Chong v Yu, 2016 CanLII 107067 (ON SCSM)

Date: 2016-12-12

File number: SC-3494-15; SC-3494-15-D1

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DATE: 20171113

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

BETWEEN:	
CINDY CHONG Plaintiff and Defendant by Defendant's Claim	Self-Represented
– and –	
CHIA CHEN YU Defendant and	*S. Azevedo*, Paralegal for the Defendant

Plaintiff by Defendant's Claim)))
)
)
)
)

HEARD at Toronto: December 12, 2016 and January 31, 2017

REASONS FOR JUDGMENT

Deputy Judge Marcel D. Mongeon

Background to Case

[1] This matter was originally tried before a different deputy judge (the "Presiding Judge"). After hearing evidence over two days (December 12, 2016 and January 31, 2017) and receiving written submissions from the parties, the Presiding Judge reserved judgement.

[2] The Presiding Judge is unable to give his decision. Accordingly, this matter has, with the consent of the parties, been assigned to me for a rehearing pursuant to s. 123 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA).

[3] My rehearing of this matter has, pursuant to s. 123(7)(b) CJA, been based on the transcripts of the original trial, the exhibits filed and the written submissions received.

[4] On the review of all of the material, I did not consider it necessary to recall any witness to give further evidence. My review allowed me to form the view that the *viva voce* record was complete and allowed me to receive a complete view of the cases of the parties as they had presented them.

Facts

[5] The Claim and Defendant's Claim both relate to the same facts. I have found the following facts.

[6] The Plaintiff (Defendant by Defendant's Claim) was the Landlord of a property located at 14 Hackett Ave. in North York. The Defendant (Plaintiff by Defendant's Claim) was the Tenant of a room in that property pursuant to a written lease. For ease of reference, I will refer to the parties as the Landlord and Tenant.

[7] The property had 11 rooms that were rented out by the Landlord[1]. Because of the property's proximity to York University, the rooms were targeted for rental to students. No information was available as to whether or not the property was properly zoned for rental to 11 tenants.

[8] The written lease between the Landlord and Tenant[2] on four pages signed by both of them on August 26, 2013 includes a monthly rent of $575 per month, a rental period of September 1, 2013 to August 31, 2014, a damage deposit of $200 and a key deposit of $10.

[9] The Tenant provided the Landlord with post-dated cheques for the rent through to the month of July, 2014[3]. The first and last month's rent were paid together with the damage deposit and key deposit.

[10] The Landlord acknowledged[4] that the damage and key deposit were likely contrary to the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (RTA) but advised that she would have returned them to the Tenant on request.

[11] The lease includes a handwritten section which states:

Wall in between 2 rooms on top floor needs to be fixed to be sound proof to secure privacy.

[12] Although not clear from the lease, the Tenant rented and occupied one of the 2 rooms on the top floor which she chose after personal inspection[5].

[13] The tenant began her occupancy in September 2013. She continued to communicate with the Landlord as to the need to fix

the wall between her room and the adjacent room. The Tenant frequently refers to a “gap” in the wall.

[14] In addition to the Tenant’s testimony, two pictures[6] show the gap. In order to make two rooms from one space, drywall has been brought to a ‘tee’ with a glass door. The gap is a crack of a small distance (I would estimate no more than 1 cm) between the two rooms. However, because of the connection of the wall to the window, it is not possible to see through the gap. However, it is likely that the gap was not as sound resistant as the adjacent drywall.

[15] In February, 2014, the Tenant still had not achieved satisfaction with the wall gap.

[16] Although the Tenant’s normal rent was $575 per month, in the month of February, 2014, she only paid $125.00[7] or a discount of $450.00. The Landlord’s testimony[8] was that the Landlord had given the Tenant a discount on her February rent to resolve the noise situation that the Tenant was complaining about.

[17] To actually effect the reduction in rent, the Landlord returned the post-dated cheque for that month to the Tenant and received as newly written cheque for that month in return[9].

[18] In March, 2014, the Tenant approached the Landlord about vacating the premises. The Tenant had finished her studies and wished to vacate at the end of May. Text messages[10] between Landlord and Tenant were exchanged which suggested that the Landlord was giving serious consideration to the Tenant’s request to vacate early.

[19] The Landlord ultimately denied the tenant’s request for an early termination of the lease. Despite such a denial, the Tenant vacated the premises at the end of May.

