

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Larder v. Russell, 2011 NSSM 41

2011

Claim No. 349547

BETWEEN:

Name: **Lana Larder**

Appellant

- and-

Name: **Robert Russell**

Respondent

Appearances:

Appellant: Vince Calderhead, Barrister and Solicitor

Respondent: Self-Represented

DECISION and ORDER

- [1] This matter, an appeal of a Residential Tenancies Director's Decision dated May 26, 2011, was heard on June 29, 2011. Both parties were present and gave evidence.
- [2] The appeal was heard together with a separate claim brought by Mr. Russell against Ms. Larder for alleged damages to the premises in question (SCCH No. 348478). I will deal with that proceeding in a separate set of reasons.
- [3] In this proceeding there is a threshold issue of whether there is jurisdiction under the *Residential Tenancies Act*, R.S.N.S., 1989. c. 401. I will deal with that issue in this decision.
- [4] In the decision of May 26th, the Residential Tenancies Officer found that there was no landlord/tenant relationship and dismissed the Application. The decision

quotes section 3(2) of the Act and, while, with respect, it perhaps could have been articulated clearer, the apparent reason was that there was no rent paid by Ms. Larder, at least, in the view of the Officer. As I will discuss further in this decision, the issue of jurisdiction really comes down to whether any “rent” was paid or was agreed to be paid.

Background

- [5] The premises in question are at 2143, Brunswick Street, Halifax. Mr. Russell owns the property, and had lived there with his son, Kerry Russell. There is a separate rental unit in the basement but nothing in this case turns on that fact.
- [6] In the fall of 2010, Mr. Russell had made plans to travel to British Columbia for an extended trip of perhaps as much as a year’s duration. As it turned out he left in late November, 2010, and returned in early May, 2011. Prior to that, his son, Kerry, was living with him but spending most of the time staying with Ms. Larder, with whom he was involved in a relationship. At that time, Ms. Larder had a rental unit on Lawrence Street in Halifax where she lived with her 16-year old daughter.
- [7] Mr. Russell discussed with his son and Ms. Larder the prospect of her and her daughter moving into 2143 Brunswick Street with Mr. Russell’s son and living there in his absence. There would be no rent per se, but they would be responsible for the utilities. In this way, the unit would be occupied in his absence. There was some conflict in the evidence as to where these discussions took place and to whom Mr. Russell first talked to but that detail is not material. The basic essentials of the discussions are as I have described.
- [8] In the event, Ms. Larder and her daughter did in fact move into 2143 Brunswick Street on or about October 31, 2010. Mr. Russell was still there and in fact did not leave for British Columbia until several weeks later.

- [9] Within two weeks of his leaving, a serious dispute or argument arose between Ms. Larder and Kerry Russell, the upshot of which was that he left the premises.
- [10] After that, over the next four- five months there was a series of communications, police involvement, changing of locks, notices served, and at least two agreements for Ms. Larder to leave, neither of which she complied with. Nothing is served by attempting to chronicle all of the exchanges and facts of this period.. Ultimately, and with the involvement of the police, she and her daughter left on May 2, 2011. Not surprisingly, but nevertheless unfortunately, a significant degree of acrimony developed between Mr. Russell and Ms. Larder.
- [11] Ms. Larder subsequently filed a complaint under the *Residential Tenancies Act* alleging a wrongful termination of tenancy and claiming damages for the fact and manner of the termination. As I have indicated above, the Director dismissed her claim on the basis that there was no jurisdiction.

Analysis

- [12] The question of whether or not the *Residential Tenancies Act* applies depends on whether circumstances exist that fit into the wording of the Act, in particular, s. 3, which reads:

Application of Act

3 (1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act applies when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.

(2) For the purposes of subsection (1), the relation of landlord and tenant is deemed to exist in respect of residential premises between an individual and a person when an individual

(a) possesses or occupies residential premises and has paid or agreed to pay rent to the person;

(b) makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent;

(c) has possessed or occupied residential premises and has paid or agreed to pay rent to the person. R.S., c. 401, s. 3.

[13] As will be seen, subsection 3(2) requires in each sub-clause, that there be “rent” paid or payable. The term “rent” is itself a defined term, in s. 2(g):

(g) "rent" means money or other value payable in consideration of the right to possess or occupy residential premises

[14] For the Appellant, Mr. Calderhead argues that there was indeed “rent” under this arrangement, and refers to two possible bases for that submission. First, he refers to wording “*other value payable in consideration*” and says that by occupying the premises, this was valuable consideration and satisfied the definition. No authority was offered in support of this argument.

