SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *3302739 Nova Scotia Ltd. v. Douthwright*, 2021 NSSM 48

ON APPEAL FROM AN ORDER OF THE DIRECTOR OF RESIDENTIAL TENANCIES

Date: 20210927
Docket: SCCH 507929
Registry: Halifax

Between:

3302739 Nova Scotia Ltd.

Appellant (landlord)

- and -

Melissa and Michael Douthwright

Respondents (tenants)

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: In Halifax, Nova Scotia on September 20, 2021 via teleconference

Appearances: For the Appellant, landlord
Igor Yushchenko, counsel

For the Respondents, tenants Nora MacIntosh, counsel

REASONS FOR DECISION

[1] This is an appeal by the landlord from a decision of the Director of Residential Tenancies dated July 23, 2021, respecting a rental townhouse at 32 Romaz Court in Lower Sackville, Nova Scotia.

[2] This tenancy has been going on for a bit more than three years, and it has unfortunately been rife with conflict. By my count, the Residential Tenancies order under appeal was either the third or fourth one between these parties, and I was advised of yet a further order that has been made, and appealed, while this one is still in process.

[3] I am not the first adjudicator to observe that a significant part of the problem is that the tenants have been chronically late in making their rent payments.
Unless they mend their ways, this habitual late payment pattern is going to have a very negative and long-lasting impact on their prospects as tenants.

[4] That said, the issue before me is not specifically about habitually late payments, and I must be careful only to deal with issues that are directly before me.

[5] To properly dispose of the appeal before me, I need to go back to the immediately prior Residential Tenancies proceeding and the Small Claims Court decision on appeal from that Residential Tenancies decision.

[6] In a decision dated April 14, 2021, in file #202100687, Residential Tenancies Officer Chantal Desrochers, in the context of a multi-issue proceeding, made a finding that the lease between the parties was a fixed term lease ending June 30, 2021. She ordered the tenants to move out on or before that day.

[7] Her order also dismissed a number of complaints by the landlord, some of which the landlord has tried to raise again. I will get to those later.

[8] The tenants appealed that order to the Small Claims Court in court file SCCH 505700. The matter went to a hearing before adjudicator Walter Thompson, QC, on June 7, 2021, who heard witnesses called by both parties. He sided with the tenant[1] on virtually every issue that he addressed. He found that the tenant and her

[1] Somehow, while both Melissa and Michael Douthwright had been parties to the Residential Tenancies order, Mr.

children were not in violation of the Good Behaviour statutory condition. But most significantly, he found that the lease between the parties was not a fixed term lease, but rather was a year-to-year lease. He made this finding despite what the lease says on its face and despite the fact that it arose out of a mediated settlement a year earlier - which settlement is somewhat equivocal but could be read as stipulating that the lease for the forthcoming year would be fixed term. Adjudicator Thompson acknowledged those factors but found that the tenant did not realize that the new lease she signed in 2020 was different from the one before. He accepted her evidence that she did not read it over carefully, and found accordingly that "no agreement had been reached by the parties." In the result, he allowed the appeal and set aside the Residential Tenancies order evicting the tenant and her family.

[9] The order of adjudicator Thompson was appealed to the Supreme Court of Nova Scotia on July 13, 2021, but as far as I know that appeal has not yet been heard.

[10] Between the time of adjudicator Thompson's order and the filing of the appeal, on July 2, 2021 the landlord filed a further application to Residential Tenancies (file #202102191) which was the starting point for the proceeding before me now. The application was for termination of the tenancy, based upon two main grounds:

a. The term of the (alleged) fixed-term lease had now expired and the tenants failed to move out;

b. Unpaid rent.

[11] The landlord further stated in the application that "all issues will be discussed during the hearing" though there is nothing to indicate what those other issues were. I believe it is fair to say that the bulk of what is contained in the written part of the application concerns the issue of the fixed-term lease. (As to what else was discussed on the Residential Tenancies teleconference, one can only surmise based on what the Residential Tenancies Officer refers to.)

[12] The landlord has argued that the inclusion in the Residential Tenancies application of "all issues will be discussed" gives it the ability to raise a number of issues that were not specifically raised at Residential Tenancies. Without being too technical about it, I do not agree that a blanket clause such as that is enough to

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Thompson only named Melissa as a party in the matter before him. This appears to have been an innocent oversight and I do not consider this to have any ongoing significance.

clothe this court with jurisdiction to consider new issues.

