SUPREME COURT OF NOVA SCOTIA

Citation: *Kerr v. 3340528 Nova Scotia Limited*, 2023 NSSC 271

Date: 20230808
Docket: *Bridgewater*, No. 517920
Registry: Halifax

Between:

Matthew Kerr

Appellant

v.

3340528 Nova Scotia Limited and Wally Pyke

Respondents

Judge:	The Honourable Justice Diane Rowe
Heard:	February 10, 2023, in Bridgewater, Nova Scotia
Oral Decision:	July 25, 2023
Counsel:	Calvin DeWolfe, for the Appellant Matthew Fancey, for the Respondents

By the Court, orally:

Background

[1] Matthew Kerr, with his former partner, was a residential tenant in a property owned by 3340528 Nova Scotia Limited and Wally Pyke (referred to as "Pyke" in the decision). There was a written Lease Agreement between the parties dated July 1, 2021. The rent was in the amount of $1850.00 per month, payable at the first of each month, with Pyke holding a security deposit in the amount of $925.00. It was a fixed term lease on a year to year basis. Within the lease was a claim providing that subletting of the premises was contingent on the landlord's permission.

[2] Pyke discovered that Kerr had permitted other people to sublet the premises without this prior consent, and locked Mr. Kerr out of the premises. Pyke proceeded to file an application pursuant to the *Residential Tenancies Act*, RSNS 1989 c. 401, and the Residential Tenancies Board seeking a termination of Kerr's tenancy, and to obtain vacant possession of the premises. Mr. Kerr responded to the application by filing a counterapplication before the Board, and requested repayment of rent for the month he had already paid on the basis that Pyke had barred him from the premises at the outset of the month.

[3] Upon hearing both parties concerning the two applications, the Residential Tenancies Officer issued an order on April 27, 2022 ("RTO"). The initial portion of the RTO states:

> "This is an application by the landlord… for termination of tenancy and vacant possession and an award of application fee; and a counterclaim by the tenant, Matthew Kerr, for compliance with the lease or the Act, setting aside a Notice to Quit, payment of money, other, and an award of the application fee."

[4] The RTO awarded Mr Kerr $1881.15 as the total claim against the landlord for the pre-payment of rent and the $31.15 application fee. The RTO decision found that the tenancy was terminated effective March 1, 2022, with the landlord receiving vacant possession on that date, so no determination on this issue was entered. It was accepted by the Residential Tenancies Officer that both parties had received the other's evidence prior to the hearing. The RTO has a note within it that "At the time of the hearing the tenant indicated he has additional claims against the landlord, however, the tenant was informed that whereas these additional claims were not included in the tenant's current application he is free to file a further application should he choose to do so."

[5] Further, the issue of the security deposit was addressed in the RTO decision, referencing it as fact that a security deposit had been maintained by Pyke, and as a note, "The security deposit will be dealt with in accordance with Section 12 of the *Residential Tenancies Act*".

[6] Section 12 requires that the landlord make application under section 13 for a determination by the Residential Tenancies Board. Pyke had done so on April 25, 2022, also citing within that Security Deposit Claim that he was seeking compensation for various items including the carpets, maintenance, and cleaning exceeding the value of the security deposit currently held.

[7] Pyke, also upon receipt of the RTO decision, also filed an appeal of the decision with the Small Claims Court in Bridgewater.

[8] Adjudicator Brent Silver, upon hearing the parties and considering their evidence, determined that the lease had been breached by Kerr with Pyke entitled to retain the security deposit. He further ordered that Pyke be entitled to $3700.00 for damage caused to the flooring and structure at the premises. It was also ordered that Pyke was entitled to filing and service costs in the amount of $458.10. Mr. Kerr was given credit for the $1850.00 claimed as the rent paid for March 2022, and set off as against the $4158.10 with all remaining claims by Kerr dismissed. Finally, while the Small Claims Court Order indicates that the amount owed by Kerr to Pyke is $2308.10 plus the security deposit, it was addressed as a mathematical error by Adjudicator Silver in his Summary Report of Findings dated November 24, 2022. It was indicated that this total was in error, as it should have

been calculated as subtracting the security deposit, for a total owed by Kerr to Pyke of $1382.10.

