CITATION: Stamm Investments v. Hobbs, 2016 ONSC 6223
Divisional Court File No.: DC-3-16
Court File No.: 516/15 (Kitchener)
DATE: 2016-10-11

2016 ONSC 6223 (CanLII)

DIVISIONAL COURT

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:	
STAMM INVESTMENTS LIMITED Plaintiff (Appellant)	Kristin A. Ley, Counsel for the Plaintiff (Appellant)
– and –	
ROBERT HOBBS Defendant (Respondent)	No one appearing for the Respondent
	HEARD: June 15 & 23, 2016

The Honourable Justice C.D. Braid

DECISION ON APPEAL

I. OVERVIEW

[1] When a landlord serves a tenant with a Notice to Terminate a Tenancy Early, and the tenant vacates the unit by the date set out in the Notice, is the tenant still liable for prospective rent? That is the key question raised on this appeal.

[2] In this case, the tenant was noted in default. The landlord sought to prove their damages. Deputy Judge Winny dismissed the landlord's claim. The landlord appeals from that Small Claims Court judgment.

[3] The appellant raises the following issues:

A. Was there a denial of procedural fairness by the Deputy Judge?

B. Did the Deputy Judge Fail to Consider a Common Law Remedy?

[4] For the reasons that follow, I answer no to both questions. The appeal is dismissed.

2016 ONSC 6223 (CanLII)

II. FACTS

[5] On May 28, 2014, Stamm Investments Limited (the landlord) and Robert Hobbs (the tenant) entered into a 12-month lease to rent an apartment in Waterloo, Ontario. The lease was from June 1, 2014 to May 31, 2015. The tenant paid first and last months' rent.

[6] The landlord received several complaints from neighbours. On January 5, 2015, the landlord sent the tenant a Notice to Terminate a Tenancy Early (Form N5). The Notice was in the standard fillable form mandated under s.64 of the *Residential Tenancies Act*. The following are the relevant portions of that two-page document, which I shall refer to as "the Notice":

i. **Termination Date**
You must move out…on or before 31 January 2015.

ii. **Part A: Reasons for this Notice**
You, your guest or another occupant of the rental unit has substantially interfered with…the reasonable enjoyment of the residential complex by the landlord or another tenant.

iii. **Part B: Details About the Reasons for this Notice**
[Details were listed of five separate incidents of] noise complaints…which have substantially interfered with other tenants' reasonable enjoyment.
Excessive noise and improper use of the unit must cease immediately.

iv. **Part C: First Notice of Termination**
If you correct the problem [by stopping the activities listed in Part B] within seven days of when you receive this notice, this notice will be void and you will not have to move out.

v. **Important Information**
2. **If the tenant moves out by the termination date in this notice**, the tenancy will end on the termination date.

[7] The affidavit in support of the claim stated that, after serving the tenant with the Notice, the landlord “received no further complaints from [sic] the unit.”

[8] The tenant returned his keys on January 31, 2015. On February 2, 2015, the landlord entered the unit and found it vacant.

III. SMALL CLAIMS COURT PROCEEDINGS

[9] The landlord sued the tenant in Small Claims Court. The landlord sought the equivalent of three months’ rent after the tenant vacated the unit; one month rent based on a reversal of a free rent coupon; one month of hydro; and the costs of cleaning, repairing and advertising the unit.

[10] The tenant was noted in default.

[11] After an Assessment Hearing, the Deputy Judge issued reasons. The court found that the value of the free rent coupon was covered by the last month’s rent that had been paid. The remainder of the claim was dismissed. The Deputy Judge found that the landlord’s Notice gave the tenant an option to stay in the apartment or vacate and terminate the lease. The court found that the landlord was not in a position to enforce the balance of the lease term.

IV. ANALYSIS

[12] A decision will only be interfered with on appeal if the court made an error of law; exercised discretion on the wrong principles; or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence: see *Housen v. Nikolaisen,* 2002 SCC 33*; H.L. v. Canada (Attorney General)*, 2005 SCC 25. On a questions of law, the standard of review is correctness: *General Motors Canada Ltd. v. Johnson*, 2013 ONCA 502.

A. Was There a Denial of Procedural Fairness?

2016 ONSC 6223 (CanLII)

[13] The landlord advances several arguments regarding the perceived lack of procedural fairness at the lower court.

[14] First, the landlord states that the Deputy Judge should have mentioned his concerns about the evidence, and provided the landlord with an opportunity to file additional evidence. The landlord argues this procedure is available under Rule 11.03 of the *Small Claims Court Rules*.

[15] This argument is a misinterpretation of Rule 11.03. The rule permits a judge to request further and better evidence when an assessment is in writing. Although one might argue that this should be available for oral hearings, the procedure is at the judge's discretion. Since it is a matter of judicial discretion, there was no breach of procedural fairness.

[16] Second, it is argued that the Deputy Judge misapprehended the evidence. I disagree. The Deputy Judge found that the tenant vacated the apartment on January 31; this was a conclusion that was available to him based on the evidence.

[17] Third, the landlord argues that it was not required to prove liability. Rule 11.03(5) of the *Small Claims Court Rules* states, "at an assessment hearing, the plaintiff is not required to prove liability against a defendant noted in default, but is required to prove the amount of the claim."

