SUPREME COURT OF NOVA SCOTIA
Citation: Takacs v. Elegant Horizon Suites, 2013 NSSC 285

Date: (20130918)
Docket: Hfx. No. 412749A
Registry: Halifax

Between:

Cameron Takacs

Appellant

v.

Elegant Horizon Suites

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	Heard by written submissions only, July 30, 2013 in Halifax, Nova Scotia
Final Written Submissions:	June 14, 2013
Counsel:	Mr. Cameron Takacs, Appellant, Unrepresented Danielle Kershaw for the Respondent

INTRODUCTION:

[1] Mr. Takacs and Elegant Horizon were in a landlord-tenant relationship. Disagreements led to a hearing before a residential tendencies officer, Sheila Briand, on January 9, 2013. Miss Briand ordered vacant possession of the premises in favour of the landlord Elegant Horizon effective January 25th, 2013 and awarded $3663.84 to Elegant Horizon.

[2] January 25th, 2013 Mr. Takacs filed an appeal of that order to the Small Claims Court. That hearing was heard February 7, 2013 and adjourned and heard further on February 21, 2013 before Adjudicator J.W. Stephen Johnston.

[3] He rendered a decision February 22 and a summary report March 18, 2013. His order reads:

> The tenant Cameron Takacs and occupants of unit 4C, 226 Bedford Highway shall provide vacant possession of that unit before February 28, 2013 at 11:59 PM. Further Cameron Takacs shall pay to the landlord/Respondent the sum of $6050.

[4] On February 25th, Mr. Takacs filed a Notice of Appeal in the Supreme Court of Nova Scotia appealing the February 7, 2013 decision of Adjudicator Johnston.

[5] That Notice alleged that the Adjudicator erred because of a "failure to follow the requirements of natural justice," and the particulars of the error or failure which form the grounds of appeal are:

> Asked for the opportunity to provide additional documents as evidence prior to decision by Adjudicator - denied documents [that?] confirm the Respondent and agents misrepresentation of facts during [the] tenancy hearing January 9, 2013 and the February 7, 2013 hearing. Claims made by the appellant for compensation were denied due to missing evidence. Superintendent misrepresented fees, HRM violation recipient and others February 7th. No order was issued for repairs and repairs had not been completed.

[6] In response to that the Adjudicator issued his summary report of findings.

[7] On June 13 Mr. Takacs filed his legal brief. Notably the brief requests that:

> The following documentary evidence will be used to support the appeal: a - affidavit of Cameron Takacs sworn February 26 2013; B - such further and other materials as this court may allow.

[8] In summary, Mr. Takacs asks that this Court quash the decision made by the Adjudicator and return the matter to Small Claims Court to be heard by another Adjudicator.

[9] On June 14th Elegant Horizon filed its brief. It requests that the appeal be denied with costs as allowed by Section 23 of the *Small Claims Forms and Procedures Regulations*, or as the Court deems just.

[10] By agreement of the parties the appeal was to be decided without oral argument, so this Court is restricted to the written materials filed.

GROUNDS OF APPEAL

[11] As pointed out by the Respondent the grounds of appeal in the Appellant's brief are more expansive than in the Notice of Appeal. Given that the Appellant is self represented and not legally trained, I will not restrict my attention to only the grounds of appeal listed in the Notice of Appeal.

[12] The grounds appeal listed in the brief are: [my paraphrasing]

- The Adjudicator failed to recognize that the Respondent Jeremy deKoe provided the Court with false and misleading statements;

- The Adjudicator did not recognize that HRM bylaw services served a notice of violation to the landlord, not the tenant, as represented by Jeremy deKoe ;

- The Adjudicator did not recognize that professional photographers are required to obtain consent when taking pictures of personal property [that being of the Takacs family];

- The Adjudicator failed to protect the privacy of the Appellant "by relying upon a pledge made by Jeremy deKoe to return photographs upon vacant possession instead of including the requirement in his order";

- The Adjudicator failed to recognize that the Respondent harassed the Appellant in his workplace in clear view of his coworkers and customers, and that a security guard was concerned to a point that he felt the need to pull Mr. Wout deKoe away from the Appellant;

- The appeal has merit and access to justice is important.

[13] I find that of the numbered listed grounds of appeal in the brief, numbers 5, 6 and 7 involve matters that are not material to the potential success of this appeal and I therefore do not need to deal with those issues. I will consider grounds of appeal numbered 3 and 4 listed in the brief, as Issue #1 and #2 respectively.

