SUPREME COURT OF NOVA SCOTIA
Citation: McIntyre v. Omers Realty, 2012 NSSC 35

Date: 20120123
Docket: Hfx No. 349060A
SCCH 340123
Registry: Halifax

Between:

Gaidheal McIntyre

Appellant

v.

Omers Realty/Oxford Properties

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 9, 2012, in Halifax, Nova Scotia
Written Decision:	January 23, 2012
Counsel:	Gaidheal McIntyre, self-represented Appellant Michelle M. Kelly and Peter LeCain (Articled Clerk), for the Respondents

By the Court:

[1] This is an appeal pursuant to s. 17E of the *Residential Tenancies Act* from a decision of the Small Claims Court sitting on appeal from a decision of the Director under that legislation.

[2] This matter initially arose out of an application by Gaidheal McIntyre to the Director seeking compensation from her landlord, Omers Realty/Oxford Properties in the amount of $7,786.15, as well as an order directing the landlord to carry out certain repairs and maintenance to the apartment in question.

[3] By decision dated November 18, 2010, Ms. McIntyre's application was dismissed for want of prosecution by a Residential Tenancies officer.

[4] In accordance with the provisions of the *Residential Tenancies Act*, Ms. McIntyre appealed the dismissal to the Small Claims Court. The Small Claims Court held a hearing on February 21 and 22, 2011, following which the parties made written submissions. On April 12, 2011, the Adjudicator issued a written decision allowing Ms. McIntyre's appeal in part and awarding compensation in the amount of $2,236.00, plus interest.

[5] On May 12, 2011, Ms. McIntyre filed a Notice of Appeal in the Supreme Court of Nova Scotia, alleging jurisdictional error, error of law and failure to follow the requirements of natural justice. Detailed particulars of the grounds of appeal are found in the seventy-three page document attached to the Notice of Appeal.

[6] On July 29, 2011, the Adjudicator produced a summary report, which was filed with the Small Claims Court of Nova Scotia on August 3, 2011. The Report is addressed to the Prothonotary and was accompanied by a cover sheet which stated as follows:

> 1. On the 12th day of April 2011 (following a hearing February 21, 2011 and February 22, 2011, and having received written submissions on March 8, 2011, March 15, 2011 and March 22, 2011), I adjudicated a claim between the above named parties, a copy of which is attached hereto.

> 2. On the attached pages, I set out for the consideration of this Honourable Court a summary report of the findings of law and fact made in the case on appeal including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by me, and a copy of the written reasons for my decision, if any.

[7] Attached to the summary report from the Adjudicator was the decision of the Residential Tenancies officer dated November 18, 2010, Ms. McIntyre's appeal to the Small Claims Court and the Adjudicator's decision. It also included the following document:

> **SUMMARY REPORT OF FINDINGS**
>
> 1, All of my factual findings, interpretation of documents and legal conclusions are contained in my Reasons for Decision dated the 12th day of April 2011.

Legislative Framework

[8] The *Residential Tenancies Act* governs this proceeding. As noted, this matter originates with a complaint by Ms. McIntyre to the Director. A complaint to the Director is made in accordance with s. 13(1) of the *Act*, and may include a determination of a question arising under that *Act*, or an allegation of a breach of a lease or contravention of the *Act*. The scope of the potential order which the Director may issue is found in s. 17(A) of the *Act*, which provides as follows:

> 17A An order made by the Director may
>
> (a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act;
>
> (b) require a landlord or tenant not to again breach a lease or an obligation pursuant to this Act;
>
> (c) require the landlord or tenant to make any repair or take any action to remedy a breach, and require the landlord or tenant to pay any reasonable expenses associated with the repair or action;
>
> (d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;

> (e) terminate the tenancy on a date specified in the order and order the tenant to vacate the residential premises on that date;
>
> (f) determine the disposition of a security deposit;
>
> (g) direct that the tenant pay the rent in trust to the Director pending the performance by the landlord of any act the landlord is required by law to perform, and directing the disbursement of the rent;
>
> (h) require the payment of money by the landlord or the tenant;
>
> (i) determine the appropriate level of a rent increase;
>
> (j) require a landlord or tenant to comply with a mediated settlement.

