SUPREME COURT OF THE YUKON

Citation: *Nicloux* v. *Whitehorse Housing Authority* 2009 YKSC 45

Date: 20090528
S.C. No. 09-A0010
Registry: Whitehorse

BETWEEN

KAREN NICLOUX

PLAINTIFF

AND

WHITEHORSE HOUSING AUTHORITY
DIRECTOR OF CRIME PREVENTION AND POLICING

DEFENDANTS

Before: Mr. Justice E.D. Johnson

Appearances:

Colleen Harrington: Counsel for Plaintiff

Penelope Gawn: Counsel for Defendants

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The Applicant Plaintiff ("tenant") resides in housing unit 7-2 Thompson Road ("unit") in the City of Whitehorse leased from the Defendant Whitehorse Housing Authority ("landlord"). The Defendant Director of Crime Prevention and Policing ("Director") is responsible for the administration of the *Safer Communities And Neighborhoods Act,* S.Y. 2006 c.7. ("*Act*")

[2] In February and March 2009 the Director received complaints from one confidential informant who alleged illegal drug activities were occurring in the rental unit occupied by the tenant.

[3] Pursuant to section 3 of the *Act* the Director initiated an investigation that resulted in the landlord preparing a written notice of termination of the lease effective April 20, 2009. The Director served the written notice of termination on the tenant on April 9, 2009.

[4] In this application the tenant seeks an order rescinding the notice of termination of the landlord pursuant to section 13 (10) of the *Act*.

[5] The Director opposes the application. Legal counsel employed by the Government of Yukon appeared on behalf of the landlord and the Director.

[6] The *Act* is relatively new legislation that was proclaimed in force on November 27th, 2006. Similar legislation was proclaimed in Manitoba on February 19, 2002, in Saskatchewan on November 15th, 2004 and on January 7, 2007 in Nova Scotia. Four decisions from Saskatchewan and one from Nova Scotia constitute the only reported interpretation and application of the legislation.

[7] This is the first contested application under the legislation in this court.

[8] The application was heard on short notice because of the pending termination of the lease on April 20. Both parties filed affidavits and I granted an interim order postponing the termination of the lease for 60 days to allow time to file this judgment.

II. ONUS OF PROOF

[9] This is the first case under this type of legislation where the tenant is the applicant. In the Nova Scotia and Saskatchewan cases the Director applied for a community safety order.

[10] The legislation of the other jurisdictions has sections authorizing a party to apply to vary a community safety order. However, the Yukon legislation is unique. It includes the variation section found in the other jurisdictions but also includes the following subsection:

> "(2) If the complaint is resolved by agreement or informal action that involves terminating a tenancy agreement or a lease, then despite anything in the lease or tenancy agreement or in any Act
> (a) the landlord of the property may terminate the tenancy agreement or lease by giving five days notice of termination to the tenant stating
> (i) the effective date of the termination,
> (ii) that the lease or tenancy agreement is terminated under this Part, and
> (iii) the specified use that is the reason for the termination under this Part;
> (b) the Director may, at the request of the landlord, serve the notice of termination;
> and
> (c) the notice of termination may be served in any manner by which a community safety order may be served."

[11] This subsection provides an alternative route where the landlord and Director may engage in the informal action of terminating the lease without the supervision of the court.

[12] To provide some protection to the tenant the legislature included section 13 (10) that authorizes the tenant to apply to a judge for relief from the termination of the lease. It states:

> “(10) If the complaint under section 2 is resolved by agreement or informal action that involves terminating a tenancy agreement or a lease otherwise than through a court order under this Part or the consent of the resident, a resident who is affected by the termination may apply to the court on notice to the landlord and the Director for an order to rescind the termination of the tenancy agreement or lease and to restore the tenancy agreement or lease with the resident as tenant.”

[13] Subsection 13 (11) authorizes the court to make the order rescinding the termination only on the same grounds as it could vary an existing community safety order under subsection 13(6) taking into account the additional factors set out in subsection 13(8).

