Claim No. 340137

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Killam Properties Inc. v. Patriquin, 2011 NSSM 29

Between:

Killam Properties Inc.

APPELLANT

and -

Mark Patriquin

RESPONDENT

Adjudicator: David TR Parker
Heard : March 21, 2011
Decision April 7, 2011

Counsel: Lloyd R Robbins represented the Appellant
Nikki Guichon, Senior Law Student and Cole Webber represented the Respondent

Parker:-this is an appeal from an Order of the Director of Residential Tenancies. The appeal was heard on March 21, 2011.

The Appellant made a preliminary motion that in essence stated the Small Claims Court did not have the jurisdiction to hear the Application that was originally before the Residential Tenancy Board. After hearing from both counsel I reserved on the motion until I could consider the information and analysis provided by each counsel to this court.

I shall start with the Director's Order dated November 17, 2010 and being number 201002804.

The Director's Order stated: "it is the obligation of the Landlord to maintain the driveway and walkways of the Tenants in manufactured home communities as per section 9[1] of the Residential Tenancies Act."

The Residential Tenancy Board hearing resulted in the above noted Order which was a result of an Application of the Respondent/Tenant. The Application is contained in form D and directed to the director. It was dated August 4, 2010 and was signed on behalf of the Tenant. In the Application form there is a section entitled:

"This Is an Application for:

- termination of tenancy
- payment of money
- any Action by Landlord or Tenant
- review of notice of rent increase and determination of appropriate rent increase[Applies to Mobile Home Parks Only]
- disposition of the security deposit
- repairs
- payment of rent in trust
- compliance with a lease.

Each of the above-referenced items could be checked off by the Applicant in this case the Respondent/Tenant herein. The Applicant/Tenant checked off the following clause:

"review of notice of rent increase and determination of appropriate rent increase[Applies to Mobile Home Parks Only]".

Under the heading in the same Application: Details of Claim the following was inserted by the Applicant/Tenant and Respondent herein:

"the Landlord issued a Notice of Rent Increase in May 2009 stating that the Landlord would no longer maintain driveways and walkways at the mobile home park in Amherst. The Tenant claims the paving driveways and walkways is not a service under s. 9[1][2] of the RTA and therefore the Landlord is not entitled to discontinue paving. [cont.]

Further in the Application under the wording:

- **review of notice of rent increase and determination of appropriate rent increase[mobile home parks only] the following words were inserted by the Applicant/Tenant and Respondent herein.**

‘The Landlord issued a notice of rent increase in May 2009 stating that the Landlord would no longer maintain driveways and walkways at the mobile home park in Amherst.[cont.] the Tenant claims that the paving of driveways and walkways is not a service under section 9 [1][2] of the RTA and therefore the Landlord is not entitled to discontinue paving. In fact, maintenance of the driveways and walkways is necessary for the Landlord to fulfill its obligations under the Act to keep the premises in a good state of repair under s.9[1][1] as driveways and walkways are fixtures on the mobile home space meaning that they fall within the definition of ‘residential premises’ in s. 2[h] of the Act."

The Landlord appealed the Director’s Order on November 26, 2010 citing the following reasons:

"1. The Residential Tenancy Officer feared in allowing the complaint which in fAct was a review of a rental increase which was out of time to proceed under section 13[4] of the Residential Tenancies Act.[“RTA”]

2. The Residential Tenancies Officer erred in determining the walkways and driveways are part of the premises that the Landlord is obligated to maintain in accordance with section 9[1][1] of the Residential Tenancies Act."

Analysis:

The Respondent is a resident/Tenant in a Mobile Home Park and has been residing in the park since May 1994.

In 2004 Killam Properties Inc./the Appellant became the owner of the Mobile Part.

The previous owner of the Mobile Home Park paid and mainted parking spaces and walkways in the park.

After purchasing the park the Appellant/Landlord continued to maintain existing driveways and walkways.

On May 29, 2009 the Appellant sent the Respondent and other mobile home renters a "notice of rent increase Mobile Home Park Space." The Notice stated *inter alia*: effective date January 1, 2010. Any change of service? Landlord will no longer maintain driveways and walkways [discontinuing a service is a rent increase and may be reviewed.]

