IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: West v. Compass Commercial Realty, 2012 NSSM 3

Date: 20120207
Claim: 356528
Registry: Halifax

Between:

Mike West and Wendy Burke

Applicants

v.

Compass Commercial Realty

Respondent

Adjudicator: J. Scott Barnett

Heard: November 7, 2011

Written Decision: February 7, 2012

Counsel: Sara Mahaney, Senior Law Student
Dalhousie Legal Aid Service
Representative of the Applicants

Harvey Ryan, Representative of the Respondent

By the Court:

INTRODUCTION

[1] The Applicants, Mike West and Wendy Burke, seek a stay of execution of an Order of the Small Claims Court dated September 30, 2011. That Order was issued pursuant to Section 17B of the *Residential Tenancies* Act, R.S.N.S. 1989, c. 401, whereby Orders of the Director of Residential Tenancies may be made Orders of this Court where no appeal has been taken from the Order of the Director.

[2] At the conclusion of the hearing before me, I advised that the Applicants' request was denied with written reasons to follow. What follows are those reasons.

FACTUAL BACKGROUND

[3] The Applicants entered into a residential tenancy lease with the Respondent Compass Commercial Realty (who was acting on behalf of the owner of the residential premises but will hereinafter be referred to as the "Landlord"), effective March 1, 2008, in respect of premises located at 14 Churchill Court, Dartmouth, Nova Scotia (the "premises").

[4] Unfortunately, the Applicants (who will hereinafter be referred to as the "Tenants") fell behind in rent. Because of outstanding rental arrears and because of what the Landlord described as numerous complaints about a foul odour emanating from the premises, the Landlord made an application to the Director of Residential Tenancies on July19, 2011 seeking termination of the tenancy, payment of money and disposition of a security deposit. The application, of which the Tenants received proper advance notice, was heard by a Residential Tenancy Officer on August 29, 2011.

[5] Neither the Tenants nor anyone acting on their behalf appeared at the hearing. After hearing the evidence of the Landlord, the Residential Tenancy Officer issued an Order of the Director dated September 6, 2011. In that Order, the Tenants were ordered to pay to the Landlord the sum of $760, the amount of the outstanding rent (net of the safety deposit) and, further, the Landlord was granted vacant possession of the leased premises effective September 14, 2011 with termination of the tenancy on that same date.

[6] Prior to the issuance of the Order, Harvey Ryan, the superintendent of the building where the premises are located, met with the Tenants on September 1, 2011. At the time of this meeting, the Landlord had determined that the foul odour coming from the Tenants' apartment was the due to the presence of a number of cats in the premises. At the meeting, the Tenants admitted to being unsure of whether or not they had five or six cats in their apartment. Mr. Ryan advised that he wanted the cats out of the apartment by the end of September 2011.

[7] In an Affidavit dated November 4, 2011, Mr. West (one of the Tenants) states that at or about the date of issuance of the Order on September 6, 2011, Mr. Paul Henderson (the Landlord's property manager) informed him that:

> "…the Order could be enforced at any time but that Ms. Burke and I were being given an opportunity to pay back our arrears and to clean up our apartment. I understood that the Order would not therefore be enforced." (para. 4)

Mr. Henderson did not testify at the hearing before me and I am not clear as to whether or not the meeting referred to by Mr. West in his Affidavit is the same one about which Mr. Ryan testified.

[8] In any event, there is evidence that the Tenants did make payments in an attempt to clear the rental arrears but they never did fully catch up.

[9] On October 3, 2011, Mr. Ryan went to check on the Tenants' progress in removing cats from the premises and cleaning up the apartment. He could see no discernable efforts being made – there was an excessive amount of household objects, debris and garbage all about the premises. Mr. Ryan counted nine cats with four litter boxes. The foul odour of cat urine was present. Mr. Ryan told the Tenants that he would allow them two more weeks to rectify the situation during which time the Tenants were to remove the large amounts of garbage from the premises and to find new homes for the cats.

[10] Unfortunately, matters got no better despite the promises of the Tenants to address the odour problem. Accordingly, on October 19, 2011, the Landlord requested that the Order of the Director be made an Order of the Small Claims Court.