[13] On July 21, 2021 the Residential Tenancies matter came before Residential Tenancies Officer Gerard Neal, via teleconference. Both parties participated in the teleconference hearing. The landlord was represented by its owner Klavdia Gonopolskiy, and the tenants by their lawyer Nora MacIntosh. The tenants themselves did not participate. Residential Tenancies Officer Neal noted that the landlord's application referred to three issues that had previously been dealt with in the prior proceeding - which is still under appeal to the Supreme Court. Residential Tenancies Officer Neal stated that he was dismissing the application at this time as the issues "are before the Supreme Court of Nova Scotia."

[14] The three issues that he referred to were the issue of the fixed-term lease, an issue with respect to the tenants' use of a second parking spot, and an issue concerning the validity of a rental increase.

[15] I do not think anyone would disagree with the proposition that it was the issue of the fixed-term lease that was most concerning to, and most vociferously argued by the landlord.

[16] Shortly after this Residential Tenancies decision, the appeal was launched which ultimately came before me on September 20, 2021. The Notice of Appeal identified the following issues:

a. Fixed lease, tenants didn't vacate
b. July's rent hasn't been paid on time
c. Increase + late payment fee + future payments
d. Parking
e. Behaviour and compliance with the lease

[17] Most of the hearing before me concerned the issue of the fixed-term lease. Counsel for the tenants raised a preliminary issue that I should not enter into the merits of that issue, because the principles of *res judicata* or issue estoppel act as a complete bar to efforts to re-litigate the question. I ruled that I would consider *res judicata* and issue estoppel in my eventual ruling, but I was not prepared to prejudge the issue.

[18] The reason to allow evidence rather than summarily deciding the issue, was to have a factual record to consider whether there was a legal basis to rule differently from adjudicator Thompson. It is well-established in Canadian law that

res judicata is not absolute. As stated quite succinctly by the Newfoundland and Labrador Court of Appeal in *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62:

> [52] It is generally recognized that there are limited exceptions to the application of *res judicata* once its constituent elements have been established. For example, where the first decision was obtained by fraud, this will not be a bar to relitigation. Similarly, the discovery of new evidence that, with reasonable diligence, could not have been discovered prior to the original decision and which, had it been considered, could have changed the outcome of the original decision, has always been a recognized category of exception to the application of the *res judicata* doctrine: *Doering*, per Ritchie J. at pp. 637-639; *Quinlan*, para. 6; *Janes v. Deer Lake (Town)* (1975), 1995 CanLII 9897 (NL CA), 130 Nfld. & P.E.I.R. 176 (NFCA), per Cameron J.A. at para. 3; *Furlong*, per Roberts J.A. at paras. 13, 15. This exception is directly in issue on this appeal.
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> [53] The rationale behind the new evidence exception is that the policies underlying the application of *res judicata* have much less strength where newly discovered evidence affecting the result exists. If subsequent to the original judgment, new evidence, not previously discoverable, is unearthed and that evidence calls into question the evidentiary basis of the earlier decision, the effectiveness and fairness of the system will be called into question because it appears that it operated on a false evidentiary premise. Finality as a policy behind not reopening a case loses its resonance when it results in compounding error. The earlier false evidentiary premise explains why, if the case is retried, there may be inconsistent results and, in a sense, justifies a second proceeding. Protestations by the other party about the
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> unfairness of being dragged back into court lose strength when it is shown that the previous decision is not soundly grounded in truth.
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> [54] The formulation of the *res judicata* rule itself contemplates its non-application to situations where new evidence which could not with
> reasonable diligence have been discovered at or before the original decision would change the whole aspect of the case.

[19] There is also an exception to *res judicata* or issue estoppel based upon fairness, also discussed in *Guardian*:

> [64] Apart from the fraud and new evidence exceptions to the application of *res judicata* identified above, the cases also refer to another exception to the application of issue estoppel: a party will be allowed to relitigate an issue where "fairness dictates that the original result should not be binding in the new context" *(Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, per Arbour J. at para. 52, citing *Danyluk*). This exception was also considered in *Penner*. There, Cromwell and Karakatsanis JJ observed that issue estoppel:

> [29] … balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties of those who stand in their place. However, even if these elements are present, the court retains the discretion to not apply issue estoppel when its application would work an injustice.

