SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Reid v. O'Hearn Holdings Trust*, 2024 NSSM 5

Date: 20240212
Docket: 23-524185
Registry: Halifax

Between:

Shelly Reid

Appellant/Tenant

v.

Jill O'Hearn Holdings Trust (2007)

Respondent/Landlord

Adjudicator:	Dale Darling, KC
Heard:	November 20, 2023, in Halifax, Nova Scotia
Decision:	February 12, 2024
Counsel:	Mark Culligan, for the Appellant The Respondent was not represented by counsel

By the Court:

[1] This is an appeal of the decision of Residential Tenancy Officer Linda Hardy, dated May 23, 2023, in which the Residential Tenancy Officer dismissed the Tenant Shelly Reid's claim for damages, which she says were caused by the Landlord, Jill O'Hearn Holdings Trust (2007), in that they evicted her in a manner contrary to the requirements of the *Nova Scotia Residential Tenancies Act*, R.S.N.S. 1989, c. 401.

[2] I am awarding $1000.00 to Ms. Reid. My reasons follow.

[3] The matter was heard by video conference November 20, 2023. Ms. Reid was represented by Mark Culligan, Community Services Worker at Dalhousie Legal Aid, and law student Christina Tellez was in attendance. Jill O'Hearn Holdings Trust (2007) was represented by Fred O'Hearn. At the hearing Mr. O'Hearn advised that the noted trust was the owner of the condominium unit in question, and the parties were amended accordingly.

[4] An appeal from a decision of the Director of Residential Tenancies is, at the Small Claims Court, a hearing *de novo,* which means it is a "new" hearing in which I am not bound by the decision of the Director, can consider any new

evidence tendered, as well as the record before the Officer, which was also provided to me. I can affirm, reverse or vary the decision of the Officer, depending on what I find to be confirmed by the evidence before me.

Background to the Tenancy

[5] At the hearing before me, I heard evidence from Ms. Reid, Jason O'Hearn and Fred O'Hearn.

[6] Ms. Reid testified that she moved into the condominium in June of 2018, paying rent of $550 per month. In January of 2020 the Landlord says the rate changed to $250.00 every two weeks, although there seems some dispute between the parties on that point. She shared the condominium unit with Mr. O'Hearn's daughter, Jill O'Hearn. This arrangement was not reduced to writing, but was a verbal agreement, but there is no dispute that the parties had an enforceable lease.

[7] Ms. Reid says that she had a "wonderful" relationship with Ms. O'Hearn, and that "we (she and Ms. O'Hearn) had each other's best interests at heart".

[8] Mr. Fred O'Hearn said in his evidence that his daughter has developmental challenges which led to the creation of the trust for her by he and his wife, and

that she has including personal security issues regarding visitors, but especially male visitors, based upon past trauma. In April of 2022, an incident occurred which led him and his wife to conclude that new arrangements were necessary. What follows below is the path by which the unit was sold, and, says Mr. O'Hearn, his daughter was moved to a one-bedroom apartment.

[9] There is in evidence a series of text messages in April of 2022 between Ms. Reid and Mr. O'Hearn. Mr. O'Hearn began the exchange on April 5th, 2023, by saying that he had been in the unit installing a TV, and Ms. O'Hearn had told him that Ms. Reid's son and his cat were both staying there. Mr. O'Hearn stated in the email that there was a no pets and no guests rules which Ms. Reid knew of, and that Ms. O'Hearn. He asked what her plans were, saying "We like you and want you to stay, but this is not acceptable, especially without asking."

[10] Ms. Reid responded by text saying that the place her son was to rent had turned out to be "a nightmare", and that she "could not let him have nowhere to stay for a few nights until we found a place." She went on to say that she did not think the restriction extended to family, and that Ms. O'Hearn sometimes stayed with a friend with a cat (the issue raised had been allergies).

[11] Mr. O'Hearn responded "Might be best if you both found a place to live? We are not tolerating this at all. We will need this fixed by Friday. We will be by then".

