

**ONTARIO
SUPERIOR COURT OF JUSTICE
*Divisional Court***

B E T W E E N:

Daniel Kelly and Lisa Kelly

**Defendants
(Appellants)**

-and-

PE Real Estate Solutions Inc.

**Plaintiff
(Respondent in Appeal)**

December 15, 2020

DECISION ON APPEAL

On appeal from the judgment of Deputy Judge K. Hales of the Windsor Small Claims Court dated May 30, 2019.

KING J.:

[1] This is an appeal by Daniel Kelly and Lisa Kelly (hereinafter "the tenants" or "the appellants") from the decision of Deputy Judge K. Hales, dated May 30, 2019. Deputy Judge Hales awarded the plaintiff, PE Real Estate Solutions Inc., (hereinafter "the landlord" or "the respondent") the sum of \$4,915.74, exclusive of interest, from the tenants arising out of the termination of a residential lease. Mr. Daniel Grenier is the principal of PE Real Estate Solutions Inc.

[2] The tenants appeal the decision on the basis that the deputy judge erred in law, was without jurisdiction, and misapplied the appropriate legal principles for the following reasons:

1. The landlord had no cause of action in the Superior Court against the tenants with respect to their decision not to vacate on or before July 31, 2018.
2. The issue in dispute between the parties had been settled fully and finally pursuant to a consent order of the Landlord and Tenant Board ("LTB") with respect to all issues raised by the landlord's eviction application. Without limiting the generality of the foregoing, the settlement included any claim made in relation to purported damages alleged by the landlord occasioned by the actions of the tenants during the term of the tenancy. That tenancy expired by agreement on August 26, 2018, reached on August 16, 2020 at the LTB, and codified in an order dated August 20, 2018.
3. In the circumstances of this case, the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("*RTA*"), has primacy over all other acts, agreements and waivers to the contrary. Furthermore, the LTB has exclusive jurisdiction with respect to all matters under its jurisdiction.
4. Such further and other grounds as counsel may advise and this honorable court permits.

[3] For the reasons that follow, I would set aside the decision of Deputy Judge Hales and dismiss the action.

1. Background

[4] The matter arises out of a residential tenancy between the parties, related to premises located at 3121 Jefferson Boulevard, Windsor, Ontario, N8T 2W7. The appellants were the tenants, and the respondent was the landlord.

[5] After the tenants had resided at the property for approximately five years, the landlord sold the property to a third-party purchaser ("purchaser"). The initial closing date for the sale transaction was scheduled on August 3, 2018.

[6] The purchaser's stated intention was to reside at the subject premises on acquisition of the property. Accordingly, the landlord commenced the process prescribed pursuant to s. 49(1) of the *RTA*, to obtain possession of the leased premises on behalf of the purchaser. On May 31, 2018, the landlord served the tenants with a written notice of termination for the purchaser's own use effective July 31, 2018. This date was three days before the closure of the sale agreement.

[7] The notice of termination stated, *inter alia*, as follows:

You do not have to move out if you disagree with what the landlord has put in this notice. However, the landlord can apply to the LTB to evict you. The LTB will schedule a hearing where you can explain why you disagree.

...

The landlord can apply to the LTB to evict you immediately after giving you this notice. If the landlord applies to the LTB to evict you, the LTB will schedule a hearing and send you a copy of the application and the Notice of Hearing

...

If the LTB issues an order ending your tenancy and evicting you, the order will not require you to move out any earlier than the termination date included in this notice.

[8] Once a landlord provides a notice of termination in the approved form, the tenant has the right to dispute the application. Section 43(2) provides as follows:

(2) If the notice is given by a landlord, it shall also set out the reasons and details respecting the termination and inform the tenant that,

(a) if the tenant vacates the rental unit in accordance with the notice, the tenancy terminates on the date set out in clause (1) (b);

(b) if the tenant does not vacate the rental unit, the landlord may apply to the Board for an order terminating the tenancy and evicting the tenant; and

(c) if the landlord applies for an order, the tenant is entitled to dispute the application.

