

Claim No: 463804

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES**

Citation: *Evans v. Lidstone*, 2017 NSSM 36

BETWEEN:

JOEL EVANS

Tenant (Appellant)

- and -

JOHN MICHAEL LIDSTONE

Landlord (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on June 8, 2017

Decision rendered on June 12, 2017

APPEARANCES

For the Tenant Self-represented

For the Landlord Self-represented

BY THE COURT:

[1] This is a Residential Tenancies appeal by the Tenant from an Order of the Director of Residential Tenancies dated May 16, 2017, in connection with a premises at 2317 Hunter Street in Halifax.

[2] The matter came before Residential Tenancies as an application and cross-application, with the Landlord seeking arrears of rent and termination of the tenancy, and the Tenant seeking an abatement of rent because of ongoing problems with the unit, and in particular with the heating system.

[3] The Residential Tenancies Officer terminated the tenancy as at May 26, 2017 and awarded the Landlord the arrears claimed, namely \$5,190.00, plus pro-rated rent for 26 days during the month of May (to the date of termination).

[4] After adjusting for the security deposit, and allowing a small rent abatement, the Tenant was found to owe the Landlord \$5,375.22.

[5] The Residential Tenancy Officer gave the Tenant a small abatement of \$150.00, which is essentially a token award. The Tenant has sought an abatement of \$700.00 per month for a period of six months, which roughly coincides with the peak heating months of the last year of the tenancy.

[6] The two main issues - rent arrears and abatement - are mostly separate, although they have a small area of intersection.

Arrears of rent

[7] There is no dispute between the parties that the tenancy began on December 7, 2012, with a written year-to-year lease at a rental of \$1,095.00 per month. According to the Landlord, that rent never changed.

[8] The Tenant tells a different story. He says that sometime in early 2014, there was a verbal agreement to lower the rent to \$1,050.00 per month, which amount (he says) was applicable up to the end of the tenancy in May 2017.

[9] The Tenant described the circumstances. He says that the Landlord had actually wanted to raise the rent at the one year mark, which the Tenant was unwilling to pay - in part because of maintenance issues. He suggested that the Landlord put the apartment up for rent at the increased rent, and see if there were any takers. There is evidence that such an effort was made, and that nothing materialized.

[10] The Tenant says that the reason he did not think the apartment would rent at an increased amount, let alone the \$1,095.00 being charged, was because of the numerous deficiencies - the most serious of which was an antiquated furnace that kept giving out and needed to be repaired or replaced.

[11] The point at which the parties agreed that the Tenant would stay, is where the evidence diverges. The Landlord says that there was no agreement to reduce the rent. The Tenant says that there was a verbal agreement to reduce it to \$1,050.00.

[12] The objective evidence is equivocal. Although the Landlord and Tenant were in frequent contact by email and text, not once during the following three years was there ever a mention of the supposed amount of the monthly rent.

[13] The payment history is erratic. The Tenant was in the habit of sending the Landlord e-transfers of rent. At no time after January 1, 2014, do we see a transfer of \$1,095.00. Beginning in January 2014, the most common payment amount was \$1,050.00, although there are many others of \$1,000.00, and some for other amounts such as \$1,025.00, \$950.00, \$1,080.00, \$1,140.00, and so on. The strongest inference is that the Tenant did believe that his rent was \$1,050.00, but at times he was unable to pay the whole amount, and often made an effort to make an adjusting payment by adding it on to the next month.

[14] Even so, the evidence supports a view that the Tenant was chronically in arrears, but there is nothing to indicate one way or another precisely what those arrears were at any given time. There is at least one reference by the Landlord in the email correspondence to wanting his "arrears."

[15] If the Landlord is to be believed, the arrears were mounting at the rate of \$45.00 per month consistently, and sometimes by a greater amount. One would have thought that he might have gone on record at some point and said something to the effect that "you do understand that the rent is \$1,095.00, and yet you appear never to be paying that amount." Such a message would have crystallized the issue, assuming there was an issue.

[16] At the hearing before the Residential Tenancy Officer, she awarded the Landlord all of his claimed arrears based on a reconciliation that assumed that the rent was \$1,095.00 throughout the tenancy. The Tenant appeals this finding.

[17] It should be noted that a good portion of the arrears occurred late in the tenancy when the Tenant was essentially on a rent strike. He only paid a total of \$500.00 after February 1, 2017. The difference between the \$1,095.00 and \$1,050.00 figures only accounts for less than \$2,000.00 of the \$5,190.00 of arrears.

[18] My impression of the Landlord is that he was not always attentive to what was going on with the tenancy. He was not a good communicator insofar as these issues were concerned. As such, I would not read too much into his failure to make clear to the Tenant that the rent was \$1,095.00. The Landlord seemed to be somewhat passive in the face of the Tenant's quirky payment history, and one could also say that he was lenient in not enforcing his rights.