The Form C also stated:

"TENANTS PLEASE NOTE

You may file an Application to have this notice of rent increase reviewed within 30 days of receiving it. Any Application will be deemed to have been filed on behalf of of all Tenants affected by this notice. An Application may be filed at the nearest office of service Nova Scotia and Municipal Relations."

In the preamble to the Director's Order it was noted that the Landlord/Appellant "argued that the Tenant/Respondent did not have standing to file this Application for a review of a notice to rent increase under section 11[a] 4 of the RTA because time had passed."

The motion before this court raises the same issue.

The preamble was on to say: "at the time of the hearing it was established and understood that the hearing would proceed under **Section 13(1) (a) of the Residential Tenancies Act to determine a question arising under this Act."**

The preamble remains silent as how it was established and how it was understood that the hearing would proceed under section 13(1) (a). There was no discussion in the Order or ruling on the Application being out of time as provided by section 11(a) 4 of

the RTA. Instead the hearing proceeded under section 13(1) (a) of the RTA to determine a question arising under the Act.

In the order the Director's officer stated:" the question at hand is whether or not Tenant driveways and walkways are a maintenance issue or are they considered a service."

Reference in the Director's Order is also made to the Tenant's argument and the Landlord's argument. The Tenant arguing that the maintenance of driveways and walkways is not a service in the Landlord maintaining the opposite point of view.

A notice of rental increase was given in May 2009 to the Tenants by the Landlord. The rental increase was to be effective January 1, 2010.

Rental increases in mobile parks are dealt with in the RTA pursuant to section 11 of that Act which states as follows:

Rental increases in mobile home parks

11A (1) Where a Landlord of a mobile home park space intends to increase the rent payable after the first twelve-month period, the Landlord shall serve the Tenant with a notice of rent increase in the prescribed form.

(2) A Landlord of a mobile home park space may determine a date to be the rent increase date for all mobile home park spaces owned or managed by the Landlord.

(3) A Tenant of a mobile home park space who receives a notice of increase of rent on or after the twentieth day of December, 1996, but before the coming into force of this Section, may make an Application pursuant to Section 14, within thirty days of the coming into force of this Section, to have the notice of rent increase reviewed.

(4) A Tenant of a mobile home park space who receives a notice of increase of rent after the coming into force of this Section may, within thirty days of receipt of the notice, make an Application pursuant to Section 14 to have the notice of rent increase reviewed.

Under the general heading PROCEDURES the ability to review mobile home park rental increases is dealt with under section 14 of the Act which reads as follows:

Review of mobile home park rental increase

14 (1) A Tenant of a mobile home park space may apply to the Director in accordance with subsections 11A(3) and (4) for a review of a notice of rent increase received on or after the twentieth day of December, 1996, and shall serve the Landlord with a copy of the Application in the manner prescribed by regulation.

(2) An Application filed pursuant to subsection (1) shall be in the prescribed form and all Tenants of the Landlord referred to in subsection (1) who pay the same amount of rent and who have received notice of the same rent increase are deemed to be parties to the Application.

(3) The Landlord shall, within fifteen days of receipt of the Application, provide the Director with the information required by regulation.

(4) If the Landlord does not provide the information required by subsection (3), the Director may make an order denying the rent increase.

(5) In exercising authority pursuant to this Section, the Director may determine and adopt the most expeditious method of determining the rent increase.

(6) In reviewing a notice of rent increase, the Director shall consider

(a) the guidelines prescribed by regulation; and

(b) any information provided or submissions made by the Landlord or Tenant.

(7) The Director may make an order pursuant to Section 17A determining a rent increase which may be made retroactive to the date of rent increase in the notice given by the Landlord and, if the order is made retroactive, it is deemed to have come into force on the date to which it is made retroactive.

