CITATION: Oz v. Shearer, 2020 ONSC 6685
DIVISIONAL COURT FILE NO.: 205/20
DATE: 20201104

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: ERAN OZ, Moving Party/Respondent

AND:

CHARLES SHEARER AND JENNA SHEARER, Respondents/Appellants

BEFORE: L. A. Pattillo J.

COUNSEL: *Howard Stern*, for the Moving Party/Respondent

Bradley J. Zochodne, for the Respondents/Appellants

HEARD: October 21, 2020

ENDORSEMENT

Introduction

[1] This is a motion by the Landlord/Respondent, Eran Oz, for an order quashing the appeal of the Tenants/Appellants, Charles Ross Shearer and Jenna Shearer, and/or lifting the automatic stay of the Landlord and Tenant Board's (the "Board") order dated August 4, 2020 evicting the Tenants and requiring payment of arrears of rent in the amount of $10,355 to January 31, 2020 plus $66.94 per day thereafter until they vacate (the "Order").

[2] For the reasons that follow, the Landlord's motion is allowed, the appeal is quashed, and the stay of the Order is lifted. The Tenants' appeal fails to raise a question of law and is otherwise totally devoid of merit. I also consider it, in the circumstances of the case, to be an abuse of process.

Background

[3] In December 2017, the Tenants began renting a newly built single-family detached home at 24 Don Hadden Court in Sunderland Ontario (the "Property") from the Landlord on a month-to-month basis for $2,063 per month.

[4] From the outset, the Tenants had complaints concerning the quality of construction and the Landlord's alleged failure to correct the deficiencies which culminated in both parties bringing multiple applications before the Board.

[5] Rather than resolving the issues, they continued to escalate. On July 26, 2019, the Tenants moved out of the Property and ceased paying rent. They refused to return the keys to the Landlord and have not paid rent for the Property since.

[6] On August 19, 2019, the Tenants commenced three applications at the Board:

1) A T6 application alleging failure to comply with maintenance obligations and claiming an abatement of rent and out of pocket expenses;

2) A T2 application alleging illegal entry; substantial interference with reasonable enjoyment of property; and harassment also claiming an abatement of rent and expenses for moving and storage; and

3) An A1 application to determine whether the grounds of the Property were part of the rented space pursuant to the *Residential Tenancies Act*, 2006 (the "Act").

[7] On October 2, 2019, as a result of the Tenants' failure to pay rent since August, the Landlord commenced an L1 application at the Board seeking an order evicting the Tenants and payment of the arrears of rent owing.

[8] Subsequently, the Board scheduled the Landlord's L1 application to be heard on January 6, 2020 and the Tenants' three applications to be heard on January 10, 2020.

[9] The Landlord's L1 application was heard by the Board on January 6, 2010 and the decision reserved. On January 10, 2020, the Tenants' applications did not proceed as further production was ordered.

The Order

[10] As a result of the onslaught of COVID 19 in March 2020 and the Superior Court's order suspending Board eviction orders from March 19 to July 31, 2020, the Board did not issue the Order until August 4, 2020.

[11] At the commencement of the hearing of the Landlord's application, the Tenants sought an adjournment to have the application heard together with their applications scheduled to be heard January 10, 2020. The Board denied the adjournment request on the basis of the amount of arrears outstanding, the Tenants' applications were to be held four days later and there was no need to have them heard together as the issues raised in the Tenants' applications were separate from those in the Landlord's application.

[12] The Tenants next brought two preliminary motions to dismiss: the first on the ground the N4 Notice of Termination had not been validly served and the second on the ground that one of the Landlord's signatures was missing from both the N4 Notice and the L1 application.

[13] The Board dismissed both motions, holding the N4 Notice was deemed validly served in accordance with s. 191(2) of the Act and it complied with the requirements of s. 43 of the Act. The Tenants were not confused or prejudiced in any way by the fact that only one of the Landlords had signed the documents.

[14] The Board then briefly set out the background of the Landlord's application including the type of the tenancy, the monthly rent, the period during which the Tenants have failed to pay rent and the total amount of the arrears of rent to January 31, 2020 which, as noted, was $10,355. The Tenants did not dispute the amount owing.

