

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
cite as: *Popenko v. Killam Apartment REIT 2020 NSSM 23*

SCCH 501114

Between:

Serhiy Popenko

Appellant

— and —

Killam Apartment REIT

First Respondent

— and —

The Bank of Nova Scotia, carrying on business as Scotiabank Canada Collections

Second Respondent

Adjudicator: Augustus M. Richardson, QC

For the Appellant: Serhiy Popenko

For the First Respondent: Alla Fiddes and Mr Sampson

Heard: November 17th, 2020 (by teleconference)

Decision: November 18th, 2020

INTERIM ORDER

[1] Sometimes justice is blind. Sometimes it must step out onto a limb. Both observations apply in this case.

[2] This is an appeal of an order of Residential Tenancy Order dated October 7, 2020 (the “Order”). The Order found that the tenant (now appellant) Serhiy Popenko was in rental arrears in the amount of \$2,128.04. It ordered Mr Popenko to pay that amount to the landlord (now

respondent) Killam Apartment REIT. It also ordered the tenancy agreement between the two terminated, and required Mr Popenko to deliver vacant possession of the unit known as Apartment 37 at 57 Westgrove Place in Halifax effective October 17, 2020. Mr Popenko then filed this appeal.

[3] Mr Popenko has been a tenant of the landlord for over 20 years. His current rent is \$720 a month. He has fallen into rental arrears which, as of the date of the Order under appeal, stood at \$2,128.04 (including the filing fee, but deducting the security deposit and interest).

[4] On reviewing the landlord's accounting records (filed as evidence) it appears that these arrears arose as follows:

- a. since March 2017 Mr Popenko had been in arrears in the amount of \$650.00;
- b. he and the landlord had carried that arrears balance forward until May 2018, when it increased to \$665.00, and then until May 2019, when it increased to \$690.00;
- c. the landlord did not seek termination of the lease by reason of that outstanding balance between March 2017 and March 2020;
- d. in April 2020 Mr Popenko missed a rent payment of \$690.00, causing the arrears to jump to \$1,380.00;
- e. between April and November 2020 Mr Popenko is shown as having made rent payments in sporadic but regular amounts of \$300.00 (May 8th), and \$976.51 (on May 8th, July 8th and September 3rd); so that
- f. by and including rent for November, 2020 his arrears stood at \$3,100.47.

[5] As I understood the evidence Mr Popenko's rent payments were deducted automatically from his bank account with the second respondent, The Bank of Nova Scotia (the "Bank").

[6] Mr Popenko has for a long time been the recipient of social assistance and disability payments. These payments have been automatically deposited into the same account with the Bank.

[7] I am satisfied on the evidence that over the twenty years Mr Popenko has been a tenant he has paid—or eventually paid—his rent; and has caught up with and satisfied any arrears that did occur. There was sketchy evidence that he had in the past fallen into substantial arrears, resulting in at least two appeals in the Small Claims Court and the Supreme Court. I was not provided with copies of those decisions. The landlord’s accounting records do support a history of arrears having developed and then being paid off gradually. I note too that at least as of March 2017 the landlord appeared content to carry the arrears of what appear to be one month’s rent without taking any steps against Mr Popenko. It was only after those arrears suddenly began to increase that the landlord took the steps that bring the parties before me. I note, in this regard, that it is in Mr Popenko’s favour that the landlord’s accounting records reveal that Mr Popenko continued to make some payments towards his mounting arrears as these proceedings moved forward.

The Reasons for Mr Popenko’s Arrears

[8] Mr Popenko offered three reasons for his fall into increasing arrears as of April 2020.

[9] First, it appears that Mr Popenko has or had a VISA credit card issued through the Bank. It appears that at some point he fell into arrears on the card. As of March 2020, if not before, the Bank, under its Scotiabank Canada Collections division, began to transfer money from his regular bank account to the VISA account as payments on that debt. Mr Popenko filed copies of letters from the Bank indicating the following transfers:

a.....	March 2020
.....\$108.94
b.....	June 2020
.....\$212.08
c.....	October 2020
.....\$150.08

[10] In its letters to Mr Popenko the Bank purported to be able to take these payments because “under the agreement(s) you have with The Bank of Nova Scotia, we can transfer amounts you have in other Scotiabank account(s) to pay on your outstanding debt (called a right of offset).”

[11] Mr Popenko alleged that he had fallen behind in his rent at least in part because the Bank “takes part of my social assistance because of my credit card debt” and because the Bank “doesn’t cash social assistance check as it is necessary to pay rent on time.”

