**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Executive Rental Agency v. Quaintance, 2009 NSSC 16

**Date:** 20090116
**Docket:** Hfx No. 300474A
**Registry:** Halifax

**Between:**

Executive Rental Agency & Wayne Polem

Appellant

v.

Natalie Quaintance

Respondent

**Judge:** The Honourable Justice Duncan R. Beveridge

**Heard:** November 4, 2008, in Halifax, Nova Scotia

**Counsel:** Wayne Polem, self represented
Natalie Quaintance, self represented

**By the Court**:

INTRODUCTION

[1] On July 31, 2008 Adjudicator J. Walter Thompson, Q.C. released a decision awarding the respondent, Ms. Quaintance the fees she had paid the appellant, Wayne Polem, (who carried on business under the name and style of Executive Rental Agency) on the basis Polem had breached his contractual obligations. The appellant now claims that the adjudicator committed jurisdictional error or erred in law. Once again the parties and this Court are hampered by the lack of a transcript. Nonetheless, for the reasons that follow I am not satisfied that the adjudicator committed the claimed errors.

FACTUAL BACKGROUND

[2] Although there is some dispute between the parties on some of the particular evidence that was adduced before the adjudicator, many of the background facts are not contested, or are otherwise set out in documentation.

[3] In the fall of 2006 Natalie Quaintance was living with her two children at 7 Moira Street in Dartmouth, Nova Scotia. She also owned a home at 131 Chalamont Drive, Hammonds Plains, Nova Scotia. Friends of hers were temporarily renting it pending the completion of their home.

[4] Ms. Quaintance had heard of Wayne Polem through friends. She contacted him to seek assistance in renting her home at 131 Chalamont Drive.

[5] They met personally. Mr. Polem explained to Ms. Quaintance the services provided by his business, Executive Rental Agency. The Agency Agreement form used by Executive Rental Agency was left with Ms. Quaintance. Ms. Quaintance later signed it and faxed it to Mr. Polem. The agreement provided that Natalie Quaintance appointed Executive Rental Agency to act as her non-exclusive agent in the marketing of 131 Chalamont Drive for lease. The agreement was to take effect on September 27, 2005 and expire on December 31, 2005.

[6] Paragraph 2 of the agreement was as follows:

> **2. Agency Relationship and Duties of Agent**
>
> The Agent is authorized to:
>
> (a) market the Property on behalf of the Landlord in such manner as the Agent considers appropriate, including on-line through the Agent's internet site (www.Executive-Rentals.net) and other communications media;
>
> (b) arrange for tenants to inspect the Property;
>
> (c) submit all offers in relation to the leasing of the Property to the Landlord for review; and
>
> (d) assist the Landlord in entering into a lease with a tenant.

[7] The Agency Agreement called for payment by the landlord to ERA a commission on a sliding scale. If the lease was a multi-year rental term the commission was one month's rent plus HST for each year of the lease. This commission was payable if the landlord, during the validity period, should through the agent, enter into a lease with a tenant. It was also payable if the landlord

entered into a lease with a tenant, after the expiry of the validity period if that individual was introduced to the landlord by the agent during the validity period.

[8] The Agency Agreement was never renewed. Nonetheless in March 2006 Ms. Quaintance was contacted by ERA advising her that they had tenants who were interested in leasing her home. The prospective tenants filled out a rental application and offer to lease on March 16, 2006. The application was signed by Ronda Laybolt. Her employment was listed as being that of a cleaner. The Co-applicant was Bruce Laybolt, then 18 years of age working at Burger King. Details of their current landlord and references were taken. The application document also referenced a Mike Laybolt who would be moving in in the summertime. He was listed as being employed with GM Maintenance. ERA contacted the references, but did not make contact with the individual listed as the current landlord. The application form was faxed from the St. Leonard's Society.

[9] It is somewhat unclear as to who exactly, on behalf of ERA, vetted the application by Ronda and Bruce Laybolt. What is uncontested is that at no time did Ms. Quaintance have the actual application form. The first time she saw it was at the hearing before the Small Claims Court Adjudication on July 14, 2008.

[10] Jade Riveria, one of the agents working for ERA, wrote to Ms. Quaintance on March 20, 2006. She enclosed, for Ms. Quaintance, two copies of the lease as executed by "the tenant". A security/damage deposit of $600.00 was enclosed from the tenant.

[11] Also included in Ms. Riveria's letter to Ms. Quaintance of March 20, 2006 was the invoice from ERA in the amount of $3,600.00 including HST, which was paid by the tenant's cheques to ERA of April, May and June 2006. The lease was for a three year term commencing April 1, 2006 at the rate of $1, 200.00 per month. The lease was actually only signed by Ronda Laybolt. The tenants listed on the standard form lease were Michael and Ronda Laybolt.

