid*, para.21.

[20] So, for example, a high-risk pregnancy wherein a doctor opined that the tenant should avoid stress, and stair climbing, both of which might risk pre-term labour, were found to satisfy satisfy s.10C(1) in *Allen v. Black, supra*; see also *Rolle v. Rockstone Investments Limited* 2015 NSSM 24 to the same effect. So too continuous water leakage problems that exacerbate a tenant's breathing problems may satisfy s.10C(1): see *Suevrk Management v. Atkinson* 2010 NSSM 1.

[21] However, the stress associated with worrying about water leaks, or the presence of a large, aggressive raccoon on the deck, at least where the landlord took steps to rectify the problems, is not: *Arab v. M.R.B., supra*. Nor is smoke that wafts into the apartment from another unit: *Amaout v. Feria, supra*; or smoke or pet dander from other units, at least where the tenant fails to give the landlord any chance to deal with the problem: *GNF Investments Ltd v. Rossell, supra.*

[22] The last point is important. A tenant who has suffered a serious deterioration is expected to discuss the problem with the landlord. After all, the landlord may be able to remedy the problem. And if the landlord can remedy the problem it can no longer be said that the deterioration in the tenant's health renders him or her unable to continue in the unit. Expecting a tenant to provide the landlord with that opportunity will also go some way towards establishing the merits of the tenant's claim that his or her condition has deteriorated to such an extent that he or she can no longer live in the unit.

[23] The upshot of it then is this. Section 10C(1) will permit an early termination of a lease for medical reasons where there is evidence

a. Of a significant deterioration in the tenant's health, and

b. The significant deterioration renders the tenant unable to continue with the lease.

[24] It must be borne in mind that it is not the existence of a medical "condition" that enables access to s.10C(1). Many people—including Ms Lang—have chronic conditions that make their life difficult. They may suffer chronic pain, or be especially sensitive to chemical smells or fumes, or have physical impairments that make "normal" life difficult. Had the Legislature intended that the existence of such a condition was sufficient to allow a tenant to apply for early termination it would have said so. But it did not. It spoke instead of a "significant deterioration" in the tenant's health. In doing so the Legislature expected and intended that tenants with chronic conditions could and should be expected to inspect a premises before renting to determine whether they could live there with their condition the way it was. If not, they would not rent. If they could, then upon renting the premises they could not later complain (at the expense of the landlord) about the premises *unless* their physical condition later suffered a serious deterioration.

[25] Moreover, the fact that a tenant has suffered a significant deterioration in his or her medical condition does not automatically mean that he or she is entitled to early termination under s.10C(1). There must be something about the interaction between the tenant's medical condition and the unit that, as a result of the deterioration in that condition, makes it impossible for the tenant to continue on in the unit. But where the premises' problematic condition can be remedied, such that the tenant can continue to live there even given his or her deteriorated medical condition, then early termination under s.10C(1) may not be available.

Application of the Law to the Facts

[26] Ms Lang wished to take advantage of s.10C(1) of the Act. To do that the onus was on her to establish that there had been a significant deterioration in her health since moving into the unit in February 2017, ***and*** that any such deterioration rendered her unable to continue living in the unit. In my opinion she failed to satisfy either requirement.

[27] First, the evidence contained in the 2010 medical reports obviously did not and could not speak to her condition in January 2017 (prior to moving into the unit), or to whether it had significantly deteriorated after February 2017. Ms Palmer's note of May 2017 says nothing at all about any deterioration. It speaks only to a chronic condition that is variable over time, which in my mind is no different from Ms Lang's statement that she "has good days and bad days."

[28] The only report that speaks directly to the issue before me is the note of Dr Singleton dated July 20, 2017. On its face it appears to do no more than repeat what Ms Lang told Dr Singleton about her condition. There is no reference to any examination or treatment during the period Feburary-April 2017. And most importantly, the period in issue is February-May 2017, not July 2017. There is nothing to explain why Dr Singleton signed the Form H certificate in April 2017, or in what way Ms Lang's chronic condition (one she had had since 2008) was *significantly* worse in April 2017 than it had been prior to that date.

