

SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Janowitz v. Hayman Real Estate*, 2023 NSSM 106

Date: 20231121
Docket: 526815
Registry: Halifax

Between:

Diana Janowitz

Tenant/Appellant

v.

Hayman Real Estate

Landlord/Respondent

Adjudicator: Michael J. O'Hara

Heard: November 1, 2023
Last submission received November 7, 2023

Decision: November 21, 2023

Appearances: Megan Deveaux and Tanya Jones, for the Tenant/Appellant
Alan Hayman, K.C., for the Landlord/Respondent

By the Court:

[1] This is an appeal of an Order of the Director dated September 7, 2023, ordering termination of the lease of the subject premises as of September 30, 2023. In a brief decision the Residential Tenancy Officer stated that there was evidence of multiple noise complaints and the Landlord had issued warning letters to the Tenant. In addition, the Tenant had provided the keys to non-authorized individuals and had breached the non-smoking rule.

[2] Before me, the Resident Manager, Brittney Howell, testified. The Tenant also testified.

[3] Before dealing with the evidence here, I wish to make comment about an evidentiary issue raised by counsel for the Tenant – that is, that the Landlord’s evidence was almost entirely hearsay evidence and, on the authority of *Cameron v. Morris*, 2006 NSSC 9, should not have been admitted. This was raised during the questioning of the Landlord’s witness and during closing submissions. With the greatest respect to the learned justice in that case – LeBlanc, J., (as he then was), I would respectfully find that the *Cameron* case is distinguishable as it did not deal with an appeal under the *Residential Tenancies Act*, RSNS 1989, c. 401.

[4] Secondly, and perhaps more significantly, a subsequent decision of Justice Moir in *Towle v. Samad*, 2013 NSSC 260 has recast and restated the extent of the admissibility of such evidence.

[5] The relevant statutory provision (which was not under consideration in the *Cameron* case), is Section 17C (7) of the *Residential Tenancies Act* which reads as follows:

(7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.

[6] It is my view that this wording is quite clear and unquestionably does permit the admission of hearsay evidence, i.e., evidence of statements of people who are not called to testify. Of course, the weight to be given to such evidence remains always within the discretion of the adjudicator and should be properly considered in any such reliance.

[7] To the extent that the *Cameron* case might be seen to apply to a residential tenancy appeal, I consider the more recent case of *Towle v. Samad* to be the more applicable authority. In that decision, Justice Moir states (paragraphs 72-79):

Hearsay

[72] Most of the damages awarded on the counterclaim were assessed based on estimates from people who were not called to testify. That is to say, they were assessed on hearsay. Mr. Towle now takes issue with this.

[73] Subsection 28(1) of the *Small Claims Court Act* permits hearsay. The statute makes "the hearsay rule ... inapplicable with the issues of relevancy and efficiency being the only barriers to the admission of evidence": *Whalen v. Towle*, 2003 NSSC 259 at para.6. See also, *Wiggins v. Steele*, 2006 NSSM 1 at paras. 19 to 24.

[74] *Morris v. Cameron*, 2006 NSSC 9 may take a more restrictive view. Justice LeBlanc accepted (para. 27) Ontario jurisprudence to the effect that hearsay is admitted in Small Claims Court but is subject to the principles of necessity and reliability when the evidence is weighed.

[75] Justice LeBlanc does not explain why a departure from *Whalen v. Towle* was justified in light of the principle of *stare decisis*. See the discussion at para. 35 to 38 of this decision. If *Whalen v. Towle* is not yet established precedent, then I join the dialogue to support its adoption. I do so with the greatest respect for Justice LeBlanc's reasoning.

[76] There are two serious problems with this approach to hearsay in Small Claims Court. Firstly, it is inconsistent with s. 28(1) to suggest that hearsay offered in Small Claims Court must come within the principled exception. Secondly, it ignores necessity.

[77] The principle of necessity is stringent. It would exclude the estimates in this case and all the various documents at issue in *Morris v. Cameron*. In a system under which hearsay is admitted then weighed according to the principled exception, necessity goes by the wayside. Note the absence of discussion of necessity when *Morris v. Cameron* reviews the adjudicator's use of the hearsay documents at para. 30 to para. 33. The attempt to infuse the necessity and reliability exception into Small Claims Court in *Morris v. Cameron*, and in the Ontario Court of Justice decision upon which it relies, strips the principled exception to reliability. And, it makes the reliability of the hearsay reviewable on appeal. That is to say, the appeal court considers the proper weight to be given to the hearsay evidence: para. 30 to para. 33 of *Morris v. Cameron*.

