CITATION: Aghazarian v. Cena 2017 ONSC 3990
DIVISIONAL COURT FILE NO.: DC-15-907
DATE: 20170630

2017 ONSC 3990 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: VERJINEH AGHAZARIAN, Tenant/Respondent

AND:

WANDA CENA, Landlord/Appellant

BEFORE: Kiteley, Wilton-Siegel, Broad JJ.

COUNSEL: *Lisa M. Carr*, for the Tenant/Respondent

Marshall Reinhart, for the Landlord/Appellant

Sabrina Fiacco, for the Landlord and Tenant Board

HEARD at Oshawa: June 27, 2017

ENDORSEMENT

Kiteley J.

[1] The Landlord appeals from two orders of the Landlord and Tenant Board (LTB): namely an order by Member Sylvia Watson dated December 15, 2015 and an order by Member Joseph Berkowits dated December 23, 2015. For the reasons that follow, the appeal is allowed and the order dated December 15, 2015 is set aside.

[2] After more than 4 years, on August 31, 2015 the Tenant vacated premises after giving proper notice to the Landlord. On November 13, 2015 she filed a form T2 in which she claimed that the landlord or her agent had entered her rental unit illegally; had substantially interfered with the Tenant's reasonable enjoyment of the rental unit or with the reasonable enjoyment of a member of her household; and had harassed, coerced, obstructed, threatened or interfered with her. The reasons included in the T2 indicated that the Landlord had entered her unit illegally between May and July 2015 without giving 24 hours notice; had spent over 20 days renovating the unit although the original agreement was 3 – 5 days; and had harassed, threatened and interfered with her, her cat and her dog. Furthermore, the Tenant alleged that the Landlord had removed both her cat and her dog from the home during the first week of July. Under "remedy"

the Tenant asked for an order that the Landlord pay $436.49 to cover the costs of the cat scratching post ($125); to replace a watch removed from her home ($275); and to replace power steering fluid in her car which was contaminated by paint ($36.40). The Tenant also attached a two page narrative of what she said had happened and in which she indicated that she wanted her dog returned to her. The address provided by the Tenant for the Landlord was in Brantford.

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[3] Staff at the LTB are responsible for serving the form T2 and issuing and serving the Notice of Hearing. A Notice of Hearing was issued by the LTB indicating that the hearing would take place on Monday December 7, 2015 at 9:30.

[4] The Tenant attended the hearing on December 7, 2015. The Landlord did not attend. The transcript consists of 14 pages. The Member questioned the Tenant and much of the discussion focused on the dog. The Tenant reported that in October she had found out where the dog was and had gone to the residence of the person (RLB) who had the dog. That person would not hand over the dog so the Tenant called the police who told her that it was a civil matter. Towards the end of the hearing, the Member confirmed that "the only real issue left" is the dog and the Tenant emphasized that the main issue was the dog and she really wanted the dog back. At the conclusion of the hearing, the Member indicated that she would "think about what, what's possible here". She asked the Tenant if the address in Brantford was the "correct address" for the Landlord and the Tenant indicated that the Landlord lived at that address with her boyfriend.

[5] The order of the Board dated December 15, 2015 is as follows:

> 1. The landlord shall pay to the Tenant $700 for the interference with the Tenant's enjoyment of the rental unit during the months of May to July due to illegal entries, noise and disturbance and interference with the Tenant's mail and personal items.
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> 2. The Landlord shall pay to the Tenant $3,000 for seriously interfering with the Tenant and her daughter's reasonable enjoyment of the rental unit by illegally removing the Tenant's dog from the rental unit, hiding the location of the dog, and refusing to return the dog to the Tenant when requested to do so.
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> 3. On or before December 31, 2015, the Landlord shall return the Tenant's dog Poppy to her, alive and in good health.
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> 4. If the Landlord fails to return the Tenant's dog Poppy as required by paragraph 3, the Landlord shall pay to the Tenant $5,000. This represents the costs of the dog, including veterinarian bills, spaying and micro-chipping costs, as well as damages for infliction of emotional suffering by reason of failing to return the Tenant's dog to her.

