

CITATION: *Ji Zhou et al. v. Azadeh Hashem Nia et al.*, 2023 ONSC 5466
COURT FILE NO.: CV-23-00701790-0000
DATE: 20230928

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ji Zhou and Zili Lu, Plaintiffs

AND:

Azadeh Hashem Nia and Alireza Abaie, Defendants

BEFORE: Carole J. Brown J.

COUNSEL: *Calvin Zhang*, for the Plaintiffs

Subramanyam Narasimhan, for the Defendants

HEARD: August 23, 2023

ENDORSEMENT

- [1] The plaintiffs bring this action for payment of rent on a home located at 5 Tahoe Ct., Toronto, ON M3B 3M6, in the amount owing of \$89,773 as at October 14, 2023. Occupation rent is \$5,689 per month or \$189.63 *per diem*.
- [2] The owner and landlord of the house is Zili Lu. Ji Zhou is the power of attorney for the landlord. Hereinafter, they are referred to as “the landlord” or “the plaintiffs”, Azadeh Hashem Nia and Alireza Aabaie, the tenants (“the defendants” or “the tenants”), entered into a residential lease agreement to lease 5 Tahoe Ct. for a term of one year commencing September 2018. The parties renewed the lease annually to September 2021, after which the lease became a month-to-month tenancy.
- [3] As of April 15, 2022, the tenants failed to pay rent, but remained in the rental premises.
- [4] The landlord initially brought an application to the Landlord Tenant Board (“LTB”) to evict the defendants on the basis that they had failed to pay rent. At that time, the amount of rent in arrears was within the jurisdiction of the LTB, namely a maximum of \$35,000. The LTB ordered the defendants to pay the plaintiff landlord \$35,186 by March 15, 2023, failing which the landlord could apply to evict the defendants.
- [5] Given that the defendants failed to pay the rents owed in accordance with the January 26, 2023 Order of the LTB, the defendants were ordered, on April 12, 2023, to move out of the rental premises by April 23, 2023.

- [6] The defendants thereafter brought a motion to set aside the April 12, 2023 eviction order, which caused the eviction order to be stayed. The parties were advised that the motion may not be heard for at least three months.
- [7] By that time, the arrears of rent owed by the defendants were well beyond the \$35,000 monetary limit of the LTB. Given that the LTB's jurisdiction had been surpassed due to the defendant's continued failure to pay monthly rent, the landlord withdrew its application before the LTB and commenced this action in the Ontario Superior Court.
- [8] The LTB hearing convened on August 15, 2023, at which time the adjudicator for the LTB advised the representative for the landlord, who was in attendance, that the request to withdraw the landlord's application had been successfully filed and the landlord's application had been withdrawn as of June 1, 2023. Thus, the landlord no longer had an application before the LTB. The previous orders for rent and eviction had been stayed and the underlying application was withdrawn.
- [9] The defendant argues that the hard copy or paper copy of the notice of withdrawal had not been received from the LTB at the time of this hearing and, therefore, the action in this court is premature.
- [10] I have no reason to doubt the LTB's statement made at the August 15, 2023 attendance before the LTB, that the request to withdraw had been successfully filed and that the landlord's application had been withdrawn as of June 1, 2013.
- [11] I find the defendant's argument regarding prematurity to be one of form over substance, designed to attempt to delay the defendant's payment of the arrears owing, and I do not accept that submission.
- [12] The landlord thereafter brought this summary judgment motion, which is being heard on an urgent basis, as the arrears of rent continue to mount.
- [13] It is the position of the landlord that this is an appropriate case for summary judgment, as there is no issue requiring a trial and the Court is able to render a decision in accordance with Rule 20. Further, the landlord argues that the defendants have not filed any evidence nor have they provided any reasons why they cannot pay the rent.
- [14] The defendants raise three defences regarding this action. Firstly, the defendants argue that pursuant to s. 207(3) of the *Residential Tenancies Act*, 2006, S.O. 2006, c.17, s. 207, because the plaintiffs initially commenced an action for payment of rent at the LTB, they have waived any rights they had to pursue further monetary reimbursement beyond the LTB jurisdiction of \$35,000. Thus, they argue that the plaintiff is effectively estopped from pursuing any claims related to rental arrears exceeding the LTB jurisdictional limit of \$35,000 to the present. They submit that once the plaintiffs submit to the jurisdiction of the LTB, all further rights for all amounts accruing and continuing to accrue above \$35,000 are extinguished.

- [15] Secondly, they argue that this matter is *res judicata* because it was already determined by the LTB. As a result, the Ontario Superior Court has no jurisdiction in this matter.
- [16] Thirdly, the defendants argue that the plaintiffs' actions are an abuse of process. They maintain that the plaintiffs are "forum shopping" by coming to the Ontario Superior Court, and that this action constitutes a collateral attack on the jurisdiction of the LTB.
- [17] Further, at the hearing of the summary judgment motion, the defendants, for the first time, indicated that they wished to attempt to settle the matter. Counsel for the defendants indicated that the defendants' business was economically affected during Covid and that the defendants could not return to Iran due to a Canadian Government Travel Advisory and therefore could not attempt to sell their property in Iran to pay arrears of rent. Accordingly, they wished to use their vacation property in St. Kitts in the Caribbean as collateral for the amounts owing to the landlord, but they would only pay up to \$35,000 for all arrears of rent to date. There was no evidence proffered to substantiate any of this.

