

2012 ONSC 4467
Ontario Superior Court of Justice (Divisional Court)

D'Amico v. Hitti

2012 CarswellOnt 9691, 2012 ONSC 4467, 222 A.C.W.S. (3d) 788, 295 O.A.C. 191

**Melissa d'Amico, Landlord (Respondent) and * Rony
Hitti and Anastassia Adani, Tenants (Appellants)**

Matlow J.

Heard: July 26, 2012

Judgment: August 2, 2012

Docket: Toronto 130/12

Counsel: Douglas H. Levitt, for Landlord / Respondent

No one for Tenants / Appellants

Subject: Property; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Real property

V Landlord and tenant

V.20 Residential tenancies

V.20.k Termination of tenancy

V.20.k.vii Practice and procedure

V.20.k.vii.B Appeal or review

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Practice and procedure — Appeal or review

Motion to dismiss appeal — Appellant tenant and co-tenants did not pay agreed upon rent of \$3,600 per month since start of lease, and were in arrears of rent of \$25,000 — Landlord eventually obtained order from Landlord and Tenant Board to evict tenant and co-tenants, after many applications were brought to collect rent or evict tenants and two cheques were dishonoured — Tenant appealed — Landlord brought motion to dismiss appeal — Motion granted with costs awarded to landlord in amount of \$13,072 — Appeal raised no *bona fide* question of law — Appeal was totally devoid of merit, vexatious and abuse of process — Tenant did not perfect appeal — Tenant's improper conduct justified award of costs on substantial indemnity basis.

Table of Authorities

Statutes considered:

Residential Tenancies Act, 2006, S.O. 2006, c. 17

Generally — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 25(1) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 61.05(5) — referred to

R. 61.09(1) — referred to

MOTION by landlord to dismiss tenant's appeal from order of Landlord and Tenant Board, permitting landlord to enforce eviction of tenant.

Matlow J.:

1 My recent experience sitting as a single judge of this Court to hear motions has convinced me that there is a growing practice by unscrupulous residential tenants to manipulate the law improperly, and often dishonestly, to enable them to remain in their rented premises for long periods of time without having to pay rent to their landlords. It is practice that imposes an unfair hardship on landlords and reflects badly on the civil justice system in Ontario. It calls for the Government, the Landlord and Tenant Board and this Court to respond.

2 I have chosen this case, which is one of many similar cases that came before me during a five-day period hearing motions, as an example of the problem that I describe. I could easily have chosen many others.

3 The motion before me was brought by the landlord to dismiss the appeal of the tenant, Hitti, (the "tenant"), the sole appellant, from an order of the Board made on March 16, 2012, which finally permitted the landlord to enforce the eviction of the tenant and his co-tenants who had not paid any rent right from the start of the term of their lease on October 11, 2011, to the present. The agreed rent pursuant to the lease was \$3,600 per month and, at the time of the motion before me, the tenants remained in occupation of the rented premises and were in arrears of rent of approximately \$25,000.

4 There is no better way to describe the background of this case, including the impact that it has had on the landlord, than in the words of the landlord herself in her affidavit in support of this motion. Her affidavit, as copied, reads as follows.

I, Melissa D'Amico, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Landlord (Respondent) and, as such, I have knowledge of the matters to which I depose. Unless I indicate to the contrary, the facts stated herein are within my personal knowledge and are true. Where I have indicated that I obtained information from other sources, I verily believe those facts to be true.

the Tenancy

2. In or about 2005, I purchased a small building. The building is located at [address deleted], Toronto, Ontario and consists of a small commercial unit and a residential unit (the "Unit"). From 2005 to 2010, I lived in the Unit. In 2010, I moved out of the Unit into a cheap rental property as I wanted to use the Unit to generate some income. This is the only investment property that I own.

3. On or about October 11, 2011, I entered into a residential lease (the "Lease") with the Appellant, Rony Hitti ("Hitti"), and Hitti's company, Toronto Bespoke Inc. ("Bespoke"), in respect of the Unit. Attached hereto as Exhibit "A" is a true copy of the Lease, dated October 11, 2011.

4. Pursuant to the Lease, Hitti and Bespoke agreed that, among other things, the Lease term would be twelve months and would commence on October 15, 2011. Hitti and Bespoke further agreed that they would pay a monthly rent of \$3,600.00.

