

CITATION: Kim v. Salomon, 2017 ONSC 7224
DIVISIONAL COURT FILE NO.: 509/17
LTB NOS.: TNL-90491-17 and TNT-92416-17
DATE: 2017/12/01

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:)
)
MOON SOOK KIM) *Arkadi Bouchelev*, for the
) Respondent/Landlord
)
Respondent/Landlord)
)
– and –)
)
AMNON SALOMON) *Nicholas Wall*, *Amicus* for the
) Appellant/Tenant
)
Appellant/Tenant)
)
) **HEARD at Toronto:** December 1, 2017

2017 ONSC 7224 (CanLII)

KITELEY J. (Orally)

[1] The landlord issued an N-12 giving notice to the tenant to end the tenancy because of an intention to occupy the unit.

[2] The tenant responded by issuing a Form T6 application making allegations about lack of maintenance. The hearing of both of those applications was conducted on May 3, and July 5, 2017. The decision of the Tribunal is dated July 14, 2017 and in it, the application of the landlord was granted. The application of the tenant was dismissed.

[3] The Order of the Tribunal indicated that the tenant should have a couple of weeks extra time in order to vacate but possession was ordered at the end of August 2017.

[4] The tenant requested a review and the Order dated August 17, 2017 indicates that the Tribunal refused the request to review and specified that the July 14, 2017 order was unchanged.

[5] On August 31, 2017 and September 1, 2017, the tenant served a Notice of Appeal from those Orders and on September 1, 2017 he filed the Notice of Appeal in the Divisional Court office along with a certificate respecting evidence which indicated, amongst other things, that the tenant would provide the transcript of the hearing.

[6] Rule 61.05(5) requires an appellant within 30 days of filing the Notice of Appeal to file proof of ordering the transcript. The date for that was on or about October 1, 2017.

[7] The landlord brought this motion to quash along with a request for alternate relief. The motion was originally returnable November 30, 2017 in the morning. It was before me on that occasion. The landlord provided an affidavit of service of the motion record, the factum and the book of authorities both by regular mail and email.

[8] On November 30, the tenant did attend but said he had not received any of the material either by regular mail or email. He said he had received a letter about a week earlier sent by the Landlord Tenant Board confirming that the Board would not attend on November 30, 2017 and he said that that was the first he heard about the motion to quash. He arrived yesterday morning without any responding material and taking the position that he had not received the moving party's material in either form of service.

[9] Yesterday, he had the advantage of *pro bono* counsel who assisted the tenant in asking for an adjournment for three weeks. As I indicated in the endorsement I made yesterday, an adjournment for three weeks to file responding material would effectively mean an adjournment of five weeks because by the time the three weeks came along, there would be no Divisional Court motion days until early in January.

[10] On the record yesterday, it appeared that the tenant had filed a Notice of Appeal, obtained a stay and done nothing to pursue the appeal. Yesterday, I asked him about the transcript and he produced emails about having acquired the digital version and emails that showed some efforts to arrange a transcriber.

[11] Mr. Bouchelev advised yesterday, that he had in the past routinely communicated by email with the tenant and on this particular occasion, the email version of the documents did not bounce back.

[12] In all those circumstances, I decided to adjourn the motion to today at 2:00 p.m. to give the tenant an opportunity to respond. Balancing the rights of the landlord and the tenant, I concluded it was fair to both to proceed quickly but after giving the tenant an opportunity to file responding material.

[13] The tenant arrived at 2:00 p.m. today with a seven page affidavit that responds in some considerable detail to the affidavit filed by the landlord in connection with the motion. He did produce a copy of an email as indicated by Mr. Bouchelev but he said that that email had gone into spam and so he says he saw it for the first time yesterday.

[14] Again today, the tenant had the advantage of *pro bono* counsel even though it was on a Friday afternoon and not the regular attendance day. Mr. Wall made submissions on the legal issues and then the tenant made submissions on the facts.

[15] The test to quash an appeal is high. I will start with the Notice of Appeal which must be considered in the context of s. 210 of the *Act*. An appeal is on the question of law only.

[16] I am going to read the first and second grounds for the appeal:

- (1) **The LTB Order/Ruling** in excess of jurisdiction (in a practical way), because the case of the property ownership, and the sale agreement, from Dec. 2009, and my rights of possession of the property (until the year 2020) according to the condition of the sale agreement, are in dispute and in claim that I filled at the Ontario Superior Court, on Mar. 24 2017 (file no. CV-17-572216) that is in motion.
- (2) **The LTB platform** is not suitable to fairly and properly run a complex case that the root of it is dispute over the property sale agreement, the agreement validity, and the condition in the agreement, especially when fraud involved, and different version of the agreement presented, and the Judicator himself said that the sale agreement version, presented by the respondent (Mrs. Kim) do not make sense.