[14] Issue #1 - [Jeremy de Koe gave false and misleading statements] is clearly an argument that the Adjudicator misapprehended the evidence or that his findings of fact were unreasonable.

[15] Issue #2 - similarly involves an allegation that the Adjudicator misapprehended the evidence regarding to whom HRM bylaw services served a notice of violation - the landlord or the tenant?

[16] Since the Notice of Appeal includes an allegation of a failure to follow the requirements of natural justice, I will also consider that ground of appeal as argued in the Appellant's brief.

Preliminary Issue

[17] Mr. Takacs wishes this Court to consider his 105 paragraph affidavit of February 26, 2013 which was created to support his motion for a stay of the Adjudicator's decision.

[18] I will not consider it because: Elegant Horizon has had no opportunity before me to cross examine Mr. Takacs on his affidavit; the affidavit goes into detail about the circumstances of the tenancy which was dealt with by the Small Claims Court hearing; the affidavit does not contain any "fresh" or "unavailable" evidence to the Appellant at the time of the Small Claims Court Appeal hearing, nor does it on its face provide compelling evidence of a breach of natural justice. Moreover, Justice Hood refused to impose the stay of the Adjudicator's decision sought by Mr. Takacs, as supported by his February 26, 2013 affidavit.

[19] In this regard, I rely on the comments of Justice McDougall in *Killam Properties Inc. v. Patriquin* 2011 NSCC 338 at paras. 5-8 and conclude as an exercise of my discretion that it is not appropriate to admit as evidence the affidavit of Mr. Takacs.

STANDARD OF REVIEW

[20] As I said in *Gallant v. Martin* 2010 NSSC 375 at paras. 6 to 13:

> [6] Section 32 of the Act allows an appeal from an Adjudicator's decision on the grounds of:
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> a) Jurisdictional error;
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> b) Error of law or;
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> c) Failure to follow the requirements of natural justice.
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> [7] In Paradigm Investments Ltd v. Bremner's Plumbing and Heating Ltd., 2010 NSSC 263, Robertson, J. observed at para. 6:
>
> There are inherent limitations of the Small Claims Court Act appeal process. The leading case often quoted is Brett Motors Leasing Ltd. v. Welsford, [1999] N.S.J. No. 466 (N.S.S.C.), where Saunders, J. (as he was then) stated at para. 14:
>
> > 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.

[8] As noted above, this Court is only entitled to consider the "materials" from the Small Claims Court hearing. These "materials" usually consist of all the exhibits filed in the hearing, as well as the Adjudicator's Decision and Summary report of the findings of law and fact that they have made in a case on appeal, including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by the Adjudicator - see sections 32(3) and (4) of the Act. Notably, this Court does not have the benefit of the transcribed testimony of witnesses at the Small Claims Court trial.

[9] This puts an appeal court at a substantial disadvantage in relation to the Adjudicator who had the benefit of seeing the testimony of the witnesses (in particular the testimony of witnesses in relation to the exhibits in the case) and who made findings of credibility that may be determinative of the outcome of the case.

[10] A high level of deference must be accorded to the Adjudicator's findings of fact. Nevertheless, any material finding of fact that is based on palpable and overriding error constitutes an error of law.

[11] As Robertson, J. observed at para. 18 in Paradigm Investments supra.:

> I have also considered the law on what constitutes palpable and overriding error. I refer to McPhee v. Gwynne-Timothy, 2005 NSCA 80, at paras. 31, 32 and 33:
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> 31 A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene...
>
> 32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities

> with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial... Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
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> 33 On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error.

[12] The term "the requirements of natural justice" is broadly interpreted to include "procedural fairness". The acceptable level of minimum procedural fairness is always context specific. As Saunders, J. (as he then was) stated in Brett Motors Leasing Ltd. v. Welsford, (1999) 181 N.S.R. (2d) 76 at para. 12:

> I think it helps to recall that the small claim court's purpose is to provide an informal and inexpensive forum... Depending on whether the parties are represented by counsel, or other circumstances, an Adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.

[13] Nevertheless, a minimum level of procedural fairness must always remain. The parties are equally entitled to such protections to ensure the outcome is "just" as between them.

