SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: 3010282 Nova Scotia Ltd. v. MacNeil, 2018 NSSM 1

SCCH No.469120

BETWEEN:

3010282 Nova Scotia Limited

Appellant

– and –

Kate MacNeil and Christina Gillis

Respondents

Adjudicator: Augustus Richardson, QC

Heard: February 5th, 2018

Decision: February 6th, 2018

Appearances: Kevin A. MacDonald, for the Appellant
Megan Deveau and Melanie Anderson, for the Respondents

DECISION and ORDER

[1] Is a tenant required to accept any amount of disruption caused by renovations being conducted to his or her rental unit by the landlord? Or is there a line past which a tenant is entitled to an abatement of rent? If there is such a line, can it be avoided by agreement between the tenant and the landlord? These are the questions addressed in this appeal.

Background

[2] This was an appeal by 3010282 Nova Scotia Limited (the "Landlord") of a decision of a Residential Tenancy Officer dated September 28, 2017. In that decision the Respondents Kate MacNeil and Christine Gillis (the "Tenants") were awarded $1,053.00, and their application fee of $31.15, for a total of $1,084.15 by way of an abatement of their monthly rent of $1,350.00. The abatement was awarded for disruption caused to the Tenants use and occupation of their third floor rental unit at 6114 South Street, Halifax. The disruption was caused by renovations of

the unit conducted by the Landlord's workers during the period April 22nd through to May 31st, 2017.

[3] The Landlord appealed this decision, essentially on the grounds that

a. There had been an agreement between the Landlord and the Tenants that in exchange for an upgraded, renovated unit they would not be subject to a rent increase if they renewed their lease in September 2017;

b. The Tenants were advised before the renovations started that there would be a disruption, and had they not agreed to accept it the Landlord would not have proceeded with the renovations; and

c. The Tenants had had the use and occupation of the unit during the renovations.

[4] At the hearing I heard the testimony of

a. Gerald MacKay, a carpenter hired by the Landlord,
b. Duncan MacAdams, the owner of the Landlord,
c. Kate MacNeil, and
d. Christina Gillis.

[5] I was also provided with photographs, emails and other documents relating to the tenancy, the correspondence between the Landlord and the Tenants over time, and the scope and extent of the renovations. Based on that evidence I make the findings of fact set out below.

[6] The Landlord is a company owned and operated by the family of Duncan MacAdams; his wife, Anne Thompson, acts as the Landlord's rental agent, while Mr MacAdams overalls the Landlord's operations.

[7] The Landlord owns eight rental buildings in and around the south end of Halifax, comprising some 85 rental units. It has been in the business for 30 years. Roughly 75% of its tenants are university students.

[8] In or about the early summer of 2016, and as per the Landlord's standard practice, the Tenants entered into three fixed term leases with the Landlord: one for the month of September 2016 for $3,100.00 per month; one fo October 2016 to July 2017 for $1,350.00 per month; and one for August 2017 for $1.00 per month.

[9] At the time of their discussions with Ms Thompson about the unit, the Tenants were told by her that the Landlord intended at some point in the following year to replace the carpet in the unit.

[10] All three leases were executed at the same time in the summer of 2016.

[11] It was also the Landlord's practice when renewing a "year" lease with tenants to renew at the same rent without any rent increase.

[12] In December 2016 the Tenants reported problems to the Landlord with heat in their unit.

[13] The unit was heated by cast iron radiators which, because they were on the third floor, sometimes lacked sufficient pressure (or had air locks) leading to lack of heat.

[14] On January 19th, 2017 Ms Thompson began to pressure the Tenants as to their intentions for the following September—she wanted to know whether they were going to renew and, if so, required them to submit their applications as soon as possible.

[15] Ms Thompson was advised on January 19th that the Tenants thought it likely that they would be staying, but asked whether "there are any plans to update the flooring in the apartment, as the carpet is unattractive and holds quite a bit of dust."

[16] On February 26th Ms Thompson advised that Mr MacAdams was "looking at flooring options for your apartment, most specifically for the living/dining/kitchen and hallway areas." She added that the Landlord "would need a period of timie to do this work, ideally when both of you might be away for a period of timie so as to minimize inconvenience and time on-site." She asked whether "such a window of time [is] likel over the next 2-3 months."

[17] On the same day Ms Gillis advised that she would be home in Cape Breton for a week or two after April 21st, but that Ms MacNeill would remain living there "but she can leave if necessary."

[18] There were further problems with heat in March.

[19] On March 8th Ms Thompson forwarded leases to the Tenants for the 2017-18 year, noting that their rent "will remain the same." Ms Thompson continued to press the Tenants to sign the new leases.

[20] On April 19th Ms Thompson notified the Tenants that Mr MacAdams was "ready to start installing your new flooring first thing this Saturday [April 22nd]," noting that he had "scheduled two guys to come over the weekend."

[21] On the same day Ms MacNeil emailed Ms Thompson:

> "Yes this works. Christina will be going back to Cape Breton on Saturday but I will still be in Halifax. What is the best thing for me to do so has to be out of the way? Would you recommend I stay with friends for the duration of the installation or will I be able to come and go to stay the night at the apartment?"

[22] Ms Thompson replied that the men would be arriving around 9:00 a.m. on that Saturday; that they would be putting down new flooring in the common areas only; and that "[w]e anticipate this will take all day Saturday and possibly most of Sunday." The workers would need to move some of the kitchen appliances into one of the bedrooms in order to do their work, and Ms Thompson asked which one should be used.

