2015 ONSC 2556, 2015 CarswellOnt 5599, 253 A.C.W.S. (3d) 206

2015 ONSC 2556
Ontario Superior Court of Justice (Divisional Court)

Solomon v. Levy

2015 CarswellOnt 5599, 2015 ONSC 2556, 253 A.C.W.S. (3d) 206

Sheldon Solomon and Sherry Solomon, Landlords (Respondents) and Gad Levy and Karen Levy, Tenants (Appellants)

DiTomaso J.

Heard: April 16, 2015
Judgment: April 17, 2015
Docket: Newmarket DC-00764-00

Counsel: Spencer **Toole**, for Landlords / Respondents
Gad Levy, Tenant / Appellant, for himself and Karen Levy

Subject: Civil Practice and Procedure; Property; Public

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

Administrative law

III Requirements of natural justice
III.6 Miscellaneous

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

Tenants leased unit from landlords — Since September 2014, tenants had neglected or refused to pay any rent to landlords — Landlords initiated eviction proceedings — Landlord and Tenant Board terminated tenants' tenancy and required them to move out of unit — Tenants initiated appeal and obtained automatic stay of order — Landlords brought motion for order quashing appeal and lifting stay of order — Motion granted — Tenants' appeal was devoid of any merit and not based on error in law — It could not be said that, by denying tenants' request for adjournment, board conducted itself in arbitrary fashion or denied tenants natural justice — Tenants' appeal was abuse of process — Appeal was filed solely for purpose of

delay so that tenants could obtain automatic stay and remain in possession of unit without paying rent for as long as possible.

Administrative law --- Requirements of natural justice — Miscellaneous

Tenants leased unit from landlords — Since September 2014, tenants had neglected or refused to pay any rent to landlords — Landlords initiated eviction proceedings — Landlord and Tenant Board terminated tenants' tenancy and required them to move out of unit — Tenants initiated appeal and obtained automatic stay of order — Landlords brought motion for order quashing appeal and lifting stay of order — Motion granted — It could not be said that, by denying tenants' request for adjournment, board conducted itself in arbitrary fashion or denied tenants natural justice — Board considered submissions in respect of tenants' adjournment request and decided not to accede to this request — Board's decision was based on prevailing facts and circumstances, and was made after hearing and considering submissions of parties.

Table of Authorities

Cases considered by *DiTomaso J.*:

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Flamboro Downs Holdings Ltd. v. I.B. of T.C.W. & H. of A., Local 879 (1979), 99 D.L.R. (3d) 165, 1979 CarswellOnt 814, 24 O.R. (2d) 400 (Ont. Div. Ct.) — considered

Lesyork Holdings Ltd. v. Munden Acres Ltd. (1976), 13 O.R. (2d) 430, 1 C.P.C. 261, 1976 CarswellOnt 300 (Ont. C.A.) — referred to

Schmidt v. Toronto Dominion Bank (1995), 37 C.P.C. (3d) 383, 1995 CarswellOnt 154, 24 O.R. (3d) 1, 82 O.A.C. 233 (Ont. C.A.) — referred to

Smither v. Lander (1998), 1998 CarswellOnt 1449 (Ont. Gen. Div.) — referred to

Zouhar v. Salford Investments Ltd. (2008), 2008 CarswellOnt 3302 (Ont. Div. Ct.) — referred to

Statutes considered:

Residential Tenancies Act, 2006, S.O. 2006, c. 17
Generally — referred to

s. 82 — considered

s. 183 — considered

s. 184 — considered

s. 210 — referred to

s. 210(1) — considered

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
Generally — referred to

s. 21 — considered

s. 25(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 63.01 — referred to

R. 63.01(3) — considered

R. 63.01(5) — considered

MOTION by landlords for order quashing tenants' appeal and lifting stay of termination order.

***DiTomaso J.*:**

The Motion

1 The Landlords Sheldon Solomon and Sherry Solomon seek an order quashing the appeal of the Tenants Gad Levy and Karen Levy and lifting the stay of the order that was issued by Vincent Ching, a Member of the Landlord and Tenant Board ("the Board") on January 15, 2015 ("the termination order").