[12] Mr Popenko offered two other factors that either contributed to his arrears, or should stand as an offset to them. First, he complained that his social assistance and disability payments were too low and had failed to keep up with the cost of living (including the cost of housing). Second, he alleged that he had potential claims against the landlord for its alleged failure to effect repairs to his unit over the years that would offset whatever arrears did exist.

[13] I pause here to note that I did not place any weight on these two factors. With respect to the first, this court is not in a position to do anything about the amounts paid to Mr Popenko under social assistance or disability benefit statutory regimes.

[14] With respect to the second, tenants who have complaints about the state of their premises have the remedy of an application to the Residential Tenancy office, or of a complaint to the local municipality for corrective action. The withholding of rent by way of a self-help remedy is not the appropriate step. Nor, I might add, was there anything in the evidence before me that supported Mr Popenko’s allegation that the landlord had failed any duty on its part to effect repairs to his unit if and when required.

[15] I was, however, concerned about the Bank’s conduct.

[16] As I understood the evidence, Mr Popenko receives social assistance and disability payments from the Province of Nova Scotia. I assume that these payments are made under the *Employment Support and Income Assistance Act*, SNS 200, c.27 (the “ESIA”) or the *Social Assistance Act*, RSNS 1989, C.432, as amended (the “SCA”), or both. That being the case, the issue is whether the Bank’s agreements with Mr Popenko, whatever they were, entitled it to do what it has been doing—that is, to deprive him of some of his social assistance and disability payments. I had some doubt that it did. I say this for two basic reasons.

[17] First, the general rule is that a creditor is entitled to seize income and assets from a debtor only after it has recovered judgment from the debtor. Once a judgment is recovered the creditor can move for execution against the debtor’s income and assets. Even here, however, there are restrictions. For example, a judgment creditor is entitled to garnish only 15% of the debtor’s gross salary—and even then the debtor’s wages cannot fall below a certain figure.

[18] In this case the Bank has purported to get around the general rule by fashioning an agreement that, it says, entitles it to seize money in Mr Popenko's account without having to go to the trouble of recovering a judgment—and without therefore running afoul of any law that protects judgment debtors. I would think that the law would be slow to accept that a creditor can get around such basic social protections by drafting a consumer contract in such a way as to avoid them.

[19] Second, and flowing from the first, assuming that the Bank has such an agreement with Mr Popenko, it seems to me that very strong wording would be required to entitle the Bank to seize social assistance and disability payments made to Mr Popenko by the Province. Such payments are not personal assets. They are not wages or income, at least in any traditional sense. They are payments made by the Province in furtherance of its goal to ensure that its citizens do not sink beneath the waves of poverty. That is a goal I assume is shared by parties to consumer contracts, whether individual or corporate. It is accordingly difficult to accept that a consumer contract between any bank and its customer could be drafted so as to negate that goal.

[20] In saying the above I am not ruling or deciding that the Bank cannot in fact or in law seize social assistance and disability payments. I am however ruling that on the evidence before me there is at least a question as to the Bank's ability to do what it has done. An answer to that question is necessary in this case because, on the evidence before me, it appears that the Bank's conduct has played and is playing a role in creating Mr Popenko's rental arrears. I will accordingly make the following interim order:

- a. the Bank is added as a second respondent to these proceedings;
- b. A copy of this Interim Order is to be sent to the Bank, care of its recognized agent Stephen J. Kingston, at McInnes Cooper, Suite 1300 - 1969 Upper Water Street, Purdy's Wharf Tower II, PO Box 730, Halifax, NS, B3J 2V1;
- c. the Bank is to cease deducting or transferring monies from Mr Popenko's account ending in ****1921;
- d. the Bank is to return any and all monies it has deducted or transferred from Mr Popenko's account ending in ****1921 from March 1, 2020 to the present;
- e. the return of such monies is without prejudice to the Bank subsequently establishing that it does indeed have the right to do what is or has been doing;

- f. the Residential Tenancy order dated October 7, 2020 is stayed pending the outcome and final resolution of this appeal;
- g. Mr Popenko shall pay \$976.51 to the landlord by the end of November 2020, and thereafter by the end of every other month, until the resolution of this appeal; and
- h. the within appeal is adjourned to **Tuesday, December 14th, 2020 at 6:00 p.m. before me by teleconference**, such notice to be given to the appellant and both respondents.

DATED at Halifax, Nova Scotia
this 18th day of November, 2020

Augustus M. Richardson, QC
Adjudicator