Payne v Vongrasamy, 2014 CanLII 35046 (ON SCSM)

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Court File No. 49/14 (Kitchener)

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

B E T W E E N:	)	
	)	
ALEXANDER PAYNE	)	Mr. Alexander Payne
	)	Self-Represented
Plaintiff	)	
-and-	)	
	)	
	)	
TAMMY VONGRASAMY and	)	Mr. Kongthong Vongrasamy
KONGTHONG VONGRASAMY a.k.a.	)	Self-Represented and agent for
JIMMY VONGRASAMY	)	Tammy Vongrasamy

)
Defendants)
)
) Heard: June 30, 2014

REASONS FOR JUDGMENT

1. This matter raises once again the imperfect intersection between the jurisdiction of the Landlord and Tenant Board and the jurisdiction of the Small Claims Court. After hearing the evidence and submissions, judgment was reserved. For the following reasons, the plaintiff's claim is dismissed, without costs.

Nature of the Dispute

2. The plaintiff is the former landlord of the defendants pursuant to a one-year lease starting on June 1, 2013. After the defendants failed to pay the rent for November 2013, the plaintiff commenced proceedings before the Landlord and Tenant Board, which found the tenancy to have been terminated effective November 15, 2013, and made an order dealing with the amount of rent due up until vacant possession, which it is common ground was given up on November 30, 2013.

3. By his amended plaintiff's claim, the plaintiff seeks damages consisting of four months' rent for the period December 2013 to March 2014 and he seeks compensation for several items of alleged damage to the premises. The defendants deny these claims

and plead that jurisdiction over this dispute lies with the Landlord and Tenant Board.

Issue 1: Does the Court Have Jurisdiction Over the Plaintiff's Claim for Rent?

4. I find that the court has no jurisdiction over the plaintiff's claim for rent in the amount of $4,200, and in any event that the claim must fail as a matter of law, for the following reasons.

5. The applicable statute is the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("the Act").

6. The facts pertaining to this issue are as follows:

a. the defendants failed to pay the rent for November 2013 when due;
b. the plaintiff served a Notice to End Tenancy Early For Non-payment of Rent (Form N4) on November 3, 2013, giving a termination date of November 15, 2013[1];
c. the defendants responded with an email on November 7, 2013 stating their intention to move out on November 30, 2013;
d. the plaintiff issued an application to terminate the tenancy (Form L1) on November 18, 2013;
e. the defendants moved out on November 30, 2013;
f. the plaintiff inspected the premises on December 5, 2013;
g. the plaintiff's application was heard by the Landlord and Tenant Board on January 14, 2013, both sides attended and

board made an order on January 15, 2014;

h. that order was the subject of an oral review hearing on May 28, 2014 (with both sides in attendance), because it failed to address termination of the tenancy;

i. a review order was issued by the Landlord and Tenant Board on June 6, 2014, finding in material part that:

i. the tenancy had terminated on November 15, 2013, being the date in the plaintiff's Form N4;

ii. the defendants owed rent including overholding rent to November 30, 2013;

iii. after applying the last month's rent deposit to November and allowing for interest on that deposit, the plaintiff owed $15.47 (but the defendants owed costs of $170).[2]

7. Despite the foregoing, the plaintiff sues in Small Claims Court for rent for the period December 2013 through March 2014, at $1,050 per month for a total of $4,200. That is the remaining period of the 12-month lease before he re-rented the premises to new tenants, effective April 1, 2014.

8. In submissions, Mr. Payne acknowledged the logical and legal conundrum presented by his claim: the tenancy has been ruled terminated effective November 15, 2013, and in addition the state of the rent account as of the date of vacant possession has been determined by the Landlord and Tenant Board, and yet he now claims in Small Claims Court that rent is due to him for a further period of four months. He said that the paralegal who represented him before the Board advised him (correctly in my view) that there were conflicting authorities on the question whether such a claim was available as a matter of law.

9. The parties provided no legal submissions on whether a landlord in the plaintiff's position can claim prospective rent beyond the termination date set out in a Form N4 in circumstances where the tenants accept the proposed termination by moving out.

10. My view of the law on this point, including a review of the conflicting cases, was set out in *Sumner v. Crease* (2012), 22 R.P.R. (5th) 136 (Ont. Sm. Cl. Ct.), and I adopt those reasons for purposes of the case at bar. Where a tenant accepts the landlord's notice of early termination, the tenancy is terminated by operation of the Act and the tenant's obligation to pay rent ceases on the date of termination.

11. *Sumner v. Crease*, *supra*, was approved by my colleague Deputy Judge Marentette in *Boardwalk General Partnership v. Fraser*, [2013] O.J. No. 963 (Sm. Cl. Ct.).

