

Claim No: SCK No. 454432

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Johnstone v. Helpard*, 2016 NSSM 66

BETWEEN:

Angela Johnstone

**Appellant/
Tenants**

-and -

Candice Helpard
Matthew Helpard

**Respondent/
Landlords**

Date of Hearing: September 19, 2016

Date of Decision: October 3, 2016

DECISION

This is an appeal of the Decision and Order of Residential Tenancies Officer, Chantal Desrochers, dated August 4, 2016. In that decision, the Residential Tenancies Officer ordered the Tenant to pay rent of \$600 for the tenancy together with the application fee of \$31.15.

The Tenant's ground of appeal is that as the common-law spouse of the Landlords' father, her late spouse advised her that she could live in the premises rent free for a year after his death.

An appeal from the decision of a Residential Tenancies Officer is a new hearing based on the evidence presented before the Small Claims Court Adjudicator. The evidence presented usually consists of that presented to the Residential Tenancies Officer and any additional evidence the parties seek to adduce. An adjudicator may confirm the Order of the Residential Tenancies Officer or vary it as he or she considers just and appropriate.

As noted in this decision, I have allowed the appeal for the reasons set out below. I reserve the right to make any editorial corrections for spelling, typographical and related errors if necessary, before publishing these reasons on the Courts of Nova Scotia website. They will not change this decision. The parties will be provided with a copy of an amended decision should that occur.

A brief review of the background to this matter is in order before reviewing the grounds of appeal.

Background

The late Barry Helpard and the Tenant, Angela Johnstone (formerly Angela Hamilton), lived together in a common-law relationship since either 1997 or 1999. The couple separated on two or three occasions in the early years, but they were together for quite a number of years prior to Mr. Helpard's death. During the "on periods" of their relationship, Ms. Johnstone resided at the premises, 2456 Prospect Road, South Waterville, King's County, which she did up to his death.

Sadly, Mr. Helpard died of cancer on March 30, 2016. According to the Landlords, Candice Helpard ("Candice") and Matthew Helpard ("Matthew"), who are a daughter and son of Barry Helpard, Candice was named sole executrix under her father's will. She does not intend to apply for a Grant of Probate for the will.

No details of the will or estate were provided in evidence. Thus, I am not aware if there are any other heirs of the estate. There was no evidence of any provision for Ms. Johnstone which would have given her a right to occupy the home, had it been an asset of his estate at his death.

The Landlords submitted into evidence a photocopy of a deed dated March 21, 2016, which purports to convey the premises from Barry Helpard to Candice Helpard and Matthew Helpard as joint tenants and not as tenants in common. Ms. Johnstone continued to reside in the premises after the conveyance and up to and including at least July 1, 2016. Matthew was also living in the premises prior to his father's death and was paying rent. After Mr. Helpard's death, the relationship between Ms. Johnstone and the Landlords, Matthew in particular, deteriorated as they argued frequently over money.

Before the Residential Tenancies Officer, the Landlords sought rent payments for the time Ms. Johnstone resided in the premises following Barry Helpard's death. Ms. Johnstone claims she was advised by Mr. Helpard that she did not have to pay rent. The Landlords claim they made arrangements with Ms. Johnstone when their father was still in the hospital.

While disputes between a deceased's children from a previous marriage and the deceased's spouse, whether by marriage or common-law, are not uncommon, it is rare for the dispute to manifest itself as a landlord-tenant dispute. It is important to note that an Adjudicator is limited to the jurisdiction of the Small Claims Court hearing a residential tenancies appeal. The parties have all given evidence of estate debts, monies owing to the estate and Ms. Johnstone's personal obligations as tenant. I am unable to make any order concerning these items, no matter whether they are valid or without merit. Likewise, I have no jurisdiction to address ownership of the property or any potential claims by Ms. Johnstone for unjust enrichment or to find a constructive trust. I have assumed for the purpose of this decision that title to the property vests in Candice and Matthew. If there is any liability arising from their actions to the estate of Barry Helpard or his heirs, that will be for determination by another court on another day.

Issues

Are the Landlords entitled to be paid rent from the Tenant, specifically, from the time of the conveyance of the premises until she vacated them? If so, how much? Alternatively, is there any evidence which would establish a legal right to rent-free occupancy for Ms. Johnstone?

The Evidence

Candice Helpard was joined by her brother, Matthew, in court. While both were sworn, only Candice gave evidence. She testified that she and her brother received the premises from their father by deed dated March 21, 2016. The deed was signed by Mr. Helpard when he was in the hospital. The deed was prepared and its execution attended to by persons in the Berwick office of the law firm of Waterbury

Newton. To the best of Candice's knowledge, the property has not been migrated but she believes the deed has been recorded. I am doubtful that either has taken place as of yet, since the tax bill continues to come in the name of Barry Helpard. Angela Johnstone agreed to pay rent to Matthew, who was also living in the premises. Candice submits that the parties agreed to \$400 per month. She acknowledges receiving \$1000 paid by Ms. Johnstone to her and her boyfriend. She also paid \$200 cash to Matthew toward rent.

