2021 Claim No. 506296

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Alpha Realty Ltd. v. Bird*, 2021 NSSM 36

BETWEEN:

ALPHA REALTY LTD.

Appellant/Landlord

- and -

JANET B. BIRD

Respondent/Tenant

Hearing Date: August 26, 2021
Last Written Submission: October 14, 2021

Appearances:
Appellant: Nathan A. McLean, Barrister & Solicitor
Respondent: Mark Bailey, Barrister & Solicitor

ORDER and DECISION

[1] This is an appeal of a Director's Order dated May 5, 2021. While the original application before the Director dealt with additional issues, the sole issue before me related to the inside parking space.

Background

[2] The Tenant, a retired teacher and interior designer, has been a Tenant of the subject premises since March 1, 2013.

[3] The Tenant's application to the Director included that she be allowed to keep her inside/underground parking space. This was based on a verbal agreement with

the Landlord from 2013 that she be permitted to park inside and that for over eight years she has utilized an inside/underground parking spot without additional charge.

[4] The signed Lease which was in evidence contains, in Section 9, the following:

9. The rent includes

Utilities
☒ Heat
☒ Water
☒ Hot Water
☒ Parking # of spaces ____ space # One Outside
No car – No Parking Spot

[5] Peter Garonis gave evidence for the Landlord. He is the Principal of PVG Management Services Inc., which provides property management services for four buildings all of which are owned by the named Landlord, Alpha Realty Ltd.

[6] Both the management company and the corporate landlord are owned by the Garonis family. In 2013 the building in question was managed by Nick and Vicky Garonis, the parents of Peter Garonis. Nick Garonis passed away in 2015. Vicky, Peter's mother, continued in a management role up to approximately 2019 and continues as an officer and owner.

[7] According to Peter Garonis, if a tenant has outdoor parking, that is included in the rent.

[8] If the tenant has inside, underground, parking, that is charged at $100 per month.

[9] If a tenant has no car there are no parking privileges.

[10] Peter Garonis testified that Ms. Bird, the Tenant here, has never paid $100 a month although she parks her car inside. He knew that she parked underground but, as I understood his evidence, he did not know that she was not paying for underground parking and stated that he only learned that in early 2021.

[11] He was not physically present or involved at all when Ms. Bird entered into the Lease in 2013. At that time he was working in Newfoundland.

[12] On February 17, 2021, a letter was issued under the letterhead of PVG Management Services Inc. to Ms. Bird which, among other things, stated the following:

> Upon reviewing your parking – <u>we noticed that in your lease, you have a parking spot located outside that is included in the rent</u>. Effective immediately we ask that you begin using the spot outside as opposed to the underground parking spot that you have been using as what I can only assume was allowed as a sign of goodwill from the company and no extra charge.
>
> The specific spot you can use is spot number 11.

[13] The Tenant, Janet Bird, gave evidence. She stated that she met with Vicky Garonis in or around February 2013 to view potential apartment units. She was interested in a two bedroom but when she got there she learned that there was only a two bedroom with a den available. She viewed the unit and very much liked it. They then went to Ms. Garonis' office to discuss terms. Ms. Bird told Ms. Garonis that she did not want the den as it was more than she needed. She did, however, want underground parking and was told that this would be $100 per month. Ms. Bird indicated that this put the unit outside of her budget or words to that effect and had her "foot almost out the door" when Ms. Garonis said the $100 for the underground parking would be included in the rent. In effect, she would not charge

for the underground parking and the rent for the unit would be $1,095 in March 2013. On that basis they concluded the deal.

[14] When shown paragraph 9 of the Lease, Ms. Bird stated that she did not understand or recall that wording and that she was always of the understanding that she was not to be parking outside. She stated that she was never supposed to be paying for the underground parking as it was included in the rent.

[15] She said that she gave Vicky a $75 deposit for the opening device which was a one-time fee. She does not recall who but it would have either been Doug the Superintendent or Vicky who gave her the opener which she has had from the day she moved in in March 2013 up to the present time. She has been parking underground since March 2013 which is almost eight and a half years.

