SUPREME COURT OF YUKON

Citation: *Mendelsohn* v. *Clunies-Ross*, 2009 YKSC 25 Date: 20090327
S.C. No. 08-A0117
Registry: Whitehorse

Between:

MARK MENDELSOHN

Petitioner

And

NORMAN CLUNIES-ROSS

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Colleen Harrington — Counsel for the Petitioner
Norman Clunies-Ross — Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a dispute between a landlord (Mr. Clunies-Ross) and a tenant (Mr. Mendelsohn), in relation to a mobile home. The landlord has a mobile home park, and the tenant owns a mobile home and rents a mobile home pad from the landlord. The landlord applied in Territorial Court to terminate the tenancy for continued breaches of a "no pet" rule. The tenant has a dog.

[2] Territorial Court Judge Roy heard the first application on July 28, 2008 and dismissed the landlord's application under the no pet rule, but suggested to the landlord that he could simply give one month's notice to terminate the mobile home tenancy.

[3] Territorial Court Judge Cozens heard the landlord's second application on September 5, 2008, and dismissed the 30-day notice application but terminated the mobile home tenancy under the no pet rule.

[4] The tenant applies to this Court to set aside the decision of Judge Cozens on the ground that he purported to decide the landlord's application on the substantial breach of the no pet rule; the issue which had already been decided and dismissed by Judge Roy. There is no application to set aside Judge Roy's decision. There is no appeal provision in the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, (the "*Act*").

Law of Mobile Home Tenancies

[5] I am going to begin by summarizing the law of mobile home tenancies because it will clarify the issues decided in the Territorial Court. I must stress that the law of mobile home tenancy agreements is different in one significant respect from the law that applies to regular residential tenancy agreements: there is a 12-month notice requirement to terminate a mobile home tenancy agreement without cause. This is because of the fact that the mobile home must be sold or removed from the land upon termination and located elsewhere, a somewhat expensive undertaking.

[6] The law for mobile home tenancies as it relates to this application is found in the *Act*, as follows:

1. the landlord is permitted to make rules concerning the tenancy both before and after the tenancy agreement is made. When they are made after the tenancy agreement they must be reasonable and conform to the purposes set out in the *Act* (ss.77(1) and (2));

2. rules that are made after the tenancy agreement is made must be clear, apply to all tenants, not substantively modify the tenancy agreement and the tenant must be give reasonable notice of the rule in writing (s. 77(3));
3. unlike the usual one month's notice to terminate a monthly residential tenancy, the landlord must give 12 months' notice to terminate a mobile home tenancy without cause (s. 90(3));
4. in addition, a mobile home tenancy cannot be terminated in the months of December, January or February (s. 90(4));
5. however, when there is a "substantial breach" of a tenancy agreement, the landlord may give 14 days' notice to terminate or apply to a judge for an order terminating the tenancy agreement (s. 93(1));
6. "substantial breach" includes specified tenant obligations in s. 76(2) or a series of breaches, the cumulative effect of which is substantial (s. 93(2)).

Judge Roy's Decision

[7] On July 28, 2008, Judge Roy found that the landlord had written the tenant in April 2008, giving the tenant until May 15, 2008 to remove all dogs from his residence. The tenant did not comply. The landlord wrote the tenant again on June 24, 2008, to inform the tenant that the mobile home tenancy would be terminated in 14 days. When the tenant refused to vacate, the landlord applied to Judge Roy to order the termination of the tenancy under s. 93(1)(a); the substantive breach provision.

[8] After hearing the affirmed evidence of the landlord and the tenant, Judge Roy found that the tenancy agreement concerning the mobile home was not signed by either

the landlord or the tenant. He also found that Schedule “B”, the Rules and Regulations, had not been signed. Paragraphs 11 and 12 of the Rules and Regulations read:

> “11. The Tenant acknowledges that no pets are allowed unless previous management granted permission prior to January 1, 1988.
>
> 12. The Tenant acknowledges that noisy or unruly pets or those that cause complaints will not be allowed to remain. If the Tenant does not cooperate, an eviction notice will follow.”

