Hegeman v. *Carter et al*, 2008 NWTSC 24

Date: 2008 04 14
Docket: S-0001-CV-2007000080

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE RESIDENTIAL TENANCIES ACT R.S.N.W.T. 1988 CHAPTER R-5, AND AMENDMENTS THERETO

AND IN THE MATTER OF THE ORDER OF THE RENTAL OFFICER FILED MARCH 28, 2008

BETWEEN:

LONA HEGEMAN

Applicant

- and -

TRACY CARTER AND JACK CARTER

Respondents

- and -

HAL LOGSDON, in his capacity as Rental Officer

Second Respondent

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervenor

Appeal from a decision of the Rental Officer

Heard at Yellowknife, NT on February 22 , 2008 and April 4, 2008.

Reasons filed: April 14, 2008

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant:	Douglas G. McNiven
Tracy Carter	On her own behalf and on behalf of Jack Carter
Counsel for Rental Officer:	Cayley Jane Thomas
Counsel for Attorney General:	Darren Pickup

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REASONS FOR JUDGMENT

[1] On March 20, 2007, the Rental Officer held a hearing following an Application made by the Tracy and Jack Carter, pursuant to the *Residential Tenancies Act*, R.S.N.W.T. 1988, c.8 (Supp.) The Carters were asking that their former landlord, Lona Hegeman, be ordered to return a security deposit that they had paid at the beginning of the tenancy. Ms. Hegeman did not appear, and the hearing proceeded in her absence. At the conclusion of the hearing, the Rental Officer ordered the return of the security deposit, with interests.

[2] Ms. Hegeman appeals this decision on the grounds that the Rental Officer should not have held the hearing in her absence. She is asking that the matter be remitted to the Rental Officer for a new hearing.

1) BACKGROUND

[3] While it seems clear that there are disagreementsbetween Ms. Hegeman and the Carters about things that transpired during the tenancy, the circumstances that are relevant to the appeal, are, for the most part, not disputed.

[4] The Carters rented residential property from Ms. Hegeman for a number of years. There is some dispute as to exactly when they vacated the property but it was some time in the Fall of 2006. On March 1, 2007, they filed an Application to the Rental Officer, seeking the return of the $900.00 security deposit.

[5] The Rental Officer called for a hearing on the Carters' Application and scheduled it to be heard on March 20, 2007. A "Notice of Attendance" was issued setting out the date, time and place of the hearing. As a matter of course, these notices are sent to the parties, along with an information sheet about the hearing. Ms. Hegeman's materials were sent to her by registered mail. The Carters were served personally at the office of the Rental Officer.

[6] On March 20, the Rental Officer noted that Ms. Hegeman had been served by registered mail with the Application. He also noted that she had been served by registered mail with the Notice of Attendance,although there was no confirmationthat she had picked up that mail. He proceeded to the hearing and heard evidence from Mr. and Ms. Carter. At the conclusion of the hearing, he issued an Order for Ms. Hegeman to return the security deposit to the Carters, with interests.

[7] The evidence adduced by Ms. Hegeman on this appeal is that she did not receive the Notice of Attendance before the hearing date. She travelled for work related duties during the month of March 2007. Her mail was being checked regularly while she was away. On March 30, she made inquiries about this matter at the office of Rental Officer. This was when she found out that the hearing had already proceeded. Ten days later she received a copy of the Order and of the Reasons for Decision by registered mail.

[8] The first issue to be decided on this appeal is whether Ms. Hegeman knew about the March 20 hearing date. The Carters submit that it is a strange coincidence that the Notice of Attendance did not reach Ms. Hegeman, whereas two other sets of materials sent to her by the same method (the Application and the Rental Officer's Order and

Reasons for Decision) did reach her. The Carters also argue that if, as Ms. Hegeman testified, she was on duty travel for only 5 days in March, it is surprising that she would not have received the materials, considering how long the post office holds registered mail.

[9] I understand the Carters' submission, but on the evidence before me, I find that Ms. Hegeman has established on a balance of probabilities that she did not receive the materials and did not know about the hearing date. Her evidence in this regard is uncontradicted. To an extent, it is supported by the documents in the Record filed by the Rental Officer, as those documents do not show anyone having signed for the registered mail package in question.

[10] A number of things could explain why the materials did not reach Ms. Hegeman. There may have been an error at the post office; the person who was checking Ms. Hegeman's mail in her absence may not have done so as regularly as Ms. Hegeman thought; or there may have been some other reason why this particular package did not reach her. Whatever the reason was, I find as a fact that it did not. I accept that Ms. Hegeman did not know about the hearing date until after the date had passed and the decision had been made. As a consequence, she did not have an opportunity to respond to the Carters' Application or present her case as to why she should be able to keep the security deposit.

