IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cited as: Lelacheur v. Densmore, 2012 NSSM 58

Date: 20121203
Claim: 391762
Registry: Halifax

Between:

Kelly Lelacheur

Applicant

v.

Kenneth M. Densmore

Respondent

Adjudicator:	J. Scott Barnett
Heard:	July 16, 2012, August 13, 2012, October 29, 2012 and November 19, 2012
Written Decision:	December 3, 2012
Counsel:	Megan Deveaux, Dalhousie Legal Aid Service For Kelly Lelacheur
	Kenneth M. Densmore, Self-represented

By the Court:

INTRODUCTION

[1] The Applicant, Kelly Lelacheur, seeks to set aside a decision and Order of this Court dated June 26, 2012 pertaining to a residential tenancy appeal at which she was not present. As far as I know, this type of Application has not previously been made in the Small Claims Court of Nova Scotia.

PROCEDURAL BACKGROUND

[2] On June 11, 2012, I heard a residential tenancy appeal initiated by Kenneth M. Densmore from an Order of the Director of Residential Tenancies dated April 20, 2012. Mr. Densmore, the Appellant Landlord, was present but Ms. Lelacheur, the Respondent Tenant, was absent. Given that Mr. Densmore presented satisfactory proof of service of the Notice of Appeal upon Ms. Lelacheur, I proceeded with the hearing of the appeal.

[3] Mr. Densmore appealed the decision of the Residential Tenancy Officer because he was dissatisfied with the amount that he had been awarded in respect of lost rent and of the cost of repairs for damage to the residential premises.

[4] After considering the sworn testimony of Mr. Densmore and the documentary evidence that he presented to me, I ultimately allowed the appeal and granted Mr. Densmore an Order against Ms. LeLecheur in the amount of $2,547.09, a figure that was approximately five times more he had originally been awarded by the Residential Tenancy Officer.

[5] On July 4, 2012, Mr. Densmore requested an Execution Order from the Small Claims Court and an Execution Order was duly issued on July 6, 2012. I understand that the Sheriff has garnished some of Ms. Lelacheur's wages pursuant to that Execution Order but it has not yet been fully satisfied.

[6] Before the Execution Order was granted, Ms. Lelacheur made the within Application on July 4, 2012, seeking to set aside the Order upon which the Execution Order was based.

[7] There is no stipulated form for this type of Application in the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as amended. The Application document employed in this case is the form used by persons seeking to set aside Quick

Judgments of this Court and it specifically refers to Section 23 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, as amended.

[8] The stated grounds for setting aside the Order were as follows:

> 1. [Ms. Lelacheur] was present in Court House but did not understand which room she was to go to.
> 2. [Ms. Lelacheur] had full intent to appear.
> 3. [Ms. Lelacheur] has a defence and wishes to present her case.

[9] A copy of this Application document was personally served on Mr. Densmore.

[10] On July 16, 2012, the parties appeared before me. Ms. Deveaux, on behalf of Ms. Lelacheur, sought and was granted an adjournment until August 13, 2012.

[11] When the Court reconvened on August 13, 2012, I raised a concern about whether or not the Small Claims Court's jurisdiction included the ability to deal with Ms. Lelacheur's Application in light of the recent decision of Justice Rosinski in *Leighton v.*

Stewiacke Home Hardware Building Center, 2012 NSSC 184. I invited the parties to provide me with further submissions.

[12] After considering those submissions, which were made in writing, I advised the Small Claims Court Clerk's office to inform the parties that I was satisfied that I had the jurisdiction to consider the Application and to set the matter down for a hearing as to the merits of the Application.

[13] On October 29, 2012, the parties again appeared before me. Mr. Densmore advised that he had only very recently been informed of my decision and he requested an adjournment so as to be able to prepare for the hearing of Ms. Lelacheur's Application. I granted a further adjournment to November 19, 2012.

[14] The parties appeared on November 19, 2012 in order to address the merits of Ms. Lelacheur's Application. After hearing evidence and submissions, I reserved my decision but I did advise the parties that my reasons for deciding that the Court did have jurisdiction to address Ms. Lelacheur's Application would be set out in writing along with my reasons as to the merits of the Application.