[78] The appeal court may not consider the proper weight to be given to any evidence. (As discussed at paras. 22 and 33 of *Morris v. Cameron*, there may be situations in which the admission or weighing of hearsay evidence amounts to a breach of the duty of fairness. That is a rare circumstance and it involves a different issue than the one under discussion.)

[79] Adjudicator Barnett had to admit the estimates. I defer to his weighing of this evidence.

[8] Based on this analysis by Justice Moir, and relying on it, I find that it is legally appropriate, if not mandatory, to admit and consider such evidence within the scop of *Towle*.

Evidence

[9] The Order of the Director and the position of the Landlord here are based on a series of complaints against this Tenant spanning the period late March to late September 2023. I will summarize the evidence relating to each of those complaints.

- **March 27, 2023** – Ms. Howell, the Building Superintendent, testified that the first complaint came by telephone call at approximately 1:45 a.m. on March 27, 2023, that there were loud voices from unit 15 and the smell of cigarette smoke from the back deck. Ms. Howell's husband, Doug Howell, went down to the unit to speak to the Tenant.

Later that day, a written warning letter was issued and delivered to the Tenant.

When asked about this incident at the hearing before me, Ms. Janowitz stated that she had received a phone call that morning concerning her father

who had been admitted to the hospital. She was the proxy decision maker and she stated that she was required to go to the hospital and was required to make a decision regarding a DNR. She stated that he was in septic shock and had had multiple organ failure. She acknowledged that she did go out on the deck and had a cigarette and the loud noises were her. She confirmed that Doug Howell did come down the hall to speak to her. Following that she left and went to the hospital.

- April 1, 2023 – This was another complaint from a Tenant. Mr. Howell investigated and determined that there was loud music and voices emanating from Ms. Janowitz's unit. Two males were observed. This was at approximately 5:50 a.m. on April 1st.

A warning letter was issued on that day to the Tenant. In the re line it states, *"noise complaint – second warning."*

Ms. Janowitz testified in regard to this date that her friend was in town and that there was a third person present. She also confirmed that Doug Howell came down and they turned the music down following that.

- June 5, 2023 – On this date three individuals were observed throwing rocks at Ms. Janowitz's windows from the outside. This apparently led to a

verbal altercation between Mr. Howell and one or more of these individuals. A letter was issued under date of June 5 referring to these complaints and the throwing of rocks which was stated to have taken place between 3:00 a.m. and 3:15 a.m. on June 5th and had awoken neighbours. The re line of the letter states “*Eviction notice – noise complaints,*” and attached and served on that date was a Form E Landlord’s Notice to Quit – Breach of Statutory Condition which was signed by Mr. Hayman and served on June 6th by Doug Howell.

Ms. Janowitz denied any knowledge and stated she had no recollection of any noise or rock throwing. She confirmed that she was asked about this the following day by Doug Howell.

- June 19, 2023 – Ms. Howell testified that the Tenant was buzzing other tenants at approximately 5:30 a.m. on June 19th. She indicated that she had left her keys in the bar and her phone was dead. A letter with the re line, “*noise complaints – 4th warning,*” was issued on June 19th and served on Ms. Janowitz.

Ms. Janowitz stated that she was returning from the hospital that morning. Her brother and her had been staying there according to her testimony. She

stated that the door had been sticking. She also stated that by accident she hit 216 rather than 215. She also indicated that Doug Howell came to see her the next day and told her he had video of her. She confirmed that she is able to open the building lock with her phone.

- June 23, 2023 – An Incident Report was prepared. In the report it was indicated that there was a man in the lobby buzzing multiple tenants to attempt to get entry to the Tenant's unit. She was not home at the time. Doug Howell went down and asked the individual to leave. Initially he refused and this led to some type of verbal altercation. Mr. Howell told the individual that he would call the police. Ultimately, he did leave. A few minutes later a female by the name of Nicole entered the building and she entered the Tenant's unit. Mr. Howell spoke to her and she confirmed that the previous person was named Evan and should not have been there as both she and Diana had had problems with him. She indicated that she was visiting from out of town and that was why Diana had given her keys.

Ms. Janowitz stated that on the day in question, June 23rd, she was at the hospital. She stated that her phone had died and in any event cell phones are not permitted to be used in intensive care. She stated she did not give Evan permission to gain entry or buzz other tenants. In subsequent discussions

with Doug and Brittney Howell she agreed to call police if Evan returned to the property. She understood that a Protection of Property Notice was being issued and she stated that Evan has not come back since then. She did not comment about giving her keys to Nicole.

