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Tenant 1 of 96

Luu v O'Sullivan, 2012 CanLII 98396 (ON SCSM)

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Court File No. 2029/11 & 2029D1/11 (Kitchener)

ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)

B E T W E E N:	)	
	)	
CHI MY LUU	)	Ms. C.M. Luu
	)	Self-Represented
Plaintiff	)	
-and-	)	
	)	
	)	

PETER CIAN O'SULLIVAN and Ms. I. O'Sullivan	)	Mr. P.C. O'Sullivan &
INGRID O'SULLIVAN	)	Self-Represented
	)	
Defendants	)	
	)	
	)	Heard: July 3, 2012

REASONS FOR JUDGMENT

1. This matter arises from an ongoing residential tenancy: the tenants (defendants) remained in possession when the Plaintiff's Claim was issued and they remained in possession at the time of hearing almost a year later. The main and threshold issue is whether the case falls within the exclusive jurisdiction of the Landlord and Tenant Board, as pleaded by the tenants in their Defence. For the following reasons, both the Plaintiff's Claim and the Defendants' Claim are dismissed for want of jurisdiction.

Basic Facts

2. The relationship between these parties has produced a variety of issues. The Plaintiff's Claim as issued in August 2011 asked for damages of $1,744.79, but her claim was increased in May 2012 to request $25,000. In June 2012 the tenants issued a Defendants' Claim asking for damages of $25,000.

3. The parties entered into a one-year lease dated January 28, 2011, for rental by the defendants from the plaintiff of the residential property at 270 Victoria Street South, Kitchener. The one-year term expired on February 1, 2012, and it is common ground that the lease then converted to a month-to-month tenancy, pursuant to the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("the RTA").

4. The rent obligation of the tenants is addressed in section 2 of the lease, which provides in relevant part that "The Tenants agree to pay $1,395 dollars plus utilities per month". It is obvious and I find that the rent for which the tenants are liable under the lease is $1,395 plus utilities. As a matter of contract law, the utilities for which the tenants are liable are part of the rent which they agreed to pay in exchange for their right to possession and use of the rented property.

5. The lease contains no suggestion that the tenants were contractually obligated to put the utilities account in their names. Any such suggestion would be barred by the entire agreement clause which provides that the lease "may not be amended, modified, extended, or supplemented except by written instrument executed by the Landlord and Tenants." I find that there was no obligation for the tenants to put the utilities account in their names and to pay any amounts to Kitchener Utilities directly. The fact the parties may have been willing in principle to proceed on that basis does not affect the conclusion that there was no contractual obligation on the tenants to do so.

6. The initial dispute between the parties related to the utilities, after the tenants communicated with Kitchener Utilities and determined that its charges would include water and sewage service. The tenants' position was that their liability under the lease was limited to gas and electricity. As noted above, the lease refers only to "utilities" and contains an entire agreement clause, but does not specifically define what was to be included in the utilities for which the tenants were liable. The tenants therefore, although willing in principle to put the utilities account in their names, declined to do so because they did not accept liability for the full amount expected to be charged by Kitchener Utilities.

7. The landlord took the position that she was entitled to payment of the utilities and also that she was entitled to compel the tenants to place the utilities account in their names. She served a Notice to Terminate a Tenancy Early (Form N5) under the RTA, dated March 22, 2011, setting out a termination date of April 14, 2011 (pages 239 to 241 attached to amended Plaintiff's Claim).

8. The tenants did not comply with that Form N5. However the landlord did not issue a Notice of Application with the Landlord and Tenant Board, after she was advised by the Board's staff that non-payment of utilities could not support an application to the Board.

9. The landlord disagreed with the position communicated to her by the Board's staff. She then served a Notice of Early Termination for Non-Payment of Rent (Form N4) dated March 24, 2011, based on the tenants' failure to pay $113.69 for

utilities. She attached the definition of "rent" in s. 2 of the RTA (pages 248-251 attached to amended Plaintiff's Claim).

10. The landlord did not issue a Notice of Application because again, she was told by the Board's staff that such an application could not proceed based on non-payment of utilities.