[9] An appeal from the Director's decision is described in s. 17C of the *Act.* The Small Claims Court hears the appeal and must give the parties full opportunity to present evidence and make submissions (see s-s. 5).

[10] Section 17D(1) of the *Act* sets out the jurisdiction of the Small Claims Court hearing the appeal as follows:

> 17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C(4), the Small Claims Court shall
>
> (a) confirm, vary or rescind the order of the Director; or
>
> (b) make any order that the Director could have made.

[11] Appeals to this Court are made pursuant to s. 17E of the *Act* and may only be taken in respect of the following grounds:

(a) jurisdictional error;

(b) error of law; or

(c) failure to follow the requirements of natural justice.

Scope of Appeal

[12] As the legislative review indicates, the jurisdiction of both the Small Claims Court and this Court is limited to the range of remedies which could have been granted by the Director in response to the initial application. Essentially, this would include a determination as to whether there has been a breach of a lease or an obligation imposed by the *Act*. And if so, an order could be issued directing compliance with the lease and *Act*, and providing for payment of compensation.

[13] Ms. McIntyre's lengthy Notice of Appeal contains widespread criticism with respect to how her complaint was handled. She expresses concerns with respect to the behaviour of the Residential Tenancy officers, as well as representatives of the landlord. She also expresses concerns with respect to the Residential Tenancy complaint and investigation process in general. I have limited my review of this matter to the questions arising under the *Act*, which are whether the Adjudicator made an error of law or failed to follow the requirements of natural justice in determining whether Ms. McIntyre was entitled to compensation for a breach of her lease or the *Act* by the landlord.

Analysis

[14] It is clear from Ms. McIntyre's detailed grounds of appeal, as well as her submissions at the hearing, that her fundamental complaint is that the Adjudicator's decision did not correspond with the evidence presented at the appeal hearing. In some cases, she alleges that there was no evidentiary basis for his findings, and in others, that his findings ignored the evidence that was presented. On some issues, she argues that he inappropriately preferred the evidence of the landlord over that which she presented.

[15] Counsel for the landlord conceded that an error of law could include material misapplication of the evidence, and referred the Court to the following passage in *Brett Motors Leasing v. Welsford* (1999), 181 N.S.R. (2d) 76, which was quoted with approval by Beveridge, J. (as he then was) in *Lacombe v. Sutherland* 2008 NSSC 391:

> 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. "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 ...

[16] In order to assess whether the Adjudicator has made an error in the assessment of evidence to a degree sufficient to establish an error of law, it is necessary to consider what evidence was before them. Since there is no transcript prepared, this Court must rely on the report of the Adjudicator under s. 32(4) of the *Small Claims Court Act*. The obligations of the Adjudicator with respect to that report are discussed in the following passage from the *Lacombe* decision:

> My role in this appeal is to review the proceedings below to determine if there has been an error in law. Despite the provisions of the *Act* that seems to envisage the proceedings in the Small Claims Court being recorded, it appears that no such recording here was done, nor is apparently being done on a day-to-day basis. There is therefore no transcript for review to determine what evidence was actually before the adjudicator and hence no ability to assess the evidentiary basis for the findings of fact or mixed findings of fact and law by the adjudicator. What the *Small Claims Court Act* does envisage to assist in meaningful appellate review is for the adjudicator to file his or her report under s. 32(4). Here the original report was not, in my opinion, a report within the meaning of s. 32(4). It simply referred to his written decision of May 9, 2008.
>
> There may well be cases where the adjudicator's decision is all that is required in the report. This is not one of those cases.

[17] Section 32(4) of the *Small Claims Court Act* provides as follows:

> 32 (4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

[18] As is clear from this section, an adjudicator who receives a notice of appeal must review that document and determine whether the grounds of appeal raise any issues with respect to the basis for factual findings or the interpretation of documents. If so, the adjudicator's report should set out the basis for those determinations. This is necessary so that this Court is able to properly consider the appellant's submissions on appeal. The obligations on the adjudicator in preparing their report do not extend to responding to every issue and argument raised in the notice of appeal. I believe that the adjudicator is entitled to make an assessment as to whether a particular finding is one that is relevant and requires justification. For example, in the present case, Ms. McIntyre's Notice of Appeal contests the Adjudicator's comments that she "boycotted" the initial Residential Tenancies' hearing and that the landlord was "reputable". These comments are irrelevant and, in my view, do not require any justification on the part of the Adjudicator in the report required by s. 32(4).

