# Sumner v Crease, 2012 CanLII 98397 (ON SCSM)

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Court File No. 2190/11 (Kitchener)

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(SMALL CLAIMS COURT)**

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| B E T W E E N: | ) | |
| | ) | |
| ALEXANDER E. SUMNER | ) | Mr. David Bouda |
| | ) | Counsel for the Plaintiff |
| Plaintiff | ) | |
| -and- | ) | |
| | ) | |
| | ) | |
| JEREMY J. CREASE | ) | No Appearance |
| | ) | |
| Defendant | ) | |
| | ) | |

) Heard: March 7, 2012

**REASONS FOR JUDGMENT**

1. This is an assessment hearing of the plaintiff's claim for arrears of rent and utilities payments under a residential tenancy. For the following reasons, judgment is granted to the plaintiff for damages of $5,359.96, plus interest and costs.

2. I am satisfied that the utilities arrears are proved as claimed, in the total amount of $2,335.77. The only issue which required consideration, and as to which counsel filed authorities which I took time to review, was the proper period for the rent arrears claim.

3. The defendant had fallen into arrears under the 12 month lease covering the period from February 1, 2010 to March 31, 2011. Rent was $1,250 per month plus utilities, with no deposit of last month's rent.

4. After the defendant failed to pay rent for November and December 2010, the plaintiff served a Notice to End a Tenancy Early for Non-Payment of Rent (Form N4) pursuant to s. 59 of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("the Act"). The notice was dated January 1, 2011 and it was served the next day. In the usual manner as provided under s. 59 and by the terms of Form N4 itself, the notice gave the tenant an election to either move out

by the stated "termination date" which was January 16, 2011, or pay the amount of $3,750 by that date. The defendant responded to service of the notice by moving out on the date of service, which was January 2, 2011. He paid no part of the outstanding arrears of rent and utilities.

5. The plaintiff then sold the property on January 13, 2011. But his claim is for three months of rent to and including January 31, 2011.

6. This raises two separate questions: first whether the arrears can be claimed beyond the termination date as set out in the Form N4 pursuant to the statutory regime created by the *Residential Tenancies Act, 2006*; and second, whether the arrears can be claimed beyond the date the property was sold. I answer both questions in the negative, for the following reasons.

7. Section 59 of the Act provides as follows:

**59. Non-Payment of Rent** - (1) If a tenant fails to pay rent lawfully owing under a tenancy agreement, the landlord may give the tenant notice of termination of the tenancy effective not earlier than,

(a) the 7th day after the notice is given, in the case of a daily or weekly tenancy; and

(b) the 14th day after the notice is given, in all other cases.

**(2) Contents of Notice** - The notice of termination shall set out the amount of rent due and shall specify that the tenancy may avoid the termination of the tenancy by paying, on or before the

termination date specified in the notice, the rent due as set out in the notice and any additional rent that has become due under the tenancy agreement as at the date of payment by the tenant.

**(3) Notice Void if Rent Paid** - The notice of termination is void if, before the day the landlord applies to the Board for an order terminating the tenancy and evicting the tenant based on the notice, the tenant pays,

(a) the rent that is in arrears under the tenancy agreement; and

(b) the additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given.

8. It appears plain from the terms of s. 59 that it contemplates and regulates the process for early termination of a tenancy based on non-payment of rent by the tenant. At common law, non-payment of rent would be a breach of contract by the tenant. The Act steps in to regulate the method and timing of a landlord's decision to act on that breach of contract. It requires the notice in Form N4 to be served, and it creates choices for the tenant once served.

9. Following service of the notice in Form N4, the tenant may pay the amount due as at the date of payment, so long as that option is exercised before the landlord applies to the Landlord and Tenant Board. If he or she exercises that option in time, the notice is void and the tenancy is effectively restored whether the landlord agrees to that result or not. The tenant's alternative is to move out by the termination date set out in the notice. A further option is that the tenant who fails to exercise either of the two options stated

on the Form N4 may accept the risk of an application to the Board in which case he or she is exposed to the range of orders which the Board might make in the particular case.

10. The statutory regime substantially changes the common law. For example the common law would not require the landlord to accept the restoration of the lease in the manner provided in s. 59.