ISSUES

[15] This Application raises two issues. First, is it within this Court's jurisdiction to grant the relief sought by Ms. Lelacheur? Second, if this Court can grant such relief, should it be granted in this case?

DISCUSSION

(a) Jurisdiction of this Court

[16] The Court is once again faced with a question concerning the scope of its jurisdiction where there does not appear to be any written decision by another Adjudicator or by a Justice of the Supreme Court of Nova Scotia on this point.

[17] It is clear that this Court hears appeals from Orders of the Director of Residential Tenancies: see Section 17C of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, as amended.

[18] As set out in Section 17C(5), the Small Claims Court "shall determine its own practice and procedure but shall give full

opportunity for the parties to present evidence and make submissions." [emphasis added]

[19] Some guidance concerning practice and procedure is provided by the *Small Claims Court Residential Tenancies Appeal Regulations*, N.S. Reg. 18/2003, as amended.

[20] Specifically, Section 5 of those regulations indicates that various sections in the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as am., apply "with the necessary changes in detail to an appeal from an order of the Director of Residential Tenancies."

[21] I have examined the identified sections of those regulations (i.e. 6 to 9, 13 to 16 and 18 to 24) but none are applicable here.

[22] It is also clear to me that Section 23 of the *Small Claims Court Act, supra*, is also inapplicable here. The various subsections there refer specifically to the granting of judgments and the setting aside of judgments in connection with Small Claims Court Claims, not in connection with appeals from Orders of the Director of Residential Tenancies.

[23] Despite the apparent absence of specific guidance in any applicable statute or any of the applicable regulations, I believe that it is important to bear in mind the purpose of the residential tenancies scheme as set out in Section 1A of the *Residential Tenancies Act, supra*:

> "The purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes."

[24] Moreover, I am convinced that everything that the Small Claims Court does should be carried out "in accordance with established principles of law and natural justice": Section 2 of the *Small Claims Court Act, supra*.

[25] That said, there is no question that the Small Claims Court is a statutory court that does not have "inherent jurisdiction" like a superior court: e.g. *Howard E. Little Excavating Limited v. Blair's Custom Metals*, 2006 NSSC 251 at para. 6 and *Leighton v. Stewiacke Home Hardware, supra*.

[26] The unassailable proposition that this Court lacks the "inherent jurisdiction" of superior courts does not mean, however,

that this Court does not possess powers necessarily incidental or ancillary to its statutory jurisdiction. In other words, it does not necessarily follow that this Court cannot act in the absence of an express statutory or regulatory power. The Court has an implied jurisdiction over a number of matters that flow from "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so….": *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, [1971] M.J. No. 38 (C.A.), at para. 16, *per* Freedman, C.J.

[27] A perfect example of a matter that is within this Court's implied jurisdiction (even though the *Residential Tenancies Act, supra*, the *Small Claims Court Act*, *supra*, and the associated regulations do not expressly state it) is the consideration of applications to extend the time for filing a residential tenancy appeal: *McNeil v. Meech*, 2003 NSSC 108.

[28] The foregoing result is consistent with the Small Claims Court being authorized, as it is by statute, to determine its own practice and procedure in respect of residential tenancy appeals.

[29] The countervailing view would hold that, in addition to a lack of jurisdiction, this Court was *functus officio* after the Order was

issued in this case following the residential tenancy appeal hearing; the only recourse would be to appeal to the Supreme Court of Nova Scotia.

[30] Unfortunately, the ability to appeal to the Supreme Court of Nova Scotia is illusory in Ms. Lelacheur's circumstances. As noted at the outset of this decision, she was not present at the appeal hearing before me and Section 17E(1) of the *Residential Tenancies Act*, *supra*, states as follows:

> **Appeal to Court**
>
> 17E(1) Subject to subsection (2), a party to an appeal to the Small Claims Court pursuant to this Act may, if that person took part in the hearing, appeal the order of the Small Claims Court to the Supreme Court of Nova Scotia in the manner set out in the *Small Claims Court Act*. [emphasis added]

[31] I note that the grounds upon which a party can appeal include jurisdictional error, error of law or failure to follow the requirements of natural justice.