Ms. Helpard tendered into evidence a series of photographs, which are screen prints of text messages between she and Ms. Johnstone. She also entered an undated one-page document entitled "Pre-Nuptial Agreement" and another letter from 2001 where she acknowledges other relationships. These latter two

documents offer nothing helpful to me in establishing a landlord-tenant relationship. The photographs of the text messages are relevant.

Angela Johnstone testified that she and Barry Helpard had been together since 1997. She moved in with Mr. Helpard in 2001. She did not know about the contents of Mr. Helpard's will, as it was kept in his safe and not seen by her. While she lived with Barry Helpard, she paid household bills, groceries and other expenses. She knew the house was going to Candice and Matthew. She denies ever discussing rent.

She sought to call several witnesses to testify to an arrangement Barry Helpard had made, namely that she could stay in the house for a year after his death. In turn, she would help with the bills. Any arrangements made by Mr. Helpard for Ms. Johnstone would have either been in his will or in some other document after the property was conveyed. The recollections of the deceased's verbal promises are of little relevance. In order to be binding, the arrangements must be in writing. Even if I fully accepted Ms. Johnstone's version of events, that evidence would not be relevant. Thus, I disallowed their evidence. I do not find there was any arrangement to live there for a year.

The text messages are contained in a series of photographs which Candice tendered into evidence. There are various discussions about payment of bills, Ms. Johnstone repeatedly acknowledged her intention to do that, including paying each of Candice and Matt \$1000 to assist with expenses. There were subsequent discussions of \$400 per month rent, once Ms. Johnstone began to delay making payment. At no point in any of the conversation did either party acknowledge an agreed upon rental payment. Candice Helpard refers to a conversation in the hospital, which Ms. Johnstone denied. Ms. Johnstone continuously promises to help Candice and Matthew in exchange for being able to live there. Candice's e-mails suggest no disagreement with paying bills, but also insists on additional rent.

For the reasons stated below, I find there is not enough evidence as would be required to prove either arrangement. The Court is left with no alternative but to determine if the *Residential Tenancies Act* applies, so as to require Ms. Johnstone to pay rent; how much rent was required to be paid and the amount actually paid.

The Law

Legal Status of Common Law Spouse

At the time of the transfer of the premises and up to his death, Barry Helpard and Ms. Johnstone were cohabiting, or as it is frequently called, "living common law". The legal status of common law spouses and married spouses differs markedly at the time of a transfer of real property and on death. By virtue of the provisions of the *Matrimonial Property Act*, there is a presumption in favour of an equal division of matrimonial property when married spouses divorce or if one of them dies. A matrimonial home is effectively, a residence owned by one or both spouses and occupied by both of them during the marriage. If the property is deemed to be their matrimonial home, then they each have a right to occupy it and neither may transfer the property without the consent of the other spouse. It does not matter if only one spouse's name is on the title document.

On the other hand, a common law couple is generally free to dispose of any property they own during cohabitation without the consent of the other spouse. The spouse is afforded no guarantee of equal division on death or breakdown. The presumption is that each spouse owns what is in their respective names, free of any claim by the spouse. A spouse who seeks a share of their spouse's property must prove unjust enrichment or constructive trust, legal remedies available in certain circumstances to address inequities where each spouse has contributed for the benefit of the other. This was confirmed by the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 and *Kerr v. Baranow*, 2011 SCC 10.

It is not disputed that Ms. Johnstone does not have legal title to the property. I am unaware of any pending challenges by Ms. Johnstone to assert any rights under the doctrines of constructive trust or

unjust enrichment. In short, from the time the property was transferred to Candice and Matthew until she vacated the premises, Ms. Johnstone was not an owner, she was a tenant.

Residential Tenancies Act

The next question to determine is if a landlord and tenant relationship actually exists or is deemed to exist between the parties as prescribed in the *Residential Tenancies Act*. Reference is made to the following sections of the legislation:

Application of Act

3 (1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act applies when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.

(2) For the purposes of subsection (1), the relation of landlord and tenant is deemed to exist in respect of residential premises between an individual and a person when an individual

(a) possesses or occupies residential premises and has paid or agreed to pay rent to the person;

(b) makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent;

(c) has possessed or occupied residential premises and has paid or agreed to pay rent to the person.