[12] Ms. Quaintance says that she testified before the adjudicator about the problems with the Laybolt's as tenants. She was unable to gain access to the premises and rent was paid sporadically. By the time she was able to evict them she had lost three months rent. She tendered many photographs depicting the condition of her property when she was able to regain possession from the tenants. The photographs are graphic. A car was left abandoned on the property full of garbage, dog feces littered the property, including the rear deck. An abandoned sofa was left on that deck. The interior of the house was filthy. Walls and floors were damaged. Garbage was left strewn. The home contained 3 ½ baths, including a master bedroom on suite. All appeared to be covered in mould and mildew. There was damage to the stairwell.

[13] Ms. Quaintance's original claim set out particulars of damages of some $45,528.79. This included not only the fees that she had paid to ERA of $3,600.00, but rental arrears, and loss of rental income, cost of materials to repair the property of some $14, 548.00 and a claim of $10,000.00 labour. Since the monetary limit for claims in Small Claims Court is $25,000.00, this was the

amount she claimed. In her Small Claims Court, Notice of Claim she set out the reason for the claim as being:

> Delivering a service in a negligent manner, without due care and consideration. Failure to provide service as contracted for which has caused lost [sic] of income and damage to property.

[14] Mr. Polem's defence was stated simply:

> Performed per the terms of Contracted Services.

OVERVIEW OF ADJUDICATOR'S DECISION

[15] Mr. Thompson filed his written decision on July 31, 2008. It does not canvass all of the evidence heard, nor the documentation tendered.

[16] The adjudicator wrote that Natalie Quaintance had retained Wayne Polem (Executive Rental Agency) to solicit and in the words of Mr. Polem himself, pre-qualify tenants for her home. After referring to the difficulties Ms. Quaintance had with the Laybolt's as tenants, he found he was satisfied that they were very poor tenants indeed.

[17] The adjudicator found that ERA represented itself as the agent for the renting of executive properties and that it offered "application, leasing and negotiations management". He found that Executive contracted to do the due diligence of a reasonably competent landlord in vetting prospective tenants to occupy an up-market property for Ms. Quaintance. Although ERA did perform a

credit check, it did not contact the tenant's most recent landlord. It did not provide the application form to Ms. Quaintance. She therefore had no opportunity to form her own opinion on the suitability of the tenants for her home.

[18] The adjudicator concluded that ERA failed to meet the standard to be expected of them in finding tenants for so-called executive properties and in negotiating a sensible term for the lease. He found Ms. Quaintance was entitled to have the fees she paid returned to her, but that ERA could not be held liable for the damages done to her premises or lost rent while the property was being repaired.

GROUNDS OF APPEAL

[19] The appellant sets out five grounds of appeal. They are as follows:

> 1. The learned adjudicator erred in law by failing to apply the terms of the contract to the parties in accordance with their mutual agreement.
>
> The contract was binding, complete, and represented the whole of the agreement between the parties, and must be enforced accordingly.
>
> 2. The learned adjudicator erred in law in finding that a representation was made to the respondent or relied upon by the respondent in entering into the contract, that the applicant tenant had been "prequalified", or that the applicant tenant was represented to be an "executive"
>
> 3. The learned adjudicator erred in making findings concerning the affairs between the landlord and tenant and applying those findings to the equities of the case between the parties to this litigation. The learned trial judge made a finding that the tenants were "very poor tenants indeed" without hearing from the tenants or hearing any evidence disputing the allegations of damage caused by them. Such considerations were not only irrelevant, but unfairly prejudiced the appellant at trial.

> 4. The learned adjudicator erred in finding that a three year lease was "unreasonable" without any evidence to support such a finding, nor was this a matter which he could properly take judicial notice of.
>
> 5. The learned adjudicator erred in finding that the respondent "had no opportunity to form her own opinion on the suitability of the tenants for her home". Such a finding was completely at odds with the evidence before him at trial.

## ANALYSIS

[20] There are no appeals as of right. Appeals are entirely creatures of statute. In Nova Scotia, s. 32 of the *Small Claims Court Act* gives to an aggrieved party an appeal as of right to the Nova Scotia Supreme Court. It provides as follows:

> 32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
>
> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice,
>
> by filing with the prothonotary of the Supreme Court a notice of appeal.