[11] Ms. Hegeman's argues that it was particularly unfair for the Rental Officer to proceed in her absence because he knew that she wanted to be present at the hearing. She testified that in December 2006, she set up an appointment to meet with him. She said that there were issues between her and the Carters that were unresolved. She expected that the Carters might commence proceedings before the Rental Officer. She said she arranged to meet him, among other reasons, to let him know that if there were such proceedings she wanted to be notified. She also said that she advised the Rental Officer that she would be travelling for work in the upcoming months and told him about various ways she could be contacted. Ms. Hegeman testified that, given what she had told the Rental Officer at that meeting, she was shocked to learn that the hearing had proceeded in her absence.

2) ANALYSIS

[12] While certain aspects of the natural justiceargument are founded on the specific circumstances of this case, a broader statutory interpretation issue is engaged by this appeal, and is potentially dispositive of it. That issue is whether the provision in the *Act* that provides for service of documents by registered mail creates a rebuttable presumption of notice, or a conclusive one.

[13] At earlier stages in these proceedings, the Attorney General of the Northwest Territories filed an Application to be granted Intervenor status so that he could present submissions on the statutory interpretation issue. The Attorney General invoked his general responsibilities under the *Department of Justice Act*, R.S.N.W.T. 1988, c.97, and the importance of the interpretation issue to the daily operations of the office of the Rental Officer. The Attorney General also argued that because the Carters were not represented by counsel, his intervention was necessary to ensure that full legal argument be presented to the Court on this issue.

[14] The Attorney General's Application was supported by the Rental Officer and the Carters. It was not opposed by Ms. Hegeman. On April 4, 2008, I allowed the Application.

1. Interpretation of Subsection 71(2) of the *Act*;

[15] Section 71 of the *Act* sets out how service of notices, processes and documents can be effected under the *Act.* Subsections (1) and (2) are the parts of section 71 that are engaged in this case:

> 71.(1) Subject to subsection (3), any notice, process or document to be served by or on a landlord, a tenant or the rental officer may be served by personal delivery or by registered mail to the landlord at the address given in the tenancy agreement or mailed to the tenant at the address of the rental premises and to the rental officer at the address of the rental officer.
>
> (2) A notice, process or document sent by registered mail shall be deemed to have been served on the 7th day after the date of mailing.
>
> (...)

[16] This provision makes it plain that the Legislature intended to provide for different methods of service in the context of this *Act*. Service by registered mail is one of those methods. What is less clear is the effect that Subsection 71(2) was intended to have.

[17] The Attorney General argues that Subsection 71(2) creates an irrebutable or conclusive presumption of notice, meaning that if it is established that a person has been served by registered mail, that person cannot later claim a remedy based on lack of notice. The Attorney General argues that Subsection 71(2) creates a legal fiction whereby a person served by registered mail is to be irrevocably considered as having received notice, irrespective of whether notice has in fact been received. Under that interpretation, even if a person can establish beyond any doubt that they did not receive the documents, that person has no recourse.

[18] The Attorney General acknowledgesthat this interpretationcan lead to breaches of the principle of natural justice requiring that a person whose rights are affectedby a decision have an opportunity to be heard before the decision is made. But the Attorney General points out that it is within the Legislature's powers to set aside common law rules, including rules of natural justice. He argues that this is precisely what the Legislature has done in enacting Subsection 71(2). The Attorney General further argues that in the context of the *Act*, this decision is understandable because a conclusive presumption enables landlords, or tenants, to obtain remedies and move on, without fear that the matter will be revisited later on the basis of lack of notice.

[19] The word "deem" has more than one possible interpretation. As the author E.A. Drieger writes:

> **Use of "deem" (or "consider") to create presumptions.** The purpose of a presumption is to establish something as a fact without the benefit of evidence. Presumptions are rebutted by tendering evidence that tends to show that the presumption is false. If a presumption is not rebuttable in this way, it is indistinguishable from a legal fiction. It is sometimes difficult to determine whether "deem" as used in a particular provision was intended to be rebuttable or conclusive. As Schultz J.A. wrote in *St. Leon Village Consolidated School District* v. *Ronceray*
>
> > In deciding whether (...) The use of the words "deem" or "deemed" establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served

> E.A. Drieger, *Construction of Statutes*, 4th ed., Butterworths, 2002, at 71.

[20] The case of *St. Leon Village Consolidated School District* v. *Ronceray,* referred to in the above-mentioned excerpt, dates back to 1960, but these two possible interpretations of the word "deem" have been acknowledged in more recent cases:

> Use of the word "deem" or "deemed" may establish a conclusive or rebuttable presumption, depending on the context. Where a statute prescribes time limits and consequences follow failure to comply with those limits, "deemed" is generally construed as meaning "adjudged" or "conclusively established". (citations omitted)
>
> *Kizemchuk* v. *Kizemchuk* [2002] O.J. No.2284, at para. 11.