[23] Mr MacAdams arrived with Mr MacKay and a man named "Larry" on April 22nd. Ms Gillis was there; Ms MacNeil, who was at the library at the time. Larry pulled up the carpet. It became apparent that Mr MacAdams' plan—which had been to pull up the carpeting and replace it with click flooring—would not work. Click flooring requires a flat subsurface. The floor in the unit was not even; the underlying joists were not even. Mr MacAdams decided at that point that since the subfloor and joists would need to be levelled he might as well install infloor heating. That would address the heating problems associated with the old cast iron radiators, and would as well increase the living space by removing them. The work at this point was clearly more involved and would be far more disruptive of the Tenants' use of the unit. Mr MacAdams expected that it would now take until the end of May to complete.

[24] Mr MacAdams testified that he told the Tenants (Ms MacNeil having been contacted on speaker phone and then later returning to the unit) that he would need the unit to be vacant for a month to enable the renovations to be completed. He said that they agreed. The issue of a rent abatement was raised by them at the time and he refused to provide one. He testified that instead

he offered to keep their rent at the same level should they choose to renew in September. He testified that they agreed.

[25] The Tenants' testimony was somewhat different. They agreed that they asked for a rent abatement and that Mr MacAdams refused. Ms MacNeil testified that she then asked Mr MacAdams "if we could stay, and he said 'yes,' it would be completely liveable." Ms Gillis testified that he said that it "would be better if they were not there" but she told him that that was not possible for her, since she would be in Cape Breton only for two weeks. She asked Mr MacAdams if he had any other units she might be able to stay in while the renovations were conducted, but he said that "it would be completely liveable."

[26] As it turned out, the extent of the renovations meant that the Tenants did not have a functional kitchen for much of the time. Their bathroom was cluttered with workmen's tools and then with construction dirt and dust. One or the other of the bedrooms was full of the kitchen appliances. The floors were ripped up leaving exposed joists, over which sheets of plywood or boards had to be placed so that the Tenants could move around when in the unit in the evenings. During the days there were three workmen working 10 hours days, seven days a week, ripping up flooring, fixing and replacing joists, installing infloor heating and new flooring on top, installing cabinets and kitchen counters. The work was completed by the end of May. Photographs introduced at the hearing demonstrate both the extent of the work being carried out and the very nice result. The unit, as Mr MacAdams said several times, had been upgraded "into the 21st century."

[27] On these facts I am satisfied that the appeal must be dismissed. I come to this conclusion for a number of reasons.

[28] First, Statutory Condition 1 of the standard residential lease requires a landlord "to keep the premises in a good state of repair and fit for habitation during the tenancy." Statutory Condition 3, which applies to both tenants and landlords, requires each of them to conduct themselves "in such a manner as not to interfere with the possession or occupancy of the tenant or of the landlord and the other tenants." These conditions mean that while a tenant must accept *some* disruption in his or her use and occupation of the premises when such disruption is necessary to enable a landlord to repair or maintain the unit, he or she is not required to accept massive disruption and interference with the normal use and occupation of a residential unit. I am satisfied on the facts that such massive disruption did occur. A unit that cannot be used during the day by two females because it is crowded with three male workers hammering away; which lacks a functional kitchen; which requires careful navigation over open joists; and which

fills bedrooms with kitchen appliances, is not a unit that is "completely liveable." Indeed, I have some doubt that it even qualifies as "liveable," unless one's definition of liveable is akin to being able to sleep in a tent in the forest.

[29] Second, and insofar as the "agreement" is concerned, I am satisfied that while the Tenants understood, accepted and agreed that some disruption would result from the renovations, their agreement extended only to the limited disruption that might be associated with moving appliances around while one part of the floor or another was worked upon. That is what Mr MacAdam had suggested to them would be the case. That is not in fact what happened. It strains credulity to think that any tenant would knowingly agree to the amount of disruption that did occur without at the same time requiring an abatement of rent. To come to any other conclusion would require a finding that in normal course a tenant would agree, in effect, to pay a month's rent for a unit that he or she could not use.

[30] Third, there was no consideration for the agreement that Mr MacAdams says he entered into with the Tenants. He testified that they had accepted the disruption based on his offer to them that he would not increase their rent should they choose to renew in September. However, the evidence is clear that the Landlord, via Ms Thompson, had already agreed to renew the lease at the same rent months before the Landlord knew that the renovations would be necessary. Hence Mr MacAdams was offering in consideration nothing more that what had already been promised to them.

[31] Fourth, and in any event, I reject the Landlord's argument that it was entitled to enter into an agreement that enabled it to inflict such conditions on the Tenants. The Statutory Conditions are just that. They exist and apply "[n]otwithstanding any lease, agreement, waiver, declaration or other statement to the contrary:" s.9(1), *Residential Tenancy Act*. A landlord is not entitled to enter into agreements to the contrary, nor can it force tenants to enter into such agreements.

[32] Finally, I was not persuaded by the Landlord's argument that had the Tenants not agreed to accept the disruption caused by the renovations he would have waited until they were gone. In my view the true underlying issue was who was going to bear the cost of a lost month of rent (or occupation) for the unit while it underwent such extensive renovations. It is clear on the facts (and photos) that the Landlord would not have been able to rent the unit to new tenants while the work was going on. So had it waited until the Tenants' lease was over the Landlord would have lost a month's rent. In order to avoid that the Landlord in this case sought to shift the cost onto the Tenants by, in effect, getting them to pay a month's rent for a unit they could not use. That result is neither fair nor just.

Order

[33] For all these reasons then the appeal of the Residential Tenancy Order is dismissed. The Landlord shall pay to the tenants the $1.084.15 ordered by the Residential Tenancy Order of September 28, 2017.

DATED at Halifax, Nova Scotia
this 6th day of February, 2018

Augustus Richardson, QC
Adjudicator