

Rosen v. Reed, 2023 ONSC 6482 (CanLII)

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ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

D.L. Corbett, Leiper and Muszynski JJ.

BETWEEN:)
)
DAVID ROSEN) *Yonatan M. Kramer*, for the Appellant
)
Appellant)
)
– and –)
)
WENDY REED) *Timothy M. Duggan*, for the Respondent
)
Respondent) *Eli Fellman*, for the Landlord Tenant Board
)
)
) **HEARD at Toronto (by ZOOM):**
) May 18, 2023

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REASONS FOR DECISION

D.L. Corbett J.

[1] This appeal concerns “pay to stay” orders made by the Landlord and Tenant Board (“LTB” or the “Board”). Are they subject to the monetary jurisdiction of the Board (currently \$35,000) or may the Board order that all outstanding rent be paid to void an order terminating a tenancy if the arrears are more than \$35,000?

[2] The short answer to this question is that the monetary jurisdiction of the Board does not constrain its discretion to impose terms to void an order terminating a tenancy. This has long been the law stated by this court and has been reaffirmed by this court as recently as 2023 (*Galaxy Real Estate Core Ontario LP v. Kirpichova*, 2023 ONSC 4356). No circumstances have arisen that would lead this court to depart from its prior decisions on this issue. In any event, this court's prior decisions on this issue are correct in law and sound in principle. Therefore, for the reasons that follow, the appeal is dismissed.

Jurisdiction and Standard of Review

[3] Appeal lies to this court from an order of the LTB on a question of law: *Residential Tenancies Act*, SO 2006, c. 17 (the "RTA"), s. 210. The standard of review is correctness for a question of law: *Canada (Ministry of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 36-37.

Background Facts

[4] The LTB found that rent arrears were \$50,000. Ms Reed (the "Landlord") waived the claim for an order for payment of arrears in excess of \$35,000 in order to proceed before the LTB, pursuant to s. 207(3) of the RTA. The LTB terminated the tenancy for non-payment of rent but also ordered that the Tenant could void the termination order upon payment by March 20, 2023 of the entirety of the arrears (\$50,000) plus accrued and accruing rent of \$10,000 per month, pursuant to s. 74 of the RTA.

[5] Mr Rosen (the "Tenant" or the "appellant") takes the position that the Landlord's entitlement to payment of arrears above \$35,000 was extinguished by the LTB's order for payment of \$35,000, pursuant to s. 207(3) of the RTA, and that the LTB erred in ordering payment of a higher amount as a condition for voiding the order terminating the tenancy.

Prior Jurisprudence on this Issue

[6] In a 2010, Ferrier J., sitting as a single judge of the Divisional Court, held as follows:

To hold that the monetary cap applies to "the outstanding arrears of rent" would result in an absurdity. The defaulting tenant could continue *ad infinitum* to merely pay the monetary limit and continue in possession, all the while continuing in default. (*Horstein v. Royal Bank of Canada*, 2010 ONSC 3134, para. 13 (Div. Ct.))

This statement was in respect to s. 74(11) of the RTA, not s. 74(4), but the principle in issue is the same for the two subsections.

[7] This court has concluded that the monetary jurisdiction of the LTB in the RTA limits the amount of an "order" that may be made for payment, and not the nominal value of all claims that may be adjudicated before the LTB: *Ryshpan v. Bayview Summit*, [2000] OJ No. 6054 (Div. Ct.).

[8] The LTB has gone both ways on this issue. Some LTB decisions have found that "pay to stay" orders are limited to the monetary jurisdiction of the Board: *Galaxy Real Estate Core Ontario Properties LP v Deen*, 2022 CanLII 78938 (ON LTB); *Guo v Apiou*, 2021 CanLII 142621 (ON LTB); *Divani v. Brown*, 2021 CanLII 147655 (ON LTB). Other LTB decisions have concluded that "pay to stay" terms may exceed the monetary jurisdiction of the Board: 2022 CanLII 56643 (ON LTB) and 2022 CanLII 127325 (ON LTB).

