IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Richardson v. RxHousing Inc., 2010 NSSM 67

2010 | Claim No. 323316
Date: 20101206

BETWEEN:

Name: **Eileen Richardson** **Claimant**

- and -

Name: **RxHousing Incorporated** **Defendant**

Appearances:

William L. Ryan, Q.C. - Claimant/Respondent
Lloyd I. Berliner - Defendant/Applicant

DECISION

[1] This is a clam arising out a contract for the rental of residential premises in West Hollywood, California. The Claimant is a resident of Halifax, Nova Scotia. The Defendant is a Texas-based corporation.

[2] The Defendant has asserted that this Court has no jurisdiction to entertain the laim, and has made submissions by way of a written submission dated April 16, 2010. The Claimant responded by written submission dated April 19, 2010. This was followed by the submission of affidavit evidence filed June 3, 2010, and further oral submissions made before me on September 28, 2010. By stipulation of the parties, my role at this stage is limited to the jurisdictional issue.

Background

[3] The background facts relevant to this application are as follows.

[4] The Plaintiff entered into a leasing contract with the Defendant for premises at 733 North King Road, West Hollywood, California, United States of America. The communications leading up to this contract were done through email. This included representations by the Defendant as to the features of the unit and photographs of the subject unit. The Plaintiff signed a written agreement and forwarded the sum of $14,076.00 (USD) representing three months' prepaid rent.

[5] Subsequently, the Clamant had her agent view the apartment and, so it is alleged, the actual condition was much different than represented. According to the Notice of Claim, the unit was small, barren as far as furnishings went, the kitchen appliances were old, and there was an unpleasant smell in the apartment.

[6] The Claimant immediately repudiated the contract and demanded the return of the deposit. The Defendant has refused to repay the deposit. The claim is for return of the deposit.

[7] The Defendant has not filed a written defence on the merits but has made its submission of April 16, 2010, submitting that this Court has no jurisdiction to hear the claim.

[8] The Rental Agreement, which was signed by the Claimant, includes the following clause:

> *"...Any non-paid balance due and owing on the 15th of the month will be charged to Guest's credit card. Any default of payment or litigation will be in Harris County, Texas and will automatically adhere to Texas property codes"*

[9] The Defendant raises three issues, any one of which is sufficient to displace the jurisdiction of this Court:

(1) The Nova Scotia Small Claims Court does not have territorial competence to hear this matter;

(2) Even if the Court has territorial competence, the Court should decline to exercise jurisdiction on the basis of forum non conveniens;

(3) Finally, even if the Court would otherwise have jurisdiction the Nova Scotia *Residential Tenancies Act*, R.S.N.S. 1989, c. 430, would apply to the case, and under that Act, the Small Claims Court would not have originating jurisdiction.

[10] I will deal with each of these in turn.

Territorial Jurisdiction

[11] As submitted by the Defendant, the Nova Scotia *Court Jurisdiction and Transfer Act,* S.N.S. 2003, c. 3, has codified the common law with respect to territorial jurisdiction.

[12] I agree with the Defendant that the Act applies to the Small Claims Court and that the provision in Section 4 of relevance to this matter is s. 4(e) which reads:

> *4 A court has territorial competence in a proceeding that is brought against a person only if*
>
> > *(e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.*

[13] Also of relevance, and was pointed out by the Claimant's counsel, is s. 11 of the Act:

> *11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding*

(e) concerns contractual obligations, and

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
(B) resulted from a solicitation of business in the Province by or on behalf of the seller;

[14] It is argued that this provision operates and therefore, on the facts here, a real and substantial connection is presumed to exist by virtue of this language.

[15] I accept that this proceeding concerns contractual obligations and I also accept that the contract here fits into the language "*the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession*".

[16] Did the contract result from *"...a solicitation of business in the Province by or on behalf of the seller*" ? In this regard, Mr. Ryan refers me to the Supreme Court of Canada case - *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers* [2004] 2 S.C.R. 427 for the proposition that an internet communication take place where it is received. On my reading of the case, it is a somewhat more nuanced ruling than that, but I accept for present purposes that a solicitation that comes through the internet to a person situate in Nova Scotia is received in Nova Scotia. Thus, it is a solicitation of business received in Nova Scotia.

