SUPREME COURT OF NOVA SCOTIA
Citation: Ross v Elliott, 2011 NSSC 298

Date: 20110719
Docket: Hfx No. 344363A
Registry: Halifax

Between:

Daniel Ross and Edna Ross

Appellants

v.

Donna Elliott and Arthur Elliott

Respondents

Judge:	The Honourable Justice Patrick J. Murray
Heard:	June 6, 2011, in Halifax, Nova Scotia
Written Decision:	July 19, 2011
Counsel:	Daniel Ross (in person), for the Appellants Angela Walker, for the Respondents

By the Court:

Introduction:

[1] This is an appeal filed by the Tenants, Daniel and Edna Ross, from a decision of the Small Claims Court awarding the net sum of $1,135.05 to the Landlords, Donna and Arthur Elliott. This amount was later amended to $835.05 to allow a credit for interest of $300.

[2] The Appellants were represented on the Appeal by Mr. Daniel Ross and throughout this decision I may refer to them as the Appellant or the Appellants or the Tenants or by name.

[3] In the Notice of Appeal to this Court, the Appellant summarized his grounds as follows:

> "The Appellant says that the Court should allow the Appeal and Order the security deposit to purchase dwelling should be removed from a Residential Tenancies Appeal decision and that a $400 per month reduction should be allowed for an illegal rental increase."

[4] The Appellant cites a jurisdictional error and an error of law in respect of these grounds.

[5] Clearly the crux of this matter and the sole issue to be decided on the Small Claims Court Appeal to this Court is whether the Adjudicator had jurisdiction to make an award with respect to the $4,500 held in trust by the Landlords to be applied toward the outstanding rent owed by the Tenants, Mr. and Mrs. Ross.

[6] I will, however, deal briefly with the claim by the Appellant for a $400 per month reduction for an illegal rental increase.

[7] In reviewing all materials before me, I see no basis whatsoever for an allowance for $400 per month reduction for an illegal rental increase as there was no basis for the Claim that there was an illegal rental increase of $400 per month. It is well settled that findings of fact by an Adjudicator in Small Claims Court should not be disturbed on Appeal and that this Appeal Court is bound by those findings. (**Brett Motors Leasing Ltd. v Welsford** 1999 NSJ No. 466 (NSSC)**)**

[8] In paragraph 22 of his decision the Adjudicator dealt specifically with this issue and found that:

> "...Mr. Elliott had in fact inappropriately increased the payments beginning March the 1st, 2010 to $1,500 per month from $1,400

> per month. I find that no rent was accepted by the Elliott's after August of 2010 which leaves rent outstanding from August 14th onwards at $1,400 per month. I also find that at that stage there was a rental overpayment of $639.94 along with a security deposit and interest of $712.55..."

[9] Therefore the Adjudicator made an appropriate finding, an illegal increase of $100 per month. He took this into account and credited the Tenant with the overpayment which accumulated from March 1st, 2010 to August of 2010. Accordingly he found there was a rental overpayment by the Tenant of $639.94 and ordered the Tenant be given credit for this amount against the outstanding rent owed by the Tenant.

[10] In addition based on a review of the Notice of Appeal to the Small Claims Court from the Residential Tenancies Board decision this appears to be new relief being requested by the Appellant. Therefore it would not be appropriate for this Court to consider such a request on an appeal where the function of the Appeal Court is to determine whether there was a jurisdictional error or error of law on the basis of the original decision.

[11] I therefore dismiss this ground claiming a rent reduction as I find no error of law was made by the Adjudicator in regard to his finding.

Background/Summary of Findings

[12] The Adjudicator made two key findings which are most relevant to this appeal. They are:

i. That the Tenant owed rent to the Landlord in the amount of $7,000.

ii. That the Landlord may apply against the amount owed, the sum of $4,500, being held as a deposit for the Tenant, as part of a "Lease to Purchase Option Agreement".