[21] Notably as Justice Duncan points out, in *Killam Properties Inc.* 2013 NSSC 171 at paragraph 22, in residential tenancies matters the appeal to this court is

pursuant to Section 17E of the *Residential Tenancy Act*, which is mirrors the grounds of appeal permitted in Section 32 of the *Small Claims Court Act*.

[22] Regarding issues number one and two and the allegations of a misapprehension of the evidence, the onus is on the Appellant to establish that there has been a misapprehension of evidence, and that that misapprehension of evidence goes to the "core of the reasoning process" of the Adjudicator before it will be appropriate for this court to overturn an Adjudicator's decision on those grounds - see the comments of Justice Cromwell [as he then was] in *R. v. Schrader* at paragraph 6 [even though a criminal case, the reasoning is equally applicable here]:

> 6 Of course, slips in reciting the evidence or failure to address every inconsistency do not constitute reversible error. In this case, the trial judge misapprehended aspects of the evidence which were critical to his findings of credibility and to the reasons he gave for finding the Appellant guilty. These misapprehensions went to "... the very core of the reasoning process which culminated in the conviction.": R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) per Doherty J.A. at p. 221. As in Morrissey, the Appellant here "...has demonstrated significant errors in the trial judge's understanding of the substance of the evidence" and that "...those errors figured prominently in the reasoning process which led to crucial findings of credibility and reliability, and then to crucial findings of fact." Therefore, even though the evidence adduced at trial was sufficient to make a finding of guilt a reasonable verdict, the conviction entered by the judge was a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code of Canada, R.S.C. 1985, c. C-46, and must be set aside: see Morrissey, supra and R. v. Miller (1999), 173 N.S.R. (2d) 26 (C.A.).

[23] Whether there is a misapprehension of evidence is best characterized as an error of law, if it can be established, and a correctness standard of review applies.

[24] Whether there has been a breach of natural justice or a failure to follow the minimum requirements of natural justice is best analogized to an error of law to which a correctness standard also applies.

[25] Thus, in summary, a correctness standard applies to: any misapprehension of evidence by the Adjudicator which could be construed as going to the very core of the reasoning process; to any breach of natural justice or unfairness that falls below the minimum "fundamentally fair" standard; and to any demonstrable error of law - for a judicial definition of this see Justice Saunders [as he then was] decision in *Brett Motors Leasing Ltd. v. Welsford* (1999) 181 NSR 2d 76 at paragraph 14.

[26] Strictly speaking errors involving facts are not included in the nominal potential grounds of appeal in Section 17 E of the *Residential Tendencies Act* /Section 32 of the Small *Claims Court Act*. Alleged error in relation to questions of mixed fact and law requires courts to characterize the error alleged based on its

potential effect on the process as either predominantly factual or legal - that is there is a spectrum between pure fact and pure law on which such alleged errors must be situated by judges for the purposes of analysis - see Justice Cromwell's (as he then was)comments in *R. v. Grouse* 2004 NSCA 108 at paragraph 44; see also Justice Major's comments in *Housen v. Nikolaisen* [2002] 2 SCR 235 at paragraph 27. The more so that a finding of fact is inextricably linked to a question of law, the more likely it will be considered to be in effect an error of law to which a correctness standard applies. The more so that a finding of fact is unrelated to a question of law the more likely it will be considered to be an error of fact which is reviewed by courts on the standard of palpable and overriding error.

[27] A question of fact can effectively amount to a pure question of law from the standard of review perspective if it involves "any material finding of fact that is based on palpable and overriding error" - see the comments of Justice Robertson in *Paradigm Investments LTD v. Bremner's Plumbing and Heating Ltd.* 2010 NSSC 263 at paragraphs 6 and 18.

[28] I observe that, ultimately the standard of review that is appropriate in relation to an alleged error is premised on a judicial precedent based policy decision regarding what level of deference a reviewing court should afford to the reviewed court/statutory body regarding such alleged errors.

Consideration of the Grounds of Appeal raised by the Appellant

[29] Issue #1 - did the Adjudicator err in not recognizing that Jeremy deKoe gave false and misleading statements?

[30] Issue #2 - did the Adjudicator misapprehend the evidence regarding to whom HRM bylaw services served a notice of violation - the landlord or tenant?

[31] Paragraphs 13 to 29 of its brief contain the majority of the Appellant's complaints in this respect - These are properly viewed in contrast to the detailed decision of the Adjudicator, after what appears to have been a fulsome hearing involving 17 exhibits. I note that both parents of Mr. Takacs testified as did Mr. Takacs.