[14] Subsection 13(6) authorizes the court to vary a community safety order and states:

> “(6) The court may make an order varying a community safety order or an order under section 8 if it is satisfied
> (a) that the applicant is a resident;
> (b) that neither the resident nor any member of his or her household for whom he or she is seeking a variation caused or contributed to any of the activities in respect of which the order was made;
> (c) that no person who caused or contributed to any of the activities is still present at or occupying the property;
> (d) that the resident or a member of his or her household for whom he or she is seeking a variation order will suffer undue hardship if the order is not varied;
> (e) that the resident will prevent or assist the Director in preventing any specified use of the property by any person; and
> (f) if the order was made under section 8, that neither the resident nor any member of his or her household for whom he or she is seeking a variation order was an occupant of the property when the community safety order was made.”

[15] Subsection 13(8) is also unique to the Yukon and states:

> "(8) The court may, in addition to any other factor that it considers relevant, consider the following factors
> (a) whether the Respondent will suffer undue hardship if the requested order is made;
> (b) whether there is a tenancy agreement between the resident and the Respondent, or
> whether there was when the resident was required to vacate the property;
> (c) whether the Respondent is opposed to the requested order, if the order would authorize a resident, who does not or did not have a tenancy agreement, to re-enter and re-occupy the property."

[16] One of the issues that emerged in argument concerned the onus of proof. The tenant argued that the Director should have applied for a community safety order because of the reliance on evidence of guilt by association. The affidavit evidence implicates the tenant because a person with an alleged history of drug dealing was seen in her housing unit. The tenant argues that her *Charter* rights of association may have been breached and yet she is being required to justify her action rather the Director who chose to avoid court scrutiny.

[17] The tenant argues that if this interpretation of the *Act* is upheld the onus of proof that is on the Director in an application for a community safety order will be shifted to the tenant. If this interpretation had been intended by the legislature, the *Act* would have been more specific. The ambiguity should be interpreted in favor of the tenant.

[18] The Director argues that the court is restricted to considering subsections 13 (6) and (8) dealing with variation of a community safety order and that the tenant must prove compliance with items (a) through (e) of subsection 13 (6). This would place the onus of proof on the tenant rather than the Director.

[19] I am satisfied that the interpretation suggested by the Director cannot have been intended by the legislature. In my view there is a gap in the legislation about this

alternative route. The court is directed to analyze the evidence as if it was considering an application to vary a community safety order even though one was never made. This interpretation would lead to the absurd result of permitting the Director to avoid judicial scrutiny and shift the burden of proof to the tenant despite the lack of specific wording to this effect in the *Act*.

[20] The absurdity is even more evident because the tenant is unable to cross-examine the confidential informant whose identity is protected by section 32 of the *Act*.

[21] The *Act* authorizes the erosion or short-circuiting of the rights of tenants under the *Landlord and Tenant Act* because of the perceived higher social value of preventing drug trafficking and other illegal activities from endangering residential neighborhoods. It is because of this impact on the rights of tenants that the legislature requires the Director to satisfy a court under 6 that the:

> "(a) activities have been occurring on or near the property that give rise to a reasonable inference that it is being habitually used for a specified use; and
> (b) the community or neighbourhood is adversely affected by the activities."

[22] As held by G.M. Warner J. in *Nova Scotia (Public Safety, Director) v. Cochrane* [2008] N.S.J. No. 73, 2008 NSSC 60 the burden of proof in an application under this section is on a balance of probabilities. He stated:

> "[48] The burden of proof as to what gives rise to a reasonable inference is contextual. I know of no burden in any civil context that is not at least a burden of establishing the facts on a balance of probabilities. The nature of the remedies in the Act are not dissimilar to those associated with an injunction, or equitable remedies in general. I apply that burden in this case."