[13] The Order of the Adjudicator in summary form is contained in paragraph 33 of his decision which states as follows:

> "It is further ordered that the Appellants shall pay the Respondents the sum of $1135,05 as follows:
>
> | | | |
> |---|---|---|
> | Outstanding rent | Aug to Dec - $1400.00 x 5 months | $7000.00 |
> | Rental overpayment | | -($639.95) |
> | Deposit credit | Purchase Option | -($4500.00) |
> | Security Deposit | with interest | -(725.00) |
> | Total | | $1,135.05 |
>
> In addition the Ross's will continue to pay $1,400 rent on January 1 and February 1, 2011 and abide by the standard conditions of the lease until their departure as above granted."

[14] By Schedule "A" dated June 1, 2011 the Adjudicator recalculated the amount to credit the Tenant with $300 interest on the $4,500 deposit thereby reducing the amount owed from $1,135.05 to $835.05.

[15] The Tenant's objection to the jurisdiction of the Court is founded upon the provision in Section 12 of the *Residential Tenancies Act* (The R.T.A). The Tenant argues that nowhere in the R.T.A. does it provide for or make reference to a "Purchase Option Lease Deposit".

[16] Section 12(2) states that a Landlord may not accept a security deposit that is in excess of one half month's rent. The rent in the present case payable by the Tenant was $1,400 per month.

[17] The submission of the Appellant's as stated in his brief is :

> "It is my submission to the Court that the Adjudicator did not have jurisdiction to make a determination as to the dispensation of the 'Purchase Option Lease Deposit', in that he was hearing an Appeal from the Residential Tenancies Board and not an appeal from the Small Claims Court."

[18] The Small Claims Court would (as would any court) be unable to hear an appeal from its own decision. That is not what occurred here. I take the Appellant's

point to be that as an Appeal Court, the Small Claims Court is restricted to matters which could be dealt with by the Residential Tenancies Board, which in this case was the original "court" of jurisdiction.

Law and Analysis

[19] The Respondent's position is that the Adjudicator clearly was vested with jurisdiction to deal with the rental arrears, and further that it was the Appellant himself who raised the issue of the return of his $4,500 deposit .

[20] In his appeal to the Small Claims Court, the Appellant stated:

> "My reason for this appeal (c)(of the receipt of $4,500 surety) 28/September/09 which Elliott's refused to return (calling this a damage deposit)."

[21] The issue of jurisdiction was addressed specifically by the learned Adjudicator in paragraphs 28 and 29 of his Summary of Findings:

> 28. Because the lease to purchase option was such an inextricable component of this overall agreement, I find that I do have jurisdiction to award a return of the deposit in the amount of $4,500 made originally on this matter, with interest outstanding. Obviously, to arrive at that conclusion, I find that all previous options to purchase to be at an end. I find further that although the Elliott's did not tender documents at the end of February 2010, the

> agreement was not enforceable due to the significant amount of uncertainties associates with that agreement.
>
> 29. It is found that I do not have jurisdiction to make that determination, in the alternative, I find that the nexus of the $4,500 with the lease itself is so proximate that I have jurisdiction to deal with that as part of the lease and therefore allow the return of the entire amount, plus interest."

[22] Clearly the Small Claims Court had jurisdiction to deal with the Residential Tenancy Board Appeal. In fact, by virtue of Section 10(d) of the Small Claims Court Act, the court has no jurisdiction in respect of Landlord and Tenant matters, except an appeal from the Residential Tenancies Board under the R.T.A. Under the R.T.A. the board has exclusive jurisdiction, in the first instance in respect of Landlord and Tenant disputes, assuming a Landlord and Tenant relationship exists.(Section 13(1)) Under Section 3(1) the R.T.A. applies where a Landlord and Tenant relationship exists. Whether such a relationship existed is not in dispute in respect of this appeal.