5. Immediately after executing the Lease, Hitti moved into the Unit with his spouse, Anastassia Adani ("**Adani**"), and Hitti and Adani have lived in the Unit ever since.

the Landlord and Tenant Board Proceedings

6. In spite of the foregoing, Hitti and Adani (collectively the "**Tenants**") immediately refused to pay their rent. By reason of their failure to pay rent, on October 21, 2011, my real estate agent, Stephen Squibb, served Hitti and Bespoke with a Notice to End a Tenancy Early for Non-payment of Rent (the "**Termination Notice**"). Attached hereto as **Exhibit "B"** is a true copy of the Termination Notice, dated October 21, 2011.

7. By reason of the Tenants' continued failure to pay rent, on or about November 8, 2011, I initiated proceedings and filed an application with the Landlord and Tenant Board (the "**Board**") seeking an Order for termination of the Tenants' tenancy, payment of rental arrears and eviction (the "**First Application**"). Attached hereto as **Exhibit "C"** is a true copy of the First Application that was served and filed with the Board on or about November 8, 2011.

8. The First Application was scheduled to be heard by the Board on November 28, 2011.

9. On or about November 28, 2011, my girl friend, Maureen Squibb ("**Squibb**"), attended at the Board for the hearing of the First Application. Hitti also attended at the Board. Prior to the commencement of the First Application, Hitti provided Squibb with a cheque for the entire amount outstanding and convinced her to withdraw the First Application. Given the fact that Hitti was paying me everything that I was owed, Squibb accepted his cheque and withdrew the First Application.

10. On December 1, 2011, I deposited Hitti's cheque. I waited to December 1, 2011 to deposit the aforesaid cheque because Hitti's cheque was dated November 30, 2011.

11. On or about December 5, 2011, I was notified by my bank that said cheque was not honoured because the payment had been stopped (the "**First Dishonoured Cheque**"). Attached hereto as **Exhibit "D"** is a true copy of the First Dishonoured Cheque and the Returned Item Advice slip that my bank sent to me, dated December 5, 2011.

12. In light of the foregoing, I decided that I needed some professional assistance to help me terminate the Tenants' tenancy and to recover the amounts that were owed to me. To this end, I retained a paralegal, Harry Fine ("**Fine**").

13. On December 20, 2011, Fine initiated proceedings and filed another application with the Board seeking an Order for termination of the Tenants' tenancy, payment of rental arrears, and eviction (the "**Second Application**"). Attached hereto as **Exhibit "E"** is a true copy of the Second Application that was served and filed with the Board on December 20, 2011.

14. The Second Application was scheduled by the Board to be heard on January 23, 2012.

15. I am advised by Fine, and do verily believe, that, at approximately 12:00 p.m. on January 23, 2012:

- a. Hitti called Fine as Fine was driving to the Board to attend to the hearing of the Second Application. Hitti told Fine that he was calling from New York and that his flight was delayed. Hitti further advised Fine that, in light of the foregoing, he wanted to adjourn the hearing of the Second Application;

- b. Fine told Hitti that I would not consent to an adjournment of the Second Application because, at the time of Hitti's call, Hitti owed me \$11,045.00, which amount consisted of \$10,800.00 in rent arrears, \$75.00 in NSF charges, and \$170.00 for the Second Application filing fee;
- c. Fine also told Hitti that Fine did not believe that Hitti was in New York or that his flight was delayed;
- d. Fine then asked Hitti if he could pay \$11,045.00 within eleven days, to which Hitti replied that he would have "no problem" paying the aforesaid amount within the next eleven days; and
- e. Fine responded by stating that, if Hitti would have "no problem" paying the aforesaid amount within the next eleven days, Fine would ask that the Board issue a "standard eleven day remedial Order". Hitti responded by stating that such an Order would be acceptable.

16. By way of clarification, when a landlord successfully prosecutes a rent arrears application, the Board will typically issue an Order that is commonly referred to as a "standard eleven day remedial Order". The "standard eleven day remedial Order" terminates a tenant's tenancy and requires the tenant to vacate the rental unit eleven days after the date on which the Order is issued, unless the tenant pays the landlord the amounts that are determined to be outstanding.

