SUPREME COURT OF NOVA SCOTIA
Citation: *Johnson v. Sarty*, 2019 NSSC 290

Date: 20190926
Docket: Hfx. No. 488579
Registry: Halifax

Between:

Amanda Johnson and Dennis O'Toole

Appellants

v.

Steve Sarty

Respondent

Decision

Judge:	The Honourable Justice Robert W. Wright
Heard:	July 8, 2019 in Halifax, Nova Scotia
Written Decision:	September 26, 2019
Counsel:	Wayne Bacchus for the Appellants Ashley Hamp-Gonsalves for the Respondent

Wright, J.

INTRODUCTION

[1] This is an appeal from a decision of Adjudicator Eric K. Slone in the Nova Scotia Small Claims Court in a residential tenancies matter. The adjudicator's written decision is dated April 28, 2019 and is reported as 2019 CarswellNS 361 (2019 NSSM 17).

FACTUAL AND PROCEDURAL HISTORY

[2] The underlying facts of the case are set out at paragraphs 2-26 of the decision but for ease of reference, I will here reproduce from the respondent's brief a summary of the facts which I adopt as accurate:

> The appellants and the respondent entered a lease agreement ("Lease") for the respondent's small home in Hammonds Plains in September 2017 ("Home"). The term of the Lease was two years, beginning September 22, 2017 and ending September 21, 2019, and called for $1400 in rent per month. The Lease did not contain a provision on tenant's insurance.
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> The Home has a basement with a living space that connects to the garage. The total area is less than 1,500 square feet. Late in the evening on April 8, 2018 there was heavy rain and the appellants noticed water seeping through a crack in the foundation in the garage. They called the respondent, who arrived first thing in the morning. The respondent hired a company to fill in the crack and mopped up the floor in the garage. The repair to the crack in the foundation was successful and apparently stopped the water from coming in. It is unclear how much water came into the basement.
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> Prior to the leak, the respondent provided the appellants with a dehumidifier that was appropriate for a space of 1,500 square feet. The dehumidifier needed to be frequently emptied by hand. Adjudicator Slone found that the

> appellants were not as diligent as they could have been in emptying the dehumidifier.
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> Following the leak, the summer of 2018 was extremely humid. In August 2018, a major growth of mold became visible in the basement, covering walls, furniture and contents in the basement. Many of the appellants' items were ruined. The appellants notified the respondent. The respondent contacted his insurance company who arranged for a specialist in mold remediation to visit the Home. The specialist began removing the mold and also found some asbestos. Around the same time, the appellants moved out of the Home. By late August, the appellants decided not to return to the Home but did not inform the respondent; they stopped paying rent. The respondent first learned of the appellants' decision to permanently leave the Home on September 11, 2018, when he was served with their notice that they were applying to the Residential Tenancies Board to terminate the lease and for compensation for outside accommodations. The respondent counterclaimed for arrears of rent.

[3] Procedurally, the complaint was first brought before the Residential Tenancies Board on October 10, 2018 when both parties were self-represented. This resulted in the issuance of an order on behalf of the board on October 24th , particulars of which were summarized by the adjudicator in his decision as follows (at para. 23):

> The matter came before Residential Tenancy Officer Chantal Desrochers on October 10, 2018. On October 24, 2018, she made her order. The following are the salient points:
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> (a) She denied the Tenants' claim for $3,357.00 (45 days of eating meals out), on the stated basis that the Tenants had already been compensated for this under their tenants' insurance.
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> (b) She denied the Tenants' claim for $6,750.00 (45 days of outside accommodations), also on the stated basis that the Tenants had already been compensated for this under their tenants' insurance.

(c) She denied without explanation the Tenants' claim for $250.00 for electricity which the Tenants contended had been used by the construction crew doing the remediation.

(d) She denied the Tenants' claim for a refund of their August rent of $1,400.00, because she was not satisfied that the premises were uninhabitable and because they had been indemnified for accommodations under their insurance.

(e) The Tenants' claim to terminate the tenancy was denied because the Residential Tenancy Officer was not satisfied that the premises were uninhabitable.

(f) The Landlord's claim for rental arrears and future rent was allowed only up to the end of October 2018, resulting in an award of $2,800.00 minus the security deposit of $700.00, for a total award of $2,100.00 to the Landlord.

