IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
**Cite as:** *Musgrave v. Templton Properties* 2016 NSSM 6

**Claim:** SCCH 449983
**Registry:** Halifax

**Between:**

Scott Musgrave

Appellant

v.

Templeton Properties

Respondent

**Adjudicator:** Augustus Richardson, QC

**Heard:** April 12, 2016

**Appearances:** Scott Musgrave, appellant, for himself
Matthew Metledge, for the Respondent

**By the Court:**

[1] This appeal of a Residential Tenancy Order dated March 30, 2016 involves a sometime practice of landlords which, if as widespread as alleged by the Respondent Landlord, is to be regretted.

[2] In July 2015 the Appellant Scott Musgrave and a friend were looking for a two-bedroom apartment to rent. They visited Fenwick Towers, a large, multi-unit apartment building owned, or at least operated, by the Respondent Templeton Properties ("Templeton"). They were shown unit 703. They liked what they saw and filled out a rental application form for Unit 703 for a lease to take effect September 1st.

[3] The Rental Application was composed of three pages. The first contained personal and

credit information regarding the two proposed tenants. The second was titled "General Rules." The rules related to the actual tenancy. So, for example, rules included a prohibition against pets; the requirement for post-dated cheques; and so on.

[4] It also contained the following paragraph:

> "I/We hereby offer to lease apartment #F0703 [crossed out and replaced with F0608] for the monthly rent of $1,275 and if my/our application is accepted, I/we will undertake to execute a yearly lease. I/we fully understand that the security deposit [empty check box] certified cheque or [empty check box] money order (please check one) in the amount of $637.50 will be deposited IN TRUST for the tenant, in guaranteed investment certificates with any chartered bank, until the termination of the lease, at which time it will be returned to me/us, plus all interest accrued at the rate set by the Nova Scotia Tenancy Act. If I/we fail to sign a lease or accept occupancy after the landlord has approved this application, I/we agree that the deposit shall be forfeited by the tenant to the landlord as liquidated damages and in such circumstances I/we authorize the landlord to lease the apartment to other prospect [*sic*] tenants."

[5] The third page was a guarantee to be signed by a guarantor of the prospective tenant.

[6] The Rental Application was dated July 21, 2015. There is nothing on either page to indicated that the landlord had accepted the application. Mr Musgrave provided the $637.50 together with three post-dated cheques for the first three months rent. He and his friend did not sign a lease at that point. Mr Musgrave understood that their credit references would be checked before the landlord made a decision with respect to their application.

[7] A few days later Mr Musgrave was told by a representative of the landlord that Unit 703 was no longer available, and that they were to take a different unit in the building. Mr Musgrave asked to see the other unit that the landlord proposed to rent to them but was told that they could not because it was still occupied and was not yet vacant. Mr Musgrave and his friend felt uneasy

referred.

[14] Third, it does not matter at this point whether Mr Musgrave failed to sign a lease for unit 608 because he was uneasy about taking a unit he had not seen; or because he had changed his mind about where he wanted to live; or whether both things happened more or less concurrently. The essential point remains the same–he did not actually enter into a lease.

[15] That brings us to the question of the $637.50 that is currently held by Templeton, and whether it is entitled to hold onto it.

[16] Mr Metledge argued that the $637.50 was one of two things. First, it was a security deposit to be held against the possibility that the applicant failed to enter into a lease once the landlord offered one to him. In the alternative he suggested that it was a form of liquidated damages intended to compensate the landlord for any damages flowing from the failure of an applicant to sign a lease or take up an apartment when it was offered. He assured the court that the collection and retention of such payments from applicants who failed for whatever reason to become tenants was a common practice amongst other large landlords with multiple unit buildings. He said it was routine and long-standing practice of Templeton.

[17] If Mr Metledge is correct about the practice of Templeton and other large landlords in the city then it is a sad comment on their knowledge and conduct. It has long been the law in this province that a payment like the one in question–offered at the time of an application and before a lease is actually entered into–is, regardless of what it is called, an "application fee" in law and in fact. And application fees are expressly prohibited by s.6(1) of the *Residential Tenancies Act*, RSNS 1989, c.401 , as amended, which provides as follows:

> **Prohibition**
>
> 6(1) No person shall demand, accept or receive, from an individual who may, or applies to, become a tenant of that person, a sum of money or other value in consideration of or respecting the application by the individual to become a tenant of that person.

[18] The courts in this province have repeatedly upheld s.6(1). They have repeatedly ruled that application fees are prohibited under the Act and must be return to the applicant when, for

about moving into an apartment unit that they had not been able to see. He accordingly asked for the money and post-dated cheques to be returned. The latter were returned; the former was not.

[8] Mr Metledge testified on behalf of Templeton. He said that Unit 703 was identical to many other two bedroom units in the building. It was a "show unit" that was not intended to be rented out. It was used instead to demonstrate what other units, once they were empty and clean, would look like. It was easier in practice to use a "show unit" rather than one that was actually occupied, because an occupied unit would be cluttered, full of furniture and perhaps dingy or dirty in appearance. Mr Metledge also cast doubt on Ms Musgrave's testimony regarding his inability to see the other unit, because a landlord could always get into a tenant's unit with 24 hour's notice once a notice to quit had been served by a sitting tenant.

[9] Mr Metledge also testified that in late July or early August Mr Musgrave had called and said that he and his friend had found a third person to share accommodation with–and that that person wanted to rent a house rather than an apartment. Mr Metledge told Mr Musgrave that the change in plans was no reason to back out of the application. He acknowledged, however, that no lease had ever been signed or entered into with Mr Musgrave.

[10] Having heard the testimony of Mr Musgrave and Mr Metledge, and having reviewed the Rental Application filed in evidence, I make the following findings of fact.

[11] First, I accept Mr Musgrave's testimony with respect to him having been show one unit but then being offered another unit without being given the opportunity to view that other unit.

[12] I come to this conclusion because the Application Form on its face was initially filled out for Unit 703. That unit number is then stroked out, to be replaced by Unit 608. If Unit 703 was indeed a show unit then there would have been no reason for the form to use its number.

[13] Second, I also accept Mr Musgrave's evidence that he was not allowed to see the other unit. Mr Metledge was not present at the time and so had no direct knowledge of what was said to Mr Musgrave by the rental agent. The fact that no lease was signed is consistent with Mr Musgrave's testimony that he was uneasy about being asked to sign a lease for a unit he had not first had a chance to view. I find it extremely unlikely that anyone in ordinary course would be willing to sign a lease without first having an opportunity to look at the space to which it

whatever reason, they fail to enter into a lease with a landlord: see *Alliance Property Group Limited v. Scott Gouthro* 1993 CanLII 4622 (NSSC); *Thomas Walker and Valerie Gapp v. A. and P. Rouvalis* 2007 NSSC 137; *Harry and Evelyn Hillyard v. Baker Drive Developments* 2007 NSSM 84.

[19] I am accordingly of the view that this appeal must be allowed. Templeton will be ordered to return to Mr Musgrave the $637.50. I will also allow Mr Musgrave costs in the amount of $100.00, plus interest on the $637.50. Since it was not a damage deposit within the Act (in which case a different interest rate would apply) I will award interest at the rate of 4% on $637.50 for 9 months, being $19.13.

DATED at Halifax, Nova Scotia
this 13th day of April, 2016

Augustus Richardson, QC
Adjudicator