[9] Mr. Kerr appeals from the decision of Adjudicator Brent Silver, as per the Small Claims Court Order made August 22, 2022, with Summary Report of Findings as set out before, dated November 24, 2022.

Grounds of Appeal

[10] A single ground of appeal in the filed Notice of Appeal by Mr Kerr was advanced, that the Adjudicator made an error of law by finding that there were damages to the flooring and structure caused by the Tenant and that the appropriate amount to pay was $3700.00.

Position of the Parties

[11] In the course of written and oral submissions, Mr. Kerr submitted that the Adjudicator had erred in law in his interpretation of the scope of an appeal of a Residential Tenancies Order, as per the provisions of the *Residential Tenancies Act* and the *Small Claims Court Act*. Kerr pleaded that the Adjudicator was precluded from addressing any of the issues that were not before the Residential Tenancies Officer in the first instance, as evidenced when it advised Kerr to start a separate

application concerning a potential claim for damages. While the Appellant concedes that the appeal before a Small Claims Court Adjudicator of a RTO decision is a "*de novo*" hearing, the scope was argued to be limited to only those issues that were before the Residential Tenancies Officer in the initial application.

[12] Mr. Kerr submitted orally that the Small Claims Court Adjudicator erred in law and erred in jurisdiction by adding the damages element. It was submitted this should have proceeded to a new application before the Residential Tenancies Board, and instead, when the Adjudicator allowed it to come before him on the appeal "*de novo*", the "set off" award resulting in a net debt to the Respondent as further error. Mr. Kerr directs the Court's attention to the *Residential Tenancies Act,* which mandates that the Residential Tenancies Officer has the "exclusive authority, at first instance" (s. 13 of the *Residential Tenancies Act*) to investigate and endeavour to mediate a settlement.

[13] Mr. Kerr pleads that there was no basis for the Adjudicator to make a determination on issues beyond that of the rent paid and vacant possession, which was the subject matter of the RTO decision. He argues that a narrow scope of "*de novo*" hearing is appropriate, limited by the prior administrative proceeding.

[14] Kerr requests that the Court set aside part of the Adjudicator's decision specifically as it relates to the damages to the carpet and flooring, as well as the security deposit, but to retain the portion of the decision that upholds the award of $1850.00 to the Appellant. Kerr also asks the Court to issue an Order to stave off the effect of any filings of the Adjudicator's decision in the Personal Property Registry and to quash any execution orders that may be in place regarding the indebtedness of the Appellant.

[15] The Respondents submit that as the Residential Tenancies Officer did address the issues before her with direction to the parties (i.e. "for Mr. Kerr to start a new application regarding his claim for damages") that it effectively demonstrates that these issues were within the scope of the Small Claims Court Adjudicator as it did appear as "an issue before the RTO" and an appropriate exercise of the Adjudicator's authority in the course of the *de novo* hearing. Pyke states that there is a policy argument that if Kerr's interpretation of the law by prevails then a person could essentially "hive off" embedded issues which could result in various administrative proceedings and related decisions all out of sequence in regard to the legislation or become issues *res judicata*, resulting in confusion. The Respondent argues that a purposive approach to the legislation would be to affirm the wider scope of the adjudicators review of <u>all</u> matters live

between the parties, subject to all the appropriate evidence placed before the Adjudicator in the appeal.

Law and Analysis

[16] Section 17C of the *Residential Tenancies Act* provides that an Appeal to the Small Claims Court is available for any party to an order of the Director. More specifically, at sections 17C(4) to (7) of the *Act*:

> 17C(4) The Small Claims Court shall conduct the hearing in respect of a matter for which a notice of appeal is filed.
>
> (5) The Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.
>
> (6) The Small Claims Court may conduct a hearing orally, including by telephone.
>
> (7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.

[17] The parties do not dispute that this section outlines that the appeal is "*de novo*". While continuing on, the *Residential Tenancies Act* provides at section 17D the duties of the Small Claims Court on appeal, that shall be to:

> 17D(1)(a) confirm, vary or rescind the order of the Director; or (b) make any order that the Director could have made.

And further at:

> 17D(2) The Small Claims Court may award to a successful party to an appeal the cost of the fee paid pursuant to subsection 17C(2) and any costs awarded to that party pursuant to clause 17A(k), but no other costs associated with the appeal.