12. In the case at bar, it could be argued that the tenants did not accept the landlord's early termination date of November 15 because they failed to vacate by that date and effectively asked for a further two weeks. But in my view the better position in these circumstances is that the termination date in the Form N4 remains effective and *per diem* or overholding rent remains due under the Act until the date of vacant possession: see *Transglobe Property Management Inc. v. Stone*, [2012] O.J. No. 4180 (Sm. Cl. Ct.), at para. 13-18.

13. In addition, and what in my view puts the present matter beyond any possible doubt, is the fact that the dispute

between these parties in fact proceeded to a hearing (indeed two hearings) before the Landlord and Tenant Board. The board was asked to determine, and in fact determined, that the tenancy had terminated effective November 15, 2013 and that the state of the rent account to and including the date of vacant possession on November 30, 2013, was that the landlord owed the sum of $15.47 to the tenants (subject to costs).

14. The jurisdiction of the Landlord and Tenant Board is expressly defined as exclusive jurisdiction, under s. 168(2) of the Act. If the board has exclusive jurisdiction, the court's jurisdiction is ousted: see *Fraser v. Beach* (2005), 2005 CanLII 14309 (ON CA), 75 O.R. (3d) 383 (C.A.). I have no hesitation in concluding that where the board had jurisdiction, exercised that jurisdiction, and determined the question of termination of the lease and the state of the rent account, this court's jurisdiction over those issues is ousted.

15. In addition, since there was a final determination of those issues by a tribunal of competent jurisdiction in a proceeding between these same parties, the doctrine of *res judicata* applies. It is not open to the plaintiff to effectively re-litigate those issues when they have already been litigated once. The system does not generally permit re-litigation of issues.

16. I conclude that this court has no jurisdiction over the plaintiff's claim for rent amounts, and that as a matter of law the defendants are in any event not liable for the rent claimed for December 2013 through March 2014, because the tenancy was terminated effective November 15, 2013.

Issue 2: **Damage to the Rented Premises**

17. The plaintiff claims a total of $943.84 for several items of damage for which he alleges the defendants are liable. The items are $614.28 for replacement of a window (Exhibit 4, page 1), $73.45 for repair of another window (Exhibit 4, page 2), $77 for removal of debris (Exhibit 5) and $179.11 for repair of a water softener leak (Exhibit 6).

18. The basement water flooding caused by a leak from the water softener was the subject of a complaint to the plaintiff in early October 2013 and generated a plumber's invoice dated October 8, 2013 (Exhibit 6). There is no direct evidence of the cause of the leak.

19. The plaintiff expressed the opinion that on his inspection, it looked like the water softener had been moved. He also gave hearsay evidence that the plumber's opinion was that it had been tampered with.

20. Mr. Vongrasamy testified that they had never touched nor moved the water softener. From the photographs (Exhibits 8 & 11) it appears to me to have been in use for some significant period of time.

21. On a balance of probabilities, I am not satisfied that the defendants are responsible for the water softener leak.

22. The removal of refuse produced costs claimed at $77. Regardless of the amount of refuse in fact required to be removed by the landlord, I find that amount is entirely within the range of the normal cleaning-related costs incurred by a landlord upon a change of tenancy.

23. As for the windows, those alleged damages were discovered by the plaintiff very shortly after the defendants moved out, on December 5, 2013. The application to the Landlord and Tenant Board was issued on November 18, 2013 and first heard on January 14, 2014, being about six weeks after the window damage was discovered.

24. The Landlord and Tenant Board has jurisdiction under s. 200 of the Act to consider amendments to applications and under s. 201 the board may amend an application on its own motion. In my view the board could have dealt with the issue of alleged damage to these windows and to the water softener. The landlord ought to have pursued those issues in that forum. It makes no sense to unnecessarily bifurcate residential tenancy disputes into two proceedings before two tribunals.

25. I find that on these facts, the claim for damage to windows and to the water softener falls within the exclusive jurisdiction of the Landlord and Tenant Board: see *Grewal v. Behling*, [2013] O.J. No. 5980 (Sm. Cl. Ct.), at para. 18-20.

26. The claims for damage to the rented premises are dismissed.

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Conclusion

27. The plaintiff's claim is dismissed. This is not a case for costs.

July 2, 2014

Deputy Judge J. Sebastian Winny

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[1] The notice would have been invalid under s. 59 of the Act if it was served less than 14 days before the termination, but since that objection was neither raised before nor determined by the Landlord and Tenant Board, its resulting order must be accepted as valid.

[2] See Exhibit 7.