[17] I conclude therefore that the presumption of real and substantial connection arises by virtue of s. 11 of the *Court Jurisdiction and Transfer Act,*. It then falls to the Defendant to rebut that presumption. Nothing has been raised here in my view that rebuts the presumption.

[18] The Defendant has referred to the choice of forum and choice of law clause under this heading. In my view, it is more appropriate to deal with that issue under the forum non conveniens heading.

[19] The Defendant further says that the Defendant has no connection to the Province of Nova Scotia. It is based in a foreign jurisdiction. I disagree. It has a connection to Nova Scotia by virtue of doing business with an individual situate in Nova Scotia. I see nothing unfair about holding that this jurisdiction has territorial jurisdiction against a company that is the beneficiary of doing business with those who are based in this jurisdiction.

[20] I am comforted in my conclusion by considering alternatively whether the State of Texas has a greater degree of “real and substantial connection.” On the basis of the facts here, I do not think so.

[21] I conclude that the Courts of Nova Scotia, including the Small Claims Court would have a real and substantial connection to the facts of this proceeding and thus, there is territorial jurisdiction.

Forum Non Conveniens

[22] Counsel for the Defendant refers to the “choice of forum” clause and cites the Supreme Court of Canada case of *Z.I. Pompey Industrie v. ECU-Line N.V.,* 2003 SCC 27, [2003] 1 S.C.R. 450 as authority for the principle that where there is a choice of forum clause the plaintiff must show “strong cause” as to why a stay should not be granted.

[23] In *CKF Inc. v. Huhtamaki Americas* et al. 2009 NSSC 21, Justice Edwards states (paras. 57-58):

> *[57] In Fujitsu Consulting (Canada) Inc. v. Themis Program Management &Consulting Ltd., 2007 CarswellBC 2137 (S.C.), the British Columbia Court considered the appropriate forum (Ontario or B.C.) to hear a contractual dispute involving work performed for the Ontario government. In doing so, the Court considered both the B.C. CJPTA and the decision of the Supreme Court of Canada in Z.I. Pompey Industrie v. ECU-Line N.V., [2003] 1 S.C.R. 450 ("Pompey"). The Pompey case stands for the proposition that in the face of a foreign exclusive jurisdiction clause, a domestic plaintiff must show "strong cause" why a stay of proceedings should not be granted.*
>
> *[58] The B.C. Court stated that the starting point for any application of the Pompey case is to determine whether the contract in question contains: (a) an exclusive forum selection clause; or (b) a non-exclusive attornment clause. If the latter exists, the "strong cause" test should not be applied. In Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Ltd., supra, the contractual clause (exclusive as to B.C.) and the balancing of factors under the B.C. CJPTA led to the conclusion that B.C. (not Ontario) was the appropriate forum to hear the dispute.*
>
> [Emphasis supplied]

[24] So, is the clause in question (a) an “exclusive forum selection clause”, or (b) a “non-exclusive attornment clause”? For convenience, I repeat the clause:

> *“...Any non-paid balance due and owing on the 15th of the month will be charged to Guest’s credit card. Any default of payment or litigation will be in Harris County, Texas and will automatically adhere to Texas property codes”*

[25] It is fairly simple clause. The *Fujitsu* case (referred to in *CKF*) indicates that the analysis in interpreting such a clause is to be an “objective, contextual analysis”:

> *[21] The governing authority on this point in British Columbia is **BC Rail Partnership v. Standard Car Truck Co.** 2003 BCCA 597 (CanLII), (2003), 20 B.C.L.R. (4th) 1 (C.A.). In that case the court directed an objective, contextual approach to interpreting the choice of forum clause that required any litigation under the contract to be conducted in Nova Scotia. The chambers judge ruled the clause was an attornment clause that meant only that the plaintiff had to attorn to the jurisdiction of Nova Scotia if an action was brought there and not a provision that gave exclusive jurisdiction to the Nova Scotia courts and on that ground declined to stay the proceeding. However, the Court of Appeal held that*

