SCCH - 17- 469416

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

Cite as: Burke v. Blue Nile Homes Ltd., 2017 NSSM 60

BETWEEN:

JODY BURKE and JENNIFER GUITARD

Tenants (Appellants)

- and -

BLUE NILE HOMES LTD.

Landlord (Respondent)

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on November 7, 2017

Decision rendered on November 14, 2017

APPEARANCES

For the Tenants	Self-represented
For the Landlord	Asim Shams, Owner

REASONS FOR DECISION

[1] This is an appeal by the Tenants from a decision of the Director of Residential Tenancies dated October 3, 2017, following a hearing at Residential Tenancies on September 26, 2017. In that order, the Tenants were ordered to pay to the Landlord the sum of $7,481.15, representing four months' rent at $1,650.00 per month, minus an $800.00 security deposit, plus the $31.15 application fee. Also, the tenancy at 15 Hanwell Drive in Lower Sackville, Nova Scotia, was ordered to be terminated as of October 31, 2017.

[2] The tenancy began on November 1, 2013, at the monthly rent of $1,650.00 The terms were month-to-month. Mostly, everything went smoothly until earlier this year.

[3] The major item of dispute is a claim by the Tenant, Mr. Burke, to the effect that he was entitled to a four month rent abatement in exchange for his work in early 2014 on a construction project that was being built by the Landlord in the same subdivision in which the tenancy was located.

[4] According to Mr. Burke, the Landlord was a relatively unsophisticated individual who had just gotten into home construction. Mr. Burke claims to be an experienced project manager and says that he performed a number of services for the Landlord that enabled that home to be completed. In particular, he acted as a conduit for receiving quotes from various subcontractors and spent time supervising their work.

[5] The evidence establishes that Mr. Burke is a heat-pump installer, but that he also has some general construction industry experience.

[6] The Landlord takes a different view, and denies that Mr. Burke did anything other than a few minor tasks to help him out. He says any work done by Mr. Burke was done as a favour and not for any monetary consideration.

[7] The Tenants called as a witness an individual by the name of Teddy Torrey, who is himself a project manager for a local construction company by the name of Louisburg Home Construction. According to Mr. Torrey, his employer (Louisburg) had sold this property to Mr. Shams, and had completed the foundation, framing and siding work, after which a serious financial dispute arose between Mr. Shams and the principals of Louisburg, resulting in no further work being done by Louisburg. In other words, Mr. Torrey says, the construction was at a relatively early stage, where there were no mechanical services roughed in, let alone completed. Mr. Burke claims that he superintended the process of having all of the subcontractors' work done from that early stage until completion.

[8] Mr. Torrey also testified that he had been privy to discussions between the Landlord and Mr. Burke whereby there was to be compensation for Mr. Burke's services. This, of course, is directly at odds with the evidence of Mr. Shams to the effect that the services of Mr. Burke were to be entirely gratuitous.

[9] Mr. Shams simply disputes that there was any form of a contractual relationship. He says that he received the various quotes from subcontractors and paid them himself. Mr. Burke does not deny that the contractors were paid by Mr. Shams, as this is entirely consistent with him performing the function of a project manager as distinguished from that of a general contractor.

[10] Mr. Shams also argues that such a contract, if it existed, would surely be reflected in some form of documentation. He questioned aloud how he can properly account for such a contract in his HST returns and other accounting.

[11] Mr. Shams also claims that the Tenants were chronically in arrears of rent, and he questions why it took the Tenants almost 3 years or more to get around to attempting to enforce this contract. This fact, he says, is consistent with there being no promise of rent abatement.

[12] The Residential Tenancy Officer heard the same evidence, except (it appears) for the evidence of Mr. Torrey, and concluded that there was no oral agreement. He observed, correctly, that the onus of proof rests with the Tenant, being the individual who alleges the existence of an oral agreement.

[13] That onus is the civil standard of evidence on a balance of probabilities.

[14] On this key factual point, having the additional benefit of Mr. Torrey's testimony, I find myself in disagreement with the Residential Tenancy Officer. I find that there was an agreement, and that the Tenants are entitled to an offset of four months of rent.

[15] I make this finding in part on my assessment that Mr. Shams was significantly downplaying the role that Mr. Burke played, even if Mr. Burke may be slightly over-playing his involvement. In essence it comes down to a question of whether Mr. Burke worked for free, or for compensation. The law tends to be highly suspicious of arrangements that are said to be gratuitous. In other words, although Mr. Burke may have the onus to prove the existence of the contract, by the same token there is a burden upon Mr. Shams to prove that the services provided by Mr. Burke were to be, effectively, a gift. As between the two

competing versions of this event, I find that Mr. Burke's version is more probable. It is not for this court to try to place a value on that service. Rather, I take it as I believe it was likely agreed, that the compensation would take the form of a four month rent abatement. Perhaps in retrospect, Mr. Shams regrets having agreed to this, but I find that he did.

