IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Hart v. 137, 145, 149 Walker Residences Corp*., 2023 NSSM 25

Date: 20230607
Claim: 523362
Registry: Halifax

Between:

Kristy Hart and Joshua Lucas

Appellants

v.

137, 145, 149 Walker Residences Corp.

Respondent

Adjudicator:	J. Scott Barnett
Heard:	May 29, 2023
Written Decision:	June 7, 2023
Counsel:	Kristy Hart and Joshua Lucas Self-represented
	Sharon Campbell for the Respondent Self-represented

By the Court:

[1] This is an appeal from an Order of the Director of Residential Tenancies dated February 3, 2023. The Appellant Tenants, Kristy Hart and Joshua Lucas, are former resident managers employed by the Respondent Landlord, 137, 145, 149 Walker Residences Corp. When their employment was terminated, the Landlord successfully applied for a termination of the Tenants' residential premises lease and vacant possession of the apartment in which the Tenants were living with their two small children, one who is four years old and one who is four months old.

[2] From what I can tell, the primary focus at the hearing before the Residential Tenancy Officer was whether the Landlord had reasonable grounds for termination of the Tenants' employment.

[3] While that continued to be a point of contention during the hearing before me, the Tenants also raised another argument; namely, that their lease was not a "working lease" and that they should therefore be allowed to stay even if their employment was terminated.

ORDER OF THE DIRECTOR (FEBRUARY 3, 2023)

[4] The Landlord's Application to Director, filed on December 30, 2022, sought termination of the tenancy and vacant possession of the leased premises on the basis that the Tenants' employment as resident managers had come to an end on December 21, 2022.

[5] I note that the Tenants had previously filed an Application to Director on December 28, 2022, seeking to set aside a Notice to Quit served on them by the Landlord on December 22, 2022.

[6] The two Applications to Director were heard concurrently by the Residential Tenancy Officer who later prepared the Order of the Director.

[7] In that Order, the Residential Tenancy Officer referred to Section 10(8)(b) of the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401 which provides as follows:

> NOTICE TO QUIT
>
> **Notice to quit**
>
> **10 …**
>
> **(8)** A landlord may give to the tenant notice to quit the residential premises where
>
> …
>
> (b) the tenant was an employee of an employer who provided the tenant with residential premises during his employment and the employment has terminated;
>
> …

[8] In addition, the Residential Tenancy Officer made the following key findings:

(a) the Tenants had entered into a lease for the premises in question, effective July 1, 2020, with a monthly rent of $1,295;

(b) the Tenants had been employed by the Landlord, receiving a salary of $45,000 a year and no rent; and

(c) the Tenants' employment ended on December 21, 2022.

[9] In light of these findings and the statutory provision referred to above, the Residential Tenancy Officer reasoned as follows at paragraphs 5 and 6 of the Order of the Director:

> 5. The tenant's position is that their employment was terminated on spurious grounds and thus seeks to continue their tenancy. The issue is whether the "why" the employment was terminated matters to an application under this Act. Section 10(8) has no wording affording an employee of the landlord much protection. Presumably the employment issue of whether someone had "just cause" to terminate a tenancy is not relevant to the question of whether a tenancy continues or not.
>
> Disposition
>
> 6. Given the specific wording in the Act, the issue of "just cause" is not a consideration. The only consideration is that the employment is terminated that is all that is contemplated from a plain wording in the Act. I accept that the tenancy must come to an end. The tenants have lived in the unit for 2½ years. Finding housing on a timely basis is difficult given the shortage of affordable units in Nova Scotia. The tenancy will continue until the end of April and the tenants are responsible to pay rent of $1,295.00 as noted. …

[10] In the end result, the effective termination date of the tenancy (and when vacant possession was to be granted) was set for the end of the day on April 30, 2023.

STANDARD OF REVIEW

[11] When resolving appeals to the Small Claims Court from Orders of the Director, Adjudicators have consistently proceeded on the basis that such appeals are conducted as hearings *de novo*. This is the proper approach in accordance with the weight of the caselaw authorities: *MacDonald v. Demont*, 2001 NSCA 61, *Patriquin v. Killam Properties Inc.*, 2014 NSCA 114, *Cote v. Armstrong*, 2012 NSSC 15 and *Crane v. Arnaout*, 2015 NSSC 106.

FINDINGS OF FACT

[12] I do not see a need to set out in any detail the content of the oral testimony of the parties. However, based on that oral testimony and the significant amount of documentation that was tendered into evidence, I am readily able to make the following findings of fact at the outset:

(a) the Tenants entered into a lease for the residential premises in question pursuant to a Standard Form of Lease commencing on July 1, 2020;

(b) Section 8A of that Standard Form of Lease provided that the term was to run "year-to-year" and that the tenancy would continue "until the landlord or the tenant gives proper notice to terminate";

(c) on the anniversary date of July 1, 2021, the lease automatically renewed for one year and remained a "year-to-year" lease pursuant to Section 10A(1) of the *Residential Tenancies Act*;

(d) on the aforementioned anniversary date, the rent increased from the original monthly amount of $1,270 to $1,295;