[4] With those adverse findings, the tenants filed a Notice of Appeal in Nova Scotia Small Claims Court on October 30, 2018 (which was amended on November 9th after they retained legal counsel). At that juncture, counsel for the tenants filed a separate Notice of Claim against the landlord in Nova Scotia Small Claims Court on January 2, 2019. That claim was framed in negligence in which the tenants sought recovery of the full replacement costs of all contents lost due to mold, as well as all costs incurred to live elsewhere. The components of the claim were $6,750 for outside accommodations, $3,357 for cost of meals and $15,849 for loss of contents (rounded down to $25,000 to fall within the monetary jurisdiction of the court).

[5] This was the first time that the claim for damages for loss of contents became part of the legal process. A special date was then set to hear both the

residential tenancies appeal and the civil claim for damages at the same time. Common to both proceedings was the claim for recovery of extra living costs for accommodation and meals.

THE ADJUDICATOR'S DECISION

[6] In his decision rendered on April 28, 2019 the adjudicator dismissed the separate proceeding for damages on the basis that the Small Claims Court lacked jurisdiction to hear it. The adjudicator based this finding on the combined effect of the *Residential Tenancies Act* (in particular sections 3 and 13) and s.10(d) of the *Small Claims Court Act*. He found additional grounds for the dismissal of the separate claim for damages in the duplicity of the two proceedings (as an instance of abuse of process) and the doctrine of *res judicata*.

[7] Ultimately, the adjudicator concluded that where this claim for damages arose out of a landlord-tenant relationship, only the Residential Tenancies Board and the Supreme Court of Nova Scotia had original concurrent jurisdiction to hear it to the exclusion of Small Claims Court. This disposition of the separate claim for damages has not been challenged in the present appeal to this Court.

[8] The adjudicator then turned his focus on the residential tenancies appeal proceeding. Unlike the Residential Tenancies Officer, the adjudicator found that the leased premises became unfit for habitation sometime in August of 2018, and

that the tenants were within their rights to consider that the tenancy was finished. He was careful, however, not to conflate that finding as constituting a breach by the landlord of his covenant in the lease ("Statutory Condition 1") to keep the premises in a good state of repair and fit for habitation during the tenancy. Indeed, he made the key finding that the premises became unfit for habitation for reasons that were not the fault of the landlord who therefore could not be found to have committed a breach of the statutory condition aforesaid. He then went on to find that the tenancy was terminated based on the doctrine of frustration of contract.

[9] To that end, the adjudicator did allow the tenants' appeal in part by ruling that they were only responsible for the payment of rent up to the date of September 11, 2018 (as opposed to the full 3 months rent allowed by the Residential Tenancy Officer). The adjudicator found September 11th to be the effective date upon which the contract became frustrated, to coincide with the date on which the tenants first gave notice of their repudiation of the lease. In the result, the adjudicator ordered the landlord to refund to the tenants the overpayment of rent beyond the September 11th termination date.

[10] Otherwise, the landlord was exonerated from any liability for payment of the tenants' damages in the absence of any fault being found on his part.

[11] In his analysis the adjudicator added that the tenants were not entitled to recover the losses claimed because they had already received indemnity for them through their own tenants' insurance policy. He ruled that the private insurance exception to the general rule against double recovery did not apply in this case. This issue, however, is not instrumental to the outcome of this appeal.

RELIEF SOUGHT BY APPELLANTS

[12] In the Notice of Appeal filed with this court on May 29, 2019 counsel for the tenants framed the relief sought as follows:

1. A ruling that:

    (a) the premises were unfit due to the actions or inactions of the Respondent;

    (b) the private insurance exception does apply to standard tenants insurance; and

    (c) damages in the amount of $25,000 along with PJI, costs and disbursements be awarded to the appellants;

2. Alternatively, a retrial in Small Claims Court only with respect to the issue of the private insurance exception and damages; or

3. As a final alternative, a declaration that the Adjudicator's ruling on the applicability of the private insurance exception for tenants insurance be struck down.

