CanLII

Abdalla et. Al. v. Koirala, 2023 ONSC 7106 (CanLII)

Date:	2023-12-19
File number:	581/23
Citation:	Abdalla et. Al. v. Koirala, 2023 ONSC 7106 (CanLII), <https://canlii.ca/t/k1vf2>, retrieved on 2023-12-21

CITATION: Abdalla et. Al. v. Koirala 2023 ONSC 7106
DIVISIONAL COURT FILE NO.: 581/23
DATE: 20231219

SUPERIOR COURT OF JUSTICE – ONTARIO DIVISIONAL COURT

RE: AHMED MOHAMMED, MOHAMMED T.M ELTAHIR , MASHAIER M.S. ABDALLA

AMR MOHAMMED, Appellants/Responding Parties

AND:

DHRUBA KOIRALA and BINDU KOIRALA, Respondents/Moving Parties

BEFORE: Leiper J.

COUNSEL: *Saba Ahmad*, for the Moving Parties

Mashaier M.S. Abdalla, Tenant on behalf of all Responding Parties

HEARD at Toronto (by videoconference): November 24, 2023

ENDORSEMENT

Leiper J.

Introduction

[1] Dhurba Koirala and Bindu Koirala, the landlords, move to quash an appeal brought by the tenants, from an order of the Landlord and Tenant Board. The Tenant, Mashaier M.S. Abdalla appeared on behalf of herself and the other tenants.

[2] The landlords argue that the appeal is devoid of any merit and that the appeal is an abuse of process. The tenants submit that the appeal has merit because they were treated unfairly by the Board.

[3] For the reasons below, I agree with the landlords that the appeal is devoid of merit and that it is an abuse of process. I grant the motion and quash this appeal.

Background

[4] The landlords own a four-bedroom single-family home at 100 Westbourne Avenue Scarborough, built in 2021. They rented it to the tenant, Ms. Abdalla, her spouse and her children, two of whom are adults who attend university in Toronto. Ms. Abdalla's husband is employed overseas. Ms. Abdalla and her family have been the only tenants in the house since it was constructed.

[5] When the landlords purchased the house, Mr. Koirala was a physician employed out of country with the United Nations. He and his wife planned to return to live in the house when Mr. Koirala's overseas employment ended. They advised the tenants that this was their plan at the start of the tenancy. The monthly rent was $4500.

[6] In 2022, the landlords moved back to Canada and sought to terminate the tenancy so they could move back into the house. The tenants declined to vacate the premises. The landlords also attended several times to inspect the property and discovered some unusual damage, beyond the usual wear and tear. The damage became the subject of the proceedings at the Board and is discussed in greater detail later in these reasons.

Proceedings before the Landlord and Tenant Board

[7] The landlords brought an application to terminate the tenancy before the Board. They also asked for compensation for the damages which they alleged the tenants had caused to the house. The Board sent out a notice of hearing in April for the hearing scheduled on June 1, 2023.

[8] Only the landlords attended the hearing, which began at 10:51 on June 1, 2023, by videoconference.

[9] The Board heard evidence from the landlords, including "before and after" photographs, contractors' estimates for repairs and oral evidence.

[10] The Board found that the tenants had caused the following damage to the house:

i Damage to the furnace by removing the filters and running the furnace without filtration;

ii Installation of bidets without proper drainage which damaged the baseboards and ceiling and mold issues;

iii Replacement of existing door handles with locking doors on each bedroom;

[11] The Board ordered that the tenants pay for the reasonable cost of the damage to the house in the amount of $35,000. The Board terminated the tenancy and ordered the tenants to vacate the premises.

[12] The tenants applied to review the Board's order. The Board held a review hearing at which their representative provided evidence that on May 31, 2023, Ms. Abdalla and her husband had gone to the doctor with flu symptoms, received over the counter medication and were advised to stay at home from work until June 5, 2023.

[13] At 12:50 a.m. on the day of the June 1, 2023 hearing, Ms. Abdalla had emailed the Board to say that they were ill and would not be attending the hearing scheduled to proceed at 9 a.m. that day. Neither Ms. Abdalla nor her husband called into the hearing at 10:51, although they were awake by 10:00 a.m. according to their evidence on the review.

