

CLAIM NO. 204986

Date: 20050111

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Muise v. Clarke, 2005 NSSM 10

Name Suzanne Lesley Muise Appellant

Name Arthur Hugh Clarke Respondent

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers for the parties on August 17, 2006. This decision replaces the previously distributed decision

DECISION

Appearances:

Arthur H. Clarke on his own behalf, for the Respondent;
Rebecca C. Druhan on behalf of the Appellant.

- [1] This Appeal from an Order of the Residential Tenancies Officer dated, July 15, 2003, came on before me on December 7, 2004.
- [2] The Officer found that there was a landlord/tenant relationship between Arthur Hugh Clarke (as landlord) and Suzanne Lesley Muise (as tenant), and ordered Dr Muise to pay \$14,294.55 to Mr Clarke for outstanding rent. For reasons unnecessary to go into here, nothing was done about the Order by Dr Muise until late 2003, when she made an application for an Order to extend the time to appeal. That Order was granted by Adjudicator Michael Cook dated January 19, 2004. An appeal from that Order was dismissed by Justice Murphy on July 6, 2004, clearing the way for the hearing of this appeal on December 7th, 2004.
- [3] I heard the evidence and submissions of the Respondent Mr. Clarke; and the evidence of the Appellant Dr. Muise, and the submissions of her counsel Ms. Druhan.
- [4] Three issues arose on this appeal:

- (a) the jurisdiction of a Small Claims Court Adjudicator to hear an Appeal involving a claim for arrears of rent that exceeds the monetary jurisdiction of a Small Claims Court Adjudicator (currently \$15,000.00);
- (b) whether the document signed by the Appellant Dr. Muise on August 1, 2002, was a Lease Agreement; and
- (c) if it was, what rent, if any, was owing by the Appellant as tenant to the Respondent as landlord.

Background

- [5] In the fall of 2001, Dr. Muise, who is and was a medical resident, met Arthur Hugh Clarke. At that time, she was in the process of divorcing her husband, by whom she had two children.
- [6] Mr. Clarke was living in a house he owned. He was under contract to provide community home services to troubled youth.
- [7] Dr. Muise and Mr. Clarke formed a relationship, and that relationship progressed to the point where, in the early part of 2002, they began to contemplate marriage. By this time she was pregnant with Mr. Clarke's and her child.
- [8] Dr. Muise owned a house on Kayton Court. Mr. Clarke's house was at 49 Orchard Drive, in Middle Sackville.
- [9] The couple discussed the possibility of Mr. Clarke purchasing a house in which they could both live. He eventually decided to purchase a house at 19 Lewis Lake Drive, in Hammonds Plains, Nova Scotia. The purchase was completed in the spring of 2002.
- [10] Dr. Muise proceeded with the sale of her own house, and then with her plans to move into 19 Lewis Lake Drive.
- [11] On August 1, 2002, she signed a Standard Form of Lease purporting to show Mr. Clarke as landlord, and her as tenant, in respect of the premises at 19 Lewis Lake Drive. The rent was \$4,500.00 per month, payable by post-dated cheques. A deposit of \$2,250.00 was required by way of security deposit. The tenant was responsible for all utilities, cable t.v. and telephone. The lease purported to include a fridge, washer and dryer, and dishwasher. The document was dated and signed by Dr. Muise and Mr. Clarke on August 1, 2002.
- [12] The relationship between Dr Muise and Mr Clarke did not run smoothly, and by November 13, 2002 they had soured to such an extent that she moved out of the

house. Mr Clarke says that she moved without paying any rent at all, leaving a total liability of \$31,500 for seven months; and that when moving out her movers damaged his landscaping to the tune of several more thousand dollars.