[23] In the present case there was both a "Lease Agreement" and a "Lease to Purchase Option Agreement". Under the former the parties are described as "Landlord and Tenant". Under the latter the parties are described as "Seller/Landlord" and "Buyer/Tenant". Under the Lease to Purchase to Option

Agreement the $4,500 is described as the “Option Consideration” and was said to be “Non-refundable”.

[24] The Adjudicator in his findings stated that all agreements were at an end due to the a lack of trust associated with them (Paras.23 of findings). Further he found that the Landlord used the option agreement for an improper purpose and brought upon the Tenant a level of coercion (Para 22). The Option Agreement had as a condition that the Buyer/Tenant not be in default under the lease. The Adjudicator found further that the Lease Agreement was “no longer sustainable” because of the “conflict and confusion arising out of the option to purchase” (See para 25).

[25] Clearly these two agreements, of which there were amended versions were “intermingled”. The Adjudicator, in fact, made this finding in paragraph 4 of his summary as follows:

> “In listening to and reviewing the evidence presented by both sides, even though the original lease and subsequent leases signed were separate documents to the original lease to purchase and subsequent lease to purchase, both these agreements were significantly intermingled making the determination on the residential leases alone to be impossible and just at the same time.”

[26] Further he made a finding that it was not possible to make an informed and just decision without considering both agreements. At paragraph 3 he made the following finding:

> "The Respondents made a preliminary motion for me to only deal with the residential lease in this matter. I explained at that time that they should be prepared to provide all information to me initially, both in regard to the lease and the option to purchase in order that I may make an informed decision in regards to whether it was possible to separate the two."

[27] In addition to the sections of the R.T.A. cited by the Appellant, there are further relevant provisions which must be considered.

[28] Section 12(1) of the R.T.A. states that any sum of money paid to the Landlord in in addition to the rent shall be deemed to be a security deposit. Section 12(3) states that a security deposit may be applied to the rent owed, if the Landlord makes an application to the Director under section 13 of the Act. (Section 12(6)) Here the Landlord made application under the Act but did not specifically ask for the $4,500 to be applied. Consequently the Director made no such order.

[29] Section 17(A) of the R.T.A. allows the Director to issue an order, among other things:

i. Requiring the payment of money by the Landlord or the Tenant (Section 17(A)(h)).

ii. Determine the disposition of a security deposit. (Section 17(A)(f)).

[30] Further under Section 17(D) of the R.T.A. the Small Claims Court on appeal shall (a) confirm, vary or rescind the Order of the Director or (b) make any Order that the Director could have made.

[31] In the present case the consideration took a form other than a traditional security deposit (one half a months rent) under the Act. Although it was in excess of one half month's rent, the amount in addition to rent is deemed, under the R.T.A., to be a security deposit.

[32] I find on the strength of the wording of the sections that the learned Adjudicator had jurisdiction to direct payment of the $4,500 deposit, even though it was paid pursuant to the Lease Option Purchase Agreement.

[33] The Appellant does not contest or appeal the award of rent itself or that payment is required. He contests only having to pay it from the amount held by the Landlord in trust.

[34] The purpose of the R.T.A. as contained in Section 1(A) is to provide Landlords and Tenants with an efficient and cost effective means for settling disputes. The purpose of the *Small Claims Court Act* as contained in Section 2 is to adjudicate informally and inexpensively claims not exceeding $25,000 in accordance with established principles of law and natural justice.

[35] The Appellant requested the Court to address the issue of the security deposit. While a literal interpretation of the term security deposit is required, it would not serve the purpose of either Act to deny the Small Claims Court's jurisdiction in this case.

[36] As an alternative, even if jurisdiction cannot be derived from the above mentioned legislative provisions, the option agreement (as previously stated) was an integral part of the lease arrangement. It would serve no practical purpose to separate the two documents. On the contrary, separating the two documents, thus forcing a further application, would provide an unjust result for the Landlord who is rightfully owed the monies. The Appellant did not appeal that aspect of the decision.

