Brydges v Johnson, 2016 CanLII 4942 (ON SCSM)

Date:	2016-01-08
File number:	10-156; 10-156-D1
Other citation:	[2016] OJ No 609 (QL)
Citation:	Brydges v Johnson, 2016 CanLII 4942 (ON SCSM), <https://canlii.ca/t/gn7bj>, retrieved on 2024-04-13
Most recent unfavourable mention:	Brydges v Johnson, 2017 CanLII 9448 (ON SCSM)

Court File No. 10-156 & 10-156-D1

SUPERIOR COURT OF JUSTICE
(Guelph Small Claims Court)

BETWEEN

RAMONA BRYDGES

Plaintiff

-and-

DAVID JOHNSON AND ALICE PARKER

Defendants

DAVID JOHNSON
Plaintiff, by Defendant's Claim
-and-

RAMONA BRYDGES AND PAUL BRYDGES
Defendants to Defendant's Claim

Appearances:
J. B. Pietrangelo- for the Plaintiff and the Defendants by Defendant's Claim
D. Johnson - in person
A. Parker - in person

Heard: October 29th & 30th, 2015

RULING ON JURISDICTION:

K.J. KELERTAS, DEPUTY JUDGE

Introduction:

This residential tenancy dispute came before me for trial on October 29, 2015 after a long and circuitous route that began in 2007. The parties' dispute led them to the Landlord and Tenant Board ("the Board"), to the Divisional Court, back to the Board, and then to this Court. A trial was concluded in July 2014 but the judgment of the Court was appealed to the Divisional Court. On appeal, the matter was remitted back to this Court for a new trial.

At the outset of the proceedings on October 29, 2015, I indicated to the parties that I had some doubt as to whether or not this Court had jurisdiction to hear any of the parties' claims.

Section 168(2) of the *Residential Tenancies Act, 2006*, S.O..2006, c.17 ("the Act"), provides that:

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 of the Act makes it clear that this includes the Board's "authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act".

It is settled law that if the Landlord and Tenant Board has jurisdiction over a matter, the jurisdiction of the civil courts is ousted: see *Fraser v. Beach* (2005), 2005 CanLII 14309 (ON CA), 75 O.R. (3d) 383 (C.A.). Two other appellant decisions have confirmed that the basic question in determining whether a matter is exclusively within the Board's jurisdiction is whether the dispute could have been (my emphasis) determined by the Board at first instance: see *Efrach v. Cherishome Living*, 2015 ONSC 472 (CanLII), [2015] O.J. No. 293 (Div. Ct.) and *Spirleanu v. Transglobe Property Management Service Ltd.*, [2015] O.J. No. 1336 (C.A.).

With this in mind, I encouraged the parties to consider a negotiated resolution. Court was then recessed for a short period of time to permit the parties to discuss settlement. Upon their return, the parties reported that they had not resolved the matter and that rather than proceed directly to calling evidence, the parties requested that I rule on the issue of jurisdiction at the outset. On the consent of the parties, Court was again recessed to the next day, October 30, 2015 to permit the parties to prepare submissions on the issue of jurisdiction.

On October 30, 2015, I then proceeded to hear the parties' submissions on the issue of jurisdiction, applying the test set out in Rule 12.02(1) of the *Small Claims Court Rules*, which has been interpreted to mean that judgment could be granted without trial if the claim or defence in question raises no reasonable cause of action, has "no meaningful chance of success" or is otherwise statute barred: see *Van de Vrande v Butkowsky* (2010), 2010 ONCA 230 (CanLII), 99 O.R. (3d) 641 (Ont. C.A.), and *O'Brien v. Ottawa Hospital*, [2011] O.J. No. 66 (Div. Ct.).

The parties called no evidence and relied solely on the pleadings and their oral submissions.

