CanLII

Gusain v Arnold, 2023 ONSC 3765 (CanLII)

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DIVISIONAL COURT FILE NO.: 151/22
DATE: 20230628

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Stewart, Lococo and Williams JJ.

BETWEEN:

BIKRAM SINGH GUSAIN and SARITA GUSAIN

Appellants (Landlords)

– **and** –

KOO CHA ARNOLD and JASON ARNOLD

Respondents (Tenants)

Delaram M. Jafari, for the Appellants (Landlords)

Petar Guzina, for the Respondents (Tenants)

HEARD at Toronto: June 9, 2023, by video conference

REASONS FOR JUDGMENT

R. A. LOCOCO J.:

I. Introduction

[1] The appellants Bikram Singh Gusain and Sarita Gusain appeal from three decisions of the Landlord and Tenant Board (the “Board”). The appellants were the owners

of residential premises in Toronto. The respondents Koo Cha Arnold and Jason Arnold were their tenants.

[2] By order dated May 27, 2022, the Board found that the appellants terminated the respondents' tenancy in bad faith and awarded them compensation. By review orders dated August 19, 2022 and September 20, 2022, the Board denied the appellants' requests to review the prior orders.

[3] The appellants submit that in making its decisions, the Board failed to afford them procedural fairness and made other legal errors. They ask that the orders be set aside and the respondents' application be remitted to the Board for a new hearing.

[4] For the reasons below, I would dismiss the appeal.

II. Factual background

[5] Effective June 1, 2016, the appellants leased a rental unit to the respondents, where they resided with their young children. On April 5, 2021, a paralegal acting for the appellants advised the respondents by email that the rental unit would be listed for sale. On May 1, 2021, the appellants served the respondents with a notice of termination of the tenancy (Form N12). The reason the appellants provided in the notice was that they had entered into an agreement of purchase and sale for the rental unit and the purchaser intended to move into the rental unit. In these circumstances, a landlord would be entitled to terminate a residential tenancy upon due notice to the tenants: *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("*RTA*"), s. 49(2).

[6] In response, the respondents served the appellants with a notice terminating the tenancy (Form N9) effective May 15, 2021. The respondents moved out of the rental unit on that date and sought return of the rent deposit. On May 21, 2021, the respondents applied to the Board on Form T1, seeking recovery of the balance of the rent deposit in the amount of $851.28.

[7] The respondents later learned that the rental unit had not been listed for sale until after they had moved out. On June 9, 2021, the respondents applied to the Board on Form T5, alleging that the appellants had given notice of termination in bad faith and seeking compensation. Along with the application, the respondents provided the Board with the documentary evidence they relied on to support their claim.

[8] By email dated March 10, 2022, the Board provided the appellants with a notice of hearing of the T5 application (alleging bad faith termination), to be held virtually on April 11, 2022. The Board's email also included the documentary evidence that the respondents had provided with the T5 application.

[9] By email dated March 21, 2022, the Board provided the appellants with a notice of hearing of the respondents' T1 application (seeking recovery of the rent deposit), to be held virtually on April 25, 2022.

[10] The appellants did not appear at the T5 application hearing before Vice-Chair E. Patrick Shea on April 11, 2022. The hearing proceeded in the appellants' absence and the adjudicator reserved his decision.

[11] On April 12, 2022, the day following the hearing, the Board received an email from the appellants, providing the appellants' documentary evidence relating to the T5 application. That evidence consisted of a letter from the appellants' real estate lawyer dated August 23, 2021, confirming that the rental unit was sold on July 30, 2021, pursuant to an agreement of purchase and sale dated July 1, 2021.

[12] In its written decision dated May 27, 2022, the Board found that the appellants had provided the notice of termination in bad faith and awarded compensation to the respondents totalling $32,569.96. In that decision, Vice-Chair Shea stated as follows:

I have no doubt that the Landlords were aware of the hearing on April 11, 2022 and chose not to attend. On April 12, 2022, they sent an email to the Board attaching what they described as 'evidence of selling' the rental unit. I have considered that evidence.