[9] Though, the landlord wanted the tenants to vacate the property on July 31, 2018, the tenants exercised their right not to vacate the property pursuant to s. 43 of the *RTA* and did not vacate the property by that date.

[10] As a result of the tenants' decision not to vacate, it was necessary for the landlord to obtain a hearing date from the LTB by filing an application to end the tenancy and evict the tenants. While the landlord could have made such an application on or about May 31, 2018, or at any time thereafter, no such application was filed until July 31, 2018.

[11] As a result of the fact that the appellants were not going to be vacating the subject property by the original closing date, the respondent could not provide the purchaser with vacant possession on August 3, 2018. Accordingly, the respondent negotiated an extension of the closing date with the purchaser on new terms. Those terms included extending the closing date to September 4, 2018. As well, the landlord incurred a negotiated penalty of \$4,000, plus additional costs such as legal fees, property taxes, and other related expenses.

[12] The hearing before the LTB was held on August 16, 2018. During that process, a mediator from the LTB facilitated the negotiation of an agreement between the parties to mutually "resolve all matters at issue in the application." The terms and conditions of that settlement included the following:

- i) The tenancy would terminate on August 26, 2018.
- ii) In return for vacant possession, the landlord waived rent for the month of August 2018.
- iii) The landlord would make a payment of \$1,500 to the tenants.

[13] Those terms were incorporated into an order of the LTB dated August 20, 2018.

[14] The tenants vacated the premises on August 26, 2018, as agreed.

[15] On August 27, 2018, the landlord provided the tenants with the agreed-to payment in the amount of \$1,500. Concurrently, the landlord served the tenants with a Small Claims Court claim seeking damages alleged to have been occasioned by their failure to vacate before the date set out in the notice to evict, namely July 31, 2018.

[16] The trial of that action occurred on May 30, 2019, before Deputy Judge K. Hales. At the trial, the landlord was represented by its principal, Mr. Grenier. The tenants were represented by Mr. Z. Battiston, a student-at-law from Community Legal Aid.

[17] The thrust of the landlord's claim was two-fold. Firstly, the landlord sought damages because the tenants' action of not vacating the premises before the closing date of the sale on August 3, 2018 caused the landlord to breach the contract of sale with the purchaser. As a result, the landlord suffered damages in several enumerated respects.

[18] Secondly, the landlord asserted that while the *RTA* provided the tenants with the right to challenge the termination of the lease, the Act itself only deals with issues relating thereto, but does not have jurisdiction over the type of damages the landlord suffered vis a vis the requirement to extend the closing date with the purchaser.

[19] The tenants argued before the Small Claims Court that they seized their statutory right to challenge the termination of the lease. They were under no obligation to leave until an agreement was reached, or they were ordered to be evicted by the LTB. There was no requirement on their part to file any application with the LTB to challenge the notice. That obligation fell to the landlord. No application was made until July 31, 2018—just days before the closing. The landlord submitted the application a full two months later than when they could have made such an application. The tenancy did not legally

terminate until August 26, 2018, as ordered by the LTB, pursuant to the parties' agreement.

[20] The deputy judge found in favour for the landlord (plaintiff) at trial. In particular, Deputy Judge Hales placed significant weight on the timing of when the tenants indicated they wanted to exercise their legal rights to challenge the eviction. The deputy judge stated, at p. 57 of the transcript of the proceedings:

I find that the tenant knew, or ought to have known, that the landlord required vacant possession for the landlord's deal, that the tenant - if the tenant was having issues - should have provided that information to the landlord ahead of time, rather than the day before the notice was to take effect. This caused the landlord to have to negotiate the deal. It caused the landlord to have to pay additional property taxes, insurance, and the hot water tank rental fees.

[21] At trial, the deputy judge upheld the landlord's claim for damages in the amount of \$4,915.74 on the basis that the tenants did not vacate on or before the eviction date - July 31, 2018.

