SUPREME COURT OF NOVA SCOTIA
Citation: Killam Properties Inc. v. Patriquin, 2011 NSSC 338

Date: 20110906
Docket: Hfx No. 348507A
Registry: Halifax

Between:

Killam Properties Inc.

Appellant

v.

Mark Patriquin

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	September 6, 2011, in Halifax, Nova Scotia
Oral Decision:	September 6, 2011
Written Decision:	September 20, 2011
Counsel:	Lloyd R. Robbins, for the appellant I. Claire McNeil, for the respondent

By the Court:

[1] This is an appeal from a decision of a Small Claims Court adjudicator given on April 7, 2011. The grounds for appeal as stated in the Notice of Appeal are:

> (a) jurisdictional error; and
>
> (b) error of law

[2] The particulars of the error or failure as set out in the appellant's Notice of Appeal are:

> 1. The Adjudicator made an error of law and was in excess of jurisdiction in determining that the Small Claims Court had jurisdiction to hear the application of the respondent for a review of rental increase.
>
> 2. The effect of the Adjudicator's decision is that he is now hearing an application for declaratory relief. It is respectfully submitted that the Adjudicator of the Small Claims Court sitting on an Appeal of an Order of the Director of Residential Tenancies does not have the jurisdiction to grant Declaratory Relief.

[3] In his brief, counsel for the appellant, Killam Properties Inc., raised three issues:

> 1. Does the Director of Residential Tenancies or an Adjudicator on an appeal of a Director of Residential Tenancies decision have the jurisdiction to hear a *Residential Tenancies Act* Section 14 review of a rent increase that has not been commenced within 30 days of notice of the rent increase?
>
> 2. Does the Adjudicator have the jurisdiction to amend the Section 14 application of the Respondent and hear it as a Section 13(1) application?
>
> 3. Does an Adjudicator have the jurisdiction to grant Pure Declaratory Relief?

[4] In her brief, counsel for the respondent raises two preliminary procedural issues:

> (1) The Court has no jurisdiction to hear interlocutory appeals; and
>
> (2) The Court has not given leave to the appellant to file new evidence and as such the affidavit of Kevin Arbuckle, Director of Property Management for Killam Properties Inc., cannot be considered.

[5] I will first deal with the issue of whether or not the affidavit of Mr. Arbuckle is properly before the Court and whether or not it should be considered on the merits of the appeal.

[6] With regard to affidavit evidence, clearly, the *Small Claims Court Act* appeal provisions do not provide for the submission of any new evidence. The appeal is not a hearing *de novo*. It is a hearing based on the record. By record, I mean the contents of the Small Claims Court file which is requested and provided to our court when a notice of appeal is filed. The entire record, including any exhibits filed in the hearing before the Small Claims Court, are all included in that file and they are all open to

review by this Court. In addition to that, the adjudicator is requested to provide a summary report of findings of law and fact made on the case on appeal. So, in addition to the decision or order of the adjudicator, the summary report is also provided to this court and is used in determining the merits of the appeal.

[7] As Justice Beveridge indicated in his decision of **Lacombe** v. **Sutherland**, [2008] N.S.J. No. 603 at para 29, there are occasions when additional affidavit evidence may be admitted. Again, I use the word "may" because it is a discretionary thing. It depends on the particular judge who hears the appeal. A request has to be made to that particular judge to adduce fresh evidence. If it is evidence that would help to establish a jurisdictional error or a breach of natural justice the request might be found to have merit. Any additional type of affidavit evidence would only be admitted if truly exceptional circumstances exist.

[8] The *Small Claims Court Act* and its Regulations do not contemplate an appeal by way of trial *de novo*. It is based on the record. This is not a carte blanche refusal to admit additional evidence but it would only be in very rare and exceptional circumstances that further affidavit evidence would be admitted. There are good policy reasons for this. If affidavits were routinely accepted the appeal would soon morph into a trial *de novo*. It would be tantamount to an appeal based on a transcript. The Small Claims Court is not required to record the evidence. There is no transcript. To allow affidavit evidence to be filed on appeal to the Supreme Court would add unnecessarily to the expense of the proceeding. It would also defeat the principle purpose for the Small Claims Court which is to provide an inexpensive and informal venue for people to present cases without the need to incur the expense of legal representation.

[9] In terms of the particular affidavit that has been tendered here, I do not accept that it is of any assistance in deciding the merits of this particular appeal. I do not see it as going to the alleged jurisdictional error that is cited as one of the grounds of appeal. If counsel wished to tender additional evidence, notice would have to be provided to the court and to opposing counsel. That was not done in this case.

[10] I will now deal with the other preliminary objection regarding the court's jurisdiction to hear an appeal from an interlocutory ruling prior to a final determination of the matter.