[13] The respondents' T1 application (for return of the rent deposit) came before Board Member Alicia Johnson for a virtual hearing on April 25, 2021, prior to the release of Vice-Chair Shea's decision on the T5 application (alleging bad faith termination). At the T1 application hearing, following mediation before a dispute resolution officer, the parties consented to an order issued May 5, 2021, in which the appellants were required to pay the amount that the respondents sought, being $851.28. The T1 application order included the following recital: "At the hearing, the parties consented to the following order and agree that this is a full and final resolution of all issues pertaining to the tenancy."

[14] After receiving the T5 application decision dated May 27, 2022 (finding bad faith termination of the tenancy), the appellants requested review of that order. After a preliminary review of the appellants' request, Board Member Renée Lang made an interim order dated June 3, 2022. The interim order noted the appellants' claim that they were not able to participate in the T5 application hearing because they were confused after receiving notices of hearing for both the T1 application and the T5 application on different dates. Board Member Lang ordered that the matter be directed to a review hearing to determine whether the appellants were reasonably able to participate in the proceedings and stayed the May 2022 order until the review was resolved.

[15] The review hearing proceeded virtually before Board Member Sandra Macchione on July 21, 2022, with the appellant Mr. Gusain and the respondents in attendance. Mr. Gusain, who was represented by a paralegal, testified at the hearing.

[16] In the review decision dated August 19, 2022, the adjudicator denied the review request and lifted the stay. She found that she was not satisfied that there was a serious error in the initial order or the proceedings. She did not accept Mr. Gusain's explanation that he was confused by the two notices of hearing for different dates, noting that he did not contact the Board to obtain clarification and provided no reasonable explanation for his negligence. The adjudicator found that the appellants were aware of the hearing and had adequate opportunity to participate in the proceedings.

[17] The appellants then requested a second review of the initial T5 application order. After a preliminary review of the appellants' request, Board Member Harry Cho denied the review request without a hearing and confirmed the previous review order. In doing so, the adjudicator denied the appellants' request that the Board waive its rule that permits a person affected by a Board order to request only one review of the order. The adjudicator found that the August 2022 review order adequately resolved the previous request to review the initial order.

III. Jurisdiction and standard of review

[18] The appellants appeal the Board's initial decision and two review decisions relating to the respondents' T5 application. A person affected by an order of the Board has a statutory right of appeal to the Divisional Court, but only on a question of law: *RTA*, s. 210(1).

[19] The standard of review on a question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[20] A tribunal is required to conduct its proceedings fairly. The degree of procedural fairness required is determined by reference to all the circumstances of the case, including: (i) the nature of the decision being made, and the process followed in making it; (ii) the nature of the statutory scheme; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of the procedure made by the administrative decision maker itself: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 21-28.

[21] Whether there has been a breach of a duty of procedural fairness is a question of law subject to correctness review on appeal: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at para. 169.

IV. Issues to be determined

[22] In the three decisions relating to the T5 application, the appellants submit that the Board breached natural justice or otherwise erred in law, as outlined below.

[23] In the initial T5 decision, the appellants submit that Vice-Chair Shea erred as follows:

a. There was no evidence to support his finding that the appellants were aware of the T5 application hearing and chose not to attend.

b. In the appellants' absence, he based the decision on the respondents' evidence without first inquiring whether the respondents' evidence had been served on the appellants at least seven days before the hearing in accordance with the Board's rules.

c. He granted the initial T5 order despite Board Member Johnson's prior consent order on the T1 application, which stated that the parties agreed that order was a full and final resolution of all issues pertaining to the tenancy.

[24] In the first review decision, the appellants submit that Board Member Macchione erred as follows:

a. She denied the review request based on the finding that appellants had received the Notice of Hearing of the T5 application.

b. She erred in not allowing the appellants to explain the merits of the dispute and in not considering the prejudice to the parties if the review were not granted.

[25] In the second review decision, the appellants submit that Board Member Cho failed to recognize the procedural fairness and abuse of process issues in the initial T5 decision and the first review decision.

[26] With that background, this appeal raises the following broad issues for determination:

a. <u>Initial decision:</u> Did Vice-Chair Shea breach procedural fairness or otherwise err in law by proceeding with the initial hearing in the appellants' absence and determining the respondents' T5 application in their favour?

b. <u>First review decision:</u> Did Board Member Macchione breach procedural fairness or otherwise err in law by denying the appellants' first request for review?

c. <u>Second review decision:</u> Did Board Member Cho breach procedural fairness or otherwise err in law by denying the appellants' second request for review?