Background

2 The Landlords are the owners of 265 Arnold Avenue, Thornhill, Ontario L4J 1C3 (the "Unit").

3 The Tenants leased the Unit from the Landlords at a monthly rent of $2,250 (the "Rent"). The Tenants have resided in the Unit since October 1, 2013.

4 Shortly after depositing the cheque that the Tenants gave to the Landlords for the Rent owing in respect of April 2014, same was dishonoured by the Tenants' bank because the Tenants had insufficient funds contained in their bank account.

5 In addition to failing to pay the Rent for April 2014, the Tenants refused or neglected to pay any Rent for May 2014 and June 2014 and, commencing September 2014, have neglected or refused to pay any Rent to the Landlords.

6 As a result of the foregoing, on or about November 11, 2014, the Landlord initiated eviction proceedings against the

Tenants and, in this regard, served the Tenants with a Notice to End a Tenancy Early for Non-payment of Rent (the "Rent Termination Notice").

7 Despite being served with the Rent Termination Notice, the Tenants continued to refuse to pay Rent, and did not vacate the Unit. Consequently, on or about November 27, 2014, the Landlords 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 Landlord's Application"). The Board, in turn, scheduled the Landlord's Application to be heard on January 14, 2015.

8 The Board heard the Landlord's Application on or about January 14, 2015 and, on or about January 15, 2015, the Board determined that the Tenants had not paid the full amount of Rent outstanding for the period from April 1, 2014 to January 31, 2015. As a result, the Board rendered an order (the "Termination Order") that:

> a. Terminated the Tenants' tenancy and required the Tenants to move out of the Unit on or before January 26, 2015, unless the Tenants voided the Termination Order by paying the amounts that were owed to the Landlords;
>
> b. Required the Tenants to pay the Landlords $12,351.15, which amount represented the amount of Rent and other compensation owing up to January 15, 2015 (less the rent deposit and interest that the Landlords owed on the rent deposit);
>
> c. Required the Tenants to pay to the Landlords $73.97 per day in compensation for the use of the Unit from January 16, 2015 to the date that the Tenants moved out of the Unit; and
>
> d. Required the Tenants to pay to the Landlord $170 on account of the cost of filing the Landlord's Application.

9 Pursuant to the *Residential Tenancies Act*, 2006, S.O. 2006, c.17 (the "RTA") and the Board's procedures, the Tenants retained the ability to void the Termination Order and continue their tenancy by simply paying the amounts that they owed to the Landlords. The Tenants, however, did not pay the amounts required by the Termination Order, nor did they vacate the Unit. Rather, on or about January 23, 2015, the Tenants initiated the within appeal.

10 By filing the Notice of Appeal, the Tenants obtained an automatic stay of the Termination Order pursuant to subsection 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 (the "Automatic Stay").

The Issue

11 The issue to be determined is whether the Tenants' appeal should be quashed and the stay lifted.

Position of the Parties

Position of the Landlords

12 The Landlords submit the Tenants' appeal should be quashed and the stay lifted for any one of the following reasons: (a) the Tenants' appeal is devoid of merit; (b) the Tenants' appeal fails to raise any legitimate point of law, and/or (c) the Tenants' appeal is frivolous, vexatious and an abuse of process.

13 It is submitted the Tenants real motive in commencing this appeal was to obtain an automatic stay and to remain in possession of the Unit without paying rent for as long as possible. To this end, the Tenants: (a) did not pay rent for April, May and June 2014 and have paid no rent since September 2014; (b) continue to pay no rent; (c) continue to reside in the Unit.

14 The Landlords submit the Board order the Tenants to pay the sum of $15,940 by January 26, 2015 to the Landlords in order to void the Termination Order. This amount was never paid by the Tenants nor did the Tenants vacate the rental unit.

As of March 1, 2015 it is submitted the Tenants owe the Landlords the sum of $20,440, the sum of $27,190 as at the end of March 2015, and the sum of $29,440 as at the end of April 20, 2015.