> 5. Provided that the Landlord returns the Tenant's dog to her by December 31, 2015, the total amount the landlord owes the Tenant is $3,700.
>
> 6. The Landlord shall pay the Tenant the full amount owing by December 26, 2015.
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> 7. If the Landlord does not pay the Tenant the full amount owing by December 26, 2015, the Landlord will owe interest. This will be simple interest calculated from December 27, 2015 at 2.00% annually on the balance outstanding.
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> 8. If the Landlord fails to return the Tenant's dog to her by December 31, 2015, the Landlord will owe the Tenant an additional $5,000 which must be paid by January 4, 2016. If the Landlord does not pay the Tenant that amount by January 4, 2016, the Landlord will owe interest. This will be simple interest calculated from January 5, 2016 at 2.00% annually on the balance outstanding.
>
> 9. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

[6] Based on her email to the LTB dated December 31, 2015, the Landlord was told by RLB that the Tenant had arrived at her home on December 19, 2015 and had demanded the dog and RLB had immediately contacted the Landlord who was in Florida.

[7] On December 22, 2015 the Landlord filed a Request to Review an Order in which she indicated that she believed that the order contained a serious error and that she was not reasonably able to participate in the proceeding:

> I was out of the country from October 23, 2015 and the address used was incorrect instead of Mississauga a Brantford add[ress] was given. I have evidence in writing text/emails that all the allegations were completely untrue. regarding emails, witnesses. . . . . I would like to have my day in court with proofs. Please see attached some of the evidence.

[8] The Landlord asked that the Board stay the order because she was out of the country and had not had a chance to defend herself. As mentioned, she attached "a sample of my evidence." The Landlord also attached a single page detailing some of the background. She noted that she had been out of the country from the end of October and would return at the end of April and the Tenant knew that the address in Brantford of her boyfriend (with whom she lived) would be vacant while they were away. She also explained what had happened with the repairs. She said she was "astonished" that the Tenant accused her of stealing the dog. She explained what had occurred (along with copies of emails and texts), namely that the Tenant had asked her to take

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the dog. She also advised that for the last 3 years she had directed the Tenant to use the Mississauga address (of her mother) as the mailing address and she attached three emails in which she indicated to the Tenant that rent cheques were to be delivered to the Mississauga address.

[9] Member Berkovits issued the "Review Order" dated December 23, 2015 in which the Member noted that "a preliminary review of the review request was completed without a hearing". The Member wrote that the Landlord took the position that the Tenant had the Notice of Hearing and Application served to the wrong address, namely to her brother (mistakenly confusing with the Landlord's boyfriend), that the Landlord had submitted without explanation that the Tenant knew that the brother was out of town at the time and the Landlord too was out of town. The Review Order states as follows:

> 4. Having reviewed the file and the Landlord's submissions, I cannot justify granting this request. There is no evidence of returned mail in the application. Nor is there any explanation for how the Landlord was nevertheless able to receive a copy of the hearing order, notwithstanding the fact that both her brother and herself were and continue to be out of the country.
>
> 5. Also the landlord has not provided any evidence of the fact that she was out of the country at the time of the hearing. This evidence might have included, for example, copies of trip itineraries, or travel reservations.
>
> 6. The Landlord has also submitted evidence that purports to dispute the findings of the Hearing Member. Because the Landlord has not satisfied the Board, on a preliminary basis, that she was unable to participate in the proceedings, this evidence cannot be considered.
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> 7. On the basis of the submissions made in the request, I am therefore not satisfied that there is a serious error in the order or that a serious error occurred in the proceedings.
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> 8. This order contains all of the reasons intended to be given.
>
> It is ordered that:
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> The request to review order TNT-76284-15, issued on December 15, 2015, is denied. The order is confirmed and remains unchanged.

[10] In a letter sent by email on December 31, 2015, the Landlord asked the Vice Chair of the Tribunal for a "board internal review". She provided a two page explanation for her request that included pointing out that the Review Order wrongly referred to her brother rather than her boyfriend; she responded to two paragraphs of the December 15 order and attached 22

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documents including her flight ticket and itinerary, her passport showing she entered the USA on October 23 and would stay until April 22, a copy of a travel insurance certificate covering that period, a number of emails or texts that corroborated her version of the events pertaining to the alleged interference with the Tenant's enjoyment of the premises and the alleged theft of the dog and text messages dated between February 2014 and February 2015 to the Tenant in which she repeatedly directed the Tenant to use the Mississauga address for mailing purposes.

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[11] The Landlord also filed her Notice of Appeal to this court on December 31, 2015.

[12] The Vice-Chair sent a letter dated January 18, 2016 in which the Vice-Chair acknowledged the Landlord's email dated December 31, 2015. That response is not the subject of this appeal. It is mentioned to indicate the comprehensive information and documentation that the Landlord supplied within 11 days of being informed of the December 15 order.