(e) on September 3, 2021, the Tenants commenced their employment with the Landlord as Resident Managers pursuant to a "Resident Managers Letter of Agreement" prepared by the Landlord and, while more details concerning the content of that letter will be provided in the reasons that follow, part of the Tenants' compensation was that they would be able to stay in their apartment "rent free";

(f) on December 21, 2022, the Tenants were advised, in writing, that their employment as Resident Managers by the Landlord was terminated, effective immediately;

(g) on that same date, the Tenants were advised that they had "7 days from the termination date to vacate the unit assigned to you under your employment contract"; and

(h) the Landlord has never complained about rent not being paid by the Tenants and, following the issuance of the Order of the Director, the Tenants have been paying monthly rent in the amount of $1,295 to the Landlord in a timely way pursuant to the direction set out in that Order.

DECISION

(a) Introduction

[13] Despite the fact that the Tenants are the Appellants in this matter, I am satisfied that the Respondent Landlord has the burden of showing, on a balance of probabilities, that it should be granted a termination of tenancy and vacant possession of the apartment in question.

[14] In this case, the foregoing proposition flows from Section 3 of the *Residential Tenancies Act*, whereby parties are precluded from "contracting out" of the provisions of that statute, and from Section 10 though to and including Section 10I of the *Act* that sets out a relatively detailed scheme by which, and in what circumstances, residential tenancy leases can legally be brought to an end by one of the parties to a residential tenancy lease.

[15] As Justice Hallett observed in *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 NSCA 13:

> The **Act** gives residential tenants substantive rights in excess of those provided by the common law particularly with respect to the landlord's right to terminate the tenancy by notice to quit.

[16] The focus will now turn to the basis upon which the Landlord says it is entitled to vacant possession and termination of tenancy in this case.

(b) Termination of Employment of a Tenant

[17] It bears repeating that Section 10(8)(b) permits a landlord to give a tenant a notice to quit when the tenant was an employee of an employer who

"provided" the tenant with residential premises "during" that employment and that employment has terminated.

[18] Applied to this case, the question is whether the Landlord "provided" the Tenants with residential premises "during" their employment by the Landlord. I have come to the conclusion that the Landlord did not do so.

[19] In the first place, I am not satisfied that the Landlord "provided" the Tenants' apartment to them within the meaning of Section 10(8)(b). The Tenants had a pre-existing residential tenancy lease into which they entered on July 1, 2020 and their employment did not commence until more than a year later, on September 3, 2021. The apartment in which the Tenants were residing when they commenced their employment with the Landlord was not an apartment that had been provided to them as a term of their employment arrangement. They already had it: see *Seven Oaks Village Housing Co-op Ltd. v. McVarish* (1991), 74 Man. R. (2d) 306 (Q.B.) at para. 22.

[20] Moreover, the most plausible meaning of the wording "during" in Section 10(8)(b) is "co-incident with" or "happening at the same time as". In other words, if the lease begins either at the same time as the employment or sometime shortly afterwards, then it could validly be said that residential premises are being provided "during" the tenant's employment. In that circumstance, the accommodations would be something offered to the employee "virtually as an incident of the employment": *Pan Properties Ltd. v. Vance* (1980), 31 O.R. (2d) 234 (Co. Ct.).

[21] In this case, the offer of employment to the Tenants did not coincide with the offer of accommodations in a designated supervisor's suite or superintendant's premises. At most, there was an offer of forbearance with regard to the rent otherwise payable by the Tenants in respect of residential premises already in their possession.

[22] Finally, and related to foregoing, there is no evidence of any "mutual contemporaneous intention" that there would be a termination, surrender or discharge of the Tenants' pre-existing residential premises lease agreement: see *DeMord v. Carlson* (1989), 15 A.C.W.S. (3d) 125 (B.C.C.A.) at para. 14.

[23] There is no doubt that there can be a discharge of a contract by express agreement: *Fougere v. Talbot* (1973), 12 N.S.R. (2d) 676 (S.C.T.D.) at para. 10. A residential tenancy lease is obviously a contract, albeit one that is subject to significant regulation through the *Residential Tenancies Act*.

[24] But here, the Tenants certainly did not abandon the apartment in which they were living before their employment with the Landlord started nor is there any indication that the parties rescinded the pre-existing lease and made a new agreement in the manner described in Swan et al., Canadian Contract Law (4th ed., 2018) at §2.106:

> The parties to any agreement can always rescind it at any time. Whether they intend to do so or not is as basic (and sometimes as difficult) a question as whether there was any agreement in the first place. Recission requires an offer by one party to bring the contract to an end and to discharge the other from any

> further obligations under it, in return for a discharge of the offeror's obligations, and an acceptance of that offer by the offeree. It is not possible to have recission with reservation or strings attached: recission has, like the making of a contract, either occurred or it has not; a contract cannot be a "little bit" rescinded, any more than, on the traditional approach to offer and acceptance, it can be a "little bit" made.