[32] While it was decided in the context of an appeal from a decision in a Small Claims Court Claim, the reasoning employed

in the case of *Kemp v. Prescesky*, 2006 NSSC 122 is instructive. In the course of setting aside the decision of a Small Claims Court Adjudicator where a judgment had been issued against a defendant who was not present at the hearing and who had not filed a defence, Justice Warner held, at para. 19, that, in his view:

> "… it is a breach of the requirements of natural justice not to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, and he or she has a reasonable excuse for defaulting and is not just stalling, and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside."

[33] I can see no principled reason why the foregoing conclusion ought not to be applied in the circumstances before me.

[34] In residential tenancy appeals, the respondent is not required to file any kind of rebuttal document like a defence before an appeal hearing but, in those circumstances where the respondent does not show up at the appeal hearing but has a reasonable excuse for not doing so and has a fairly arguable response to the

appellant's position, it would constitute a denial of natural justice to deny the respondent an opportunity to be heard in the absence of serious prejudice to the appellant. It would clearly be contrary to the requirement placed upon this Court, by statute, to permit the parties a "full opportunity" to present evidence and argument to the Court.

[35] In addition to the foregoing, I find it hard to believe that the Legislature intended to force landlords or tenants (many of whom represent themselves in these residential tenancy matters) into what could well be expensive, time-consuming and rather intimidating appeals to the Supreme Court of Nova Scotia in circumstances such as these, a result that would also appear to be contrary to the stated purposes of both the *Residential Tenancies Act*, *supra*, and the *Small Claims Court Act*, *supra*. If a refusal to consider Ms. Lelacheur's Application would constitute a denial of natural justice, then this Court ought not to purposely make a decision that would achieve that result and require superior court intervention.

[36] In summary, I conclude that this Court does have jurisdiction to address Ms. Lelacheur's Application to set aside the Order of June 26, 2012.

(b) Should the requested relief be granted?

[37] In support of her Application, Ms. Lelacheur submitted two Affidavits (her own and that of her daughter, Shelby Lelacheur). Both she and her daughter testified at the Application before me and they were cross-examined by Mr. Densmore.

[38] Mr. Densmore called Nancy Gallant as a witness and she was briefly cross-examined by Ms. Lelacheur's representative.

[39] The evidence of Ms. Lelacheur and her daughter was consistent. They provided evidence that they arrived at the Courthouse on Spring Garden Road where the Small Claims Court regularly sits in Halifax. They arrived at approximately 5:30 p.m. on June 11, 2012. The original appeal hearing was set for 6 p.m. that night although, as many know, all matters on the Court's docket are set for 6 p.m. but that does not mean that the hearing of each case begins at 6 p.m. – parties must wait until their matter is called by the Court.

[40] Upon arrival, the Lelacheurs were directed by a Sheriff to a waiting room where they were told to sit until Ms. Kelly Lelacheur's name was called.

[41] The Lelacheurs say that a court clerk entered the waiting room at approximately 6 p.m. and called a name. Some people left the waiting room but others remained.

[42] At approximately 6:30 p.m., the Lelacheurs say that the same court clerk came back to the waiting room and called another name. The remaining people left the waiting room, leaving the Lelacheurs alone.

[43] At approximately 8 p.m., Shelby Lelacheur went to Courtroom Number Five, where the appeal hearing was scheduled to be heard. She observed, through the window of the courtroom door, Mr. Densmore sitting in the back of the courtroom, but she did not enter. She returned to the waiting room. When questioned by Mr. Densmore about why she did not enter the courtroom, she said that she assumed that one could enter the courtroom and listen to cases other than one's own but she was not interested in doing that.

[44] Between approximately 8:30 p.m. and 9:30 p.m., the Lelacheurs say that a female custodian came into the waiting room in order to collect the trash. The women had general conversation

about how long it took for cases to be heard. The female custodian reportedly said that Small Claims Court hearings could last as late as midnight.