[14] In its review order, the Board was not satisfied that the tenants were "not reasonably able to participate in the proceedings" and dismissed their request for a new hearing for these reasons:

[15] The Tenant's were discharged from the hospital at approximately 7:00pm the day before the hearing. I find that if the Tenants were not feeling well enough to fully participate in the hearing, then they had an obligation to attend the hearing and request an

adjournment. Further, the Tenant's emailed the Board at 12:50am on the date of the hearing requesting that the matter be rescheduled. Given the time of the request, the Tenants did not receive confirmation from the Board that the matter was rescheduled. Despite not receiving a response from the Board, the Tenants did not call into the videoconference or follow up with Board staff to confirm if the matter had been rescheduled. The evidence before me suggests that the Tenants decided the day before the hearing that they simply would not attend.

[16] Even though the Tenant testified that she slept in on the hearing date and woke up after 10:00 am, the Tenant's own evidence suggests that the Tenant made no effort to call into the videoconference after she woke up to confirm if the matter had been heard or to follow up with her request to reschedule the matter. Page 1 of the notice of hearing clearly states that the matter may be heard later in the day and that the parties should be prepared to attend the videoconference the whole day. The matter was in fact heard at approximately 10:51 am and as such, the Tenants did have an opportunity to call into the hearing and request an adjournment, despite sleeping in on the hearing date.

[17] The courts have enjoined that the phrase "not reasonably able to participate" should be interpreted broadly to ensure natural justice and, where a party shows that they genuinely intended to participate in a hearing but were prevented from so doing, then they should be entitled to a hearing through the review process.

[18] I find that the Tenants nonattendance at the hearing was due to a lack of due diligence and that the Tenants were reasonably able to participate in the proceedings.

[19] As stated by the Court in *Q Res IV Operating CP Inc. v. Berezovs'ka* 2017 ONSC 5541 "If parties are not diligent in dealing with legal proceedings, then they cannot demand that a Tribunal waste its resources by rehearing matters a second time. To allow this would undermine the ability of the administration of justice to deliver timely cost-effective and final orders"

[20] In this case, the Tenants received advance notice of hearing and decided the day before that they would not attend because they were not feeling well. I do not accept the Doctor's note entered into evidence stating that the Tenant could not attend work until June 5, 2023 as a reason for not attending the hearing. Board proceedings have been held by way of telephone and/or videoconference since 2020 and as such, despite feeling ill, the Tenants could have either called or logged into the hearing virtually to request an adjournment of the matter. The Tenants however chose not to attend the hearing and assumed that the matter would be adjourned based on their email sent to the Board the morning of the hearing.

[21] The Board dismissed the review and extended the time for the tenants to vacate the property to September 15, 2023, considering the presence of children in the house.

Proceedings before the Divisional Court

[22] The tenants appeal the Board's decisions denying his request to set aside the termination order. Their notice of appeal was filed out of time, several days before the date to vacate. The grounds of appeal related to the failure of the Board to consider their explanation for failing to attend the hearing and the remedial nature of the legislation.

[23] As a result of launching the appeal, the tenants obtained an automatic stay of the eviction.

[24] The Divisional Court convened a case management conference on October 27, 2023. Following that case conference, Justice Nishikawa directed, among other matters, that the tenants pay $1,500 per month toward arrears. They were also directed to also request any recordings of the hearings before the Board for the purposes of the appeal.

[25] At the landlords' request, the Court scheduled this motion to quash the appeal.

[26] In support of the motion, the landlords filed an affidavit that set out the history of these proceedings, photographs of the damage and the record of the arrears in payment of rent. The tenants made one rent payment after receiving the affidavit but did not otherwise pay the amount directed towards the arrears.

[27] In response to the motion, the tenants filed no materials, or evidence that the transcripts had been ordered from the Board hearings. Ms. Abdalla made oral submissions that she and her family had now relocated to a short term rental and were seeking longer term accommodation. In her submission the Board had been unfair in not permitting a second hearing at which she would present evidence that much of the damage in the house was not caused by the tenants, but that some of it was caused by the builder's substandard workmanship. Her appeal does not seek to reinstate her family as tenants in the house, but to reduce the amounts found owing for the damages. Ms. Abdalla acknowledged that if her family had damaged the house she would be willing to pay for reasonable damages.

Issues and analysis

[28] The landlord seeks an order quashing the appeal on the basis that it is devoid of merit, that it is an abuse of process and that there has been undue delay.

[29] I agree that the appeal is an abuse of process, and it is devoid of merit. Although the overall delay to date in may not rise to the level of "undue delay," I have considered the tenants' delay in filing the appeal under the abuse of process analysis.