[23] It is logical that when the tenant seeks to vary the public safety order the onus should be on the tenant. The evidence has been judicially considered and presumably the tenant has taken some steps to address the problems that resulted in the granting of the order. However it is illogical to place the burden of proof on the tenant when there has been no public safety order made. To proceed in this fashion the court would have to assume an order would have been granted if the Director had applied for an order. Taking this approach would subvert the whole purpose of section 6 and the remove the burden of proof on the Director.

[24] Accordingly, I believe a two-step process should be followed. First, the court should consider if the evidence tendered by the Director satisfies section 6 on a balance of probabilities. Second, if section 6 is satisfied, the court should then consider if the evidence of the tenant satisfies subsection 13(6) and (8) on a balance of probabilities.

III. EVIDENCE

[25] The specified activity as defined in section 1(1) of the *Act* and alleged by the Director was the use and trafficking in a controlled substance as defined in the *Controlled Drugs and Substances Act* (Canada).

[26] Kenneth Putnam (“Putnam”), an investigator employed by the Government of Yukon deposed that the Government created a unit to enforce the *Act* known as the Safer Communities and Neighborhoods Unit (“SCAN Unit”) consisting of himself, James King (“King”) and Ryan Leef (“Leef”). Corrine Carvill (“Carvill”) is the registrar of the *Act*. Putnam is a former RCMP officer with 33 years experience as a front-line officer.

[27] Carvill told Putnam that she received a complaint on February 26, 2009 from a confidential informant that the tenant was “dealing crack” at the unit. The informant

indicated that the tenant “is up all night and sleeps all day” and that she had visitors mostly on the weekend. The informant also indicated that she saw Chris Ouellet (“Ouellet”), a known drug dealer, at the unit three times in the week prior to the complaint.

[28] As a result of this information, on February 27, 2009 the SCAN unit set up a surveillance van near the unit and monitored it until March 1. However, the unit did not accumulate sufficient evidence to proceed to warn or evict the tenant.

[29] Instead Putnam and King met with the tenant on March 4 to discuss their concerns. They told her that they had arrested, evicted and removed Ouellet from a housing unit located at 810 Wheeler. The tenant admitted that Ouellet had visited the unit a few times to see her daughter but had stopped his visits. The investigators warned the tenant that Ouellet would “bring her grief” and that she should consider kicking her daughter out of the unit if she continued to allow Ouellet to visit her. They also told her they would be watching the unit in the future.

[30] On March 30, 2009 Carvill received a second complaint from the same informant that Ouellet was at the unit and that the tenant, not her daughter, was dealing crack cocaine.

[31] On April 1, 2009 the complainant left a recorded message on the SCAN phone that the tenant was “dealing dope” and that they should do a better job of trying to catch her.

[32] The SCAN unit responded to the complaints by setting up the surveillance van near the unit on April 1. They continued the surveillance for the next three days and produced the following log of events as set out in para. 16 of the Putnam affidavit.

> "On April 6, 2009 the surveillance video review at the residence was started with the following results:
>
> > April 1: from 14:20 hours to 19:58 hours for a total of 5 hours and 38 minutes. There were 12 Activities. Five of these Activities were under 15 minutes with an average time being 4.4 minutes.
> > April 2nd: from 08:25 hours to 20:54 hours for a total of 12 hours and 29 minutes. The first Activity on April 2 was at 08:25 hours and the second Activity was not until 12:40 hours. There were 15 Activities in that time period. Six of these Activities were under 15 minutes with the average being 8.6 minutes at the residence.
> > April 3: from 08:00 hours to 11:30 hours for a total of 3 hours 30 minutes. There were three Activities which included a female leaving the property at 09:08 hours. An adult and younger female left at 09:26 hours then returned at 11:30 hours. A female arrived at 11:01 hours and left again at 11:30 hours."

[33] On April 7, 2009 the tenant was arrested by the R.C.M.P. outside 23A Hanna Crescent and charged with possession of cocaine for the purposes of trafficking. She was released on an undertaking containing the standard conditions and was placed on a curfew between 10:30 p.m. and 6:00 a.m.