[18] The landlord argues that the Deputy Judge committed an error by concluding that the landlord had not established liability. The landlord even goes so far as to state, in its factum, that the Deputy Judge suggested that the landlord acted dishonestly or ruthlessly in claiming rent for the balance of the fixed term tenancy. In my view, this is a perverse characterization of the reasons.

[19] I find that the Deputy Judge committed no error when he required that the landlord establish liability. Rule 11 of the *Small Claims Court Rules* must be read together with Rule 19 of the *Rules of Civil Procedure*.

2016 ONSC 6223 (CanLII)

[20] Rule 19 states that a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the claim. However, a plaintiff is not entitled to judgment on a motion for judgment, or at trial, merely because the facts alleged in the statement of claim are deemed to be admitted. This is, of course, unless the facts entitle the plaintiff to judgment. The plaintiff must establish its entitlement to judgment as a matter of fact and law: see *Segraves v. Fralick*, [1951] O.R. 871 (C.A.); *Nikore v. Jermain Investment Management Inc.* (2009), 97 O.R. (3d) 132 (S.C.J.).

[21] Small Claims Court, which is a subsidiary of the Superior Court, cannot mechanically process claims. If a claim does not disclose a basis for liability, or if the evidence does not establish the relief claimed, the court must make an order that is just. The court cannot ignore the facts, or the law. This is the overarching duty of every judge.

[22] Deputy Judge Winny made an order that was just, and based on the information available to him. Thus, the landlord was not denied procedural fairness.

B. Did the Deputy Judge Fail to Consider a Common Law Remedy?

[23] The landlord submits that the Deputy Judge failed to consider the common law rules of contract. The landlord argues that the tenant's conduct and early termination of the fixed term lease were material breaches of the lease agreement. Therefore, the landlord submits it has the right to claim damages for the balance of the lease, subject to the requirement to mitigate.

[24] I do not agree that the Deputy Judge made any error of law. He made reference to the leading cases on the issue, which cases deal with the common law arguments. He mentioned the common law and was alive to arguments. Specifically, he considered the language in the *Residential Tenancies Act* on this topic. It cannot be said that he failed to consider a potential common law remedy.

C. Additional Comments

2016 ONSC 6223 (CanLII)

[25] I have been referred to a number of conflicting authorities from the Small Claims Court. This area of the law is unsettled at the lower courts. For that reason, I make the following additional comments.

[26] The *Residential Tenancies Act* contemplates the tenant being put to an election by the landlord. The tenant may elect to vacate and allow the proposed early termination to occur without the need for an application to (or order of) the Landlord and Tenant Board. That is consistent with the stated purposes of the *Act*, which includes informal resolution of residential tenancy disputes.

[27] The Notice to Terminate a Tenancy Early is a form that is approved by the Landlord and Tenant Board. Section 43(2)(a) of the *Residential Tenancies Act* requires that the Notice inform the tenant that, if the tenant vacates the rental unit in accordance with the notice, the tenancy terminates on the date in the Notice.

[28] The Notice is clear: a tenant has the right to terminate the tenancy if they move out by the termination date. If the landlord chooses to serve this Notice, the landlord has no right to claim prospective rent after the termination date.

[29] The *Residential Tenancies Act* provides a complete scheme for termination of residential tenancies. Pursuant to s.17 of the *Act*, common law rules of contract only apply if a breach occurs and the *Act* does not deal with the situation. Since the *Act* provides the tenant with the option to end the tenancy, there is no remedy in common law for prospective rent after termination.

[30] As a matter of principle, it is illogical to suggest that, despite termination of the tenancy, the tenant may continue to be liable for rent after the date of termination. Where a Notice is served, and the tenant accepts the proposed early termination by moving out on or before the termination date, the tenancy is terminated. The obligation to pay rent does not continue beyond the termination date. This would be inconsistent with the plain language of the Notice.

2016 ONSC 6223 (CanLII)

[31] I am mindful of the policy concerns expressed in two Ontario Court (General Division) decisions regarding intentional lease-breaking by tenants: see *190 Lees Avenue Partnership v. Dew*, [1991] 2 O.R. (3d) 686 (C.J. Gen. Div.) and *Pajelle Investments Ltd. v. Braham* (1993), D.L.R. (4th) 187 (C.J. Gen. Div.). However, policy concerns cannot defeat the plain language of the *Act* and the Notice.

V. CONCLUSION

[32] For all these reasons, the appeal is dismissed.

_____

Braid, J.

Released: October 11, 2016

2016 ONSC 6223 (CanLII)

CITATION: Stamm Investments v. Hobbs, 2016 ONSC 6223
Divisional Court File No.: DC-3-16
Court File No.: 516/15 (Kitchener)
DATE: 2016-10-11

2016 ONSC 6223 (CanLII)

DIVISIONAL COURT

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

STAMM INVESTMENTS LIMITED

Plaintiff (Appellant)

– and –

ROBERT HOBBS

Defendant (Respondent)

DECISION ON APPEAL

CDB

Released: October 11, 2016