V. Analysis and conclusion

[27] As explained below, I have concluded that the Board did not breach procedural fairness or otherwise err in law in making the initial decision or the two review decisions relating to the respondents' T5 application.

A. Initial decision

[28] As previously noted, the appellants did not appear for the hearing of the respondents' T5 application before Vice-Chair Shea on April 11, 2021, and the hearing proceeded in their absence. As set out in the opening paragraphs of the initial decision, the adjudicator found that he had "no doubt that the Landlords were aware of the hearing on April 11, 2022 and chose not to attend." The appellants argue that this finding was an error in law since there is no evidence to support the finding, which the appellants characterized as unreasonable.

[29] The appellants also argue that the adjudicator breached procedural fairness by, among other things, (i) finding that they were aware of the hearing and chose not to attend, (ii) proceeding with the hearing in their absence, and (iii) basing his decision on the respondents' evidence without first inquiring whether that evidence had been served on the appellants at least seven days before the hearing in accordance with the Board's *Rules of Procedure*.

[30] I see no merit in these submissions.

[31] There is no dispute that the appellants received the notice of hearing for the T5 application hearing by email from the Board on March 10, 2021. Accompanying the notice of hearing was the documentary evidence that the respondents relied on to support their application. In the absence of any explanation for the appellants' non-appearance,[1] it was open to Vice-Chair Shea to proceed with the hearing in their absence, at the conclusion of which he reserved his decision.

[32] On the day following the hearing, the Board received an email from the appellant Mr. Gusain, providing the appellants' documentary evidence relating to the T5 application, without referring to the hearing the previous day. The appellants' documentary evidence indicated that they entered into an agreement of purchase and sale for the rental unit dated July 1, 2021. The agreement date was two months after the date of the appellants' notice of termination of tenancy (dated May 1, 2021), in which the appellants stated that they had already entered into an agreement to sell the rental unit. As indicated in the initial T5 decision, the adjudicator considered that evidence in making his decision, which included a finding that the appellants acted in bad faith in giving notice of termination of the respondents' tenancy. That finding was open to the adjudicator on the evidence based on the respondents' evidence and the documentary evidence that the appellants provided the day after the hearing.

[33] The initial T5 decision also included a preliminary finding that the appellants were aware of the April 11, 2021 hearing date and chose not to attend. That finding was also open to the adjudicator on the evidence, by way of inference from the Board's receipt of an email from the appellants with their documentary evidence the day after the T5 application hearing and the absence of any explanation for the appellants' failure to attend the hearing.

[34] In these circumstances, I see no breach of procedural fairness or other error of law in Vice-Chair Shea's decision.

[35] The appellants also submit that the adjudicator erred in making the May 27, 2021 T5 application order, given the contents of the prior order of Board Member Johnson dated

May 5, 2021, relating to the respondents' T1 application for recovery of the balance of the rent deposit. The latter order included a recital that the parties consented to that order and agreed that it was "a full and final resolution of all issues pertaining to the tenancy." The appellants argue that making the initial T5 application order in these circumstances was an abuse of process, which is an issue of procedural fairness and a question of law.

[36] Again, I disagree. There is no evidence to suggest that, at the time the consent T1 application order was issued, either the appellants or the respondents understood that the consent order was intended to resolve the issues raised in the respondents' T5 application alleging bad faith termination of the respondents' tenancy.

[37] Several factors support the opposite conclusion, including the following: (a) the T1 application and T5 application were brought separately and proceeded before different Board members, without any request that they be heard together; (b) the T5 application had already been heard and was awaiting decision when the T1 consent order was issued; (c) there was no reference to the T5 application in the T1 consent order; (d) the release language in the T1 consent order was included as an introductory matter in a recital rather than in the dispositive part of the order; (e) the amount awarded in the T1 consent order ($851.28) was the full amount the respondents sought in the T1 application for return of the balance of the rent deposit, which was significantly less than the amount subsequently awarded in the T5 initial order ($32,669.96); and (f) the issue was not raised as a ground for review in the appellants' first request for review of the initial T5 application order.

[38] In these circumstances, I would not give effect to this ground of appeal.