[9] Judge Roy dismissed the landlord’s application on the issue of the tenant’s dog. Unfortunately, the clerk’s notes indicate simply that “the tenant does not have to leave but can serve a new notice without cause for terminating the tenancy.” The Court Order of Judge Roy filed November 24, 2008, did not reveal the basis for allowing the tenant to stay at the premises. However, the Reasons for Judgment of Judge Roy, transcribed at the request of this Court on January 12, 2009, specifically denied the application as it related to the dog issue at paras. 8 and 9 as follows:

> When there is a monthly rent paid we consider that a verbal lease on a monthly basis and, as such, can be terminated by a month notice. So that is what I have said this morning, that it was a fragile situation for the tenant and for the landlord, because with a month notice the lease can be terminated. So this is why I invited you to try to find an agreement, because on the specific reason regarding dogs in the schedule, it is mentioned, this specific condition, but it has never been signed, this Schedule “B”, by neither party. So I cannot receive your application, sir, on the specific condition regarding dogs, even though it has been recognized by the tenant that he has got the dog. He is asking, well, to be treated fairly. I will not comment on that. I will just mention that there are other dogs; that is what he mentioned, but I will not go further on this specific condition regarding dogs.
>
> So while on the specific application to terminate the lease because of dogs, if the schedule would have been signed by the tenant the situation would have been different regarding the same facts concerning the dogs. It has not been signed,

> but there is a lease, though. There is a lease even though it is not written, and this lease is a monthly lease that can be terminated with a month notice. So you understand that this is a fragile situation and if the landlord decides to give you a notice today, the lease will be terminated in a month, and that in a month, you will have to go elsewhere.

[10] Judge Roy's ruling is contrary to the 12-month notice provision for terminating mobile home tenancies found in s. 90(3) of the *Act*.

[11] There is no provision in the *Act* to appeal Judge Roy's decision nor is there any provision that relates specifically to judicial review.

Judge Cozens' Decision

[12] On September 5, 2008, Judge Cozens heard the application of the landlord to terminate the mobile home tenancy on one month's notice and on the breach of the pet rule. The landlord's affidavit simply repeated his affidavit filed before Judge Roy and included the following at para. 6:

> THAT as shown on Exhibit "B" throughout the term of this tenancy the Tenant has persistently defaulted in abiding by Prospect Trailer Park Ltd. Rules and Regulations regarding dogs.

[13] The transcript of the hearing indicates that there was no sworn evidence given but rather oral submissions were made by the landlord, tenant and a friend of the tenant on the subject of the dog and the no pet rule. Judge Cozens did not have the benefit of Judge Roy's Order filed November 24, 2008, or his Reasons for Judgment filed January 12, 2009.

[14] Judge Cozens concluded that the tenant had reasonable notice that he could not have a dog and decided that the fact that the tenant had a dog constituted a substantial breach of the mobile home tenancy.

[15] Judge Cozens terminated the tenancy as of September 30, 2008. In response to the tenant's submission that one year's notice was required, he stated:

> Well, it is irrelevant if the termination is simply going to be on the basis of notice, but frankly I am looking at – we have two applications. One application was here on the 28th; it was dealing with a substantial breach. The evidence we got today, the position of the landlord is the whole reason he was told on the 28th to go and bring back another notice. But frankly, the agreement itself is binding even though it is not signed, and I expect that was part of the basis for the July 28th decision, it is the uncertainty about your awareness or your knowledge of the agreement. We are dealing with a substantial breach of the tenancy agreement. That is the basis.
>
> The *Landlord and Tenant Act* is relevant if he were just to say, "Oh, I just want him out because I want my relatives to move into the place." Well, that is a year, right, and there is no way around that year in that kind of a case. But he is alleging, or he brought a position, and the evidence is clear that there has been a fundamental breach of the tenancy agreement which allows him, on 14 days notice, to terminate the tenancy. You have had more than 14 days notice. I could arguably have terminated the tenancy tomorrow but the landlord is allowing to the end of the month, at least."

[16] There is no doubt that Judge Cozens made his decision on the substantial breach issue based on the no pet rule which had already been decided by Judge Roy.

The Law of Judicial Review

[17] The tenant applied in this court to set aside the judgment of Cozens T.C.J. on the basis that it is *res judicata*, which means that the issue of substantial breach of the mobile home tenancy agreement had already been litigated and decided by Judge Roy. It was final and could not be decided again by Judge Cozens. I might add that Judge Cozens did not hear any sworn or affirmed evidence, although that is not the basis on which the application has been brought.