[18] There is no standard of review set out in the *Residential Tenancies Act* for the Small Claims Court to undertake when it receives an appeal of a RTO. As noted before, it is accepted that the legislation in the *Act* provides for a *de novo* hearing of the issues.

[19] Upon an appeal of a decision of the Small Claims Court, in the context of the *Residential Tenancies Act*, the standard of review for the Supreme Court is set out in both the *Small Claims Court Act*, in conjunction with the *Residential Tenancies Act*. The grounds in this appeal under review are that the Adjudicator erred in law, and, as was alluded to in the oral argument, a jurisdictional error.

[20] The Appellant must demonstrate to this Court on this appeal that, on a balance of probabilities, the Adjudicator committed a "palpable and overriding error" in law (as per *Hoyeck v Maloney*, 2013 NSSC 266 para 23-24) and that the error resulted in an incorrect finding.

[21] As Justice Hoskins wrote at para 30 of *John Ross and Sons Limited v Federal Express Canada Corporation*, 2022 NSSC 336,:

> [30] While there may be a divergence of opinion as to whether this Court should review Small Claims Court findings of fact for palpable and overriding error, it is clear, as Justice LeBlanc stated in *C.M. MacNeil & Associates v. Toulon Development Corporation*, 2016 NSSC 16, at para. 37, that this Court may find an error of law where there was no evidence to support the conclusions reached. As Moir J. pointed out in *Hoyeck*, at para. 23, this would have to be apparent from the summary.

[22] The Court has reviewed the documentary evidence and the Summary Report of Findings submitted by the Adjudicator. Adjudicator Silver summarized the evidence of each witness that appeared in the hearing with findings on their credibility, and recounted his review of the photographic and documentary evidence before him. In the Summary Report of Findings, the Adjudicator notes that the expert tendered by Pyke was "vague and unconvincing" but found that, based on the evidence of Constable Clark concerning the state of the premises, and "my assessment of the evidence as a whole," he assessed a total of $1700.00 for cleaning the walls and carpets, and $2000.00 for repairs to the walls. This calculation was informed by his review of the photographic evidence of the state of the premises entered by Pyke, as well as oral testimony.

[23] In this element, the Court accepts that the Adjudicator had a basis on the evidence before him to make the conclusion concerning damages. It is accepted that, absent palpable and overriding error, deference to findings of fact is given upon an appellate review. If this were the sole issue, the Court would not disturb the finding of fact the Adjudicator made concerning the award for damages.

[24] However, the Appellant raises the question of whether the Adjudicator had erred in law by permitting this element and argument to come before him at all in the context of the Small Claims Court appeal of the RTO. In support of this

position, Kerr relies upon the obiter comment by Justice Freeman in *MacDonald v Demont* [2001] NSJ No 135 at para 15:

> 15) I would add that a Board hearing an appeal from a Director's order should, as a minimum, include in its record for the court reasons establishing that a hearing *de novo* has been held and an independent adjudication made of issues raised before the Director, that evidence was received from which specified findings of fact were made or, in the alternative, that no evidence was presented which would support findings of relevant facts.

[25] In response, the Respondent has directed the Court to consider the preceding para 14 of *MacDonald, supra*, where the Court had written as follows:

> 14) I would also endorse the closing reminder of Huband, J.A. in **Shams v. Wiebe** (supra):
>
> > I would, however, recommend (if it is not already the practice) that when the decision of a Residential Tenancies Officer [our Director, represented by a Hearing Officer] is appealed, the notice of appeal should clearly indicate that the hearing before the Commission is an entirely new hearing where the parties must tender the evidence which they rely upon and that failure to appear and provide the evidence is likely to be fatal to their case.

[26] *Eastern Mainland Housing Authority v. Hadley* 2019 NSSM 23, a case also relied upon by the Appellant, is distinguished by the Respondent as it was accurately pointed out to the Court that, after considering numerous cases that commented on the appeal process from a RTO to the Small Claims Court and what should properly be the subject matter of the appeal hearing, that the Adjudicator still holds that he is bound by the Nova Scotia Court of Appeal's decision in *McIntyre v Omers Realty*, 2012 NSSC 35, in which Wood, J stated at para 9, "The

Small Claims Court hears the appeal and must give the parties full opportunity to present evidence and make submissions."

