2010 CarswellOnt 11272
Ontario Superior Court of Justice

Athanassiades v. Lee

2010 CarswellOnt 11272, [2010] O.J. No. 4605

Andri Athanassiades, Plaintiff and Rose Lee and Michael Irwin, Defendants

J. Sebastian Winny D.J.

Heard: July 19, 2010; July 20, 2010; October 28, 2010
Judgment: October 31, 2010
Docket: Kitchener 1958D1/05

Counsel: Mr. Filipe A. Mendes, for Plaintiff
Mr. Steven Jackson, for Defendants

Subject: Property; Civil Practice and Procedure

Headnote

Real property --- Landlord and tenant — Residential tenancies — Constitutional issues — Jurisdiction of boards and commissions

Real property --- Landlord and tenant — Residential tenancies — Repairs and fitness — Tenant's obligation

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Practice and procedure — Miscellaneous

***J. Sebastian Winny D.J.*:**

1 This matter arose from a residential tenancy which had already been the subject of three proceedings before the Ontario Rental Housing Tribunal ("ORHT"). The matter brings into focus once more the tension between the jurisdiction of the ORHT (now the Landlord and Tenant Board) and the jurisdiction of the Small Claims Court. Judgment was reserved after three days of trial. For the following reasons, the Defendant's Claim is dismissed.

Nature of the Dispute

2 This trial involved solely the Defendant's Claim by the former landlord, Ms. Andri Athanassiades. The Plaintiff's Claim against Ms. Athanassiades by the former tenant, Ms. Rose Lee, was withdrawn with leave of the court on February 9, 2007. In these reasons for judgment I will refer to Ms. Athanassiades as the landlord or plaintiff, and to Ms. Rose and Mr. Irwin as the tenants or the defendants. The amount of damages claimed by the landlord, by amendment allowed by order dated March 3, 2010, is $18,294.35 subject to interest and costs.

History of the Landlord and Tenant Proceedings

3 The tenancy started on December 1, 2002, pursuant to a Rental Agreement dated October 21, 2002 (Exhibit 4, Tab A1). The terms of contract include a term that the tenants would use "the rented premises only as a private residence" (clause 1), they would "not carry on any kind of business at the rented premises" (clause 3), they would "keep the rented premises in a good and clean condition and will leave the rented premises in a good and clean condition when the tenant vacates the same" (clause 5), and they "will be responsible for any damages." (clause 8).

4 The plaintiff issued an application to the ORHT on October 22, 2002 (Exhibit 4, Tab A2). In that application, she asked for an order terminating the tenancy and for an order for the payment of $1,379.60 for damage for which the tenants were alleged to be responsible. The repairs which she alleged to be required were described in the application as follows:

Master bedroom - carpet removed or thrown out by tenant carpet underpad and installation (of the same as the one removed) $600

Middle bedroom carpet - carpet underpad installation tax (cigarette burns + stains) $614.60

Staircase railing & wall - material + labour + tax $165.00

5 The parties participated in an ORHT-sponsored mediation on November 25, 2004. The mediation resulted in a voluntary settlement of the application, and a written Mediation Agreement signed by the parties on that date (Exhibit 4, Tab A3). In relevant part, the Mediation Agreement provided as follows:

The landlord(s) and tenant(s) agree to the following terms (including the notes) in full satisfaction of all issues set out in the application for the period Nov. 25, 2003 to Nov. 25, 2004:

1. The tenancy will terminate & the tenants will vacate no later than June 30, 2005 and if not then per s. 77 of the Act, the landlord without notice to the tenants may apply for an ex-parte order terminating the tenancy.

2. The landlord will carry out the carpet replacement in the master bedroom & the middle bedroom at the landlord's own expense.

3. The tenants will advise the landlord of any issues in writing and the landlord will then investigate and take appropriate action to remedy the issue, this includes the landlord looking into the maintenance issues set out in the tenant's letter of Sept. 13, 2004, and repair actions will commence for the more minor items by Dec. 15, 2004 and for major items (except the windows) by Feb. 1, 2005.