[13] I interject here my observation that the adjudicator expressly stated in his decision that all of the tenants' claims were squarely before him on the appeal from the Director of Residential Tenancies, even though the latter did not deal with the damages claim for loss of contents. As stated earlier, that head of damages arose as part of the separate civil claim for damages in Small Claims Court, which the adjudicator ultimately dismissed for lack of jurisdiction. However, I recognize that the Small Claims Court permits considerable procedural latitude in the cases which come before it and as the adjudicator noted in his decision, replacement costs for loss of contents would have been within the jurisdiction of the Residential Tenancies Board had it been raised. In any event, the reasoning followed by the adjudicator in reaching his decision has equal application to all components of the tenants' claim for damages. This procedural technicality should therefore not be of any consequence in the outcome of this appeal.

SCOPE OF APPEAL

[14] I turn now to the statutory grounds of appeal prescribed under s.32(1) of the *Small Claims Court Act*. They are (a) jurisdictional error, (b) error of law, or (c) failure to follow the requirements of natural justice.

[15] Although all three of these grounds are plead in the Notice of Appeal, the issue which this case turns on is whether the adjudicator made an error of law in reaching his decision.

[16] The seminal case on the scope of review in an appeal from the Nova Scotia Small Claims Court is **Brett Motors Leasing Ltd. v. Welsford**, [1999] N.S.J. No. 466. Justice Saunders there articulated the permissible scope of review in the following passage (at para. 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. "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. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[17] This case has consistently been applied by this Court in many subsequent decisions. For the sake of brevity, I need refer to only one other, namely, the decision of Justice Moir in **Maloney v. Hoyeck**, [2013] N.S.J. No. 421. The relevant passages are contained in paras. 19-24 which read as follows:

> 19. The need for deference to fact-finding becomes acute on a Small Claims Court appeal. The *Act*, true to its purpose of economical dispute resolution, limits appeals to an error about jurisdiction, an error of law, and a failure in the duty of fairness: s. 32(1). Note the absence of palpable and overriding error of fact.
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> 20. "... [T]he jurisdiction of this court is confined to questions of law that must rest upon findings of fact as found by the adjudicator": *Brett Motors Leasing Ltd. v. Welsford*, [1999] N.S.J. No. 466 (Saunders J.): para. 14. Despite what s. 3(1) of the *Small Claims Court Act* says, it is not a court of record in the ordinary sense of that phrase. The testimony is not recorded. This, too, accords with the economical purpose of the *Act*.
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> 21. Instead of a record, the statute requires the adjudicator to prepare a "summary report of the findings of law and fact" if there is an appeal: s. 32(4). In recent years, Small Claims Court adjudicators have shown a tendency to burden themselves with written decisions in more complicated cases. The decision is attached to the summary and makes for a fresher record of the adjudicator's thinking.
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> 22. We have to rely on the adjudicator's summary: *Victor v. City Motors Ltd.*, [1997] N.S.J. No. 140 (Davison J.) at para. 14. The summary may offend the duty of fairness when it gives no information on the evidence that stood as the basis for an important finding of fact: *Morris v. Cameron*, 2006 NSSC 9 (LeBlanc J.) at para. 37. That does not mean that the adjudicator has to labour over the summary to nearly replicate a transcript. It is just a "summary" after all.
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> 23. We do not review Small Claims Court findings of fact for palpable and overriding error. Our jurisdiction to review for error of law may extend to the situation "where there is no evidence to support the conclusions reached": *Brett* at para. 14. That would have to be apparent from the summary.
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> 24. In conclusion on this point, fact-finding in Small Claims Court is only reviewed when it appears from the summary report and the documentary evidence that there was no evidence to support a conclusion. An insufficient summary may attract review on the third ground, fairness, but it is not insufficient just because it is less satisfying than a transcript.

[18] Counsel for the tenants submits that the adjudicator did not fully review or analyze in his decision all the evidence which would support the assertion that the landlord breached his duty under Statutory Condition 1 in the Lease. More particularly, the criticism is that the adjudicator did not make mention in his decision of the evidence given at the hearing confirming that the landlord did not

use a hydrometer to measure the moisture content of the gyproc or floorboards and that there was no air exchanger or HVAC system in the premises.

