

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 98**

Date: **2024 05 22**
Docket: KBG-BF-00184-2023
Judicial Centre: Battleford

BETWEEN:

VILLAGE OF PAYNTON

PLAINTIFF

- and -

BERNICE CRAMER

DEFENDANT

Counsel:

Kubashnee Govender
No one appearing

for the plaintiff
for the defendant

FIAT
May 22, 2024

DANYLIUK J.

[1] The Village of Paynton [Village] took tax enforcement proceedings against the defendant, due to arrears of taxes. In mid-December 2021 the Village obtained title to the property. The property is 109 - 1st Avenue West, Paynton, Saskatchewan; legally described as Lot 19 Blk/Par 5 Plan No B3481 Extension 0, Surface Parcel #128138373 [Property].

[2] For reasons which remain shrouded in mystery, the Village did nothing to obtain possession of the Property until June 2022. From a reading of the material filed, it appears the Village and its counsel did not know what to do. I will explain.

[3] The Village has now made three applications without notice regarding

obtaining vacant possession of the Property. Apparently, the defendant continues to occupy same. It is useful to review each of the Village's applications.

[4] All of the applications were brought under Rule 3-26 of *The King's Bench Rules* although reliance was also placed on Rule 3-24. Rather than taking alternate enforcement proceedings (discussed below), the Village had issued a statement of claim on September 20, 2023, and that claim was noted for default on December 5, 2023. The Village filed an affidavit of personal service indicating Ms. Cramer, the defendant, had been served personally on October 11, 2023.

[5] The first without notice application was not filed until March 7, 2024. That application (as well as the other two) was for a default judgment. The draft order for judgment filed sought the following relief (reproduced verbatim):

1. That the residential tenancy between the Plaintiff and Defendant is terminated as at June 6th, 2022 in respect of the following premises: 109 1st Avenue, West Paynton, SK, S0M 2J0, Lot 19 Blk/Par 5 Plan No B3481 Extension 0, Surface Parcel #128138373 ("Premises");
2. That the Defendant shall vacate the Premises not later than 12 o'clock noon from the date of this Order, failing which a civil enforcement agent has the authority after service of the Order has been effected and proof of service of the Order has been filed at the Court of King's Bench Saskatchewan to evict the Defendant and/any occupant of the Premises;
3. That the Plaintiff to remove and sell or otherwise dispose of any property located on the Premises belonging to the Defendant provided that the Plaintiff has:
 - 3.1.1 has made reasonable efforts to determine the Defendant's whereabouts if the Defendant has left the Premises; an
 - 3.1.2 the Defendant who left the Premises cannot be located or,
 - 3.1.3 if that Defendant has been located, that Defendant has not made reasonable arrangements for the disposition of the Premises.

[6] The Village's initial application came before Justice Hildebrandt. Showing remarkable restraint, she refrained from commenting on the torturing of the English language in the draft order. However, she had questions, and outlined her concerns in her fiat of March 13, 2024:

In light of the provisions of s. 36 of the Tax Enforcement Act, RSS 1978, c T-2, does this court have jurisdiction to make the requested order? Should the plaintiff have brought proceedings under The Residential Tenancies Act, 2006?

Leave is granted to file submissions on these issues if the requested order is to be further pursued.

[7] Counsel for the Village did not file submissions. Instead, on May 2, 2024 she filed a second application without notice. The relief sought was identical to that in the first application. The supporting affidavit for the second application was a photocopy of the affidavit filed to support the first application. In other words, nothing had been changed by the Village. Having been asked to provide submissions, counsel instead opted to re-file the already deferred initial application.

[8] That second application did, in fact, come to the attention of a different judge. On May 8, 2024, Justice Morrall noted Justice Hildebrandt's earlier fiat and said it "remains valid, extant and applicable". He directed that an application **and** submissions could be filed. The Court file's endorsements show Village counsel was notified of the fiat on May 9, 2024.

[9] Somehow, in some way, for some reason, Village counsel had filed yet another application on May 6, 2024. That is, between the date of filing her second application (on May 2) but before she was even notified of the May 8 fiat rejecting same (on May 9), she filed her third application (on May 6).

[10] Why? Unknown. There was no explanation of these events.

[11] I set that aside and move to the Village's third application, which has just come before me. This application was essentially identical to the other two prior applications. A photocopy of the supporting affidavit filed with the first two applications was again filed (more on this later). The difference was that this time a cover letter with some submissions was filed. However, to make this timeline of events even more murky, that cover letter is dated May 1, 2024. Maybe that cover letter was supposed to be sent with application #2 but was missed, so was sent with application #3. I do not know. I should not have to guess.

[12] In any event, it is worthwhile to reproduce the "submissions" contained in the May 1, 2024 letter from Village counsel (again, verbatim):

Pursuant to the questions raised by Justice Hildebrandt on Fiat issued on March 13, 2024, I submit the following:

1. s26 of The Tax Enforcement Act confirms that the relationship between the Defendant being the Tenant and the Plaintiff as the Landlord under Residential Tenancies Act 2006;
2. s12 of the Residential Tenancies Act 2006, permits a Landlord to seize the tenant's property pursuant to an **Order of Court**. I attach the excerpt of the Residential Tenancies Act 2006 for ease of reference.
3. The Statement of claim has been successfully served on the Defendant (Tenant) and an affidavit of service has been filed in this matter);
4. The Defendant (Tenant) has been noted in Default on December 5, 2023;
5. KB Rule 3-26 states:
 - (1) that in any other action on default of defence by one or more defendants, the plaintiff may apply without notice to the Court for an order for Judgment.
 - (2) On an application pursuant to subrule (1), the Court may order the judgment to be entered that the Court considers that the plaintiff is entitled to, with or without evidence of the truth of the statement of claim.
 - (3) Evidence of the truth of the statement of the claim

may be given orally, by affidavit or by any other means that the Court may direct.