Pursuant to the Act a Tenant "may, within thirty days of receipt of the notice, make an Application pursuant to Section 14 to have the notice of rent increase reviewed." The date of the rental increase notice was May 29, 2009." The date of the Application to the

Director which makes reference to rental increase is dated August 4, 2010 which in essence is over a year. The Application itself commingles rental increase with maintaining driveways and walkways at the mobile home park in Amherst.

The duties and powers of the Director are outlined under sections 16 and 17 of the RTA.

Duties and powers of Director

16 (1) Upon receiving an Application pursuant to Section 13, the Director shall investigate and endeavour to mediate a settlement of the matter.

(2) Where a matter is settled by mediation, the Director shall make a written record of the settlement which shall be signed by both parties and which is binding on the parties and is not subject to appeal.

(3) Where a matter is settled by mediation, the Director may, if a party fails to comply with the terms on which the matter was settled, make an order pursuant to Section 17A.

1997, c. 7, s. 7.

Order by Director

17 (1) Where, after investigating the matter, the Director determines that the parties are unlikely to settle the matter by mediation, the Director shall, within fourteen days, make an order in accordance with Section 17A.

(2) The Director is not disqualified from making an order respecting a matter by reason of having investigated or endeavoured to mediate the matter.

1997, c. 7, s. 7.

Contents of order

17A An order made by the Director may

(a) require a Landlord or Tenant to comply with a lease or an obligation pursuant to this Act;

(b) require a Landlord or Tenant not to again breach a lease or an obligation pursuant to this Act;

(c) require the Landlord or Tenant to make any repair or take any Action to remedy a breach, and require the Landlord or Tenant to pay any reasonable expenses associated with the repair or Action;

(d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;

(e) terminate the tenancy on a date specified in the order and order the Tenant to vacate the residential premises on that date;

(f) determine the disposition of a security deposit;

(g) direct that the Tenant pay the rent in trust to the Director pending the performance by the Landlord of any Act the Landlord is required by law to perform, and directing the disbursement of the rent;

(h) require the payment of money by the Landlord or the Tenant;

(i) determine the appropriate level of a rent increase;

(j) require a Landlord or Tenant to comply with a mediated settlement.

The Tenant or Landlord may appeal a Director's Order pursuant to section 17 of the RTA which in effect allows the Small Claims Court to hear the entire matter once again. This is known as a trial de novo. The power of the Small Claims Court is no greater than the Director. The Small Claims Court may confirm vary or rescind the order the director or make an order that the director could have made.

The entire thrust of this motion is that the Application made by the Tenant/Respondent involved a review of rental increase under section 14 and as that rental increase review Application was outside the 30 day review period. The Tenant/Respondent has no standing to be heard before the director and as a consequence before this court. This is a greater question than merely increasing the rent. According to the Act a Landlord can discontinue a service, privilege, accommodation or thing and anyone of those elements that are discontinued can deemed to be a rent increase. A determination has to be made

whether maintaining driveways and walkways is a service, privilege, accommodation or thing which the Landlord provides or is it a condition of the premises which the Landlord is required to keep in a good state of repair and fit for habitation. That basic question still has to be answered. If this court on hearing the evidence determines that the maintaining of the driveways and walkways in the mobile home park is a service then the Landlord has every right to invoke section 11(5) of the RTA which reads as follows:

11 (5) Where a Landlord discontinues a service, privilege, accommodation or thing and such discontinuance results in a reduction of the Tenant's use and enjoyment of the residential premises, the value of such discontinued service, privilege, accommodation or thing is deemed to be a rent increase for the purpose of this Section.

> At which time the Landlord may argue that the Tenant/Respondent at this late date should not be allowed to make an Application for a rent increase review.

There are two reasons therefore why I will not grant the Appellant's Motion and they are as follows:

1. The Application to the Director co-mingles rental increase and maintaining walkways and driveways as a condition of the premises, and
2. it is necessary to determine whether maintaining walkways and driveways is a service or a condition of the premises.

While this may be *orbiter* I only mentioned that the appeal time in which to review rental increase may be directory and not mandatory, but that is for another time and discussion.

The parties should contact the clerk of the Small Claims Court, subject to an appeal of this decision to have a court date for the continuation of this hearing.