[45] At approximately 10 p.m., after having waited the whole time between 5:30 p.m. and 10 p.m. and after not having left the first floor of the courthouse building, the Lelacheurs approached the Sheriffs stationed at the front door of the courthouse. As one of the Sheriffs went to investigate what was transpiring in Courtroom Number Five, the Lelacheurs saw Mr. Densmore and Ms. Gallant leaving the courthouse.

[46] The Lelacheurs then immediately went to Courtroom Number Five and at which time Kelly Lelacheur was advised to call the Small Claims Court Clerk's Office the following morning since the hearing had already been held.

[47] I note that Kelly Lelacheur says that she made eye contact with Mr. Densmore before he entered the men's washroom at the courthouse at approximately 5:40 p.m. on the night of the appeal hearing. Mr. Densmore denies seeing Ms. Lelacheur before the appeal hearing.

[48] Kelly Lelacheur also testified that she has never been in Small Claims Court before and she is not familiar with the Court's process and procedure. She denied being concerned until 10 p.m. about the length of time it was taking before the appeal hearing case was called because she assumed that some cases simply take longer to be heard and she was merely waiting her turn in accordance with the instructions from a Sheriff.

[49] Ms. Lelacheur further testified that she had to book off of work at 4 p.m. (as opposed to her usual shift end at 6 p.m.) in order to be able to get to the Courthouse for 5:30 p.m. She had with her various photographs and documents to be presented to the Court at the appeal hearing on June 11, 2012.

[50] By way of cross-examination and subsequent oral argument, Mr. Densmore attempted to demonstrate that Ms. Lelacheur's failure to check with anyone in a position of authority before 10 p.m. was unreasonable.

[51] Ms. Lelacheur responded that many people came and went from the waiting room and a number of people were in the hallway outside the waiting room throughout the night. Her brief conversation with the female custodian merely served to confirm

her own assumptions about the length of time it could take for other cases to be heard and she was merely following the Sheriff's instructions in terms of waiting for her name to be called.

[52] Mr. Densmore questioned Kelly Lelacheur about the nature of her position in connection with his appeal. She denied responsibility for any of the damages that were awarded by this Court above and beyond those originally awarded by the Residential Tenancy Officer. During her redirect examination, Ms. Lelacheur indicated that she intended to prove that the residential premises in question were not left in the condition claimed by Mr. Densmore so as to justify reimbursement for additional damages.

[53] Nancy Gallant testified on behalf of Mr. Densmore. Her evidence was largely confined to her observations concerning the condition of the residential premises in question both before and after Ms. Lelacheur rented them. In cross-examination, it was established that Ms. Gallant lives in the Halifax Regional Municipality and there are no known reasons why she would be unable to testify in the future concerning the condition of the residential premises.

[54] For her part, Kelly Lelacheur argues that she can satisfy a proposed four part test justifying the setting aside of the Order of June 26, 2012, the four parts being:

a. A reasonable excuse for failing to appear;
b. No unreasonable delay in applying to set aside the Order;
c. A reasonably arguable defence; and
d. No prejudice to the other side if the Order is set aside.

[55] Based on the decision in *Kemp v. Prescesky, supra*, I am prepared to accept these as the four applicable factors to take into account in deciding this Application. These factors are reasonably derived from that case and the cases cited therein: *Ives v. Dewar*, [1949] 2 D.L.R. 204, *Temple v. Riley*, 2001 NSCA 36 and *Logic Alliance Inc. v. Jentree Canada Inc.*, 2005 NSSC 2.

[56] I also accept the concession made by Ms. Lelacheur's representatives that the burden rests with her to satisfy this test.

[57] The first question is whether or not Ms. Lelacheur has a reasonable excuse for not appearing at the appeal hearing.

[58] While it is possible that Ms. Lelacheur's name was called and neither she nor her daughter were paying sufficient attention, I am not prepared to assume that to be the case on a balance of probabilities. It is even more unlikely that either of them heard Ms. Lelacheur's name and simply did not go to the courtroom – Ms. Lelacheur missed time from work in order to be there that evening, she had the documents with her that were needed to contest Mr. Densmore's appeal and it is unlikely that she would have wanted to miss any more time from work in order to make another appearance in court.

