

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Milne v. Metropolitan Regional Housing Authority, 2010 NSSM 5

BETWEEN

Donna Milne

APPELLANT

- and -

Metropolitan Regional Housing Authority

RESPONDENT

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: January 13, 2010

Decision: January 26, 2010

Scott McGirr Senior Law Student and Counsel, Fiona Traynor represented the Appellant Counsel, Terry Potter represented the Respondent

Parker:- This matter came before the Small Claims Court of Nova Scotia at Halifax on the January 13, 2010

This is an appeal of an Order of the Director of Residential Tenancies dated November 17, 2009 and File #200903477

The parties were advised that this was an appeal from a decision and order of the Director of Residential Tenancies and as such will be conducted as a new trial.

The parties were asked if there are any questions about the procedure to be followed in the Small Claims Court hearing and there being none the matter proceeded accordingly.

This matter involved bedbugs found in the Appellant's rented premises. The Appellant was seeking the following relief:

- Rent abatement July 2008 to November 2008 in the amount of \$1965.00
- rental cost for alternative housing November 2008 to April 2008 in the amount of \$2800.00
- moving expenses in the amount of \$270.00
- cleaning services and supplies in the amount of \$1572.00
- replacement cost for personal items and furniture \$4907.00
- travel and miscellaneous expenses \$490.00.

The total amount of damages being sought by the Appellant was \$12,012.00.

After hearing the evidence of the Appellant and the Respondent's witnesses including the property manager and the pest control people involved the following factual conclusions were determined;

The Appellant's premise was indeed infestation with bedbugs.

The Appellant made efforts to notify the Respondent in September 2008 about the situation and the Respondent took active steps to eliminate the bedbug infestation. Further the Respondent had the pest control people inspect every unit on the Appellant's floor as well as every unit in the floors above and below the Appellant. A total of 60 units were inspected and it was determined that there were no bedbugs in any of the 60 units and except for the Appellant's.

The Appellant's unit was fumigated a total of eight times commencing in September 2008 and ending in January of 2009.

The Appellant noticed no bedbugs after December 2008 and there were no bedbugs found after the final spraying January 27, 2009.

The Appellant moved out of the apartment in October/November 2008 and returned at the end of April 2009.

The Appellant paid rent on her rental unit until November 30, 2008.

The Respondent did not require the Appellant to pay rent from December 1, 2008 until April 30, 2009.

The Law and the Analysis:

The Appellant in her testimony advised the court that she did not have people into her apartment and did not socialize with other people within the apartment complex. There is no evidence whatsoever that the bedbugs migrated from other areas in the building or adjoining units to the Appellant's unit. The expert evidence of the pest control people lead to the conclusion that the bedbugs entered the apartment with someone or something being brought into the apartment.

Counsel for the Appellant invited me to accept the position that since bedbugs were in the unit then the Respondent/Landlord should be responsible for the relief being sought.

The director it would appear in his decision held the Landlord in this case the Respondent was responsible for those months when the Appellant had moved out of the apartment and when the fumigation was continuing to occur. That time being October 15, 2008 to January 31, 2009 where the Appellant paid \$400 per month and therefore the Appellant was entitled to compensation for 3 1/2 months or \$1400.00. The director then

went on to say in his order that as the Appellant was compensated with a rent rebate of \$1990.00 representing December 1, 2008 to April 30, 2009 then in such a case the \$590.00 difference was sufficient compensation for the Tenant's inconvenience and out of pocket expenses from September 2008 to January 31, 2009. The director then went on to say that as there was no negligence in the director's view on the part of the Landlord/Respondent the Landlord therefore is not responsible for damage to the Tenant's in this case the Appellant's personal property.

Hagan v. M. Bergen Ltd. [1984] M.J. No. 72; 28 Man.R. (2d) 271

[Head note]This was an action for a refund of rent paid for an apartment owned by the defendants. Two weeks after moving into the suite, the plaintiffs discovered that it was infested with bedbugs. The plaintiffs vacated the suite for one week while the defendants fumigated the premises but gave notice immediately after viewing the suite upon their return. Large numbers of dead bedbugs littered the floor and a note from the fumigator indicated that further fumigations might be required.

HELD: The action was allowed. An apartment infested with bedbugs at the commencement of the term was not "fit for habitation" within the meaning of s. 98 of the Landlord and Tenant Act. The plaintiffs were entitled to terminate the lease immediately and were not required to give the notice required under s. 98(3) of the Act. The plaintiffs did not waive the right to terminate the lease by leaving the premises while the fumigation was carried out. Under all the circumstances, the repudiation was made within a reasonable time. Although the plaintiffs occupied the suite for two weeks, the suite was not in a habitable condition and the defendants were not entitled to rent for such period. The plaintiffs were entitled to a refund of rent and damages for moving and storage costs and costs of fumigating their furniture. No general damages were allowed for the plaintiff's pain and suffering allegedly caused by bedbug bites, in the absence of adequate medical evidence.