[37] The Respondent has stated its position on jurisdiction in it's brief as follows:

> "The adjudicator addresses the issue of jurisdiction clearly in his decision at paragraphs 28 and 29. The adjudicator found that all previous options to purchase were at an end. It is submitted that this finding of fact is not being appealed by Mr. Ross. The adjudicator goes further and states that even if he is in error in relation to his jurisdiction to order the return of this money that because the lease itself was so proximate to the option to purchase, this in and of itself afforded jurisdiction to deal with the issue."

[38] I have already concluded that there was ample basis for the Adjudicator's finding that the lease and option to purchase were intermingled. I concur with the Adjudicator's finding that the lease was "so proximate" to the option agreement that it afforded jurisdiction to the Adjudicator. "Proximate" is defined in Black's Law Dictionary to mean as follows:

> "In the legal sense, closest in causal connection."

[39] In my view this finding of the Adjudicator should be overturned only if it amounts to a palpable and overriding error. (**Brett Motors Leasing Ltd. V Welsford** 1999 NSJ No. 466 (NSSC)**, Paradigm Investments Limited v Bremner's Plumbing and Heating Limited** 2010 NSSC 263; **MacIntyre v Nicols**, 2004 NSSC 36 (NSSC).

[40] For the reasons given I see no error in this conclusion, let alone a palpable and overriding one. Throughout the entire arrangement between the parties, the lease and option agreement were the controlling documents. When one was changed or amended the other followed. Separating one from the other would have meant addressing some but not all of the issues affecting the parties and their relationship, which went on for some time.

[41] The essential character of the dispute rested on both the Lease and the Option to Purchase Agreement. Under both documents the relationship of Landlord and Tenant existed, albeit altered by the various aspects of each agreement which the Adjudicator found came to an end.

[42] Further authority for the court's jurisdiction can be found in the recent case of **Corfu Investments Limited v Oickle** [2011] NSJ No. 153 (SC). In **Corfu** Rosinski, J. found in an action for damages based on an alleged negligent disposal of smoking material, no concurrent jurisdiction in the Supreme Court for matters arising under the R.T.A. Indeed, the Court found that any residual jurisdiction that would be otherwise concurrent with that the R.T.A. authorities has been exclusively vested with the RTA , rather than the Courts. The Adjudicators

jurisdiction in this case then was properly established , as the matter being appealed from, arose under the RTA.

[43] There is a final related issue which requires analysis before concluding this appeal.

[44] The Respondent argues, that even if the Court did not have jurisdiction, the Appellant, Mr. Ross (and Mrs. Ross) submitted or “attorned” to the jurisdiction of the Small Claims Court. This means by appealing this issue to the Small Claims Court, the Appellant accepted its jurisdiction. A discussion of the relevant cases and in particular the cases submitted, is useful in this regard.

[45] In **Potter v Burrell** [1989] NSJ No. 87 (SC) the Tenant, Peter Burrell, objected to the report of the Annapolis Valley Tenancy Board which found the Tenant liable to the Landlord for outstanding rent of $562. The basis for the objection (then the method of appeal) was that the board had no jurisdiction to hear the Landlord's application as the premises were not located in the Annapolis Valley district, but rather in the County of Digby separated by the Bear River.

[46] In that case the Tenant argued the merits at the board hearing without objecting to its jurisdiction. Also, both parties resided in Annapolis County according to or at the time of the pleadings. Both parties also attended the hearing and participated in the hearing, having responded to the Notice of the Court as to the time and place for the hearing.

[47] Haliburton J. noted with respect to the Tenant's objection,

> "The recommendation of the board having gone against him, he now objects...on the sole ground that the hearing should have been held before a different board."

[48] Haliburton J. further stated in his decision as follows:

> "The Tenant having submitted to the jurisdiction of the Residential Tenancies Board cannot after the event, be heard to complain that the board had no jurisdiction to deal with the matter."