- [13] The Residential Tenancy Officer found that there was a landlord/tenant relationship; found Dr Muise liable for the seven months rent; but deducted from that liability the value of a dishwasher, range hood, range, washer and dryer (which Dr Muise had supplied when she moved in), leaving a balance of \$13,994.55 in unpaid rent.
- [14] There followed a long and somewhat tortuous history of disputes and proceedings in various courts, none of which, in light of my findings below, are relevant to the issues I had to decide.
- [15] The central issue in the dispute and litigation that ultimately developed between Mr. Clarke and Dr. Muise concerned the nature of this document.
- [16] Mr. Clarke took the position that it was a Lease, and was enforceable according to its terms.
- [17] Dr. Muise's evidence, on the other hand, was that the document was never intended to be a Lease; that there was no intent between the parties to constitute the document as a Lease Agreement; and that there never was a landlord/tenant relationship between them.
- [18] Dr Muise's evidence was that Mr. Clarke had required the document in order to assist him to obtain a mortgage with respect to another property that he wanted to purchase. According to her, he said that he needed to be able to show an income for the 19 Lewis Lake Drive property because he already had two other properties (and mortgages on all his existing properties), and that without being able to show some income in respect of the Lewis Lake property, he would not be able to obtain a mortgage for the fourth property.
- [19] I now turn to a consideration of the issues, and in particular, the issues of jurisdiction.

Jurisdiction of a Small Claims Court Adjudicator With Respect to Residential Tenancy Matters

- [20] The jurisdiction of a Small Claims Court Adjudicator under *The Small Claims Court Act*, R.S.N.S. 1989, C. 430, as amended, is a peculiar hodge podge.
- [21] In general, an Adjudicator's jurisdiction is limited to claims in respect of monetary awards arising under contract or tort where the claim does not exceed \$15,000.00: s. 9(a), *The Small Claims Court Act*.

- [22] However, these monetary limits do not apply to an Appeal of an Order of the Director of Residential Tenancies pursuant to s. 17C of the *Residential Tenancies Act*: s.9A (2) of *The Smalls Court Act*, as amended by s. 39 of *The Justice Administration Amendment (2002) Act*, S.N.S. 2002, C. 10.
- [23] Accordingly, the fact that arrears in rent may exceed \$15,000.00 does not take the claim beyond the jurisdiction of a Small Claims Court Adjudicator, at least insofar as Appeals under the *Residential Tenancies Act* are concerned.
- [24] Turning to the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended, s. 17D(1)(b) provides that a Small Claims Court Adjudicator, on an appeal can “make any order that the Director [Residential Tenancies] could have made.”
- [25] I interpret these provisions to mean that a Small Claims Court Adjudicator has the same jurisdiction as the Director of Residential Tenancies, at least with respect to Orders.
- [26] Since an Adjudicator can only exercise the powers of a Director, I must then turn to the question of the jurisdiction of the Director of Residential Tenancies.
- [27] The Director draws his or her authority from the *Residential Tenancies Act*.
- [28] The application of the *Act* is set out in section 3(1) and (2) of the *Act* as follows:
- 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.
- 3(2) For the purposes of subsection (1), the relation of landlord and tenant is deemed to exist in respect of residential premises between an individual and a person when an individual
- (a) possess or occupies residential premises and has paid or agreed to pay rent to the person;
 - (b) makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent;
 - (c) has possessed or occupied residential premises and has paid or agreed to pay rent to the person.

- [29] It appears then that a finding crucial to the establishment of the Director's (and hence, an Adjudicator's) jurisdiction under the *Residential Tenancies Act*, is a finding that there was a relationship of "landlord and tenant" between a person and an individual. Crucial to that finding is a finding that there was an agreement to pay, or a promise to pay, rent.
- [30] Any possession or occupation of residential premises unaccompanied by any payment of rent; or by an agreement to pay rent; or by a promise to pay rent is not a form of possession that falls within the *Residential Tenancies Act*. Any such possession is not a form of possession that falls within the jurisdiction of the Director, or, through him or her, a Small Claims Court Adjudicator.
- [31] In other words, the jurisdiction of the Director (and hence an Adjudicator) is exhausted once he or she makes a determination that the possession of a residential premises took place without:
- a. the payment of rent; or
 - b. an agreement or promise to pay rent.
- [32] In the event there is such a finding the Director (or an Adjudicator) cannot in my view make any other findings; nor can he or she make an Order, other than one dismissing any application under the *Residential Tenancies Act*.
- [33] With that in mind I turn to the case before me.
- [34] Having heard the evidence of Mr. Clarke and Dr. Muise, and having considered the various documents entered into evidence, I am satisfied that the document signed by the parties on August 2, 2002, was not a Lease or Rental Agreement within the meaning of the *Residential Tenancies Act*, and accordingly, neither the Residential Tenancies Officer, nor this Court, has jurisdiction over the parties. That being the case, the Order of the Residential Tenancies Officer was a nullity, and the Execution Order on which it was based must be vacated and set aside.
- [35] I came to this conclusion for a number of reasons.
- [36] First, having observed both Mr. Clarke and Dr. Muise give their evidence, in chief and under cross-examination, I am satisfied that the evidence of Dr. Muise is to be preferred. Mr. Clarke was frequently argumentative and evasive on the stand, changing his evidence when he was faced with documents that contradicted oral testimony he had just given. He did not strike me as credible. Dr Muise did.
- [37] Second, there is the matter of the improbability of Mr Clarke's version of the nature and character of the document.