[16] She also stated that this arrangement was to be in effect for as long as she lived there.

Analysis

[17] The issues raised in this case bring into sharp relief the conflict that can arise between the interests of certainty and clear terms in a written agreement on the one hand as opposed to equitable principles, or in everyday language, basic fairness, of requiring a party to live up to a verbal commitment made by its principal and which is relied on by the other party.

[18] The law of contracts holds as one of its most important tenets that a written contract should be enforced in accordance with its terms. However, in appropriate cases, the law has developed many methods which militate against this strict enforcement of contractual terms. For example, there are the doctrines of misrepresentation, waiver, collateral contract, promissory estoppel and

rectification. The foregoing list is not intended by any means to be exhaustive but is illustrative of several of the common arguments that can be raised.

[19] Before dealing with the applicable law I should state that I consider the evidence of Ms. Bird to be credible and, with one exception, I accept it. Indeed, with respect to the discussions that she testified about that she had with Vicky Garonis, they were uncontradicted. And in saying this, I note that the Landlord did not call Vicky Garonis to give evidence. At the time in question, 2013, Vicky Garonis was, and as I understood the evidence, continues to be up to the present time, one of the officers of the Landlord as well as an owner. I have no doubt that she was in a position of authority and as a matter of law could bind the corporate Landlord.

[20] Having said that Ms. Bird's evidence was uncontradicted, does not mean that I am compelled at law to accept everything that she stated. In the case of ***R v. D.R.***, 1996, CanLII 207, the Supreme Court of Canada confirmed that is open to a trier fact to "believe a witness's testimony in whole, in part, or not at all."

[21] Given the potential financial implications of having a perpetual free indoor parking spot, and given the fact that Vicky Garonis was a well experienced landlord, it appears to me that it would be very unlikely for her to have committed to that. Furthermore, I doubt that under the *Residential Tenancies Act*, RSNS 1989, c. 401, a term or a condition relating to a service or benefit can be enforced in perpetuity or for as long as the tenant remains a tenant.

[22] I do find as a fact that there was discussion and agreement between Vicky Garonis and Janet Bird that there would be no charge for the inside parking. With respect to how long that was to be the case, I find it more likely than not, that it simply was not discussed.

[23] Then, the question is how is this verbal agreement to be legally upheld in light of the explicit wording to the contrary that was in the signed Lease. In my view, the most appropriate legal doctrine is that of rectification. Alternatively, the doctrine of promissory estoppel could be applied.

[24] The doctrine of rectification was recently dealt with by the Supreme Court of Canada in the case of ***Canada (Attorney General) v. Fairmont Hotels Inc.*** 2016 SCC 56. At paragraph 12 the majority states:

> [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a **term incorrectly expresses the parties' agreement** — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, **rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two.** Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at S. 8.229).
>
> [Emphasis supplied]

[25] It is my view that the facts here, and particularly the evidence of Ms. Bird, establishes that the written Lease Agreement ultimately signed by the parties did not correctly express the parties' agreement with respect to the inside parking. Therefore, the Court should rectify the wording to make it accord with that verbal agreement. That can simply be done here by changing the words under the first part of Section 9 that indicates parking to be included in the rent from "one outside" to "one **inside**."

[26] That means the inclusion of inside parking as part of the rent continues to be a term of the contract unless and until the Landlord takes steps to alter it. Here,

Section 11 of the *Residential Tenancies Act*, is relevant, in particular, subsections 4 and 5. The full Section 11 reads as follows:

RENTAL INCREASE

Restrictions increasing rent

11 (1) A landlord shall not increase the rent to a tenant for the twelve-month period following the commencement of a week-to-week, month-to-month, year-to-year or fixed-term lease.