[21] Generally an appellate court does not engage in a rehearing of a dispute. In the case of an appeal from a decision of a Small Claims Court Adjudicator this Court only has jurisdiction to intervene if the appellant makes out any one of the three grounds under which the appellant can complain, that is an error in law, jurisdiction or a breach of the requirements of natural justice. I take it as well settled that I do not have any jurisdiction to make my own findings of fact. This

was well expressed by Saunders J., as he then was, in *Brett Motors Leasing Ltd. v. Welsford*, (1999), 181 N.S.R. (2d) 76 where he wrote:

> [14] One should bear in mind that the jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact...

[22] Saunders J. also discussed what might constitute an error of law:

> [14] ..."Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts...

[23] It has also been recognized that even questions of mixed law and fact can sometimes amount to a pure question of law. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 the majority judgment was written by Iacobucci and Major JJ. They explained:

> [27] Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the [page258] decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

First and Second Ground

[24] Grounds one and two raise closely related complaints. It is appropriate to deal with them together. I would note that both parties filed written briefs and made oral submissions on November 4, 2008.

[25] The essence of the appellant's complaint set out in grounds one and two and elaborated upon in his argument is that the adjudicator erred in law by failing to conclude that the terms of the contract between the appellant and the respondent were as solely set out within the four corners of the Executive Rentals Agency Agreement. Furthermore that the adjudicator erred in law in finding that a representation was made to the respondent about what services were to be provided by ERA.

[26] With all due respect to the appellant, what is or is not a contractual term is in essence a finding of fact and a Court is not limited by the words used in a written contract. Even where there are "entire agreement" clauses specifying that the written contract constitutes the "entire agreement" between the parties does not in and of itself exclude any finding of a side agreement or collateral contract, let

alone the potential for legal consequences from misrepresentations (see Cartwright, Misrepresentation Mistake and Non-Disclosure 2nd (Sweet and Maxwell, London 2007 para 9.12)

[27] In Fridman, The Law of Contract in Canada, 5th ed. (Thomson Carswell, Toronto 2006) the author reviews the law with respect to statements made by a party to a contract at or prior to the finalization of the agreement. He notes the distinction between statements that are intended to be and are regarded as being terms of the contract and statements which are not terms, but are merely inducements to the making of the contract and the different approach at common law and equity to these kinds of statements. He notes that at common law if the statement was made to get consent to enter into a contract it will usually be considered a term of the contract (see p.296).

[28] If representations amount to a term of the contract, then the innocent party can sue for breach of contract and damages. If the representation was not a term of the contract then the innocent party can sue for non-contractual remedies such as avoidance or recision of the contract, not to mention the potential for the innocent party to advance a claim in tort for negligent misrepresentation. Representations can also amount to a collateral contract.

[29] Although the appellant asserts that the adjudicator erred in law in finding that a representation was made to the respondent or relied upon by the respondent in entering a contract, this issue is a factual one (Fridman at p. 439). Both parties testified before the adjudicator about their interaction prior to signing the Agency

Agreement. In addition, the appellant's website, produced for the adjudicator, indicates that ERA offers "application, leasing and negotiations management". The appellant, in his written argument acknowledges that the evidence before the adjudicator was that ERA represents higher-end properties throughout HRM catering to a more affluent tenant clientele. He also acknowledges that ERA did go through a "pre-qualification" process with respect to the prospective tenants for the respondent. Nonetheless, he contests that this was merely an internal process in order to "profile" a prospective tenant to determine whether they might have a property to meet with their requirements, including budget and that this did not qualify the tenant for the landlord.

[30] This assertion seems directly contrary to what ERA actually did. If the process was as described by Mr. Polem, why would ERA do any credit checks and check with references, and try to check with the tenant's previous landlord if it was not to carry out a vetting of the suitability of the prospective tenants.

[31] In any event, both the appellant and respondent testified before the adjudicator, putting forward their respective positions. He found:

> ...In my opinion, Executive contracted to do the due diligence of a reasonably competent landlord in vetting prospective tenants to occupy an "up market" property for Ms. Quaintance.

[32] In my opinion, the appellant has failed to demonstrate any error of law in making these findings.

[33] The appellant also complains that the adjudicator failed to take into account a clause in the Agency Agreement that sought to limit the liability of ERA. The clause was:

> In the event the Landlord accepts a tenant introduced by Executive Rentals Agency, the leasing/rental agreement is held directly between the tenant and landlord or landlord's authorized agent. Executive Rentals Agency does not warrant and is not responsible for either parties actions, responsibilities and/or obligations under any leasing agreement.