> *it was an exclusive jurisdiction clause that gave sole jurisdiction to the courts of Nova Scotia and it directed a stay of the British Columbia action.*

[Emphasis supplied]

[26] On a basic reading the clause may be read as primarily directed to issue of payment, or more accurately, non-payment. I say this based on the sentence preceding the clause which refers to payment being due on the 15th and other wise being charged to the Guest's credit card. The clause refers to "default of payment" which suggests that what is primarily under consideration is litigation related to non-payment which is not what is at issue here.

[27] There is then reference to *"Texas property codes".* I was not given any information about what that might mean. The question does arise as to whether as a matter of California (or Texas) law, Texas property codes would apply to a property in the State of California.

[28] In *Hayes v. Peer 1 Network Inc.*, 2007 CanLII 245 (ON S.C.) (reversed on another ground at 2007 CanLII 65614 (ON S.C.D.C.)), Master Glustein considered and ultimately concluded that the following clause was not an exclusive jurisdiction clause:

> *This Agreement is governed by the laws of the state of Washington and each party irrevocably attorns to the jurisdiction of the court system of the state of Washington*

[29] Here the clause does not contain "irrevocably". Indeed it contains no wording that would compel a finding of exclusivity.

[30] I conclude that the clause in question is not an exclusive forum selection clause". Rather, it is a "non-exclusive attornment clause". Accordingly the "strong cause" test does not apply.

[31] The analysis then turns to a consideration of forum non conveniens.

[32] The factors to be considered have been codified in s. 12 of *Court Jurisdiction and Transfer Act* :

> *12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.*
>
> *(2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including*
>
> *(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;*
>
> *(b) the law to be applied to issues in the proceeding;*
>
> *(c) the desirability of avoiding multiplicity of legal proceedings;*
>
> *(d) the desirability of avoiding conflicting decisions in different courts;*
>
> *(e) the enforcement of an eventual judgment; and*
>
> *(f) the fair and efficient working of the Canadian legal system as a whole*

[33] In *Bouch v. Penny* 2009 NSCA 80 (CanLII), 2009 NSCA 80, the Court of Appeal confirmed, in the following terms, that the test remains that the competing jurisdiction (Harris County, Texas, in this present case) must be shown to be clearly more appropriate (par 62):

> [62] A*s Justice Sopinka made clear in* ***Amchem****, the existence of a more appropriate forum must be* <u>*clearly*</u> *established in order to displace the forum selected by the plaintiff. Where there is no one forum that is the* <u>*most appropriate*</u>*, the domestic forum chosen by the plaintiff wins out by default. Justice Wright was bound by the Supreme Court''s ruling in* ***Amchem****. Nothing in the* ***Act*** *changes the test to be applied in such circumstances. Accordingly, I would not disturb Justice Wright''s conclusion:*

> *[73] .... factors which favour trial in Nova Scotia, show that there is no one jurisdiction which is clearly more appropriate than the other for the trial of this action.*
>
> *[74] Since the selected forum wins out by default in that situation, according to Amchem, the defendants' application must fail, thereby enabling the plaintiffs to proceed with their action in this Court.*

[34] Based on the material before me, I am unable to conclude that Harris County, in the State of Texas, is clearly more appropriate. Therefore, the selected forum of Nova Scotia “wins out by default”.

Nova Scotia Residential Tenancies Act

[35] Counsel for the Defendant argues that the Claimant here is subject to the *Residential Tenancies Act,* R.S.N.S. 1989, c. 401. and, since the Small Claims Court does not have originating jurisdiction over matters falling under that Act, the Small Claims Court does not have jurisdiction in this present matter.

