CanLII

Telan v. Elm Place Inc., 2023 ONSC 4957 (CanLII)

Date: 2023-08-31
File number: 420/23
Citation: Telan v. Elm Place Inc., 2023 ONSC 4957 (CanLII), <https://canlii.ca/t/k00fw>, retrieved on 2023-10-25

CITATION: Telan v. Elm Place Inc. 2023 ONSC 4957
COURT FILE NO.: 420/23
DATE: 20230831

ONTARIO

SUPERIOR COURT OF JUSTICE

Divisional Court

BETWEEN:	
ERIN KATE TELAN Appellant (Tenant)	Paul Robson, for the Appellant
– and –	
ELM PLACE INC. Respondent (Landlord)	Timothy Duggan for the Respondent
	HEARD: August 30, 2023

REASONS ON MOTION FOR A STAY

SCHABAS J.

Overview

[1] The appellant, Erin Kate Telan (“Telan” or “the tenant”), seeks a stay of an order of the Landlord and Tenant Board (“LTB”) dated February 22, 2022, which terminated her tenancy due to non-payment of rent. That order was reviewed and upheld by the LTB on August 30, 2022, and an appeal to this Court was dismissed on April 26, 2023: *Telan v. Elm Place Inc.*, 2023 ONSC 2528.

[2] Following the release of the decision of this Court, on April 28, 2023, Telan applied to the LTB to set aside, or void, the eviction order pursuant to s. 74(11) of the *Residential Tenancies Act*, SO 2006, c 17 ("*RTA*"). That application was dismissed by the LTB on June 19, 2023. The LTB found that the tenant had not paid all outstanding rent: *Elm Place Inc. v Erin Kate Telan*, 2023 ONLTB 44304.

[3] A review of the June 19, 2023 order was sought on June 23 and, on June 26, 2023, the LTB found that the tenant had not established that a serious error existed in the June 19, 2023 order or that a serious error occurred in the proceedings. The June 19, 2023 order was confirmed: *Elm Place Inc. v. Telan*, 2023 ONLTB 47795.

[4] Telan then appealed the two orders made in June 2023 to this Court on July 11, 2023. The tenant requisitioned, and obtained, stays of those two orders. However, as Matheson J. noted in a direction following a case conference on August 2, 2023 which set the schedule for this motion, the stay of the June 2023 orders "does not stay the eviction order" of February 22, 2022.

[5] For the reasons that follow, the motion for a stay is dismissed.

<u>The test for a stay</u>

[6] To obtain a stay pending appeal, the moving parties must satisfy the well-known three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at p. 334, that: (1) there is a serious issue to be tried; (2) the moving parties will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting the stay.

[7] These factors are not rigid "watertight compartments" or a series of independent hurdles, but are "interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay." Strength in meeting one part of the test "may compensate for the weakness of another": *Louis v. Poitras*, 2020 ONCA 815 at para. 16.

Serious issue

[8] The test to establish a serious issue is not high. However, s. 210(1) of the *RTA* permits appeals "only on a question of law." Thus, the tenant must demonstrate that her appeal raises a serious issue on a question of law.

[9] Telan advanced three grounds of appeal in her notice of appeal:

1. The LTB erred in law when it misapprehended the evidence and found that the tenant was in arrears of rent as at June 19, 2023;

2. In that regard, the LTB erred in law when it failed to find a novation had occurred; and

3. The LTB erred in law in denying procedural fairness to the tenant by failing to recognize that the tenant to present her case was not reasonably able to participate in the proceedings.

[10] The first ground raises a question of fact, not law. As Favreau J., as she then was, observed in *Sandgecko Inc. v. Ye*, 2020 ONSC 7245 at para. 33, disputes over rent payments and the LTB's findings on arrears are questions of fact. See also: *Smallhorn v. Gutta*, 2020 ONSC 8066 at para. 19.