2. Jurisdiction of the Court

[22] This appeal is pursuant to a final order of a judgment of the Small Claims Court in the amount of \$4,915.74, excluding interest.

[23] Section 31(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides as follows:

31. An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,
(a) for the payment of money in excess of the prescribed amount, excluding costs; ...

[24] Accordingly, the appellants take the position that an appeal lies to the Divisional Court because the amount in issue exceeds \$2,500, exclusive of costs.

[25] The appellants also rely on the extension of time granted by this court to extend the time to file their notice of appeal, dated August 13, 2019. Leave to appeal is not required.

[26] I find that the court has jurisdiction to hear this appeal.

3. Issues

[27] The following issues are before the court:

- Issue # 1: Did the landlord have a cause of action in Small Claims Court for the failure of the tenants to vacate prior to July 31, 2018?
- Issue #2: Did the consent order of the L TB dated August 6, 2018 constitute a full and final settlement of all issues raised by the notice of eviction?
- Issue #3: Does the *RTA* have exclusive jurisdiction over all other Acts?

4. Analysis

Issue # 1: Did the landlord have a cause of action in Small Claims Court for the failure of the tenants to vacate prior to July 31, 2018?

[28] The tenants submit the deputy judge committed an error in law in concluding that the landlord had a cause of action arising from the tenants' failure to vacate the premises prior to the original termination date of July 31, 2018.

[29] The landlord argues that by overstaying the July 31, 2018 notice of termination date (and the August 4, 2018 closing date) for the sale of the subject property, the tenants caused the landlord to breach the agreement of purchase and sale. As a result, the tenants are liable for damages to compensate the landlord for the costs incurred to extend the closing date.

[30] Further, the landlord submits that while s. 43(2)(c) gives a tenant an unqualified right to dispute an eviction hearing at the L TB, that right does not mean they were in lawful possession on July 31, 2018, or on August 4, 2018.

[31] I find that the deputy judge erred in law in concluding the landlord had a cause of action.

[32] The *RTA* sets out a complete code dealing with the termination of a tenancy. Section 49(1) of the *RTA* provides for an eviction mechanism when a landlord is required to terminate a tenancy as a result of a sale to a purchaser who, in good faith, requires possession of the leased property for their own occupation.

[33] It was an error to attribute responsibility (and by extension legal liability) to the tenants as a result of the landlord having to extend the closing date of the transaction for several reasons.

[34] The agreement of purchase and sale was made between the landlord and the purchaser. In no way did that agreement create any legal obligation on the tenant.

[35] Only the landlord could trigger a hearing before the LTB to effect an eviction.

[36] A tenant with a notice to vacate has the right to either vacate in accordance with the notice or challenge the eviction. If a tenant does not vacate (like in this case), the landlord has a statutory right to make an application for an eviction order under s. 43(1) and s. 69(1) of the *RTA*. Once a notice is given, an application can be made by a landlord to the LTB at any time for an eviction hearing.

[37] In this case, the landlord could have made such an application at any time after May 31, 2018. However, the landlord made the application on July 31, 2018.

[38] The powers of the LTB are extensive and are prescribed ins. 83 of the *RTA*. They include the power to grant an eviction, delay, or postpone same: see s. 83(1)(a) & (b). The LTB can also make an order for arrears.

[39] I have concluded that the deputy judge made a number of palpable and overriding errors in her interpretation of the *RTA* and her conclusion that the tenants were liable for failing to give the landlord sufficient notice of their intention to challenge the May 31, 2018 eviction notice.