The Facts:

On its face, the facts of the Plaintiff's Claim, as amended (initially issued on March 4, 2010), can be summarized as follows:

a) The Plaintiff landlord rented a residential unit located at 1204 Gordon Street in Guelph to the Defendants pursuant to a written lease, commencing on September 1, 2000, with a monthly rent of $1,250.00.
b) In December 2007, a Property Standards Order was issued by the City of Guelph against the Defendants as the Defendants were allegedly storing salvaged materials outside the rental unit in breach of a City by-law.
c) As a result of the breach of the City's by-law, the landlord applied to the Landlord and Tenant Board to have the tenancy terminated and to evict the tenants. On November 13, 2008, the Board ordered the tenants to vacate the premises.
d) Between November 2008 and February 2010, the tenants challenged the eviction process, including an appeal to the Divisional Court. These proceedings resulted in a stay of the Board's eviction Order.
e) After all reviews and appeals were exhausted by the Defendants, and the stay of the Board's original Order was lifted, the Defendant tenants were eventually evicted by the Sheriff on or about February 5, 2010.
f) The Defendants did not pay any rent to the Plaintiff between December 1, 2008 and February 5, 2010.
g) The Plaintiff also claims that upon eviction, the Defendants "left the rental unit damaged and in a state of disarray." The Plaintiff was therefore required to clean and repair the premise.

The Plaintiff therefore claims:
(i) arrears of rent in the amount of $17,723.21;

(ii) the costs of cleaning and repairing the premises in the amount of $10,421.15; and
(iii) prejudgment interest from December 1, 2008, post judgment interest, and costs.

The Plaintiff has waived her right to any amount over $25,000.00 to bring her Claim within the jurisdiction of this Court.

The Defendants, in their respective Defences, admit none of the allegations in the Claim, save and except for the fact that they rented the premises from the Plaintiffs beginning on September 1, 2000 and that they paid a deposit of $1,250.00 for last month's rent.

The Defendant Parker simply pleads that she vacated the premises in April 2008 and that the Plaintiff was aware of this fact. She brought a motion to have the Plaintiff's Claim against her dismissed on these grounds, but the motion was dismissed by Deputy Judge Payne on November 3, 2011. Therefore, she remains a Defendant to the Plaintiff's Claim.

The Defendant Johnson pleads that:
a) the Plaintiff landlord did nothing to maintain the premises during the tenancy citing a number of repair and maintenance issues that pre-existed the tenancy, as well as others that arose during the tenancy. Consequently, he pleads that any alleged damage to the premise was actually caused by a lack of basic maintenance by the Plaintiff or, in the alternative, natural wear and tear.
b) the Plaintiff landlord's agents improperly seized Mr. Johnson's personal belongings at the time of his eviction from the premises in February 2010 including two motor vehicles (a Volvo and a Ford Van), antiques, and collectibles. Mr. Johnson claims that his personal property was never returned to him; and that
c) the value of the personal property improperly seized by the Plaintiff's agent "exceeds any alleged claims by the landlord."

In his Defendant's Claim, Mr. Johnson claims for:
a) the value of the personal property that he alleges was improperly seized by the landlord's agents (the then solicitors for

the Plaintiff who were initially a Defendant to the Defendant's Claim but that Claim has already been struck);

b) the aborted cost of a moving truck and rental truck. This cost was incurred after Mr. Johnson was advised by the landlords' agents that he could retrieve his property from the premises on February 6, 2010 after the eviction date. However, Mr. Brydges at the time of his attendance at the property ordered Mr. Johnson to leave;

c) "Other damages assessed by the Court"; and

d) Prejudgment interest from February 6, 2010, costs and post judgment interest.

The total claimed by Mr. Johnson is $24,000.00.

In their Defense to the Defendants' Claim, Ramona and Paul Brydges plead that they complied with the provisions of section 41 of the *Residential Tenancies Act*. Therefore, they plead that they have no liability for the losses allegedly suffered by Mr. Johnson arising out of the eviction and subsequent seizure and sale of the property that was left behind after the expiry of 72 hours after the eviction notice of the Sheriff took effect.