[19] I do not reject outright the Tenant's evidence that there were discussions about the rent being other than \$1,095.00, and the payment history supports the Tenant's view, but the question is whether there is a legal basis to find that the lease terms were amended. The written lease was renewed annually, by virtue of the fact that neither party served a formal notice to prevent the automatic renewal.

Was the lease amended

[20] It is a matter of general law that one cannot amend a written contract by entering into a collateral oral agreement, or at least, that a court will be very suspicious of such a claim. People enter into written contracts to bring certainty to their legal affairs.

[21] The most common way to amend an agreement, short of re-writing the contract, is to make the changes in handwriting and initial the changes. That was not done here.

[22] There are other ways that a verbal amendment may be accepted. The court may, in an appropriate case, find that a party (here the Landlord) is “estopped” from enforcing the strict terms of the contract, because of a verbal representation, to the effect that strict rights would not be enforced, where such representation is relied on the other party (here the Tenant) to his detriment. The law regards it as unjust for a party to enforce his full legal rights after declaring that he would not do so.

[23] Neither party raised this argument at the hearing, which is not surprising given that they are not lawyers and estoppel is a legal concept best known to lawyers.

[24] Even so, I believe that the Tenant’s evidence and argument raised this issue implicitly, and I must consider it.

[25] In the case here, had I seen a consistent history of \$1,050.00 payments over three years, I might have been convinced that the Landlord was representing (by his silence) that the rent was that amount. What is missing here is any clear representation by the Landlord that the rent was other than \$1,095.00, as stated in the lease. Estoppel requires a clear representation by a party that they do not intend to enforce their legal rights. In my weighing of all of the evidence, I find no such clear representation. I find a Tenant with a quirky payment history and a passive Landlord. As such, I believe that the written lease governs and the rent never legally changed from \$1,095.00 to \$1,050.00.

[26] This ground of the Tenant's appeal does not succeed.

The abatement

[27] The Tenant complained about the heating system virtually from the beginning of the tenancy. The furnace was more than 50 years old, and it broke down more often than would be considered normal, particularly in and after October 2016.

[28] The Landlord's long term plan had always been to replace the furnace, and promises to that effect were made many times. In early October 2016, the furnace stopped working completely and was not repaired until several weeks later. Although October is not peak heating season, it can get chilly at night and heat may be required.

[29] The repair in October 2016 was a temporary fix. There are different versions of what this consisted of. The Tenant described the repair as "hot wiring" the furnace, such that it would run continuously and could only be turned off at the circuit breaker. The Tenant believes that this was wasteful and cost him a lot of expense for oil, and moreover was not comfortable.

[30] According to the Landlord, who based his view on what the repair person told him, is that it was only the circulating pump that was hot wired, and that the thermostats still controlled whether or not the burner went on.

[31] In a normal situation with hot water heating, the water circulation would not be continuous, but would only engage when the system was calling for heat. If the water does not circulate, the heat from the burner would be wasted.

[32] I am inclined to believe the Landlord. Although the technician was not in court to testify, this is what his invoice says that he did. It is more likely that the Tenant misunderstood what the hot wiring was for.

[33] In the months that followed, there was a new furnace finally installed. There was a period of more than a week when the building was not heated, and the Tenant had to go elsewhere. Also, the new furnace (actually a 7-year old furnace) had some problems that needed several service calls to fix.

[34] The Tenant complained of other issues that would have affected this heating bills, most notably poor windows and lack of weatherstripping on the outside doors.

[35] There were other minor deficiencies raised by the Tenant, such as loose kitchen tiles, an unrepaired ceiling, and a mouse infestation.

[36] As mentioned, the Residential Tenancy Officer allowed a \$150.00 abatement, without any explanation for how this was arrived at. One can read into this that she considered the Tenant's complaints to be minor in nature.

[37] The Tenant appeared to me to be sincere, and even passionate, about the problems that he experienced with the unit. He says that the heating issues kept him from having a roommate, which cost him money. The written records supports

that view that the Tenant complained frequently, and the Landlord responded indifferently and often late.

[38] Abatements are intended to compensate tenants for a service, or part of a service, that they did not receive. Having a poor heating system, and having frequently to complain about it, is something less than a tenant bargains for. I find that the situation between October 2016 and March 2017 was indeed a frustrating one for the Tenant, and that he did not get what he bargained for. The Tenant worked from his home during this time, and had to put up with periods of inadequate heat and frequent repair intrusions.

[39] I do not believe that the Residential Tenancy Officer took these problems seriously enough. The \$150.00 abatement does not come close to what I believe the Tenant deserves. Nor do I believe that \$700.00 per month is justified. I believe the number should be somewhat less than that.

[40] This is not an exact science. My assessment of the appropriate abatement would be \$250.00 per month for those six months, for a total of \$1,500.00.

[41] In the result, the appeal is allowed, in part, and the Landlord is entitled to be paid the net amount of \$4,025.22.

[42] There is no need to deal with termination of the tenancy, as the Tenant moved out on the date specified in the order of the Residential Tenancy Officer.

Eric K. Slone, Adjudicator