ENDORSEMENT

Court File No.: CV-19-00028402-A1CP

Date: May 27, 2021

PLAINTIFF: Gordon et al DEFENDANT: 837690 Ontario Limited

Counsel: For Plaintiff: S. Strosberg, H. Strosberg and J. Smith

For Defendant: C. Stribopolous and C. Galea

For Third Party, Troy Life:

For Third Party, Tyco Integrated: L. Lorimar

For A.P.I. Alarm Inc.:

For MK Electric Ltd.: M. White

NICHOLSON J.:

[1] This proceeding is brought under the *Class Proceedings Act, 1992* and has yet to be certified. The certification hearing is scheduled for September 2021. The proceeding arises out of a fire at an apartment building ("Westcourt Place") in Windsor, Ontario that occurred on November 12, 2019.

[2] The proposed class includes the tenants of the building. The defendant is the owner and landlord of the building. There are various third parties who are alleged by the defendant to have played a role in the fire.

[3] There are two motions before me today. The plaintiff class members essentially seek directions and orders that the defendant pay the costs of packing, removing, cleaning and storing the contents of the class members' apartments while the building is renovated. The defendant seeks an order permitting it to communicate directly with the remaining tenants for the purpose of informing them that their leases are frustrated as a result of the fire in combination with the Covid-19 pandemic. The defendant also seeks an order that the tenants remove the contents of their units within 30 days so that the renovations can begin.

[4] The matter was scheduled for argument today. I was notified that the parties had reached an agreement on a consent order and provided a draft of the order, as well as a letter that the defendant intended to send to the tenants pursuant to the order.

[5] Upon reviewing the consent order and the attached letter I had concerns with my jurisdiction to make such an order in this case, even if on consent of the parties. I advised counsel of those concerns in advance of the hearing.

[6] The draft consent order provides, *inter alia*, that:

> (a) the defendant may communicate with the tenants who still have contents in their apartments and are not represented by counsel, by sending the attached letter (in paragraphs 2 and 3 of the draft order).
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> (b) on or before July 1, 2021, each tenant must elect to pack and/or move all or part of their belongings on their own at their own expense, or provide Westcourt with permission to do so on their behalf at the defendant's expense. If the tenants do not respond on or before July 1, 2021, then the defendant can remove the contents from the units and store them so that the units can be cleaned (paragraph 4 of the draft order).
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> (c) the defendants shall provide counsel for the plaintiffs with proof that the movers/packers/cleaners are bonded and insured, that the storage facility is climate controlled and that they have a policy of insurance in respect of the contents (paragraph 5 of the draft order).
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> (d) the entire expense of the inventory, insurance, packing, cleaning and moving the contents of the units shall be solely at the expense of the defendant until further order of the court (paragraph 6 of the draft order).
>
> (e) once the units are renovated and the contents cleaned, the defendant shall move the contents back to Westcourt Place or to another location within Windsor-Essex County solely at the expense of the defendant (paragraph 7 of the draft order).
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> (f) the defendant will, in good faith, make best efforts to provide access to the stored contents to the tenants of Westcourt Place from time to time at the storage unit (paragraph 8 of the draft order).

[7] It should be noted that the prior case management judge, Verbeem J., had made an order in March of 2020 that prohibited the defendant from communicating with the tenants for the purpose of having them remove their belongings.

[8] My concern centres upon those tenants that have not "signed on" to the class proceedings and may never choose to do so. Their interests are not being protected by counsel for the plaintiffs or by the defendant landlord. It is this court's obligation to ensure that their interests are considered as well.

[9] Furthermore, there may be ramifications that the parties may wish to consider with respect to the certification proceedings in September if I assume jurisdiction at this time. Indeed, when I raised this at the hearing today, counsel for the defendant indicated that he was alive to the jurisdiction issue and that it would be a focus of his position at the certification hearing.

Jurisdiction:

[10] Counsel for the plaintiffs urged me to consider the length of time it would take if landlord/tenant proceedings were required in respect of all these tenancies. While there would be tremendous delay, the parties to a proceeding cannot clothe the court in jurisdiction it does not have, even if on consent. A court does not have the option to assume jurisdiction for the sake of expediency.

[11] Pursuant to the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, ("*RTA*"), the Landlord and Tenant Board has exclusive jurisdiction to determine all applications under the Act and with respect to all matters in which jurisdiction is conferred on it by the Act, (ss. 168(2)).

[12] However, s. 207 (1) of the *RTA* limits the Board's jurisdiction to the monetary limits of the Small Claims Court, which are presently $35,000. S. 207 (2) provides as follows:

> (2) A person entitled to apply under this Act but whose claim exceeds the Board's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction.