- July 27, 2023 – On this date between 1:00 and 1:30 a.m. there were complaints regarding loud noises and partying through the halls upon Ms. Janowitz entering with three other individuals. Two of the complaining tenants indicated that they recognized Ms. Janowitz's voice. Ms. Howell confirmed that they subsequently reviewed security footage and confirmed that it was Diana.

Ms. Janowitz confirmed that she had been out with Lenny Petra who was a former tenant in the building and was a friend of hers. She indicated that they had sporadic interaction. She stated that they entered the building and went to her apartment. She did not deny causing the noise in the hallways. She said she was not familiar with the other two people.

- September 30, 2023 – There is a video from approximately 2:55 a.m. of what in the Incident Report is stated to be Ms. Janowitz "*prying your mailbox open to retrieve its contents.*" The issue of the damage to the mail

was the subject of considerable discussion and debate about whether or not it was appropriate to be considered in this hearing. While I was of the view that it was appropriate, I nevertheless gave counsel for the Tenant the opportunity to submit additional information in writing which I received on November 2nd. The Landlord had the opportunity and did in fact respond to this by submission dated November 6th and received in hard copy on November 7th.

- September 20, 2023 – An Incident Report stating that there was video footage of a *“friend of yours trying to access into our secured building at two different entrances, attempting to use a set of keys to achieve entry. This happens to be after you arrive home around 3:00 a.m.”*

Ms. Janowitz stated that she just learned on the day of the hearing that it was Lenny who was trying to gain access. .

[10] In addition to this evidence, there was a letter submitted under date of September 20 and signed by six other tenants. The letter is short; it states:

We, tenants of 985 Brussel Street, request that you take appropriate action to evict the occupant of unit 15 due to continued excessive noise between the hours of 11:00 p.m. – 6:00 a.m. and serious concerns about our safety from unwanted guests buzzing our doors requesting entry into our secured building.

Analysis

[11] Primarily, the Landlord's case here is based on alleged breaches of statutory condition 9(1)(3) which, reads as follows:

3. Good Behaviour – A landlord or tenant shall conduct himself in such manner as to not interfere with the possession or occupancy of the tenant or of the landlord and other tenants, respectively.

[12] If this provision is breached by the tenant it can lead to termination of the tenancy at the instance of the landlord. Such an order is not intended to somehow penalize or punish the tenant, rather, it is done to eliminate the issue in the future *vis-à-vis* the other tenants. In this regard it can be seen as an obligation held by the landlord to all of the tenants who may be affected by the conduct of the tenant in question. Typically, one breach will be insufficient to support a termination but where there is more than one and particularly where warnings have been given by the landlord, termination will often be seen to be the only appropriate remedy.

[13] Termination of tenancy is obviously a very significant decision for the affected tenant. That is particularly so given the current environment and realities of residential premises and “affordable” residential premises. At the same time, the other tenants in a residential building are entitled to reasonable quiet, particularly during nighttime hours.

[14] The evidence here of the noise complaints and door entry buzzers being rang, and other interference, were almost all within the hours of 1:00 a.m. to 6:00

a.m. when the vast majority of people would be sleeping and where there is an expectation of quiet or at least relative quiet. The Tenant here received warnings but it appears to not have influenced her behaviour.

[15] Even leaving aside the incidents where third parties caused the issues and for which she may not be fairly seen to bear responsibility – the incidents of June 5, June 23, and September 30 - there is still a significant amount of conduct directly attributable to the Tenant which breaches the cited statutory condition. The mailbox damage issue is somewhat murky since, contrary to what I understood the Landlord to be asserting, the actual damage does not appear to have been done on September 30 when the video was taken. I say that because the Tenant was only using her bare hands to pull the mail out. And, the photo from September 27 shows the mailbox top protruding an inch or so. The real damage must have been done prior to that and, in my opinion, some tool, such as a screwdriver or knife, must have been used. Whether it was Ms. Janowitz who did it is unproven.

[16] Therefore, I will ignore the mailbox damage issue.

[17] With respect to the smoking issue, that happened once and can fairly be overlooked.

[18] That still leaves the incidents of March 27, April 1, June 19, and July 27. I am compelled to conclude that the degree and quantity of breaches are such that vacant possession ought to be granted.

[19] I will order vacant possession as at January 31, 2024.

Order

[20] It is hereby ordered that the decision of the Director of Residential Tenancy is affirmed but the vacant possession date is amended to January 31, 2024, at which time the Tenant and any occupants thereof of the premises known as Unit 15, 985 Brussels Street, Halifax, Nova Scotia, must vacate.

Michael J. O'Hara, Small Claims Court Adjudicator