The Statutory Provisions

(a) Claims for Payment of Money

[9] [Section 207](#) of the *RTA* provides as follows:

(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.

[10] The current monetary jurisdiction of the Small Claims Court is \$35,000.00: [O. Reg. 626/00, s. 1](#). Thus, the LTB may not order payment of more than \$35,000.00 by virtue of [RTA, s. 107\(1\)](#) and [O. Reg. 626/00, s. 1](#). A person wishing seeking an order for payment of more than \$35,000 under the *RTA* may then do one of two things:

(a) bring the claim in the Ontario Superior Court (being the court of competent jurisdiction to hear a claim above the monetary jurisdiction of the Small Claims Court) to obtain an order for payment of the amount of the claim. In this event, the court could also grant an order terminating the tenancy and could exercise any other powers available to the LTB under the *RTA* in relation to the claim.

(b) Bring the claim before the LTB for “a sum equal to or less than” \$35,000.00. In this event, the claimant's rights in excess of \$35,000.00 “are extinguished once the Board issues its order.”

So, the claimant has a choice to make: to use the faster, less expensive, less formal process before the Board, the claimant must limit the claim for an order for payment to \$35,000.00. Or the claimant can pursue its full rights to payment before the Superior Court of Justice.

(b) Claims for Termination of Tenancy

[11] [Section 59](#) of the *RTA* provides as follows:

(1) If a tenant fails to pay rent lawfully owing under a tenancy agreement, the landlord may give the tenant notice of termination of the tenancy effective not earlier than,

(a) the 7th day after the notice is given, in the case of a daily or weekly tenancy; and

(b) the 14th day after the notice is given, in all other cases.

(2) The notice of termination shall set out the amount of rent due and shall specify that the tenant may avoid the termination of the tenancy by paying, on or before the termination date specified in the notice, the rent due as set out in the notice and any additional rent that has become due under the tenancy agreement as at the date of payment by the tenant.

(3) The notice of termination is void if, before the day the landlord applies to the Board for an order terminating the tenancy and evicting the tenant based on the notice, the tenant pays,

(a) the rent that is in arrears under the tenancy agreement; and

(b) the additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given.

[12] Subsection 69(1) of the *RTA* provides:

A landlord may apply to the Board for an order terminating a tenancy and evicting the tenant if the landlord has given notice to terminate the tenancy under this Act....

[13] Subsection 74(2) of the *RTA* provides:

An application by a landlord under section 69 for an order terminating a tenancy and evicting the tenant based on a notice of termination under section 59 shall be discontinued if, before the Board issues the eviction order, the Board is satisfied that the tenant has paid to the landlord or to the Board,

(a) the amount of rent that is in arrears under the tenancy agreement;

(b) the amount of additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given; and

(c) the landlord's application fee.

[14] Subsections 74(3) and (4) of the *RTA* provide as follows:

(3) An order of the Board terminating a tenancy and evicting the tenant in an application under section 69 based on a notice of termination under section 59 shall,

(a) specify the following amounts:

(i) the amount of rent that is in arrears under the tenancy agreement,

(ii) the daily amount of compensation that must be paid under section 86, and

(iii) any costs ordered by the Board;

(b) inform the tenant and the landlord that the order will become void if, before the order becomes enforceable, the tenant pays to the landlord or to the Board the amount required under subsection (4) and specify that amount; and

(c) if the tenant has previously made a motion under subsection (11) during the period of the tenant's tenancy agreement with the landlord, inform the tenant and the landlord that the tenant is not entitled to make another motion under that subsection during the period of the agreement.

(4) An eviction order referred to in subsection (3) is void if the tenant pays to the landlord or to the Board, before the order becomes enforceable,

(a) the amount of rent that is in arrears under the tenancy agreement;

(b) the amount of additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given;

(c) the amount of NSF cheque charges charged by financial institutions to the landlord in respect of cheques tendered to the landlord by or on behalf of the tenant, as allowed by the Board in an application by the landlord under section 87;

(d) the amount of administration charges payable by the tenant for the NSF cheques, as allowed by the Board in an application by the landlord under section 87; and

(e) the costs ordered by the Board.