[13] Accordingly, the Act does not grant the Board exclusive jurisdiction over all claims of non-repair against a landlord. The Board has jurisdiction over a tenant's or former tenant's claim for damages where the "essential character of the claim" is for non-repair and within its monetary jurisdiction. S. 207(2) extends jurisdiction to the Superior Court of Justice over landlord/tenant matters if a claim exceeds $35,000. (See: *Letestu Estate v. Ritlyn Investments Limited*, 2017 ONCA 442).

[14] Justice Perrell, in *Mackie v. Toronto (City) and Toronto Community Housing Corporation*, 2010 ONSC 3801, [2010] O.J. No. 2852 is credited with establishing the

"essential character of the claim" test in the *RTA* context. He stated at paras. 43 and 44 as follows:

> [43] It is, therefore, my opinion that the Board has exclusive jurisdiction to resolve the Plaintiff's repair claims. Further, it is my opinion that characterizing the claims as a negligence claim or as an Ontario Human Rights Code or Charter claim does not infuse the Superior Court with jurisdiction. From a jurisdictional perspective, it is the substance and not the form of the claim that matters, and the substance of the Plaintiffs' claim is a repair claim between a landlord and tenant that is within the monetary jurisdiction of the Board. See *Politzer v. 170498 Canada Inc*., [2005] O.J. No. 5224 (S.C.J.) at para. 27; *Brown v. Bermax Capital Ltd*., [1999] M.J. No. 67 (C.A.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
>
> [44] The Plaintiff's characterization of the repair problems as negligence or as discrimination in breach of the *Code* and the *Charter* does not assist them. If the essential character of the dispute, in its factual context, arises from the statutory scheme, it does not matter that the claim is asserted for a cause of action which is ordinarily within the jurisdiction of the courts and upon which the legislation may be silent. The characterization of the dispute is resolved by whether the subject matter of the dispute expressly or inferentially is governed by statute: *Toronto Police Association v. Toronto Police Services Board*, [2007] O.J. No. 4156 (C.A.), leave to appeal to S.C.C ref'd Sept. 25, 2008, *Regina Police Association v. Regina (City) Board of Police Commissioners* [2000], 1 S.C.R. 360. In the case at bar, the dispute about repairs and complaints about compliance with housing standards is a repair claim for under $10,000 and comes within the Board's exclusive jurisdiction.

[15] Whether or not these claims are considered to be in substance a landlord/tenant matter caught by the provisions of the *RTA* may be significant in this case. If it is not, in substance, such a claim, then this court has no jurisdiction to make eviction orders or determine any rights as between the parties as landlord/tenant. If, however, the claim is properly categorized as landlord/tenant then the remedies that may or may not be available to the plaintiffs *could* (I choose not to decide at this juncture) be affected.

[16] I agree with counsel for the defendant that these motions are not the proper context to determine the jurisdiction issue. However, this court ought not to assume jurisdiction at this juncture for the purpose of making landlord/tenant orders and then subsequently be asked to consider reaching a different conclusion on jurisdiction at the certification hearing. The court either has jurisdiction or it does not.

[17] Furthermore, even though the amount claimed in the Class Action as a whole significantly exceeds $35,000, the proper view *may* be to examine each of the proposed

claims individually, not in the aggregate (see *Gates v. Sahota*, 2018 BCCA 375, leave to appeal to the SCC refused, 2019 CanLII 37465(SCC)).

[18] I do accept that it is sufficient that each of the claim seeks in excess of $35,000, even if the amount awarded is ultimately less than $35,000, unless it is patently a sham for the purposes of accessing the Superior Court. Such a tactic could likely be addressed by the court through an award of costs.

[19] In my view, there are, in this particular case, three different categories of tenants. The first is the residential tenants that intend to be class members. These tenants have asserted claims that arguably individually exceed $35,000 and, accordingly, this court would have jurisdiction to make landlord/tenant type orders that the Board would be permitted to make. In that regard, I note that s. 207(2) provides that the court may exercise *any* powers that the Board could have exercised, which necessarily includes eviction notices, and findings of frustrated contracts.

[20] The second category of tenants are the commercial tenants. These tenants are not governed by the *RTA* at all. Accordingly, if the Superior Court is exercising its jurisdiction pursuant to s. 207(2) of the *RTA* it does not have the authority to do so in respect of those tenants.

[21] Finally, there are the residential tenants that do not intend to be a part of the class action. The claims of these tenants, if any, have not yet been presented, to my knowledge, and are not yet quantified. These tenants may *never* present claims arising out of this fire. This court can have no jurisdiction to evict these tenants or take any other actions under the *RTA* in respect of these tenants, in my view. If the landlord wishes to terminate any of those tenancies, the landlord must do so through the Board.

[22] The parties provided me with an order made by Justice Belobaba dated July 17, 2019 in a similar Class Proceeding, *Clement Chu, et al v. Parwell Investments Inc*., et al, (CV-18-00604410-00CP). In that case, Belobaba J.'s order specifically refers to the relocation of the "class members". No provisions of that order dealt with any tenants that were not members of the class, on my review. Counsel for the plaintiffs advises that the certification hearing had already taken place in that case by the time the order was made.