[20] The Landlord attempted to deposit the post-dated cheque for June 2014 of the tenant’s. The check was returned as ‘Payment Stopped.’[11]

[21] The Landlord had advertising costs of $99.25 on each of June 11, 2014 and July 11, 2014 to advertise the vacancy on Kijiji[12].

[22] The Tenant has not been paid interest on the deposits held by the Landlord. Although there is an allegation in one of the text messages that the Tenant was refunded the damage deposit of $200 and the key deposit of $10 by way of being provided Loblaw Gift Cards, as a fact, I hold that such a repayment has not been proved.

Claim and Defendant's Claim

[23] In the formal Amended Plaintiff's Claim received on June 29, 2016, the Landlord seeks $1,808.50 comprising rent for June and July, 2014 at $575.00 ($1,150.00); the discount provided for February 2014 of $450.00, the cost of replacing a room key of $10 and costs of $198.50 to advertise to find another renter.

[24] In the formal Defendant's Claim received on June 29, 2015, the Tenant seeks $1,725.00 for necessary maintenance and repairs to the unit which allegedly made it unsafe during the Tenant's period of occupation.

Submissions and Applicable Law

[25] A number of submissions were addressed to the jurisdiction of the Small Claims Court versus the Landlord and Tenant Board (LTB). Reference was also made to section 168(2) of the RTA conferring exclusive jurisdiction on the LTB "to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act."

[26] The Small Claims Court has no jurisdiction if a tenant is still in possession of the relevant rental unit; any applications in that case have to be directed to the LTB. Section 87 RTA makes it clear that the LTB is responsible for such applications.

[27] However, when the tenant is no longer in possession, a claim for rent arrears can no longer be brought before the LTB[13]. Although there is no specific provision in the RTA stating this, a

claim for arrears of rent after the tenant is no longer in possession can be made to the Small Claims Court.

[28] The Tenant's Defendant's Claim is for damages alleged as a result of the Landlord not making necessary repairs to the unit.

[29] Section 20(1) of the RTA provides that "A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards."

[30] Section 29(1) of the RTA provides that "a tenant or former tenant of a rental unit may apply to the Board for" ... "1. An order determining that the landlord has breached an obligation under subsection 20 (1)" ...

[31] It is clear from the wording of section 29(1) that only the LTB can determine the matters in dispute in the Defendant's Claim; an allegation of lack of maintenance or repair cannot be heard by the Small Claims Court.

[32] To summarize: the Small Claims Court can determine issues related to arrears of rent but it cannot determine issues related to the lack of maintenance or repair of the unit.

Analysis and Application

[33] The Landlord is entitled to be paid the rent she is seeking for June and July, 2014. (Total: $1,150.00)

[34] Even though the Tenant had asked to be released early from her lease, there is nothing in the RTA or the general law which requires the Landlord to do so.

[35] Although the Tenant may have had valid concerns about the lack of repair and maintenance of the rental unit, these are not enforced by a declaration that the lease is void; rather they are enforced by the LTB through an application to force the repairs to be done or for an abatement of rent. Lack of repair or maintenance cannot be raised as a defence to the payment of rent. The intention

of the legislator is clear in s. 29(1) that only the LTB can consider issues of lack of repair and maintenance.

[36] With respect to the discount of rent provided for February, 2014, there is no evidence whatsoever that the rebate was only provided as alleged "on condition that the Tenant finish out the lease." The discount was provided in February and there is no evidence of any condition requiring its return to the Landlord.

[37] With respect to the deposits: the receipt of the damage deposit of $200 is an offence under s. 234 (f) of the RTA: "A person is guilty of an offence if the person ... (d) requires or receives a security deposit from a tenant contrary to section 105". S. 105 RTA makes it clear "[t]he only security deposit that a landlord may collect is a rent deposit collected in accordance with section 106." Section 106 provides that only the last month's rent may be received as a deposit.

[38] The language of s. 234 is such that it did not matter if the Tenant had agreed to pay such a deposit; even its receipt is an offence.

[39] The Landlord had collected $200 as a security deposit in contravention of the RTA. The Tenant shall be credited with this amount.

[40] The Landlord pursuant to s. 106 RTA is required to pay the Tenant interest on the rent deposit. For 2013, the interest rate was 2.5% *per annum*. On the $575 that the Landlord held from the Tenant until August 2014 when the last month would be payable, the appropriate amount of interest is $14.38.