Jurisdiction of the Small Claims Court and the *Residential Tenancies Act*:

For any part of the Plaintiff's Claim or the Defendant's Claim to be properly before this Court, there must be a rational basis to conclude that such parts fall outside of the jurisdiction of the Landlord and Tenant Board. Despite the fact that this matter has been before this Court since March 2010, it does not appear that the question of jurisdiction was ever addressed by any of the presiding Deputy Judges or by the Divisional Court upon the appeal of the judgment rendered after the first trial in this Court. I therefore invited the parties to address the question of whether their claims can actually be heard by this Court.

Plaintiff's Claim:

Mr. Pietrangelo appeared for the Plaintiff and the Defendants on the Defendants Claim. He submitted that this Court has jurisdiction to hear the Plaintiff's Claim for rental arrears. He cited sections 86 and 87(1) of the *Residential Tenancies Act*:

86. A landlord is entitled to compensation for the use and occupation of a rental unit by a tenant who does not vacate the unit after his or her tenancy is terminated by order, notice or agreement.

87. (1) 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) the tenant is in possession of the rental unit.

Mr. Pietrangelo put particular emphasis on subsection 87(1)(b), arguing that after a tenant is no longer in possession of a rental unit, the Board has no jurisdiction to hear a claim for arrears and that the proper forum is the civil courts. He cited the 2014 decision of Justice Wilton-Siegel in *Kipiniak v. Dubiel*, 2014 ONSC 1344 (Div. Ct.). In that case, the Plaintiff landlord brought a claim in the Small Claims Court for "occupation rent" that had accumulated while the tenant appealed an eviction order made by the Board. The Plaintiff in *Kipiniak* brought his claim one day after the Defendants vacated the premises. At trial, the Deputy Judge found that rent remained unpaid during the eviction appeal, but held that she lacked jurisdiction to order payment of those arrears because section 207(3) of the *Residential Tenancies Act* extinguished the Landlord's claim in excess of $10,000.00 (the monetary jurisdiction of the Board at the time) upon issuance of the Board's eviction order. On appeal to Divisional Court, it was held by Justice Wilton-Siegel that the Board's Order (which only addressed rental arrears that had accrued prior to the making of the initial order) did not extinguish a Landlord's right to seek arrears for occupation rent that accrued after the date of that Order. The Court held that any application to

seek occupation arrears was required to be made to the Board so long as the tenant remained in possession of the premises. However, once the tenant was no longer in possession, the Small Claims Court had jurisdiction to hear the claim, subject to its monetary jurisdiction and the provisions of the *Limitations Act*.

Mr. Pietrangelo argued that the facts in *Kipiniak* were similar to those pleaded by the Plaintiff in this matter. The Defendants did not pay any rent to the Plaintiff landlord pending the review and subsequent appeal of the Landlord and Tenant Board's Order terminating the tenancy. He argued that the total amount of the arrears owing for occupation rent did not crystalize until the tenants vacated the premises. Therefore he argued that it was appropriate that the Plaintiff wait until the tenants had vacated the premises to commence her claim for the arrears, rather than commence a fresh application before the Board pursuant to section 87(1) or (3) for an Order for the payment of compensation for the use and occupation of her rental unit after the order of the Board terminating the tenancy had been given effect.

With respect to the claim for the costs of repairing the damage to the rental premises allegedly caused by the Defendant tenants, Mr. Pietrangelo referred to section 89(1) of the *Residential Tenancies Act* which provides that:

89. (1) A landlord may apply to the Board for an order requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex and the tenant is in possession of the rental unit.

