CLAIM NO. 242831
Date: 20050830

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Ocean Equities Ltd. v. Colley, 2005 NSSM 33

BETWEEN:

Name	Ocean Equities Limited	Landlord/Appellant
Name	Ramona Colley	Tenant/Respondent

D E C I S I O N

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 22, 2007.

Appearances: Jamie MacNeil, for the Landlord; Meagan Longley, on behalf of the Tenant, assisted by Joanna Wells, law student.

[1] This appeal by the Landlord from a decision of the Residential Tenancy Officer dated August 3, 2005 came on before me on August 23rd. I heard the evidence of the landlord's local property manager, Mr Allan Emery, and a former security guard, Mr Ashley Pomfrey, on behalf of the Landlord; and the evidence of the Respondent Tenant Ramona Colley and her aunt, Adrian Brown.

Background to this Appeal

[2] On April 3, 2003 Ramona Colley entered into a Standard Form of Lease with S& N Ghosn. The lease was for unit 806 at 15 Kennedy Drive, in Dartmouth. The monthly rent was $535.00.

[3] Mr Ghosn sold the building to Ocean Equities Limited ("Ocean Equities") in November 2004. The head office of Ocean Equities is in Toronto. The leases were assigned to Ocean Equities.

[4] In March 2005 Ocean Equities gave Ms Colley notice that her lease would not be renewed; and that May 31st, 2005 would be her last day.

[5] Ms Colley agrees that she received this notice. However, there is an issue as to:

a. the date of this notice; and

b. when it was given to Ms Colley.

[6] The Landlord's position is that the notice from Ocean Equities' head office in Toronto was dated March 1st, 2004: see Ex. A-6. Ms Colley says that the letter was dated March 21st, 2004: see Ex.D-4 and D-7. The only difference in the two forms of notice is the date. The Landlord's copy says March 1st; the tenant's copy says March 21st.

[7] Having reviewed the actual documents, I am satisfied that the letter was actually dated March 21st. I am also satisfied that someone in the Landlord's Toronto head office altered the date of the notice by whiting out the number "2" so as to convert the date from March 21st to March 1st. (I am also satisfied on the evidence, and on reviewing the file materials in the Residential Tenancy file, that Mr MacNeil was not aware that someone in his client's office had made the change; or that his client was passing off a letter dated March 21st as one dated March 1st.)

[8] I now turn to the question of when Ms Colley received this notice. Mr Emery said that the notice was faxed from the Toronto head office to his office; and that the notice would then have been given to a security guard for delivery. He could not recall if it was he or his wife who would have done that. He had no direct knowledge of when the notice was given. Nor did he know what security guard would have delivered it.

[9] Ms Colley, on the other hand, said that it was slipped under her door on March 21st.

[10] I have already found that the notice was dated March 21st. Ms Colley had direct knowledge of its receipt. She was not shaken in cross examination. On balance then I find that it was delivered to her on March 21st.

[11] The landlord alleges that there was another form of notice that was given to Ms Colley. It was put into evidence: see Ex. A-2. The notice is dated March 16th, 2004. It comes from Ocean Equities Toronto head office. It states that it "has been brought to our attention that illegal activities are being carried out of Unit 806." It goes on to state that "your lease will not be renewed on your anniversary date June 1st, 2005." For good measure, the letter adds that "[w]e hereby give you 60 days notice to quit the premises ... [b]y May 31st, 2005." It concludes by stating that "[i]n the interim we are making an application to the Nova Scotia tenancy board to receive an earlier eviction for Unit 806."

[12] Ms Colley says that she never received this notice. Mr Emery did not have direct knowledge of its delivery. It was signed by the Toronto property manager. Mr Emery thought that it had been delivered by one of their security guards. He did not say who, or why he thought that that was the case.

[13] On balance, I accept Ms Colley's evidence. The document is signed by the Toronto property manager. It presumably would have been faxed, in the same manner that the March 21st notice was faxed. However, unlike the March 21st notice, it does not bear a fax stamp. As well, *if* this notice had been delivered there would have been no reason to send the March 21st notice. Or, to put it another way, the fact that the March 21st notice was sent suggests that no notice was sent before that date. Indeed, the March 21st notice does not refer, either expressly or impliedly, to any earlier notice. This too is odd, especially given that the same person (Simran Riar) signed both documents.