[34] The Hanna Crescent unit is the home of Hazel Guyett. The police believe that her daughter is a prolific drug user and trafficker.

[35] On April 8 the complainant advised Carvill that four vehicles were parked on the Thompson Road property. She also told Carvill that she saw Rowena Casey at the unit and thought she was living there. The police believe Casey has a drug addiction problem.

[36] On April 8 Wayne Wheeler, the Manager of the Defendant Authority, told Putnam that he had received complaints that "something is going on" at the tenant's unit.

[37] On April 9 Putnam served the notice of termination of the lease on the tenant outside the unit and she drove off. He then knocked on the front door of the unit. Doreen Ouellet, who apparently is connected in some way to Chris Ouellet, answered the door.

[38] Doreen and Chris Ouellet were evicted from a rental unit at 15 Maple Street on February 25, 2009 because of suspected trafficking in crack cocaine from the unit.

[39] Doreen and Chris Ouellet had been previously evicted from a rental unit at 810 Wheeler on July 1, 2008 for suspected illegal drug activities.

[40] On April 15, 2009 Chris Ouellet's probation officer told Putnam that she had denied Ouellet's permission to move into the Thompson Road unit.

[41] As a result of this evidence Putnam believes that the unit is being used for the sale of illegal drugs. He also believes that the surrounding neighborhood is being adversely affected by the illegal drug activity at the unit.

IV. ANALYSIS

[42] There are five reported cases to assist me in deciding whether the evidence submitted by the Director is sufficient to satisfy the onus of proof on a balance of probabilities in the case at bar. They are in chronological order:

(a) *Saskatchewan (Director of Community Operations) v. S.M.M.* [2006] S.J. No. 34, 2006 SKQB 19;
(b) *Saskatchewan (Director of Community Operations) v. Carroll* [2006] S.J. No. 497, 2006 SKQB 360;
(c) *Saskatchewan (Director of Community Operations) v. Li* [2007] S.J. No. 153, 2007 SKQB 114;
(d) *Saskatchewan (Director of Community Operations) v. Mercer* [2007] S.J. No. 390, 2007 SKQB 271;

(e) *Nova Scotia (Public Safety, Director) v. Cochrane* [2008] N.S.J. No. 73, 2008 NSSC 60.

[43] The applications were denied in *S.M.M*. and *Carroll* but granted in the remaining three cases. In *S.M.M.,* McMurtry J. noted that the 14 complaints about noisy parties and frequent visits to the suspect property were neutral about drug activity. The complaints that were consistent with drug activity consisted of the following (at para. 10):

> "* On many occasions visitors openly exchanging money for baggies of marihuana, which is then smoked in front of 2318 Retallack Street;
>
> *Drug paraphernalia (hash pipes and homemade "bongs") found on neighbour's lawns throughout the summer; …
>
> *May 14, 2005-Two teenage boys attended into 2318 Retallack Street and upon leaving minutes later say 'Let's snort it all right now'; …
>
> * August 28, 2005-Witnessed [A. P.] snorting something off of a table top, which also had baggies and razor blades on same;
>
> * September 5, 2005-Strong smell of marihuana from back yard party at 2318 Retallack; …
>
> *September 24, 2005-Another drug transaction occurs on the street, observed by 3 different neighbours;
> *October 19th, 2005-Two teenage boys openly smoking a joint in front yard of 2318 Retallack Street; …
>
> * October 23rd, 2005-[A.P.] and 5 female friends openly smoking a joint at 3:50 p.m., on the front street at 2318 Retallack and are observed openly passing it around between themselves before driving off in [S.M.'s] car; …
>
> * November 4th, 2005-Large party, police called again, kids openly drinking booze and smoking drugs on the front street, passing around joints and carrying baggies."

[44] However, McMurtry J. was concerned because there was insufficient detail in the evidence to establish that the drug activity took place at the residence in question and that the owners participated. He noted that a court should be careful about relying too heavily on the evidence of confidential informants who could not be cross-examined.