Appeal: Jurisdiction and Standard of Review

[13] The Landlord appeals from the December 15 order and the December 23 review order. Pursuant to s. 210 of the *Residential Tenancies Act* the appeal is on a question of law only. Counsel agree that the standard of review is reasonableness. As indicated below, the thrust of the Landlord's appeal is that she was not given the opportunity to attend at the hearing and as a result, she was denied natural justice. Counsel agree that there is no standard of review on questions of procedural fairness. The question is simply whether the procedure was fair.

[14] At the request of the court, counsel also made submissions on the jurisdiction of the Tribunal to make the orders with respect to the dog.

Analysis: Procedural Fairness

A. Hearing December 7, 2015

[15] During the hearing on December 7, 2015, the Member made no inquiry and made no attempt to ascertain whether service had been effected on the Landlord. Indeed, the transcript does not indicate that she observed that the Landlord was not present. According to counsel for the LTB, it is the practice of the LTB to assume service unless documents are physically returned. At the end of the transcript there is an exchange about the Brantford address being the correct address and the Tenant made no mention of the Mississauga address.

[16] It is the case that the Landlord subsequently acknowledged that documents had been sent to the Brantford address that did reach her. But that is not the issue as of December 7, 2015.

[17] In any proceeding, it is incumbent on the Tribunal to address the question of notice to the absent party.

[18] There was no urgency in the hearing of the Tenant's T2 since she had vacated and she was only seeking damages. If the Tribunal had made an inquiry as to service of the Notice of

Hearing and the Application, in a case of no urgency, the Tribunal would have had to consider an adjournment to confirm service.

[19] It was a denial of natural justice for the Member to have conducted the hearing without any inquiry as to notice. The Landlord was not given notice of the hearing to which she was entitled pursuant to s. 6(1) of the *Statutory Powers Procedures Act*. On that basis, the order dated December 15, 2015 must be set aside and a new hearing take place if the Tenant decides to pursue the claim.

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B. Request for Review

[20] Pursuant to rule 29.1, a party may ask the LTB to review a final order and pursuant to rule 29.2, the LTB may exercise its discretion to review "where satisfied . . . the person making the request was not reasonably able to participate in the proceeding".

[21] Pursuant to rule 29.7 a party may make a request to review if it is in writing, signed and accompanied by the required fee. The Landlord complied with those requirements.

[22] Pursuant to rule 29.8 the request to review must be complete and must include a list of items. Those which are relevant are as follows: the order number; the address of the rental unit; the requestor's name, address and telephone number; a detailed description of the alleged serious error or explanation why the requestor was not reasonably able to participate in the hearing; the requestor's position on how the order should be changed if the request to review is successful; if the requestor wants a stay of the order, the reasons why a stay is necessary and whether there is any prejudice or harm which may result if a stay is not ordered; and information about any appeal of the order. The Tenant complied with those requirements.

[23] Pursuant to rule 29.11, the LTB will conduct a preliminary review of the request and may:

> a. dismiss the request because it was not filed in time and refuse to extend the time for filing;
>
> b. extend the time for making the request;
>
> c. dismiss the request because it is not complete, the order is not a final order, or the grounds for considering a review are not satisfied; or
>
> d. direct a review hearing of some or all of the issues raised in the request, decide the hearing format and, where appropriate, make any interim orders.

[24] The Request to Review an Order includes the following instructions to the requestor:

> Explain in detail why you believe the order contains a serious error or why you were not reasonably able to participate in the proceeding. As well, indicate how you think the order should be changed if your request for review is successful.
>
> **If you do not convince the Board that there may be a serious error in the order, or that you were not reasonable [sic] able to participate in the proceeding, your Request to Review an Order may be dismissed without further consideration.**

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[25] Rule 29.7 clearly requires a detailed description of the explanation why the requestor was not reasonably able to participate in the hearing. As indicated above, her explanation was that she did not receive notice as the Tenant gave the wrong address. She explained that the Tenant had been asked to use the Mississauga address on her mailing address for the past three years. In addition, she alleged that the Tenant knew that the Brantford address would be vacant until the end of April, 2016. The Landlord was also required to give a detailed description of the alleged serious error and she explained that she had evidence in writing (some of which was attached) that all of the allegations were untrue and that she was "astonished" that the Tenant accused her of stealing the dog.

[26] Notwithstanding her compliance with rule 29.8 the Board Member conducted a "preliminary review" of her request and denied it. No grounds are stated but the denial must have been pursuant to rule 29.11(c).

[27] In her submissions, counsel for the LTB took the position that it was not sufficient for the requestor to provide a detailed description. Rather, the requestor had to **convince** the Member, as indicated in bold type on the Request to Review, that there may be a serious error or that the requestor was not reasonably able to participate in the hearing. Furthermore, counsel for the LTB takes the position that pursuant to rule 29.2 the LTB may consider the *merits* of the review in the context of considering the *request* for the review. In other words, while the Request for Review form is inconsistent with the rules, a Member may exercise his or her discretion on a *preliminary review* of the Request for Review to make findings of credibility and deny the request.

