

Appeal of the Order of the Director of Residential Tenancies
Cite as: Royal Bank of Canada v. Westphal Court Ltd., 2016 NSSM 26

ORDER
in the Small Claims Court of Nova Scotia

B E T W E E N:

ROYAL BANK OF CANADA

Appellant

-and-

WESTPHAL COURT LIMITED

Respondent

DECISION

1. This matter came before me on June 2, 2016. Ms. Heather Scott was in attendance on behalf of Westphal Court Limited and the Royal Bank of Canada (RBC) was represented by Douglas W. Schipilow.
2. It was not clear that the RBC was served notice of the Residential Tenancies original hearing however, there is a note in the file prior to the hearing sent to Ms. Briand at Access Nova Scotia from Joshua Santimaw representing the interests of the RBC at that time.
3. Mr. Santimaw confirmed in that letter that RBC had extended a loan to the then owner, Rhonda Glasgow. Mr. Santimaw was confirming that RBC was not an owner of the property and was not realizing on its security over the property. He further indicated that it was Ms. Glasgow's responsibility, under the lease that she executed, to make payments to the Respondent. In addition, Mr. Santimaw noted that Ms. Glasgow had gone bankrupt and the claim should be submitted to the Trustee in Bankruptcy, Salyzyan and Associates.

4. The RBC's appeal form states the reasons for the appeal as follows:
 - (a) Pursuant to s. 2(j) of the *Residential Tenancies Act*, the Act does not apply to the appellant and the appellant is a chartered bank of Canada.
 - (b) The appellant is not a tenant. The appellant is a secured creditor with a security interest in the mobile home which occupies the rented land. The mortgagor/owner of the home is the tenant.

5. Mr. Schipilow provided a comprehensive brief before the hearing quoting case law and essentially taking the position that as the holder of collateral security against Ms. Glasgow's mobile home, RBC was (1) not a tenant with Westphal Court Limited and (2) as a chartered bank, did not fall under the jurisdiction of the Director further to the *Residential Tenancies Act* and (3) had no relationship that obligated the RBC to either pay arrears owing for past rent or having any further obligations under the original land lease.

6. No one attended on behalf of RBC at the hearing as the facts were not contested. I further understand from Mr. Schipilow's representations that initially after the bankruptcy, RBC took control of the asset to assess its interests. In doing so, it incurred protective disbursements to maintain the mini home which included the remediation of an oil spill and other minor repairs. In addition, RBC initially made rental payments to Westphal Court Limited. Ultimately they stopped paying the pad rent for the trailer.

7. In regards to the status of Ms. Glasgow's account with Westphal Court under her land lease agreement, as of April 15 the outstanding sum owed was \$2,785.15. In addition to the arrears, Westphal Court was seeking vacant possession of the premises known as 18 Birch Street, Dartmouth, NS where the mobile home still sits vacant to this very day.

8. Mr. Schipilow finally indicates in his brief that subsequent to July 2015, after remediation was completed for the oil spill, RBC determined it would not seize and sell the mini home in pursuit of recovery of the borrower's outstanding debt. The combination of this comment and the comments of Mr. Schipilow's associate, Joshua Santimaw in his letter of March 28, 2016 where he said "*RBC is not in [sic] the owner of the property and is not realizing on its security over the property*" caused me some concerns

9. I asked Mr. Schipilow directly whether his client RBC was therefore releasing their interest under a security agreement originally entered into by Rhonda Glasgow with the RBC and registered under the PPSA. Mr. Schipilow clarified that RBC was not in the sense walking away from their security and was not interested in releasing it.

10. It appears, as a result of the evidence presented, that the Bank wanted the best of both worlds. They never put Westphal Court Limited on notice of their intention to walk away and essentially abandon the mobile home. In addition, notwithstanding that failure, they still wanted to maintain their security interest of the property itself.

11. Ms. Scott provided the court with an email from Linda Hardy, a Residential Tenancies Officer, which said as follows:

Hi Jackie:

With reference to our telephone conversation, before giving authorization for the sale of the mobile home located at 18 Birch Street, I will require a clear PPRS report.

12. I understand that Westphal Court Limited as a result of the ongoing arrears was seeking an order to sell the mobile home. A copy of the PPRS was provided showing RBC's security against the mobile home.

13. In addition, Mr. Schipilow provided a recent Decision of the Small Claims Court from my brother Eric K. Sloane, Adjudicator, noted as Bank of Montreal v. Woodbine Park SCCH 448536 June 6, 2016, suggesting that the court found on behalf of the Bank of Montreal in that instance under similar circumstances. Upon further review, one significant difference in the facts of that particular case was that the Bank, according to the adjudicator, never took possession of the home notwithstanding they paid arrears over several months directly to the landlord.

14. Adjudicator Sloane undertook a comprehensive review of the difference between "person" and "individual" as it relates to "landlord" and "tenant", determining that the tenant, could not be an incorporated entity or an entity such as a chartered bank.

Secondarily, he reviewed the exception to this rule under s. 3(2) of the *Residential Tenancies Act*, which provided jurisdiction where such an entity became an assignee or a legal representative.

15. He then determined that the facts did not support that the Bank was a legal representative of the tenant and further found that the land lease was in no way assigned to the Bank and therefore the facts before him did not provide for that exception.

16. He finally reviews the secondary document in this matter, referred to as the *Model Assignment of Lease Consent Agreement for Manufactured Homes*. He found under the terms of that Agreement that the particular wording, although it agrees to consent to an assignment, the language did not create an assignment. Finally, he notes and recites paragraph 4 of that agreement as follows:

The lender will not be liable for any of the tenant's covenants, including payment of rent, prior to such notice or until the lender takes possession of the home whichever occurs first.