[40] To reiterate, the *RTA* creates no obligation on tenants to provide notice of intention to challenge an eviction notice. Notwithstanding that, the deputy judge determined that if the tenants were having issues, they "should have provided that information to the landlord ahead of time; rather than the day before the notice was to take effect." The deputy judge imposed a notice obligation on the tenants when no such obligation is required in the *RTA*. That is, she erred in attributing "fault" or legal "responsibility" to the tenants in waiting until just before the termination date set out in the notice to indicate they were not vacating. The tenants were under no obligation pursuant to the *RTA* to indicate their intention not to vacate by any specific date, or during any specific time period. In reviewing the transcript, it is evident that the deputy judge did not fully appreciate that the obligation to take the necessary steps to evict pursuant to the *RTA* rests solely with the landlord. The exchange with the student-at-law representing the tenants demonstrates that misunderstanding, at pp. 53 and 54:

THE COURT: Right. Yes. If the landlord applies for an order, the tenant is entitled to dispute the application of course.

MR. BATTISTON: And in this circumstance, Your Honour, that is in fact what my client was doing in this instance, and they have that legal right to do under this act.

THE COURT: Right. But how is the landlord to know that your client is not going to vacate the rental unit under the N2 - or N12, pardon me?

MR. BATTISTON: So under ...

THE COURT: So you're saying every landlord should be bringing an application right away.

MR. BATTISTON: If a landlord has an instance in which they need a tenant gone from that premises, best practice would suggest then, Your Honour, that an application for eviction would be filed subsequent to the N12, to ensure that tenant is evicted from that property, and so that whatever circumstance that the N 12 was served for can proceed without a potential breach, or some other instance, Your Honour.

THE COURT: So you're saying it's fully on the landlord, so there should be no costs payable at all, is that right?

MR. BATTISTON: Correct, Your Honour. Yes.

THE COURT: All right. Go ahead.

[41] The deputy judge erroneously concluded that, as part of the statutory process for eviction, the tenants were obligated to give notice of their intention to challenge the eviction at an earlier (unspecified) date. However, the *RTA* does not prescribe a timeline or deadline by which a tenant must give notice of an intention to challenge an eviction notice. It was an error to conclude there was any timeline or deadline, or that there was a shared legal responsibility in that respect.

[42] Pursuant to s. 71 of the *RTA*, a landlord can make application to the LTB immediately upon giving notice of eviction under to s. 69 of the *RTA*. Given this provision, it was an error in law for the deputy judge to conclude that the tenants were in any way required to give notice - reasonable or otherwise. The landlord had control of the process by law and failed to take steps in a timely manner to appear before the LTB. Pursuant to the *RTA*, the landlord had the unfettered and unqualified right to have filed such application two months earlier. Had the landlord done so, the hearing before the LTB would have been held well in advance of the original closing date. In that manner, the landlord could have obtained vacant possession.

[43] The deputy judge erred in interpreting the Act in a manner that ignored, or otherwise disregarded, the statutory and unambiguous rights of the tenants to challenge the eviction notice by not vacating the premises. Section 43 of the *RTA* provides a tenant who receives a notice of termination the right to refuse to vacate the premises until there is an order by the LTB terminating the tenancy and evicting the tenant. By her ruling, the deputy judge shifted the responsibility from the landlord to give a notice of eviction and proceed to the LTB in a timely manner to a joint responsibility that includes an obligation for tenants to state their intention. This is contrary to the provisions of s. 43 of the *RTA*.

[44] Section 3 7 (1) of the *RTA* provides that a tenancy may be terminated only in accordance with the Act.

[45] Pursuant to the order of the LTB dated August 20, 2018, the tenancy between the parties did not legally terminate until August 26, 2018.

[46] It was patently unreasonable for the deputy judge to hold the tenants liable for not vacating the premises during the term of the tenancy.

[47] It was an error to hold the tenants liable to the landlord with respect to its dealings with a third party without a finding that the tenants violated the *RTA* in any manner.

[48] The deputy judge found the tenants "knew or ought to have known that the landlord required vacant possession." That phrasing denotes that the tenants had some type of legal obligation to the landlord regarding his dealings with the purchaser. No such duty existed in contract or tort. In the context of the statutory scheme for evictions of a tenant in the event of a bona fide sale to a third-party purchaser intending to use the premises, it was an error in law to conclude that the tenants' failure to act- to either notify earlier or vacate on or before July 31, 2018- was actionable.