17. Having said that, the Second Application was heard by the Board on January 23, 2012. Fine and I attended at the hearing of the Second Application. At the commencement of the Second Hearing, Fine described his conversation with Hitti to the Member who heard the Second Application.

18. Ultimately, the Board found that the Tenants had not paid the total rent that they were required to pay for the period from October 15, 2011 to February 14, 2012. Consequently, on or about January 25, 2012, the Board rendered an order (the "**Eviction Order**") that, among other things,

- a. terminated the Tenants' tenancy and required the Tenants to move out of the Unit on or before February 5, 2012, unless the Tenants voided the Eviction Order by paying the amounts that were owed to me, the particulars of which are set out below;
- b. required the Tenants to pay me \$12,265.99, which amount represented the amount of rent and other compensation owing up to January 25, 2012 and the total charges related to NSF cheques tendered to me by the Tenants;
- c. required the Tenants to pay to me \$118.36 per day in compensation for the use of the Unit from January 26, 2012 to the date that the Tenants moved out of the Unit; and
- d. required the Tenants to pay me \$170.00 on account of the cost of filing the Second Application.

Attached hereto as **Exhibit "F"** is a true copy of the Eviction Order dated January 25, 2012.

the Void Motion

19. On or about February 5, 2012, Hitti delivered a non-certified cheque to me. The cheque was in the amount of \$11,045.00, which amount was sufficient to void the Eviction Order.

20. On or about February 6, 2012, I deposited Hitti's cheque.

21. On or about February 8, 2012, I was notified by my bank that said cheque was not honoured because there were insufficient funds in Hitti's account (the "**Second Dishonoured Cheque**"). Attached hereto as **Exhibit "G"** is a true copy of the Second Dishonoured Cheque and the Returned Item Advice slip that my bank sent to me, dated February 8, 2012.

22. So, on February 9, 2012, after finding out that the aforementioned cheque was returned NSF, I went to the Court Enforcement Office (the "**Sheriff**"), paid the requisite fee (namely \$318.00), and filed the Eviction Order so that same could be enforced. Attached hereto as **Exhibit "H"** is a true copy of a form titled "Instructions For Filing Evictions", which form the Sheriff gave to me when I filed the Eviction Order, together with the receipt that the Sheriff issued to me in respect of the filing fee.

23. After I attended at the Sheriff's office, I discovered that, on February 6, 2012, the Tenants filed a motion with the Board to void the Eviction Order on the basis that, before the Eviction Order became enforceable, the Tenants paid me the amount required to void the Eviction Order, namely \$11,045.00 (the "**Void Motion**").

24. In support of the Void Motion, Hitti provided the Board with an affidavit in which he swore under oath that he had paid me \$11,045.00. Hitti also attached, to his affidavit, a photocopy of the Second Dishonoured Cheque.

25. Pursuant to the Board's procedures, the Void Motion is brought in writing and on a without notice basis. As a result, I did not have an opportunity to respond to the Void Motion. Accordingly, after the Board reviewed the materials that were filed by Hitti, the Board granted the Void Motion, and ordered that the Eviction Order could not be enforced (the "**Void Order**"). Attached hereto as **Exhibit "I"** is a true copy of the Void Order, dated February 7, 2012

the Set Aside Motion

26. On February 10, 2012, I brought a motion to the Board to set aside the Void Order (the "**Set Aside Motion**"). In the form that I filed with the Board, I explained that, in my view, Hitti had lied in his affidavit when he advised the Board that he had paid \$11,045.00 to me, as he knew that there were no funds in the bank account on which the Second Dishonoured Cheque was drawn. I also stated that, at the hearing of the First Application, Squibb withdrew the First Application when Hitti gave her the First Dishonoured Cheque. Finally, I advised the Board that, in light of Hitti's actions, I was being ruined financially. Attached hereto as **Exhibit "J"** is a true copy of a document titled Landlord's Motion to Set Aside an Order to Void, dated February 10, 2012, which document I filed with Board in order to bring the Set Aside Motion.