[16] The fact that it took as long as it did for Mr. Burke to make this claim, has been taken into account. It rings true to me that he did not immediately seek compensation because Mr. Shams appeared to be in some financial difficulty. He did say, and I believe, that he repeated more than a few times to Mr. Shams that he wanted eventually to be compensated for the time he put in. It is more probable than not that there was a certain looseness to the arrangement, but in the end four months of rent appears to have been the understanding.

[17] It also makes sense, that all of this came to a head earlier this year when the Tenants advised Mr. Shams that they intended to leave the property at the end of 2017. It was then that Mr. Burke apparently told Mr. Shams that the house would need significant upgrading, and the figure of $25,000.00 was apparently mentioned. Mr. Shams appears to have misunderstood and believed that the Tenants had caused damages in the amount of $25,000.00, which I find was simply not the case. Mr. Burke was convinced that the property had been poorly constructed, which was why it had deteriorated and needed upgrading.

[18] At that point, the Tenants decided to begin withholding rent to collect on the promised abatement, and the matter became litigious. Specifically, the Landlord commenced the application at Residential Tenancies on August 23, 2017.

[19] Although they did not launch their own application at Residential Tenancies, the Tenants also advanced a claim, which received no credit from the

Residential Tenancy Officer, that the rent should be further abated as a result of various deficiencies in the property. One of the major deficiencies that is alleged, is the lack of proper flooring in the basement of the house. Apparently, the house had been built originally with laminate flooring, but at some point early on the flooring became saturated with water from the concrete sub-floor, with the further result that the flooring became mouldy. The Tenants ended up ripping up the flooring, and living with a less than desirable concrete floor. The Tenants also raised complaints about the lack of proper water pressure, and cracks in the ceiling which are evident in photographs put into evidence. The Tenants also complain about poor conditions of the driveway.

[20] Mr. Burke believes the property, which was brand-new when he and his family moved in, will require a significant investment of money by the Landlord if he hopes to sell it, as is apparently his plan. He also believes there should be an abatement for all of the time he and his family spent in a sub-par house.

[21] Mr. Burke testified that he and his family had intended to move out at the end of December 2017, which of course is two months after the order of the Residential Tenancy Officer provided. There are additional rent arrears to consider, which have accrued since the date of the order.

[22] On all the evidence, I do not believe this is a proper case for an abatement respecting the condition of the property. I am not satisfied that the Tenants did not receive reasonable value for the rent paid. Some of the defects they complain about are purely cosmetic. And as for the flooring, I do not see a sufficient record of a complaint made by the Tenants to the Landlord. One would expect there to be something in writing if the Tenants took a view that the lack of

the laminate flooring over the concrete was a serious deficiency. In the result, I reject any claims for an abatement beyond the four months for Mr. Burke's work.

Corporations Registration Act

[23] There is another issue that was argued before the Residential Tenancy Officer. That issue concerns the applicability of section 17(1) of the *Corporations Registration Act,* (hereafter called the CRA), which provides:

> **Restriction on bringing court action**
>
> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force .....

[24] The evidence is clear that Mr. Shams allowed the registration of Blue Nile Homes Ltd. to lapse for non-payment of fees in July 2015, and he did not reinstate the company until October 13, 2017 - almost three weeks after the hearing at Residential Tenancies.

[25] The Residential Tenancy Officer did not actually rule on this provision or its applicability to proceedings in Residential Tenancies. The officer stated:

> "I have reviewed the departmental policy available online as to the identity of parties but unfortunately that policy only provides guidance with respect to individuals and not corporations. In my view, given the lack of policy guidance to officers, the Landlord will be able to maintain the action. Mr. Shams however should realize that an appeal by the Tenants on this ground could result in further delays and he should take steps to reactivate his company lest an adjudicator be less than flexible as I am being."

[26] There is, in fact, fairly clear case law on this subject, specifically on whether placing a company in good standing after having commenced a claim is sufficient to cure the default and allow a claim to be maintained.

Is the Residential Tenancies system a "court"

[27] An important preliminary question is whether the term "court" as used in the statute includes a tribunal such as Residential Tenancies. In applying a purposive interpretation to s.17(1) of the CRA, the answer must be that the Director of Residential Tenancies is a court for purposes of that Act. The Residential Tenancies system has exclusive jurisdiction in matters within its realm. Parties cannot bypass Residential Tenancies and go to a different "court." It would be perverse if a corporate Landlord could have legal status in the administrative body established to deal with residential tenancies, but not in any other civil court.

[28] The situation may be analogized to cases where administrative tribunals have been held to be equivalent to "courts of competent jurisdiction" for purposes of granting remedies under s.24 of the *Canadian Charter of Rights and Freedoms*. I appreciate that this case does not involve a constitutional question, but I believe that s.17(1) of the CRA must be read as if the term court included other bodies that have jurisdiction to "in respect to any contract," which would logically include enforcement by legal process of the terms of a lease.

