

2016 ONSC 4132
Ontario Superior Court of Justice (Divisional Court)

Regan v. Latimer

2016 CarswellOnt 9921, 2016 ONSC 4132, 268 A.C.W.S. (3d) 204

James Francis Regan, Tenant/Respondent and Donna Latimer, Landlord/Moving Party

L.A. Pattillo J.

Heard: June 21, 2016
Judgment: June 22, 2016
Docket: 231/16

Counsel: David Strashin, for Tenant / Respondent
Spencer Toole, for Landlord / Moving Party

Subject: Property

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.iii By landlord for cause

V.20.k.iii.D Miscellaneous

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — By landlord for cause — Miscellaneous

Non-payment of rent — Tenant did not pay any rent from outset of his tenancy — Landlord applied to Landlord and Tenant Board for order terminating tenancy, payment of rent arrears, and eviction — Tenant was granted adjournment of hearing on condition that he pay rent into Board, but he failed to do so — Board issued order terminating tenancy and requiring tenant to move out unless he voided termination order by paying amount owing to landlord — Landlord brought motion to dismiss tenant's appeal — Motion granted — Tenant alleged certain deficiencies in landlord's application and errors in law by Board without giving any explanation or detail — Any deficiencies were procedural and did not raise questions of law — There was no substance to ground that Board failed to ascertain real substance of transaction and good faith of participants as required by s. 202 of Residential Tenancies Act, 2006 — Board found that tenant failed to pay rent as alleged by landlord, and specifically addressed s. 83(2) of Act which requires it to review circumstances and consider whether it should exercise its power to grant eviction order — Since tenant failed to pay monies into court as ordered, Board was justified in not hearing his submissions on state of repair of premises — Tenant's concerns about state of repair of premises could and should have

been raised before Board's decision, and did not excuse his total failure to pay any rent — There was no denial of procedural fairness and natural justice by Board — Tenant's appeal was quashed on basis that it was completely devoid of merit and stay of Board's order was vacated — Vacant possession of premises ordered.

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, 69 O.A.C. 312, 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 1994 CarswellOnt 375 (Ont. C.A.) — referred to

Statutes considered:

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

- s. 20 — considered
- s. 82 — considered
- s. 82(1) — considered
- s. 83(2) — considered
- s. 83(3) — considered
- s. 195(4) — considered
- s. 201 — considered
- s. 202 — considered
- s. 210 — considered
- s. 210(1) — considered

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

- s. 25(1) — considered

MOTION by landlord to dismiss appeal by residential tenant from decision of Landlord and Tenant Board terminating his tenancy.

L.A. Pattillo J.:

Introduction

1 The Landlord, Donna Latimer, brings this motion to dismiss the Tenant, James Regan's appeal from the decision of the Landlord & Tenant Board (the "Board") dated April 15, 2016, which, among other things, terminated his tenancy.

2 At the conclusion of the hearing, I advised the parties that, for reasons to follow, I was allowing the motion and ordering, among other things, that Mr. Regan's appeal be quashed on the basis that it was completely devoid of merit and the stay be vacated.

3 These are my reasons.

Background

4 Mr. Regan began living in the rented premises (the "Premises") in late October 2015 pursuant to a Tenancy Agreement dated November 1, 2015. The monthly rent is \$3,200. Mr. Regan has not paid any rent from the date he moved into the Premises to today.

5 In December 2015, the Landlord served Mr. Regan with a Rent Termination Notice. On January 20, 2016, the Landlord filed an application with the Board for an order terminating the tenancy, payment of rent arrears and eviction.

6 On February 16, 2016, the Landlord and her representative and Mr. Strashin, on behalf of Mr. Regan, attended at the Board for a hearing. Mr. Regan sought an adjournment. The Board issued a consent interim order that provided, among other things, the hearing would be adjourned on a peremptory basis to Mr. Regan and he would pay \$3,200 into Board on or before February 29, 2016; \$3,200 to the Board on or before March 7, 2016 and thereafter the monthly rent of \$3,200 to the Board until resumption of the hearing.

7 On April 11, 2016, the Landlord's application came back on for a hearing. The Landlord and her representative along with Mr. Regan and Mr. Strashin on his behalf were present. Mr. Regan had paid no monies to the Board pursuant to the February 16, 2016 consent order. The hearing proceeded.