[29] Second, Ms Lang's testimony as to her condition after February 2017 was vague. The conditions she complained of appear to have existed, on and off, with various degrees of severity, since 2008. Even accepting for the sake of argument that she had entered a period of "bad days" after February 2017 there was nothing to suggest that this period was any different than any other string of bad days she had suffered in the past. Nor too did it establish that the deterioration was "significant"—that is, that it was anything other than the normal type of "bad days" that she would experience in normal course as a result of her chronic condition.

[30] I note too that she had inspected the unit before deciding to rent it. She was aware of its physical structure, layout and amenities. She was aware of its flooring. She must then have accepted that the unit was within the boundaries set by her chronic condition. She did not explain why any such decision on her part had proved wrong.

[31] Third, there was nothing in Ms Lang's testimony to establish that any deterioration in her chronic condition rendered her unable to continue living in the unit. She suffered from chronic complaints that waxed and waned. An increase in pain, accepting that any such increase existed, is not in and of itself proof that she could not live in that unit. All people experience pain from

time to time. But the fact that one experiences pain does not mean that one cannot live in an apartment.

[32] Fourth, there is the point that Ms Lang never complained to GNF about the situation. She never advised that there were problems with noise, or with the size of the sink, or with the fumes or dust, or with the floor. Had she done so GNF may have been able to remedy some if not all of those issues. The law is clear that tenants who want to take advantage of s.10C(1) must do that. Failure to do so does not of course negative resort to s.10C(1). I can agree and accept that some significant deteriorations would render a unit so obviously unfit for the tenant that s.10C(1) would apply. I am thinking, for example, of a tenant living in a two level residence who is rendered a paraplegic. But here the conditions Ms Lang complained of were varied. GNF may have been able to address at least some (the noise, dust and fumes). Given the vague and shifting nature of Ms Lang's complaints it may be that addressing these issues would have been enough to remedy or at least reduce any discomfort that Ms Lang says she was experiencing in the unit. Ms Lang's failure to give GNF the chance to attempt to remedy whatever in the unit was causing problems means that she cannot establish that her condition—even if it had seriously deteriorated—made it impossible for her to continue in that unit.

[33] On these facts and this reasoning I have concluded that Ms Lang did not satisfy the requirements of s.10C(1). She was not entitled to quit the apartment as of May 31st, 2017. That being the case Ms Whitman, who had co-signed the lease, was not entitled to the benefit of s.10C(2) of the Act. That section provides that were a tenancy is terminated pursuant to s.10C(1) "the tenancy is terminated for all the tenants in the same residential premises."

[34] Since Ms Lang was not entitled to quit she cannot complain about the costs associated with the move. Even if she could, I was not satisfied that she had established her claim for the extra costs. The fact that only one elevator was available for use does not mean that the landlord had failed to supply a service normally available to tenants under the lease. Moreover, elevator maintenance, which involves taking an elevator out of service, is a normal occurrence. It is an inconvenience that is a normal part of life in high rise buildings. I would dismiss this part of her claim.

[35] I turn now to the question of mitigation. GNF's measure of damage is the lost rent from June 1, 2017 to January 31, 2018. However, as a landlord GNF was required to mitigate its loss. It did so by entering into a year to year lease on June 1, 2017 for unit 401. The term commenced September 1, 2017. The rental amount in the new lease was redacted, so I take it to have been for the same rent.

[36] I was not satisfied that this was proper mitigation. The new lease was signed a few days after Ms Lang and Ms Whiteman moved out. No explanation was given for GNF's decision to enter into a lease that commenced four months after the apartment was available. I have some concern that the rental agents–-being commissioned agents—may have been more concerned about obtaining a signed lease than making an effort to find a tenant prepared to take the unit sooner. Four months is a long time to wait, at least in the absence of any explanation. It would have been more reasonable to attempt to find someone to take the unit sooner than September 1st. Under these circumstances I have decided to set GNF's loss at two month's rent. Two months is a common period of time when seeking or finding new tenants.

[37] I accordingly allow the appeal, and hence GNF's claim for lost rent, but only for two month's rent at $1,695.00 per month, for a total of $3,390.00. The landlord apparently holds a security deposit of $847.50. On the assumption that it still holds that amount I order that it can be applied to the $3,390.00, leaving a balance of $2,542.50. I will make an order to the effect that both respondents are liable for that amount.

DATED at Halifax, Nova Scotia
this 30th day of August, 2017

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Augustus Richardson, QC
Adjudicator