[36] It is certainly true that the Small Claims Court does not have originating jurisdiction over matters falling under the *Residential Tenancies Act*. That is made clear by s. 10(d) of the *Small Claims Court Act,* R.S.N.S. 1989, c. 430:

> *10 Notwithstanding Section 9, no claim may be made under this Act*
>
> *(d) which involves a dispute between a landlord and a tenant to which the Residential Tenancies Act applies, other than an appeal of an order of the Director of Residential Tenancies made pursuant to Section 17C of that Act;*

[37] Does the Residential Tenancies Act potentially have application to the facts of this case? That is, to premises in West Hollywood California, United States of America. There was no case cited and I could find no case where this issue was expressly dealt with.

[38] The *Residential Tenancies Act* itself does not expressly state that it does not apply to premises outside of Nova Scotia. Section 3, which is headed "Application of Act", reads:

> ***Application of Act***
>
> *3 (1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act applies when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.*
>
> *[Emphasis supplied]*

[39] The definition of "residential premises is contained in section 2(h) as follows:

> *2.(h) "residential premises" includes any house, dwelling, apartment, flat, tenement, mobile home, mobile home park, mobile home space or other place that is occupied or may be occupied by an individual as a residence or that part of any such place that is or may be occupied by an individual as a residence, but does not include*
>
> *(i) a university, college or institution of learning, a public hospital, mental hospital, tuberculosis hospital, maternity hospital or sanatorium, a municipal home, or a jail, prison or reformatory,*
>
> *(ii) a maternity home that is licensed under the Children's Services Act,*
>
> *(iii) a nursing home to which the Homes for Special Care Act applies,*
>
> *(iv) a hotel that is licensed under the Hotel Regulations Act, or*
>
> *(v) a residential care facility licensed under the Homes for Special Care Act;*

[40] As a matter of statutory interpretation, is it to be implied that the definition of residential premises only extends to properties situate in and only in Nova Scotia. In my opinion, that is the correct construction.

[41] I refer to the *Interpretation Act,* R.S.N.S. 1989, c. 235, which states:

> *9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.*
>
> *(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters*
>
> > *(a) the occasion and necessity for the enactment;*
> >
> > *(b) the circumstances existing at the time it was passed;*
> >
> > *(c) the mischief to be remedied;*
> >
> > *(d) the object to be attained;*
> >
> > *(e) the former law, including other enactments upon the same or similar subjects;*
> >
> > *(f) the consequences of a particular interpretation; and*
> >
> > *(g) the history of legislation on the subject.*

[42] In this regard I would take notice of the significant historical and societal background to this legislation. There is lengthy and comprehensive reference to this material in the seminal Supreme Court of Canada case, *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186.

[43] In that case the Supreme Court upheld the constitutional validity of amendments to the Nova Scotia *Residential Tenancies Act.* The territorial application of the Act was not at issue but there appears to me to be an underlying assumption throughout the case that provincial laws relative to residential tenancy would only have application to properties within the subject province. I refer specifically to the legal and historical analyses set out in the case of the laws and legal history

of tenancies relating to the Provinces of Nova Scotia, New Brunswick, Quebec, and Ontario.

[44] I also gain some degree of comfort from the information counsel for the Claimant provided that his office inquired of the Residential Tenancies Directors office and were advised that there were no known cases where that office had assumed jurisdiction over a property outside of Nova Scotia.

[45] For all of these reasons, I conclude that the Nova Scotia *Residential Tenancies Act* was not intended to or, nor as a matter of law, does it have application to premises that are situate outside the geographical boundaries of the Province of Nova Scotia.

Summary

[46] I conclude that the courts of the Province of Nova Scotia, including the Small Claims Court, has territorial jurisdiction over the subject matter of this claim.

[47] I further conclude that there is no basis to exercise my discretion and decline to accept that jurisdiction.

[48] Finally, in my opinion the Nova Scotia *Residential Tenancies Act* has no application to this proceeding.

[49] From my conclusions, it follows that the Nova Scotia Small Claims Court has jurisdiction to consider this claim.

[50] I would suggest that counsel contact the Clerk to arrange a mutually convenient hearing date.

DATED at Halifax, Nova Scotia, this 6th day of December, 2010.

Michael J. O'Hara
Adjudicator