[21] In *Kizemchuk*, the issue arose in the context of landlord tenant legislation. The Court examined the context of the legislation, the purpose of the provision, and concluded that the word "deem" created a conclusive presumption. The provisions that were being considered did not relate to notice. They were designed to prevent challenges to lawfulness of rent and rent increases. It is apparent that this had a considerable bearing on the Court's interpretation of the provision:

> There is nothing in this context that makes a conclusive presumption inappropriate. There are two components to a lawful rent increase: adequate notice and an amount that is not excessive. Section 141 operates as a statutory limitation period which bars any challenge to the notice or the lawfulness of the amount when the rent charged was first charged more than one year previously.
>
> *Kizemchuk* v. *Kizemchuk*, *supra*, at para. 12

[22] One of the factors that has a bearing on how this type of provision is interpreted is the notion of acceptable consequences. The more significant the consequences, the more likely it is that the term will be interpreted as meaning "deemed until the contrary is proven". For example, in the context of expropriation, a provision stating that a notice of expropriation could be served by registered mail and was deemed to be served on the day it was mailed was interpreted as creating a rebuttable presumption only. *Hopper* v. *Municipal District of Foothills* No 31 [1975] 2 W.W.R. 337 (Alta S.C.).

[23] The Attorney General argues that an examination of the *Act* as a whole supports the interpretation that Subsection 71(2) creates a presumption that cannot be rebutted.

First, he points to another provision in the *Act,* Subsection 60(2), that creates a presumption and specifically provides that it can be rebutted. He argues that if the Legislature had intended the presumption in Subsection 71(2) to be rebuttable,similar language would have been used.

[24] I do not find this argument compelling because the word "deem" is not used in Subsection 60(2). That provision uses the word "presumption". In addition, the two provisions arise in completely different contexts: Subsection 60(2) creates a presumption of bad faith in certain circumstances, whereas Subsection 71(2) is concerned with service. Finally, as mentioned at Paragraph 19 and 20, *supra,* there is ample authority to support the notion that a rebuttable presumption can be created by the use of the word "deem", without qualifiers.

[25] The Attorney General also argues that the purpose of the *Act* is to ensure the efficient and expeditious resolution of disputes between landlords and tenants, and that a conclusive presumption serves this purpose. I agree that expeditiousness and efficiency are among the purposes that emerges from the *Act.* It is also true that a conclusive presumption of notice would serve these purposes, as it would limit considerably the availability of appeals based on lack of notice. Under that type of regime, fewer decisions would be subject to appellate review, and fewer cases would have the potential of lingering on for months and months after the relevant events, as this one unfortunately has.

[26] But expeditiousness is not the only consideration that is given importancein the *Act*. The *Act* also reflects concern for fairness and compliancewith the rules of natural justice. Section 75 of the *Act* makes this plain:

> 75. A rental officer shall adopt the most expeditious method of determining the questions arising in any proceedings and ensure that the rules of natural justice are followed.

[27] I find it difficult to accept that the Legislature could have intended the rules of natural justice to be followed by a Rental Officer during a hearing, while at the same time potentially eliminating, through a conclusive presumption of notice, one of the most fundamental rules of natural justice, namely, the right for all parties to be heard.

[28] Service, after all, is a means to an end. The point of service is ensuring that people whose rights may be affected by a proceeding are aware of it. Section 77 of the *Act* requires that parties be notified when a hearing is to be held. It would seem

that the legislative intent is that those whose rights will potentially be affected be aware that a hearing has been scheduled. This suggests, contrary to what the Attorney General argues, that the Legislature did not intend to eliminate that aspect of natural justice from these types of proceedings.

[29] For those reasons, I conclude that Subsection 71(2) creates a rebuttable presumption of notice, and not a conclusive one.

2. Whether a re-hearing should be ordered

[30] My conclusion on the statutory interpretation issue does not necessarily mean that this appeal should be allowed. Not every person who appeals a decision and establishes that they did not have notice is entitled to a re-hearing, far from it. Under section 89 of the *Act*, the decision to allow or not an appeal is discretionary. A Court may be disinclined, for example, to order a re-hearing if there is no evidence to suggest that the person who appeals on the basis of lack of notice would have had an arguable case to present at the hearing in any event.

[31] It is obvious from the evidence adduced by Ms. Hegeman that she disputes the version of events presented by the Carters at the hearing. She would have presented a different version of events had she been in attendance. Ms. Hegeman alleges things that may have had an impact on the Rental Officer's decision to order the return of the security deposit.

