Date: 20000201
Docket: CA 158917

NOVA SCOTIA COURT OF APPEAL

[Cite as: Canasia Industries Ltd. v. May, 2000 NSCA 21]

Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

BETWEEN:	)	
	)	
CANASIA INDUSTRIES LTD.	)	Brian Wales
)		appeared on
Appellant	)	behalf of the
	)	Appellant
- and -	)	
	)	
CHRISTOPHER MAY	)	Respondent
	)	appeared in
Respondent	)	person
	)	
	)	
	)	
	)	Appeal Heard:
	)	January 21, 2000
	)	
	)	
	)	Judgment Delivered:
	)	February 1, 2000

THE COURT: The appellant's appeal and the respondent's notice of contention or cross-appeal are dismissed without costs as per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Cromwell, J.A., concurring.

CHIPMAN, J.A.:

[1] This is an appeal by the landlord from a decision and order of Gruchy, J. allowing the respondent tenant's appeal from an order of the Residential Tenancies Board dated August 9, 1999.

[2] The history is eventful. The story began on October 6, 1998 when the landlord rented Apartment 5 at 106 Pinecrest Drive, Dartmouth, Nova Scotia, to the tenant on a year-to-year lease at a rental of $595.00 monthly, due on the first of each month. The tenant paid the landlord $532.50 on October 6, 1998. Of this sum, $297.50 was for a security deposit (placed in a trust account), and the balance of $235.00 represented discounted rent from October 6, 1998 to November 1, 1998.

[3] The landlord provided a $25.00 rebate each month to tenants if they paid their rent on or before the first of the month.

[4] On December 30, 1998 the tenant made an application to the Director under the **Residential Tenancies Act**, R.S., c. 401 requesting a termination of the tenancy on the ground that there was unreasonable noise and drug problems at the apartment building and that the landlord failed to complete the premises. The tenant also requested a rental rebate from October, 1998 to December, 1998 in the total amount of $892.50.

[5] On January 4, 1999 the landlord made an application to the Director claiming payment of money in the total amount of $1,131.53, consisting of $214.03 for rent to be paid in October, $25.00 rent rebate for November, plus $297.50, plus rent rebate for December, and January rent of $595.00. The landlord also claimed an order that the tenant comply with the terms of the lease, and should he wish to vacate, it should be done in accordance with the provisions of the **Act**. It appears clear from this claim that the landlord is asking that the security deposit be applied towards the amount claimed.

[6] The tenant's application of December 30, 1998 and the landlord's application of January 4, 1999, were heard by Janet Light, Residential Tenancy Officer on January 18, 1999, pursuant to s. 13 of the **Act**. In her decision dated January 26, 1999, she set out the facts at length and ordered that the tenant was to pay the landlord $623.45, being a total of $923.45 for rent and late payment fees, less $300.00 compensation awarded to the tenant.

[7] The decision of the Residential Tenancy Officer was appealed by both the landlord and the tenant to the Residential Tenancies Board which held a hearing on February 12, 1999, chaired by Phyllis Thompson. Evidence was given on behalf of both the landlord and the tenant. The landlord testified that the tenant left the premises on January 10, 1999 and did not pay any rent for that month. In her decision, Ms. Thompson reviewed the facts and found that there was a year-to-year lease, with a monthly rental of $595.00, and that there were noise and drug problems in the building not resolved. The landlord was thus in

violation of statutory condition 9(3) of the standard lease and as a result, the tenant was entitled to have the lease terminated on January 31, 1999. The Board found that the landlord was holding a security deposit and interest totaling $298.49, that the tenant was entitled to compensation and the landlord entitled to rent for the month of January and late payment charges. The Board ordered, in the result, that the tenant pay the landlord $227.46, representing the amount allowed to the landlord for rent and late payment charges in the amount of $600.95, less compensation awarded to the tenant and the security deposit and interest thereon.

[8] The Board's decision was appealed to Saunders, J. of the Supreme Court who allowed the appeal and ordered the matter to be remitted to the Board for a rehearing. The order of Justice Saunders was made on April 20, 1999.

[9] On May 28, 1999, the rehearing was held by Richard L. Goulden of the Residential Tenancies Board. A settlement was arrived at between the parties at the hearing. The Board's order dated June 4, 1999 recited the history briefly and concluded that the relationship of landlord/tenant existed between the parties. It then read as follows:

> After reviewing the evidence of the previous two hearings and reviewing the Finding of Facts, Mr. Wales stated that he would be prepared to settle the matter, in the following manner:
>
> (1) The tenant would pay back the $25.00 per month incentive for three months = $75.00.
>
> (2) Half a month's rent for December, in the amount of $275.50 to be paid back, for a final total of $372.00.
>
> After some discussion between the parties, they both agreed to settle for $320.00, to be paid

> in the following manner: - the tenant, Christopher May, will give to Canasia Industries Ltd., three post-dated cheques. The first cheque will be payable on June 28, 1999 - $100.00; the second cheque payable on July 28, 1999 - $100.00; and, the final cheque payable on August 28, 1999, in the amount of $120.00.
>
> An agreement to this effect was signed by both parties, and is attached, becoming part of this report.

[10] The attached agreement initialled by the parties was expressed in the same terms as those which I have extracted from the order of Mr. Goulden, except that the words “the dispute” were used as descriptive of the subject matter of the settlement.

[11] On June 16, 1999, Mr. Goulden signed an endorsement making his order of June 4 an order of the Supreme Court. By order of the Supreme Court dated June 18, 1999, the order of the Board, as attached thereto, was approved and made an order of the Supreme Court of Nova Scotia.

[12] The order of June 18, 1999 of the Supreme Court providing for the payment of $320.00 by the tenant to the landlord by way of three postdated cheques was not appealed. We are told that the tenant did not provide the cheques and that the landlord “therefore registered the debt and requested the Sheriff to collect $320.00 with costs, making a total of $480.00". The sheriff seized the tenant’s bank account and secured the sum of $480.00.

[13] In the meantime, on June 16, 1999, the landlord made an application to the Director for payment of money from the tenant. The claim alleged that the tenant abandoned the

apartment in question on January 10, 1999, thereby breaking the lease. It recited that the landlord had obtained an order from the Board to compensate for everything except advertising, which could not be claimed for at the time of the first hearing in January of 1999.

[14] The landlord's claim for advertising costs in the amount of $244.14 consequent upon the tenant's abandonment of the apartment came on for hearing before Judy Butler, Residential Tenancy Officer, on July 20, 1999. By her decision dated July 22, 1999, she recited the history in part and referred to the settlement arrived at before Mr. Goulden at the rehearing on May 28, 1999. She found that this was a complete and final settlement with respect to the tenancy, and that the landlord was not entitled to anything further. The claim of $244.14 for advertising costs was disallowed.

[15] Ms. Butler's order was appealed by the landlord to the Board on July 22, 1999.

[16] A hearing of the Board was held on July 30, 1999, chaired by Moira Ducharme. Ms. Ducharme found that a landlord/tenant relationship existed between the parties which commenced on October 6, 1998, at a monthly rental of $595.00, due on the first of each month. Her decision recited the fact that the tenant vacated the premises.

[17] Ms. Ducharme then summarized the position of the landlord pointing out that he, at no time, filed a claim for advertising costs until June 16. He said that he had been informed at the original hearing that he would have to file another application for those costs as they

were not included in the previous claim.

[18] Ms. Ducharme summarized the position of the tenant to the effect that the settlement reached earlier and incorporated in the order of the Board included all matters arising out of the landlord/tenant relationship between the parties.

[19] Ms. Ducharme made the following findings:

1. A valid landlord/tenant relationship existed between the parties.

2. The only matter before this Board is the decision of the Tenancy Officer made July 22nd, 1999, with regard to an application filed June 16th, 1999, and Numbered H99-10,463.

3. The landlord followed proper procedure by filing a claim for these costs in accordance with Section 13(1) of the Act.

4. Based on the evidence presented at the hearing the landlord is entitled to advertising costs as the tenant vacated without notice.

5. Advertising costs of $244.14 are allowed.

[20] The tenant appealed Ms. Ducharme's decision to the Supreme Court. The matter was heard by Gruchy, J. in Chambers on September 24, 1999. In his decision he found:

(a) The issue of the security deposit was not before him.

(b) On the merits of the appeal, he was satisfied that when the parties used the phrase "that they had agreed to settle the dispute", this was an all encompassing phrase and included the "entire amount at issue". The landlord did not have the right of "... a second action".

(c) When the matter was settled, it was settled "... for $320.00 with no credit to

the tenant for the security deposit".

(d) The appeal was allowed.

[21] The order giving effect to Gruchy, J.'s decision provided that the order of the Board made by Ms. Ducharme was set aside and the landlord's claim against the tenant dismissed. The order then continued:

> **AND IT IS FURTHER ORDERED** that the appellant will pay to the respondent, the sum of $320.00 being the amount already agreed upon. The appellant is not liable for any costs in the recovery of this sum incurred after the date of settlement agreed upon by the parties.

[22] The issues before us arising out of the landlord's notice of appeal and the tenant's notice of contention which is in effect, a cross-appeal, are:

(1) Whether Gruchy, J. erred in considering a submission by the tenant which was not copied to the landlord.

(2) Whether Gruchy, J. erred in overturning the decision of Ms. Ducharme.