[19] Because a review of this particular evidence was not included in the adjudicator's decision, counsel for the tenants sought leave of this court to introduce it by calling *viva voce* evidence on the appeal. That request was summarily denied and the appeal proceeded by the hearing of oral submissions only.

[20] In my view, the omission of this piece of evidence in the adjudicator's decision does not render it insufficient for a proper review by this Court. The adjudicator took judicial notice in his decision of the fact (which was not contentious) that the summer of 2018 was notoriously humid. He expressly accepted that the problem which lead to the mold development was excess humidity. The adjudicator also expressly found that this problem was compounded by the fact that the tenants themselves were partly at fault for failing to notice the dangerously high humidity levels and were not as diligent as they could have been about emptying the dehumidifier. There was ample evidence referred to by the adjudicator in his decision to support those findings.

[21] Accordingly, there is no merit to the submissions advanced by counsel for the tenants that the denial of his request to call *viva voce* evidence on this appeal

would violate both the rules of natural justice and s.7 of the Charter, which is clearly not engaged in this case. As stated earlier, what this appeal turns on is whether the adjudicator erred in finding that the landlord was not at fault for the tenants' damages and had not acted in breach of Statutory Condition 1 of the Lease.

PRINCIPAL ISSUE ON APPEAL – LIABILITY OF LANDLORD

[22] In addressing this issue, the adjudicator reviewed the evidence and concluded that the landlord was not responsible for the tenants' losses. He wrote that he was "not convinced that the Tenants have proved that the Landlord negligently caused their losses, or more accurately was in breach of his obligations as a landlord".

[23] The adjudicator then recounted the two pronged theory upon which the tenants' case rested, namely, that the landlord ought to have supplied a larger, better dehumidifier and that he ought to have done more to repair the situation after the leak. He concluded that neither of those theories could stand up to scrutiny.

[24] Rather than paraphrasing his reasoning, I prefer to reproduce the following passages from his decision (at paras. 59-64):

> No one really knows how or why the mold developed, nor how it appears to have grown so quickly. I can accept that the problem was excess humidity. But the Tenants seek to

> place all of the responsibility for this humidity at the feet of the Landlord, when they themselves were in a better position to monitor the state of the basement. As noted, this was a summer of great humidity everywhere. There was a dehumidifier in the basement. I am not convinced that the Tenants were diligent in emptying it, which meant that it was not working anywhere near its capacity. The Landlord has an obligation under Statutory Condition 1 to keep the premises "in a good state of repair and fit for habitation during the tenancy." However, in my view the Landlord cannot be held responsible for a condition that develops over time that the Tenants could reasonably have detected and perhaps prevented.
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> I am also not convinced that the Landlord acted irresponsibly after he had the basement crack filled. The Landlord impressed me as someone who was responsible and who cared about this house. He made an assessment that whatever water was still in the basement could be removed by diligent dehumidification. While he may arguably have been wrong in his assessment, I do not believe his misjudgment would rise to the level of actionable negligence or breach of any other duty.
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> Not every situation involves fault. Things happen. The high humidity situation and mold growth simply happened. Saying that it could have been avoided is using the benefit of hindsight. In retrospect, if fault is to be found, I find that the Tenants themselves failed to notice the dangerously high humidity level. They were the ones breathing the air and feeling the state of the basement. If the dehumidifier was not adequate to the task, they might have noticed…
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> A finding of negligence, or a claim for breach of the Statutory Condition, brands the liable party as having failed to meet the standard of a reasonable person in that position, in this case a reasonable landlord. I cannot conclude on the evidence that the Landlord failed to live up to that standard.
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> As such, I reject the claims that the Landlord was in breach of the condition to keep the premises "*in a good state of repair and fit for habitation during the tenancy*." That is different from finding that the premises became unfit for habitation, for reasons that were not the fault of the Landlord…

[25] Clearly, the adjudicator found that the tenants' losses were not caused by any act or omission or breach of duty on the part of the landlord. Hence, the landlord did not commit a breach of the statutory condition in the lease to keep the premises in a good state of repair and fit for habitation during the tenancy.

[26] Causation of damages is a question of fact. It bears repeating that the jurisdiction of this Court on an appeal from Small Claims Court is confined to questions of law that must rest upon findings of fact as found by the adjudicator. It cannot be said in this case that there is no evidence to support the conclusions reached by the adjudicator or that he misapplied the evidence in material respects thereby producing an unjust result.