[18] There is no appeal provision in the *Act* from the decision of Judge Cozens. The tenant comes before this Court by way of an application for *certiorari*, asking this Court to set aside Judge Cozens' decision because he did not have the jurisdiction to hear an application already heard and decided by Judge Roy.

[19] It is well established that judges of the Supreme Court of Yukon, appointed under s. 96 of the *Constitution Act, 1867*, have the jurisdiction to hear applications of *certiorari* to review decisions of Territorial Court judges. See *R.* v. *Skogman*, [1984] 2 S.C.R. 93 and *R.* v. *Russell*, 2001 SCC 53.

[20] In *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada discussed the use of estoppel to preclude an unsuccessful party from relitigating a matter in the courts that had already been litigated before an administrative tribunal. The principle that had been developed to deal with a situation of relitigation is the doctrine of estoppel, which has two forms: cause of action estoppel and issue estoppel. The doctrine was originally established to deal with prior court proceedings and has subsequently been extended to apply to prior administrative board hearings as in *Danyluk* v. *Ainsworth Technologies Inc.*, at paras. 20 and 21.

[21] In my view, the case at bar involves a question of issue estoppel; the precise issue being whether the landlord could terminate the mobile home tenancy on the ground that the tenant was in substantial breach of the no pet rule.

[22] The preconditions for the application of issue estoppel were set out by Dickson J. in *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,

> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[23] Under the first question as to whether the same question has been decided, Binnie J. stated at para. 54 of *Danyluk* v. *Ainsworth Technologies Inc*, *supra*:

> … Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court of tribunal or competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[24] However, Binnie J. also note at para. 42 that, even though the preconditions to estoppel were met, a court may still exercise a discretion to refuse to apply estoppel. The court found the discretion to be "very limited" in the context of court proceedings but necessarily broader in relation to decisions of administrative tribunals. As stated by Finch J.A., as he then was, in *British Columbia (Minister of Forests)* v. *Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.) at para 32:

> … The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

[25] The list of factors to consider in the exercise of this discretion is open and I have been guided by those listed in *R.* v. *Consolidated Maybrun Mines Ltd.,* [1998] 1 S.C.R. 706 and *Minott* v. *O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.). In the latter case, Laskin J.A. discussed the public policy issue at para. 50:

> Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[26] Cases where issue estoppel may be refused require “special circumstances”, which include a change in the law or the availability of further relevant material which could not by reasonable diligence be adduced in the first proceeding. It may also work an injustice to apply issue estoppel based on a decision of an administrative tribunal in a civil action for wrongful dismissal.

DECISION

[27] I have concluded that the preconditions for the application of issue estoppel have been met in this case. Both Judge Roy and Judge Cozens decided the same issue of whether there was a substantial breach of the mobile home tenancy based on the no pet rule. Judge Roy made the first decision dismissing the landlord’s application and Judge Cozens simply heard a relitigation, perhaps on the misunderstanding that Judge Roy had not already decided the issue. The record available to Judge Cozens was not at all clear about the basis of Judge Roy’s decision.

[28] As to the second precondition, I am of the view that Judge Roy’s decision was final. The *Act* does not provide any appeal, presumably to avoid inevitable delays, when both the landlord and tenant seek a speedy and inexpensive determination of their rights under the *Act.* That unfortunately has not been the case here because of the confusion and delay caused by the second judgment.

[29] The final precondition is met because the parties are exactly the same in both hearings and decisions.

[30] I have decided that it is appropriate to apply the common law rule of issue estoppel to set aside the decision of Judge Cozens. There are no special circumstances that would suggest otherwise. The exercise of discretion is much narrower when there are two court hearings on the same issue. The second hearing should have been simply to confirm the issue of the length of notice to the tenant.

[31] I therefore order that the Order, Amended Order and Warrant of Judge Cozens, all dated September 5, 2008, be set aside. The further Order and Warrant of Judge Cozens dated October 28, 2008, shall also be set aside.

[32] The landlord did not wish to retain a lawyer to act on his behalf in this matter, despite my encouragement that he do so. I want to make it clear that this decision should not be interpreted as a rejection of landlord rules made under s. 77 of the *Act.* Judge Roy decided on the evidence that the no pet rule did not apply to this tenant in the circumstances of no signed lease or rules.

VEALE J.