He argued that once a tenant is no longer in possession of the rental unit, this Court has jurisdiction to hear a landlord's claim for compensation for alleged damage to the property and any clean-up costs associated with the tenants allegedly leaving the rental premises in a state of disarray. He cited the 2014 decision of Deputy

Judge Winny in *Mercier v. Hawco*, [2014] O.J. 56, who found on the facts of that case that if the landlord "…did not and could not have discovered the damage until after tenant was out of possession", the Landlord and Tenant Board did not have jurisdiction over a subsequent application for damages. Mr. Pietrangelo submitted that on the facts alleged in the Plaintiff's claim, the Landlord could not have discovered the damage to the rental premises or assess the costs of cleaning up the premises until after the Defendant tenants had vacated.

In response to Mr. Pietrangelo submissions, Mr. Johnson argued that the Landlord and Tenant Board has exclusive jurisdiction over any dispute between a landlord and tenant once those disputes have been remitted to the Board. At first instance, the landlord had applied to the Board for an order terminating the tenancy and for arrears of rent. The Board granted the Landlord's application. Although the tenants requested a review of that order and subsequently appealed the dismissal of their review application to the Divisional Court (which was ultimately dismissed), the fact that there were arrears owing at the time of the tenant's eviction should have prompted the landlord to go back to the Landlord and Tenant Board before the tenants vacated the premises and ask the Board to order the tenants to pay back-rent. Therefore, he argued that the civil courts have no jurisdiction to subsequently order the payment of arrears.

With respect to the Plaintiff's claim for the cost of repairing the alleged damage to the rental premises and the cost of clean up after the tenants vacated the premises, Mr. Johnson argued that like the arrears, the Landlord should have remitted those matters to the Board while the tenants were in possession. He argued that the landlord had a right to inspect the premises under the *Residential Tenancies Act* under certain circumstances (see section 27), and since the Landlord knew that there were problems on the outside of the premises, the Landlord should have exercised due diligence and inspected the interior of the rental unit prior to the tenants vacating. If the landlord had done so, she could have brought an Application before the Board pursuant to section 89 of the *Residential Tenancies Act* prior to the tenants vacating.

Therefore, Mr. Johnson submitted that since the Landlord and Tenant Board has exclusive jurisdiction over all the Landlord's claims arising out of the tenancy, this Court had no jurisdiction.

Defendant's Claim:

With regards to the Defendant's claim, Mr. Pietrangelo argued that section 41 of the *Residential Tenancies Act* bars any claim in the civil courts for damages against a landlord arising out of the improper seizure or disposal of property left by the tenant in a rental unit. Section 41 provides that:

41. (1) A landlord may sell, retain for the landlord's own use or otherwise dispose of property in a rental unit or the residential complex if the rental unit has been vacated in accordance with,

(a) a notice of termination of the landlord or the tenant;

(b) an agreement between the landlord and the tenant to terminate the tenancy;

(c) subsection 93 (2); or

(d) an order of the Board terminating the tenancy or evicting the tenant.

(2) Despite subsection (1), where an order is made to evict a tenant, the landlord shall not sell, retain or otherwise dispose of the tenant's property before 72 hours have elapsed after the enforcement of the eviction order.

(3) A landlord shall make an evicted tenant's property available to be retrieved at a location close to the rental unit during the prescribed hours within the 72 hours after the enforcement of an eviction order.

(4) A landlord is not liable to any person for selling, retaining or otherwise disposing of a tenant's property in accordance with this section.

(5) A landlord and a tenant may agree to terms other than those set out in this section with regard to the disposal of the tenant's property.

(6) If, on application by a former tenant, the Board determines that a landlord has breached an obligation under subsection (2) or (3), the Board may do one or more of the following:

1. Order that the landlord not breach the obligation again.

2. Order that the landlord return to the former tenant property of the former tenant that is in the possession or control of the landlord.

3. Order that the landlord pay a specified sum to the former tenant for,

i. the reasonable costs that the former tenant has incurred or will incur in repairing or, where repairing is not reasonable, replacing property of the former tenant that was damaged, destroyed or disposed of as a result of the landlord's breach, and

ii. other reasonable out-of-pocket expenses that the former tenant has incurred or will incur as a result of the landlord's breach.