[28] The Landlord was denied procedural fairness in that she complied with rule 29.7 and 29.8 and yet her Request for Review was denied on a preliminary basis in reliance on bolded words in the Request for Review form that were inconsistent with rule 29.7 and 29.8. Furthermore, as indicated in the reasons given for denying the Request for Review, the Member rejected the statements of the Landlord, some of which were documented, both as to the alleged serious error and as to her explanation for not having reasonably been able to participate in the hearing. Instead, the Member implicitly made findings of credibility where none were permitted or warranted. Notwithstanding that the Landlord provided some documentation and indicated that much more would be available, the Member denied her the opportunity to provide it while reading her material so superficially as to confuse the Landlord's boyfriend with her brother. The Member did not acknowledge that the Landlord's Request for Review was submitted on December 22, 7 days after the order was issued and 4 days before part of the order took effect.

In the circumstances of the immediacy of the effective dates in the order dated December 15 (namely December 26 and December 31), the Member denied the Request for Review because the Landlord had not provided trip itineraries or travel reservations, or an explanation as to how she received the hearing order, which she could not possibly know were required by the Board Member and, in any event, which are not required by rule 29.8.

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Analysis: Errors of Law

[29] Pursuant to s. 29(1) of the *Residential Tenancies Act*, a tenant may apply to the Board for any of six enumerated orders. Based on the reasons given by the Tenant in her form T2, those that are relevant are as follows:

> 3. An order determining that the landlord . . . has substantially interfered with the reasonable enjoyment of the rental unit . . . for all usual purposes by the tenant or a member of his or her household.
>
> 4. An order determining that the landlord. . . harassed, obstructed, coerced, threatened or interfered with the tenant during the tenant's occupancy of the rental unit.
>
> 6. An order determining that the landlord. . . has illegally entered the rental unit.

[30] Not all disputes between two parties are subject to the jurisdiction of the LTB merely because the parties have a landlord-tenant relationship.

[31] The order made by the Member that the Landlord pay $700 to the Tenant appears to be a combination of s. 29(1)3 and s. 29(1)6. For purposes of this appeal, I accept that that order was within the jurisdiction of the Board.

[32] Section 29 is exhaustive of the issues that the LTB may address on application by a tenant. It is only the six orders listed that are possible remedies. Section 29 does not give jurisdiction to the LTB to make the orders listed in paragraph 5 above, namely #2, 3, 4, 5 and 8 with respect to the dog and #6, 7 and 9 to the extent that they also relate to the dog.

[33] It was an error of law for the LTB to have made those orders. None are within the jurisdiction of the LTB and all will be struck out.

[34] Based on the information provided by the Tenant to the LTB, she had called the police in October 2015 when she tried to recover the dog and she had been told it was a civil matter. That advice was correct. However, it was not a matter for the LTB and each of those requests should have been rejected.

[35] To add insult to injury, the LTB also made an order for damages totaling $8,700 when the amount claimed in the Tenant's Form T2 was $436.49. That too was an error of law.

Costs

[36] At the conclusion of submissions, I asked counsel for the appellant and respondent if they had agreed as to costs. They had not and I directed them to briefly "huddle" to arrive at consensus. They informed the court that they agreed that the amount of costs should be set at $7000 subject to success.

[37] In this case, the Tenant bears responsibility for providing to the LTB an address for service which she knew not to be consistent with repeated instructions from the Landlord since 2013. Further, when the Landlord failed to appear at the hearing on December 15, 2015, the Tenant did not take the opportunity to advise the Board Members of the mailing address of the Landlord. That set in motion a train of events that led to the hearing of this appeal. Once the hearing commenced on December 7, 2015 the Landlord was denied procedural fairness and was subject to errors of law. The Landlord has been put to significant expense in pursuing this appeal in which all she asked was to be treated fairly. The Landlord has been successful and is entitled to be recompensed.

ORDER TO GO AS FOLLOWS:

[38] The order dated December 15, 2015 is set aside because the Landlord was denied procedural fairness and, with respect to paragraphs 2-9, because the Landlord and Tenant Board erred in law in making orders for which it had no jurisdiction.

[39] The Tenant shall pay to the Landlord costs of the appeal in the amount of $7000.

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Kiteley J.

I agree ___________________________

Wilton-Siegel J.

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I agree ___________________________________

Broad J.

Date: June 30, 2017

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