

SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Islam v. Cygnet Properties Ltd.*, 2024 NSSM 9

ON APPEAL FROM AN ORDER OF THE
DIRECTOR OF RESIDENTIAL TENANCIES

Date: 20240207
Docket: 529214
Registry: Halifax

Between:

Aliya Ali Islam

Appellant (tenant)

v.

Cygnet Properties Ltd.

Respondent (landlord)

Adjudicator: Eric Slone

Heard: February 1, 2024

Decision: February 7, 2024

Counsel: Tammy Wohler, Nova Scotia Legal Aid, for the Appellant
James Taylor and Janet Dares for the Respondent

By the Court:

[1] This is an appeal by the tenant from a decision of the Director of Residential Tenancies dated December 8, 2023.

[2] This case raises the question of to what extent, if any, is a Residential Tenancies Officer (and by extension this court) bound to terminate a tenancy when the tenant is, or has been, in arrears of rent.

[3] This matter concerns a tenancy for a house on Kelly Street in Halifax. Rent during the relevant period was \$1,785.00 per month on a year-to-year tenancy that commenced in October of 2020. The tenant lives there with her five children.

[4] It appears that the tenant fell into significant arrears beginning in about August 2023. She explained that her five children had been taken into care by the Department of Community Services (child protection), resulting in the cessation of her Canada Child benefit which led to a drastic decrease in her household income. This was a time of significant crisis for her family. The court understands that the children have since been returned to her care and the Canada Child benefit has been reinstated. Her ability to cover the rent in the future does not appear to be in doubt.

[5] The landlord elected to serve a Form J in late October 2023, bringing the matter directly to the Director of Residential Tenancies for a hearing on December 8, 2023. That application sought termination of tenancy and to address current and future rent.

[6] The landlord did not serve the tenant with a Notice to Quit for rental arrears (a Form D), which they could have done. This distinction will become important. Without a Form D, a Form K could not follow and an order for vacant possession could not be issued without a hearing.

[7] The tenant's phone apparently ceased working the evening before the hearing and she was unable to call into the Residential Tenancies hearing, and so her voice was not heard by the Residential Tenancies Officer. An Order for vacant possession on January 15, 2024, and payment of arrears in the amount of \$3,924.00 was issued. She appealed to the Small Claims Court in a timely manner. After a short first appearance, the hearing proceeded over zoom on February 1, 2024 with the tenant having legal representation. Counsel subsequently submitted some written submissions mostly concerning the legal issues raised.

[8] In the weeks since the Residential Tenancies order, the tenant has brought

her arrears entirely up to date, which includes February rent. The tenant wants to continue with the tenancy.

[9] The landlord argues that the tenancy should nevertheless be terminated. Apparently, there have been other incidents of arrears, though we did not delve into the details. The evidence before me does not point to a tenant who has been chronically in arrears during the tenancy. I am willing to accept that there has not been a perfect record, which is sometimes the case where outside agencies are responsible for paying some or all of the rent. But that is a far cry from the situations we often encounter where the tenant has a chronic difficulty paying rent.

The statutory scheme

[10] There is more than one way for a landlord to attempt to obtain termination of a tenancy on the ground of rent arrears.

[11] Under s.10(6) of the Residential Tenancies Act, if the rent is more than 15 days in arrears, the landlord may serve a Form D Notice to Quit, setting in motion an elaborately detailed process that could potentially terminate the tenancy without allowing a Residential Tenancies Officer or adjudicator any apparent discretion to mitigate the result:

10 (6) Where a fixed-term lease exists or where a year to year or a month to month tenancy exists or is deemed to exist and the rent payable for the residential premises is not paid by the tenant on or before the fifteenth day after the rent is due, on or after the sixteenth day the rent is due the landlord may give to the tenant notice to quit the residential premises effective not earlier than the fifteenth day after the date the notice to quit is given to the tenant.

(6A) Not later than fifteen days after receiving a notice to quit under subsection (6), the tenant may

- (a) pay to the landlord the rent that is in arrears, and upon the payment of that rent, the notice to quit is void and of no effect; or
- (b) apply to the Director under Section 13 for an order setting aside the notice to quit.

(6B) [not relevant]

(6BA) Where the tenant makes an application to the Director under subsection 10(6A) and the Director decides not to set aside the notice to quit after holding a hearing in accordance with Section 17, the Director may order one or more of the following:

- (a) that the tenant vacate the residential premises;
- (b) that the tenant pay to the landlord all rent owing for the month in which the notice to quit was given and pay any rent in arrears for months previous to that month;
- (c) that the landlord retain the tenant's security deposit and interest to be applied against any rent found to be owing for the month in which notice to quit was given and for any rent found to be owing and in arrears for months previous to that month.

(6C) Where a tenant who has received a notice to quit under subsection (6) does not pay the rent that is in arrears or make an application to the Director in accordance with subsection (6A), the tenant

- (a) is conclusively deemed to have accepted that the tenancy is terminated on the effective date of the notice; and
- (b) must vacate the residential premises by that date.

(6D) Where a notice to quit has been given by the landlord under subsection (6) and (a) the notice to quit has not been voided under clause (6A)

- (a) by the tenant paying to the landlord the rent that is in arrears not later than fifteen days after receiving the notice to quit;
- (b) the tenant has not disputed the notice by making an application to the Director under clause (6A)(b); and
- (c) the fifteen-day time period for making the application under subsection (6A) has expired,

the landlord may apply to the Director under Section 13 for any one or more of the following:

- (d) an order to vacate the residential premises;
- (e) an order requiring the tenant to pay to the landlord any rent owing for the month in which the notice to quit is given to the tenant and any rent in arrears for months previous to that month;
- (f) an order permitting the landlord to retain the tenant's security deposit and interest to be applied against any rent found to be owing for the month in which notice to quit is given to the tenant and against any rent in arrears for months previous to that month.