[14] This evidence on balance leads me to conclude that the March 16th letter was never sent to Ms Colley. I am strengthened in this finding by the fact that I have already found that someone in the landlord's Toronto office altered a document in such a way as to leave a misleading impression as to its date. In the absence of any direct evidence to the contrary, I am satisfied that the Landlord's position (that the March 16th letter was sent) is erroneous. (Once again, I am also satisfied that neither Mr MacNeil nor Mr Emery knew that this was the case.)

[15] On or about June 29, 2005 the landlord applied to the Director of Residential Tenancies for an order for termination of Ms Colley's tenancy, on the grounds that:

a. she "poses risk to safety & security of landlord or other tenants (s.10(7A);"

b. rent in arrears; and that

c. notice to quit had been given on March 1, 2005.

[16] The Details of the Claim specified that the rent was "$535.00/575.00" and that it was a monthly term. (The landlord withdrew the rental arrears claim at the subsequent hearing.)

[17] The hearing took place July 4th, 2005. In a decision dated August 3rd, 2005 the Residential Tenancies officer found that the lease was a month to month lease with a rental of $535. She found that the March notice was not given at least three months prior to the anniversary date and was accordingly ineffective; and that the evidence did not substantiate the claim that there was a risk to security or safety.

[18] The landlord appealed this finding, on the grounds that:

a. the officer did not properly consider the risk that the tenant poses to the safety and security of the landlord and other tenants; and

b. the officer erred in finding that proper notice to quit was not given.

The Issues

[19] The following issues arise on the facts of this case:

a. what type of a tenancy was it?

b. was three-months notice given?

c. was there justification for less than three month's notice to quit?

Issue 1: Type of Tenancy

[20] The written lease that was signed by Ms Colley on May 30, 2003 was ambiguous as to its term. Clause 6 of the Standard Form Lease deals with the beginning date of the tenancy. It is broken into three separate paragraphs.

[21] The first contains a blank space which is intended to be filled out with the commencement date of the tenancy, which is called "the anniversary date as defined in the [Residential Tenancies] Act." "Anniversary date" under the Act is defined to mean "a date on which a lease was first entered into, and refers to the same date in a subsequent year as long as the lease continues, regardless of whether the lease is for a term running week to week, month to month, year to year, or for a fixed term:" s.2(a). The blank space was not filled in.

[22] The second paragraph of clause 6 contains check boxes, where the parties can indicate whether the tenancy is year to year, month to month or week to week. None of the boxes were checked.

[23] The third paragraph, which is expressed to be an alternative to the second, states that the tenancy is for a fixed term, and contains blanks for the beginning and end dates of the tenancy. In this case, only the first blank (the commencement date) was filled out. The date June 1st, 2003 was written in the first blank, but nothing was set out in the second blank.

[24] The way in which clause 6 was filled out might suggest that the parties intended the term to be a fixed one. There are, however, two facts which lead me to the contrary conclusion, and that in fact June 1st, 2003 was intended by the parties to be the anniversary date.

[25] First, if the tenancy was intended to be a fixed term, then one would have expected the termination date to have been inserted. By definition, a fixed term (which can be for any period of time) must have a commencement and a termination date. Indeed, the paragraph ends with the statement that "[a]ny continuation of the tenancy at the end of a fixed term requires the written consent of the landlord. At the end of the

fixed term, the tenancy is finished and the tenant must vacate." The failure to insert a date renders this provision inoperative, and makes any attempt to determine what the fixed term is impossible.

[26] The second reason for concluding that clause 6 was not intended to create a fixed term tenancy is found in the way that the parties completed clause 15 of the standard form lease. This clause deals with when a notice to quit must be given, and provides for three types of tenancies: yearly; monthly; and weekly. In this case the parties checked the box opposite "yearly."

[27] These two facts, taken together, lead me to the conclusion that the parties intended in May 2003 to enter into a yearly, not a monthly or a fixed term lease.

[28] The finding that the lease was a yearly term lease leads, as a matter of law, to the conclusion that the lease renewed itself for another year on or about June 1st, 2004, by virtue of the provisions of s.10A(1) of the Act. Section 10A(1) provides that a lease, "except for a fixed-term lease, continues of the same type of term if no notice [to quit] is given pursuant to subsection (1) of section 10 and is deemed to have been automatically renewed." Since there was no evidence that any notice to quit was given in 2004, I am driven to the conclusion that the lease renewed itself automatically in 2004, with a new anniversary date of June 1st, 2005.

[29] This now leads us to the question of when notice to quit had to be given in 2005.