11. Ms. Luu, unconvinced by the Board staff's position that she had no remedy before the Board for non-payment of utilities by her tenants, then embarked on a campaign to challenge that position. She wrote to the Board, its Chair, her Member of Provincial Parliament, the Mayor of Kitchener, two successive Ministers of Municipal Affairs and Housing, and the Attorney General of Ontario, among others. Unfortunately her efforts accomplished little if anything. To appreciate the responses she received, it suffices to consider this part of a letter to her from the Honourable Rick Bartolucci, Minister of Municipal Affairs and Housing, dated April 14, 2011 (pages 145-146 attached to amended Plaintiff's Claim):

The issue of who is responsible for paying utility bills may depend on whether utilities are included as part of the rent. If utilities are included in the rent, and the tenant fails to pay the rent, the landlord may be able to apply under the RTA to the Landlord and Tenant Board (LTB) for an order to evict the tenant and to require the tenant to pay the unpaid amount. However, if a tenant is directly responsible for paying the utility bill, the utilities may not be considered as rent.

12. As that position may imply, and as Ms. Luu had by then already recognized, the key to this issue is the definition of "rent" in s. 2 of the RTA.

13. In any event, the landlord issued her Plaintiff's Claim in Small Claims Court on August 5, 2011, claiming damages of $1,744.79. That claim was based on two issues: approximately $938 was claimed for alleged damage to the property, and the balance was for unpaid utilities. In their Defence, the tenants challenged the jurisdiction of the Small Claims Court over that claim. They also brought a motion to dismiss the claim, but a motions judge determined, on September 12, 2011, that the question of jurisdiction should proceed to trial as the question of what was included in "rent" involved questions of fact.

14. Ms. Luu amended her Plaintiff's Claim on May 16, 2012, by increasing the amount claimed to $25,000. That pleading is quite lengthy and also has 503 pages of attachments. The tenants reacted to the amended claim by issuing a Defendant's Claim on June 8, 2012, in which, like Ms. Luu, they also claimed damages in the maximum amount of this court's monetary jurisdiction.

15. The matter came before me for trial based on a settlement conference judge's estimate (prior to amendment of the Plaintiff's Claim and issuance of the Defendants' Claim) of half a day being required. Since it appeared that a trial of all the issues as currently presented would in fact require two or even three days, I determined that it was expeditious to address the question of jurisdiction first. I treated the parties' factual representations as evidence, along with the various key documents attached to the

pleadings and referenced in submissions.[1] That hearing took almost a full day and judgment on that issue was reserved.

Issue 1: Exclusive Jurisdiction of the Landlord and Tenant Board

16. The purposes of the RTA are stated in s. 1 as follows:

1. The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

17. The Landlord and Tenant Board is the administrative tribunal established under s. 168(1) of the RTA to adjudicate disputes between residential landlords and tenants. Section 168(2) of the RTA provides that:

(2) 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.

18. If a matter falls within the exclusive jurisdiction of the Board under s. 168(2), then this civil court cannot assume jurisdiction over that matter. The predecessor of s. 168(2) was held to oust the jurisdiction of the Superior Court of Justice to terminate a residential tenancy and evict the tenants: *Fraser v. Beach* (2005), 2005 CanLII 14309 (ON CA), 75 O.R. (3d) 383 (C.A.).

19. One might have thought that the determination whether a particular matter falls within the exclusive jurisdiction of the Board would not give rise to significant controversy. However, the reported decisions of the Small Claims Court that have addressed its jurisdiction over particular residential tenancy disputes yield but a smattering of fact-specific rulings and few principles of general application. There are few decisions from the appellate courts on this general subject matter.

20. One appellate decision, cited by both parties before me, is *Crooks v. Levine* (2001), 148 O.A.C. 44 (Div. Ct.). In that case the tenant gave notice of termination, but before the date specified therein the landlord re-entered the apartment and disposed of personal property owned by the tenant. The tenant sued successfully in Small Claims Court for conversion, for interest on the last month's rent and for return of a small amount of rent from the date of the landlord's re-entry. The appeal court rejected the landlord's submission that the case was within the exclusive jurisdiction of the Ontario Rental Housing Tribunal (now the Landlord and Tenant Board), commenting (at para. 14) that:

> 14. The line between what is exclusively within the jurisdiction of the Tribunal and what may be addressed in the regular courts is not razor sharp.