[15] [Subsection 74\(11\)](#) of the *RTA* provides:

A tenant may make a motion to the Board, on notice to the landlord, to set aside an eviction order referred to in subsection (3) if, after the order becomes enforceable but before it is executed, the tenant pays an amount to the landlord or to the Board and files an affidavit sworn by the tenant stating that the amount, together with any amounts previously paid to the landlord or to the Board, is at least the sum of the following amounts:

1. The amount of rent that is in arrears under the tenancy agreement.
2. The amount of additional rent that would have been due under the tenancy agreement as at the date of payment by the tenant had notice of termination not been given.
3. The amount of NSF cheque charges charged by financial institutions to the landlord in respect of cheques tendered to the landlord by or on behalf of the tenant, as allowed by the Board in an application by the landlord under section 87.
4. The amount of administration charges payable by the tenant for the NSF cheques, as allowed by the Board in an application by the landlord under section 87.
5. The costs ordered by the Board.

[16] The effect of these provisions is that the LTB may make an order to terminate a tenancy for non-payment of rent: the landlord gives notice of termination for non-payment (s. 59), following which the landlord may apply to the LTB for an order terminating the tenancy (s. 69). The tenant may avoid eviction, before the LTB issues an eviction order, by paying everything owing under the lease plus the fee paid by the landlord to commence eviction proceedings before the LTB (s. 74(2)). If the tenant does not do this, and the LTB issues an eviction order, the LTB specifies the amount the tenant must pay to void the eviction order before it becomes enforceable (s. 74(3)), and if the tenant pays that amount before the eviction order “becomes enforceable”, then the eviction order is void (s. 74(4)). Even after the eviction order has become enforceable, if the order has not yet been executed, the tenant may move before the LTB to set aside the eviction order upon proof of payment of rent obligations under the lease and the landlord’s costs and expenses (s. 74(11)).

[17] The obligation to pay rent is a tenant’s fundamental obligation: *Schwartz v. Fuss*, 2021 ONSC 1159 (Div. Ct.); *Gencay v. Capreit Limited Partnership*, 2021 ONSC 8293 (Div. Ct.); *Galaxy Real Estate Core Ontario LP v. Kirpichova*, 2023 ONSC 593 (Div. Ct.). A landlord is entitled to obtain an eviction order where a tenant is in default of this fundamental obligation. However, the *RTA*, being remedial in nature, and seeking to protect the interests of tenants in their security of tenure in their home, affords tenants an opportunity to cure their default on notice of the landlord’s claim, prior to that claim being adjudicated by the LTB, and even after the LTB’s decision. In each of these circumstances, the tenant may cure the default by making the landlord whole – that is, by paying arrears “under the tenancy agreement” plus accrued occupancy charges and the landlord’s costs.

[18] The essence of the LTB order, in each case, is an order terminating the tenancy. If the tenant does not void the order, and it is enforced by removing the tenant, the order is then spent and may not subsequently be enforced as an order for payment of money.

(c) Condition for Setting Aside an Eviction Order is not an Order for the Payment of Money within the meaning of s. 207 of the RTA

[19] An “order for the payment of money” within the meaning of s. 207 of the RTA is an LTB order that may be registered with the court and enforced in the same way as an “order for the payment of money” made by a court. Orders terminating a tenancy under s. 69 of the RTA are not orders for the payment of money. They are orders terminating a tenancy. They are enforced by removing the tenants from possession of the premises and giving possession of those premises to the landlord. Once that has been done, the orders are “spent”, having been “executed”. Orders made pursuant to s. 74 are orders terminating a tenancy, not orders for the payment of money.

