

Court of Queen's Bench of Alberta

Citation: Botar v. Mainstreet Equity Corp., 2007 ABQB 608

Date: 20071011
Docket: 0603 15530
Registry: Edmonton

Between:

Andrew S. Botar

Applicant

- and -

Mainstreet Equity Corp.

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee**

[1] This is an appeal of a Master's Order issued on September 19, 2007 arising out of a Special Chambers hearing. The Master directed that Mr. Botar was required to pay Mainstreet Equity Corp. the sum of \$3,150 for rental arrears for the period January 1, 2007 to September 1, 2007, and that this payment had to be made on or before October 31, 2007. The Master's Order also directed Mr. Botar to continue to pay each and every month the sum of \$350 in rent to Mainstreet Equity Corp. starting from October 1, 2007. These payments were directed to be interim payments only and were not intended to represent a final Order, which final Order would have to be determined by the trial judge.

[2] Mr. Botar's original application, although extremely lengthy in nature, essentially consisted of an Originating Notice and an Amended Originating Notice which sought to allow him to live rent free in an apartment that he had been living in since 2000 on the basis of Section 17 of the *Residential Tenancies Act*, R.S.A. 2000, c. R-17.1 which reads as follows:—

- 17(1) If a residential tenancy agreement is in writing and the tenant has signed and returned the written residential tenancy agreement to the landlord, the landlord shall, within 21 days after the written residential tenancy agreement is returned to the landlord, serve on the tenant a copy of the written residential tenancy agreement signed by the landlord.
- (2) A tenant may withhold payment of rent until the tenant is served with a copy of the residential tenancy agreement under subsection (1).

[3] Mr. Botar then purported to withhold the payment of all rent on the basis that he had not received a residential tenancy agreement or written lease, as he believed he was authorized to do pursuant to Section 17(2) of the *Residential Tenancies Act*. Before withholding all rent from the Landlord, Mr. Botar says that he consulted with three lawyers, including a lawyer who had written a book on the subject, who all agreed that he did not have to pay rent based on the fact that he was not in receipt from Mainstreet Equity Corp. of a residential tenancy agreement or written lease.

[4] Counsel for Mainstreet Equity Corp. points out that the corporation purchased this residential apartment property from a third party, who had a written tenancy agreement with Mr. Botar in 2000, and there was never a formal lease or residential tenancy agreement made between Mainstreet and Mr. Botar. Mr. Botar has simply been a month to month tenant after the existing lease expired, something that is specifically provided for in the original tenancy agreement and also within Section 13 of the *Residential Tenancies Act* which reads as follows:—

- 13 When a periodic tenancy is implied by operation of law after the expiration or termination of a prior fixed term tenancy, the implied tenancy, in the absence of facts showing a contrary intention, is
 - (a) if the prior tenancy was for a fixed term of one month or more, a monthly tenancy, or
 - (b) if the prior tenancy was for a fixed term of less than one month, a weekly tenancy.

[5] Mainstreet also points out that there have been a number of rental increases since 2000, that Mr. Botar seems to consistently ignore, and that the Master's Order did not take into account either.

[6] Mr. Botar submits that this position by Mainstreet is in fact an admission that his legal argument is correct in that it is only from the lease agreement that there can be any continuing month to month or other tenancy, and without a signed copy of the original lease agreement, he is entitled to withhold all payments of rent.

Conclusion

[7] I conclude that the Master's Order being appealed from represents a reasonable middle ground between these parties on an interim basis. The various rental increases which have taken this rent up apparently to the \$675 range were not considered as part of the monies that had to be paid by Mr. Botar to Mainstreet. The Master's Order was not a final Order but simply one that was subject to confirmation by a trial judge.

[8] There are some problems with Mr. Botar's arguments in any event. If Mr. Botar were to be allowed to continue to withhold rent entirely from the Landlord, this would constitute a form of summary judgment before a trial has even been held, notwithstanding the Landlord vehemently opposes this application. The Landlord's position is an arguable one in that the implied tenancy that the Tenant is now occupying the premises on is found in Section 13 of the *Residential Tenancies Act*, and is not necessarily contained or dependent on the written terms of the lease agreement that was made in May 2000. The implied tenancy provisions of the *Residential Tenancies Act* has the practical advantage of not requiring every Landlord and every Tenant to complete a monthly agreement each month to maintain a tenancy.

[9] Further Mainstreet cannot supply the residential tenancy agreement in writing in this matter because there has never been a lease agreement between it and Mr. Botar. The last residential tenancy agreement or lease that was in effect between Mr. Botar and Nordel Holdings ended in 2000, and Mr. Botar signed this particular agreement. The fact that Mr. Botar has requested on numerous occasions since 2000 to receive a written lease with respect to these premises, and the fact that he still does not have a written lease from this Landlord Mainstreet, is more because there is no obligation on the part of Mainstreet to provide a written lease or tenancy agreement for a month to month Tenant.

[10] At this point I am simply dealing with an appeal from the Master's Order, and I dismiss that appeal. The ultimate issues raised by Mr. Botar and by Mainstreet can be dealt with at trial.

[11] Mr. Botar also claims that he is impecunious, and is on a fixed income. He does not know who should be responsible for paying the \$600 registration fee to set this matter down for trial as directed by the Master. Obviously Mainstreet can afford to make this payment, and as the Master's Order is unclear as to who is responsible for the filing fees of starting the action, I direct that Mainstreet assume that financial responsibility initially.

[12] Mainstreet seeks \$1,200 in costs against Mr. Botar for the present application. The issue of costs will be determined by the trial judge.

Heard on the 5th day of October, 2007.

Dated at the City of Edmonton, Alberta this 11th day of October, 2007.

Donald Lee
J.C.Q.B.A.

Appearances:

Andrew S. Botar
Appeared on His Own Behalf

Christopher D. Ruttkay
Warren Tettensor Amantea LLP
for the Respondent