[27] Further, as was held in *Densmore v Lidstone* 2008 NSSM 48, procedural fairness only precludes new evidence or new matters at a Small Claims hearing *de novo* when it is not addressed in either the Director's hearing or contained as a grounds of appeal in the Notice of Appeal. As Adjudicator O'Hara wrote at para 4: "I cannot adjudicate on an issue that was not even known to the parties prior to the hearing or disclosed in the appeal documents."

[28] It is apparent on a review of the RTO decision in this matter that the issue of a potential damages claim was raised by the parties, both in regard to potential claims by Kerr and by Pyke concerning the end of the tenancy and the state of the premises. This is shown by the reference appearing in the "Notes" as referenced earlier in this decision.

[29] Further, on a review of the Form A- Notice of Appeal, which is a form created in accordance with section 2 of the *Residential Tenancies Appeal Regulations,* made pursuant to the *Residential Tenancies Act,* as filed by Pyke, the Court notes that reference is made that the issues include the cleaning of carpets and the premises, lawn care, and "fraudulent contract", which the Court interprets

as breach of the lease. I will also note that at the bottom of the form, in bolded type, is the following paragraph for the information of all recipients:

> **Appellant/Respondent: An appeal from a Residential Tenancies Director's Order is a brand new hearing. You must present all arguments and evidence at this appeal hearing. Include any new evidence that was not presented at the original Residency Tenancy hearing.**

[30] As the Form is a part of the *Regulations*, made pursuant to the *Act*, they have a function and foundation in law in informing the participants of the intended scope of the appeal hearing before the Small Claims Court.

[31] In consideration of Freeman, J.'s comment in *MacDonald, supra*, at para 14, it would appear that the Form A was drafted to address a potential ambiguity for participants, to highlight that this is a *de novo* hearing and inform concerning what is anticipated of the participants.

[32] Therefore, both parties to the tenancy agreement had notice that all the issues were to be the subject of the "brand new hearing" before the adjudicator of the Small Claims Court, as they were referenced in the RTO and in the Form A, and even in the filing Mr. Pyke made concerning the security deposit. All arguments and evidence were mandated to be included, as well as new evidence not before the RTO at the first hearing were to be heard.

[33] Further, in keeping with section 17D(1)(a) and (b), it was within the Adjudicator's scope of authority to confirm, vary, or rescind the order of the Director; or make any order that the Director could have made. This section is permissive, and allows the Adjudicator to enter into a consideration of the flooring, structural issues, security deposit, or other matters that were placed before him in the course of the appeal hearing and make an order.

[34] In reviewing Adjudicator Silver's findings of fact made in support of his decision on the appeal on this element, the Court does not find that he made an overriding or palpable error of fact that would require the decision to be set aside.

[35] Finally, were I to accept the Appellant's position that there is a limited scope to the *de novo* hearing on an appeal to the Small Claims Court made pursuant to the *Residential Tenancies Act*, then it would heighten the risk of fragmenting the issues between the parties to a lease agreement, as well as potentially fragmenting the processes as between the Court and the administrative Board. This would run against the public policy objectives of the *Residential Tenancies Act*, and the *Small Claims Court Act*, as has been canvassed in caselaw and in legislation, which is to create a speedy and inexpensive form of judicial proceeding to address the legal issues between the parties.

[36] This is a purposive interpretation of the *Residential Tenancies Act*, its Regulations and Form A, upon on appeal of a RTO decision, as read in harmony with the *Small Claims Court Act.* It appears then that it is incumbent for the parties to bring all the issues to the Small Claims Court upon the hearing of an appeal of a RTO decision.

Conclusion

[37] For the reasons set out above, the appeal is dismissed, with costs awarded to the Respondent, Pyke in the amount of $50.00 as was requested.

[38] In regard to the mathematical error that Adjudicator Silver accounted for in the Summary Report, to the extent that there has been any filings or processes for collection undertaken in regard to his Order, it is incumbent upon the Respondent, Pyke's counsel to ensure that Adjudicator Silver's erratum, or error, is accounted for and adjusted, to ensure that the correct amount of $1383.10 is payable to Pyke.

Diane Rowe, J.