

Dotchin v Albrecht, 2022 CanLII 39873 (ON SCSM)

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Court File No. SC-21-00000398-0000 (Brantford)

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

BETWEEN:

Dana Dotchin paralegal)	Elizabeth Anani,
)	
)	
)	plaintiff
- and -)	
)	
Rick Albrecht aka Richer Albrecht student at law)	Travis Dyk,

)
)
defendant)
)

Heard May 4, 2022

REASONS FOR DECISION

Introduction

1. This settlement conference proceeded virtually today. At the outset of the proceeding I advised the parties that I had concerns that the claim sought relief which was not within the jurisdiction of the Small Claims Court to grant, and was for that reason not capable of success. After full discussion of the issues in the claim (and the defendant's claim) I advised the parties that I would briefly reserve to consider my decision.

2. I conclude that the claim can not succeed at a trial in the Small Claims Court, and that this is one of the limited instances in which it is appropriate to dismiss a claim at the settlement conference stage. Following are my reasons for my decision, as required by Rule 13.05(2)(iii).

Parties

3. The plaintiff Dana Dotchin was at all material times a tenant at a rental property owned by the defendant landlord Rick Albrecht, in Paris, ON.

Nature of the Claim

4. The landlord-tenant relationship deteriorated and proceedings were commenced at the Landlord and Tenant Board (“LTB”). Ms. Dotchin asserts that she was not given an opportunity to participate in the LTB process, and she alleges that the Order of the LTB made June 8, 2021 (“the LTB Order”) was based on fraudulent misrepresentations made by Mr. Albrecht, grossly understating that rent which she paid in the period December 1, 2016 through September 30, 2020.

5. The LTB Order was produced by Mr. Albrecht in his document brief at Tab 5. I attach a copy to these reasons as Appendix ‘A’.

6. The LTB Order incorporates findings of significant arrears, which Ms. Dotchin vehemently contested at the settlement conference today. The amount which she was ordered to pay if she wanted to remain in the rented premises was \$25,509.98, and if she chose to end the tenancy, \$27,673 (both figures not including certain post-Order adjustments).

7. Although not evidenced in the pleadings or documents in the record, Ms. Anani today advised that Ms. Dotchin had requested a review of the LTB Order pursuant to [section 209\(2\)](#) of the *Residential Tenancies Act, 2006, S.O. 2006 c. 17*. Ms. Anani further advised that the LTB in its review confirmed that it had not followed the proper procedure, but that the LTB Order would stand.

8. Ms. Anani advised that the plaintiff had chosen not to appeal to the Divisional Court because of the prohibitive cost of that process.

9. Instead, Ms. Dotchin commenced this proceeding, seeking damages which she claims to have suffered as a result of Mr. Albrecht enforcing the LTB Order, firstly through securing the assistance of the Sheriff in evicting Ms. Dotchin and also from the issuance of a garnishment order to secure payment of \$2,773 of rent arrears, plus interest.

Position of the Plaintiff

10. Ms. Anani argued that the instant claim was not an attempt to sidestep the LTB Order, but was a straightforward claim for damages flowing from the fraudulent misrepresentation of Mr. Albrecht.

11. Those damages are particularized in the claim as \$10,200 representing increased rent which Ms. Dotchin was forced to pay to secure new accommodations, liquidated damages of \$391.17 for storage and moving expenses and \$100 for document preparation.

12. Ms. Anani took the position that the damages sought were unrelated to the LTB Order, which she maintained was not validly obtained because of Mr. Albrecht's fraud, but were the consequence of Mr. Albrecht's *enforcement* of that Order, which he knew to be based on his fraudulent misrepresentations.

Position of the Defendant

13. The defendant takes that the plaintiff's claim is a collateral attack on the LTB Order.

Analysis

14. The plaintiff's position is not tenable.

15. The plaintiff submits that the elements of fraudulent misrepresentation are made out here, and that they entitle her to relief based on that tort. The plaintiff recites the elements of fraudulent misrepresentation in the claim (at para 14 of Schedule 'A') as:

- a. The defendant made a false representation of fact.
- b. The defendant knew of the falsity of that representation or was reckless as to its truth.
- c. The defendant intended that the false representation be acted on.
- d. The defendant knew that the false representation would be relied on.
- e. The plaintiff suffered damages as a result.

16. This is not an accurate description of the constituent elements of the tort of fraudulent misrepresentation, described by Perell, J. in *Marcinkiewicz v. General Motors of Canada Co.*, [2022 ONSC 2180](#) at para [131](#) [QL] as:

- a. A false statement by the defendant.