11. It also seems plain that by the terms of s. 59 and Form N4, if the tenant moves out by the termination date, he or she is electing to accept the early termination of the lease as proposed by the landlord.

12. As a matter of principle, it appears illogical to suggest that despite termination of the tenancy, the tenant may continue to be liable for rent after the date of termination. It would also seem inconsistent with the purposes of the Act as set out in s. 1, which include providing for "processes to informally resolve disputes." The Act is designed "to encourage speedy, fair and efficient access to justice in residential tenancy matters." *Metropolitan Toronto Housing Authority v. Godwin* (2002), 2002 CanLII 41961 (ON CA), 161 O.A.C. 57 (C.A.), at para. 14-16. It does not seem fair and efficient for Form N4 to advise a tenant that he or she may move out by the termination date and the tenancy will end on that date, if that is not so. I note that part of the standard language of Form N4, under the heading "**WHAT YOU NEED TO KNOW**", states as follows:

**If you move out** by the date in this notice, your tenancy will end on the termination date. However, you may still owe money to

your landlord. Your landlord will not be able to apply to the Board but they may still take you to Court for this money.

13. The Act is remedial legislation and must be interpreted using the modern rule of statutory interpretation - with reference to the context of the language, the words used by the legislature, and the scheme and purpose of the Act: *Price v. Turnbull's Grove Inc.* (2007), 2007 ONCA 408 (CanLII), 85 O.R. (3d) 641 (C.A.), at para. 24-26.

14. In my view applying that rule in this context leads inexorably to the conclusion that where a notice of early termination is served under s. 59 and the tenant accepts the proposed early termination by moving out on or before the termination date, the tenancy is terminated. The effective date of termination can only be the termination date set out in the notice as required by s. 59(1). For the obligation to pay rent to survive beyond that date would in my view be inconsistent with the plain language of the section, in its context, within the scheme and purpose of the Act.

15. Mr. Bouda has referred me to several first instance decisions, to which I now turn to determine if the conclusion which I would otherwise reach on this question is precluded by binding authority.

16. In *190 Lees Avenue Limited Partnership v. Dew* (1991), 1991 CanLII 7114 (ON SC), 2 O.R. (3d) 686 (Gen. Div.), Justice Chadwick was presiding over what was at the time commonly referred to as Landlord and Tenant Court. He held that despite

service of notice of early termination, the landlord could still, after recovering possession, sue for loss of prospective rent. After citing common law authority dealing with commercial tenancies, and found that a predecessor of the Act was silent on what damages a residential landlord could claim where a notice of early termination has been served following a material breach by the tenant. He found that allowing the landlord to have a claim in contract made good policy sense, as otherwise a tenant could deliberately engineer early termination by the landlord by withholding rent, in order to contain the financial consequences which would otherwise flow from a tenant's breach of the lease.

17. *190 Lees*, *supra*, was followed by Justice Chapnik in *Pajelle Investments Ltd. v. Braham* (1993), 1993 CanLII 9398 (ON SC), 99 D.L.R. (4th) 187 (Ont. Gen. Div.).

18. Mr. Bouda also, and quite properly, referred me to the decision in *Yonge Pleasant Holdings Ltd. v. Dragonov*, [1995] O.J. No. 2448 (Gen. Div.), where Justice Gibson declined to follow *190 Lees*, *supra*, and *Pajelle Investments*, *supra*, and held that the tenant's liability for rent could not extent beyond the date set out in the landlord's notice of early termination.

19. I note that Justice Gibson, at para. 13, points out that those cases dealt with fixed-term leases. In my respectful view that is not a significant distinction, since a residential tenant has an inherent right under the Act to let the lease convert, at the end of the fixed term, to a month-to-month lease. In any event a month-to-month tenant is obliged to give notice under the Act, so that the same question of prospective rent claims arises where the landlord

serves notice under s. 59 and the tenant moves out by the termination date.