[11] Appeals to this Court are governed by section 32 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 which states:

> **Appeal**
>
> 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
>
> (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.
>
> ...

[12] I also make reference to the decision of Justice Duncan Beveridge (as he was then) in **Lacombe** v. **Sutherland**, *supra*, paras 26, 27 and 28:

> 26 There are not appeals as of right. There is no inherent right accorded to a litigant to appeal or for a superior court to entertain an appeal. Appeals are entirely creations of statute. Typically an appeal is not a re-hearing of the dispute between the parties.
>
> 27 In Nova Scotia the *Small Claims Court Act* provides an appeal as a right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the *Act* does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.
>
> 28 It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing *de novo*, the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice. Even in an ordinary civil case an appellate court can only intervene if the trial court made an error of law or an error of fact that amounts to a clear and palpable error.

[13] Justice Beveridge makes it very clear that if there is a right of appeal it is created by statute and in this particular instance by s. 32 of the *Small Claims Court Act, supra*.

[14] The question that has to be asked is: "Has there been 'an order or determination' of an adjudicator from which to appeal?" Reference should be made to the ruling of the adjudicator on the preliminary motion raised by the Landlord's counsel at the outset of the Small Claims Court appeal of the order of the Director of Residential Tenancies. The motion was heard on March 21, 2011. The hearing was suspended pending a ruling which was delivered in writing on April 7, 2011. On page 9 of the decision, the adjudicator made it clear that he was ruling on the preliminary motion only. It was not a final decision as he invited the parties to "contact the clerk of the Small Claims Court, subject to an appeal of this decision **to have a court date for the continuation of this hearing**." [emphasis added].

[15] It is unfortunate that the adjudicator added the clause "subject to an appeal of this decision." It appears to open the door for an appeal which would expand the right of appeal found in s. 32 of the *Small Claims Court Act*. The adjudicator cannot confer jurisdiction on this Court, the Supreme Court, to entertain an appeal of an interlocutory ruling. An appeal to the Supreme Court under s. 32 of the *Small Claims Court Act* is "from an order or determination of an adjudicator." I interpret that to mean a final order or determination. An interlocutory appeal from a ruling on a preliminary motion is not what is meant by this statutory provision.

[16] I refer to the decision that I rendered in the case of **Her Majesty the Queen** v. **Christopher Wayne Primrose**, 2009 NSSC 241. Although that decision arose in the context of a Summary Conviction Appeal under the Criminal Code, and although s. 830 of the Criminal Code uses the phrase "or other **'final'** [emphasis mine] order or determination" which the *Small Claims Court Act* does not despite that, I am still of the view that the reasons for refusing to entertain an interlocutory appeal in that decision are also applicable to the case that is before me.

[17] I decline to hear the appeal and refer the matter back for a continuation before the same Small Claims Court adjudicator who made the ruling on the preliminary motion.

[18] There are policy reasons as well for making this particular ruling today. The *Small Claims Court Act* as is the *Residential Tenancies Act*, is meant to be an informal and inexpensive means of having issues that affect the parties adjudicated. It is intended to allow people to present their own arguments without the necessity of engaging or retaining lawyers to represent them. That does not mean that parties are prevented from engaging counsel and probably in many instances they are wise to do so, but if this Court was to entertain an appeal of an interlocutory ruling it would result in delays in having matters heard and would likely result in increased costs to the litigants.

[19] The right to appeal a final decision of a Small Claims Court adjudicator on an issue involving residential tenancies is still open to be brought to this court. Nothing in my decision will prejudice or preclude any of the parties to this particular action from launching an appeal if they feel aggrieved by the final decision that the adjudicator makes.

[20] The matter is sent back to the Small Claims Court. Arrangements can be made to have the hearing continued before the same adjudicator.

[21] With regard to Mr. Robbins fear that he might be precluded from launching an appeal of the ruling because of the statutory limitation of 30 days, I do not share his concerns. This is simply a ruling given during the course of a hearing. It is not a final order or determination made by a Small Claims Court adjudicator. This particular issue or the issues that he wishes to raise pertaining to jurisdiction could be included in any appeal that is launched if the ultimate decision is not in favour of the current appellant, Killam Properties Inc. Obviously a decision to appeal will have to await the final decision of the adjudicator after all of the evidence is heard. I note that an appeal from a decision of the Director or his agent to the Small Claims Court is, in fact, a re-trial. It is a re-hearing of the facts. It is not the same as an appeal to our court which relies on the record from the court below.

[22] After hearing from the parties on costs, I order Killam Properties Inc. to pay the sum of $50.00 to Dalhousie Legal Aid as counsel for Mark Patriquin.

McDougall, J.