In the Hagan the case the court found the only logical conclusion that can be reached was that the bugs were in the suite when the plaintiffs moved into it.

The case we are now dealing with the Respondent/Landlord suggested that the only logical conclusion that could be reached was that the bugs were introduced into the suite by the Appellant/ Tenant. This appears on its face to make sense as the evidence disclosed that the Appellant did not socialize or invite visitors into her apartment. Further the Landlord/Respondent had 60 units inspected for bedbugs and these units were all on the same floor or in the floors above and below the Appellant. No bedbugs were found in any of the 60 units. The Landlord/Respondent also said that a bedbug was found in books located above the bed of the Appellant. It was confirmed by the pest

control people that indeed a bedbug was found in one of the books. The evidence of the pest control people was that the bedbugs did not migrate from an adjoining apartment or another apartment into the Appellant's apartment rather they would be carried in either on a person or on objects brought into the apartment.

The Appellant proposed her own theory and that was that the bedbugs came in with the Respondent's maintenance workers who were carry out maintenance in her apartment in July. It was soon thereafter that she encountered red welts on her person. To counter this argument the pest control people gave evidence that if any of the Respondent/Landlord's workers or employees were carriers of the bedbug it would have been reported to them as their own residence would be affected.

In terms of damages awarded in the **Hagan** case the court concluded the following:

“The plaintiffs are therefore entitled to a refund of rent for the month of October, as well as a refund of the amount which they paid to the rentals man for the November rent. In addition, they are entitled to be reimbursed for their moving and storage costs in the sum of \$275.32 and costs of fumigating the furniture in the sum of \$45. The female plaintiff testified that she had some of her clothes dry cleaned but there was no proof of any expenses being incurred in this regard, and therefore any claim in this regard is disallowed.”

Boardwalk Rental Communities v. Ravinen [2009] A.J. No. 1016; 2009 ABQB 534

[Head Note]Appeal by the Landlord, Boardwalk Rental Communities, from a rent abatement and damages award in favour of the Tenant, Ravine. The Tenant suffered a bedbug infestation in her residence rented from the Landlord under an oral agreement. The Tenancy Dispute Officer awarded abatement of one and half a month's rent plus damages for the cost of alternative accommodation for the same period. The Officer refused the Tenant's claim for damages for the purchase of chemicals to fight the infestation and new furniture including a new bed. The Officer found no negligence, impropriety or substantial breach of the Residential Tenancies Act by the Landlord. The Landlord appealed on the basis that it could not be held to a standard of strict liability in the absence of a finding of a substantial breach of the Act. The Tenant submitted that the bedbug infestation breached the Landlord's covenant for quiet possession of the premises. She submitted that a breach of statutory covenants related to public health issues constituted a substantial breach under the Act.

HELD: Appeal dismissed. The Officer clearly found that the Tenant had suffered a bedbug infestation which she did not cause and rendered her residence uninhabitable. The infestation forced her to leave the premises for two weeks while the Landlord addressed the matter. In such scenario, the Tenant did not have peaceful enjoyment or quiet possession, of her leased premises. That breach of the Landlord's obligations subjected it to an award for abatement of rent and damages. The fact

that the Landlord was not negligent or unreasonable in addressing the infestation did not detract from its obligation to provide the Tenant with a premises that was capable of occupation.

In this case Justice Viet stated at paragraph 5;

“The Tenancy Dispute Officer made clear findings that the Tenant had suffered from a bedbug infestation which she did not cause, but which caused her to have to leave the premises for some 2 weeks. That finding is a finding that, during those weeks, the Tenant did not have "peaceful enjoyment", or quiet possession, of her leased premises. Where there is a breach of the Landlord's obligation to provide peaceful enjoyment of leased premises, the Landlord becomes subject to abatement of rent and damages.”

And Paragraphs 20 to 22 Justice Viet also references a Nova Scotia Small Claims Court decision of Opus 3:

20 Similar reasoning applies in this case. Even though in this case the Landlord was not negligent or unreasonable in dealing with the bedbug infestation, it still had an obligation to provide the Tenant with premises that could be occupied.