[15] As the Tenant testified he withheld rent on the basis of the issues he had with the rental unit and the Landlord's actions and was seeking an abatement or full waiver of the arrears, the Board permitted the Tenants, in accordance with s. 82 of the Act, to raise an issue with respect to mould in the rental unit which he discovered on September 24, 2019 when he attended the Property and discovered a water leak.

[16] After reviewing the evidence of the Tenant and Landlord as to what was found and the steps that were taken to remediate the leak and the damage it caused, the Board was satisfied, based on the Landlord's testimony and a video, that there was no mould after the Landlord addressed the issue. The Board found that the Landlord acted in a timely and effective manner in dealing with the leak issue and the Tenants were not entitled to a rent rebate.

[17] Further, the Board noted that it had considered all the disclosed circumstances in accordance with s. 83(2) of the Act and concluded, pursuant to s. 83(1) that it would be unfair to grant relief from eviction.

[18] In conclusion, the Board ordered that unless the Tenants paid the Landlord the rent owing ($10,355 to January 31, 2020 plus $66.94 per day until they move out and $175 in Board costs), on or before August 15, 2020, the tenancy was terminated and on August 16, 2020 the Landlord was entitled to file the Order with the Sheriff to enforce eviction.

The Appeal

[19] Pursuant to s. 210 of the Act, an appeal from an Order of the Board lies to the Divisional Court on a question of law only.

[20] On September 2, 2020, the Tenants filed a Notice of Appeal from the Order pursuant to s. 210 of the Act. In the Notice of Appeal, the Tenants allege the following grounds of appeal:

I. The Board failed to provide them with procedural fairness in denying their adjournment request and subsequently granting the relief it did;

II. The Board erred in law in:

i. Failing to interpret and apply ss. 82 and 83 of the Act;
ii. Failing to adjourn the hearing or hear all issues together;
iii. Concluding that the notice of termination had been properly served and the Board had jurisdiction to hear the application;
iv. Failing to join the Landlord's application with the Tenants' application;
v. Failing to provide adequate reasons; and
vi. Failing to consider or materially misapprehending the evidence.

Analysis

[21] The test for quashing an appeal to this court is whether the appeal is "manifestly devoid of merit or an abuse of process seeking solely to delay". See: *Solomon v. Levy*, 2015 ONSC 2556 at para. 34.

[22] As an appeal under s. 210 of the Act only lies in respect of a question of law, the court has no jurisdiction to deal with findings of fact or mixed fact and law.

[23] In their factum, the Tenants summarize their grounds of appeal as follows:

1. Denial of procedural fairness;
2. Failure of the Board to properly interpret and apply the Act;
3. Failure of the Board to exercise its discretion to grant an adjournment; join all the issues together and/or refuse to hear the Landlord's L1 application; and
4. Inadequate reasons.

i. Denial of Procedural Fairness

[24] There is no basis, in my view, to the Tenants' ground of appeal regarding procedural fairness. The duty of procedural fairness ensures that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence and have them considered by the decision maker: *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699 (SCC), 1999 SCC 699, [1999] 2 S.C.R. 817 at para. 22.

[25] The Tenants confirmed at the hearing that they received notice of the hearing. They attended and were able to make full submissions before the Board in response to the issues raised by both themselves and the Landlord.

[26] The Tenants' allegations concerning denial of procedural fairness concern the Board's failure to hear the issues in their applications which were scheduled to be heard by the Board on another date. The Board considered that issue and declined to adjourn the Landlord's application. There is no issue of procedural fairness.

[27] My conclusion is further supported by the fact that the Tenants have raised the Board's failure to grant an adjournment and/or join their applications with the Landlord's as substantive issues in the appeal.

[28] I am satisfied the Tenants' claim of denial of procedural fairness is manifestly devoid of merit.

ii. Failure to Interpret and Apply ss. 82 and 83 of the Act

[29] Section 82(1) and (2) of the Act provide:

82(1) At the hearing of an application by a landlord under section 69 for an order terminating a tenancy and evicting a tenant based on a notice of termination under section 59, the Board shall permit the tenant to raise any issue that could be the subject of an application made by the tenant under the Act if the tenant,
a) Complies with the requirements set out in subsection (2); or

b) Provides an explanation satisfactory to the Board explaining why the tenant could not comply with the requirements set out in subsection (2).