(2) Where a landlord intends to increase the rent payable after the first twelve-month period, the landlord shall give the tenant a notice in writing stating the amount and effective date of the increase in the case of

(a) a year-to-year lease, four months prior to the anniversary date;

(b) a month-to-month lease, four months prior to the anniversary date;

(c) a week-to-week lease, eight weeks prior to the anniversary date;

(d) a manufactured home space lease, seven months prior to the anniversary date, and in no case shall a landlord increase the rent to the tenant more than once in a twelve-month period and without proper notice prior to the anniversary date in each subsequent year.

(2A) Notwithstanding subsection (2), where the landlord is a housing association within the meaning of the Co-operative Associations Act, the landlord may establish a common anniversary date for the increase of rent payable by tenants in accordance with the regulations and that date is thereafter the anniversary date respecting tenancies in the buildings owned by the association and the notice periods referred to in that subsection apply with respect to those tenancies.

(3) In the case of a fixed-term lease, the lease shall indicate the amount and effective dates of any increases and in no case shall the rent be increased to a tenant more than once in a twelve-month period.

(4) **The deletion or withdrawal of a service is deemed to constitute a**

rental increase.

(5) **Where a landlord discontinues a service, privilege, accommodation or thing and such discontinuance results in a reduction of the tenant's use and enjoyment of the residential premises, the value of such discontinued service, privilege, accommodation or thing is deemed to be a rent increase for the purpose of this Section**.

(6) Nothing in this Section applies to increases or decreases based solely on the income of a tenant pursuant to a public housing program.

[Emphasis supplied]

[27] The discontinuance of the free inside parking would fall under one or more of the words contained in subsection 5 of Section 11, that is either being a "service, privilege, accommodation, or thing," and therefore would be deemed to be a rent increase for purposes of Section 11.

[28] This, indeed, is the exact same conclusion arrived at by the Residential Tenancies Officer in the Decision of May 5, 2021.

[29] This is not the end of the matter; there is the further complication of Section 8 of the *Residential Tenancies Act*, which reads:

Standard form of lease

8 (1) In addition to the statutory conditions, a landlord and tenant may provide in a standard form of lease for other benefits and obligations which do not conflict with this Act.

(2) An additional benefit or obligation under subsection (1) is void unless it appears on both the landlord's and tenant's copies of the standard form of lease.

(3) Any alteration of or deletion from provisions that a standard form of lease is required by regulation to contain is void.

(4) On or after the first day of February, 1985, a landlord and a tenant who enter

> into a written tenancy agreement or renew a written tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.
>
> (5) A landlord and tenant who have an oral tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.
>
> [Emphasis supplied]

[30] This would indicate that any agreement, written or verbal, for an additional benefit or obligation is void unless it appears in both the landlord's and tenant's copy of the lease. Does this mean that s. 8(2) has the effect of rendering rectification unavailable for leases under the Nova Scotia *Residential Tenancies Act?*

[31] I am not aware of any authority which deals with this issue and my research discloses nothing directly on point.

[32] Given the potential significance of this, I sent emails to counsel following the hearing requesting submissions on this issue. Mr. McLean, not surprisingly, argues that Section 8(2) be applied to render the unwritten benefit of indoor parking to be void. Mr. Bailey simply states that in the circumstances it would be inappropriate to apply the provision in this manner.

[33] In my opinion, Section 8 is a very important, perhaps fundamental, provision in the Nova Scotia *Residential Tenancies Act*. It represents a legislative intent to reduce the number of potential disagreements that might arise between parties to residential tenancies.

[34] One may take notice that the reality is and has been that the relationships between landlords and tenants are frequently contentious. The legislation is

remedial and in various places of the *Residential Tenancies Act* there are provisions that require notices to be in writing, amendments and provisions to be in writing, and, in some cases, specified forms to be used, all of which is a legislated attempt to reduce the potential for disagreement in these relationships.

[35] In this situation however and in addition to the undisputed evidence of Ms. Bird, the parties have, for over eight years, functioned in an entirely consistent manner with what Ms. Bird says was the verbal agreement. I should add here that to my mind there is no question at all that the Landlord, was by virtue of Ms. Garonis' direct involvement, aware of the verbal agreement. Also, the Tenant testified that she paid a $75 one-time deposit for the transmitter and has parked her vehicle inside since March 2013 up to the present time, a period of some eight and a half years.