[20] Accordingly, I may apply these principles and make a ruling that is contrary to that made by adjudicator Thompson, if I believe such a result is warranted.

[21] I do not think anyone would argue that the ruling by adjudicator Thompson was procured by fraud, in the sense intended. So, the live exceptions to consider are the fresh evidence and fairness exceptions.

[22] At the hearing before me, Ms. Gonopolskiy gave extensive evidence about the history of the lease in question, and about the circumstances of its execution. She produced text messages and emails that she says support her position that the tenants knew, or ought to have known, that the lease they were signing was a fixed-term and not a year-to-year lease.

[23] For unexplained reasons, the tenants did not participate in the hearing before me, except through their counsel, who presumably made the tactical decision not to call evidence.

[24] It will be recalled that adjudicator Thompson had the opportunity to hear from both Ms. Douthwright and Ms. Gonopolskiy. His decision was based on a weighing of those two competing versions of the events. Since there is no recording or transcript of the evidence, there is no way to know everything that was testified to. But he is a very experienced adjudicator, particularly in the area of Residential Tenancies, and his decision deserves a lot of deference.

[25] The landlord was not legally represented by counsel at the hearing before adjudicator Thompson and may not have done as thorough a job presenting her case as was done in the hearing before me. She may not have fully anticipated the evidence that she would be facing, or appreciated that she had to put her best foot forward in terms of the evidence that she would present. But that does not meet the test for *"evidence that, with reasonable diligence, could not have been discovered prior to the original decision and which, had it been considered, could have changed the outcome of the original decision .."* None of the evidence that Ms. Gonopolskiy presented was new. It is precisely the kind of evidence that, with reasonable diligence, could have been presented to adjudicator Thompson. Some

or much of it actually may have been presented to him, though I expect that with the aid of counsel Ms. Gonopolskiy mustered a stronger effort before me than she did before adjudicator Thompson.

[26] But a litigant cannot just get a second kick at the can. Most unsuccessful litigants could probably do a better job the second time around, armed with the benefit of hindsight. They would in many cases choose their evidence differently. But there must be something, such as fraud or truly new evidence, to justify reopening the issue.

[27] The fairness exception to *res judicata* or issue estoppel is narrow, and applies where *"fairness dictates that the original result should not be binding in the new context."* In the case here, there is no new context. It is the very same context.

[28] As observed, the tenants chose not to testify before me, perhaps secure in the belief that *res judicata* would be enough to foreclose the issue. As such, I only heard one side of the issue, and notwithstanding that I found Ms. Gonopolskiy to be fairly compelling in her testimony, this is not enough to overcome the fairly high burden to demonstrate that "fairness" demands that this court be allowed to make a contrary finding to that of adjudicator Thompson.

[29] Of course, that decision may yet fall on appeal, which would change the entire complexion of the dispute.

[30] As such, I agree with Residential Tenancies Officer Neal that this application, to the extent that it seeks to characterize the tenancy as fixed term, must be dismissed as *res judicata*.

Other grounds of appeal

[31] The Notice of Appeal listed five grounds:

a. Fixed lease, tenants didn't vacate
b. July's rent hasn't been paid on time
c. Increase + late payment fee + future payments
d. Parking
e. Behaviour and compliance with the lease

[32] Item a. has already been disposed of.

[33] Item d. respecting parking is a complaint that the tenants are using two spaces, instead of the one space that the lease provides. This issue was explicitly decided by Residential Tenancies Officer Desrochers in her April 14, 2021 decision where she found that the tenants are entitled to park two cars for the duration of the tenancy. So long as the landlord and tenants are operating under the same lease, this must be considered as *res judicata*. Residential Tenancies Officer Neal took this same position.

[34] I realize that this somewhat begs the question of what entitlement the tenants might have under a lease renewal, assuming that the lease is deemed to automatically renew as a periodic lease. Given that she regarded the lease as fixed-term, I doubt that Residential Tenancies Officer Desrochers intended the term "duration of the lease" to operate in perpetuity. But there is also to consider the issue of whether removing one parking space would amount to a rental increase, which may or may not be unlawful in the current climate. As such, I do not propose to make any order concerning the parking space issue.