21. The appeal court in *Crooks v. Levine*, *supra*, held that the "major element in the action" (para. 17) was the claim for conversion and that matter was properly before the civil court. It was therefore practical for the lesser issues of interest and rent credit to be determined by the trial judge even though those issues

could be characterized as coming within the exclusive jurisdiction of the Tribunal. Justice Rutherford said this (at para. 17):

17. ... it would be unfortunate and poor policy to force a litigant to split was is, effectively, one dispute and pursue remedies against a landlord in two arenas.

22. My colleague Deputy Judge Bale declined to follow *Crooks v. Levine*, *supra*, in *Devries v. Green*, [2012] O.J. No. 1507 (Sm. Cl. Ct.), despite facts and a claim for conversion which were similar to those in that case. He said this at para. 20-22:

20 In [*Crooks v. Levine*, *supra*], the court looked to see whether the facts pleaded would support a cause of action ordinarily within the jurisdiction of the courts and contemplated the possibility of concurrent jurisdiction. Looking at the case in this way, Rutherford J. held that the tenant had a claim for damages for conversion of her property and that such a claim was not specifically assigned to the tribunal by the Act. The court also pointed out [that] the tenant's loss, although related to the unlawful entry, was not actually caused by the unlawful entry (i.e. it was caused by the disposal).

21 In [*Mackie v. Toronto (City)*, 2010 ONSC 3801 (CanLII), [2010] O.J. No. 2852 (S.C.J.), Perell J.], the court held that it doesn't matter whether a tenant's claim is for a cause of action ordinarily within the jurisdiction of the courts and upon which the legislation may be silent. Rather, the court must determine the essential character of the dispute and, if having done so, the court finds that the subject matter is expressly or inferentially governed by the statute, then the claim is within the exclusive jurisdiction of the Board.

22 With respect, I prefer the approach taken in *Mackie* simply because I find it easier to reconcile that approach with the exclusive jurisdiction provided for in [s. 168(2) of the RTA].

23. In *Walleye Trailer Park v. Swire* (2001), 2001 CanLII 32753 (ON SCDC), 149 O.A.C. 108 (Div. Ct.), the issue was whether the landlord would charge certain taxes as part of the rent at a trailer park. The landlord's claim succeeded in the Small Claims Court but on appeal, Justice Maloney held that the matter was within the exclusive jurisdiction of the Tribunal and the judgments of the deputy judge were therefore set aside. In Jack Fleming, 2012 Ontario Landlord & Tenant Law Practice, (Markham, Ontario: LexisNexis Canada Inc., 2011), at p. 427, the result in *Walleye Trailer Park v. Swire*, *supra*, is described as "the opposite" to that in *Crooks v. Levine*, *supra*, thereby creating "conflicting appellate decisions".

24. The recent decision in *Kaiman v. Graham* (2009), 2009 ONCA 77 (CanLII), 245 O.A.C. 130 (C.A.), does not assist here because that case turned on s. 207(2) of the RTA. The tenants had sued unsuccessfully for rectification of the lease, a declaration that they held an ownership interest in the property and damages of $250,000. On appeal they argued that the Superior Court of Justice had lacked jurisdiction over the case. The Court of Appeal disagreed, holding that even if the Board had exclusive jurisdiction over a request to declare the tenancy terminated, other claims in the case fell outside its jurisdiction and the entire case was properly brought in the Superior Court of Justice under s. 207(2).

25. Section 207(1), (2) & (3) of the RTA provide as follows:

Monetary Jurisdiction of Board

207. The Board may, where it otherwise has jurisdiction, order the payment to any given person of an amount of money up to the greater of $10,000 and the monetary jurisdiction of the Small Claims Court.

(2) A person entitled to apply under this Act but whose claim exceeds the Board's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction.

(3) If a party makes a claim in an application for payment of a sum equal to or less than the Board's monetary jurisdiction, all rights of the party in excess of the Board's monetary jurisdiction are extinguished once the Board issues its order.

26. That provision gives the Board a monetary jurisdiction that is equal to that of the Small Claims Court and permits the Board to address damages claims incidentally to other matters which are properly before the Board by application under the RTA. Claimants who have an application before the Board with an incidental damages claim in excess of $25,000 can proceed in the Superior Court of Justice and in such cases that court has jurisdiction as a civil court and may also exercise the Board's powers. That is not this case because neither party claims more than $25,000.

