CITATION: Christo v. Woon, 2017 ONSC 5127
COURT FILE NO.: DC-17-56-00
DATE: 20170829

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

RE: Melissa Christo and Ronald MacNeil, Appellants/Tenants

AND:

Desmond Woon and Sherifa Woon, Respondents/Landlords

COUNSEL: P. Ratti, Counsel for the Appellants/Tenants

T. Duggan, Counsel for the Respondent/Landlords

HEARD: August 25, 2017

REASONS ON LANDLORDS' MOTION TO QUASH

BACKGROUND

[1] Mr. and Mrs. Woon are landlord/owners at 1 Fernbank Road, Brampton.

[2] Ms. Christo and Mr. MacNeil are the tenants at 1 Fernbank Road, Brampton as of approximately April 2016.

[3] There was no written lease agreement.

[4] This tenancy is governed by the *Residential Tenancies Act* (*Act*).

[5] On or about March 6, 2017 the tenants commenced a maintenance and a substantial interference application with the Landlord and Tenant Board ("Board") ("Maintenance and Interference Applications").

[6] On or about March 10, 2017 the landlords served a notice to terminate the tenancy for persistent late payment of rent. Shortly thereafter, the landlords brought an application to terminate the tenancy for non-payment of rent ("Termination Application").

[7] The Board conducted one hearing on April 12, and May 11, 2017 to deal with both the tenants' and landlords' applications. The tenants' and landlords' applications were dealt with by the same member of the Board.

[8] On May 29, 2017, the Board issued two decisions:

A) THE TERMINATION APPLICATION

[9] On the Termination Application, the Board found that the monthly rent was $1,850 and the tenants owed the arrears claimed by the landlords. The arrears as of March 31, 2017 was $4,111.40. The Board also found that the rent was due on the first of the month and the tenants were persistently late in paying the rent. The Board denied the tenants' proposed payment plan to pay the arrears. The Board terminated the tenancy and granted the tenants until June 30, 2017 to find alternate accommodations. ("Termination Order")

B) THE MAINTENANCE & SUBSTANTIAL INTERFERENCE APPLICATION

[10] On the Maintenance and Interference Application, the Board determined:

a) there was adequate heat in the habitable areas;

b) the electrical in the rental unit was in good condition when the tenants moved in. Considering the facts, the Board found that no remedy was warranted regarding the electrical issues;

c) On the other issues raised by the tenants, the Board considered each item which the tenants alleged required maintenance (the fireplace, dryer, fridge, stove, hood fan, toilet, kitchen sink, miscellaneous other issues) and did not find that the landlords breached or seriously breached their obligations under the *Act* and, therefore, no remedy was warranted.

d) the Board dismissed the tenants' application with costs but did order that a rear deck, bathroom and kitchenette be repaired by July 1, 2017. ("Tenant Order")

[11] On June 20, 2017 the tenants filed a Request for Review with Board of both orders.

[12] The Request for Review was dismissed because this appeal was filed.

THE APPEAL

[13] On June 22, 2017, the tenants filed a Notice of Appeal of the Termination Order. The filing of the appeal resulted in the automatic stay of the Termination Order.

[14] After this appeal had been set down and just days before this hearing, the tenants filed an Amended Notice of Appeal which essentially attempts to characterize the grounds of appeal as errors of law. I will deal with the tenants' Amended Notice of Appeal in disposing of this appeal.

SUBSEQUENTLY

[15] The tenants have remained in the premises.

[16] They have not paid any amount of the arrears found by the Board or paid any ongoing rent or utilities since June 9, 2017.

THE LAW

LIMITED RIGHT OF APPEAL TO DIVISIONAL COURT

[17] The *Act* provides:

> 209 (1) Except where this Act provides otherwise, and subject to section 21.2 of the *Statutory Powers Procedure Act*, an order of the Board is final and binding.
>
> 210 (1) Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, *but only on a question of law.*
>
> (emphasis added)

[18] Clearly, an appeal lies to the Divisional Court **on questions of law alone**.

WHAT CONSTITUTES A QUESTION OF LAW?

[19] What constitutes a question of law was described in Zolynsky *v North Shore Farming Company Limited*, 2016 ONSC 2838:

> [6] The distinction between questions of law and fact is discussed in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1996] S.C.J. 116:
>
> > 35 Section 12(1) of the Competition Tribunal Act contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

[7] In *Creston Moly Corp.* v. *Sattva Capital Corp.*, 2014 SCC 53 (CanLII) the court cautioned:

> [54] ...courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in Housen to exercise caution in attempting to extricate a question of law is relevant here:
>
> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]

[8] The Landlord and Tenant Board is a specialized tribunal and the legislature has clearly limited appeals from its decisions. Part of the reason is to ensure that the process is streamlined, timely and cost efficient.