(6E) Notwithstanding Sections 16 and 17, in the circumstances described in subsection (6D), the Director may, without investigating and endeavouring to mediate a settlement and without holding a hearing, order any one or more of the following:

- (a) that the tenant vacate the premises;
- (b) that the tenant pay to the landlord all rent owing for the month in which the notice to quit was given and pay any rent in arrears for months

previous to that month;

(c) that the landlord retain the tenant's security deposit and interest to be applied against any rent found to be owing for the month in which notice to quit was given and for any rent found to be owing and in arrears for months previous to that month.

[12] This court frequently sees cases where, having received a Form D notice, a tenant neither cures the default within 15 days, nor makes an application to Residential Tenancies for a hearing. Typically, the Residential Tenancies Officer makes an order for vacant possession (without a hearing) and the tenant then appeals to the Small Claims Court.

[13] Although the case turned on another issue, I observed the following in *Dorfschmidt v. Kneblewski*, 2022 NSSM 26:

(a) Had the landlord followed the procedure precisely and served a proper Form D, there would not have been much that the Residential Tenancies Officer or this court could have done to prevent the landlord from obtaining possession.

(b) Section 6C of the *Residential Tenancies Act* states:

(6C) Where a tenant who has received a notice to quit under subsection (6) does not pay the rent that is in arrears or make an application to the Director in accordance with subsection (6A), the tenant

(a) is conclusively deemed to have accepted that the tenancy is terminated on the effective date of the notice; and

(b) must vacate the residential premises by that date.

(c) I believe it is generally accepted that this “conclusive deeming” does not leave the Residential Tenancies Officer with any discretion to refuse vacant possession on some equitable or other basis. And this court only has the jurisdiction under s.17D of the Act to make an order that a Residential Tenancies Officer “could have made.”

[14] Counsel for the tenant does not necessarily accept that I would have lacked any discretion in such a situation, but I will leave that argument for another day.

Form J Procedure and Section 13

[15] Here, the landlord did not serve a Form D but elected to file an application under section 13 of the Residential Tenancies Act, which is initiated with a Form J. Part of Section 13 is this:

13 (1) Where a person applies to the Director

- (a) to determine a question arising under this Act;
- (b) alleging a breach of a lease or a contravention of this Act; or
- (c) to determine a question or matter arising under a guarantee agreement, and, not more than one year after the termination of the lease, files with the Director an application in the form prescribed by regulation, together with the fee prescribed by regulation, the Director is the exclusive authority, at first instance, to investigate and endeavour to mediate a settlement.

[16] If mediation is unsuccessful, the matter proceeds to a hearing where the Residential Tenancies Officer has a number of options under section 17A of the Act. The relevant options for present purposes are:

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;
- ...
- (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;
-
- (h) require the payment of money by the landlord or the tenant;
-

[17] Although there is a prevailing view that falling behind in rent is always, or almost always deserving of termination, that does not flow from the Act. There is nothing in these sections which mandates a particular result. The tenant argues, and I accept, that the regime allows the Director of Residential Tenancies, and, by extension, the Small Claims Court, the freedom and flexibility to consider a variety of remedies based on the context of a case, to ensure a just outcome, when considering a request by a landlord to terminate a tenancy for rental arrears. There is no positive obligation on the Director or the Small Claims Court to terminate a tenancy due to rental arrears. To the contrary, section 17A of the Act allows an Order that sets aside a notice to quit under section 10(6) (notice for rental arrears). The Act does not set out any conditions when the Director or the Court cannot set aside such a notice to quit.

[18] I do not minimize the hardship that landlords may face when rent is not

paid. However, housing is a fundamental need and the consequences of families losing their housing - particularly in this climate - can be catastrophic.

[19] Residential Tenancies Officers and Small Claims Court adjudicators must strike a balance between these competing priorities.

[20] The result need not be all or nothing. As counsel for the tenant points out, section 17A of the Act provides this Court with options other than eviction when faced with low-income individuals in a temporary financial bind. One option is to make an order providing reasonable deadlines for payment, in default of which termination would occur. This was the course taken by Adjudicator Richardson in *Popenko v. Killam Apartments REIT*, 2020 NSSM 23, where the matter was adjourned to allow certain steps to be taken, namely, to address a frozen bank account. The matter was returned to Adjudicator Richardson and the final decision amended the Order of the Director. The Final Order confirmed the amount of outstanding arrears, imposed a payment schedule, and included a provision for vacant possession in the event the full amount of arrears owed were not paid by a specified deadline.

Applying the law to the facts of this case

[21] The tenant fell into arrears, through no apparent fault of her own. Those arrears have been brought up to date. In fact, I am impressed by the tenant's diligence in making sure that the landlord has been brought up to date. I see no justice in allowing a termination to occur. Nor do I see any need to impose conditions. The landlord's position is unduly rigid, particularly as there are plans apparently to sell the house, which would likely end the tenancy anyway.

[22] If the tenant falls into arrears again, the landlord has its remedies.

Issues surrounding rental increase

[23] There is some dispute over what is the correct rental amount currently in effect. The landlord may have imposed a rent increase in excess of the allowed 5%.

[24] In any event, whether the rental account is currently at zero, or a few dollars off either way, is not material to the important question. The amounts at issue are *de minimis*. I trust that the parties themselves can resolve that issue without the assistance of the court. Should the need arise, the parties may bring the matter back before the court for determination.

ORDER

[25] In the result, the Order of the Director of Residential Tenancies dated December 8, 2023, is set aside and the landlord's application to terminate the tenancy and for the payment of money, is dismissed.

Eric K. Slone, Small Claims Court Adjudicator