[11] Mr. Robson nevertheless submits that the LTB's findings on arrears is "fundamentally flawed" and therefore amounts to a "misapprehension" of the evidence which can constitute a question of law. This argument is not supported on this motion. The

evidence before me regarding arrears is limited. Both sides assert their position, but the burden is on the tenant to show that there is a serious argument that the LTB misapprehended evidence before it, and that has not been met. The evidence before me, which Telan disputes, shows that arrears continue to be outstanding.

[12] It was also drawn to my attention that the LTB recently decided a separate application by the landlord to terminate the tenancy and evict Telan for being "persistently late" in paying rent: *Elm Place Inc. v. Telan*, 2023 ONLTB 56225. Although the LTB concluded that the tenant has paid rent monthly from October 2022 to the present, the LTB specifically did not discuss arrears, noting that this was being addressed separately, in this proceeding. This is consistent with this Court's recent decision in *Tataw v. Minto Apartment L.P.*, 2023 ONSC 4238 at para. 19, which noted the distinction between late payment and arrears, which are "different problems" which "usually lead to different remedies."

[13] In any event, the fact that Telan has been found to have paid her rent since last October, albeit often late, does not provide any basis to support an argument that the LTB "misapprehended" the evidence of arrears.

[14] The second ground of appeal, that the LTB erred in failing to find that a novation had occurred, is also not a question of law. Although the legal issue of what constitutes a novation may be, on its own, a question of law, it is a question of fact whether a novation occurred: *Re Bankruptcy of Kenneth Temple*, 2012 ONSC 376 at para. 7.

[15] There are two other fundamental problems with this argument. First, there is no evidence that the issue of novation was raised before the LTB on the applications in June 2023. Mr. Robson submits he made the argument in a letter seeking review, but I do not have it.

[16] However, accepting that the concept of novation was at least raised before the LTB, the argument that a novation occurred, or that a "new deal" was reached, has no support in the evidence, and does not raise a serious issue. The fact that Telan had been paying rent for the previous eight months was simply in compliance with an existing tenancy agreement, and the application to void the eviction order was based on an argument that Telan was in good standing on her rent on that existing tenancy agreement. Counsel simply asserting that there was a new deal does not raise a serious issue, let alone a question of law alone.

[17] The third ground of appeal, asserting a lack of procedural fairness at the original hearing in February 2022 was, quite sensibly, abandoned by Mr. Robson in oral argument. As he acknowledged, arguments of procedural unfairness of the hearing were raised in the appeal to this Court and rejected: *Telan v. Elm Place Inc.*, 2023 ONSC 2528 at para. 26. They cannot be revisited, nor can new arguments be advanced, now.

[18] As the tenant has failed to raise a ground of appeal based only on a question of law, the first branch of the test for a stay is not met.

Irreparable harm

[19] In *Radinovsky v. Knight*, M51348 (C.A., February 25, 2020), Tulloch J.A., as he then was, addressed the test for a stay in a residential tenancy matter. Having concluded that there was no serious issue raised, he found that there could be no irreparable harm. As he put it at para. 7 of his Reasons for Decision, "[w]ithout a legal basis to interfere with the Board's decision, it cannot be said that any harm, irreparable or not, will flow by not interfering."

[20] Nevertheless, I address the issue here in more detail.

[21] Irreparable harm is the sort of harm that “either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.” It is the nature of the harm that is to be considered, not its magnitude: *RJR* at p. 341. At the same time, evidence of irreparable harm must be “clear and not speculative”, and it must be supported by evidence that the moving party would suffer it. Evidence of possible, or even likely, harm is not enough. The evidence must show that the party will (not may) suffer irreparable harm: *Sazant v. College of Physicians & Surgeons (Ontario),* 2011 CarswellOnt 15914 (ONCA) at para. 11; *Noble v. Noble*, 2002 CarswellOnt 4445 (ONSC) at para. 16.

[22] Telan’s submission is that she will lose her “home and refuge” if the stay is not granted. But this will always be the case in residential tenancy cases; something more must be shown, otherwise the test is met in every case. To this end, Telan states that she has “serious health issues that require stability”, “a family to support”, and that she does not have money to move. Telan says she is “financially embarrassed having spent all my excess funds on maintaining the subject premises, paying off arrears and paying my rent on time.” She also states that she works from the premises and has lived there since 2015.

[23] Telan’s evidence of harm are assertions made as briefly as I have quoted above. No details of her situation or corroborating materials have been provided to support her claims of harm, or that it will be irreparable. There is no medical evidence that she will suffer irreparable harm to her health if required to move, nor has she provided details of her financial situation to support her claim that she cannot afford to move, or that she supports a family. Indeed, her only comment about family is that her mother and daughter live in the same building but, she says, she cannot live with them as there is “no space.” Simply telling the Court that she works from her home and has lived there for several years does not help.

[24] Accordingly, Telan has not satisfied me that she will suffer irreparable harm if the tenancy is terminated and she is evicted.

Balance of convenience

[25] The final element of the *RJR* test requires the court to balance the interests of the two parties and consider who will suffer greater harm or inconvenience if an order is or is not granted.

[26] Here, the prejudice to the landlord is largely financial while the prejudice to the tenant is more substantial as she will lose her home. This favours a stay. However, the situation is more complicated. The balance of convenience must consider the entire context, and that favours refusing a stay.

[27] The landlord obtained an order terminating the tenancy for non-payment of rent in February 2022. The tenant has been unsuccessfully seeking to overturn that order ever since, and has known that if she is not successful, she faces eviction. Although Telan has paid rent since October 2022, that followed a direction of this court to do so, failing which the landlord could bring a motion to lift the stay of the LTB order of February 22, 2022: Direction of Nishikawa J., September 28, 2022. The protracted legal battle has continued at considerable expense, inconvenience and frustration to the landlord. The application to void the termination – which was found by the LTB to have been brought “to once again delay the eviction” – is the latest step in this process: *Elm Place Inc. v Erin Kate Telan*, 2023 ONLTB 44304 at para. 4.

[28] Overall, the balance of convenience is neutral. While Telan will be required to move, the landlord is entitled to have this long-running dispute resolved and not have to

continue to respond to legal challenges, especially this appeal which I have found does not raise a serious issue.

The interests of justice

[29] The overarching consideration is whether a stay is in the interests of justice. I have concluded that the tenant has failed to establish the first two parts of the test, and that the third branch of the test is neutral. Stepping back, this dispute has now been the subject of consideration by the LTB on several occasions. This Court has addressed it in thorough reasons earlier this year. In the course of the appeal to this Court the landlord was required to respond to unfounded allegations of misleading the LTB and of breaching the *RTA*, and it had to respond to misleading submissions of the tenant: *Telan v. Elm Place Inc*., 2023 ONSC 2528 at paras. 17 - 26.

[30] The tenant was entitled to seek to void the termination order, but she failed on that application which, the LTB said, was brought "to once again delay the eviction." On this motion, the tenant has failed to raise any serious issue that merits consideration by this Court.

[31] Viewing the matter wholistically, the interests of justice, which include bringing an end to proceedings with no merit, favour dismissing the motion for a stay.

Conclusion

[32] The motion for a stay is dismissed. Telan shall pay costs of this motion to the respondent in the agreed upon amount of $5,000.

Paul B. Schabas J.

Released: August 31, 2023

CITATION: Telan v. Elm Place Inc. 2023 ONSC 4957
COURT FILE NO.: 420/23
DATE: 20230831

ONTARIO

SUPERIOR COURT OF JUSTICE

Divisional Court

ERIN KATE TELAN

– and –

ELM PLACE INC.

REASONS ON MOTION FOR A STAY

Schabas J.

Released: August 31, 2023