[12] Ms. Reid's son left on April 8th, 2022 (the Friday) and on that same day Mr. O'Hearn asked for a meeting between Ms. Reid, and the three O'Hearns, (Mr. and Mrs. O'Hearn and their daughter). Ms. Reid initially suggested the following week, and then on April 10, 2022, declined to meet at all, saying she had always been a respectful and helpful tenant, and the residential tenancies legislation did not require her to meet.

[13] That same day, Mr. O'Hearn responded saying he was disappointed she did not want to meet, and that they wanted to tell her they were selling the property.

[14] An initial DH2 Notice to Quit dated April 15, 2022, was drafted. Ms. Reid responded by letter dated April 21, 2022 saying that the Notice had not been served properly as it had not been delivered by hand or registered mail, and also that she would continue her tenancy until "(1) you have sold the unit (2) I have been provided with the properly completed and delivered notices and (3) the new landlord has confirmed that my tenancy will terminate".

[15] For ease of reference, the relevant section of the *Residential Tenancies Act* related to sale of a rental property is reproduced here. It requires that the seller prove that a sale has occurred, and provide documentation to that effect in the form of a Notice to Quit and an Affidavit regarding the buyer's intention to occupy the unit:

> ***Early termination for sale of residential complex***
>
> 10AA (1) In this Section, "residential complex" means a building in which one or more residential premises are located.
>
> (2) A landlord of a residential complex that contains no more than four residential premises may end a tenancy in respect of residential premises in the residential complex if
>
> (a) the landlord enters into a purchase and sale agreement in good faith to sell the residential complex;
>
> (b) all the conditions, unrelated to the title, on which the sale depends have been satisfied;
>
> (c) the purchaser is an individual; and
>
> (d) the purchaser
>
> (i) asks the landlord, in writing, to give notice to end the tenancy on the grounds that the purchaser, or a family member of the purchaser, intends in good faith to occupy the residential premises, and
>
> (ii) provides to the landlord an affidavit sworn by the purchaser that the purchaser, or a family member of the purchaser, intends in good faith to occupy the residential premises.
>
> (3) A landlord ending a tenancy pursuant to subsection (2) must give to the tenant
>
> (a) a copy of the sworn affidavit of the purchaser; and
>
> (b) a notice, in the form required by the Director, to end the tenancy effective on a date that must be
>
> (i) not earlier than two months after the date the tenant receives the notice,
>
> (ii) the day before the day in the month, or other period on which the tenancy is based, that rent is payable under the tenancy agreement, and

> (iii) where the tenancy is a fixed-term lease, not ear- lier than the date specified as the end of the tenancy.
>
> (4) A tenant who receives a notice referred to in clause (3)(b) may, at any time before the date specified in the notice, terminate the tenancy, effective on a specified date earlier than the date set out in the notice referred to in clause (3)(b) but at least ten days after the tenant gives notice to the landlord to terminate the tenancy.

[16] Based upon the information from Ms. O'Hearn regarding the first Notice, Mr. O'Hearn provided a second Form DR2, Landlord's Notice to Quit, dated April 29, 2022, with a tenancy termination date of June 30, 2022. He also provided a Statutory Declaration from Mr. James Allen, dated April 28, 2022, in which Mr. Allen declared that he was the purchaser and intended to reside in the property in question.

[17] Ms. Reid moved out at the end of June of 2022. On August 5th, 2022, Kendall Leighton, a Senior Law Student at Dalhousie Legal Aid, wrote to Mr. O'Hearn asking for an update on the status of the property, as it was still listed online, she said, as belonging to Jill O'Hearn Holding Trust. Mr. O'Hearn says that he wrote on the letter that the sale had fallen through, and that the unit was empty and for sale again and returned the letter to Ms. Leighton. He asked for Ms. Reid's mailing address because of a rental arrears issue he said existed.

[18] In his evidence, Mr. Fred O'Hearn said that after Ms. Reid moved out, he had his son Jason O'Hearn address some repairs in the apartment, which he

says turned into major issues regarding mould and moisture. Mr. Jason O'Hearn testified that he spent some three weeks working on the property in July of 2022, replacing drywall, insulation and vapour barrier, painting, and taping. When asked in cross examination if Ms. Reid could have stayed in the unit, he replied that "her room was torn apart".