27. The Set Aside Motion was scheduled by the Board to be heard on March 7, 2012.

28. On March 7, 2012, I attended at the Board together with Fine. The Tenants did not attend. However, the Tenants' lawyer, Gerald Mitchell ("**Mitchell**"), appeared on their behalf. At the commencement of the hearing, Mitchell requested that the Set Aside Motion be adjourned to March 12, 2012. As a condition of the adjournment, Mitchell stated that Hitti would pay to the Board all of the amounts that were, at the time, owed to me, namely \$14,963.00, failing which the Tenants would concede.

29. Fine, in turn, suggested that, if Hitti was willing to pay the aforesaid amount into the Board, then the Board should issue an interim order containing the terms proposed by Mitchell so that the parties did not have to again attend at the Board on March 12, 2012. Mitchell agreed with Fine's suggestion. Accordingly, on March 8, 2012, the Board issued an order on consent (the "**Consent Order**") that, among other things, required the Tenants to pay \$14,963.00 to the Board in trust on or before March 12, 2012, failing which the Set Aside Motion would be granted. Attached hereto as **Exhibit "K"** is a true copy of the Consent Order, dated March 8, 2012.

30. The Tenants did not pay the amounts that they were required to pay to the Board with the result that, on March 16, 2012, the Board granted the Set Aside Motion, ordered that the Eviction Order remained in force and effect, and directed the Sheriff to enforce same (the "**Set Aside Order**"). Attached hereto as **Exhibit "L"** is a true copy of the Set Aside Order, dated March 16, 2012.

31. It is important to note that, in spite of the fact that the Void Order was set aside, pursuant to the *Residential Tenancies Act, 2006* and the Board's procedures, the Tenants were still able to pay the amounts that they owed to me and then file another motion with the Board to void the Eviction Order. This was explained to Mitchell during the hearing of the Set Aside Motion.

the Tenants' Abuse of Process

32. The Tenants, however, did not pay the amounts required by the Eviction Order or the Consent Order, nor did they vacate the Unit. Rather, on March 16, 2012, the Tenants initiated this appeal, with the result that the Eviction Order has been stayed. Attached hereto as **Exhibit "M"** are true copies of the Notice of Appeal and the Appellant's Certificate respecting Evidence, dated March 16, 2012, that the Tenant filed in respect of the Set Aside Order.

33. In addition to the foregoing, the Tenants delivered an Amended Notice of Appeal on March 19, 2012, a true copy of which is attached hereto as **Exhibit "N"**.

34. In their Amended Notice of Appeal, the Tenants are essentially relying on the following two grounds for their appeal:

- a. the Board made an error at law when it refused the Tenants' adjournment request (the "**First Ground of Appeal**"); and
- b. Bespoke was not named as a tenant in the Second Application, but was adversely affected by the Set Aside Order (the "**Second Ground of Appeal**").

35. It is my belief that the Tenants' appeal is devoid of merit, and has been filed solely for the purpose of delay and in order to permit the Tenants to remain in possession of the Unit without paying rent for as long as possible.

36. With respect to the First Ground of Appeal, and as I explained in greater detail above, the Board did not refuse the Tenants' adjournment request. Rather, the Board issued a consent order on the terms proposed by the Tenants' lawyer, Mitchell.

37. As for the Second Ground of Appeal, I should note that at no time during any of the proceedings did the Tenants object to the fact that the First Application and/or the Second Application did not name Bespoke. Moreover, the only people that reside in the Unit are the Tenants. That said, Bespoke did have notice of the aforesaid proceedings. In fact, the First Dishonoured Cheque was issued from Bespoke's bank account. In addition to the foregoing, the Termination Notice named the Tenants and Bespoke.

38. In any event, I cannot see how a corporation, like Bespoke, can qualify as a residential tenant given the fact that a corporation cannot occupy a rental unit for residential purposes.

39. Having said all that, in my view, the Tenants' motive in bringing the within appeal was to obtain an automatic stay of the Set Aside Order pursuant to subsection 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, and to remain in possession of the Unit without paying rent for as long as possible.