[35] Item e. appears to also have been dealt with by Residential Tenancies Officer Desrochers who found there to be insufficient evidence to make a finding that the tenants were in breach of the good behaviour statutory condition. I do not consider this to be *res judicata* in the sense that behaviour - if it persists or is repeated - can be an ongoing issue, but it does not appear that this item was pressed before Residential Tenancies Officer Neal, nor was there any significant evidence at the hearing before me to support such a claim, and I accordingly dismiss this ground.

[36] As for b. and c., the evidence before me was that no cheque for the July rent was provided until mid-July, and it was deposited without prejudice to the landlord's position vis-a-vis the fixed-term lease. That cheque bounced. Eventually, on July 30, 2021 the tenants made up the payment via an e-transfer. While I do not condone late payment of rent, I would not terminate this tenancy on the ground of this late payment.

[37] The payment eventually made, and subsequent rent payments, failed to contain a claimed rental increase and late payment fees - which is the two-pronged issue raised in item c.

[38] The landlord says that the rent as of July 1, 2021 should have been $1,412.70, which is 2% above the previous rent of $1,385.00. It is well understood

that rental increases during Covid have been limited to 2%. Even so, if a landlord wishes to raise the rent by even that amount, section 11(2) of the *Residential Tenancies Act* requires that there be written notice four months before the increase becomes effective *"stating the amount and effective date of the increase."*

[39] In the case here, the landlord did not give such a notice. What she did communicate was in an email dated February 28, 2021 where she stated that "the monthly rent price of the house is going to be increased." This was in the same email that reminded the tenants that their lease would terminate on June 30, 2021,

and that she expected them to vacate. So what the tenants were being told was that, after their lease terminated and they were expected to be gone, future tenants would be paying more than they were currently paying.

[40] While I might be prepared to excuse a lack of formality concerning notice, I cannot torture the language of this email into a notice that the tenants would be expected to incur a 2% rental increase, effective July 1, 2021. There is no mention of 2%, let alone any mention of the $1,412.70 rent. I find that the rent has never been validly increased and it remains $1,385.00 per month until a proper increase is effected.

[41] The last small point concerns late payment fees. If the landlord is correct, the tenants owe (at least) three payments of $50.00 for having bounced the July rent and the original August rent cheques, and for having put a stop payment on a second August rent cheque. Although those rent payments were eventually made good, the landlord had the cheques returned by her bank and had to chase the tenants to make up their rent.

[42] The subject lease provides that the tenant is obligated to pay "returned cheque charges not to exceed $50.00." At various times the tenants have willingly paid this charge and have not previously disputed the landlord's right to collect this charge. They now contend that they do not have to pay any such charge, as Ms. Gonopolskiy is apparently mistaken in her belief that her bank actually charges her almost that amount for returned cheques. In fact, the charges levelled by her own bank for cheques returned NSF are minimal, while she would be obliged to pay the more significant charge if one of her own cheques bounced - which is irrelevant to this situation.

[43] On this issue, notwithstanding Ms. Gonopolskiy's misunderstanding, I agree with her position. Every time a cheque is returned, the landlord incurs a cost

in terms of extra work to inform the tenants and pursue collection. There is also the risk of the landlord's account incurring an overdraft charge which, in turn, could affect the landlord's credit rating. Even if the landlord's own bank does not penalize it with a specific service charge, there is a cost incurred which is reasonable to pass on to the tenants.

[44] If the language of the lease is arguably ambiguous, then the past practice of the parties provides a basis to discern their joint understanding of what the language means. It means: if you provide a rent cheque that is dishonoured by our bank, you pay a $50.00 fee. As such, the tenants owe the landlord the sum of $150.00, for dishonoured cheques in July and August. And they will owe $50.00 any time one of their cheques is returned unless a subsequent lease contains language providing otherwise.

[45] I make no findings concerning rent or charges respecting the month of September as I lack evidence to do so.

ORDER

[46] For all of the preceding reasons, the appeal is dismissed, and the order of the Director of Residential Tenancies is confirmed, though modified to the limited extent that the tenants are ordered to pay the landlord $150.00 in late fees. In the circumstances, I make no order as to costs.

Eric K. Slone, adjudicator