[20] In *Housen v. Nikolaisen*, [2002] 2 SCR 235, the Supreme Court held that an appeal from a trial judge's findings of fact, or inferences drawn from facts require palpable and overriding error. An error in applying a legal standard to the facts is a mixed question of fact and law, and also requires palpable error, unless it involved applying an erroneous principle of law. The Supreme Court stated:

> In this regard, we respectfully disagree with our colleague when he states, at para. 106, that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that ***the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law***.
>
> [Emphasis added]

QUASHING AN APPEAL FROM THE BOARD'S DECISION

[21] A court to which an appeal is taken may quash the appeal under s. 134(3) of the *Courts of Justice Act*, "in a proper case". This applies where the appeal is manifestly devoid of merit: *Lesyork Holdings Ltd. v. Munden Acres Ltd.* (1976), 13 O.R. (2d) 430 (C.A.).

[22] This court also has the jurisdiction to quash an appeal where the appeal where the appeal is limited to a question of law because the appeal does not raise a question of law. See *Jericho Investments Inc. v Rankel,* [2002] OJ No. 3880.Where the single judge cannot determine on a motion that the appeal is clearly or manifestly devoid of merit or clearly fails to raise a question of law, the single judge of the Divisional Court should not usurp the role of the full panel. The power to quash an appeal is a power that should be exercised sparingly. See Schmidt *v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (Ont. C.A.).

[23] Abuse of the court process by a litigant, including the filing of an appeal as a stratagem to delay eviction, should not be condoned: *Haley v. Morra*, [2001] O.J. No. 134 (S.C.J.); *Minto Yorkville Inc. v. Trattoria Fieramosca Inc.*, [1997] O.J. No. 5247 (Gen. Div.).

THE BOARD'S INTERPRETATION OF THE RESIDENTIAL TENANCIES ACT

[24] The standard of review of the Board's interpretation of the statute creating the Board is reasonableness. See *First Ontario Realty Corporation Ltd. v. Deng*, 2011 ONCA 54:

> [17] As noted in *Dunsmuir* at paras. 54-55 and para. 60, the standard of review for questions of law may depend upon the nature of the legal question in issue. Where the question is one of true jurisdiction or one of general law that is of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. However, deference will usually be afforded where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48).Deference may also be warranted where an administrative tribunal has developed

> particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context. Finally, deference applies to questions of fact, discretion or policy and where the legal and factual issues are intertwined and cannot be readily separated: *Dunsmuir*, at para. 53.

[25] See also *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477.

THE POSITION OF THE PARTIES

[26] The landlords seeks:

a) to quash the appeal on the basis that it is manifestly devoid of merit;

b) lift the stay of the Termination Order;

c) order the tenants to provide security for costs;

[27] The tenants submit that the motion should be dismissed as:

a) it is premature;

b) the grounds of appeal are not manifestly devoid of merit.

[28] It should also be noted that the tenants' counsel conceded that the tenants should be paying ongoing rent but should not pay the arrears found by the Board. No explanation has been given why the tenants have failed to pay ongoing rent.

THE ANALYSIS

[29] The tenant's appeal is hereby quashed as it is manifestly devoid of merit or fails to raise a question of law. The stay is lifted allowing the landlords to enforce the Termination Order. There is no need to deal with the other relief claimed in this motion.

[30] The following are the reasons for reaching this conclusion:

Ground #1 - Incorrect test to determine whether the landlords breached their maintenance obligations

[31] While this ground is framed as using the "incorrect test", essentially, the tenants challenge the Board's determination there was no breach or serious breach of the landlords' maintenance obligation. Whether or the extent of or breach of the landlords' maintenance obligation is a factual finding by the Board.

[32] The Board may under s. 83(3) of the *Residential Tenancies Act* refuse an eviction if the Board determines there is a serious breach by the landlord. The Board made a factual finding and determined not to refuse an eviction. This is a factual determination.

[33] In any event, the Board was not obliged to exercise its discretion in these circumstances and there is no basis to conclude that the Board's decision to refuse the eviction was unreasonable.

[34] This ground is manifestly devoid of merit.

Ground #2 - the Board failed to consider the impact of the landlords' breaches.

[35] The Board had before it the Termination Application and the Maintenance and Interference Applications. The essence of the tenants' submission is that the Board should have found the landlords' conduct amounted to a serious breach of its obligations to the tenants.

[36] This is a factual determination that was available to the Board but the Board chose not to make the finding sought by the tenants or grant such relief.

[37] This alleged failure is not an error of law. The tenants simply don't like the Board's decision.

[38] This ground is manifestly devoid of merit.

Ground #3 - The Board shifted the maintenance obligations to the tenants

[39] This is nothing more than a restatement of Ground #2.

[40] The onus was on the tenants to establish that the landlords had seriously breached their maintenance obligations. They failed to do so. This was the Board's finding of fact.

[41] This ground is manifestly devoid of merit.

Ground #4 - The Board failed to conclude that the eviction should have been voided under s. 74(3) of the Residential Tenancies Act.

[42] This provision only applies to a landlords' application under s. 69 to terminate a tenancy under s. 59 (where the tenant has not paid the rent due).

[43] In this case, the landlords' application included termination for persistent late payment of rent. As a result, s. 74(3) of the *Act* has no application to this ground of termination should this be established by the landlords. It was. Section 74(3) of the Act has no application.

[44] The tenants' counsel submits that, because one part of the landlords' application includes termination for non-payment of rent, then s. 74(3) would apply regardless of what other grounds the landlord might have for termination.