27. In my view, *Crooks v. Levine*, *supra*, is distinguishable and does not control the case at bar. Most obviously, it does not deal with the question of utilities. Secondly, it involved a situation where the tenant was no longer in possession and the lease had

been terminated before the Small Claims Court action had commenced.

28. If necessary I join Deputy Judge Bale in preferring the approach of Justice Perell in *Mackie v. Toronto (City)*, *supra*. I cannot accept as a general proposition that the line between the jurisdiction of the Board and that of this court is simply not "razor sharp" - because by definition a matter either is or is not within the Board's exclusive jurisdiction.

29. In my view one of the most significant factors in this case is the fact that the tenants remain in possession. The distinction between tenants in possession and tenants out of possession is a clear and simple one. Two decisions of the Divisional Court support the significance of that factor.

30. In *Lorini v. Lombard*, [2001] O.J. No. 3108 (Div. Ct.), it was held under the predecessor of the RTA that the Tribunal had no jurisdiction over disputes between landlord and tenant arising after termination of the tenancy and such disputes had to proceed in civil court. In *O'Shanter Development Corp. v. Separi*, [1996] O.J. No. 1589 (Div. Ct.), it was held that a landlord's application for arrears of rent was only available where the tenant remained in possession.

31. The other factor which I consider particularly significant is Justice Rutherford's observation in *Crooks v. Levine*, *supra*, that "it would be unfortunate and poor policy to force a litigant to split was is, effectively, one dispute and pursue remedies against a

landlord in two arenas." I am in respectful but nevertheless complete agreement with that opinion.

32. Considering the foregoing authorities, the general analytical approach which I apply here is this: given this is a residential landlord and tenant matter in which the tenants remain in possession, it is *prima facie* a matter within the exclusive jurisdiction of the Landlord and Tenant Board. For any part of the Plaintiff's Claim or Defendant's Claim to be properly before the Small Claims Court, there must be a rational basis to conclude that any such parts fall outside the jurisdiction of he Board. I now turn to a review of the specific issues between the parties.

Issue 2: Landlord's Claim for Arrears of Utilities

33. This is the issue which originally gave rise to the dispute between these parties. I agree with Ms. Luu's initial reaction to the Board's position that she had no remedy through the Board for arrears of utilities: such arrears clearly fall within the definition of "rent" in s. 2 of the RTA and so they are properly pursued before the Board in the same way as other arrears of rent.

34. Section 2(1) of the RTA defines "rent" as follows:

> "rent" includes the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or the landlord's agent for the right to occupy a rental unit and for any services and facilities and any privilege, accommodation or thing that the landlord provides for the tenant in respect of the occupancy of the rental unit, whether or not a separate charge is made for services and facilities

or for the privilege, accommodation or thing, but “rent” does not include,

(a) an amount paid by a tenant to a landlord to reimburse the landlord for property taxes paid by the landlord with respect to a mobile home or a land lease home owned by a tenant, or

(b) an amount that a landlord charges a tenant of a rental unit in a care home for care services or meals;

35. Rent is a common law concept and includes both base rent and additional charges such as utilities. Under the language of the specific lease between these parties, there is no distinction between base rent and utilities: the combination of both is what the tenants must pay as consideration for possession and use of the rented property. That combination is the rent payable by the tenants to the landlord pursuant to the lease.

36. If the legislature had intended to exclude the utilities component of rent from the statutory definition under the RTA, it could easily have included utilities in the exclusions to the definition. It did not do so. This is not a conclusion based on a finding of insufficiently-clear legislative language: there is simply nothing in the language of the statute to suggest a legislative intention to exclude the utilities component of rent from the definition of “rent” in s. 2. It follows that a notice by landlord based on non-payment of the utilities component of rent is properly available under RTA s. 59 and that an application for early termination under s. 69 is in turn available.

37. Accordingly, since this landlord’s claim for unpaid utilities could properly be made by application under the RTA, s.

168(2) applies and the Small Claims Court has no jurisdiction over that claim because it falls within the exclusive jurisdiction of the Board.