(2) The requirements referred to in subsection (1) are the following:

1. The tenant shall give advance notice to the landlord of the tenant's intent to raise the issue at the hearing.
2. The notice shall be given within the time set out in the Rules.
3. The notice shall be given in writing and shall comply.

[30] Section 83(1) of the Act gives the Board the discretion on an application to evict, to refuse to grant an eviction order unless it is satisfied, having regard to all the circumstances, it would be unfair to refuse. Section 83(2) provides that if a hearing is held, the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under s. 83(1).

[31] The issues before the Board did not involve the interpretation of ss. 82 or 83 of the Act. Rather, they involved the Board's application of the facts before it to the requirements in each of those sections. That is a matter of mixed fact and law. No question of law is raised.

[32] The Board permitted the Tenants to raise the issue of mould pursuant to s. 82 of the Act as the events involved occurred after the Tenants had commenced their T2 and T6 applications raising allegations of failure to maintain and breach of quiet enjoyment. The mould issue was clearly a matter that "could be the subject of an application" under the Act and accordingly was properly considered by the Board.

[33] On the other hand, as the allegations in the Tenants' T2 and T6 applications were already the subject of applications under the Act which were scheduled for a hearing on January 10, 2020, s. 82 did not apply to those applications and s. 82 did not require the Board to deal with them.

[34] Further, in issuing the Order, the Board conducted the mandatory review required by s. 83 of the Act and held, based on the disclosed circumstances before it, that it would be unfair to refuse to grant the application. In reaching that conclusion, the Board did not interpret s. 83. Rather it applied the facts before it to the requirements of the section which does not raise a question of law.

iii. The Board's Failure to Exercise its Discretion

[35] The Board's decision to not adjourn the Landlord's L1 hearing to be heard together with the Tenants' applications involved the exercise of discretion. The exercise of discretion is also not a question of law. At the most it involves a question of mixed fact and law. See*: BA International Inc. v. Ontario (LRB*), 2005 CanLII 45405 (ONSCDC) at paras. 10, 11 and 14.

[36] The Board's refusal to hear the issues raised by the Tenants in their applications together with the Landlord's application is a matter of discretion. Apart from the fact that the Tenants brought no joinder motion, as noted, there is no basis under s 82 to hear those issues as the Tenants' applications dealing with them were already before the Board and scheduled to be heard in four days' time and they were separate from the Landlord's application.

[37] Similarly, the Board's dismissal of the Tenants' preliminary motions concerning service and sufficiency of the Landlord's eviction notice involve issues of mixed fact and law and accordingly do not give rise to a question of law.

iv. Inadequate Reasons

[38] The Tenants submit that the reasons fail to address why their issues were not heard or the Landlord's failure to comply with the Board's rules.

[39] I disagree. The Board's reasons deal with the Tenants' preliminary motions, including why they were denied. Further, they set out the circumstances of the case and the reasons for the Board's conclusion. The reasons are intelligible to the parties and are sufficient for appellate review. There is no basis whatsoever to say that the Board's reasons for decision are inadequate.

[40] In my view, the Tenants' allegation of inadequate reasons is manifestly devoid of merit.

Conclusion

[41] For the above reasons, therefore, I am satisfied that the Tenants' appeal raises no question of law and is otherwise totally devoid of merit. I am also of the view that in the circumstances, particularly the fact that the Tenants have not paid rent since August 2019, have not lived at the Property since July 2019 and have taken no steps to advance their applications before the Board, that the appeal was commenced solely for delay and is therefore also an abuse of process.

[42] The Landlord's motion is therefore allowed, and the Tenants' appeal is quashed and the stay from the Order is vacated.

[43] The Landlord is entitled to his costs of the motion. At the conclusion of the hearing, while there was no agreement in respect of the Tenants' costs, the parties agreed that if the Landlord was successful, he was entitled to $10,000 in costs.

[44] Accordingly, costs of the motion to the Landlord, fixed at $10,000 in total.

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L. A. Pattillo J.

Released: November 4, 2020