

CITATION: *Parutu v Gabriel* [2009] NTMC 034

PARTIES: TOMMY PARUTU
v
MEDHAT GABRIEL

TITLE OF COURT: LOCAL COURT

JURISDICTION: RESIDENTIAL TENANCIES

FILE NO(s): 20924967

DELIVERED ON: 19 AUGUST 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 6 AUGUST 2009

JUDGMENT OF: ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

PROCEDURE - Application to file appeal out of time – appeal to be lodged within 14 days - unless the court allows an extension of time – considerations which apply

Residential Tenancies Act (NT) s 150(5)(a)
Ratnam v Cumarasamy [1964] 3 All ER 933
Schafer v Blyth [1920] 3 KB 140
Hughes v National Trustees [1978] VR 57
Youngman v Melbourne Storage Co Ltd (1885) 7 ALT 53
Kidron v Garrett (1994) 35 NSWLR 572

REPRESENTATION:

Counsel:

Appellant: NA
Respondent: NA

Solicitors:

Appellant: Self Represented
Respondent: Self Represented

Judgment category classification: B
Judgment ID number: [2009] NTMC 034
Number of paragraphs: 19

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20924967

BETWEEN:

TOMMY PARUTU
Appellant/Applicant

AND:

MEDHAT GABRIEL
Respondent

REASONS FOR JUDGMENT

(Delivered 18 August 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is an interlocutory application filed by the appellant applicant, seeking an order for an extension of time in which to file a notice of appeal against a decision of the delegate of the Commissioner of Tenancies (“the delegate”). The burden in proving that the extension should be granted lies with the applicant. That is, the applicant needs to prove that sufficient reasons exist to grant the extension of time.
2. Section 150(5) of the *Residential Tenancies Act* (NT) provides:
 - (5) Subject to subsection (6), an application for appeal may be lodged:
 - (a) before 14 days after the date of the order, determination or decision appealed against, unless the court allows an extension of time; or

- (b) if the Commissioner does not give reasons for the order, determination or decision at the time of making it – within 14 days after the parties are given the reasons.
- 3. Evidence was given at the interlocutory application by affidavit material filed by both the applicant and respondent. Leave was also granted to file and serve further supporting affidavit material following the hearing of the application.
- 4. The background to this matter is as follows:
 - (i) An inquiry pursuant to the *Residential Tenancies Act* was held before the delegate on 9 September 2008.
 - (ii) At that inquiry the applicant did not appear. The respondent appeared.
 - (iii) Following the inquiry the delegate made an order and published reasons. The order and reasons were dated 9 October 2008.
 - (iv) Both the applicant and respondent received copies of the orders and reasons in the post soon thereafter. The parties also each received a cover letter accompanying the order and reasons, from Consumer Affairs, advising as to the appeal rights and the time in which to file an appeal.
 - (v) The delegate's order was registered with the Local Court on 28 October 2008.
 - (vi) In June 2009 the respondent commenced recovery proceedings against the applicant in the Local Court.
 - (vii) On 28 July 2009 the applicant filed a Notice of Appeal, appealing the delegate's order.

5. There were further issues raised by the parties in relation to whether the applicant appeared at the correct time before the delegate or not, and whether the inquiry was listed at 10.00am or 12.30pm. For the purposes of this application, the reasons why the applicant did not appear are immaterial. I will take it simply that he did not, and therefore was not able to put his case to the delegate.
6. The applicant's affidavit, filed in support of his application, did not disclose any reason why he waited almost 9 months before filing an appeal. At hearing the applicant stated that he was simply too busy with work and family and forgot about it. I infer that the recent recovery proceedings, commenced by the respondent, may have had some motivating effect. It was the applicant's evidence that he had a strong case against the respondent, a case which he should be allowed to advance on appeal, and which he did not put before the delegate. It was his case that he had been wrongly charged rent for three weeks whilst he and others were repairing the rented premises. It was also his evidence that the property was not in a clean condition when he moved in and that he should not have been held to account to pay for cleaning costs when he vacated. There were other issues concerning the landlord's conduct during the term of the tenancy which were unrelated to the order made by the delegate and not relevant to the application.
7. The respondent gave evidence that he had duly attended the inquiry held before the delegate and that, notwithstanding the non attendance of the applicant, he was put to task in proving his claim. On his evidence he provided the delegate with receipts, condition reports and photographs, the inquiry took some 40 to 50 minutes, and the delegate disallowed certain items. The respondent provided a copy of the delegate's orders and reasons.
8. In respect to the present application, it was the respondent's submission that he had received a lawful judgment and was seeking to enforce that judgment. It was his submission that he should not be deprived of that right