[11] A few days later, the Society for the Protection of Cruelty to Animals (SPCA) became involved, apparently because of a complaint from another tenant. The SPCA sought the Landlord's

assistance in contacting the Tenants in order to arrange the removal of cats from the premises.

[12] Before the end of the month of October, the SPCA was successful in removing some but not all of the cats from the premises. Mr. West testified that a number of cats "went into hiding" for five days after the SPCA's removal of the other cats.

[13] Shortly after the SPCA's removal of cats from the premises, the Tenants met with Mr. Henderson and Mr. Ryan on October 26, 2011.

[14] At the meeting, the Landlord's representatives informed the Tenants that the SPCA had told them that the Tenants actually had seventeen cats in their premises, including a young litter of kittens just five weeks old. Also, the Tenants were told that the high degree of disarray in the premises prevented the retrieval of all of the cats. In the circumstances, the Landlord's representatives informed the Tenants that they would be seeking to enforce the Order for vacant possession because of the Tenants' failure to remedy the cat and associated odour problem. According to Mr. Ryan, the Tenants were given eleven (11) days – i.e. until November 7, 2011 – to find another place to live. He also says that

Mr. West told him that he and Ms. Burke had already been looking for somewhere else to live.

[15] Mr. West addresses this meeting in his Affidavit. He confirms that he and Ms. Burke were told that they would have to vacate the apartment but he says that they were given ten (10) days to do so. He also deposes as follows:

> "I understood from Mr. Henderson that, if Ms. Burke and I required additional time to vacate the apartment, to request for an extension of time sooner rather than later." [sic] (para. 6)

[16] Mr. West's Affidavit continues as follows:

> "On or about November 1, 2011 I made a request to Harvey [Ryan], Superintendent, for more time to pack and vacate the apartment. I requested that we be given an extension until November 15, 2011. I was informed that the Sheriff had already been paid and that we were to vacate the apartment on Monday, November 7, 2011." (para. 7)

[17] In his testimony, Mr. Ryan admitted that a day or two after the meeting on October 26, 2011, the Landlord requested the Sheriff's assistance in enforcing the Order for vacant possession.

[18] On November 4, 2011 (a Friday), the Sheriff posted a forty-eight hour notice of eviction to the door of the premises after the Tenants had left for work in the morning. They discovered the notice upon their return later in the day. They apparently took the notice to Dalhousie Legal Aid Services and the meaning of the notice was explained to them. Steps were then taken to make the within Application for a stay.

[19] Incidentally, the Landlord, through Mr. Ryan's testimony, indicated that it had requested the Sheriff's assistance in enforcing the eviction but the Landlord did not pick the eviction date and it only learned of the posting of the eviction notice after the fact.

[20] The hearing of the within Application by the Tenants was set for the next available hearing date which was Monday, November 7, 2011 and I heard the Application at that time. The hearing began at some point after 6 p.m.

[21] Earlier in the day before the hearing, however, at approximately 12:30 p.m., the Sheriff showed up at the premises with Mr. Ryan and the locks were changed.

[22] At the same time, a number of photographs depicting the inside of the premises were taken and they were entered into evidence at the hearing before me.

[23] The inside of the premises can best be described as being in complete disarray. There are boxes (both empty and containing objects), food containers (some appearing to contain food while some are empty), large plastic storage containers, various cleaning supplies, clothing, garbage and recycling bags, cat litter boxes and other personal effects strewn all about the apartment. There is virtually no horizontal surface that it is not piled up with objects. Very little of the floor is visible. The kitchen, the inside of the refrigerator and the bathroom all appear to be in a most unsanitary condition.

[24] Mr. Ryan described the inside of the premises as a fire hazard and a danger to the Tenants, other tenants in the building and the wellbeing of the cats still present.

[25] Mr. West did not testify about any efforts that he or Ms. Burke made to pack up their belongings in light of the notice of the pending eviction that they received. He did testify, however, that he had been finding it hard to locate other accommodations – he

has applied for tenancy in other residential premises but he has been denied. He nevertheless believed that if he and Ms. Burke had until the end of November 2011 to find another apartment, he would be successful in securing alternate accommodations.