[49] The landlord's damages were not caused by the tenants' refusal to vacate the premise an exercise of their statutory right to challenge the eviction notice. Rather, it was the failure of the landlord to take timely steps to ensure that the LTB hearing was conducted before the termination date (and, by extension, the closing date). That caused the landlord to have to renegotiate the agreement of purchase and sale.

Issue #2: Did the consent order of the LTB dated August 16, 2018 constitute a full and final settlement of all issues raised by the notice of eviction?

[50] The tenants submit the deputy judge erred in failing to conclude that the minutes of settlement resolved "all matters at issue in the application" and, as a result, did not preclude the landlord from making a claim for damages.

[51] In response, the landlord submits that it was fatal to the tenants' position that they did not agree that the LTB should have full jurisdiction on the hearing on the matter.

[52] I have concluded that it was an error of law for the deputy judge to conclude that a cause of action for damages existed outside the scope of the *RTA*, the minutes of settlement, and the resulting order of the LTB. The deputy judge had no jurisdiction to make such a ruling.

[53] Every legal aspect of this matter arises out of, and in respect of, the residential tenancy between the parties.

[54] The *RTA* covered all terms and conditions of the lease arrangement. The landlord gave notice of termination (eviction) pursuant to the Act and then pursued eviction to the LTB, as required.

[55] The order of the LTB dated August 20, 2018, "resolved all matters at issue in the application" and requested an order on consent to be issued by the Board. Based on that wording, it was clear and unambiguous that all issues arising out of the tenancy between the parties were resolved.

[56] The process before the LTB clearly and fully resolved the following issues:

- i) The date of termination of the lease - August 26, 2018;
- ii) The date of departure of the tenants (August 26, 2018); and
- iii) Compensation to the tenants for August in the amount of \$1,500.

[57] On a reading of her reasons, the deputy judge erred in law in finding liability on the part of the tenants based on provisions of the *RTA*. The tenancy could only be terminated pursuant to the Act, and the minutes of settlement and subsequent order ended that process.

[58] The deputy judge erred in not concluding that the minutes of settlement resolved all issues arising out of the tenancy. It was an overriding and palpable error to find that a cause of action existed outside the regime of the *RTA*.

[59] The agreement of purchase and sale was between the landlord and a third party. The tenants were in no way a party (legally or beneficially) to that transaction.

[60] But for the application to the LTB, there could be no issue for the landlord being unable to provide the purchaser with vacant possession on August 4, 2018.

Did the deputy judge have jurisdiction to award damages at common law?

[61] In the factum, the respondent submits that the deputy judge had jurisdiction to award "financial damages" other than monetary exchanges for services with the purpose of renting a residential unit, damages to contents, and rights to safe and enjoyable living. It claims that the LTB does not have jurisdiction over financial damages that occur to a landlord when the actions of the tenant cause the landlord to breach a purchase and sale agreement with a new purchaser.

[62] With respect, that interpretation is flawed.

[63] The landlord, at para. 21 of their factum, references several ways in which a landlord can claim damages. However, the landlord states that none of these provisions relate to the right to "claim monetary damages for forced delays in selling the property."

[64] The *RTA* regulations and LTB rules prescribe a complete code governing when a tenant may be liable. The listing of those conditions is limiting.

[65] There is nothing in the *RTA* addressing "forced delays in selling the property." The failure to include that consideration in the *RTA* does not mean that, by default, a common law entitlement to make such a claim exists.

[66] Furthermore, and, in any event, there can be no common law claim for such damages on the evidence of this case.

[67] The deputy judge refers to the date of notice which, in her view, was an actionable delay caused by the tenants' exercise of their statutory right to challenge the eviction notice. All of that is grounded in an interpretation of the wording of the scheme and the provisions available pursuant to the *RTA* that allow a landlord to evict a tenant for a purchaser of the leased premises. It cannot be both ways. If the claim is grounded in the Act, then the minutes of settlement and resultant LTB order are a complete resolution of all issues.

