**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Fotherby v. Cowan***, 2012 NSCA 59

**Date:** 20120605
**Docket:** CA 392849
**Registry:** Halifax

**Between:**

Lynne Fotherby and Brilyn Bed & Breakfast and Nature Tours

Appellants

v.

Brent Cowan and Tiffany Property Ventures Limited

Respondents

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| **Judge:** | The Honourable Justice Duncan R. Beveridge |
| **Motion Heard:** | May 24, 2012, in Halifax, Nova Scotia, In Chambers |
| **Held:** | Motion for a stay is dismissed without costs |
| **Counsel:** | Lynne Fotherby, appellant, in person<br>Ezra Van Gelder and Tara Wilcox, Law Student, for the respondents |

**Decision**:

[1] The appellant initially sought to have her motion for a stay heard on an emergency basis. The request was denied. Her motion for a stay of the execution of the order issued by the Honourable Justice Gerald R. P. Moir was heard in due course in regular Chambers on May 24, 2012. At the conclusion of the proceedings I dismissed her motion. These are my reasons for doing so.

[2] The appellant and her husband operate an unincorporated business "Brilyn Bed and Breakfast and Nature Tours". Mrs. Fotherby entered into a commercial lease with the respondent, Tiffany Property Ventures Limited commencing August 1, 2010 for the building and premises located at 1240 Ketch Harbour Road in Halifax, Nova Scotia. The lease granted a number of rights to the tenant, including to purchase the property for a set amount, make improvements, sublet and to act as listing agent and divide the net proceeds should a greater than minimum price be obtained. The lease was for a period of one year with an option to renew for an additional 12 months on the same terms. There was no renewal.

[3] What occurred is succinctly described by Justice Moir in his reasons for judgment issued May 7, 2012 (2012 NSSC 182) as follows:

> [55] *Rent*. The rent fell into arrears a month after the lease was signed, and $2,175 was past due in January, 2011 when Ms. Fotherby wrote to Mr. Cowan seeking an indulgence.
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> [56] Mr. Cowan agreed to forbear his remedies not only for the $2,175 but also for the February rent coming due. Ms. Fotherby agreed to pay these off in "mid-Summer, 2011", which was her phrase.
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> [57] Mr. Cowan warned that on further default, "I will consider the lease broken and look for other tenants".
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> [58] Ms. Fotherby defaulted again in early July. Mr. Cowan gave her a notice to quit effective August 31, 2011.
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> [59] There is no dispute about the amount of rent in arrears.

[4] Mrs. Fotherby, on her own behalf, and as a sole proprietor, sued Tiffany Property and its principal, Brent Cowan, alleging causes of action for negligent

misrepresentation, breach of contract, deceit, breach of confidence and breach of fiduciary duty. The respondents defended and filed a counterclaim for breaches of the lease and damage to the leased premises. The appellants' defence to the counterclaim appeared to raise claims of defamation and possibly intentional infliction of emotional harm.

[5] The respondents moved for summary judgment to dismiss all claims by the appellants and summary judgment on the breach claims and the counterclaim.

[6] Justice Moir dismissed all claims of the appellants and found for the respondents. He granted an order on May 10, 2012 dismissing all actions by the appellants, gave judgment in favour of the respondent Tiffany Property Ventures Limited against the appellants in the amount of $21,329 and ordered the appellants to immediately vacate the lands and premises at 1246 Ketch Harbour Road and do all things necessary to transfer possession of the lands and premises of the respondent Tiffany Property Ventures Limited forthwith. He also ordered the appellants to pay to the respondents costs in the amount of $10,000 plus disbursements.

HEARING OF MAY 24, 2012

[7] At the outset of the hearing, I reviewed with Mrs. Fotherby the general principles that an appeal does not stay the execution or enforcement of a judgment (90.41(1) *Nova Scotia Civil Procedure Rules*). But there may be circumstances where to ensure that the statutory right to challenge a lower court's decision is not rendered illusory, a judge of the Court of Appeal may grant a stay or some other order. I referred her to Rule 90.41(2), which provides:

> **90.41** (2) (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[8] I also reviewed with Mrs. Fotherby the principles upon which the discretion to stay is guided, as set out in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (N.S.C.A.). I advised Mrs. Fotherby that for her application to be successful, she needed to establish, on a balance of probabilities, that there is an arguable issue raised by her appeal, irreparable harm to her should the stay not be

granted (assuming her appeal would ultimately be successful); and that she would suffer greater harm if the stay is not granted than the respondents if the stay is granted. In addition, an appellant may also be successful in obtaining a stay or equivalent relief even if these three criteria are not met but only if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. Mrs. Fotherby expressed understanding of these requirements.

[9] Mrs. Fotherby filed an affidavit sworn May 14, 2012 and a supplementary affidavit sworn May 17, 2012. There are many paragraphs in these affidavits, in addition to her written and oral submissions that focus on her complaint of error by the learned Chambers judge in granting relief on the motion for summary judgment hearing. I advised Mrs. Fotherby that the requirement for her to demonstrate that there is an arguable issue raised by her appeal is not an onerous one. Despite the able argument of Erza van Gelder, on behalf of the respondents, I asked her to assume that she had raised an arguable issue and that she should focus her submissions on why she would suffer irreparable harm if her motion for a stay was not granted.

[10] From the materials filed, and Mrs. Fotherby's submissions, the only aspect of the order of Justice Moir dated May 10, 2012 for which she seeks a stay, is the requirement that she vacate 1240 Ketch Harbour Road "immediately". For example, in her initial request for an emergency motion for a stay, she wrote:

> **7.** In closing I would like to state that the emergency situation in this emergency stay motion is because I currently reside at this location with my husband, operate my business from this location and work at home full time as a "work at home agent" for convergys from this location and <u>if I am forced to vacate immediately I would inevitably lose my job</u> that I have held for over 13 years, suffer a closure of my business that I have operated for over 10 years and stand a good chance that I may never be able to reopen as I do not yet have a suitable place to relocate my business.
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> **8.** If I am not granted an emergency stay for enough time to appeal or at at the very least 30 days to relocate carefully and properly I stand to suffer substantial losses that cannot be recovered if my inventory is damaged or stolen during a "rush move."
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> **9.** As part of the contract that has now been voided, I live, work and operate my business from this location and I have been doing so for 2 years. Most of my personal belongings were moved to this location so I could clear out my other

> residence to get it ready to sell to be able to put more money into this contract. Now that this contract has been made void, I am left with no suitable location to move to "immediately." I need time to prepare my other property to be able to move back to it, get phone, internet and utilities all reconnected to be able to work from home as my full time job dictates.
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> ...
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> **14.** Again I request an emergency stay till an appeal is heard or in the very least that I be given a reasonable 30 day stay of the order to vacate to be able to relocate without suffering further loss. [Emphasis added]

[11] Neither of Mrs. Fotherby's affidavits of May 14 and May 17, 2012 set out any facts or circumstances demonstrating irreparable harm should a stay not be granted. When questioned, Mrs. Fotherby frankly acknowledged that she simply needed some reasonable period of time for an orderly move of her substantial quantity of personal belongings off the property. She also acknowledged that she had already started that process. Mrs. Fotherby conceded she would only need three weeks from May 24, 2012 to complete that process. Mr. van Gelder expressed some sympathy for the circumstances of the appellant and was prepared to hold off enforcing eviction until June 15, 2012.

[12] Having demonstrated no irreparable harm, I dismissed Mrs. Fotherby's motion for a stay. By the grace of the respondents' she has until June 14, 2012 to vacate the premises.

[13] There will be no order to costs as no costs were sought.

Beveridge, J.A.