4. Order that the landlord pay to the Board an administrative fine not exceeding the greater of $10,000 and the monetary jurisdiction of the Small Claims Court.

5. Make any other order that it considers appropriate.

Since Section 41(6) specifically contemplates an Application to the Board by a former tenant, Mr. Pietrangelo argues that this Court is without jurisdiction to hear the Defendant's claim and it should be struck out. In support of his argument, Mr. Pietrangelo cited another 2014 decision of Deputy Judge Winny, *Tuka v. Butt*, [2014] O.J. 852, who held that section 41(4) acts as an absolute bar to a claim in the Small Claims Court by a tenant for the improper sale, retention, or disposal of a tenant's property in accordance with provisions of the balance of section 41.

Further, Mr. Pietrangelo argued that the Defendant's Claim and the Defence of Mr. Johnson, insofar as they purport to claim an abatement of rent or se-toff arising from the alleged failure of the Plaintiff to keep the rental premises in good repair, should also be struck out on the basis that sections 20, 29 and 30 of the *Residential Tenancies* Act gives the Landlord and Tenant Board complete

jurisdiction to adjudicate such claims by tenants and former tenants.

Mr. Johnson disagreed with Mr. Pietrangelo's submissions on the issue of the seized property, saying that he had a right to sue for the return of his improperly seized property, or damages in the alternative. Nevertheless, he did agree that the jurisdiction of this Court to hear any claim for an abatement of rent or a set-off appeared to be ousted.

Ms. Parker declined to make any submissions on any of the matters relating to the jurisdiction of this Court.

Ruling:

With respect to the Plaintiff's claim for compensation for arrears of rent or unpaid occupation rent, I find that I am bound by the decision of Justice Wilton-Siegel in *Kipiniak*, *supra.* that held that the Small Claims Court has jurisdiction to hear such claims after a tenant is no longer in possession of the rental unit. While the decision in *Kipiniak* comes before the decisions in *Efrach* and *Spirleanu*, *supra.,* I agree with the Plaintiff's position that even though a claim for arrears or occupation rent could have been brought before the Landlord and Tenant Board at any time while the tenants remained in possession, the total amount of arrears did not crystalize until after the Defendants were evicted and had vacated the premises. I agree that in a case where a tenant has stopped paying rent pending the review or appeal of an Order of the Board terminating the tenancy, it would be incongruous for the landlord to be required to apply to the Board for the payment of any subsequent arrears of rent before all requests for review or appeal by the tenants of an eviction order have been exhausted and the full amount of the rent owing (including occupation rent payable after the termination date) could be determined. As Justice Wilton-Siegel points out in *Kipiniak* at paragraph 28, *supra.*, a tenant is not entitled to live rent free while he or she awaits the outcome of reviews and/or appeals of an eviction order. Furthermore, since the Landlord and Tenant Board has no

jurisdiction to hear an application under section 87 of the *Residential Tenancies Act* once the tenants are no longer in possession, the Plaintiff's Claim for arrears or occupation rent is properly before this Court.

With respect to the Plaintiff's claim for damages for the alleged damage to the premises by the Defendant tenants and the clean-up of the premises post-eviction, the Landlord and Tenant Board has exclusive jurisdiction under section 89 of the *Act* to hear claims by the landlord for alleged damage to the premises by the tenants while they are still in possession of the premises. Claims for post-eviction damage or clean-up are clearly within the jurisdiction of this Court. However. if the damage to the property occurred during the tenancy and prior to the tenant's eviction, it is a question of fact as to whether or not the damage could have been discovered by the landlord through the exercise of reasonable due diligence prior to the tenants vacating the premises. The Court cannot determine this question without first hearing all of the evidence. Consequently, the determination of this issue is reserved to be decided at the end of the trial.