[32] The Carters argues that Ms. Hegeman's appeal should be dismissed in any event because she did not pursue this matter diligently and there have been unreasonable delays as a result. They argue that Ms. Hegeman is an experienced landlord who should be well versed in the procedures and mechanisms provided for in the *Act;* that Ms. Hegeman had an onus, at the outset, to take the proper steps under the *Act* if she thought she should be permitted to keep the security deposit; and that Ms. Hegeman was not diligent in advancing her appeal in this Court.

[33] I agree with the Carters that this appeal was not advanced diligently by Ms. Hegeman. On the other hand, the evidence adduced on this appeal suggests that even before the Carters' Application was filed, Ms. Hegeman had taken certain steps in the hopes of being kept informed if proceedings were undertaken at the office of the Rental Officer. That evidence has to be considered as well.

[34] It is extremely unfortunate that this appeal was heard over a year after the decision appealed from was made. There were many contributing factors to this, and none of them were the Carters' doing. The delay before the appeal proceeded was inordinate. However, under the circumstances, I do not think that delay alone is a reason to dismiss Ms. Hegeman's appeal.

3. Natural justice issues arising from Ms. Hegeman's meeting with Rental Officer in December 2006

[35] Ms. Hegeman's submissions at the hearing of the appeal were focused on the natural justice issues arising from her December2006 meeting with the Rental Officer. I do not need to engage in a more detailed analysis of the doctrine of legitimate expectation and other natural justice considerations that were referred to during those submissions.

[36] I do want to comment briefly, however, on what my decision on the statutory interpretation issue means (and does not mean) to the daily practices of the Rental Officer in holding hearings.

[37] As I have already alluded to, the *Act* provides for various methods of service, and service by registered mail is one of them. Generally speaking, once it is established that a person has been served with a Notice of Attendance by registered mail, the Rental Officer is entitled to presume, on the seventh day after the date of mailing, that the person has received notice. That is the effect of the deeming provision in Subsection 71(2).

[38] That this presumption can be rebutted simply means that if the Rental Officer decides to proceed under those circumstances, he does so at the risk, which may often be a remote risk, that the party who did not appear did not in fact receive notice and may later raise this on appeal. The risk is somewhat heightened if there is no indication that the person picked up the registered mail at the post office. It is even greater if the Rental Officer has information suggesting that a party did not receive the notice, or may have been prevented from attending the hearing. The Rental Officer ought to be especially cautious where the absent party has manifested an intention or interest in taking part in the proceedings.

[39] There are circumstances where it may be prudent to make further inquires before proceeding in the absence of a party who has been served by registered mail,

even though that is a valid method of service under the *Act*. This is not an area that lends itself to hard and fast rules. Each situation must be assessed on its own facts by the Rental Officer. The various objectives of the *Act* must be balanced. One the one hand, these types of proceedings are meant to be efficient and expeditious. It is not acceptable that they should grind to a halt because a party is stalling, negligent, or attempting to avoid dealing with the matter. It may be that it will be appropriate, in a large number of cases, to proceed in the absence of a party who has been served by registered mail. On the other hand, the *Act* provides that the rules of natural justice apply to proceedings before the Rental Officer and those rules may, in some cases, require that further inquiries be made before proceedings in the absence of one of the parties. These situations should be approached on a case by case basis.

3) CONCLUSION

[40] For these reasons, I have concluded that Ms. Hegeman's appeal should be allowed and the matter remitted for a re-hearing.

[41] Both the Rental Officer and Ms. Hegeman take the position that a re-hearing should not proceed before Mr. Logsdon, the Rental Officer who presided over the first hearing, because the evidence adduced on this appeal and some of the submissions made raise issues of apprehended or actual bias. I agree that under the circumstances, it is preferable that Mr. Logsdon not hear this matter.

[42] This, counsel advised, presents somewhat of a problem, in that Mr. Logsdon is the only Rental Officer currently appointed under the *Act*. I do not think this is an insurmountable problem. Section 72 of the *Act* contemplates the appointment of a rental office "for the Territories or a specific area in the Territories". The provisions of the *Act* that deal with the powers of a rental officer refer to "a" rental officer, and not "the" rental officer. There is nothing in the *Act* that seems to precludes the appointment of more than one rental officers. Hopefully an appointment can be effected in short order so that this case can proceed to a re-hearing and the issues between the parties can be adjudicated upon.

[43] I hereby direct the following:

1. There shall be a re-hearing of Application #10-9458 filed with the Office of the Rental Officer;

2. The re-hearing shall not proceed before Hal Logsdon;

3. All parties shall be served personally with a Notice of Attendance for the re-hearing at least fourteen days before its scheduled date.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
14th day of April 2008

Counsel for the Applicant: Douglas G. McNiven
Tracy Carter, appearing on behalf of herself and Jack Carter
Counsel for Hal Logsdon: Cayley Jane Thomas
Counsel for Attorney General: Darren Pickup

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