21 The problem of bedbugs in residential tenancies is one which appears to be treated in the case law as a matter of degree. Case law may establish that where a Landlord is making reasonable attempts to deal with the problem, although a Tenant will be entitled to an abatement of rent and perhaps damages to compensate for the breach of the obligation of quiet possession, a Tenant will not be able to terminate the tenancy. It may be that it is only in the most serious situations of infestation that cannot be dealt with relatively promptly or where the Landlord refuses to act reasonably that bedbugs can provide a basis for the termination of a tenancy. Some of these notions are discussed in **Opus 3 Investments Ltd.** The Nova Scotia decision includes the following comments:

- **67** Statutory Condition One (that is deemed to be part of the agreement between a Landlord and a residential Tenant pursuant to Section 9(1) of the Residential Tenancies Act) provides as follows:
 - "1.
 Condition of Premises - The Landlord shall keep the premises in a good state of repair and fit for habitation during the tenancy and shall comply with any statutory enactment or law respecting standards of health, safety or housing."
- **68** I was not presented with any information respecting whether or not the presence of bed bugs is contrary to any specific statutory enactment or law respecting health, safety or housing standards.
- **69** That said, I am satisfied that a bed bug infestation renders residential leased premises unfit for habitation. While I doubt that any authority is required for that proposition, I was able to locate the decision in *Hagan v. M. Bergen Ltd. (c.o.b. Edison Rental Agency)*, [1984] M.J. No. 72 (Co. Ct.) that reaches that same conclusion; i.e. that premises infested with bed bugs are not "fit for habitation."

- 70 There is no evidence to suggest that the Tenant is in breach of Statutory Condition Four that reads as follows:
 - "4.

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 willful or negligent act of the Tenant or of any person whom the Tenant permits on the premises."
- 71 Based upon the evidence that I heard, I am satisfied that the Tenant has largely done what she can to keep the leased premises clean and free of bed bugs.
- 72 That said, any attempts to eradicate the persistent bed bug problem in the leased premises will require a certain degree of ongoing co-operation between the Landlord and the Tenant. The Landlord has the right to gain entry to the leased premises upon provision of adequate advance notice to the Tenant to, for example, apply any caulking that is required, in addition to having bed bug treatments carried out and carrying out necessary inspections. It is in the Tenant's own best interest, and that of her children, that she fully co-operate with that process despite whatever bad feelings towards the Landlord she may have because of her view that the matter was inappropriately handled when she first notified the Landlord of the bed bug problem.
- 73 In the face of a dearth of evidence that the Tenant is somehow even partially responsible for the initial presence of the bed bugs in the leased premises, financial responsibility for addressing the bed bug infestation and arranging for the further necessary treatment(s) to be carried out falls upon the Landlord in accordance with Statutory Condition One.
- 74 The question then becomes whether or not a rent rebate is appropriate for what has been, as the Tenant put it, "just a nightmare."
- 75 There is no question that the Tenant has endured a certain degree of inconvenience, trouble and expense. I am satisfied, however, that the Landlord has not ignored the problem. It did ultimately attempt to have the matter addressed, even though a successful result has not yet been obtained. There is no question that bed bugs are tenacious pests and that it can be very difficult to eradicate them.
- 76 In the circumstances, I am prepared to allow for a rent rebate of \$500.00 for the Tenant's past stress and aggravation over the past few months and I will order the Landlord to pay that sum to the Tenant.

22□

Other variations on that theme are found in Fleming and Hagan.

The **Boardwalk** case and the inclusion of the **Opus 3 Investments Ltd v. Schnare** [2009] NSJ No. 179 case suggests that if the Tenant does not contribute to the bedbug infestation, the Landlord becomes wholly responsible for addressing the infestation in

arranging the fumigation of the apartment. The particular case at hand and what I have had to come to grips with is whether or not the Tenant/Appellant is responsible for the introduction of bedbugs into her unit. It is not necessary for the Landlord to show the Tenant is responsible on the basis of a high degree of certainty but only on the basis of a balance of probabilities that that is the case. In this particular case I have considered all those factors enumerated earlier and I cannot conclude that the infestation was caused by the Tenant/Appellant or the workmen who entered the apartment to do some maintenance work. I wish more questions have been asked or that the workers who were in the apartment had appeared in court to provide some clarity, however in the long run it may not have made any difference in determining where these little creatures came from. At the end of the day to draw a conclusion would be based on circumstantial evidence and deductive reasoning. As I stated I cannot say with certainty that there is sufficient evidence to determine exactly how the bedbugs took up residency in the Appellant's apartment. Nor can I say on the balance of probabilities that it was the Respondent's workers or the Appellant herself that was responsible for the bedbug infestation.