[59] Given the instructions that I accept the Lelacheurs received from the Sheriff, and Ms. Lelacheur's lack of knowledge of Small Claims Court procedure, it was not unreasonable for them to remain in the waiting room, even for the lengthy period of time that they did wait, without checking with someone in authority like a Sheriff.

[60] The presence of Mr. Densmore as he waited in Courtroom Number Five would not necessarily have caused concern. If the evidence had been that Shelby Lelacheur had seen Mr. Densmore testifying or making submissions to the Court as she peered

through the window of the courtroom door, my conclusion would likely be different.

[61] In any event, I am satisfied on a balance of probabilities that Ms. Lelacheur has a reasonable excuse for not appearing at the appeal hearing before me.

[62] The next question is whether or not Ms. Lelacheur unreasonably delayed making the within Application. The timeframe in question is really only a matter of days, less, in fact, than the relevant appeal period from the Order of June 26, 2012. I have no hesitation in concluding that there was no unreasonable delay on the part of Ms. Lelacheur, especially considering the novel nature of the within Application.

[63] The third issue is whether or not Ms. Lelacheur has a reasonably arguable response in connection with Mr. Densmore's claims in the residential tenancy appeal. In my view, it is not necessary or desirable for the Court to delve too deeply into the issue of the condition of the residential premises as Ms. Lelacheur left them. This is really only a threshold determination that does not require a final decision on the merits of what Ms. Lelacheur wishes to advance in defence of the appeal.

[64] Mr. Densmore, at the original appeal hearing, did advance photographs and oral testimony to support his claims for increased damages to the residential premises previously rented by Ms. Lelacheur. At the Application before me, Ms. Gallant elaborated on the damages that she saw in those premises.

[65] By contrast, Ms. Lelacheur testified that she has numerous witnesses and photographs to establish that the residential premises were not in as bad a condition as alleged by Mr. Densmore and Ms. Gallant and she further testified that some of the damage seen in the photographs tendered by Mr. Densmore at the original appeal hearing were present when she first moved in.

[66] It is not for me, at this stage, to decide if Ms. Lelacheur's recollection of the condition of the residential premises in question is to be preferred over that of Mr. Densmore and Ms. Gallant. I am nevertheless satisfied that there is sufficient evidence to conclude that there is a fairly arguable issue concerning the condition of the residential premises and whether or not Ms. Lelacheur is responsible for any damages above and beyond those for which she has accepted responsibility.

[67] The final issue is whether or not Mr. Densmore will suffer any prejudice if the Order of June 26, 2012 is set aside.

[68] On this point, Mr. Densmore noted that, consistent with his testimony at the original appeal hearing, he is not a landlord with numerous units and he has incurred a substantial cost since Ms. Lelacheur left the leased residential premises in terms of repair costs and lost rent during the repairs. I accept what Mr. Densmore says in that regard and I take it as a given that a loss of cashflow does impact upon one's ability to honour a mortgage commitment.

[69] That said, the prejudice to be addressed in the test here is whether or not Mr. Densmore will suffer any prejudice in terms of his ability to advance his claim for damages if the Order of June 26, 2012 is set aside and the appeal is re-heard.

[70] On that front, I am satisfied that there is sufficient documentary and oral evidence available to Mr. Densmore to successfully pursue the appeal and attempt to rebut the assertions being advanced by Ms. Lelacheur. In that sense, I do not believe that he will sustain the type of prejudice with which we are concerned here should the Order be set aside. It follows that I find that Ms. Lelacheur has satisfied this element of the test.

CONCLUSION

[71] Ms. Lelacheur's Application seeking to set aside the Order of June 26, 2012 is allowed. That Order and the Execution Order based upon it will be set aside. I would direct a Clerk of the Small Claims Court to schedule a re-hearing of Mr. Densmore's residential tenancy appeal before another Adjudicator of the Small Claims Court and to notify the parties of the time and date of that new appeal hearing.