- [38] For example, the document calls for Dr. Muisse to pay \$4,500.00 a month for rent, plus pay utilities. The total annual rent would thus be \$54,000 plus utilities. However, in 2002, Dr. Muisse's total gross income from all sources (including the support she was receiving from her former husband) was \$40,996.00, which is significantly less than the total annual rent called for in the lease. Hence to accept Mr Clarke's evidence means having to accept that Dr Muisse would agree to pay more in rent than she was making in income.
- [39] Moreover, the rent itself seems high when matched against Mr Clarke's expenses in respect of the property. Mr. Clarke's evidence was that the mortgage on the house was approximately \$2,100.00 a month. He admitted that Dr. Muisse was paying the utilities, which means that even allowing for realty taxes and insurance costs, he had a purported income from the property almost double his expenses. It struck me as improbable that a residential landlord could obtain what amounts to a 100% return on his investment.
- [40] There are too the facts surrounding Dr Muisse's possession of the property. Dr. Muisse's evidence, which was not disputed by Mr. Clarke, was that:
- (a) she paid no security deposit;
 - (b) she paid no rent;
 - (c) she provided no post-dated cheques; and
 - (d) she had occupancy of the premises for roughly seven months.
- [41] It struck me as improbable that any landlord who truly expected to obtain \$4,500.00 a month in respect of a residential premises would permit a tenant to move in and obtain occupancy without any of these payments or security being provided; or without taking any steps to secure such payments during the period of occupancy.
- [42] Finally, the fact that Dr Muisse was pregnant with Mr Clarke's child; and the fact that they did live together in the house (at least during the periods when Mr Clarke's presence was not required at his group home) lends support to Dr Muisse's version of events. An agreement that calls for a tenant to pay more than her annual income to a landlord who fathered her child, for a profit to that landlord of roughly 100%, would strike any reasonable person as both incredible and unconscionable. Such facts make all the more likely an explanation that the "agreement" was not what it purported to be on its face; but was in fact something else.
- [43] Taking all of the above into account, I am satisfied as a matter of fact that neither party to the document signed on August 1, 2002, intended or expected the document to constitute a lease between the two of them. The document was a

sham; Dr. Muise was not a tenant; Mr. Clarke was not a landlord; and the relationship between them, whatever it was, was not that of landlord and tenant.

[44] Given this finding, it is clear that the Residential Tenancies Officer erred in finding that there was a lease between Mr. Clarke and Dr. Muise. While the relationship between Mr. Clarke and Dr. Muise, whatever it was, may have created obligations or responsibilities *inter se*, those obligations and responsibilities were not those of a landlord and tenant under the *Residential Tenancies Act*. Accordingly, even if there were monies owing by Dr. Muise to Mr. Clarke (and I make no finding on the point), such monies were not rental monies and in particular, could not constitute rental arrears. There was thus no jurisdiction to order payment of "rental arrears." The *Residential Tenancies Act* did not apply.

[45] Accordingly, I will make the following Order:

- (a) the Appeal of the Order of the Residential Tenancies Officer dated July 15, 2003, is allowed;
- (b) the Order of the Residential Tenancies Officer dated July 15, 2003, ordering Dr. Muise to pay to Mr. Clarke \$14,294.55 is vacated and set aside;
- (c) the Execution Order in respect of the aforesaid amount issued out of the Small Claims Court on November 14, 2003, is vacated and set aside; and
- (d) any and all monies currently held by the Sheriff pursuant to the aforesaid Execution Order must be returned to Suzanne Lesley Muise.

Dated at Halifax, Nova Scotia
this 11th day of January 2005

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ADJUDICATOR
W. Augustus Richardson

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)