I also taken from these cases and other cases such as **Bramar Holdings Inc. v. Deseron** [1996] O.J. No. 1013 and **Fleming v Bradin Properties Ltd.** [1994 O.J. No. 547 that in addition to a rebate on the rent the Landlord would be responsible for certain damages related to the infestation. I realize this is a high degree of responsibility placed on a Landlord not only by the case law but by the interpretation of Statutory Condition One. The case law however is clear, notwithstanding the Landlord makes all the reasonable and necessary steps to eradicate the problem, when the Tenant is unable have quiet enjoyment of the premises the Landlord will be held responsible by way of a rebate of rent and possibly damages.

The powers vested upon this appeal court are also outlined in the Residential Tenancies Act and they are as follows:

Contents of order

17A An order made by the Director may

- (a) require a Landlord or Tenant to comply with a lease or an obligation pursuant to this Act;**
- (b) require a Landlord or Tenant not to again breach a lease or an obligation pursuant to this Act;**
- (c) require the Landlord or Tenant to make any repair or take any action to remedy a breach, and require the Landlord or Tenant to pay any reasonable expenses associated with the repair or action;**
- (d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;**
- (e) terminate the tenancy on a date specified in the order and order the Tenant to vacate the residential premises on that date;**
- (f) determine the disposition of a security deposit;**
- (g) direct that the Tenant pay the rent in trust to the Director pending the performance by the Landlord of any act the Landlord is required by law to perform, and directing the disbursement of the rent;**
- (h) require the payment of money by the Landlord or the Tenant;**
- (i) determine the appropriate level of a rent increase;**
- (j) require a Landlord or Tenant to comply with a mediated settlement.**

1997, c. 7, s. 7.

Consequences of failure to appeal

17B (1) Where no appeal is made pursuant to Section 17C, a decision or order made by the Director under this Act may be made an order of the Small Claims Court and may be enforced in the same manner as any order or judgment of that Court.

(2) To make a decision or order made by the Director an order of the Small Claims Court, the Director shall endorse a copy of the decision or order certified by the Director to be a true copy as follows:

Make the within an order of the Small Claims Court.

Dated this day of , 20

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Director of Residential Tenancies

(3) The Director may forward the decision or order so endorsed to a clerk of the Small Claims Court who shall, upon receipt thereof, enter the same as a record and it thereupon becomes and is an order of the Small Claims Court and enforceable as any order or judgment thereof.

2002, c. 10, s. 25.

Appeal to Small Claims Court

17C (1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the Small Claims Court.

(2) An appeal may be commenced by filing with the Small Claims Court, within ten days of the making of the order, a notice of appeal in the form prescribed by regulations made pursuant to the

Small Claims Court Act accompanied by the fee prescribed by regulations made pursuant to the *Small Claims Court Act*.

(3) The Appellant shall serve each party to the order and the Director with the notice of appeal and the notice of hearing.

(3A) Service of all documents may be by personal service or such other manner of service or substituted service permitted pursuant to the *Small Claims Court Act*.

(4) The Small Claims Court shall conduct the hearing in respect of a matter for which a notice of appeal is filed.

(5) The Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.

(6) The Small Claims Court may conduct a hearing orally, including by telephone.

(7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.

(8) The evidence at a hearing shall not be recorded.

1997, c. 7, s. 7; 2002, c. 10, s. 26.

Duties of Court on appeal

17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C(4), the Small Claims Court shall

(a) confirm, vary or rescind the order of the Director; or

(b) make any order that the Director could have made.

(2) repealed 2002, c. 10, s. 27.

1997, c. 7, s. 7; 2002, c. 10, s. 27.

Decision:

In this particular case the Tenant/Appellant first noticed the problem at the end of July and it was eventually identified in September as a bedbug problem. The Appellant made it known to the Landlord and the Landlord took immediate steps to eradicate the problem. The Tenant moved out in mid-October and move back in the apartment at the end of April. Rent rebate should only be for the months when the apartment was infested with the bedbugs. While the final spray or fumigation of the apartment occurred at the end of January the evidence is that there were no bedbugs later in December 2008. I would therefore allow a rebate of rent for the months of August, September, October, November and December. The Appellant did not pay December's rent of \$393.00 and

therefore the rebate would be for the months of August to November that is four months at \$393.00 per month for a total of \$1572.00. The Appellant did pay another person for the month of December when she was out of her apartment therefore I would allow that amount to be claimed up to \$393.00 as she would have received a rebate for December month. There is evidence that the spraying of the apartment does not cause the apartment to be not habitable for a more than a few hours and therefore there is no reason for the Tenant/Appellant to be of the apartment during January month. The Tenant/Appellant is asking for a rental costs for alternative housing and excepting for December of month it is my view that is accomplished through the rental rebate required by law during the time that she could not have quiet enjoyment of her apartment. The Respondent/Landlord provided the Appellant a rebate of \$1990.00 this being an overpayment of rebate required by law of \$418.00.