The appeal is an abuse of process

[30] Section 134(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that, on a motion, "a court to which an appeal is taken may, in a proper case, quash the appeal". An appeal may be quashed where it amounts to an abuse of process: *Oladunjoye v. Jonker*, 2021 ONSC 1199 (CanLII) at para. 17.

[31] A litigant who brings an appeal from an order of the Board to get an automatic stay of an eviction order, is abusing the process of the court: *Regan v Latimer*, 2016 ONSC 4132 (Div. Ct.), at para. 25; and *Wilkinson v. Seritsky*, 2020 ONSC 5048 (Div. Ct.) at para. 34. Where a tenant has failed to pay rent for a persistent and lengthy period without a reasonable explanation or any intention to remedy the situation, this may amount to evidence that the tenant's appeal is an abuse of process at the expense of the landlord: *Wilkinson*, at para. 34 and *Oladunjoye*, at para. 27.

[32] The tenants stopped paying rent in April of 2023, and made only one payment after that, after receiving the landlords' affidavit filed on this motion to quash. Their appeal was filed out of time, shortly before the date on which they were ordered to vacate the premises.

[33] At the time the tenants moved in, their financial disclosure to the landlords indicated that they owned two other condominium units in Toronto which are income rental properties. There is no indication that the tenants do not have the means to pay rent. There are no materials to explain their failure to pay rent, given that they paid rent before and provided financial disclosure that shows they had those means at the time they began their tenancy.

[34] The tenants commenced these proceedings out of time. They have failed to comply with the Court's case management directions. They filed no material on the motion to quash.

[35] In my view, given the unpaid rent, the timing of the appeal, the failure to respect orders of the court and the lack of any evidentiary explanation for these factors, this appeal is an abuse of process and should be dismissed on that basis alone.

The appeal is devoid of any merit

[36] Lack of merit is an alternative basis on which an appeal may be quashed: *Mubarak v. Toronto Community Housing Corporation*, 2022 ONSC 382 at para. 28. The question on a motion to quash is whether the appeal is "manifestly devoid of merit": *Schmidt v. Toronto Dominion Bank* (1995), 1995 CanLII 3502 (ON CA), 24 O.R. (3d) 1 (C.A.), at para. 6. Because this is a drastic finding, quashing an appeal for lack for merit should not be done lightly.

[37] An appeal from a decision of the Board is only available on a question of law: Section 210(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17. It is appropriate to quash an appeal from an order of the Board where the appeal does not raise a question of law: *Mubarak* at para. 30; *Solomon v. Levy*, 2015 ONSC 2556 (Div. Ct.), at paras. 33-34; and *Mahdieh v. Chen*, 2019 ONSC 4218 (Div. Ct.), at para. 8.

[38] The tenants' notice of appeal specifies two errors in law. The first is that the Board erred in law in "its analysis of whether the Tenant showed a lack of diligence." The notice of appeal alleges that the Board erred in its assessment of language barriers and the tenants' lack of familiarity with the Canadian legal system.

[39] The reasons on the review order considered the tenants' position that they were unable to attend the hearing due to illness. The material filed does not suggest that the tenants did not understand the nature of the hearing due to language material. The issue before the Board, which it addressed, concerned diligence and the tenants' obligations to attend and request an adjournment if they were too ill to participate. This is not an error in law that gives rise to a right of appeal from that decision.

[40] The second error alleged is that the Board failed to consider the remedial nature of the *Act*. There is nothing in the review order to require a discussion or application of the remedial nature of the Act. The Board considered the new evidence, the reasons given by the tenants for failing to attend, jurisprudence on the Board's processes including in the matter of adjourning hearings and made findings. It was entitled to do so. There is nothing in the review order to suggest that the Board was not aware of its legislative framework or the remedial nature of the Act in coming to its conclusions. This is not a meritorious ground of appeal in the context of this appeal.

[41] I am satisfied that in this case it is appropriate to quash this appeal for a lack of merit based on my findings that it does not raise true questions of law and cannot succeed.

Conclusion

[42] For the reasons above, I grant the landlord's motion and order that the tenants' appeal be dismissed.

[43] As the successful party on the motion, the landlords are entitled to their costs. The tenants are to pay costs of $4500. Their last rental payment of $4500 which was made after this motion was filed, shall be allocated to the landlord's costs.

____

Leiper J.

Date: December 19, 2023