Does reinstatement cure the problem?

[29] The short answer is that it is all in the timing, and in the case here, the timing is against the Landlord. There is no question that disallowing or refusing to

consider a claim on the basis of non-compliance with the CRA may seem to be a disproportionate penalty for what may have been no worse than an inadvertent failure to pay a small fee, but the authorities make clear that serious consequences (such as the dismissal of a claim) may be the only way to compel compliance with the statute.

[30] In *Island Seafoods, LLC v. R. & L. Fisheries Ltd.*, 2012 NSSC 348 (CanLII), Justice Muise considered section 17(1) of the CRA and drew a distinction between the situation where a company was revoked before it commenced an action and a company that was in good standing when it commenced its action but was subsequently revoked, and held that in the former situation the default could not be cured by simply reinstating the company. At paragraph 8 his Lordship stated:

> [8] The real issue in this case is …that of the timing of the registration of the Plaintiff company. It started the action without being registered… It has now registered under the *Corporations Registration Act* of Nova Scotia. The question is whether that subsequent registration cures the lack of registration when the action was commenced.

[31] He went on to distinguish the case from others where the registration had lapsed after the action had commenced, in which cases reinstating the company had the effect of curing the default. He stated:

> [23] ..... It makes sense to me that the ability to maintain an action can be reinstated part way through the process by registering after a lapsed registration. Maintaining an action is an ongoing event. It is merely suspended during non-registration. In contrast, commencing an action is a one time event. The party seeking to commence the action is either registered, or is not registered, at the time. It is thus either authorized, or not authorized, to commence the action.
>
> [24] This interpretation gives effect to the wording of section 17(1).

> [25] Unless and until the corporation is registered, it cannot bring an action. So if it is not, at the time, it can wait until it is registered to bring the action.
>
> [26] Unless and until the corporation is registered, it cannot maintain an action. So if it is not registered, it cannot proceed further ..... with the action until it does become registered and can proceed further with the action.
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> [27] Suspending an action that was started with registration in place, until the lapse in registration is rectified, gives effect to the punitive provision, that is section 17(1).
>
> [28] To allow the commencement of an action without registration to be cured by subsequent registration would retroactively forgive a contravention of a penal provision of the Act.

[32] This law is current and binding. I find that the Landlord was non-compliant with the CRA when it commenced its claim in Residential Tenancies in August 2017, and no subsequent registration would have been able to cure that default. The Residential Tenancies proceeding ought not to have been allowed to proceed, and ought to have been dismissed by the Residential Tenancy Officer.

What is the proper result?

[33] The Residential Tenancy Officer awarded the Landlord rent at the rate of $1,650.00 per month for the months of June, July, August, September and October 2017, for a total of $8,250.00, from which he deducted the $800.00 security deposit and to which he added the filing fee of $31.15, for a total award of $7,481.15.

[34] As I have already found, the Residential Tenancy Officer should not have awarded anything specifically to the Landlord, because it was a corporation that was in noncompliance with the CRA.

[35] It is important to emphasize, however, that the effect of section 17(1) is procedural, and not substantive. In other words, it does not negate the debt but rather prohibits the continuation of an action to collect on that debt.

[36] It also follows that the remedy of termination of the tenancy is one that the Landlord ought not to have been granted, given that he was in noncompliance with the CRA.

[37] Nevertheless, the matter comes before me on appeal, which is a proceeding *de novo*, the Landlord is now in compliance with the CRA, and I must try to make some sense out of the situation, mindful also of the fact that the CRA does not prohibit a corporation from defending itself against claims.

[38] I have found that the Tenants are entitled to an abatement for four months which are logically applied to June, July, August and September 2017. It follows that rent for October and November are currently outstanding and should the Tenants remain for the month of December a further month's rent will be owing.

[39] I do not intend to terminate the tenancy any earlier than December 31, 2017, which is the date that the Tenants have specified that they wish to leave anyway. Accordingly, the order that I make will provide that the Tenants shall vacate the premises on or before December 31, 2017. Further it shall provide that the Tenants are in arrears of $1,650.00 per month for each of the months of October and November 2017, and that as of December 1, 2017 the further sum of $1,650.00 will be payable.

[40] I do not propose to offset the security deposit against these amounts owing, as I believe the security deposit should be dealt with in the normal course of events. I don't wish to invite further litigation, but the $800.00 is intended to offset any damages that the Tenants may have caused to the property during the tenancy, beyond normal wear and tear. Either the Landlord or the Tenants may decide to bring a further proceeding before Residential Tenancies to determine whether the security deposit ought to be returned in full, or whether some or all of it may be applied toward damages to the property.

[41] I do not propose to allow the Landlord its filing fee at Residential Tenancies of $31.15, on the basis that it was a non-registered company at the time and should not be rewarded with its costs of bringing that proceeding.

Eric K. Slone, Adjudicator