[26] As at the time of the hearing, the Tenants remained in arrears of rent. They neither indicated at the hearing before me nor at any other time that they intend to appeal the Order of the Director dated September 6, 2011 that included the order for vacant possession of the premises.

ISSUES

[27] This Application raises two issues. First, does this Court have the jurisdiction to grant the relief that the Tenants seek? Second, should the requested relief have been granted in this case?

DISCUSSION

(a) Jurisdiction of this Court

[28] The Tenants rely on my decision in *Davison v. Canadian Artists Syndicate Incorporated*, 2011 NSSM 28 as authority for the

proposition that their Application for a stay is within the authority of the Small Claims Court to consider.

[29] While the *Davison* case addresses this Court's jurisdiction to grant relief from execution orders issued pursuant to judgments rendered in the Small Claims Court, I accept that the same reasons given in that case support the view that this Court has the implied jurisdiction to grant stays with respect to Orders for the Sheriff to Deliver Possession of Property in residential tenancy matters (Form B in the *Small Claims Court Residential Tenancy Appeal Regulations*, N.S. Reg. 18 / 2003, as amended).

[30] I would also reiterate, however, that the exercise of this Court's discretion with respect to its implied jurisdiction in this regard should be carried out in a very cautious manner. In fact, in circumstances such as those here (i.e. a vacant possession order that is not the subject of an appeal), I believe that only exceptional circumstances would justify a stay.

(b) Should the requested relief be granted?

[31] The Tenants argue that the Landlord's actions in failing enforce the Order of the Director right away and in accepting

payments of rent in the meantime trigger the doctrine of estoppel by conduct.

[32] In the brief filed on their behalf, the Tenants cite the *Canadian Encyclopedic Digest*, Estoppel II.13.(4) at para. 53 which states:

> "Where a party entitled to certain rights acts inconsistently with such rights in dealings with anyone and thereby knowingly induces that other person to alter a position or to submit to obligations or liabilities from which he or she would have otherwise abstained, such actions are considered to be evidence of renunciation or abandonment of his or her rights. The party must be aware of its rights alleged to have been renounced, and must also be aware that the other party has altered its position based on a mistaken belief."

[33] The Tenants also cite the decision of Justice John Holland of the Ontario Supreme Court – High Court of Justice (as it was then called) in *Clarke v. Northern Life Assurance Co. of Canada*, [1981] O.J. No. 547.

[34] In *Clarke*, a life insurance company denied a claim for benefits by a nineteen year old widow in respect of a policy issued on the life of her then deceased eighteen year old husband. The insurer maintained that the policy had lapsed because, according to

the written terms of the policy, the last scheduled monthly premium payment had not been made in a timely way. However, the insurer's agent had regularly accepted late payments and at no time prior to the deceased's death had the late premium payments been questioned or caused a lapse of the policy – in fact, the arrangement for late payments had been made for the convenience of the agent who, every two months, went out to the insureds' home in order to pick up the premium payments. In the circumstances, the court held that the insurer was estopped from relying upon the written policy provisions in light of its prior conduct and dealings with the insureds.

[35] To be frank, I see few parallels between the facts in the *Clarke* case and those before me in the Tenants' Application for a stay and thus I do not find that the case assists the Tenants' request for relief. One of the main distinctions (although there are a number of others) is that the prejudice to the insureds in the *Clarke* case could not be remedied if the insurer were permitted to rely upon the strict terms of the written policy. I suspect that the result would have been different had the insurer given sufficient advance notice before the death of the deceased husband that the late payment arrangement would no longer be accepted and that the

insurer would be relying in the future on the written policy terms concerning premium payment.

[36] The first difficulty that I see here with the Tenants' Application for a stay is that the eviction order has already been executed – the Landlord is back in possession of the premises and the locks have been changed. While I understand that this Application was filed as a request for a stay of execution because, at the time, execution had not yet taken place, by the time that the parties came before me, the execution had already taken place.

[37] The Tenants recognize this problem and suggest that the Landlord has attempted to circumvent the authority of the Court by proceeding with the eviction despite notice of the within Application. They also ask that this Court order the Landlord to provide a key to the Tenants so that they can access the premises where the new locks have been installed.