38. The fact that the parties informally agreed that the tenants were to pay the utilities directly to Kitchener Utilities is of no legal significance. The landlord simply directed that those payments be paid to Kitchener Utilities instead of to her directly, and accepted that such payments would satisfy the tenants' obligation to pay the utilities to her pursuant to the lease. By doing so she appointed the tenants as her agents to make such payments. The Tribunal itself has acknowledged that rent is not always payable personally by the tenant to the landlord: see *Parkway Realty Ltd. v. Jani*, [2000] O.R.H.T.D. No. 46 at para. 26.

39. I am aware of Interpretation Guideline 11 issued by the Landlord and Tenant Board. I adopt the comments I made in that regard in *Settle v. Punnett*, [2010] O.J. No. 3529 (Sm. Cl. Ct.), at para. 61-68:

61. As a matter of law, it is perfectly clear to me that when a tenant promises to pay rent for a residential unit, and promises to pay hydro in addition to that base rent amount, that the hydro component of that contract is "consideration... for the right to occupy [the] rental unit". The additional clause in that definition, "whether or not a separate charge is made for services..." only lends greater force to the otherwise obvious conclusion that hydro is part of the consideration paid by the tenant for the rental unit. Furthermore, the exclusions in subsections (a) and (b) of the definition invite the question why, if hydro was to be excluded from "rent", did the legislature not simply add that item to the exclusions?

62. If the hydro component of rent is “rent” for the purposes of the *Residential Tenancies Act, 2006*, then proceedings before the Landlord and Tenant Board arising from arrears of rent are mandated equally for that component of rent as for the base rent amounts. For staff of the board to tell landlords that hydro cannot be claimed is wrong as a matter of law.

63. It is interesting to note the content of Interpretation Guideline 11 issued by the Landlord and Tenant Board, entitled “Eviction for Failure to Pay Rent”. There is a section of that document entitled “Utilities Charges”, which reads as follows:

Utilities Charges

When a landlord and tenant are entering into a tenancy agreement, they may agree that utilities will be included in the rent. In this case, the landlord is responsible for paying all utility bills and the rent would remain unchanged despite any fluctuations in these costs.

Alternatively, the landlord and tenant may agree that utilities will not be included in the rent, and that the tenant will be responsible for paying all utility costs directly to the utility company. In this case it is clear that the payment of the utility costs is not rent, and even if the landlord pays the bill because the tenant fails to, they would not be able to claim the amount as rent arrears.

However, in some cases the tenancy agreement may require the tenant to reimburse the landlord for the actual amount of the utility costs. The question that then arises is, if the tenant is in default, can the landlord include these amounts in an application for the payment of rent arrears?

In these situations, it will generally be considered that the cost of utilities is not included in the “rent”, and that the landlord is acting as an agent for the utility company for the purposes of collecting payment from the tenant. If these amounts were considered to be part of the rent then any upward fluctuations in the utility charge could be considered an unlawful rent increase.

Therefore, any unpaid amounts for utilities will not be included in the calculation of arrears, although they may be a debt owing to the landlord that may be recovered through the courts.

In all cases, the Member must review the tenancy agreement. However, the definition of rent cannot be affected by the tenancy agreement in view of sections 3 and 4 of the RTA. Section 3 provides that the RTA applies despite any agreement to the contrary, and section 4 provides that any provision of the tenancy agreement inconsistent with the RTA is void.

64. Interpretation Guideline 11 plainly states a policy position that some hydro charges may be pursued before the Landlord and Tenant Board, and some others may not. The position requires a case-specific analysis and presumes that the matter may proceed to the hearing stage so that the Member will review the tenancy agreement.

65. Taking that Interpretation Guideline at face value, it is inconsistent with the actual practice of the staff of the Landlord and Tenant Board. The practice that appears from the evidence in this case, and in others I have heard, is to reject applications in which amounts for hydro are claimed as part of the rental arrears alleged.

66. The Interpretation Guidelines are merely "non-binding guidelines to assist members in interpreting and applying this Act and the regulations made under it", as stated in s. 176(3) of the Act. In my view, Interpretation Guideline 11 is problematic on several levels:

a. Based on the definition of "rent" in s. 2 of the Act, which, unlike the Interpretation Guideline, has the force of law, hydro payable as consideration under a lease is "rent" within the meaning of the Act and is therefore properly claimed by a landlord before the Landlord and Tenant Board as part of an application for arrears of rent;

b. That definition in s. 2 catches hydro regardless of whether it is payable directly by the tenant to the utility company. Failure to pay is a failure to pay consideration due under the lease and gives the landlord a common law cause of action for breach of contract;

c. The notion that if the hydro is paid by the tenant as a reimbursement to the landlord, then the landlord is somehow acting as a mere agent for the utility company and not in the landlord's own capacity, is an ingenious notion which enjoys no support in the law of agency and flies in the face of basic contract law;

d. The second-to-last paragraph of the guideline cannot be reconciled with the second, third, fourth and last paragraphs of the guideline.

