Yellowknife Housing Authority v. Bisson and Bisson
2009 NWTSC 33

S-1-CV-2009000041

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

YELLOWKNIFE HOUSING AUTHORITY

Applicant/Landlord

- and -

ROGER BISSON and LISA BISSON

Respondent/Tenant

Transcript of Decision on Chambers Application
delivered by the Honourable Justice L.A. Charbonneau,
sitting at Yellowknife, in the Northwest Territories,
on May 1st, A.D. 2009. (Digitally Recorded and
Stenographically Transcribed)

APPEARANCES:

Mr. S. Mansell: Counsel for the Applicant/Landlord

Mr. D.P. Large, Q.C.: Counsel for the Respondent/Tenant

THE COURT: The notice of motion that is before me was filed by the Applicants and it seeks a rehearing, as well as a stay of execution on an eviction order that was issued by this Court on April 3rd, 2009. That order declared that the tenancy agreement between the Applicants and their landlord was terminated as of February 28th and ordered their eviction on or after April 17th.

So this notice of motion was filed April 20th. It is supported by an affidavit sworn by one of the Applicants, who deposes that he only became aware of the eviction issue on April 17th when he was served with the eviction order. His affidavit includes statements that he has made recent payments towards the arrears. He attaches receipts to substantiate this. He deposes about difficult personal circumstances that he and his wife face, about his concerns about having to move out of the rental premises, and, importantly, for the purposes of this application, he deposes that he never got notice of the April 3rd court date, which was the date of the hearing that led to the eviction order being made.

The motion was before the Court last week, on April 24th, and the presiding Judge at that

point expressed some concern about whether this Court had jurisdiction to entertain the relief that was sought, suggested that the jurisdiction would exist in the event that the matter was appealed, but that there may not be any jurisdiction for a Judge of this Court to reopen a matter already decided by this Court or to stay an order made by another Judge of this Court. So we are here today because counsel asked, and were granted, an opportunity to research the point further.

As I said at the outset, I have reviewed the cases that were filed by the Applicants, and Mr. Large has referred to them in his submissions. The first two are dated cases, but they do deal with the Court's ability to control its own process and to take certain steps to rectify mistakes or grave errors that might have been made in the making of a decision. I do not find these cases apply to the circumstances here, because I do not find that the case has been made out that the order that was made on April 3rd was the result of an abuse of the Court's process or of any such types of irregularities that are alluded to in those two decisions.

The incontrovertible fact is that the Residential Tenancies Act does provide that

service by registered mail – and in some instances even service by regular mail – is an acceptable mode of service under the Act. That section reads at the first paragraph that:

> ... 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.

So the Legislature has chosen to make this an acceptable mode of service under the Act. The Applicants argue that because the normal rule under the Rules of Court is that Originating Notices must be served personally and because court pleadings are a significant document, they ought to have been included specifically in section 71 if they were to be part of those things that could be served by registered mail or by mail.

I considered this submission, but I find that in the context of the Act the section is worded in a very broad way and seems to be

intended to allow all the processes under the Act to be served in this fashion. Looking at the French version, actually, of that section, the words that are used are very broad. It talks about "actes de procédure", and "actes de procédure" is the French term for pleadings.

So if I look at both versions, I see that the language is very broad, and in the context I am unable to agree with the Applicants that an Originating Notice is excluded from this mode of service. Then, as Mr. Large fairly conceded, that being the case, the Act does have precedence over the Rules, and so it was proper service - even if it was service of an Originating Notice - to proceed the way that was used in this case.

When the matter was before the Court on April 3rd there was affidavit material setting out how service had been effected, and reliance was placed on paragraph 2 of section 71, which I have already read during submissions, and is the deeming provision that says that when something is sent by registered mail, it is deemed to have been served on the 7th day after the date of the mailing.

So there was all this evidence before the Court. Of course, the Applicants have also filed a case of this Court that says that these

proceedings should not be taken ex parte, and I certainly agree with that decision, but a proceeding that has been served by way of a legitimate means of service provided for in an Act cannot be characterized as ex parte. Of course, the affidavit of the Applicant is to the effect – and it is not contradicted – that he never did receive the notice that was mailed to him by registered mail, and that seems to be confirmed by the fact that counsel for the Respondent has indicated that the materials were eventually returned to his client after the hearing date.

So the claim that is being made here about lack of knowledge is very analogous to the one that was made in the case of Hegeman v. Carter, which has been filed and referred to in submissions. That was a case where a hearing had proceeded in front of a Rental Officer on the basis that the landlord had been served by registered mail. The landlord did not appear at the hearing. The hearing proceeded and a decision was made by the Rental Officer that required the landlord to return the security deposit to the tenants. The landlord later appealed that decision and claimed and produced evidence that she had never, in fact, received

notice of the hearing, and, much like the Applicants in this case, she sought a rehearing so that she could present the arguments that she would have presented had she had notice of the hearing.

The Court ruled in that case that the presumption in section 71(2) is rebuttable and that a person can come forward and say, "Even though this is an acceptable method of service, in my case I did not know. I did not get these documents."

Also, in Hegeman v. Carter the Court ultimately allowed Mrs. Hegeman's appeal and granted her a rehearing so that she would be able to go before a different Rental Officer and attempt to make her case.

But the big difference, as I have already mentioned during submissions, between Hegeman v. Carter and the situation in this case is that decision was in the context of an appeal; an appeal of a Rental Officer's decision, granted, but still an appeal, a review process, and this case is not being brought forward as an appeal.

On an appeal, a person may well seek to have an order set aside on the basis that they did have a case to present and never got a chance to present it. That would be for the reviewing

Court to decide. But it is a different matter altogether to go to the same decision making level and try to get a decision that has been already made stayed and also to get a rehearing in front of the same level of decision making to have the matter reopened and revisited.

I think the doctrine that applies here is the doctrine of res judicata. This Court made a decision on this case, and, if there are reasons to revisit that, it cannot be coming back before the same Court. There are areas of the law where it is more flexible, where it is more possible to go back and demonstrate that there is a change in circumstances or circumstances that were unknown at the time the original order was made. The area of family law is one where that is certainly more frequently done than many others.

But, as I have said, in this particular circumstance I do not think that I can find anything that would give -- and I certainly agree with Mr. Large. It would be a far more expeditious and simple way for the Applicants to have a chance to make their case, and some of the things in the affidavit material -- which at this point is not contested and has not been tested through cross-examination, but some of the things that are in their affidavits do present a

sympathetic case and some of the difficult circumstances that they have faced.

But, in addition to the materials that were filed by the Applicants, I have reviewed in detail the Residential Tenancies Act, the Rules of Court, the Judicature Act, and I am unable to find anything in any of these statutes that would give a Judge of this Court the authority to do any of the things that are sought as relief in this notice of motion. I do not find anything that would give me the jurisdiction to order a rehearing in a matter already decided by this Court, nor do I see anything that would give me jurisdiction to direct a stay of an order made by this Court. In my view, these are remedies that, if they are to be pursued, must be pursued within the purview of an appeal of the April 3rd order.

So, counsel, for those reasons, I am dismissing the application. Under the circumstances, there will be no order as to costs. Each party will bear their own.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules.

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Jill MacDonald, RMR
Court Reporter