[45] No law was supported with respect to this interpretation. This submission makes no sense as there are many other serious breaches which cannot be cured by payment of rental arrears. For example, if the tenants had seriously damaged the rental unit but were also in arrears in rent claimed, the tenants' proposed interpretation would require the Board to void the eviction simply because the landlord had claimed rental arrears.

[46] The tenants do not allege that this "interpretation" was raised before the Board at the hearing. Even if this was a question of law, it would be improper to allow this issue to be raised on appeal without any explanation why it had not been raised before the Board.

[47] This ground of appeal is manifestly devoid of merit.

Ground #5 - The Board failed to dismiss the landlords' application for retaliation for reporting issues to the authorities

[48] The Board found merit in the landlords' position.

[49] The Board found little or no merit in the tenants' position.

[50] The Board was entitled to make these findings and come to these conclusions. These factual findings and conclusions are inconsistent with the tenants' submission that the landlords' application was retaliation.

[51] This ground of appeal is manifestly devoid of merit.

Ground #6 - The Board failed to provide an opportunity for the tenants to cross examine the landlords

[52] There is no evidence of this in the record before this court. In fact, the tenants have not filed the transcript of the Board hearings.

[53] The tenants submit that this motion should be dismissed as premature and point to a lack of transcript before this court.

[54] I note that the tenants waited approximately two months after the Board decision to order a transcript. I note that the tenants now have a copy of the transcript. I note that the tenants have failed to file the transcript. The tenants chose to advance this ground without evidence.

[55] This ground of appeal is manifestly devoid of merit.

Ground #7 - The Board allowed witness' evidence without viva voce evidence

[56] The Board has broad discretion to "adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter". See s. 183 of the Act and s. 15 of the *Statutory Powers and Procedures Act.*

[57] The tenants cannot and do not point to having objected to proceeding in this fashion before the Board. Like the previous ground, this is not a ground which should be raised for the first time on appea.

[58] This ground of appeal is manifestly devoid of merit.

Ground #8 - The Board's reasons disclose a palpable error of law

[59] The tenants submit that the Board erred in accepting the landlords' evidence as credible. This is a factual finding which the tenants' challenge. This ground does not raise an error of law.

[60] This ground of appeal is manifestly devoid of merit.

Ground #9 - The Board erred in finding that the rent was due on the first of the month

[61] This is clearly a factual finding. This ground does not raise an error of law. This ground of appeal is manifestly devoid of merit.

Miscellaneous tenants' issues

[62] The tenants submit that they were denied natural justice when they were unrepresented on the April 12, 2017 hearing. However, the only issue on that date was whether the tenants' son was a tenant or occupant. In the end, this issue played no part in the Termination Order. The tenants were represented by counsel on May 11, 2017.

[63] The tenants submit that they have also appealed the Maintenance and Interference Order and intend to consolidate the appeals. The tenants have not yet done so. In any event, having determined that the appeal on the Termination Order is quashed, there are no appeals to consolidate. There is no such motion before the court. No submissions were made regarding this issue at the hearing. I decline to deal with this relief in the absence of a motion.

[64] The tenants submit that the motion is premature and the appeal should be allowed to be perfected. I disagree. There is sufficient evidence to deal with the merits of the motion to quash.

It is clear that the tenants are seeking to challenge findings of fact or mixed fact and law and attempting to cloth such findings as errors of law.

[65] The tenants resisted payment of rent until questioned by the court. It was only after the questions that the tenants' counsel agreed that ongoing rent should be paid but not arrears. This certainly leaves the impression that the tenants are attempting to remain in the premises rent free.

CONCLUSION

[66] While the results of this motion will end the appeal, a decision not lightly made, it is clear that the Amended Notice of Appeal is manifestly devoid of merit.

[67] In light of the appeal being quashed, there is no reason to consider the other relief claimed by the landlords.

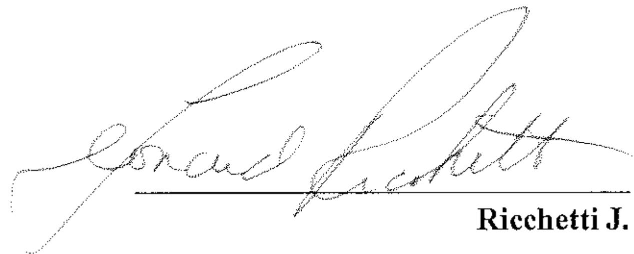
[68] The appeal is quashed. The stay is lifted. To be added to the amounts due to the landlords shall be payment of the rent as found by the Board until August 31, 2017. The tenants shall vacate by September 6, 2017 failing which the landlords can enforce the Termination Order.

COSTS

[69] Any party seeking costs shall serve and file written submission on entitlement and quantum within two weeks of the release of these reasons. Written submissions shall be limited to 3 pages, with attached Costs Outline and any authorities.

[70] Any responding party shall have one week thereafter to serve and file responding submissions. Written submissions shall be limited to three pages with any authorities relied on attached.

[71] There shall be no reply submissions without leave.



Ricchetti J.

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Released: August 29, 2017