B. First review decision

[39] Consistent with their submissions relating to the initial T5 order, the appellants argue that Board Member Macchione denied them procedural fairness by refusing their first review request in reliance on the finding that the appellants had in fact received the notice of hearing for the T5 application. They also submit that the adjudicator erred in not allowing the appellants to explain the merits of the dispute and in not considering the prejudice to the parties if the review were not granted.

[40] I see no merit in those submissions.

[41] In his testimony at the review hearing, the appellant Mr. Gusain acknowledged receiving the Board's email of March 10, 2022, which included as an attachment the notice of hearing (returnable April 11, 2022), together with the respondents' documentary evidence in support of their T5 application alleging bad faith termination. Mr. Gusain also acknowledged receiving a further email from the Board dated March 21, 2022, which included a notice of hearing (returnable April 25, 2022) relating to the respondents' T1 application relating to return of the rent deposit. In his testimony, Mr. Gusain stated that he did not read the emails or their attachments in their entirety (or perhaps at all) but had the impression that the second notice of hearing displaced the first one. He explained that based on this misunderstanding, he appeared at the T1 application hearing on April 25, 2022 (when the T1 consent order was issued) but not the T5 application hearing on April 11, 2022. He also acknowledged that he had not made any inquiries to the Board for an explanation relating to the two notices of hearing for different dates.

[42] As they did at the review hearing, the appellants argue that even though they received the notice of hearing for the T5 application, they were denied the opportunity to be heard, citing the confusion caused by the two notices of hearing received one after the other, for two hearing dates within the same month. The appellants rely on *King-Winton v. Doverhold Investments Ltd.*, 2008 CanLII 60708 (Ont. Div. Ct.), at para. 3, and *Zaltzman v. Kim*,

2022 ONSC 1842 (Div. Ct), at para. 3, in which the court stated, "Being reasonably able to participate in the proceeding must be interpreted broadly, natural justice requires no less."

[43] *King-Winton* and *Zaltzman* were both brief oral decisions, with only passing reference to the background facts. In both cases, the tenants successfully appealed an adverse Board decision that was made after the tenants failed to appear at the Board hearing. In *Zaltzman*, the court found as a fact that the tenant did not receive the notice of hearing (unlike the present case). In *King-Winton*, there was no serious issue that the tenant received the notice, but the court accepted that the tenant had reason to be confused about the hearing date and found that she did not have the opportunity to be heard.

[44] When determining whether Board Member Macchione erred in failing to give effect to the appellants' submissions relating to their opportunity to be heard, it is useful to outline the Board's rules and procedures for a request to review a Board decision and consider the extent to which those procedures were followed in this case. This approach is consistent with the Supreme Court's direction in *Baker*, at para. 27, that is, when considering whether an administrative body has afforded procedural fairness to the parties, the court should "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker*, at para. 27.

[45] The Board has the authority to determine its own procedure and practices and to establish rules and make orders for that purpose, including rules relating to the review of its own decisions: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 21.2, 25.0.1 and 25.1. The Board's power to review its own decision or order may be exercised if a party to a proceeding was not reasonably able to participate in the proceeding: *RTA*, s. 209(1).

[46] The Board's procedures relating to requests to review a Board decision are set out in Rule 26 of the Board's *Rules of Procedure*, with additional guidance being provided by the Board's Interpretation Guideline 8.

[47] As described in Interpretation Guideline 8, the Board's review process has two stages. The first stage is a preliminary review, which may result in the request being dismissed without a hearing or being sent to the second stage, a review hearing. At the preliminary stage, the reviewing adjudicator decides if the order may contain a serious error or whether the requestor may not have been reasonably able to participate. In either case, the Board may direct a review hearing on some or all the issues raised in the review request and may make interim orders: see rule 26.9(d).

[48] Interpretation Guideline 8 provides specific guidance for determining whether a party was not reasonably able to participate in the proceeding, based on previous Board decisions. Among other things, it states that the Board will refuse review requests where the party's failure to attend was the result of negligence or it finds no reasonable explanation for the failure to attend.

[49] In this case, Board Member Lang conducted a preliminary review of appellants' request. As set out in her interim order dated June 3, 2021, she directed the request to a review hearing to determine whether the appellants were reasonably able to participate in the proceedings.