just because the applicant had decided to appeal some 9 months after the decision. Apart from the time which had elapsed and that he had undertaken many of the repairs and paid outstanding cleaning costs, the respondent could not point to any significant prejudice if the application was allowed.

9. There are a large number of cases which have dealt with the factors to be considered on an extension of time application. Extension of time provisions are usually provided either via statute or rules, and the considerations that apply to each are similar. In certain instances such provisions restrict the discretion of the Court by requiring “leave” or “special circumstances”, in other cases there is no apparent limitation of the discretion. In this matter s 150(5) of the *Residential Tenancies Act* provides no express limitation on the discretion to extend time.

10. In considering such applications the law makes it clear that there must be some material upon which the Court can exercise its discretion, otherwise in the words of Lord Guest in *Ratnam v Cumarasamy* [1964] 3 All ER 933:

“If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

11. The rationale for allowing the Court to extend time has been said to avoid injustice (*Schafer v Blyth* [1920] 3 KB 140). However, the starting point would appear to be that the “object in fixing times under the rules is to achieve a time table for the conduct of litigation in order to achieve finality of judicial determinations (*Hughes v National Trustees* [1978] VR 57 at 263). Further Higginbotham J in *Youngman v Melbourne Storage Co Ltd* (1885) 7 ALT 53 at 54 stated:

“When the time has been allowed to elapse that gives the defendant a vested interest in the judgment, this vested interest ought not to be disturbed unless there is some good reason for disturbing it”.

12. In relation to what constitutes “good reason” McInerney J in *Hughes* (supra) was of the view that it imported a consideration of whether justice as between the parties is best served by granting or refusing the extension sought. A number of factors may be relevant to such a determination. Those factors may include consideration as to the length of delay in commencing the appeal, the reasons for the delay, the chances of the appeal succeeding if the extension of time was granted and the degree of prejudice to the respondent if time was extended.
13. In this case the respondent clearly had a vested interest, he had an order from the delegate, he had registered it with the Local Court and was seeking to enforce it.
14. In relation to the length of delay, the appeal was filed some 9 months after the delegate’s decision, and some 8.5 months out of time. The only reason proffered for the delay was that the applicant was busy and forgot.
15. In relation to the chances of success on appeal, I have read the reasons of the delegate. I am satisfied that, despite the applicant’s absence from the inquiry and lack of an opportunity to put his case forward, the decision of the delegate was well reasoned and considered. It was not a matter of judgment in default of an appearance for the applicant. The delegate required proof from the respondent and was sufficiently satisfied. I am satisfied that if an extension was granted, the applicant would have poor chances of success on appeal.
16. In respect to the prejudice which may be suffered by the respondent, I note that the respondent has been left out of pocket in respect of unpaid rent and the costs of repairs and cleaning. Although an appeal would further delay the recovery proceedings, and the respondent would continue to be deprived of money owed, there is no significant prejudice. There was no issue that the respondent would be unable to prosecute the appeal due to the further

passing of time. The respondent still retained all documentary and photographic evidence to support his original claim.

17. In coming to a decision I am mindful of the words of Priestly JA in *Kidron v Garrett* (1994) 35 NSWLR 572 who said that where there is a lack of satisfaction with the reasons for a delay, but where the delay is small, the appeal not hopeless and there is no relevant prejudice, then it would be a miscarriage to refuse an extension.
18. In my opinion this is not such a situation. I am not satisfied with the reasons for the delay, the delay has not been small and the appeal has little prospect of success. The applicant has failed to prove that his application to extend time should be granted.
19. The application for an extension of time to file an appeal is denied.

Dated this 19 day of August 2009

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR