Rumpel v Loohuizen, 2017 CanLII 77338 (ON SCSM)

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SUPERIOR COURT OF JUSTICE
KENORA SMALL CLAIMS COURT

BETWEEN:

CRYSTAL RUMPEL,

Plaintiff
(Defendant by Counterclaim)

- and -

HEIDI LOOHUIZEN also known as HEIDI STEPANIK and WILLIAM STEPANIK,

Defendants
(Plaintiffs by Counterclaim)

ENDORSEMENT

1. The Plaintiff has moved for an Order dismissing the Defendants' (Plaintiffs by counterclaim) counterclaim for want of jurisdiction. The Plaintiff contends that the subjects of the counterclaim ought properly to have been brought before the Landlord and Tenant Board (the "Board"). Of crucial significance to the outcome of the Plaintiff's motion is the fact that both the Plaintiff's claim and the Defendants' counterclaim were not advanced until after the Plaintiff's tenancy of the Defendants' premises had ended.

2. The Plaintiff's claim was initially advanced in the Superior Court, hence the otherwise inappropriate use of the expression "Counterclaim" in the Style of Cause of the action.

3. On November 26, 2014, the Plaintiff filed a Statement of Claim in the Superior Court of Justice advancing the following claims:

   a) the sum of $500.00 on account of the purchase of appliances at 12 and 14 Sunrise Place, in Kenora;

   b) repayment of a loan in the amount of $5,000.00;

c) the sum of $336.00 on account of costs to repair the furnace;

d) pre-judgment and post-judgment interest on the loan for $5,000.00 at the contractual rate of 2% per month beginning June, 2013; and

e) costs.

4. On December 23, 2014 the Defendants filed a Statement of Defence and Counterclaim in the Superior Court of Justice and counterclaimed against the Plaintiff as follows:

a) the sum of $1,100.00 on account of the last month of occupancy;

b) the sum of $160.00 on account of utilities for the last month of occupancy;

c) the sum of $1,582.00 on account of a quad ramp converted by the Plaintiff;

d) the sum of $6,100.00 on account of damages to the rented premises; and

e) costs of the action and counterclaim.

5. By consent, the action was transferred from the Superior Court of Justice to the Smalls Claims Court on April 11, 2016, though the style of cause remains unaltered.

6. The Plaintiff's Amended Reply and Defence to Counterclaim seeks dismissal of the counterclaim due to lack of jurisdiction on account of the counterclaim being "statute-barred"; at the initial instalment of the Settlement Conference, however, it was determined that the Plaintiff in fact wished to bring a motion to dismiss the counterclaim for want of jurisdiction.

7. On November 8, 2016 the Plaintiff filed her Notice of Motion seeking dismissal, together with a brief Affidavit in support.

8. I have been longer reaching this matter than would normally be acceptable, due to a combination of circumstances relating to the submissions of the parties having being temporarily "missing in action" though duly filed, and subsequently by matters arising affecting my physical health. I apologize unreservedly for the unintended delay in which has occurred in considering and determining the Plaintiff's motion.

9. The issue on the Plaintiff's motion is whether or not this Court has jurisdiction to hear the Defendants' counterclaim, or whether

the counterclaim falls under the exclusive jurisdiction of the Landlord and Tenant (the “Board”).

10. The Plaintiff contends that the Defendants’ counterclaim cannot be entertained by the Court, because of the jurisdictional provisions of the *Residential Tenancies Act, 2006, S.O. 2006, C.17* (the “*RTA*”), in particular Sections 168, (2)d, 174.

11. The Defendants contend in a preliminary way that the motion should be dismissed for a lack of evidence, there being no facts deposed to in the Affidavit of the Plaintiff pertaining to the jurisdictional issue. The Defendant further submits that there are effectively no proven facts before the Court such as would enable a jurisdictional determination to be made by the Court.

12. Because of the need for a clarifying disposition of the jurisdictional issue as between the Board and the Court which recurs with needless frequency in this Court, and against the backdrop of the deliberate informality relating to the matters of evidence in this Court, I have relied on the temporal allegations in the Plaintiff’s claim and the Defendants’ defence as true. The Defendants appear content to effectively argue the motion on that alternative basis.

13. The Defendants further preliminarily contend that since the Plaintiff's advocate's submissions were contained in a Memorandum made an Exhibit to the Plaintiff's Affidavit, but not separately filed, the submissions ought not to be regarded by the Court. I disagree, and, again in accordance with the level of informality customarily encountered in this Court, I have reviewed and do take account of the Plaintiff's advocate's submissions. That said, it is of course preferable that the submissions be filed separately, not as an Exhibit to an Affidavit. Doubtless the Plaintiff's advocate, who appears not infrequently in the Court, will reap the benefit of this observation going forward.

14. The Plaintiff contends that by virtue of a combination of Sections 168(2) and 174 of the *RTA,* the Board enjoys jurisdiction over the subjects of the Defendants' counterclaim. However, that particular submission lacks force when one examines the specific provisions of the two Sections.

Section 168(2) states as follows:

"The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.".

Section 174 states as follows:

"The Board has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act.".

15. Crucially, by their terms both Sections 168(2) and 174 are predicated upon the Board otherwise enjoying jurisdiction over any particular claim. That is, these sections are preconditioned on there being a separate provision in the *RTA* conferring jurisdiction over any particular head of claim or component of a claim. Sections 168(2) and 174, do not, in fact, confer jurisdiction; rather, they are confirmations of the exclusivity of the jurisdiction of the Board in matters otherwise specifically conferred on the Board by the *RTA*, and are confirmation of the scope of the jurisdiction otherwise granted.

16. The Plaintiff in her Brief stresses that in determining the matter of jurisdiction as between the Board and the Court, the test by which jurisdiction is to be decided requires a determination of the essential character of the dispute. Reference is made to *Efrach v. Cherishhome Living*, *2015 ONSC 472* being a Divisional Court decision. However, *Efrach* dealt with a tenant's remedy, specifically an attempt to "dress up" a tenant's claim for a matter which clearly ought to have been before the Board, as one which could be properly brought before the Court by the tenants framing their

cause of action as one of negligence by the landlord in failing to ensure that their unit was kept locked.

17. In *Efrach*, the Divisional Court found that the essential character of the dispute involving a tenant's remedy for want of repair fell within the ambit of the *RTA*, and the tenant's claim was found to be exclusively within the Board's jurisdiction. In the recent May 18, 2017 decision of *Letestu Estate v. Ritlyn Investments Limited*, [2017], ONCA 442, the Court of Appeal confirmed that the Board has exclusive jurisdiction over tenants' non-repair claims within its monetary jurisdiction.

18. Unfortunately for the Plaintiff here, in the realm of statutory interpretation, and in particular, the statutory conferral of jurisdiction, what is sauce for the goose, is not always sauce for the gander. That is, the ability of a landlord to advance a claim in this Court either for unpaid rent or damages to property is unquestionably broader than the right of tenants who are advancing claims against landlords.

19. In *Kipiniak v. Dubiel, [2014] O.J. No. 939 (Div. Court)*, the Divisional Court held that where a tenancy had ended, the landlord may apply to this Court for relief under Sections 87 and 89 of the *RTA*. *Kipiniak* concerned an Application by a landlord where the

tenant was no longer in possession. The issue in *Kipiniak* was not whether the claim was in its "essential character a landlord and tenant claim"; rather, whether or not the Board had jurisdiction, given that the tenant was no longer in possession.

20. The Plaintiff also argues the discoverability principle, which has been imported by certain decisions of Deputy Judges into this area of the law, in my view, unnecessarily and improperly. Certain decisions of this Court have found that the Court has jurisdiction pursuant to Section 89 of the *RTA* where the damage could not have been reasonably discovered during the tenancy, but not otherwise. The reasoning in those cases appears to be that since *RTA* permits landlords' damage claims to be commenced while a tenant is in possession, it therefore logically follows that if the damage was known while the tenant was in possession, a claim could and should have been commenced before the Board, and therefore, the Court is without jurisdiction.

21. As it happens, notwithstanding the foregoing rationale, in *Laquerre v. Fuller*, 2016 CanLII 75049, although the landlord there was aware of some damage issues and had raised concerns prior to the termination of the tenancy, the Court found that the damages had not crystallized until after the tenancy was terminated.

22. In obiter comments (i.e. not necessary to the Court's decision), the Court in *Laquerre* raised issues such as what would happen if certain damages were discovered by a landlord during a tenancy, and certain other damages only after a tenancy had terminated. In such circumstances, would the landlord be obliged to commence two proceedings, one before the Board and one before the Court? Such multiplicity of proceedings is clearly to be avoided, if at all possible.

23. The second concern of the Court in *Laquerre* relates to the fact that importing a discoverability requirement into the relevant sections of the *RTA* could leave landlords without recourse. If the Court were to determine that a landlord could reasonably through due diligence have discovered the damage to the property during the tenancy, the landlord's Court action would be dismissed; however because the tenant is no longer in possession in the example posited, the landlord would have no ability to seek recourse before the Board. Such an interpretation leads to an absurdity, and again is to be avoided.

24. The Defendants argue that the sections of the *RTA* relied upon by the Plaintiff make it clear that the Board only has jurisdiction in respect of matters where that jurisdiction has been expressly

conferred on the Board by the legislature. Specifically, Section 87(1) of the *RTA* is crucial, and provides that a landlord may "apply to the Board for an order for the payment of arrears of rent if, (a) the tenant has not paid rent lawfully required under the Tenancy Agreement; and (b) is in possession of the rental unit".

25. Section 89(1) of the *RTA*, also under the Compensation for Landlord heading, sets out the provisions respecting a landlord's entitlement to compensation for damage caused by tenants, but specifically in its last 10 words provides "[if] … and the tenant is in possession of the rental unit.". [emphasis added]. Here, as it happens, the Plaintiff provided written notice to the landlord to terminate the tenancy via an email dated June 2, 2014, which purported to confirm notice given on May 30, 2014 to terminate the tenancy as of July 31, 2014.

26. In the final week of June 2014, the Defendant, Heidi Stepanik, attended at the premises to inspect the property with a contractor, as arranged with the Plaintiff. During the visit the Defendant noticed that the Plaintiff appeared to have removed all of her belongings from the premises. The Plaintiff was not present at the meeting at the premises.

27. To all intents and purposes, the Plaintiff had abandoned the premises. As it happens, however, rent had been paid for the premises through the end of June 2014, and in the result, the premises could not meet the definition of "abandoned" as contemplated by the *RTA*. Further rental arrears would not have become apparent to the Defendants until after July 2, 2014, the day after the rent for July 2014 was due by the Plaintiff to the Defendants.

28. I accept the Defendants' submission that as an agreement to terminate the tenancy on July 31, 2014 had previously been entered into by the parties, the relief of the Defendants as landlords is governed under Section 87 of the *RTA,* and not Section 88.

29. Assisting in the disposition of the Plaintiff's motion, there is substantial Board and judicial precedent governing the various heads of relief sought by the Defendants in their counterclaim. To begin with, the Board has addressed claims arising under Section 89 of the *RTA* after a tenant vacates possession of the rental unit, as had occurred here. In a case styled *CET-26592-12 (Re), 2012 CanLII 86699 (ON LTB)* the Board affirmed that "after the Tenant has vacated the rental unit, the landlord cannot apply to the Board for

an order for damage to the rental unit. This is in accordance with Section 89 of the *RTA*.". [emphasis added]

30. As well, damage allegedly done to the rental premises in these circumstances is governed by *Laquerre*, where the Court specifically states (at page 16) that "Section 89(1) [of the *RTA*], unlike some other provisions of the *RTA*, confines itself to situations in which a tenant is alleged to have caused damage, and such tenant remains in possession of the rental unit.". [emphasis added]

31. The foregoing comments from both the decision of the Board in the *CET* case and the decision of the Small Claims Court in *Laquerre* make it clear that the temporal tenancy status aspects of any landlord and tenant dispute are crucial for a proper determination of the Court's jurisdiction to entertain claims by landlords in respect of damage to the premises, rental arrears, and utility charges claimed due as rent.

32. I pause here to observe, as did the Deputy Judge in *Laquerre*, that while it may be advisable to bring as many residential tenancy matters as possible under the umbrella of a tribunal with specialized expertise, the language of Section 89(1) stops palpably short of achieving that result. If the legislators are listening, and if

there is a will to modify the *RTA*, then so be it. For now, however, the legislature has not seen fit to amend Section 89(1) of the *RTA*, and hence the apparent dichotomy in favour of landlords to invoke the jurisdiction of this Court in circumstances where a tenant may not do so, unless a tenant's claim exceeds the Board's monetary limit.

33. As to rental arrears, it is clear from a review of the decision of Deputy Judge Kelertas in the recent decision of this Court in *Brydges v. Johnson, 2016 CanLII 4942 (ON SCSM)*, that a landlord may only apply to the Board for an order for payment of arrears if the tenant is still in possession of the rental premises. Once a tenant is no longer in possession of the rental premises, it is the appropriate Court (Superior Court or Small Claims Court depending on the quantum of the claim) and not the Board, which has jurisdiction.

34. The same situation prevails with utility charges claimed as rent. Section 2(1) of the *RTA* places it beyond doubt that utility charges can properly form the subject of rent, conditional at all times upon the lease between the parties so providing. Here, the Lease at page 2, paragraph 2 states:

"The Lessor covenants with the Lessee will pay all gas, sewer and water, electric charges, telephone, cable/satellite (all to be used

responsibly) charges in connection with the demised premises as they become due and payable".

Indeed, if there was any doubt about jurisdiction over utility charges claimed as rent, it was removed definitively in *Luu v.* O'*Sullivan*, 2012 CanLII 98296 (ON SCSM).

35. I note in passing that both Sections 87 and 89 of the *RTA* expressly require that the tenant be in possession in order for the Board to have jurisdiction in the matters referred to in Sub-sections 87 (1) and 89 (1). Deputy Judges of the Small Claims Court have issued judgments dealing with the issue in *Mercier v. Hawco, [2014] O.J. 56 (Sm.Cl.Ct.)* and *Brydges v. Johnson, [2016] O.J. No. 609, 2016, CanLII 4942 (Sm.Cl.Ct.)* effectively holding that if a landlord could not have reasonably discovered the damages complained of until after the tenant vacated, there is no bar to the claim being brought in the Small Claims Court.

36. In my view, however, there is no need for this Court to introduce any notion of discoverability into the legislative scheme not otherwise found there. In fact, it is presumptuous to do so, and admits of potential mischief and the prospect for absurdity, as noted above.

37. The bottom line is simply that Sections 87 and 89 of the *RTA* only permit a landlord to bring an Application to the Board while a tenant is in possession. Sections 87 and 89 permit such a clear unequivocal pronouncement by virtue of a plain reading of the words contained therein. It is unhelpful for Deputy Judges of this Court to import a notion of discoverability not found in the *RTA* itself.

38. The jurisdiction of the Superior Court (including the Small Claims Court as a division thereof) is deliberately broad. Only where that jurisdiction has been expressly reserved to another body by virtue of express statutory language can the jurisdiction of the Court be ousted. Accordingly, here in the landlord and tenant matters, if the Board does not have jurisdiction, the Court does. In short, the Court has all the jurisdiction that has not been expressly reserved in so many words to the Board.

39. Accordingly, because the *RTA* reserves jurisdiction to the Board under Sections 87 and 89 only where the tenant is in possession, it necessarily follows that by default, as it were, the Superior Court (including the Small Claims Court, depending on the amount at issue) has jurisdiction over all claims that do not fall within that temporally inspired and restricted definition.

40. In my view the clearly preferable approach is to only consider the temporal tenancy status restrictions set out in Sections 87 and 89. Is the tenant in possession or not? If yes, the claim goes to the Board. If not, the claim is properly advanced before the Court. In sum, there exists nothing in the language of Section 89 of the *RTA* to suggest that imposing a discoverability test in damage claims is either required or helpful. Such imposition of a discoverability test is not sanctioned by the legislation, and as noted earlier, could lead to at least the two cited instances of mischief, if not perhaps more, as well as the prospect for absurdity.

41. In the present case, clearly the Plaintiff was no longer in possession at the time the Defendants advanced their counterclaim. The heads of claim are matters which under the temporal tenancy status restrictions contained in Sections 87 and 89 of the *RTA* necessarily fall outside the grant of jurisdiction to the Board. In the result, they are matters properly brought before this Court.

42. In consequence of the foregoing reasons, the Plaintiff's motion is dismissed, with costs to the Defendants. As to the matter of costs, the Defendants here have been put to substantial cost in preparing a comprehensive written submission outlining the law.

Whereas the Rules of the Small Claims Court limit costs on a motion to $100.00 unless there are “special circumstances” (undefined by the Rules), in this instance where the Defendants have been put to the expense of their counsel preparing a comprehensive written submission as noted, I am inclined to and do so order costs payable in the modest amount of $250.00.

43. I emphasize that the award of costs in this matter is not intended to nor is it permitted to be punitive in any sense. Rather the award of costs is to reflect the fact that the matters in respect of which relief was claimed by the Plaintiff in her motion are effectively the subject of settled law, if not perfectly understood law. When that is so, parties are to be discouraged from seeking to blaze a new trail which either flies in the face of clear statutory provisions or Judge-made law contained in a developed body of jurisprudence.

44. Finally, I am constrained to note that it is regrettable that certain decisions of this Court have conflated the treatment of matters not specifically dealt with in the *RTA* with matters which have in fact been specifically delineated, complete with temporal tenancy status restrictions. Those decisions (which importantly deal only with tenants’ remedies and <u>not</u> landlords’ remedies) are unhelpful

to the analysis required of anyone attempting to understand the issues arising in the present case of a landlord's remedies. In short, by sticking to the precise words of the *RTA*, one is spared the seeds of confusion sown in the earlier decisions, resulting here in the purported transfer of the "essential character" test to landlords' remedies, neither necessary nor permissible in my view.

DATED this 19th day of June, 2017.

Paul J. Brett, Deputy Judge

Court File No. #. **SC-16-051-00**

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