I submit on the basis of the aforementioned, I understand that this court does have jurisdiction to make the requested order. Accordingly, I humbly request that the enclosed Order be issued.

If you have any questions, please do not hesitate to contact our office.

[13] It is apparent that these submissions do not squarely address the question raised by Justice Hildebrandt: did the Village use the correct procedure, or should it have proceeded under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001? This was the exact question she posed in her March 13, 2024 fiat. As well, counsel quotes the wrong section of *The Tax Enforcement Act*, RSS 1978, c T-2, despite Justice Hildebrandt having cited the correct section.

[14] I looked to the material filed to see if Justice Hildebrandt's question was addressed.

[15] All three applications without notice cited the same case: *Brinkworth v Walzack*, 2017 SKQB 268. That decision does not deal with the issue raised by Justice Hildebrandt. It deals with the situation where a statement of claim contains a claim for a liquidated demand and a damage claim. Justice Scherman dealt with the process to be followed. *Brinkworth v Walzack* is of no assistance in addressing the question posed.

[16] I return to the supporting affidavit, sworn by Stephanie Knorr on March 5, 2024. She is the office administrator for the Village. There are some problems with this affidavit:

- (a) She swears (para. 2) that all the contents of the statement of claim are true. This is problematic insofar as the claim does not suggest

that the defendant is a tenant by operation of law; rather, para. 5 simply says she continued to remain on the property as a tenant. This is repeated in para. 6 but the claim states she “failed to pay monthly rent”. What monthly rent? There is no pleading of a lease, or any terms, or any rental rate. Later in the claim (and despite these deficiencies in pleading) the plaintiff says the defendant did not pay rent and says this is a just debt. Then, in para. 10 the plaintiff states the total rent owed is \$17,600.00. This sum is repeated in para. 11(a) and is called “arrears of rent” but in para. 11(d) the claim is for “Judgment in an amount to be proven at trial but no less than \$17,600 being the **estimated amount of rent due**” [emphasis added]. All of these things cannot be correct. Swearing that all of them are correct is problematic.

- (b) She swears (para. 3) that the claim for which the Village seeks default judgment is a claim “as defined in and Rule 3-21(4) and Rule 3-26”. As seen above, the claim itself is in conflict on this point but beyond that, how is it that the office administrator is averring to principles of law and the operation of *The King’s Bench Rules*? That is opinion and argument. This is an application for a final judgment. Rule 13-30 confines an affidavit to facts, and those facts must be within the deponent’s personal knowledge. This deponent should not be swearing to these matters.
- (c) Paragraph 5 is interesting. In it the Village administrator swears that on June 6, 2022 she posted a Notice to Vacate and Notice of Arrears to the defendant’s door, on the Property. She purports to attach a copy of same as an exhibit. However, she does not have an actual

copy because apparently only one was prepared and, well, she posted it to the door. So she doesn't have a copy. But, she says, she took a photo and that is Exhibit "A". Problem is, the photograph is slightly more than two inches square and is almost entirely illegible. I can read the title: "Immediate Notice to Vacate and Notice of Arrears, Form 7". Otherwise, it cannot be read. To be of any probative value an exhibited document must be legible. Exhibit "A" is entirely useless to this Court in these circumstances. Pausing for a moment to indulge in conjecture, I note Form 7 may be one of the forms used by landlords to secure possession of premises under *The Residential Tenancies Act, 2006*. This would relate to Justice Hildebrandt's original question. Indeed, it appears the Village has used some unique hybrid of two entirely different legal processes, a hybrid of its own devising.

[17] This Court still has no authority or submissions from the Village that justify this odd procedure. The *Brinkworth* case cited by Village counsel is of no help.

[18] The Village might have looked at *Embee Diamond Technologies Inc. v Prince Albert (City)*, 2018 SKCA 44, 74 MPLR (5th) 179. There, the City took title to a commercial building. At para. 17 Richards C.J.S. specifically referred to s. 36 of *The Tax Enforcement Act*. Later he refers to the interplay between that legislation and *The Landlord and Tenant Act*, RSS 1978, c L-6. Here, it is *The Residential Tenancies Act, 2006* that is in issue and that legislation has broader tenant protection than its commercial counterpart.

[19] I am not about to make arguments or do research for the Village. The point is, there **is** legal authority that would help to address Justice Hildebrandt's inquiry

made months ago.

[20] It would be helpful to have counsel present for the presiding judge to speak with as to questions of jurisdiction and procedure. That is not possible on an application without notice. The defendant might also have something to say about the notion that she somehow owes the Village over \$17,000.00 in rent, particularly in light of *Embee* saying the lease is notional. Finally, the Village needs to examine exactly how a possession order is properly obtained in tax enforcement proceedings where it has obtained title to land.

[21] No less care should be taken in the preparation of applications without notice than with notices of application. Proper attention must be paid to everything from spelling and grammar to substantive content. When the Court seeks submissions on an issue such as jurisdiction, cogent and helpful submissions are expected, not slapdash opinions. As well, affidavits are not mere pieces of paper. They are sworn evidence. Great care must be taken with their drafting; it was not here.

[22] **Accordingly, I direct the following:**

1. This matter must proceed by means of a Notice of Application, in chambers.
2. The plaintiff shall personally serve the defendant with proper notice of its application, supporting material (which should include a new affidavit), and a copy of this fiat.
3. As part of its supporting material the plaintiff is directed to serve and file a proper brief of law in support of its application.

J.
R.W. DANYLIUK