(3) Whether Gruchy, J. had the jurisdiction to make any order respecting the order of the Supreme Court of June 18, 1999 and, in particular, to order that the landlord recover the sum of $320.00 without the costs incurred in enforcing the order.

(4) Whether Gruchy, J. should also have ordered the landlord to return the security deposit of $297.50, plus interest.

First Issue:

[23] The record before Gruchy, J. shows that at the outset of the argument he advised

the parties that he had received and read the tenant's written submission. There was no indication that he was aware that the landlord was not provided with a copy. The landlord addressed the court immediately after this statement was made and neither advised the court that he had not received a copy, nor raised any objection. In these circumstances, I would dismiss this ground of appeal.

Second Issue:

[24] The appeal from the decision of Ms. Ducharme to Gruchy, J. was, by reason of s. 17(E)(2) of the **Act**, one which could only be taken on a question of law or jurisdiction. The question before us therefore is whether Gruchy, J. erred in finding that Ms. Ducharme erred in law and whether he otherwise erred with respect to the other issues raised.

[25] Ms. Ducharme's decision was in response to a claim for costs of advertising for a new tenant consequent upon the former tenant's abandonment of the apartment. The tenant's defence was that the landlord had already settled all his claims, the settlement being incorporated in the order of the Board which was made an order of the Supreme Court on June 18, 1999.

[26] The settlement made at the hearing before Mr. Goulden on May 28 did not expressly cover any outstanding claims of the landlord arising out of the tenant's abandonment of the premises on January 10, 1999.

[27] Can it be said that Ms. Ducharme erred in law because she dealt with another claim arising out of the landlord/tenant relationship after this settlement? Can it be said that this dispute was already resolved before Mr. Goulden? In my respectful opinion the answer to both of these questions must be in the affirmative.

[28] The order issued by Mr. Goulden on June 4, 1999 and the memorandum attached referred to settlement of “the matter”, “the dispute”. In my view, the proper interpretation of these terms is that they relate to the matters in issue before Mr. Goulden. An examination of the applications, giving rise ultimately to this hearing, shows that on the one hand there was a claim by the tenant for an order terminating the lease and money, and on the other hand, a claim by the landlord for money.

[29] When the claims constituting the dispute were settled, the relationship of landlord and tenant was clearly recognized as having no longer existed. The tenant’s claim for relief in his application included a claim for termination of the lease.

[30] “The matter” or “the dispute” which was settled at the hearing before Mr. Goulden was the landlord’s claim for rents and the tenant’s claim for a termination of the tenancy and a rebate of rentals back to October, 1998. The settlement was stated in terms of a simple payment of money by the tenant to the landlord. Implicit in this must be that all of the claims arising out of the two applications of December 31, 1998 and January 4, 1999 by the tenant and landlord respectively were disposed of. Included in these claims was that the tenant sought a termination of the tenancy.

[31] In my view, it was an error of law to conclude that after this settlement was made, claims could still be made arising out of the landlord and tenant relationship which was, by the settlement, extinguished.

[32] The decision of Gruchy, J. setting aside the Board's decision should be affirmed.

Third and Fourth Issues:

[33] The issue of whether or not the security deposit is now to be repaid by the landlord and whether or not there should be any sheriff's fees for enforcing the order of June 18, 1999 were not before Gruchy, J. on the appeal to him. Indeed, he recognized that the issue of the security deposit was not before him. In this respect, he was correct. However, he erred in ordering that the tenant was not liable for costs in the recovery of the monies ordered to be paid pursuant to the settlement. The order of June 4, 1999 was neither appealed nor, in any event, before Gruchy, J. It flows from this that the tenant should fail on these issues.

[34] Even if I am wrong in concluding that Gruchy, J. correctly refrained from addressing the issue of the security deposit, I am of the view that the tenant would not be entitled to it in any event. The landlord raised the issue of the security deposit in his application of January 4, 1999. When the dispute was first resolved by Ms. Thompson, she dealt with the security deposit in her order. An examination of the terms of the settlement before Mr. Goulden calling for payment by the tenant of $320.00 to the landlord in installments clearly

negates any suggestion that the security deposit was not to be kept by the landlord as part of the deal. The security deposit was clearly a live issue from the very beginning in these proceedings before the Board. I would therefore reject the tenant's claim for the security deposit in any event.

Disposition:

[35] In the result, I would dismiss the landlord's appeal. I would dismiss the tenant's notice of contention. I would delete the second operative paragraph of the order of Gruchy, J. dated September 28, 1999, which I have quoted above.

[36] Finally, as to costs, Gruchy, J. allowed no costs on the appeal before him. Success in this Court is divided. I would allow no costs to the parties on this appeal.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.