17. He therefore concludes, after touching on deemed tenancy, that the Director of Residential Tenancies had no jurisdiction to consider the landlord's claim against the Bank.

18. With all due respect, I disagree with my brother's interpretation and intent of the agreements entered into. First and foremost, I find that there is a specific agreement between the Respondent, Westphal Court, and the RBC further to the Model Assignment of Lease Consent Agreement for Manufactured Homes signed on August 14, 2008.

19. Upon reviewing this Agreement, it appears that the intention of the drafters of this Agreement and the parties who subsequently sign them under these circumstances, are to avoid the very circumstances that these two parties presently find themselves.

20. The first substantive paragraph in that Agreement reads as follows:

The landlord acknowledges and consents to the lender's security interest over the tenant's personal property, including the home, and to the mortgage of or

assignment to the lender of the tenant's interest in the site lease and in any renewals, extensions, replacements or amendments of the site lease.

21. Given the very unique nature and relationship of a mobile home and its lot, such a reference has significant importance in acknowledging the interests of all parties. Of more importance, is the understanding that while the security that the bank takes is against the chattel itself, the value ultimately rests significantly on its ability to stay on that lot especially where the mobile home is of significant age. This appears why this clause provides the lender with the option to step in and protect the value by securing the right to keep the trailer on the lot. The bank knows this as do all parties involved in the mobile home business.

22. I believe in this instance the mobile home was 35 years of age and that any potential value would have been limited unless it came with an agreement to continue to sit on the Respondent's lot. Heaven's knows how little it would be worth once moved .

23. Clause number four goes on to discuss all respective parties' obligations should there be a default by the tenant. It reads as follows:

If the tenant defaults under the Site Lease, before terminating the Site Lease or commencing eviction proceedings, the landlord will advise the lender in writing at the above address of the tenant's default, within a reasonable time frame (within 90 days) and allow the lender a reasonable amount of time (within 45 days after receipt of the notice) to cure the default, including payment of all arrears.

The lender will not be liable for any of the tenant's covenants, including payment of rent, prior to such notice, or until the lender takes possession of the home, whichever occurs first.

24. I see no confusion with this section. In regards to the notice provisions, it appears that the Bank was notified and by paying up arrears, as acknowledged, they waived any further notice requirements. The last sentence of the paragraph appears to be the fulcrum upon which the responsibility tips towards the Bank who has entered this Agreement.

25. Referenced in the negative, it notes that the Bank takes on no liability for covenants or rent “until” such notice or “until” they take possession of the home.

26. It appears clear to me on the facts presented by Mr. Schipilow that they did take possession of this home and were notified. Typical to mortgagee responsibilities, they apparently resolved an oil spill and fixed up the trailer. They clearly effected control of the location and took possession of the property to effect those changes.

27. According to this section therefore, that because they have taken possession or in the alternative have been given notice they are liable for the tenants’ covenants including payment of rent. Nowhere in Mr. Schipilow’s presentation did he argue that RBC was not properly notified of the situation.

28. The final significant clause, paragraph 6, sets out the obligations of the respective parties, one of which is the Bank, in regards to how matters are dealt with upon the default. With the clear intention to protect the interest of the landlord, the section references that as long as the arrears are paid, the lender may take possession of the home, sell it or remove it from the community. The section reads as follows”:

(6) So long as all arrears are paid and obligation under the Site Lease are upheld, and ongoing rental payments are made when due, then, upon default of the tenant under the lender security, the lender (including its employees and agents), but subject to the terms of the mortgage and/or other security agreed between the lender and the tenant, may enter the community and take possession of or sell the home (other than by onsite auction) while it is in the community or the lender may remove the home from the community, on condition that the lender promptly repairs any damage to the community caused by such removal.

Upon such removal or sale of the home, the lender will have no further obligation to the landlord.

29. The last sentence of this section is clear. The *quid pro quo* arising from this Agreement and in order to force the obligations between the parties, starts with the

creation of the responsibility of the Bank. It ends, as noted in the sentence - *upon the removal or sale of the home*. The bank “must” continue with the tenant’s obligations until the property is either moved or sold. This makes abundant sense.

30. I find either as a legal representative or an assignee, the Bank, under this Agreement referenced as an “Assignment” satisfies the noted principles giving the *Residential Tenancies Act* jurisdiction over this matter and RBC.

31. Furthermore, as indicated above, this Agreement appears to have been designed to avoid the result the Bank now seeks by maintaining its security but abandoning the property and attempting to avoid all further responsibilities of rent.

32. I find this Agreement a balancing of the interests between the landlord and the Bank. Contrary to the landlord’s general interest of looking to have an older mobile home removed from the lot (recital 6) the agreement provides for the sale of the mobile home on the condition it remains on the noted lot and that such approval to sell the mobile should not be unreasonably withheld.

33. I therefore find that under the Model Assignment of Lease Consent Agreement for Manufactured Homes, the Bank is obligated to pay the arrears up to present and into the future until they have either sold the home, removed it from the lot or released their security in the property to allow the landlord to sell the home.

34. While I was aware of the outstanding arrears at the time of the original hearing on April 15, 2016 of \$2,785.15, I was not apprised as to the present outstanding amount. If the parties cannot agree to that amount, I will re-hear the parties in regards to those outstanding amounts.

ORDER

35. The Royal Bank of Canada shall pay to Westphal Court Limited outstanding arrears up until and including June 1, 2016.

36. In addition flowing from this determination I provide a date certain for vacant possession allowing a reasonable period for the bank to attend to the potential sale of the unit. The Royal Bank of Canada shall provide vacant possession of 18 Birch Street , Lower Sackville N..S. on or before 11.59 pm September 30,2016.

Dated this 29 day of June, 2016

J. W. Stephen Johnston
Small Claims Court Adjudicator

original – court file
appellant/respondent