15 Instead, on or about January 23, 2015, the Tenants commenced this appeal. In their Notice of Appeal, the Tenants are claiming that the Board erred by not giving the Tenants an adjournment and by not considering and/or allowing the Tenants to tender evidence.[1] The Landlords submit the Board had good reasons for not granting the Tenants an adjournment. Further, the Landlords submit the Board did not refuse to consider and/or refuse to allow the Tenants to tender relevant evidence. The appeal ought to be quashed and the stay lifted.

Position of the Tenants

16 The Tenants submit the motion is frivolous, without merit, an abuse of process and ought to be dismissed. The Tenants submit the Board erred by not giving the Tenants an adjournment and by not considering and/or allowing the Tenants to tender evidence. The Landlord's motion ought to be dismissed.

Analysis

17 The Record before this court consists of the Landlords' Motion Record, Factum and Book of Authorities. I accept the evidence of Sheldon Solomon contained in his affidavit sworn March 18, 2015 and all exhibits thereto.[2] His evidence is detailed, credible and uncontroverted regarding what transpired between the parties and, in particular, what transpired before the Board on January 14, 2015.

18 I allowed Mr. Levy to submit a three page unsworn response to the motion on the basis that I would review same and determine what weight, if any, it deserves. I find this document is deserving of no weight at all. Rather, it is entirely focused on matters pertaining to the condition and disrepair of the rental unit as opposed to the substance of the Landlords' motion. The Tenants' document was totally unresponsive to the issues raised by the Landlords on this motion. Accordingly, the Tenants' response is absolutely of no use and is disregarded by this court.

19 Also filed by Mr. Levy was a transcript of the proceedings before the Board. I have read this transcript which is not of the highest quality. Nevertheless, I find the transcript when read as a whole supports the position taken by the Landlords and not the Tenants regarding the adjournment issue.

20 The Tenants have also submitted that the time for perfecting this appeal is June 2, 2015. I find the perfection of this appeal to be of no consequence as the evidence which the Tenants wish to file relate again to the condition and disrepair of the rental unit and not to the adjournment issue or the issues raised on this motion.

21 The critical question to be decided on this motion is whether the appeal should be quashed and the stay lifted. For the following reasons, the answer to this question is yes and this motion is granted.

22 On or about January 14, 2015, the Landlords attended at the Board for the hearing of the Landlords' Application. Mr. Levy and the Tenant's legal representative, G. Di Marco "(DiMarco"), attended on behalf of the Tenants.[3]

23 At the commencement of the hearing, Di Marco requested that the hearing of the Landlords' Application be adjourned because Ms. Levy had recently had a baby and could not be present at the hearing, and because Di Marco had been busy and had not had time to adequately prepare for the hearing.[4]

24 With respect to Di Marco's failure to adequately prepare for the hearing of the Landlords' Application, Di Marco submitted that the Tenants wanted to raise issues pursuant to section 82 of the *Residential Tenancies Act*, 2006, S.O. 2006, c.17 (the "RTA"), which section provides that, at an application commenced by a landlord with respect to arrears of rent, a tenant has the right to raise any issue and to be granted the same relief as if the tenant had commenced his or her own application. Specifically, Di Marco stated that the Tenants intended to claim that the Rental Unit was in a state of disrepair (the "Section 82 Issues") and that, as a result of said disrepair, the Tenants were entitled to an abatement of the Rent. Di Marco stated, however, that he was not prepared to raise the Section 82 issues at the hearing and, as a result, required an

adjournment.[5]

25 For a number of reasons, the Landlords objected to the Tenants' adjournment request. Specifically, the Landlords opposed the Tenants' adjournment request because:

> a. the Tenants owed the Landlords seven months' rent, and had not paid any rent since September 2014;
>
> b. the Landlord were of the view that the adjournment request was a delay tactic and was made in an effort to allow the Tenants to continue to remain in possession of the Rental Unit while continuing to not pay the Landlords any Rent;
>
> c. the Tenants were served with the Landlords' Application in early December 2014 and had retained Di Marco in mid-December 2014 and, as a result, had sufficient time to prepare for the hearing; and
>
> d. the Tenants did not advise the Landlords of their intention to request an adjournment until immediately before the hearing.[6]