[50] As indicated previously, the first review hearing proceeded virtually before Board Member Macchione, with the appellant Mr. Gusain and the respondents in attendance. Mr. Gusain, who was represented by a paralegal, testified at the hearing. In the review decision, the adjudicator denied the review request. She did not accept Mr. Gusain's explanation that he was confused by the two notices of hearing for different dates, noting that he did not

contact the Board to obtain clarification and provided no reasonable explanation for his negligence. The adjudicator found that the appellants were aware of the hearing and had adequate opportunity to participate in the proceedings.

[51] In support of her decision, the adjudicator relied on this court's decision in *Q Res IV Operating GP Inc. v. Berezovs'ka*, 2017 ONSC 5541(Div. Ct.). In that case, the landlord requested that the Board review its decision granting a rent abatement to the tenant after a hearing at which the landlord failed to appear. The Board refused the review request, finding that the landlord's failure to attend the hearing was due to a lack of diligence on the part of the landlord's office staff. On appeal, the landlord argued that the Board erred in law since there was no evidentiary basis for its finding of lack of diligence. The Divisional Court disagreed and dismissed the appeal. At para. 8, the court stated as follows:

> Lack of diligence in dealing with court proceedings is a reason for refusing to set aside an order where a party has failed to appear. In other words, it was not an error in law for the Review Board to find that lack of diligence constituted a reason not to grant the landlord a rehearing. 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.

[52] Taking the foregoing into account, I see no breach of procedural fairness or other error in law in Board Member Macchione's decision to deny the appellants' request to review the initial T5 application order.

[53] On the evidence, it was open to the adjudicator to find that the appellants had the opportunity to participate in the initial hearing. Despite the appellants' failure to appear at the hearing, their documentary evidence received the following day was taken into account by Vice-Chair Shea in making the initial decision. In his testimony at the review hearing, the appellant Mr. Gusain also had the opportunity to explain the appellants' failure to attend the initial hearing. The adjudicator did not accept his explanation. It was open to her to do so and make the findings she did.

[54] I also find no merit to the appellants' submission that it was a breach of procedural fairness for Board Member Macchione not to allow the appellants to explain the merits of the dispute and not to consider the prejudice to the parties if the review were not granted.

[55] In accordance with the Board's rules and procedures and Board Member Lang's interim order, the matter for determination at the review hearing was the threshold issue of whether the appellants were reasonably able to participate in the proceedings. The adjudicator did not err in law in finding that they were reasonably able to participate. I see no legal error arising from the fact that the adjudicator did not go on to make further findings, on matters that were beyond those that she had been directed to determine in the interim order.

[56] Denying the appellants' request for review was also consistent with the Board's guidance in Interpretation Note 8 that it will refuse review requests where the party's failure to attend was the result of negligence or it finds no reasonable explanation for the failure to attend. In that regard, I note the finding in the review decision, at para. 3, that there was "no reasonable explanation offered to explain [Mr. Gusain's] negligence."

C. Second review decision

[57] The appellants submit that Board Member Cho breached procedural fairness or otherwise erred in law by denying the second review request since he failed to recognize the procedural fairness and abuse of process issues in the initial T5 decision and the first review

decision. Since I have found that there was no breach of procedural fairness or other error of law arising from the prior decisions, this submission fails on that basis.

[58] In any case, rule 20.18 of the Board's *Rules of Procedure* provides that the Board will not consider a further request to review the same order or a request to review a review order. As one of the grounds for dismissing the second review request, the adjudicator found that the appellant had not established good cause to derogate for that rule. I see no error in making that determination.

VI. Disposition

[59] For the foregoing reasons, I would dismiss the appeal and order the appellants to pay costs to the respondents in the amount of $2,000 all inclusive.

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Lococo J.

I agree

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Stewart J.

I agree

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Williams J.

Date of Release: June 28, 2023

CITATION: Gusain v. Arnold, 2023 ONSC 3765
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REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date of Release: June 28, 2023

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[1] As noted further below, in his testimony at the review hearing before Board Member Macchione, the appellant Mr. Gusain provided an explanation for the appellants' failure to attend the initial hearing. In the first review decision, the adjudicator did not accept that explanation.