I have to consider now damages that were incurred as a result off the infestation of bedbugs in the Respondent's apartment. This presents itself with some difficulty as I was only presented with the evidence of booklet and this evidence was not presented except in a cursory manner by the Appellant through direct examination and obviously was not cross-examined on by the Respondent and this would include the affidavit contained in that booklet. However if this matter goes to appeal I shall at least direct my attention to what is contained in the book and try to deal with it in a reasonable manner as if it was presented to me formally through direct examination. I realize that the rules on admissibility of evidence are often thought by counsel as being somewhat lax, a term often used in his court.

The Small Claims Court Act speaks to the admissibility of evidence in section 28 which states the following:

Evidence

28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing that

(a) would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) is inadmissible by any statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings. *R.S., c. 430, s. 28*

This appears to give the adjudicator wide latitude into what is admissible in the Small Claims Court. However in conjunction with this is section 2 of the Act which requires the adjudicator to abide by the principles of law. Section 2 states the following:

Purpose

2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice. *R.S., c. 430, s. 2.*

This is somewhat tempered by section 17[C][3] Of the Residential Tenancies Act which states as follows:

(7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.

Notwithstanding section 17[C] [3] and section 28 noted above the court must be careful on what it accepts as admissible evidence to prove a fact. It is my view that even though documentation may be placed before the court unless it has some supporting foundation and unless it complies with some basic rules of evidence it should be given little or no weight. For example there is the affidavit of the Appellant submitted in a booklet of exhibits. A number of the enumerations therein were effectively brought forward through rather effective and clear questions put forward to the Appellant by the Appellant's Senior Law Student during his direct examination. However it would have been more complete if the affidavit had been referenced when the Appellant had been on

the witness stand and then she could have been cross-examined on the contents of her affidavit. What was left out of the affidavit on direct examination was not cross-examined and those particular facts if they are correct would be hearsay evidence unless it was supported by other reliable factual information.

Some of the compensation noted in the exhibit book tab 2 was not dealt with in the direct examination and therefore it is difficult for the court to deal with them. A couple of the notations in the enumerated list of compensations being sought were dealt with by the Respondent's Counsel to show there was no support for those items or that they would not be relevant in terms of compensation. The two that were mentioned were the collection of horse models and damage to their boxes causing a loss of value of \$500.00. Counsel for the Respondent correctly pointed out that there is no basis for this conclusion. Another item on the list was clothing at \$2000.00. Again there were no foundation receipts that were brought to the court's attention. Notwithstanding that I will deal with those which I am able to address on their face in the event the matter goes to appeal and the Appeal

Court wants to understand how I arrived at my conclusion on damages that I considered would be appropriate in this particular case. In reviewing the receipts for items purchased in the clean up I was able to tally approximate \$470.00 inclusive of tax. There are a number of hand written receipts for Wanda Bullerwell and Reg McLean which appear to be related to assisting the Appellant in cleaning the apartment. These amounted to 92 hours at \$10.00 per hour for a total of \$920.00. It is difficult to determine what work was done, who did the work or even in fact if it was for dealing with the infestation. Certainly some time was required and \$393.00 would be inappropriate amount in the circumstances. There are a number of unsupported items detailed in correspondence from the Appellant to the Respondent again these are not dealt with in direct examination and with respect to furniture items I cannot determine what their value was or if a betterment element should be applied and therefore I am simply just not going to allow the amount being claimed. There must however been some losses in this area and I would allow again a month's rent to equate to these losses. Therefore I would allow another \$393.00

In summary I would allow the following:

\$1572.00 Rebate of Rent representing August to November

plus \$393.00 representing December's rent

less \$1990.00 payment made by landlord

plus \$ 470.00 cleanup items and replacement items

plus \$ 393.00 cleanup assistance

plus \$ 393.00 attributed to personal property losses

\$1231.00 The total amount to be paid to the Appellant

Following a hearing:

That the Director of Residential Tenancies Order dated November 17, 2009 and File #200903477 is hereby varied as follows:

The Respondent shall pay the Appellant **\$ 1231.00**

IT IS THEREFORE ORDERED THAT the Respondent pay the Appellant the following sum:

\$1231.00

Dated at Halifax, 26 dated January 2010

David T.R. Parker
Small Claims Court Adjudicator