[41] With respect to the additional $200, the Tenant is also entitled to interest on this amount from when paid (September 1, 2013) until the time of judgment (November 1, 2017). The applicable interest is also the 2.5% *per annum* that prevailed when paid. There will be interest for 4 1/6 years at 2.5% on $200 or $20.83 credited to the Tenant.

[42] The Landlord had also collected a key deposit of $10 and seeks this amount to pay for the key that was not returned. There is

no credit or debit for this amount as the Landlord is already holding this amount as a deposit.

[43] As to the advertising: I have ordered that the Landlord is entitled to the rent for June, July and August 2014[14]. As such, although the Landlord was required to mitigate her damages by trying to re-rent the unit, the costs thereof would represent a double collection of damages against the Tenant. Assuming that the Landlord would have to be advertising for a new tenant in August in any event, the Landlord would have had to pay the advertising at some point without being able to collect from the Tenant. The awarding of rent covers the claim for the other costs of seeking tenants.

[44] In the result, the Landlord is entitled to rent for June and July, 2014 ($1,150.00) minus the amounts to be credited to the tenant (Deposit: $200; interest on rent deposit: $14.38 and interest on security deposit: $20.83; total: $235.21) for a net amount payable to the Landlord of $914.79.

[45] The Defendant's Claim is dismissed.

Costs

[46] Any unpaid costs orders to date are cancelled.

[47] Section 29 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that: "An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding."

[48] The original amount sought in the Plaintiff's Claim was $1,808.50; the amount in the Defendant's Claim was $1,725.00.

[49] The Plaintiff obtained approximately ½ of what she was seeking in the Claim; the Defendant was wholly unsuccessful in the Defendant's Claim.

[50] The Plaintiff was self-represented. The Defendant was represented by a paralegal.

[51] Rule 19 of the *Small Claims Court Rules*, O. Reg. 258/98 generally provides that a successful party is entitled to have their reasonable disbursements paid the unsuccessful party (r. 19.01) as well, in the case of a self-represented party, to receive an amount not in excess of $500 for 'inconvenience and expense.' (r. 19.05)

[52] Costs awards should provide a partial indemnity to successful parties. They should be proportional to the amount at stake and the complexity of the case.

[53] Although this matter was tried over two days, in large part that was because the parties dealt with the issue of repairs and safety of the unit. This could never have been in the jurisdiction of this court because of the clear provisions of the RTA.

[54] Based on all of the foregoing, I am fixing costs, including all disbursements, at $500 and awarding them to the Plaintiff. This is inclusive of both the Plaintiff's and the Defendant's Claims.

Orders

[55] On the Plaintiff's Claim there is judgment in favour of the Plaintiff against the Defendant for $914.79. This amount bears interest at the *Courts of Justice Act* rate for pre-judgment interest from August 31, 2014.

[56] The Defendant's Claim is dismissed.

[57] Costs and disbursements for both Plaintiff's and Defendant's Claim is fixed at $500 payable by the Defendant to the Plaintiff.

Deputy Judge M.D. Mongeon

Released: November 13, 2017

SC-003494-15-00
SC-003494-15-D1

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

BETWEEN:

CINDY CHONG
Plaintiff and
Defendant by Defendant's Claim
– and –

CHIA CHEN YU
Defendant and
Plaintiff by Defendant's Claim

Deputy Judge MD Mongeon

Released: November 13, 2017

[1] Cross-examination of Cindy Chong – January 31, 2017, p. 4, line 12

[2] Exhibit 7

[3] Examination-in-chief of Chia Chien Yu, January 31, 2017, p. 29, l. 6

[4] Cross-examination of Cindy Chong – December 12, 2016, p. 61, l. 4

[5] Examination-in-chief of Chia Chien Yu, January 31, 2017, p. 32, l. 5

[6] Exhibit 3

[7] Exhibit 4

[8] Cross-examination of Cindy Chong – December 12, 2016, p. 75, l. 30

[9] *Ibid.*

[10] Exhibit 6

[11] Exhibit 1

[12] Exhibit 1, pages 3 and 4

[13] The LTB's Form L9 which would be used to claim arrears of rent (see: http://www.sjto.gov.on.ca/documents/ltb/Landlord%20Applications%20&%20Instructions/L9.pdf) includes a Checklist. The first question on the checklist is "Is the tenant still in possession of the rental unit?" The additional commentary states: "You cannot file this application if the tenant is no longer in possession of the rental unit."

[14] The rent for August, 2014 was collected as the last month rent deposit.