[27] In the result, this Court will not interfere with the adjudicator's findings that the landlord is not responsible for the tenants' losses. It is not the role of this Court to retry the case which is essentially what it has been asked to do on this appeal.

[28] There was one misstep in the adjudicator's decision which also should be addressed. It pertains to the issue of the private insurance exception to the general rule against double recovery of damages, which was of considerable focus both at the trial and in argument on this appeal.

[29] In introducing this subject in his decision, the arbitrator correctly stated that one only gets to the issue of double recovery if the tenants can establish that the landlord is liable for their losses. However, instead of first addressing that liability issue, the adjudicator then ventured into a legal analysis, including a review of case law, of the application of the private insurance exception. Ultimately, he found that the tenants' insurance policy did not fall within the private insurance

exception, holding that the tenants are not able to sue the landlord for losses that they had already recovered under their indemnity policy. Only then did he turn to the main issue of whether the landlord was responsible for the tenants' losses "even if" he was wrong about the applicability of the private insurance exception. This was putting the cart before the horse, so to speak.

[30] It is not necessary for purposes of this appeal for me to delve into the subordinate issue of the applicability of the private insurance exception in this a residential tenancy case. Suffice it to say, that the issue is not material to the outcome of this appeal where the adjudicator's decision that the landlord bears no liability for the tenants' losses has been upheld.

RENT COUNTERCLAIM/FRUSTRATION OF CONTRACT

[31] The remaining issue dealt with by the adjudicator was the landlord's counter-claim for three months rent for the months of August, September and October of 2018.

[32] As noted earlier, the adjudicator disagreed with the finding of the Residential Tenancies Officer that the premises had not become uninhabitable and her award to the landlord of three months rent. The adjudicator stated that the fact the landlord may be found blameless for the occurrence of mold did not equate with a finding that the premises were fit for habitation. His finding was that the

premises became unfit for habitation sometime in August of 2018 and that the tenants were within their rights to consider that the tenancy was finished.

[33] The adjudicator based this finding on the concept of frustration of contract. He explained that doctrine as one that allows for legal termination of a contract due to unforeseen circumstances that prevent the achievement of its objectives, render its performance illegal or make it practically impossible to execute.

[34] In the opinion of the adjudicator, the mold outbreak, coupled with the finding of asbestos (the significance of which was unknown) amounted to frustrating events whereby the parties were relieved from further performance of the contract. He held that the tenants could not be expected to have waited indefinitely for the situation to resolve and that they had made a reasonable decision to live elsewhere. He then fixed the contract termination date to be September 11, 2018 to coincide with the date when the tenants first served their notice upon the landlord that they were applying to the Residential Tenancies Board to terminate the lease. Accordingly, the adjudicator held that the tenants' rent obligation should have ended on that September 11th date and adjusted the outstanding rent calculation accordingly.

[35] Although this was a somewhat liberal application of the doctrine of frustration of contract on the facts of this case, I find no error of law on the part of

the adjudicator in invoking it. In any event, the tenants clearly communicated their repudiation of the lease contract to the landlord on September 11th and the landlord clearly accepted that repudiation subject to maintaining his claim for three months rent. That rent claim was rightly disallowed effective on the September 11th date given the timing of the tenants' communication and, of course, the finding that the premises had become unfit for habitation, indefinitely. The adjudicator's findings produced a fair and just result in this regard which will not be interfered with by this Court on appeal.

UNJUST ENRICHMENT CLAIM

[36] Lastly, counsel for the tenants raised for the first time on the hearing of this appeal a claim for compensation based on the doctrine of unjust enrichment. That doctrine has no application on the facts of this case.

[37] As stated in the leading case of **Kerr v. Baranow**, 2011 SCC 10 (at para. 32 ff.), "Canadian law permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment". None of those elements can even remotely be established in this case.

CONCLUSION

[38] For all of the foregoing reasons, this appeal is dismissed. The respondent is awarded costs in the amount of $50.00 as requested by his counsel pursuant to the regulations enacted under the *Small Claims Court Act*.

J.