SUPREME COURT OF NOVA SCOTIA
Citation: *Anyanwu v. Kintziger*, 2013 NSSC 218

Date: 20130709
Docket: Hfx. No. 413605A
Registry: Halifax

Between:

Benedette Anyanwu

Appellant

v.

Martine Kintziger & Dirk Staatsen

Respondents

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: June 24, 2013, in Halifax, Nova Scotia

Counsel: Jonathan Cuming, for the Appellant
Nicholas C.G. Mott, for the Respondent

By the Court:

[1] This is an appeal by Benedette Anyanwu from an order made by an adjudicator of the Small Claims Court on February 19, 2013. The order relates to an appeal of a decision of the Director under the *Residential Tenancies Act,* R.S.N.S. 1989, c. 401, dated January 11, 2013.

[2] The respondent tenants, Martine Kintziger and Dirk Staatsen had advised the landlord, the appellant Benedette Anyanwu, that they were building a house and would be moving out at some future date. According to the adjudicator's decision, this was communicated to the landlord in March 2012. Subsequently, Ms. Anyanwu had contact with a prospective tenant who also spoke with Ms. Kintziger and Mr. Staatsen. Apparently, a lease was drafted and while Ms. Anyanwu executed a copy it was not signed by the prospective tennant.

[3] On June 1, 2012 the solicitor for the respondents advised by letter that because the respondents had not provided a notice to quit, the lease agreement between the parties was automatically renewed for a further year and his clients were not obligated to move from the rental property on June 30, 2012. By reason of this letter the appellant maintains that she discontinued her search for a new tenant.

[4] The adjudicator referred to s. 9(1)(6) of the *Residential Tenancies Act* as follows, at para. 3 of his decision:

> [3] I start with the general proposition that a party to a contract that has been breached has a general duty to mitigate their losses. This principle is codified in the Nova Scotia **Residential Tenancies Act** (the "Act") as follows:
>
> 6. Abandonment and Termination - If the tenant abandons the premises or terminates the tenancy otherwise than in the manner permitted, the landlord shall mitigate any damages that may be caused by the abandonment or termination to the extent that a party to a contract is required by law to mitigate damages.

[5] The adjudicator went on to comment on this provision at para. 4:

> [4] The "abandonment" or "termination" here, to use the cited language of the Act, is based on the decision of October 1, 2012, wherein Adjudicator Barnett was compelled to find that no written notice to quit had been given. Accordingly, the

> Tenants were unable to trigger the statutory provisions requesting that the term be changed to a month to month lease and, in the result, the lease was automatically renewed for a further one year period.

[6] The meaning of this paragraph is difficult to extract, but it is clear that nowhere in the adjudicator's decision was the date of "termination" or "abandonment" indicated.

[7] The issue that the adjudicator dealt with was whether the landlord had, as a matter of law, acted reasonably in mitigating her losses. He found that she had not. The essence of his decision appears at para. 18:

> I am not entirely clear why the Landlord did not take the opportunity to conclude a new lease with Mr. Bulley. As I've said, my finding is that that lease was available to her and it was through her failure to communicate between the parties as to the actual move-in date that led to not be consummated. Alternatively, according to the finding of Adjudicator Barnett, she canceled [sic] the pending arrangement with prospective tenant once she received the June 1, 2012 letter. In either case, the actions of the Landlord are such that she has not acted to reasonably mitigate her potential losses.

[8] The argument by the appellant is that there was no duty on Ms. Anyanwu to mitigate her losses because there was no abandonment or termination until the respondents moved out.