[45] In *Carroll*, as in the case at bar, the tenant had been charged with possession for the purpose of trafficking and released on an undertaking. Gerein J. determined that the objectionable activities were not then current in light of undertakings that had been made to the court by the tenant who was occupying the property.

[46] In *Li,* Currie J. granted the application. He noted one of the two tenants of the property had 59 criminal convictions including 12 for drug offences. Further, three of the four persons residing at the property at the time of the application had convictions for drug offences. He inferred the drug activity from these backgrounds and the evidence of investigators who had the property under surveillance for a considerable time. They observed that activities consistent with the sale of drugs from the properties that included a high volume of repetitive vehicular and pedestrian come-and-go traffic. The property also had a large number of visitors, almost all of whom stayed at the property for only a few minutes at a time.

[47] There was similar evidence in *Mercer*. In that case, a convicted drug dealer visited the property frequently and there was a high volume of repetitive short visits by vehicular and pedestrian traffic throughout the day and night.

[48] Finally, in *Cochrane* there was extensive evidence about the activities at a residence that operated a legally sanctioned needle exchange. The evidence included the affidavits of five officers who were cross-examined as well as the viva voce

testimony of another officer and the Director. There was evidence that the tenant kept drugs and drug paraphernalia on the property and that teenagers were exposed to the activity.

[49] In the case at bar the tenant has no criminal record and there is no direct evidence that she possessed or sold drugs at the unit. She was arrested outside 23A Hanna Crescent which is the residence of Hazel Guyett. Putnam alleges that Guyett's daughter is known to police as a prolific drug user and trafficker. While this may be interesting to the police it has nothing to do with the tenant engaging in the prohibited activities at or near the unit.

[50] The evidence that she was selling crack cocaine at the unit came from one confidential informant. He or she was not cross-examined about how they knew the tenant was selling drugs and the evidence carries little weight.

[51] The evidence consistent with possible drug activity is that Doreen Ouellet resided at the unit and that Chris Ouellet visited a few times, coupled with the activity recorded over the three-day period. Ouellet was described as a known drug dealer who had been evicted from other units for dealing in drugs. Although he is alleged to have been on probation there was no criminal record provided.

[52] The regular presence of a person on the property who possesses a criminal record for drug offences coupled with frequent short visits by many people enables a judge to more comfortably draw the inference required under 6(1)(a) of the *Act*. This is what occurred in *Li* and *Mercer*.

[53] While the tenant is charged with possession for the purposes of trafficking off the unit she is presumed to be innocent until convicted. If she is convicted it is more likely in

the future that a judge considering similar evidence of the short visits would draw the inference of drug dealing required under section 6(1)(a).

[54] This evidence of the Director in the case at bar is weak compared to that before the courts in *Mercer*, *Li* and *Cochrane*. I am unable to draw the necessary inference on a balance of probabilities that drug dealing took place at or near the unit.

V. CONCLUSION

[55] If the Director had applied for the order I would have refused to grant it.

[56] In addition there is contrary evidence from the tenant that denies the allegations and provides a believable explanation for the presence of Doreen Ouellet at the unit. If the order had been granted I am satisfied that the tenant has satisfied the requirements of subsection 13(6).

[57] Furthermore there is some evidence of hardship to satisfy subsection 13(8) and the tenant agreed to have her undertaking amended to include a clause prohibiting possession of drugs.

[58] I accordingly grant the application and rescind the notice of termination of the lease.

[59] The short time frame for preparation of the evidence in this application flows from the choice of the Director to use informal action instead of applying for an order. It put the tenant under the immediate threat of eviction and forced this application to proceed on short notice.

[60] An application for an order would have been preferable and would have given the Director sufficient time to prepare affidavits of better quality to substantiate the allegations. There would also have been time to cross-examine the tenant on the

alleged inconsistencies in her affidavit. Hopefully this is how the Director will proceed in the future. If there is a true emergency section 7 is available.

[61] The tenant is awarded party-party costs.

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Johnson J.