26 After considering the circumstances, the Board denied the Tenants' adjournment request. The Board determined that, while the Tenants had the right to raise Section 82 issues at the hearing, it was the Tenants' responsibility to make sure that they were fully prepared to raise said issues at the hearing. The Board found that, in the within case, the Tenants were not prepared to raise the Section 82 issues because their representative, Di Marco, was preoccupied with other things, and that this was not a sufficient reason to adjourn the Landlords' Application. Finally, the Board noted that the Tenants would be able to raise the Section 82 issues, and/or any other issues that they wished to raise, on a later date by simply initiating their own application at the Board.[7]

27 Notably, after the Board made its decision regarding the Tenants' adjournment request, Mr. Levy and Di Marco consented to proceed with the hearing of the Landlords' Application and indicated that the Tenants would be reserving their right to initiate an application against the Landlords. That said, as of the date hereof, the Tenants have not initiated any proceedings against the Landlords at the Board.

28 Specifically, regarding the denial of the adjournment request, the Member's reasons are clear, unambiguous and reflect what transpired on January 14, 2015 as follows:

> Having considered the circumstances in this case, I decided to deny the adjournment request.
>
> Both parties and their legal representatives are present at the hearing. This hearing was scheduled to hear the Landlords' (L1) application because the Tenants did not pay all the rent that they owe. The Tenants have the right to raise section 82 issues at this hearing; however it is their responsibility to make sure that they are fully prepared to raise these issues at the time of hearing.
>
> In this case, the Tenants stated that they are not prepared to raise these issues at this hearing because their legal representative was preoccupied with other things. However, this should not constitute ground to delay the hearing on the Landlords' application. The Tenants can always exercise their legal rights to raise maintenance and other issues with the Board by filing their own applications.
>
> Based on the above, I decided to deny the Tenant's adjournment request and proceeded with the hearing on the Landlords' application only. The Tenant and his legal representative consented to proceed with the hearing and they indicated that they would reserve their right to file their own application.
>
> D.C. stated that the Landlords would like to withdraw the L2 application and proceed with the L1 application only.[8]

29 Ultimately, after hearing the parties' evidence, and after considering the submissions of the parties' legal representatives, on January 15, 2015, the Board determined the Tenants had not paid the full amount of the rent outstanding and rendered the termination order previously referred to.[9]

30 The court finds the Tenants' appeal should be quashed and the stay lifted for the following reasons.

a. the Tenants' appeal is devoid of merit;

b. the Tenants' appeal fails to raise any legitimate point of law; and/or

c. the Tenants' appeal is frivolous, vexatious and an abuse of process.

Devoid of Merit

31 Subsection 210(1) of the RTA provides that an appeal to the Divisional Court of an order of the Board is only available on a "question of law".[10]

32 The distinction between questions of law, fact, and mixed fact and law was articulated by Justice Iacobucci in *Canada (Director of Investigation & Research) v. Southam Inc.*:

> 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.[11]

33 Accordingly, where a tenant appeals an order of the Board on a question of fact or of mixed fact and law, the Divisional Court does not have the jurisdiction to hear the appeal.[12]

34 On a motion, the Divisional Court may quash an appeal if the appeal is manifestly devoid of merit, or is an abuse of process seeking solely to delay.[13]

35 The Court may grant an order under the provisions of subrule 63.01(5) of the *Rules of Civil Procedure* that the automatic stay of eviction under subrule 63.01(3) be lifted on the basis that an appeal is without merit.[14]

36 I find the Tenants have not appealed to this court on a question of law.

Failure to Grant Adjournment

37 Section 184 of the Act provides that the SPPA applies to all proceedings before the Board.[15]

38 The authority to adjourn hearings is found in section 21 of the SPPA, which provides that:

> A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.[16]

39 While the granting of adjournments is in the discretion of the Board member hearing an application, the general approach of the Board is informed by section 183 of the Act, which directs the Board 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 to be heard on the matter".[17]

40 Accordingly, the Board member must take into account the public interest in resolving a case as soon as possible. The key question becomes how to balance the rights of the parties to ensure that matters are resolved quickly while not adversely affecting their respective rights to a fair hearing.