[9] The appellant filed a notice of appeal dated March 18, 2013 appealing from the order or determination of the adjudicator on the grounds of error of law. She set out the particulars of the alleged errors as follows:

> 1. The learned adjudicator, erred in law in finding that the Appellant had a duty to mitigate her losses by finding an alternate tenant, subsequent to June 1, 2012, whereon, in a letter from the respondents' solicitor, the respondents asserted their right to remain within the leased residential premises after the anniversary date of June 30, 2012, because no Notice to Quit had been provided and the year to year lease had been automatically renewed.
>
> 2. The learned adjudicator erred in law in finding that the duty to mitigate imposed by subsection 9(1)(6) of the *Residential tenancies* [sic] *Act,* was

> triggered, prior to September 12, 2012, by reason of an abandonment of the premises or termination of the tenancy.
>
> 3. Alternatively, the learned adjudicator erred in law in imposing on the appellant a greater duty to mitigate any damages occasioned by the termination or abandonment than that required by a party to a contract who is required by law to mitigate damages.
>
> 4. Alternatively, the Trial Judge erred in law in failing to place an **onerous** burden of proof upon the Respondents to establish that the Appellant failed to mitigate her loss;
>
> 5. Alternatively, the learned adjudicator erred in law in failing to find that good faith attempts by the Appellant, intended to avoid the losses caused by the Respondents' breach, constituted reasonable mitigation efforts.

[10] In *Wilson v. Hatt,* 2012 NSSC 349, 2012 CarswellNS 804, confirmed that the analysis set out in *Brett Motor Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.) remains the authority on the appropriate standard of review to be applied to an adjudicator's determination of law. As such, questions of law are reviewed on a standard of correctness. A Small Claims Court adjudicator is therefore not entitled to deference on a question of law (*Wilson* at para. 7).

[11] In *McNaughton v. Ward,* 2007 NSCA 81, the Court of Appeal set out the test for determining whether an erroneous factual finding amounts to an error of law. Saunders J.A. said, at para. 34:

> 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen, supra*, and *H.L. v. Canada (Attorney General)*, 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result.

[12] In oral argument appellant's counsel dealt with grounds 1 and 2. What follows is my decision on these two grounds of appeal. I will deal with both grounds together in my analysis.

1. Ground 1 - the learned adjudicator erred in law in finding that the appellant had a duty to mitigate her losses by finding an alternate tenant, subsequent to June 1, 2012, whereon, in a letter from the respondent's solicitor, the respondents asserted their right to remain within the leased premises after the anniversary date of June 30, 2012 because no notice to quit had been provided and the year-to-year lease had been automatically renewed.

2. Ground 2 - The learned adjudicator erred in law in finding that the duty to mitigate imposed by ss. 9(1)(6) of the Residential Tenancies Act, was triggered prior to September 12, 2012 by reason of abandonment of the premises or termination of the tenancy.

[13] Under s.9(1)(6) of the *Residential Tenancies Act*, a landlord's duty to mitigate losses is triggered by either an abandonment of a rental unit or the unauthorized termination of a tenancy. When either of those events occur a landlord is subject to the common law duty to mitigate his or her losses.

[14] In my view, the adjudicator made no finding as to when the lease was terminated or abandoned. After reviewing the adjudicator's decision, it is clear that he found that the duty to mitigate commenced prior to September 12, 2012 which was the date that the respondents abandoned the property. This is clearly contrary to s. 9(1)(6) of the *Act,* which provides that the duty to mitigate arrises as a result of abandonment, not before.

[15] Having done so, the adjudicator was in error. The statutory requirement is that there must be an abandonment or an unauthorized termination of tenancy to trigger the duty to mitigate. The adjudicator did not appear to be alive to this issue, as he did not determine that there had been an abandonment, which would have triggered duty.

[16] As well, the adjudicator committed a reviewable error by not being alive to the issue of anticipatory breach and/or repudiation, which would be relevant to the mitigation efforts or lack thereof, prior to the abandonment date of the property on

September 12, 2012. Counsel for the parties at this appeal spent a great deal of time in written and oral argument dealing with anticipatory breach which both parties determined to be relevant. At no point did the adjudicator deal with these issues, nor did he appear alive to the requirement to do so.

[17] For these reasons, I allow the appeal and the matter is referred back to the Small Claims Court for a rehearing with a different adjudicator. The appellant shall have costs in the amount of a $50.00 barristers fee, plus allowable disbursements.

Pickup, J.