67. Equally problematic is the apparent practice, based on the evidence in this case, for applications which seek arrears of hydro amounts to be rejected by the staff of the Landlord and Tenant Board. It is one thing for individual members to determine, on a case-by-case basis after holding a hearing, whether hydro is "rent" for purposes of the Act as the concluding paragraph of Interpretation Guideline 11 indicates is its bottom-line position. Such determinations may be correct or incorrect, but are subject to a right of appeal to the Divisional Court under s. 210 of the Act. When required, the law can be clarified by that means.

68. If applications are refused by the board's staff, they will never be determined by the board and there will be no appeal because there no ruling has been obtained. It is as if the staff have a *de facto* power to quash applications, when of course they are given no such power.

40. Since my decision in *Settle v. Punnett*, *supra*, new s. 138 of the Act has come into force.[2] In my view it fortifies the

conclusion that utilities are included within the definition of "rent" in s. 2. It provides that for a building containing not more than six rental units, utilities may be charged by the landlord on the basis of apportionment between the units, with the written consent of the tenant and on certain conditions, but provided specifically in s. 138(2) that in that event, the tenant's apportionment of the utility cost "shall not be considered a service that falls within the definition of 'rent' in subsection 2(1)." This fortifies the conclusion that if all utilities charges were to be excluded from the definition of "rent", the RTA could easily say so.

41. Apart from the statutory interpretation exercise leading to the conclusion that "rent" includes utilities, it defies common sense to suppose that the legislature intended a situation where a simple claim for arrears of rent for a given period of time would require two separate proceedings: an application to the Landlord and Tenant Board for arrears of base rent, and an action in the Small Claims Court for arrears of the utilities component of that same rent for that same period of time. Such a conclusion is contra-indicated by s. 207 of the RTA, and particularly s. 207(3), and by s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which codifies the principle that multiplicity of proceedings is to be avoided as much as possible.

42. In my view, the position that the RTA excludes the utilities component of a residential tenant's obligations to pay rent, cannot be reconciled with the modern rule of statutory interpretation, that "the words of an Act... be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559 at para. 26. There is nothing harmonious about the unwarranted bifurcation and multiplication of legal proceedings which flows from that position.

43. I conclude that Ms. Luu's claim for arrears of utilities falls within the exclusive jurisdiction of the Landlord and Tenant Board and I dismiss that claim for want of jurisdiction. The question then becomes whether any other items claimed by the plaintiff are properly before this court.

Issue 3: Claims by Landlord Apart from Utilities

44. As noted above, the other claim in the initial Plaintiff's Claim issued by Ms. Luu is for damage to the property alleged to have been caused by the tenants. Since the tenants remain in possession, I find that her allegation in that regard would properly be the subject of a notice under s. 62 of the RTA. Accordingly it falls within the exclusive jurisdiction of the Board and I dismiss that claim for want of jurisdiction.

45. In her amended Plaintiff's Claim, Ms. Luu made additional claims which were clarified during her submissions.

46. Her claim for economic duress discloses no reasonable cause of action because duress is a defence and not a cause of action. Her claim for civil conspiracy discloses no reasonable cause of action because no viable case for liability or damages in that regard is pleaded. Civil harassment is not a cause of action under Ontario law. Her allegation that she allowed a $350 credit

for maintenance work which the tenants then failed to perform can be addressed before the Board as a claim for arrears of rent in that amount.

47. Ms. Luu submitted that her claim for punitive damages was one over which the Board has no jurisdiction. I disagree. Justice Cullity held that the Board did possess that jurisdiction, in *Politzer v. 170498 Canada Inc.* (2005), 20 C.P.C. (6th) 288 (Ont. S.C.J.), at para. 31. I would observe that if this statutory court possesses such jurisdiction (which it does, despite the absence of any specific reference to punitive damages in its constituent legislation), so does the Board.