[25] Although it was not raised by the parties, I am aware that in the Resident Managers Letter of Agreement, buried in a paragraph at the end, there is a form of "entire agreement" provision. Specifically, there is a statement in the letter that its written provisions constitute the entire agreement of the parties and they supersede all prior agreements, understandings, negotiations and discussions, whether oral or written.

[26] This generically worded "entire agreement" provision does not, as a matter of contractual interpretation, evince any intention to terminate the pre-existing lease. The late professor Stephen Waddams, in his text entitled The Law of Contracts (7th ed., 2017), explained (at §326) how these types of "entire agreement" provisions take their meaning from their context: see also *Firestar Customs Home Builders Inc. v. 1099000 B.C. Ltd.*, 2022 BCCA 324.

[27] Read in context, the "entire agreement" provision in the letter in question should reasonably be seen as limited to the subject matter of the Tenants' employment, exclusive of their pre-existing (and still continuing) residential tenancy lease. Something much more detailed and specific would be required to adequately reflect an intention on the part of the Tenants to, in effect, give up the benefit of the protection afforded by their lease in terms

of security of tenure while providing the Landlord with a right to invoke the somewhat extraordinary remedy in Section 10(8)(b).

(c) Resident Managers Letter of Agreement

[28] Although the Landlord's representative at the appeal hearing did not say expressly say so, the fact is that the Landlord in this case is relying heavily upon the terms of the employment contract between itself and the Tenants.

[29] This document was drafted by the Landlord and there is no evidence whatsoever of any negotiation that occurred prior to the Tenants simply signing the same so as to memorialize their agreement to start work as resident managers for the Landlord.

[30] After setting out the employment duties expected of the Tenants as Resident Managers (which appear to be the normal duties that one would expect), the Resident Managers Letter of Agreement sets out the compensation to be paid for performing those duties.

[31] Among other things, the Landlord agreed to "free rent and use of the apartment" that the Tenants and their children were already occupying pursuant to the previously mentioned lease: see Section 1 under the title "TERMS".

[32] In conjunction with this free rent, the document purports to provide for a quick eviction of resident managers upon termination of their employment in that same Section 1 under the title "TERMS":

> It is agreed that this apartment is for your residence use only, and if at any time your employment is terminated, you agree to vacate the apartment in accordance with the timelines outlined in the prevailing Residential Tenancy Act and if no such act shall address this matter, then you are to vacate within seven (7) days of notice of termination. You acknowledge that company policy is that former employees are not permitted to rent a unit in the building after termination.

[33] Later on in the document, under a section entitled "TERMINATION", we find the following:

> The Landlord may terminate your employment any time, or as set out in the Residential Tenancy Act, should such act apply. Within 7 days of the date of termination you agree to surrender the apartment you are occupying, and upon the date of termination you agree to return to the Landlord all building keys and all information relating to the building to the Landlord, without delay. Should you fail to vacate then a per diem charge will be charged to you, based on the market rent for that type of apartment will apply plus any cost relating to hydro, and you irrevocably direct and acknowledge that such charges will be deducted from the final wages owing to you. … [sic]

[34] Despite expressly providing in the section entitled "GENERAL" that the document is to be construed and interpreted in accordance with the laws of Nova Scotia and to be treated, in all respects, as a contract of Nova Scotia, the document somewhat surprisingly refers to Ontario's *Employment Standards Act, 2000* with regard to the Tenants' rights upon termination of

their employment and, specifically, their entitlement to advance notice of termination or pay and benefits in lieu thereof.

[35] The seven day period between termination of employment and termination of a tenant's lease as set out in the Resident Managers Letter of Agreement is suspiciously similar to that found in Ontario's *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, Section 93(2).

[36] In any event, the provisions of the Resident Managers Letter of Agreement with respect to termination are ineffective to the extent that they would otherwise fetter the discretion of the Director of Residential Tenancies (or any court on appeal) if a landlord's notice to quit were challenged by a tenant. Reference can again be made to Section 3 and Section 10 through to and including Section 10I along with the dispute resolution process in which a number of different orders can ultimately be made: see Section 17A.

[37] In light of the conclusion that the Tenants' lease will not be terminated nor do they have to offer up vacant possession of their apartment, I am not called upon to decide upon an effective date of termination. However, if I had been required to make that determination, it seems reasonable to conclude that the Legislature contemplated that an employee would be given reasonable advance notice of termination of employment and that a notice to quit because of a termination of employment would not be effective immediately (if pay in lieu of advance notice was given) or even within seven days as indicated in the Resident Managers Letter of Agreement: *Stewart-Kerr Properties Ltd. v. Fitzgerald* (1979), 25 O.R. (2d)

374 (Co. Ct.). Ultimately, a more lengthy period of time before termination of the tenancy would have been appropriate.

(c) Conclusion

[38] The Appellant Tenants have been successful on this appeal; the Order of the Director will be rescinded. The Tenants' original lease of July 2020 continues to be in effect and all that has changed is that the Landlord's waiver of the Tenants' obligation to pay rent ended upon the termination of the Tenants' employment.

[39] An Order will be issued in accordance with these reasons for judgment.

J. Scott Barnett
Adjudicator of the Small Claims Court