[15] While I appreciate that there is some benefit to having the unit occupied - for example, the potential for increased insurance premiums for unoccupied premises - I am not satisfied that this would be enough to meet the legislative intent. For one thing, it would mean that there would no case where rent is not being paid or agreed to be if all that is required is the fact of occupation. It becomes somewhat of a circular argument. I reject this argument.

[16] The second part of counsel's argument is that the payment of utilities - principally the power and fuel - constitutes the payment of “rent” because it is *money... payable in consideration of the right to possess or occupy residential premises*. In counsel's submission, it is immaterial that the money in this case was payable

(and paid) to a third party - Nova Scotia Power and The Oilman fuels - and not Mr. Russell. As well, counsel refers to a Small Claims Court decision in *Vallee v. Balsom* (July 27, 2007), where the payment of the power bill was said to constitute “rent”.

[17] In the *Vallee* case, the Adjudicator referred to the payment of \$100 or \$500 as being rent and, on my reading, while there was a dispute over which applied, that was separate and distinct from the payment of utilities. Therefore, it seem to me that it while he does refer to the payment of utilities as rent, it was not necessary for him to do so since there clearly was money flowing directly to the landlord of either \$100 or \$500 per month. To that extent therefore, the reference to the payment of the power bill as being rent, was obiter dictum.

[18] Beyond that, as a matter of law, I do not consider myself bound by another adjudicator’s decision. And, with all due respect, and with due recognition to the importance and benefits of consistency in the decisions of the Small Claims Court, I would not share the view that a utility or fuel payment to a wholly-unrelated third party constitutes the payment of “rent” under the *Residential Tenancies Act*.

[19] In this I am supported by the following cases.

[20] In **Lenz Estate v. Lenz**, 2005 SKQB 5 (CanLII), the Court states (par 18) as follows:

[18] The definitions provided for “rent” in Black’s Law Dictionary, 7th ed, are:

rent, n. 1. Consideration paid, usu. periodically, for the use or occupancy of property (esp. real property).

2. Hist. A compensation or return made periodically by a tenant or occupant for the possession and use of lands or corporeal hereditaments; money, chattels, or services issuing usu. annually out of lands and tenements as payment for use . . .

[19] According to the above definition, the monthly occupancy fee in my view would be considered “rent”. The fee was a payment that was made monthly **to the owner of the property** that, coupled with the terms listed in Occupancy and Operating Agreement, gave the Testator the right to occupy the unit. There are many similarities between the organization of this occupancy and the typical residential tenancy.

[Emphasis supplied]

[21] And, in **Stanciu v. Stanciu**, 2004 CanLII 15291 (ON SC), the Court states (para 21):

[21] Before discussing the issues of the constructive trust or resulting trust, the following should be pointed out:

. . .

(c) The expression reserving the lifetime occupancy in 67 Louisa Street as set forth in deed number 700708, registered March 25/81 (Exhibit Tree, tab 3) referred to occupancy of "an apartment" in the house "rent free". Rent, as defined in Black's Law Dictionary, 7th Edition, 1999 is: "Consideration paid periodically for the use or occupancy of property. **Utilities are usually dealt with separately and absent an express intention, would not be included in rent. Occupation "rent free" would require the occupier to remain responsible for the payment of utilities and other expenses except taxes and fire insurance.**

[Emphasis supplied]

[22] Recognizing that these comments were made in different contexts, they nevertheless provide support for the proposition that rent is consideration paid **to the landlord**. Further, I accept the statement in **Stanciu** that “...utilities are usually dealt with separately and absent an express intention, would not be included in rent”..

[23] For these reasons, I conclude that there was no “rent” paid or payable in the arrangement in this present case. That being the case, it follows that there was no relation of landlord and tenant and, by virtue of s. 3 of the *Residential Tenancies Act*, the Act does not apply to this case.

[24] The Appeal is therefore dismissed, the Order of the Director is upheld, and the complaint of Lana Larder under the *Residential Tenancies Act* is dismissed.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia, this 12th day of July, 2011.

Michael J. O’Hara
Adjudicator