48. Ms. Luu cited *Gill v. Residential Property Management Inc.* (2000), 2000 CanLII 22701 (ON SC), 50 O.R. (3d) 752 (S.C.J.), at para. 14, where Juriansz J. (as he then was) mentioned decisions by the Board finding no such jurisdiction existed. His Honour expressed neither agreement nor disagreement with those decisions, and the issue before him was whether paralegals could appear in landlord and tenant matters in the Superior Court of Justice. To the extent that some members of the Board have expressed that view, I find that view is wrong based on *Politzer*, *supra*.

49. Accordingly, subject to incidental matters as to which no reasonable cause of action is pleaded, I find that Ms. Luu's amended Plaintiff's Claim falls within the jurisdiction of the Landlord and Tenant Board and must therefore be dismissed for want of jurisdiction.

Issue 4: Jurisdiction over Defendants' Claim

50. The Defendants' Claim raises numerous items, and these were clarified during submissions. As with the Plaintiff's Claim, I conclude that subject to some issues as to which no reasonable cause of action is pleaded, the Defendants' Claim must be dismissed for want of jurisdiction.

51. There are claims for reimbursement of $674 spent on furnace repair and $150 for three unlawful entries into the rented premises. Those may be addressed by an order of the Board, if warranted, under ss. 29, 30 or 31 of the RTA.

52. There is a claim for $2,625 for harassment. That is not a civil cause of action in Ontario but if it results in a breach of the covenant of quiet enjoyment it could be addressed by the Board by way of a claim for an abatement of rent. Mr. O'Sullivan agreed that in substance that is the nature of much of the tenants' claim.

53. The tenants make a variety of claims of defamation, claiming $1,800. Essentially it appears they take exception to the various communications of Ms. Luu with third parties as she attempted to challenged the Board's refusal to deal with her claim for unpaid utilities. Alternatively they claim that she is liable for breach of privacy under the recent authority of *Jones v. Tsige* (2012), 2012 ONCA 32 (CanLII), 108 O.R. (3d) 241 (C.A.). The claims for this item total $19,600 (although based on the cap created by that case, it appears obvious that their claims if meritorious would not warrant even the $10,000 awarded in that case).

54. The total amount claimed for all aspects of the Defendants' Claim is $25,000, which is the monetary jurisdiction of the Board. The essential character of their claim is for an abatement of rent, which falls within the exclusive jurisdiction of the Board. Any incidental damages claims are limited to the monetary jurisdiction of the Board and should be dealt with in that forum.

Closing Remarks

55. The question of the Board's jurisdiction over the utilities component of rent payable in residential tenancies cries out for appellate resolution. One avenue for such resolution would be on appeal from this judgment.

56. The other avenue would be for the Board to make a decision on this issue which could then be appealed as a question of law under s. 210 of the RTA. However if the practice of the Board's staff is to turn away applications based on the contents of Interpretation Guideline 11, this creates an unfortunate obstacle to clarification of the law for residential landlords and tenants in Ontario. My view is that Interpretation Guideline 11 is seriously flawed and internally inconsistent, but it is clearly not a legally-binding instrument. The Board's ability to adjudicate this issue should not be compromised by its own staff; nor should the ability of the Divisional Court to clarify this issue be so compromised.

57. It also appears plain that there is no aspect to this problem which could not be addressed by amendment to the RTA or its regulations.

58. The Small Claims Court, like any other court or tribunal, must apply the current law. My determination is that this matter falls within the exclusive jurisdiction of the Landlord and Tenant Board. Accordingly, both parties' claims are dismissed for want of jurisdiction.

59. Since success is equally divided, and since the proceedings resulted from what I view as a legally-erroneous position taken by the staff of the Landlord and Tenant Board, there will be no costs.

July 10, 2012

Deputy Judge J. Sebastian

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[1] The Small Claims Court can accept and act on unsworn testimony: see *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 27(1) & (2); *O'Brien v. Rideau Carleton Raceway Holdings Ltd.* (1998), 109 O.A.C. 173 (Div. Ct.).

[2] And Interpretation Guideline 11 was amended effective January 4, 2011, but my comments about it remain applicable after the amendments.