[36] Given that period of time during which the parties acted in accordance with the verbal agreement, it would be wholly illogical to pretend that verbal agreement did not exist and render it void. However, that is literally what s. 8(2) would dictate.

[37] In my view, the appropriate response here is to apply by analogy the law with respect to the *Statute of Frauds* R.S.N.S., 1989, c. 442. The *Statute of Frauds* is a very old statute which requires that certain contracts, including those for the sale of land, must be in writing. However, there is good authority in this Province and in other jurisdictions of Canada that holds that where a verbal agreement has been confirmed through part performance, that such is a defence to an argument of non-compliance with the *Statute of Frauds* (see, for example, ***Brekka v 101252 PEI Inc.***, 2015 NSCA 73).

[38] In a similar manner, I would find that the actions and conduct of the parties in functioning for some eight and a half years in accordance with the verbal agreement that inside parking would be included in the rent negates the application of Section 8 (2) of the *Residential Tenancies Act*. Accordingly, the doctrine of rectification should be applicable.

[39] However, as noted earlier, I reject the suggestion that this verbal agreement should be considered to be perpetual.

[40]

[41] An alternative approach to rectification would be promissory estoppel. This doctrine is explained In ***Can-Euro Investments Ltd. v. Industrial Alliance Insurance***, 2009 NSSC 20 (CanLII), where Beveridge, J. (as he then was) stated:

> [136] It is my view that the doctrine to be applied whether it be called waiver or promissory estoppel or variation of the contract or simply binding promises, stems from the words of Lord Cairns in ***Hughes v. Metropolitan R. Co.*** (1877), 2 App. Cas. 439 at p. 448:
>
>> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results--certain penalties or legal forfeiture--afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

[42] Under this approach, the Landlord, which under the terms of the written lease agreement is entitled to $100 per month for inside parking, would be estopped from asserting those rights as a result of the verbal representations of Vicky Garonis made in February, 2013.

[43] In my view, that does not mean, the estoppel is necessarily perpetual. To the contrary, the law would support a reassertion of those rights but only upon reasonable notice. This approach protects the reliance interest (see J. McCamus, "*The Law of Contract*", Irwin Law, 2005, at pp. 285-287).

[44] I have already referred to the provisions of the *Act,* dealing with the process for the discontinuance of a service, etc. in Section 11. This would also apply to the reassertion of the rights contained in the written lease agreement, under the promissory estoppel approach.

[45]

[46] So, under the promissory approach we end up at the same place as with rectification.

[47] I find that the appeal should be dismissed and that the decision of the Residential Tenancies Director be affirmed. I will specifically indicate in the Order that the wording in the first part of Section 9 of the Lease dated February 14, 2013, be revised by deleting the word "outside" and replacing it with the word "inside."

[48] As well, the handwritten note at the bottom of the page on the first Schedule B, which states "*going monthly u/g (if you use one) would be $100*" is to be deleted.

ORDER

[49] It is hereby ordered that the appeal herein is dismissed and the Decision of the Residential Tenancies Director dated May 5, 2021, is hereby affirmed.

[50] It is further ordered that the Lease Agreement dated February 14, 2013, between the parties herein is rectified and revised by deleting the words "*one*

outside" and replacing them with the words "*One Inside/Underground*," so that Section 9 reads as follows:

9. The rent includes

Utilities
☒ Heat
☒ Water
☒ Hot Water
☒ Parking # of spaces ____ space # One Inside/Underground
No car – No Parking Spot

[51] Finally, it is ordered that the handwritten note at the bottom of the page on the first Schedule B, which states "*going monthly u/g (if you use one) would be $100*" is deleted.

[52] There shall be no costs for either party.

DATED at Halifax, Nova Scotia, this 25th day of October, 2021.

MICHAEL O'HARA
ADJUDICATOR