[49] In **Lantz v Newton** , [2010] NSJ No 619 (S.C.) a law firm commenced action against a former partner claiming fees and disbursements owed to the firm by a client which the partner continued to represent after his departure from the firm. The partner, Mr. Newton, objected to the jurisdiction of the Court to hear the

matter as the partnership agreement contained a clause requiring that disputes be submitted/settled by arbitration, and not the Courts.

[50] In his decision LeBlanc, J. found that the partner had taken steps which were inconsistent with the Court not having jurisdiction. It was not sufficient that the partner refused to answer questions at discovery concerning the merits and that his defence did not specifically address the merits of the claim.

[51] The learned Justice noted in paragraph 21 that s. 7 of the Arbitration Act required the Defendant to move for a stay or dismissal on the basis of lack of jurisdiction before the filing of a Defence. At paragraph 23 the Court concluded:

> "I conclude that by filing a defence addressing the merits of the claims advanced by the respondent, Mr. Newton attorned to the jurisdiction of this Court. I am also satisfied that he took steps after filing the defence that were inconsistent with the view that the court did not have jurisdiction. He was, in effect, complying with pre-trial procedural requirements. Apart from refusing to be discovered, it appears to me that Mr. Newton took several of the steps discussed above, and was, in fact, participating in the court process."

[52] In **Lantz v Newton** the Court also noted an important additional concern. The court stated that the client, Mr. Lantz, who was also a named Defendant, did not participate or was not a party to the partnership agreement and did not

otherwise contract with the Plaintiff firm to settle disputes by arbitration. This additional factor supported the necessity of a court proceeding rather than arbitration.

[53] Mr. Ross, the Appellant here, was both a party and a participant. He asked, on appeal to the Small Claims Court, for that court to deal with the deposit under the Option Agreement. The court dealt with it. He argued the merits and at no time objected to the jurisdiction of the Court. In fact it was the Respondent who raised the issue of jurisdiction which was addressed by the Arbitrator in paragraph 3 of his Summary and referred to in paragraph 26 of this decision:

[54] I concur with the reasoning of Haliburton, J. in **Potter v Burrell** and find it to be applicable on this appeal.The Appellant in the present case having submitted to the jurisdiction of the Court cannot now be heard to complain that the Court has no jurisdiction in the matter.

[55] I therefore conclude that the Small Claims Court Arbitrator was correct to accept the jurisdiction to hear this matter and render his decision.

Conclusion

[56] I find the following with respect to this Appeal from the Small Claims Court:

1. The provisions of the *Residential Tenancies Act* would have allowed the Director to make an order in regard to the $4,500 deposit and consequently the Small Claims Court Adjudicator had jurisdiction to award same on appeal.
2. Even if jurisdiction did not exist before the Small Claims Court Adjudicator strictly on the provisions of the *Residential Tenancies Act*, the co-mingling of the two agreements, namely the Lease to Purchase Option and the Lease itself were so intertwined that jurisdiction under that Act was afforded as part of the lease arrangement, as confirmed in paragraphs 28 and 29 of the Adjudicator's summary.
3. Even without the co-mingling of the two documents, the recent case law pertaining to jurisdiction under the R.T.A. states that the Residential Tenancies Board and not the Courts govern Residential

Tenancies disputes. Consequently this provides further authority for the Adjudicator accepting jurisdiction in the form of an appeal from the Board's decision.

4. Even if jurisdiction did not exist, the Appellant attorned or accepted the jurisdiction of the Small Claims Court with respect it its Appeal by specifically asking the Court to address the issue of the deposit and arguing the issue on its merits. At no time during the original appeal hearing did the Appellant contest the jurisdiction of the Court.

[57] The Appellant's appeal therefore is hereby dismissed with the costs awarded to the Respondent pursuant to the Regulations of the Small Claims Court Act.

[58] Order accordingly.

J