- b. Knowledge of the falseness of the statement, or indifference as to its truth on the part of the defendant.
- c. An intent on the part of the defendant to deceive the plaintiff.
- d. The false statement being material and inducing the plaintiff to act.
- e. The plaintiff suffering damages.

17. The critical error made by the plaintiff is the assumption that a false statement knowingly made by a defendant to a third party, relied on by that third party and resulting in an outcome which causes the *plaintiff* to suffer damages gives rise to a claim for fraudulent misrepresentation. Fraudulent misrepresentation requires that the false representation be made to and relied/acted on *by the plaintiff*. Ms. Dotchin was not the recipient of the allegedly false representations, and she did not rely on them.

18. As there is no claim for fraudulent misrepresentation available on these facts, I look more closely at the substance of the claim, and I conclude that it seeks to hold the defendant liable for “damages” suffered by the plaintiff from the issuance and enforcement of the LTB Order, an order which she says is a nullity, but has not sought to overturn through an appeal to the Divisional Court.

19. I find that this proceeding amounts to a collateral attack on the LTB Order.

20. Hourigan, JA writing for the court in *R. v. Irwin*, [2020 ONCA 776](#) said, beginning at paragraph 23 of that decision that:

[23] The jurisprudence regarding the collateral attack rule is well established. Generally, a collateral attack is defined as an

attack on an order “made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order”: *Wilson v. The Queen*, [1983 CanLII 35 \(SCC\)](#), [1983] 2 S.C.R. 594, at p. 599. The rule provides that, with limited exceptions^[2], “an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose”: *R. v. Bird*, [2019 SCC 7](#), [2019] 1 S.C.R. 409, at para. [21](#).

[24] The rule protects the integrity of the justice system by prohibiting a party from avoiding the consequences of an order issued against it by proceeding in another forum: *Garland v. Consumers’ Gas Co.*, [2004 SCC 25](#), [2004] 1 S.C.R. 629, at para. [72](#) and *R. v Litchfield*, [1993 CanLII 44 \(SCC\)](#), [1993] 4 S.C.R. 333 349. Caldwell J.A. writing for the Saskatchewan Court of Appeal, succinctly summarized the rule this way: “In practical terms, the common law rule prevents a person charged with violating a court order from saying, in his or her defence to that charge, that the order is invalid or unlawful”: *R. v Envirogun Ltd.*, [2018 SKCA 8](#), 3 W.W.R. 247, at para. [43](#).

[25] While the early case law on the collateral attack rule focussed on collateral attacks of court orders, the Supreme Court developed a distinct analytical approach when considering the collateral attack of administrative orders. For such orders, the tension animating the rule is between ensuring that the legislature’s decision to assign decision-making powers to administrative bodies is not undermined and that individuals have an effective means available to them to challenge administrative orders: *Maybrun* at para. 44, and *Bird*, at paras. [25-26](#).

[26] The Supreme Court has also identified two important policy rationales that support the rule’s application to administrative orders. First, permitting parties to ignore established procedures for challenging an order would risk discrediting administrative bodies’ authority and thereby undermine their effectiveness. Second, if collateral attacks are allowed, the state will have to resort to criminal charges and sanctions to secure compliance: *Maybrun*, at para. 42; *Bird*, at paras. [27-28](#).

21. The outcome sought by the plaintiff in this action would only be available if the trial judge agreed that the enforcement of the LTB Order by the defendant gave rise to a claim for damages. I can not conceive how this might result without a finding by the trial judge, implicit or explicit, that the LTB Order itself was invalid, or flawed, and that the flaw was the result of the deliberate conduct of the defendant.

22. This is precisely the definition of a collateral attack. The plaintiff here seeks to avoid the consequences of the LTB Order finding that she owed certain amounts to the defendant, NOT by exercising her right to appeal the LTB Order, but by commencing a separate proceeding seeking to hold a third party liable for the *issuance and enforcement* of that Order.

23. Any complaint about the LTB Order must be resolved via the appeal route provided in the *Residential Tenancies Act, 2006* – in this case, the Divisional Court. The Small Claims Court may be a more affordable, more expedient venue but it does not have the jurisdiction to disturb an Order of the LTB.

24. For the above reasons the plaintiff's claim in Court File No. SC-21-00000398-0000 is dismissed, with costs payable to the defendant fixed in the amount of \$400, all-inclusive.

May 4, 2022



Judge

Richard Campbell, Deputy