[23] Counsel for the plaintiffs suggests that it is impossible to categorize tenants as class members or not, prior to the certification hearing. While that may be the case, that fact does not alter the concern I have with respect to jurisdiction. There are tenants whose rights as tenants will be affected by the consent order, and whose rights are specifically addressed in the letter appended to that order, who would not properly fall within the jurisdiction of this court under s. 207(2).

[24] I am very mindful of the effort that counsel made to negotiate and craft the consent order. It is important to all parties that the building's renovations commence and the issues concerning the tenancies be resolved. The subject fire occurred 18 months ago. It is my hope that after hearing my concerns today that the parties can tweak the order in such a way as to allay my fears, and do so quickly.

[25] By way of guidance, I agree that there needs to be an order that permits the defendant to communicate with the tenants, as set out in paragraphs 2 and 3 of the draft order provided. In my opinion, Justice Verbeem's order was not intended to remain in place for this length of time and to present a barrier to any renovations.

[26] I applaud the defendant for agreeing to accept the expenses of removing and cleaning the contents of units.

[27] However, it is paragraph 4 of the draft order that gives me pause. In my view, the court ought to be satisfied that it has the jurisdiction over all the tenants before it makes an order permitting access to a tenant's unit. It may be that the court has jurisdiction over the putative class members but the parties should consider carefully whether they are prepared to concede that point as they may be bound by the ramifications of that in the future. The court could make an order that binds only "class members" (or some variation of that phrase) as Justice Belobaba's order did.

[28] Another possibility is that the defendant landlord and the tenants can reach an agreement as contemplated by s.37 of the *RTA*, for example. If that is the case, no term of the order is required in the form of paragraph 4.

[29] In terms of the proposed letter attached to the order, I have the following suggestion with respect to the language of the fourth paragraph on page 2:

> "The management of Westcourt wishes to start repairing the building. To do so, each apartment must be vacant. If you have personal possessions in an apartment at Westcourt, we would like to propose that you agree to one of the following three options:
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> 1. On or before June 30, 2021, you must enter the apartment at Westcourt that contains your contents and remove your contents. You and Vickie ******, the Westcourt manager, must agree on a date and time for the removal. Please email Vickie at v********@*****.ca or call her at (***) ***-**** to arrange your date.
> 2. That after July 1, 2021, Westcourt will remove, store and, if necessary, clean your contents that are contained in an apartment at Westcourt without charge to you; or

3. That after July 1, 2021, Westcourt will remove and, if necessary, clean your contents that are contained in an apartment at Westcourt and, at your request, deliver your contents to you at another location within Windsor-Essex County, without charge to you."

[30] There is a reasonable prospect that most of the tenants are likely to agree to one of these three proposals, without the need for a court order as set out in paragraph 4. However, those tenants that choose not to agree, in my view, have the rights afforded to them under the *RTA* with respect to entry and the contents of their units, as would the landlord.

[31] On page 3 of the proposed letter, I point out simply that it is not a certainty that the court will decide whether or not a lease is frustrated. S. 19 of the *RTA* and the provisions of the *Frustrated Contracts Act*, grant authority to the Board to make findings in respect of frustration of leases, in cases where the Board has exclusive jurisdiction. The court would only make that determination upon accepting that it has jurisdiction under s. 207(2).

[32] Counsel for the defendant has suggested that the issue of jurisdiction be dealt with by way of motion in advance of the certification hearing. Counsel for the plaintiffs opposes bifurcating that issue from the certification hearing, on the basis that a decision on jurisdiction would likely be appealed and this would delay the certification hearing.

[33] It is my opinion that it is a preferable use of court resources to deal with jurisdiction issues during the certification hearing. From a practical perspective, it is very difficult to obtain a further hearing date that accommodates the schedule of all counsel and the court (both in Windsor and in London where I normally sit).

[34] Finally, Ms. Lorimar for the third party, Tyco, wishes that the order includes a provision granting the third parties the ability to access the building and inspect the location where the fire is alleged to have originated. This provision makes imminent sense.

[35] I recognize that my raising the jurisdictional issue may have caught the parties off guard. I am prepared to entertain written submissions as part of these motions from any counsel, no longer than 3 pages in length, in the event that it is asserted that I do have jurisdiction and the parties still wish me to make the consent order that was presented to me today. I am prepared to reconsider my position on the issue, if I deem it appropriate. Those submissions must be received no later than June 13th, 2021 at 4:00 pm, through the Windsor T.C.

[36] The parties may provide me with an amended consent draft order, with attached letter, for my review in the event they can reach an agreement that satisfies my concerns. There is no deadline for them to do so.

[37] A copy of this endorsement should be made available to the tenants of Westcourt Place and Ms. Strosberg and Mr. Stribopolous should arrange for that to occur.

Justice Spencer Nicholson