This Court has no jurisdiction to hear the Defendant's Claim. I find that subsections 41(4) and 41(6) of the *Residential Tenancies Act*, coupled with subsection 168(2), acts as a complete bar to any claim in this Court for damages or any other remedy arising out of the improper exercise of a landlord's powers under section 41. Any such claims are properly within the exclusive jurisdiction of the Landlord Tenant Board. Section 41 does not appear to impose any time limitation on a former tenant bringing a section 41(6) application before the Board. The Defendants are free to pursue such a claim before the Board, subject to any other provisions of the *Act*.

Consequently, the Defendant's Claim is dismissed as being an abuse of the Court's process. I find that doing so is just and agreeable to good conscience, and that, in any case, the dismissal of the Defendant's Claim at the end of the trial issue is a foregone conclusion, given the issue as to jurisdiction.

In the same vein, paragraphs 1, 2, 3, 4, and 5 of the Amended Defence of David Johnson are struck insofar as they relate to the alleged improper seizure and/or sale of the Defendant's property, the matter of which is within the exclusive jurisdiction of the Board.

In so far as the Defendants might have a claim for an abatement of rent or set-off arising from the landlord's alleged breach of her duty to repair (which is not specifically pleaded but could be implied), such a claim is barred. The jurisdiction of this Court is ousted by section 168(2) of the *Residential Tenancies Act*. Based on the facts alleged in the Defendant's Claim and in the Defense to the Plaintiff's Claim, all of the Defendant's issues regarding non-repair arose during the time of the tenancy. Subsection 29(1).1. of the *Act* provides that:

29. (1) A tenant or former tenant of a rental unit may apply to the Board for any of the following orders:

1. An order determining that the landlord has breached an obligation under subsection 20 (1) ....

Subsections 20(1) and 20(2) of the *Act* provide that:

20. (1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

(2) Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement

Subsections 30(1), (2), (3), (4), (5), and (9) of the Act provide, in part, that:

30. (1) If the Board determines in an application under paragraph 1 of subsection 29 (1) that a landlord has breached an obligation under subsection 20 (1)..., the Board may do one or more of the following:

1. Terminate the tenancy.

2. Order an abatement of rent.

3. Authorize a repair or replacement that has been or is to be made, or work that has been or is to be done, and order its cost to be paid by the landlord to the tenant.

4. Order the landlord to do specified repairs or replacements or other work within a specified time.

5. Order the landlord to pay a specified sum to the tenant for,

i. the reasonable costs that the tenant has incurred or will incur in repairing or, where repairing is not reasonable, replacing property of the tenant that was damaged, destroyed or disposed of as a result of the landlord's breach, and

ii. other reasonable out-of-pocket expenses that the tenant has incurred or will incur as a result of the landlord's breach.

. . .

9. Make any other order that it considers appropriate.

Clearly, it was open to the tenants to seek an Order from the Board to rectify the repair or maintenance problems they allege they had had with the rental premises during their tenancy or even afterwards. They could have raised these issues in response to any of the Landlord's Applications to the Board, or could have brought a separate application before the Board for an abatement of rent within one year of the alleged improper conduct of the landlord: *see* subsection 29(2) of the *Act*. Notwithstanding this fact, it is entirely open to the Defendants to defend the Plaintiff's Claim with respect to damages for the repair and/or clean-up of the premises upon the tenants vacating the premises based upon the balance of the Defendants' pleadings and upon the evidence to be heard at trial.

Order:

In accordance with the Reasons provided herein, it is hereby ordered that:

1. the Plaintiff's Claim shall proceed to trial;

2. the Defendant's Claim is dismissed;

3. paragraphs 1 to 5 inclusive of the Defence of David Johnson are struck; and

4. costs, if any, are reserved to the trial judge.

While I did not hear any evidence, I am willing to remain seized of this matter so as to expedite a trial date given the amount of time that this matter has been before the Court.

Dated: January 8, 2016

(signed) "K.J. Kelertas"
K.J. Kelertas, Deputy Judge