8 Although Mr. Regan has provided no evidence on the motion, in both his factum and Mr. Strashin's submissions before me, Mr. Regan submits that the Board refused to hear his submissions concerning the state of repair of the Premises on the ground that he had not paid any of the monies to the Board as required by the February 16, 2016 consent order.

9 On April 15, 2016, the Board issued its decision/order terminating Mr. Regan's tenancy and requiring him to move out on or before April 30, 2016 unless he voided the termination order by paying the amount owing to the Landlord plus costs (which totaled \$17,772.26 at that point) plus \$105.21 per day of occupancy beyond April 16, 2016. The Board noted that the amount payable on April 30, 2016 would be \$19,420.00. The Board's reasons make no mention about its refusal to permit Mr. Regan to make submissions to it.

10 Mr. Regan did not pay any of the amounts owing as set out by the Board by April 30, 2016.

11 On May 9, 2016, Mr. Regan appealed the Board's April 15, 2016 order to the Divisional Court pursuant to s. 210(1) of the *Residential Tenancies Act*, S.O. 2006, c. 17 (the "Act"). That section provides that the appeal is only on a question of law. The appeal gives rise to an automatic stay of the April 15, 2016 order pursuant to s. 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

Discussion

12 Mr. Regan's Notice of Appeal sets out the following grounds of appeal:

1. The Board erred in law in granting the application and terminating the tenancy;

2. The Board erred in law in failing to consider properly or at all Section 82 of the Act and the Tenant's claims;
3. The Board denied the Tenant procedural fairness and natural justice by failing to consider the Tenant's s. 82 claims;
4. The Board failed to consider properly or at all the deficiencies in the Landlord's application;
5. The Board failed to consider s. 202 of the Act (to ascertain the real substance of all transactions and the good faith of the participants), particularly where, as in this matter, the Landlord has not been transparent as to its true intentions; and
6. The Board failed to apply properly or at all the mandatory provisions of s. 83(3) of the Act.
7. Section 210 of the Act.

13 On this motion, the Landlord has filed an affidavit setting out the history and what occurred at the February 16 and April 11, 2016 appearances before the Board. Mr. Regan has filed no affidavit material. As noted, he has filed a factum, of which I will say more shortly. Also, on June 20, 2016, Mr. Regan attended at the Divisional Court office and provided a bound report from Haddad Geotechnical Inc. dated April 28, 2016 (the "Report") and insisted that it be put in the court file. The Report had not been served on counsel for the Landlord and was not provided to him until after the motion commenced before me and I raised it with counsel.

14 In his factum on this motion, Mr. Regan states that he did not attend the February 16, 2016 hearing. He has then written in handwriting that he was not aware of any orders or interim orders granted. As noted, he has filed no affidavit in support of that allegation. Further, Mr. Strashin confirmed that while Mr. Regan was not present at the Board on February 16, 2016, he was there on his behalf and he made him aware of the consent interim order and the requirement to pay the rental monies to the Board as ordered.

15 Grounds 1, 4 and 7 are general allegations and do not set out any detail. There is no indication either in Mr. Regan's factum or Mr. Strashin's submissions as to what, if any, deficiencies there are in the Landlord's application before the Board. Regardless, even if deficiencies exist, they are procedural and do not raise questions of law. Further s. 201 of the Act deals with the appeal from the Board to this court.

16 Nor do I consider that there is any substance to Ground 5 that the Board failed to ascertain the real substance of all transactions and the good faith of the participants as required by s. 202 of the Act. The Landlord's application was based on failure to pay rent. The Board found, based on the evidence before it that Mr. Regan had failed to pay rent. Further, the Board specifically addressed s. 83(2) of the Act which requires that before granting an order to evict a tenant, it review the circumstances and consider whether or not it should exercise such powers and stated as follows:

I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the Residential Tenancies Act, 2006 (the 'Act'), and find that it would not be unfair to postpone the eviction until April 30, 2016 pursuant to subsection 83(1)(b) of the Act.

17 Grounds 2, 3, 4 and 6 all deal with Mr. Regan's submission that the Board breached ss. 82 and 83(3) of the Act by refusing to hear his submissions in accordance with s. 82 concerning deficiencies at the Premises and that the Landlord was in breach of s. 20 of the Act.