[68] Alternatively, if the landlord is correct and the board cannot rule on "damages" for forced delays in selling the property, then the deputy judge committed different errors in law. That is, she grounded a claim for damages in either a non-referenced statute, or a common law duty of care or contract not covered by the *RTA*. In either way, she committed a reversible error.

[69] In this respect, the tenants have referred the court to *Efrach v. Cherishome Living*, 2015 ONSC 472, in which the court addressed the issue of whether the exclusive jurisdiction of the LTB was engaged.

[70] Horkins J. stated, at para. 10:

The Deputy Judge correctly referred to and applied the test as set out by Perell J. in *Mackie v. Toronto*, 2010 ONSC 3801 at paras. 43-44. The Deputy Judge set out the test at para. 10 of her reasons:

The real test is that described at page 7 of the *Luu* case when it reviewed the reasoning of then Deputy Judge Bale and Justice Perell in relation to the Mackie

v. Toronto decision. As Justice Perell put the point: "It doesn't matter whether a tenant's claim is for a cause of action ordinarily within the jurisdiction of the courts and upon which the legislation may be silent. Rather, the court must determine the essential character of the dispute and, if having done so, the court finds that the subject matter is expressly or inferentially governed by the statute, then the claim is within the exclusive jurisdiction of the Board.

[71] I reject the landlord's submission that the failure of the tenants to raise the issue of the landlords' subsequently filed claim for damages before the L TB provides a basis for its claim. No party can be required to raise a jurisdictional issue in anticipation of a claim in a different legal jurisdiction that has not even been contemplated or filed.

[72] In any event, such a "failure" cannot legally confer jurisdiction on the Small Claims Court judge to award damages at common law when no such jurisdiction exists.

Issue #3: Does the *RTA* have exclusive jurisdiction over all other Acts?

[73] Section 3(4) of the *RTA* provides as follows:

If a provision of [the *Residential Tenancies Act*, 2006,] conflicts with a provision of another Act, other than the *Human Rights Code*, the provision of the Act applies.

[74] This issue is moot. No other Act was referenced in the trial decision that would trigger a premonitory analysis.

[75] In any event, given my conclusions with respect to issues #1 and #2, it is unnecessary to address this issue.

5. Conclusion

[76] The deputy judge committed errors of law by concluding:

- i) That the minutes of settlement dated August 16, 2018 and the order issued by the L TB on August 20, 2018 did not constitute a full and final resolution of all issues arising out of the tenancy between the parties and the termination of same.
- ii) That the tenants were required to give any notice of their intention to challenge the notice of eviction when no such obligation is contained in the *RTA*.
- iii) That a cause of action existed outside the scope of the *RTA* while relying on provisions of the Act to base a finding that the tenants did not notify the landlord soon enough that they were not going to vacate pursuant to the eviction notice.

iv) By finding the tenants liable for damages arising out of dealings between the landlord and the purchaser when the tenants were not legally a party to that transaction.

[77) For all these reasons, the appeal is allowed, the decision of the deputy judge is reversed, and the claim of the landlord is dismissed.

6. Costs

[78) In the event the tenants are seeking costs and the parties are unable to agree on the question of costs, they may file brief written submissions with the court, no more than five (5) double-spaced pages (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the formatting standards of r. 4.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the following schedule:

- a. The appellants shall deliver their submissions within 30 days following the release of these reasons;
- b. The respondent shall deliver their submissions within 30 days following service of the appellants' submissions;
- c. The appellants shall deliver their reply submissions, if any, which shall be limited to no more than three (3) double-spaced pages, within 10 days following service of the respondent's submissions; and
- d. If either party fails to deliver their submissions in accordance with this schedule, they shall be deemed to have waived their rights with respect to the issue of costs, and the court may proceed to make its determination in the absence of their input or give such directions as the court considers necessary or advisable.