41 In *Flamboro Downs Holdings Ltd. v. I.B. of T.C.W. & H. of A., Local 879*, the applicant initiated an application for judicial review to set aside a decision of the Ontario Labour Relations Board on the ground that its refusal to grant an adjournment of a hearing constituted a denial of natural justice. The Court determined that no denial of natural justice had occurred and, in so doing, held as follows:

> Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulation labour relations. ...
>
> ...But a party who has adequate notice of the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. ...[18]

42 In the circumstances of the within case, it cannot be said that, by denying the Tenants' request for an adjournment, the Board conducted itself in an arbitrary fashion or denied the Tenants natural justice. The Board, as its decision makes plain, considered the submissions in respect of the Tenants' adjournment request and decided not to accede to this request. The Board's decision was based on the prevailing facts and circumstances, and was made after hearing and considering submissions of the parties. There was ample reason for the Board's refusal to delay the hearing of the Landlords' Application.

Abuse of Process

43 On the full and complete record before this court, I find the tenants' appeal is devoid of any merit, is not based on an error in law, and is an abuse of process. I am satisfied the appeal was filed solely for the purpose of delay so that the Tenants could obtain the automatic stay of the Termination Order and in remain in possession of the rental unit without paying rent for as long as possible.

Costs

44 Costs submissions were heard. The Landlords are the successful parties and are entitled to costs of the motion and appeal on a substantial indemnity scale fixed in the amount of $5,000 all inclusive of disbursements and HST. These costs are fair, reasonable and proportional and take into account the conduct of the tenants in launching an unmeritorious appeal only for the purpose of delay.

Disposition

45 For the reasons set out, the Landlords' motion is granted. The court orders the following:

(1) The within appeal is hereby dismissed;

(2) A stay of the Termination Order of the Landlord and Tenant Board dated January 15, 2015 is hereby lifted.

(3) The Court Enforcement Office (Sheriff) shall give immediate and expedited possession of the rental unit known as 265 Arnold Avenue, Thornhill, Ontario L4J 1C2 to the Landlords.

(4) The Tenants shall pay to the Landlords costs of this motion and the appeal fixed at $5,000 inclusive of disbursements and applicable HST.

46 The Landlords are not required to obtain the approval of this order from the Tenants as to form and content prior to its issuance. Order to go per signed Order.

Motion granted.

Footnotes

[1] Notice of Appeal, Motion Record at Tab 3

2 Motion Record, Affidavit of Sheldon Solomon sworn March 18, 2015 at Tab 2

3 Motion Record, Solomon Affidavit, para. 11

4 Motion Record, Solomon Affidavit, para. 12

5 Motion Record, Solomon Affidavit, para. 13

6 Motion Record, Solomon Affidavit, para. 14

7 Motion Record, Solomon Affidavit, para. 15

8 Motion Record, Order of the Board dated January 15, 2015, Motion Record, Affidavit of Sheldon Solomon, Tab 2, Exhibit E p.2

9 Motion Record, Sheldon Solomon affidavit, para. 17

10 *Residential Tenancies Act*, 2006, S.O. 2006, c.17, s.210

11 *Canada (Director of Investigation & Research) v. Southam Inc.*, 1997 CarswellNat 368 (S.C.C.) at para. 35

12 *Zouhar v. Salford Investments Ltd.*, 2008 CarswellOnt 3302 (Ont. Div. Ct.) at paras. 8-9

13 *Lesyork Holdings Ltd. v. Munden Acres Ltd.*, 1976 CarswellOnt 300 (Ont. C.A.) at para. 18; *Schmidt v. Toronto Dominion Bank*, 1995 CarswellOnt 154 (Ont. C.A.) at para. 6

14 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, rule 63.01; *Smither v. Lander*, 1998 CarswellOnt 1449 (Ont. Gen. Div.) at paras. 3 and 4

15 *Residential Tenancies Act*, 2006, S.O. 2006, c.17, s.184

16 *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, s.21

17 *Residential Tenancies Act*, 2006, S.O. 2006, c.17, s.183

18 *Flamboro Downs Holdings Ltd. v. I.B. of T.C.W. & H. of A., Local 879*, 1979 CarswellOnt 814 (Ont. Div. Ct.) at paras. 12-13

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