[34] In my opinion, this clause is of no assistance to the appellant in limiting or excluding his liability where the respondent is claiming a breach of contract by the appellant. In any event, the adjudicator did not award any damages to the respondent as the result of the tenant's failure to live up to their obligations under the Leasing Agreement. While it could very well have been argued by the respondent that the adjudicator ought to have awarded her damages for breach of the contract, he only ordered the appellant to repay the fees she had paid to the appellant. The adjudicator wrote:

> ...In my view, however, Executive cannot be held liable for the damages done to her premises over two years, or for the rent lost in making repairs. Executive was not contracted to manage the property and did not do so. It was Ms. Quaintance's responsibility as a landlord to protect her own property.

[35] In effect, the adjudicator did apply the terms of the limiting clause set out in the Agency Agreement.

Third Ground

[36] The appellant complains that the adjudicator erred in making the finding that the tenants were “very poor tenants indeed”, without hearing from the tenants or any evidence disputing the allegations of damage caused by them, and in any event the evidence was irrelevant and unfairly prejudiced the appellant at trial.

[37] There was no requirement for the adjudicator to hear from the tenants disputing the allegations of damage caused by them. The appellant did not assert that he was caught by surprise by the nature of the allegations being made at the hearing before the adjudicator. The appellant acknowledges that the respondent had contacted him and complained about the quality of the tenants and the damage done by them and that she would be seeking redress from the appellant. Her Notice of Claim specifically alleged a failure by the appellant to provide services as contracted for, causing loss of income and damage to her property.

[38] The damage depicted in the photographs provided ample evidence that the tenants were far from suitable, by any reasonable standard. If the appellant was taken by surprise at the hearing he could have sought an adjournment and called the tenants to refute the evidence called by the respondent. He did not do so. With all due respect to the appellant, the quality of the tenants was plainly relevant.

Ground Four

[39] The appellant complains that the adjudicator erred in finding that a three year lease was “unreasonable” without any evidence to support such a finding, nor is it a matter of which that he could properly take judicial notice.

[40] Neither party provided any elaboration as to how a three year term was proposed and later accepted by the respondent. Nowhere in the adjudicator's decision does he make a finding that the three year term was "unreasonable". The adjudicator referred to the three year term as being "a mistake" as it handcuffed Ms. Quaintance in her later efforts to get rid of her tenants. He also concluded that ERA failed to meet the standard to be expected on them in finding tenants for so-called executive properties and in "negotiating a sensible term for the lease".

[41] In my opinion, there was ample evidence before the adjudicator for him to make this finding. The application to lease was being made by a mother and her 18 year old son who is said to have been employed by Burger King. There was in fact no prior check with the applicant's previous landlord. The application form was faxed from St. Leonard's Society. The respondent testified that this would have sent alarm bells off as she understood it was involved with helping individuals involved with the criminal justice system. It also assists in providing a healthy environment for women and children who are either homeless or in an emergency situation. Perhaps neither one of these applied to the tenants, but it certainly supported the adjudicator's conclusion that ERA failed in its obligation and a three year term was not sensible. A three year term was certainly in the financial interests of Mr. Polem since the commission his agency earned went up with the length of the term of the lease.

Fifth Ground

[42] The appellant lastly contends that the adjudicator erred in finding that the respondent "had no opportunity to form her own opinion on the suitability of the tenants for her home" and that such a finding was completely at odds with the evidence at trial.

[43] The appellant at the hearing before the adjudicator took the position that the respondent had ample time to vet the suitability of the prospective tenants. The only role of ERA was to market the property, submit any offer from an interested tenant and to assist the landlord into entering into a lease. For the reasons earlier elaborated, the adjudicator did not accept that this was the extent of the contract between the appellant and the respondent.

[44] On appeal, the appellant took a similar position. He argued that Ms. Quaintance was engaged in the leasing process over several weeks and she had ample opportunity to review and discuss all aspects of the proposed tenancy to ensure it was acceptable to her in advance of signing the lease. This gave her ample opportunity to vet the prospective tenants to her own satisfaction.

[45] However, the documentary evidence before the adjudicator plainly shows that the prospective tenants filled out an application form on March 16, 2006. The lease, for the respondent's signature was forwarded to her on March 20, 2006. The evidence of the respondent before the adjudicator, which was not contested in the hearing before me, was that the first time the respondent ever saw the application by the prospective tenants was at the hearing on July 14, 2008. The adjudicator specifically found as a fact that ERA did not provide the application form from the

tenants to Ms. Quaintance and that she therefore had no opportunity to form her own opinion on the suitability of the tenants for her home. The appellant has failed to satisfy me that this conclusion is in any way at odds with the evidence before the adjudicator.

[46] The appeal is dismissed with costs to the respondent as allowed by Regulation 23 of the *Small Claims Court Forms and Procedures Regulations.* If the parties cannot agree on the amount of recoverable costs I will hear them at their convenience.

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Beveridge J.