18 Section 82(1) of the Act provides that at a hearing to terminate a tenancy and evict a tenant, the Board shall permit the tenant to raise any issue that could be the subject of an application by the tenant under the Act. Section 83(3) provides that the Board shall refuse to grant an application for eviction where, among other things, the landlord is in serious breach of its responsibilities under the Act or any material covenant in the tenancy agreement. Section 20 provides that a landlord is responsible for providing and maintaining, among other things, a rental unit in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

19 Before me, Mr. Strashin submits that the Board erred in not allowing Mr. Regan to raise his claim that the Landlord

was in breach of s. 20 of the Act in failing to maintain the Premises in a good state of repair as set out in the Report. The Report discloses water damage and mould behind the drywall around the east windows of the Premises which Mr. Strashin submits are significant enough to have perhaps resulted in a different disposition by the Board.

20 There are a number of problems with Mr. Regan's position. First, s. 195(4) of the Act provides that if a respondent is required to pay a specified sum into the Board within a specified time under clause (1)(a) [which the February 16, 2016 consent order required Mr. Regan to do] and fails to do so [which Mr. Regan did], the Board may refuse to consider the evidence and submissions of the respondent. The Board, therefore, had the authority in the circumstances of this case to refuse to hear Mr. Regan's submissions. Nor is there any evidence before me that the Board improperly exercised its discretion to not allow Mr. Regan to make submissions. In my view, in the circumstances before it, the Board's decision to not hear Mr. Regan was completely justified. Mr. Regan had not paid rent from the outset of the tenancy. As a term of an adjournment of the Landlord's hearing which he requested Mr. Regan consented to an order to pay his rent from that point on to the Board which he did not do.

21 I also have concerns about Mr. Regan's *bona fides* in respect of his allegations about the state of repair of the Premises. While the Report identifies some issues in need of repair, they did not arise recently. His concerns about the state of repair of the Premises could and should have been raised well before April 11, 2016. And in any event, they do not excuse his total failure to pay any rent from the outset of his tenancy.

22 Mr. Regan seeks to rely on the Report to establish a deficient state of repair. The problem is that the Report was both started and completed after the April 11, 2016 hearing and the subsequent decision of the Board. It was not before the Board and it is not admissible on the appeal because the evidence it purports to provide was clearly available to Mr. Regan before April 11, 2016. See: *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

23 Further, and as indicated by Mr. Strashin, apart from himself, Mr. Regan had no evidence concerning the deficiencies available at the April 11, 2016 hearing.

24 Finally, I do not consider that there is any merit to Ground 3 that there was a denial of procedural fairness and natural justice by the Board. At all times Mr. Regan had notice of the proceedings and was represented by counsel. Further, and as discussed, it was within the Board's power to not allow him to make submissions on April 11, 2016 given his failure to comply with the consent order to pay his rent to the Board during the currency of the Landlord's application.

25 For the above reasons, there is no merit whatsoever to Mr. Regan's appeal from the Board's April 15, 2016 order. Further, given the circumstances before the court and particularly that he has failed to pay any rent whatsoever for the Premises from the outset of his tenancy, I consider Mr. Regan's appeal to be an abuse of process and vexatious. The only purpose of the appeal is to prolong Mr. Regan's rent free existence.

26 I have considered whether an order requiring payment of all back rent and costs within a short period of time failing which the appeal would be dismissed would be appropriate. Given, however, Mr. Regan's history of not paying rent, such an order is not appropriate. Nor is such an order sought by the Landlord.

Conclusion

27 Accordingly, for the reasons herein, the Landlord's motion is allowed. Mr. Regan's appeal is dismissed and the stay is vacated. The Sheriff is directed to give immediate and expedited vacant possession of the Premises to the Landlord, not to be exercised before June 29, 2016.

28 The Landlord is entitled to her costs of the motion. Given my findings that Mr. Regan's appeal is totally devoid of merit and an abuse of process, I concur with the Landlord's submission that she is entitled to substantial indemnity costs. Her costs outline indicates that those costs are \$4,545.78. Given the issues, the work done by counsel and the hourly rates charged, I consider the amount claimed to be fair and reasonable.

29 Costs to the Landlord, fixed at \$4,545.78 payable forthwith.

30 Order signed by me.

Motion granted.

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