20. The last case cited to me was *Viscount Properties v. Rock*, [2005] O.J. No. 3092 (Sm. Cl. Ct.), a decision of Deputy Judge Searle. After referring to *190 Lees*, *supra*, and *Pajelle Investments*, *supra*, my colleague concluded at para. 10 that he "must hold" that the tenant's liability for rent extended beyond the termination date stated in the landlord's notice of early termination. I take it from my colleague's use of that expression that he felt bound *by stare decisis* to apply those first instance decisions from the former Ontario Court (General Division).

21. There are conflicting views on whether first instance decisions of the Superior Court of Justice are binding on lowers courts. One view is such decisions do not have binding effect: *Masse v. Dietrich*, 1971 CanLII 554 (ON SC), [1971] 3 O.R. 359 (Co. Ct.). On this view, the decisions of the Superior Court of Justice are binding on lower courts only when they are the product of its appellate jurisdiction: *R. v. Gagne*, [1988] O.J. No. 2518 (Prov. Div.). This approach was recently said to be supported by the weight of the authorities: *R. v. L.(D.) (No. 2)*, 2005 ONCJ 344 (CanLII), [2005] O.J. No. 3183 (O.C.J.), at para. 15-20. However the correctness of this approach has been questioned, in the name of greater certainty and predictability: *Kingscott v. Megaritis*, 1972 CanLII 473 (ON SC), [1972] 3 O.R. 37 (H.C.J.). No doubt unanimity on this question continues to evade Ontario courts in 2012.

22. I am aware of no authorities which analyze this question in any depth as applied to the Small Claims Court. Nor am I aware of any appellate decisions on this point and it is inherently unlikely that an appellate court would ever find it necessary to direct a first instance court on how to treat its own precedents.

23. It is unnecessary for me to resolve this interesting question of *stare decisis* because here, I am faced with conflicting first instance decisions from the former Ontario Court (General Division). The applicable rule of *stare decisis* entitles me to choose between them. Based on my view of the correct statutory interpretation analysis, and under the current Act, I prefer to follow *Yonge Pleasant Holdings Ltd. v. Dragonov*, *supra*. That decision does not appear to have been cited to Deputy Judge Searle in *Viscount Properties*, *supra*.

24. I understand that the Landlord and Tenant Board's position has always been that rent arrears are only payable to the date of termination set out in the landlord's notice, subject only to additional *per diem* rent where the tenant moves out or is evicted after that date: *Minto Management Ltd. v. Khosa*, [2004] O.R.H.T.D. No. 17, at para. 9(9). In *30 Speers Road Apartments v. Mehta*, [2000] O.R.H.T.D. No. 52, the tribunal preferred to follow *Yonge Pleasant Holdings Ltd. v. Dragonov*, *supra*, over *190 Lees*, *supra*, and *Pajelle Investments*, *supra*. It is desirable that the law be consistently applied as between civil courts and that specialized tribunal.

25. Though it is an employment law case, I find the recent decision in *Elsegood v. Cambridge Spring Service (2001) Ltd.*, [2011] O.J. No. 6095 (C.A.), to be applicable. It dealt with the question of

how a termination of employment for purposes of the *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 56(1), affects the common law status of the employment relationship. The court held that a termination under the Act was a termination for all purposes, including the common law. As Justice Juriansz stated for the court, at para. 6:

> Simply put, statutes enacted by the legislature displace the common law.

26. I find that reasoning applies here. Section 59 of the *Residential Tenancies Act, 2006*, deals with termination of a tenancy. If a tenancy is terminated under that provision by virtue of a tenant moving out on or before the termination date set out in the notice of termination (Form N4), the tenancy is terminated for all purposes, including the common law. Therefore the landlord has no basis to claim prospective rent after the date of termination set out in his Form N4.

27. In this case the termination date in the notice was January 16, 2011. However the plaintiff sold the property on January 13, 2011 and so there is no loss beyond that date. Monthly rent at $1,250 is $40.32 *per diem*, which for 13 days is $524.19. Therefore the plaintiff's entitlement is to rent for November and December 2010 at $1,250 each, plus $524.19, for a total of $3,024.19, plus the utilities arrears, plus interest and costs.

28. Costs are allowed based on $100 for preparation of pleadings, $500 for representation fee, and reasonable disbursements of $300, for a total of $900 all-inclusive.

March 8, 2012

Deputy Judge J. Sebastian

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