[20] The appellant’s arguments do not seriously contest this analysis. Rather, they focus on this language in subsection 207(3) of the RTA: “...all rights of the party in excess of the Board’s monetary jurisdiction are extinguished once the Board issues its order.” Arrears under the lease that exceed the monetary jurisdiction of the LTB are “extinguished” once the LTB “issues its order” and thus, on calculating the amounts required to be paid to void a termination order, “rent in arrears under the tenancy agreement” does not include arrears the rights to which have been “extinguished”.

[21] The result of this approach could be the very “absurdity” noted by Ferrier J. in *Horsheim*: a tenant could fail profoundly to meet their obligation to pay rent, running arrears over \$35,000, and then “cure the default” by paying \$35,000, obtaining a rent reduction proportional to the extent of their profound default. The only way to avoid this situation, for a landlord, would be to bring proceedings in the Superior Court – with much higher costs and delays, and adding significantly to the burdens of a court system that is already under considerable strain.

[22] The sense of absurdity is all the greater when one considers the continuing accrual of arrears. In this case, the arrears (accruing at \$10,000 per month) were \$50,000 at the time of the LTB decision but grew an additional \$20,000 over the course of the time required to give the Tenant an opportunity to cure pursuant to s. 74 of the RTA. It could not have been the intention of the Legislature to create a situation whereby a tenant could obtain an ever-greater reduction in rent arrears, at the expense of the landlord, by delay in curing its default in meeting its fundamental obligation to pay rent. These provisions were designed to afford tenants a significant opportunity to cure their default and preserve their tenancy, not to afford tenants an extended period of rent abatement.

[23] Alternatively, if the appellant’s argument were given effect, it would still permit landlords to pursue eviction before the LTB but would require landlords to defer a request for an order for payment of arrears until after termination of the tenancy. It would require the LTB to make its order for payment only after termination had been ordered and executed. In other words, by requiring additional steps and by following a particular order of adjudication, the landlord and the LTB could defer making an “order for the payment of money” until after eviction had taken place – making the process more cumbersome and expensive for the LTB and for the parties.

[24] It is in this context that the LTB stated as follows on this issue in this case:

While the Board cannot order a person to pay more than \$35,000.00 in accordance with [s.207(1)] of the Act, I find that this does not apply to the “stay and pay” option set out in

the order below. The order terminates the tenancy and requires the tenant to pay the amount up to the Board's monetary jurisdictional limit of \$35,000.00 plus the cost of filing the application. The tenant can choose to pay the full amount of rent, and costs owing to the Landlord if they choose not to vacate the unit. This amount is optional and only required if the Tenant elects to continue the tenancy. Therefore, the Board is not ordering this amount to be paid and is not ordering an amount that exceeds the limit. (Decision, para. 4)

[25] The standard of review on a question of law is correctness, but this court "should take the administrative decision maker's reasoning into account – and indeed, it may find that reasoning persuasive and adopt it..." (*Vavilov*, para. 54; see also *Smith v. Youthlink Youth Services*, 2022 ONCA 313, para. 17; *Reisher v. Westdale Properties*, 2023 ONSC 1817, paras. 9-10). As explained above, the LTB's reasoning on this issue is persuasive and gives effect to the different provisions in the RTA governing orders for payment of money and orders for termination of a tenancy. It follows longstanding authority from this court. The contrary interpretation would result in an unfair windfall to tenants, and would likely have the long-term effect of encouraging transfer of a significant number of landlord and tenant disputes to the Superior Court.

Disposition

[26] The appeal is dismissed, with costs payable by the appellant to the Landlord fixed at \$10,000, inclusive, payable within thirty days. There shall be no costs for or against the LTB.

"D.L. Corbett J."

I agree: "Leiper J."

I agree: "Muszynski J."

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SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

D.L. Corbett, Leiper and Muszynski JJ.

BETWEEN:

David Rosen

Appellant

– **and** –

Wendy Reed

Respondent

REASONS FOR DECISION

D.L. Corbett J.

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