[19] When Fred O'Hearn disclosed these issues to Mr. Allan as required, he says Mr. Allan did not finalize the purchase, relying upon his option to withdraw if serious deficiencies were discovered.

[20] Mr. O'Hearn says that the property went back on the market in late July of 2022, and was sold in August, with documentation provided in evidence of an Agreement of Purchase and Sale dated October 8th, 2022, with a closing date of October 30, 2022.

[21] The Appellant, through her representative Mr. Culligan, seeks a remedy under section 17A (d) of the *Residential Tenancies Act*:

> Contents of order
>
> 17A An order made by the Director may
>
> (a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act; ….
>
> (d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;

Mr. Culligan urges that the actions of Mr. Fred O'Hearn on behalf of the Landlord were carried out in bad faith, and that there is no evidence to support that there was ever an intention to sell to Mr. Allan.

[22] He says that although section 10 AA (2) is not as specific as that relating to "renovictions" under the Act in 10 AD, a Small Claims Adjudicator has broad powers under Article 17 (a) through (d). The same principles as those relating to renovictions should be used to heal the breach, and that applying 10 AC(2) (b) and 10 (AD), Ms. Reid should be awarded the following (I note that her calculations are based upon $500 per month, not $250 every two weeks, or $550):

1. One month's rent (section 10 AC(2)(b) ($500);
2. Moving expenses (section 10 AD(e)) $216.88;
3. Reasonable additional expenses (section 10 AD (b)) $500.00;
4. Compensation for the difference in rent paid for the two summer months by staying at Mt. Saint Vincent ($750 per month, and so $250 x 2 = $500), plus 8 months of the rent differential (she now shares an apartment with her son with a lease commencing October 1, 2024), with a total rent of $1495.00 /2 = 747.50, $247.50 X 8 = $1980.00.

[23] This makes a total of $3216.88 plus the application fee.

[24] Mr. Culligan provided two authorities, the first being *Mordo v. Goulet*, 2022 BCSC 1968, a decision of the Supreme Court of British Columbia regarding a judicial review of a decision of a Residential Tenancy Branch Arbitrator.

[25] In that case, the Landlord had issued a two month notice to end the tenancy on the grounds that he intended to have his son move into the unit. That did not occur, and after the tenant complied, the unit was later rented to a different tenant, and the Landlord was assessed the penalty under section 51(2) of the Act below.

[26] Under the British Columbia *Residential Tenancy Act*, Section 51(2), a Landlord is required to pay to a tenant the equivalent of twelve months rent if the stated purpose in the Notice given is not complied with.

[27] A defence to this section's penalty is found in section 51 (3), where if the Landlord can demonstrate "extenuating circumstances" for not complying with the stated purpose of the Notice.

[28] Mr. Culligan states that the analogy here is that the burden of proof is on the Landlord to demonstrate on a balance of probabilities that the initial purchase

was in good faith, and that like the Landlord in the *Mordo* case, he is unable to do so, and so a penalty should be assessed against him.

[29] Mr. Culligan also cites *R & S Realty Ltd. v Harlow*, 2004 NSSM 27, in which a landlord acknowledged he changed the locks on the tenant's apartment and cut the power because she had not paid her rent. Adjudicator Thompson awarded general damages of $500 and "exemplary damages" of $1,500 as a result.

Conclusion:

[30] I note that in the Nova Scotia legislation has quite different language from that of British Columbia, with the existence or non-existence of "bad faith" creating the breach. The language in the BC Act referenced in the *Mordo* case of "extenuating circumstances", is based upon a preliminary finding that the Act had been breached, and that is what switches the burden to the Landlord. The Nova Scotia legislation does not create a defence to the bad faith finding, and it is what breach is based upon. The burden in Nova Scotia is therefore upon the Appellant Tenant to prove on a balance of probabilities that there was bad faith.