The Law and Analysis

- [18] Pursuant to Rule 20, the court shall grant a summary judgment motion, *inter alia*, where it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties. Where the summary judgment motion is heard by a judge, the judge may exercise the following powers for that purpose: weighing the evidence, evaluating the credibility of a deponent, drawing any reasonable inference from the evidence. Summary judgment motions must be granted where there is no genuine issue requiring a trial; further, there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 47-49 and 94.
- [19] Based on all of the evidence that the plaintiffs have placed before me and taking into consideration the evidence of the defendants as well, I am satisfied that I am able to render a decision on this summary judgment motion based on the said evidence. The defendants are in breach of the tenancy agreement to a significant extent. They owe a considerable amount of rent which remains outstanding. They have given no reason for their failure to pay the rent. I find that there is no genuine issue requiring a trial in this regard.
- [20] With respect to the defences raised by the defendants, I make the following comments.

Residential Tenancies Act, s. 207

- [21] Section 207 regarding monetary jurisdiction of the Board of the *Residential Tenancies Act* provides as follows:

207 (1) The Board may, where it otherwise has the 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.

- [22] In the present case, the plaintiffs commenced a proceeding before the LTB for arrears of rent at a time when the arrears of rent fell within the monetary jurisdiction of the LTB. The LTB awarded the arrears of rent and, when the defendants failed to pay the amounts owing pursuant to the order, ordered eviction, with which the defendants also failed to comply. The defendants thereafter brought a motion for a rehearing, which automatically stayed the rent and eviction orders. Given that by that time, the arrears of rent were much higher than the jurisdiction of the LTB, and the application would not be heard for several months, the landlord withdrew its application before the LTB such that there was no further proceeding before the LTB.
- [23] The landlord then commenced this action in the Ontario Superior Court, which court does have full jurisdiction.
- [24] Further, I find the defendants' argument that once an application is commenced at the LTB all amounts continuing to accrue beyond the \$35,000 limit of the LTB are extinguished to be untenable, unjust and contrary to the interests of the administration of justice. However, in this case, that is not the issue. Rather, the issue is that the order is no longer extant.

Res Judicata

- [25] I do not find there to be any issue as regards the defendants' argument of *res judicata*. There is a two-step test for determining whether issue estoppel arises:
1. Three preconditions must be established, namely that
 - i) the same question has been decided;
 - ii) the relevant judicial decision was final — i.e., the issue said to be barred was a fundamental issue in the substantive decision, with no appeal available on that particular issue; and
 - iii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

2. Second, even if the above preconditions are shown, the court still has discretion to decide if issue estoppel ought to be applied.

See *Danyluck v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paras. 25 and 33.

[26] In this case, the decision was not final. The LTB had the jurisdiction to hear the defendants' motion to vary or set aside the decision. Here, the motion to set aside commenced by the tenants before the LTB stayed the eviction order, during which time, the landlord's applications were withdrawn. Therefore, there is no substantive decision that is final or binding that decided the same issue raised in this action. Further, there is no genuine issue for trial on the defendant's counterclaim for the same reason.

[27] In my view, there is no basis on which I would exercise my discretion to apply issue estoppel/*res judicata*.

Abuse of Process

[28] I find that the defendants' argument as regards abuse of process and forum shopping does not have merit.

[29] I find the conduct of the tenants to be unacceptable.

Conclusion

[30] I order as follows:

1. The defendant is to pay to the plaintiff the amount of \$89,773 as arrears of rent owed by the defendants from April 15, 2022 to August 14, 2023;
2. The defendants are to pay to the plaintiff the amount of \$5,689 or \$189.63 *per diem* as occupation rent per month after August 14, 2023 to the date of vacancy of the property;
3. The lease is terminated;
4. I grant leave to have the Registrar of the Superior Court issue a writ of possession for the property;
5. The defendants' counterclaim is dismissed; and
6. I order that the defendants pay the plaintiffs' costs of the motion in the amount of \$8,778.05 and of the action in the amount of \$5,139.98.

[31] Finally, as I have ordered that the lease be terminated, I have given leave to the Registrar of the Superior Court to issue a Writ of Possession for the property to the Sheriff of the City of Toronto to ensure that the premises are vacated by the defendants. The tenants are

to leave the premises in a clean and habitable condition and are to vacate the premises pursuant to the said Writ of Possession. In the event that the tenants leave any damage on the property, they are liable to pay the full costs of those damages.

Date: September 28, 2023

C.J. Brown J.