[17] Ground Nos. 1 and 2 overlap and require background. The tenant is the prior owner of this property. He sold and agreed with the purchaser that he would remain as tenant and he has. The issue in Ground No. 1 was that on account of this background, the Landlord and Tenant Board exceeded its jurisdiction by hearing the case. The tenant took the position that the member should have adjourned until after the motion with respect to the Superior Court case he had launched was heard in September 2017. The Tribunal refused to adjourn.

[18] This issue is a question of law but the law is clear. The Landlord and Tenant Board has jurisdiction over the tenancy and only the Landlord and Tenant Board could make an order as to possession.

[19] The first ground of appeal has no merit. The second ground of appeal is related. The Tribunal gave detailed reasons and made findings of mixed fact and law as to the terms of the tenancy. There is no merit to the second ground of appeal.

[20] I am reading the third ground of appeal:

The LTB process and order have error of fact finding, lack of evidentiary, skip or ignore important fact and evidence, inadequate reasons, the all process follow with bias and lack of fairness/due process, and the judicator even raised an issue on own initiative.

[21] As is apparent, that third ground lacks specifics. Based on the tenant's submissions, including his affidavit filed today, it is clear that the tenant disagrees with the finding and conclusions of the Tribunal.

[22] As for procedural fairness, it is the case that the Tribunal did not grant the adjournment to await the outcome of the Superior Court but that does not create a breach of procedural fairness because there was no overlap between the Superior Court proceedings and the Landlord Tenant proceedings. The third ground of appeal has no merit.

[23] In his submissions, the tenant referred repeatedly to what had occurred at the hearings on May 3 and July 5, 2017. His lengthy affidavit served today reflects his view of what did or should have happened. That is not helpful. The tenant had an obligation to provide proof of ordering the transcript as he committed to doing in his certificate of evidence filed September 1, 2017.

[24] I raised that with him yesterday and he pointed out correspondence by email with respect to acquiring the digital version of the hearing and the challenges he was having in having it transcribed. I indicated yesterday that there were challenges to him opposing this motion to quash when the transcript was not available. Today he has still not provided proof of ordering the transcript. He does not have the certificate of the transcriber. If he had complied with the rules and ordered it by October 1, 2017, it may well have been ready or almost ready and that would have contributed greatly to the motion to quash and whether there were merits of the appeal. He is solely responsible for failing to comply with the rules.

[25] In his affidavit sworn December 1, 2017, the tenant acknowledges that he has known since March 2017 that the landlord and his wife were legally separated; that the wife would be the owner of the property; and that the wife and her children would move into the house. He has not challenged the validity of the owner's planned occupation. Eight months later he is still in possession and after filing a Notice of Appeal and certificate of evidence, he has done nothing to pursue the appeal.

[26] The absence of merit to the appeal and the failure to prosecute the appeal, leads me to the inference that the appeal is intended as a delaying tactic. This is one of those clear cases where the appeal should be quashed. I am making an order that the motion to quash the appeal is granted.

[27] I have endorsed the Motion Record as follows: "Motion to quash appeal resumed at 2:10 p.m. The Tenant served and filed an affidavit. After hearing submissions and giving oral reasons, I heard submissions as to costs. Counsel for the moving party asks for full indemnity costs of \$10,621.23. I agree with *pro bono* counsel that full indemnity costs were not warranted and an amount that is more proportionate to the amounts in issue is appropriate; bearing in mind that the fundamental issue of possession is important to both parties. The Court is grateful for

the assistance of *pro bono* counsel on November 30, and December 1, 2017. Order to go as follows:

- (1) Appeal is quashed. Certificate of Stay issued September 7, 2017 is vacated.
- (2) Tenant/Appellant shall pay costs to the Landlord in the amount of \$4,000.00.
- (3) Landlord may take out this order without approval by Tenant as to form and content.”

KITELEY J.

Date of Reasons for Judgment: December 1, 2017

Date of Release: December 6, 2017

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Respondent/Landlord

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Appellant/Tenant

ORAL REASONS FOR JUDGMENT

KITELEY J.

Date of Reasons for Judgment: December 1, 2017

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