[38] With respect, I do not believe that the Landlord has attempted to circumvent the authority of this Court. It requested enforcement of the Small Claims Court Order dated September 30, 2011 (which reflects the Order of the Director dated September 6, 2011) back on October 19, 2011. The enforcement process was already

underway by the time that the Tenants filed the within Application in the sense that the matter had been placed in the hands of the Sheriff's Office and the forty-eight hours' advance notice of eviction had already been posted by the Sheriff.

[39] When the Sheriff attended at the premises on Monday, November 7, 2011 at 12:30 p.m., the Sheriff was acting pursuant to a valid and enforceable Order and I see nothing untoward in the fact that the Sheriff delivered possession of the premises to the Landlord.

[40] Because there is really no decision for the Court to make in that execution has already been carried out and thus no stay of execution is technically possible, the Application could be dismissed on that basis alone.

[41] Even without taking into account the timing of the Application before me, I can say that I do not see any estoppel by conduct on the part of the Landlord. As noted, the Tenants argue that the Landlord abandoned its right to enforce the Order of the Director (and the subsequent Small Claims Court Order) by accepting rent payments and by failing to more or less immediately enforce the order for vacant possession.

[42] The law of waiver and estoppel is complicated and I do not see the need to embark on a long analysis of it here. In this case, the Landlord made it perfectly clear to the Tenants that it would not seek to enforce the order for vacant possession upon timely satisfaction of certain conditions of which the Tenants were well aware and in respect of which they could be under no delusion.

[43] Specifically, if the Tenants had gotten rid of the cats in their premises and had cleaned the inside of the apartment, I accept the Landlord's contention that it would not have sought enforcement of the vacant possession order even in light of the rental arrears. The history of the tenancy discloses that the Landlord had worked with the Tenants and had allowed them to stay despite rental arrears in respect of which special arrangements had been made from time to time in the past.

[44] The issue in this case was not so much about the rental arrears as it was about the state of the premises and the complaints regarding foul odours emanating from those premises. The Tenants were given a fair opportunity to address those issues by the Landlord but they simply failed to do so. Ultimately, the Landlord gave the Tenants advance notice of enforcement after

allowing the situation to continue for approximately six weeks without any discernable progress towards a solution for the outstanding issues. I agree with the Landlord that the state of the premises constitutes a potential threat to the health and safety of all of the tenants in the building where the premises are located, including the Tenants before me on this Application.

[45] Given the state of the apartment as disclosed in the photographs, I find it difficult to believe that the Tenants made any effort after October 26, 2011 (when they were told that the Landlord would be seeking to enforce the vacant possession order) to even attempt to get ready to move, let alone over the weekend after the Sheriff gave them forty-eight hours' notice of eviction.

[46] Moreover, I do not see the Landlord's acceptance of money from the Tenants from the beginning of September 2011 onwards as establishing an estoppel. There is no evidence that the Landlord indicated that so long as payments were being made against the rental arrears, then the order for vacant possession would not be enforced. Those payments simply served to reduce the amount of the Tenants' debt to the Landlord.

[47] If I were to accept the Tenants' arguments in this case, landlords would be discouraged from ever attempting to make mutually acceptable arrangements with their tenants after orders for vacant possession are granted by residential tenancy officers. The only viable option for a landlord would be to proceed with eviction. However, there is obviously a cost to a landlord of proceeding with eviction and attempting to secure a replacement tenant and there is also a significant cost (that is not only financial) to a tenant who is forced to move. It may well be in the best interests of both parties to reach an arrangement whereby the tenant remains in the premises but the outstanding issues are addressed.

[48] Although the facts will always be of central importance, I do not believe that a landlord's forbearance should necessarily lead to a finding of estoppel in all cases. With respect, I believe that parties in cases such as the one brought before the Court here should not be dissuaded from attempting to reach their own mutually acceptable solutions.

[49] In this case, the Landlord gave sufficient warning to the Tenants that it would proceed with enforcement despite its earlier

forbearance and the circumstances are not such as to justify a stay even if a stay had been a practical possibility.

CONCLUSION

[50] The Tenants' Application for relief is denied but, in the circumstances, I decline to order any costs.