[32] Notably the Adjudicator stated at paragraph 25:

> On hearing the totality of evidence up until that point, I got the distinct sense that all these issues were simply brought up as delay tactics as it relates to avoiding payment obligations under the lease.

[33] Similarly at paragraph 31:

> In addition, I also find that the landlord had no other choice but to serve Cameron Takacs at his place of work [as no one would answer the phone or the door] and I found that they did that appropriately, initially requesting that a security guard be in attendance at the time. In addition, the security guard testified at the hearing and confirmed that everything was done [in] a proper manner.

[34] Moreover, the Adjudicator gave Mr. Takacs the option of setting the date for vacant possession at the end of March 2013 if outstanding arrears of $6400 were paid by February 18, 2013; if that was not the case vacant possession would be ordered for the end of February. As no payment apparently had been made by February 18 he arranged for both parties to attend a hearing on February 21 to confirm this. At that hearing the Adjudicator was informed that the matter was being appealed - thus vacant possession was set for the end of February.

[35] I conclude there is no air of reality to the suggestions that the Adjudicator misapprehended the evidence of Jeremy deKoe. Furthermore, the materials

available to me did not suggest any palpable or overriding error in the findings of fact made by the Adjudicator.

[36] Therefore, I find neither Issue #1 or Issue #2 are not a good ground of appeal.

[37] Issue #3 - was there a breach of natural justice or failure to follow the requirements of natural justice?

[38] In Mr. Takacs' legal brief he alleges:

> 23 - the Appellant asked the court for the opportunity to obtain a copy of the officer's notes from the residential tendencies board hearing in order to confirm the change in position and the request was denied;
>
> 25 - at the second court hearing [February 21, 2013] the Appellant attempted to provide the court with a letter from the landlord's bank that confirmed that the service charges are seven dollars each not $25 as stated by Jeremy deKoe. Mr. Johnson refused to accept the letter.

[39] Neither of those examples, even if true, nor any others that I might infer from the legal brief of Mr. Takacs suggest a breach of the minimum requirements of natural justice, particularly bearing in mind the informal and efficient process that is the hallmark of Small Claims Court hearings.

[40] Therefore, I find that Issue #3 is not a good ground of appeal.

CONCLUSION

[41] The Appellant's have markedly failed to demonstrate that there was either an error of law or a failure to follow the requirements of natural justice in this case. I dismiss the appeal herein.

[42] Mr. Takacs has now had the benefit of a review of the original decision of Mr. Briand, the Residential Tenancies officer, and by two courts. There is no further appeal available - section 32(6) of the *Small Claims Court Act*.

[43] Payment of the outstanding amounts should be made forthwith; if it has not already been made.

COSTS

[44] Elegant Horizon has requested costs pursuant to section 23 of the *Small Claims Court Forms and Procedures* regulations or as this Court deems just.

[45] Section 23 of the *Small Claims Court Forms and Procedures* regulations OIC 93-110,NS Reg.17/93 reads:

> "On an appeal from a decision of an Adjudicator, the judge may award the following costs:
>
> A - any costs which the Adjudicator could have awarded under section 15;
>
> B - a barrister fee not to exceed $50;
>
> C - out-of-pocket expenses approved by the judge."

[46] Section 15(1) of the regulations reads:

> The Adjudicator may award the following costs to the successful party:
>
> A - filing fee
>
> B - transfer fee
>
> C - fees incurred in serving the claim or defence/counterclaim
>
> D - witness fees
>
> E - costs incurred prior to a transfer to the small claims court pursuant to section 10
>
> F - reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held
>
> G - additional out-of-pocket expenses approved by the Adjudicator.

[47] I note in this case that the parties agreed that an oral hearing was not required - as permitted by the regulations in Section 22 [9]. I therefore decline to award a barrister fee.

[48] The Adjudicator's order for the payment of the sum of $6050 was based on four months rent in arrears [$6400] less $400 as a reduction in rent in December 2012 for Mr. deKoe's inappropriate entrance without due notice at the tenant's residence; and an additional cost of two returned cheques at $25 each.

[49] In all the circumstances here, I decline to award costs in favour of the successful party Elegant Horizon Suites Ltd., given that no filing fee was required on appeal, that Elegant Horizon would have been aware that it could not claim its legal fees beyond the permitted $50 barrister fee., and no "out-of-pocket expenses" were specifically requested.

Rosinski, J.