CITATION: Zarei v. Afsharian, 2023 ONSC 5317
DIVISIONAL COURT FILE NO.: 22-1332
Oshawa
DATE: 20230926

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: ARMAN ZAREI and SOUDEH AFSHARIAN, Appellants

AND: BAHAREH ATTARBASHI and MEHRDAD RAHMATI, Respondents

BEFORE: D.L. Corbett, McGee and Cullin JJ.

COUNSEL: *Ms. Afsharian,* self-represented

Mr Rahmati, self-represented

Linda Naidoo, for the Landlord and Tenant Board

HEARD: at Oshawa by ZOOM, September 18, 2023

ENDORSEMENT

D.L. Corbett J.

[1] This is an appeal from the decision of the Landlord and Tenant Board ("LTB") dated July 18, 2022, finding that the appellants / landlords misused the process of terminating a tenancy for their personal use of the premises, and awarding the respondents / tenants compensation for this misuse, and from the reconsideration decision of the LTB dated August 22, 2022, rejecting the tenants' argument that they did not receive notice of the original hearing before the LTB.

[2] An appeal to this court from a decision of the LTB is available but only in respect to questions of law: *Residential Tenancies Act, 2006,* SO 2006, c. 17, s.210. The standard of review on questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Issues of procedural fairness – where they are matters of legal standards – are likewise decided on a standard of correctness: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.

[3] The primary issue raised by the appellants is a question of procedural fairness – they say that they did not receive notice and thus did not have an opportunity to participate in the hearing. A question of procedural fairness is reviewed in this court on a standard of

correctness. However, in this case the issue of procedural fairness raised by the appellants turns solely on a finding of fact by the Board: the Board found that the appellants received notice of the hearing. Given that finding, which is not subject to appeal in this court, no issue of procedural fairness arises, and for this reason the appeal must be dismissed.

[4] Procedural fairness, and the LTB's own practices and procedures, require that parties be given notice of a hearing. In this instance, notice was sent to Mr Zarei's email address. In the request for reconsideration, the appellants argued that Mr Zarei did not receive the email until after the hearing had taken place. In its reconsideration decision, the LTB rejected Mr Zarei's argument and found that he did receive the notice in a timely manner. This was a finding of fact, available to the LTB on the record before it on reconsideration, and this court has no jurisdiction to interfere with it.

[5] During oral argument, Ms Afsharian provided an explanation as to why the appellants say that Mr Zarei did not receive the email in a timely manner. She told the court that Mr Zarei was travelling out of Canada at the material time. His email account included a two-factor security setting which sent a verification code to his Canadian cellphone when he attempted to access the account from abroad. While on this trip, he elected not to use his Canadian cellphone SIM card to save money, and so he was unable to access the verification code when it was sent to his phone. This led Google to "freeze" his account until he verified his identity. This situation was not rectified until Mr Zarei returned to Canada and resumed his use of his Canadian SIM card. By that time, the hearing had taken place. Ms Afsharian noted that her husband could not reasonably have expected a security issue would arise in respect to his phone, and so it was understandable why he had not brought his phone with him and kept it activated.

[6] This description of events was not corroborated by independent third parties (such as Mr Zarei's cellphone provider). Ms Afsharian stated that these security arrangements were in place because the email account was an important communication tool for Mr Zarei's work, but provided no plausible submissions to explain why Mr Zarei would permit this important tool to remain unavailable to him for a period of weeks while he was travelling, or that he took any steps to address the issue either before he left or once he discovered it. Further, the account of these events provided to the LTB was less coherent than the account provided to this court orally by Ms Afsharian. The LTB was entitled to decide the notice issue on the basis of the materials provided to it by the appellants, and it was entitled to reject the appellants' claim that notice was not received in a timely manner on the basis of the materials provided. The appellants are not entitled to a "second kick at the can" in this court – an appeal is not a re-hearing, but rather is concerned with what happened before the LTB on the materials before the LTB.

[7] We note that this was an "open file" with the LTB and that parties have an obligation to ensure that their email service address is accurate. The Board has a high volume of cases before it and cannot discharge its function to provide timely adjudication of residential tenancy disputes if parties can avoid and delay their hearings by their own failure to maintain their email addresses. Further, the status of Board matters – including hearing dates – may be viewed on the Board's web site – so, if a party was unable to access their email, they could still follow the progress of their file by checking the web site. In this context, in the circumstances of this case, I see no error in the Board's conclusion that notice was given to the landlords.

[8] Ms Afsharian also argued that there is no evidence that Mr Zarei opened the email on delivery of it, or that notice was given to her of the hearing. These arguments do not avail the appellants. The LTB is entitled to deem that a delivered email is proper service and that service on one residential landlord is service on all landlords. There was no

evidence before the LTB that would render these inferences unavailable in the circumstances of this case.

[9] In addition, I am not persuaded that there is an arguable injustice in the LTB's substantive disposition of this case when account is taken of the appellants' version of events. On the appellants' version, they sought to oust the tenants from the premises for resale of the home and they resorted to a claim that they wanted the premises for their personal use to achieve this goal. This is not a proper use of a claim for personal use of leased premises.

[10] It appears that the premises was re-let for a higher rent, as found by the LTB, and then subsequently sold. The tenants could have remained in the premises until sale and until a subsequent purchaser had a valid "personal use" claim to recover the premises. The tenants left the premises on the basis of the landlord's recourse to an "own use" application during the summer of 2021, when COVID-19 conditions made relocating more difficult, and the tenants now find themselves in less desirable premises at higher rent. In all the circumstances, if the landlords had been present at the hearing and given their account of events, it appears that the result of the hearing would have been the same.

[11] For these reasons the appeal is dismissed.

[12] The respondents ask this court to award $5,000 for "pain, suffering, stress, and fees associated with this process" (that is, associated with the appeal). Such an award is not available in this court. The appellants were entitled to appeal, and the respondents are not entitled to more than an award of costs in this court, which is an indemnity for actual out-of-pocket costs to defend the appeal. The parties both sought costs in their factums but have not filed costs materials. However, both sides are self-represented and there is no direction that they file costs materials before the appeal hearing. The Practice Direction requires that costs materials be provided in advance, but I would not preclude the self-represented respondents from seeking their costs now in all the circumstances. If the respondents wish to seek an order for costs they shall provide the court, by email, by October 6, 2023, with a brief explanation of their costs claim, supported by receipts (except in respect to court fees, which may simply be listed). The appellants may provide brief responding costs submissions by October 13, 2023, by email.

"D.L. Corbett J."

I agree: "McGee J."

I agree: "Cullin J."

Released: September 26, 2023