Issue 2: Notice to Quit Absent "A Risk to Safety or Security"

[30] A Landlord who wishes to terminate a tenancy must follow defined steps. It must give notice in writing. The notice must be in writing; it must be signed by the landlord or its agent; it must describe the premises; and it must set out the date the agreement terminates: s.10(4).

[31] In the case of a year to year notice must be given at least three months before the anniversary date: s.10(1)(a).

[32] As I have found that the tenancy in question was a year to year tenancy, with an anniversary date of June 1st, notice to quit in ordinary course had to be given on or before March 1, 2005.

[33] Since notice was not given until March 26th, 2005 the landlord failed to comply with the Act, and the notice was not effective to prevent the lease from automatically renewing itself for another year pursuant to s.10A(1) on June 1st, 2005.

[34] This brings us to the third issue: was the landlord entitled to provide short notice pursuant to s.10(7A) of the Act?

Issue 3: Short Notice Where There is a "Risk to Safety or Security"

[35] Notwithstanding the normal notice periods set out in the Act, where "a tenant poses a risk to the safety or security of the landlord or other tenants in the same building on account of the contravention or breach by that tenant of any enactment," five day's notice may be given: s.10(7A).

[36] In this case the landlord relies on s. 10(7A). It says that Ms Colley constituted "a risk to the safety or security of the landlord or other tenants" in the building, ad that it was accordingly entitled to apply on short notice for an order terminating the tenancy.

[37] A landlord who seeks to rely on s.10(7A) must accordingly prove on a balance of probabilities two things:

a. that there is a contravention or breach of an enactment *by that tenant*; and

b. the contravention or breach poses *a risk* to the safety or security of other tenants or the landlord.

[38] Ms Colley's counsel makes two objections to the landlord's application under this provision.

[39] First, she says that s.10(7A) requires that notice of complained of conduct must be given in the notice to quit. If I found (as I did) that the March 16th notice was not given, then the March 26th notice was not effective because it did not contain any reference to any threats to safety or security.

[40] Second, she says that in any event the evidence relied upon by the landlord is not sufficient to trigger the provisions of s.10(7A).

[41] The first objection is an attractive one, given the wording of the section and the general notice provisions set out in the Act. However, it is not necessary for me to decide this issue because I am satisfied that the second objection has been made out.

[42] The landlord relied on two basic allegations: one, that Ms Colley was selling drugs from her apartment; two, that her friends and visitors were gathering in the stairwell to sell and smoke marijuana and carry on in a raucous fashion.

[43] I am satisfied on the evidence that at least one person who knew (and visited) Ms Colley would from time to time gather with others in the stairwells of the building after leaving her apartment, to either smoke or sell marijuana.

[44] The landlord's counsel submits that such a finding would be sufficient to trigger

s.10(7A). I do not agree.

[45] First, insofar as the stairwell congestion is concerned, there was no evidence that Ms Colley knew of the problem or caused, condoned or encouraged it in any way. The evidence appears to be that the people involved always left once the security guard approached them. Nor was there any evidence that anyone appeared to be unduly alarmed by the people. While they might have been justifiably irritated by noise, such irritation is not in my mind sufficient on itself to support a finding that there was a risk to safety or security.

[46] Second, there was no evidence that Ms Colley was herself selling drugs in her apartment. The fact that an acquaintance of hers might do it after he left her apartment but before he left the building is not in my view alone sufficient to trigger the provision. Section 10(7A) requires the tenant to be evicted to be the one contravening an enactment. There was no eyewitness evidence of Ms Colley selling or providing drugs. Nor was there any clear evidence of her permitting the sale of drugs out of her apartment. Nor was the evidence sufficient to warrant a finding that Ms Colley was letting drug sellers into the building with the intent of abetting their activities inside the building.

[47] In my opinion these types of activities would certainly justify an application under s.10(7A). However, the evidence here fell short of establishing any of these facts. The best that could be said was that an acquaintance of hers was contravening an enactment outside of her apartment.

[48] I am accordingly not satisfied on the evidence presented that the landlord has established grounds for short notice under s.10(7A) of the Act. This of course does not preclude the landlord from again giving short notice, or from again applying for an early termination, in the event that it obtains evidence that Ms Colley is contravening an enactment, and that such contravention is posing a risk to the security or safety of other tenants or the landlord.

Dated at Halifax)
this day of August, 2005)
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ADJUDICATOR
W. Augustus Richardson

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)

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