In subsection **2(1)** of the Act, the following terms are specifically defined:

(g) "rent" means money or other value payable in consideration of the right to possess or occupy residential premises;

(h) "residential premises" includes any house, dwelling, apartment, flat, tenement, manufactured home, land-lease community, manufactured home space or other place that is occupied or may be occupied by an individual as a residence or that part of any such place that is or may be occupied by an individual as a residence, but does not include...(six exceptions are listed which do not apply to this matter.)

Findings

The definition of residential premises in the Act is broad with few specifics. I find the premises were residential premises, consisting of Ms. Johnstone's room and the remaining common areas of the house which she shared with Matthew Helpard and his family. None of the exceptions to the definition apply.

As Barry Helpard's common-law spouse, Ms. Johnstone was an occupant and perhaps a licensee while the property was in his name. However, once the premises were conveyed to Candice and Matthew, the relationship was different. She was the occupant of residential premises owned by Candice and Matthew up until Mr. Helpard's death. For that short period of time, the tenancy was not subject to the *Residential Tenancies Act* as they had no intention to collect rent from their father or Ms. Johnstone. The intention changed once their father passed away, Candice and Matthew became landlords and Ms. Johnstone became the tenant.

The remaining issue is if Ms. Johnstone paid or agreed to pay rent.

It is clear there is no written lease. Any agreement must either be established verbally or electronically. There is evidence from Candice that Ms. Johnstone agreed to pay rent similar to what Matthew was paying, namely \$400 per month. Ms. Johnstone denies that, testifying that she intended to make payments from time to time and to pay bills. She also says that Mr. Helpard told her in the presence of witnesses, she could live there after his death. Such an agreement must be in writing if it were to continue after the conveyance of the property to Candice and Matthew and Barry Helpard's death.

I have considered the evidence of the witnesses and read the text messages several times. I could find nothing in the form of acknowledgement by both parties to an agreed rent. While Candice Helpard has stated to Ms. Johnstone that they agreed to that arrangement in the hospital, it was refuted by Ms. Johnstone in the text message. I find the evidence is not sufficient to establish that. Ms. Johnstone offered to help out with paying of bills, but the extent was not adequate.

The definition of "rent" in the Act is "money or other value payable in consideration of the right to possess or occupy residential premises". There is nothing in this definition which requires rental payments be payment of money directly to the landlord or on any type of periodic basis. Ms. Johnstone has repeatedly expressed interest in providing help for Candice and Matthew.

Various offers and demands were made by both parties. Nobody agreed to anything specific. I find Ms. Johnstone intended to pay money to Matthew and Candice to compensate for her stay there. At all times, Ms. Johnstone intended to pay money to assist with expenses in exchange for a right to remain in the premises.

Despite her submissions to the contrary, I find Ms. Johnstone paid and agreed to pay rent. Therefore, I find a landlord-tenant relationship existed.

The relationship ended on July 1, 2016 by mutual consent without further obligation to pay rent beyond that date.

Having found a landlord-tenant relationship existed, it is necessary to look at the circumstances surrounding any money paid to the landlords by the tenant. To date, Ms. Johnstone has made two direct payments to her landlord, \$200 which Matthew acknowledges is a partial payment of rent and \$1000 to Candice with the stipulation that it was to be used to help them with expenses.

It is important to note that from March 31 and onward, the parties had a legal relationship as landlord and tenant. It follows that if Ms. Johnstone was legally required to pay rent, then any funds advanced to the landlord from her must also be taken into consideration for that amount. Thus, when Ms. Johnstone paid \$1000 to Candice, she was a tenant advancing a sum of cash to her landlord. There was no evidence this was a gift. Indeed, it came with the stipulation that it was to help with the expenses. Therefore, I find this payment was also an advance of rent.

I find the tenancy lasted from March 31 – July 2, 2016. I find Ms. Johnstone has paid \$1200 or the equivalent of \$400 per month. In my view, this is adequate for the tenancy in these circumstances.

As noted at the outset of the decision, there are bills which remain in dispute that were estate expenses. It is not clear what arrangements were made to pay them. They were frequently intermingled with other claims by the landlords but they had nothing to do with the tenancy. For her part, there is evidence Ms. Johnstone paid bills to the funeral home and the final power bill. These items are for the parties to resolve in another forum. Hopefully, they can resolve these matters on their own.

Conclusion

The appeal is allowed. The decision is varied to remove any further obligation on the part of Ms. Johnstone to pay rent. Given that Ms. Johnstone was successful but on different grounds of appeal, this is an appropriate case for each party to bear their own costs at Small Claims Court and before the Residential Tenancies Officer.

An order shall be issued accordingly.

Dated at Halifax, NS,
on October 3, 2016;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Tenant(s)
Copy: Landlord(s)