40. To this end, the Tenants:

- a. have paid no rent and continue to pay no rent;
- b. continue to reside in the Unit;
- c. provided me with the First Dishonoured Cheque, which cheque they must have known would not clear, and then convinced me to withdraw the First Application;

- d. provided me with the Second Dishonoured Cheque, which cheque they must have known would not clear, and then misled the Board in order to obtain the Void Order;
- e. have initiated the within appeal, which appeal is devoid of merit;
- f. have not filed proof that a transcript of evidence was ordered within the time prescribed by subrule 61.05(5) of the *Rules of Civil Procedure*; and
- g. have not taken any steps to perfect their appeals within the time prescribed by subrule 61.09(1) of the *Rules of Civil Procedure*.

the 2009 Appeal

41. In addition to the foregoing, I have recently discovered that the Tenants have a history of initiating frivolous appeals to obtain rent-free housing. Specifically, in or about February, 2009, Hitti initiated an appeal of an eviction order obtained by Hitti's former landlord, Metropolis Properties Inc. (the "**2009 Appeal**").

42. Specifically, on or about November 24, 2009, Hitti's former landlord brought a motion to the Ontario Superior Court of Justice (Divisional Court) to, among other things, quash the 2009 Appeal on the basis that Hitti had breached numerous Court Orders that required Hitti to make various payments into Court. Attached hereto as **Exhibit "O"** is a true copy of the Notice of Motion, dated November 13, 2009, together with the supporting affidavit sworn by Jordan Druxerman November 13, 2009 (without exhibits), in respect of the 2009 Appeal.

43. On or about November 24, 2009, the Court quashed the 2009 Appeal and awarded Hitti's former landlord \$7,500.00 in costs (the "**Quash Order**"). Attached hereto as **Exhibit "P"** is a true copy of the Quash Order, dated November 24, 2009, together with a copy of the Court's endorsement.

44. On or about December 7, 2009, Hitti brought a motion to the Ontario Superior Court of Justice (Divisional Court) to set aside the Quash Order. Attached hereto as **Exhibit "Q"** is a true copy of Hitti's Notice of Motion, dated December 4, 2009.

45. On or about January 25, 2010, the Court dismissed Hitti's motion and awarded Hitti's former landlord \$1,200.00 plus GST in costs (the "**Dismissal Order**"). Attached hereto as **Exhibit "R"** is a true copy of the Court's endorsement, dated January 25, 2010.

46. Based on my experience with Hitti, I am certain that he has not paid the amounts that he was ordered to pay pursuant to the Quash Order and/or the Dismissal Order.

47. As of the date hereof, the Tenants owe me \$25,445.00, which amount represents the amount of rent owing and compensation up to June 14, 2012 and the total charges related to the dishonoured cheques tendered to me by the Tenants. The aforesaid amount does not include the interest awarded to me by the Board, nor does it include the fees that I incurred when I requested the Sheriff to enforce the Eviction Order.

48. The Tenants do not dispute the amount that is outstanding, or that they have failed to pay same.

49. If the Tenants' appeal is not ultimately dismissed, I believe that it will cost me at least \$6,000.00 to respond to same. I also do not believe that the Tenants have any assets in Ontario, with the result that they will not be able to pay the costs of the appeal.

50. More importantly, if the Tenants' appeal is not dismissed and/or if the Tenants do not ultimately pay me the amounts that are outstanding and/or that will become due, I am at significant risk of being ruined financially.

51. I make this affidavit in support of the relief sought in the Notice of Motion and for no improper purpose.

Sworn before me at the City)
of Toronto in the Province of)
Ontario this 4{th} day of June, 2012)
[signature of Commissioner])
_____)
Commissioner for Taking Affidavits Douglas H. Levitt

Melissa D'Amico

5 At the conclusion of the hearing of the motion, I granted the order sought and awarded costs to the landlord, fixed at \$13,072.12, payable by the tenant. I concluded that his appeal raised no *bona fide* question of law, that it was totally devoid of merit, vexatious and an abuse of process and that the tenant had not perfected the appeal as required by the Rules. As well, I concluded that the tenant's conduct improper conduct justified an award of costs on a substantial indemnity basis and that the amount awarded was supported by the landlord's costs outline. I also stated that written reasons for my decision would follow. These are those reasons.

6 It is my hope that those in a position to amend the Rules of this Court will consider this judgment and see fit to restrict the right of appeal in residential landlord and tenant cases and, perhaps, require that leave to appeal be obtained before appeals can be brought.

Motion granted.

Footnotes

* Although the original title of proceeding has been maintained, it should be noted that the sole appellant was the tenant, Hitti.