[31] Taking all the evidence together, I find there is no evidence of "bad faith" on the part of Mr. O'Hearn acting for the Landlord. I accept his evidence that he and his wife had concluded that in his daughter's best interest, the unit should be sold.

[32] With respect to the sale to Mr. Allen, he says that he had no choice but to disclose deficiencies to the buyer, and that the sale was concluded as quickly as possible.

[33] There is no question that the events of April of 2022 led to the decision to sell, but that decision was a sincere intention on the part of the Mr. O'Hearn and his wife to divest themselves of the property, and they did so.

[34] "Bad faith" would be saying that the property was to be sold, and then not doing so. The trajectory to sell this property did not waiver, and the Landlord should not be penalized if, as sometimes happens, a sale fell through. It was not like the facts in *Mordo*, where the Landlord had been heard to say "How do I get them out" with respect to the Tenants, or like *R & S Realty*, which the Landlord admitted to knowing his (obviously egregious) acts were contrary to the legislation.

[35] Even though I find that there was no bad faith on the part of the Landlord, there is no question that the Landlord's attempts to meet the requirements of section 10 AA of the Act, were not performed as required in April of 2022. I take note that Mr. O'Hearn provided Ms. Reid with a corrected DR2, but did not provide that other requirement under the 2 (d) (ii), which requires that the purchaser "provides to the Landlord an affidavit sworn by the purchaser that the purchaser, or a family member of the purchaser, intends in good faith to occupy the residential premises."

[36] What was provided instead, was a Statutory Declaration, in which Mr. Allan states that he "solemnly declare that I will be residing at the property." The document then goes on to say that he makes "the solemn declaration conscientiously believing it to be true and knowing it is the same force and effect as if made under oath and by virtue of the Canada Evidence Act." His Declaration is "declared" before a lawyer, and signed by the lawyer and Mr. Allan.

[37] A Statutory Declaration and an Affidavit are similar, but not the same. An Affidavit is a document made by a person who signs and swears to its veracity under oath, and a lawyer or notary certifies the statement. A Statutory Declaration is a written statement of facts declared to be true before a person

with the authority to take the Declaration (a Commissioner of Oaths, lawyer or notary) (see S. Coughlan, *Canadian Law Dictionary*, Barrons, 7th, Ed, 2013.)

[38] So, a Statutory Declaration is like a sworn statement, but it is not one. This may seem like legalistic splitting hairs, but the plain language of the Residential Tenancies Act requires an Affidavit, and legislative interpretation does not allow for something else to be considered "close enough", or "like it". The Act is specific with respect to the requirement.

[39] And so, while there was not bad faith on the part of the Landlord, I find that the initial notice was not in accordance with the requirements of the Residentials Tenancies Act, and that accordingly, some recompense is appropriate.

[40] As noted, on appeal, a Small Claims Court Adjudicator can make any order that the Residential Tenancy Officer could have made. It is urged upon me by Mr. Culligan that the regime in the Act dealing with "renovictions" should be used in this case. I do not agree.

[41] Ruth Sullivan, in *Driedger on the Construction of Statutes* (3rd ed. 1994) at p. 131, states the modern rule of statutory interpretation:

> **The modern rule.** There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

Reading the entirety of section 10 of the Residential Tenancy Act makes it clear that the legislature creates specific relief related to what are called "renovictions", and that those specifics do not apply to sale of a property. The renoviction amounts required are effectively a tariff on the Landlord's ability to (arguably) increase the value of the property, and the legislation seeks to compensate tenants accordingly.

[42] So far, the Legislature has not seen fit to issue similar tariffs where a sale is undertaken, and I will not read in an intention to do so.

[43] I therefore look to section 17 of the Act, which under 17A (d) gives me the authority to "order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach".

[44] The breach as described was technical in nature, and by October of 2022, the property had indeed been sold. I therefore award Ms. Reid compensation for

rent in the amount of $500.00, presenting the difference in rent for July and August 2022, and $500 representing rent for September of 2022, for a total award of $1000.00. All other claims are dismissed. As success was divided, the application fee will not be awarded.

[45] An order will issue accordingly.

Dale Darling, KC, Small Claims Court Adjudicator