[19] In this case, the Adjudicator's report simply refers the reader to his decision. The decision makes many factual findings; however, it does not always describe the evidence that the Adjudicator relied on in coming to that conclusion. Ms. McIntyre argues that the report should have included this information and, if it had, it would have assisted her and this Court in dealing with the appeal.

[20] I agree with Ms. McIntyre that a more detailed report from the Adjudicator would have been helpful. Without that, the Court was required to rely on the submissions of Ms. McIntyre and counsel for the landlord with respect to what transpired at the hearing. Through a combination of these submissions, the notice of appeal and the Adjudicator's decision, I am satisfied that I can adequately deal with this matter without the necessity of remitting it to the Small Claims Court or requesting further clarification from the Adjudicator.

[21] At the hearing, Ms. McIntyre advised that she was seeking an order for all of the expenses originally encompassed in the original complaint to the Director. The Adjudicator decided that she was entitled to a portion of those expenses, and in particular an abatement of rent for a period of four months when she was not able to fully occupy the unit. He also awarded compensation for transportation expenses incurred in visiting the unit during that time frame.

[22] The largest single disallowed claim was $2,000.00 which Ms. McIntyre says she incurred for alternative accommodations during the four month period when

she was unable to occupy the premises. The Adjudicator concluded that since she was entitled to a rental rebate for this time frame, any costs incurred in securing alternative accommodations do not represent loss. I agree with the Adjudicator on that point and would disallow that item.

[23] There were also a significant number of expenses which Ms. McIntyre claimed as a result of the fact that she was unable to heat the apartment for two years. These included the costs of alternative heat sources, as well as blankets. The reason she was unable to heat the apartment was related to her environmental sensitivities. She wanted the landlord to run the heating system for forty-eight hours before she moved in, in order to "off-gas" any residual chemicals which might be on the pipes. The Adjudicator heard evidence on this issue and determined that he was not satisfied that the apartment needed to remain unheated for two years. It is not my function to assess whether his interpretation of the evidence was correct, but only that there was some evidence on which he might reach that conclusion. I am satisfied that this is the case.

[24] There were a number of expenses claimed by Ms. McIntyre alleged to be the result of damages to her property by the landlord and their workmen. The Adjudicator concluded that these items were not substantiated and I am not prepared to interfere with his assessment of the evidence on these issues.

[25] One of the largest items claimed by Ms. McIntyre was $1,030.00 for e-mails which she sent to the landlord requesting action on a variety of issues. She charged an arbitrary amount of $5.00 per e-mail and said that these were only necessary because of the landlord's unreasonable behaviour and failure to respond. The Adjudicator concluded that there was no basis in law for recovery of time spent sending e-mails. Even if this arose out of the landlord's breach of its obligations under the lease, compensation for time spent dealing with these issues is in the nature of general damages which are not recoverable in Residential Tenancy proceedings.

[26] Ms. McIntyre had claimed $149.86 representing Nova Scotia Power costs for the four months when she was unable to occupy the premises. Since the Adjudicator concluded that she was entitled to a rental rebate for this period, as well as the costs of periodic visits to the premises, I do not see why this additional electrical expense should not also be included. The Adjudicator failed to explain why he disallowed this claim.

Disposition

[27] Having considered the materials on file, including the detailed grounds of appeal and the oral submissions of the appellant, I am not satisfied that she has shown an error of law on the part of the Adjudicator, with the exception of the failure to award the Nova Scotia Power expense in the amount of $149.86. As a result, I will vary the Adjudicator's decision to award damages and costs in the total amount of $2,385.86 to be paid by the landlord to the appellant. This amount will bear interest at a rate of 4% per annum from November 1, 2009.

[28] In light of the divided success on the appeal, I am not prepared to award either party their costs.

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Wood, J.