6 The terms listed at the bottom of the Mediation Agreement just after the signature lines, included these:

(a) The applicant(s) cannot re-apply on the same grounds and time-frame as is covered in this agreement.

(b) If terms 1, 2 or 3 are not met, then the application may be re-opened, without cost, for up to one year from the date of this agreement being fully signed.

7 Unfortunately the mediated settlement did not resolve the matter. Six months later, under that same application file number (SWL-64852), the plaintiff filed a Request to Re-Open an Application on May 3, 2005 (Exhibit 4, Tab A4).

8 What had happened was that the dispute between the parties had continued after the November 25, 2004 settlement. The tenants took the position that the landlord had failed to perform her part of the agreed terms of settlement, and for the rent due April 1, 2005 they provided the landlord with a cheque for $950.00 which was unsigned and therefore could not be negotiated (see Exhibit 4, Tab A4, 3rd page attached to Request to Re-Open an Application). They had also demanded payment from the landlord of $2,355.95 for alleged damage to their personal property (see Exhibit 4, Tab A4, 2nd page attached to Request to Re-Open Application).

9 Surprisingly, although Ms. Athanassiades was unable to explain its particulars and did not appear to even recall its existence, clearly a separate application to the ORHT was launched by her. Her Request to Re-Open an Application dated May 3, 2005 (Exhibit 4, Tab A4) references the existence of a related application involving the same rental unit, with file number SWL-70300. Based on that file number, it was obviously commenced some time after the earlier application.

10 The evidence before me includes an order under the latter file number dated June 27, 2005 (Exhibit 4, Tab A5). It indicates that it was an application by the landlord to terminate for non-payment of rent - which was not an issue on the application she filed on October 22, 2004 (Exhibit 4, Tab A2) and which non-payment apparently only arose in April 2005. It indicates that the application to terminate for arrears of rent was dismissed on June 27, 2005 as abandoned, because no one had appeared for the hearing of that application on June 23.

11 During her examination-in-chief, the plaintiff said there was a hearing before the ORHT on May 19, 2005, which apparently was in the nature of a speak-to attendance simply to advise the ORHT if a cheque provided by the tenants had bounced. Ms. Athanassiades, who was the only person to attend that hearing, advised that the cheque had not bounced. The ORHT member apparently advised that she was setting another date which would be June 23, 2005.

12 I find that there was a second application commenced by the landlord in April 2005, to terminate the tenancy for non-payment of rent. The matter did not proceed to a hearing and adjudication but was abandoned by the plaintiff after the unpaid rent giving rise to that second application was paid by the tenants. It was then unnecessary from the plaintiff's perspective to attend the ORHT hearing on June 23, 2005 - as the plaintiff conceded on cross-examination - and the ORHT therefore issued the order dated June 27, 2005. The order references the hearing date as June 23, 2005. That was the proceeding in which the plaintiff had appeared on May 19, 2005.

13 Accordingly, while the parties appeared to treat the June 27, 2005 order as an order dismissing the Request to Re-Open and Application, I find it was in fact an order dismissing application SWL-70300.

14 The Request to Re-Open an Application contains lengthy attachments. On page 2 it states the fact of the earlier mediated settlement and alleges that the tenants "did not meet one or more terms of our agreement" and also that during the mediation the tenants "coerced me or deliberately made false or misleading statements which had a substantial effect on the agreement", and then in the next section, calling for an explanation, she stated "Please see attached pages for particulars of both reasons."

15 The attachments include a variety of documents which I need not describe. They also include a lengthy typed submission in the nature of a narrative of the historical events between the parties both before and after the mediated settlement (Exhibit 4, Tab 14, last 19 pages). The landlord's complaints in that submission refer to the following issues as having been raised in the initial application:

- replacement of carpet in the middle and master bedrooms
- damage to the wall by the staircase railing
- damage to the backyard resulting from running an illegal business
- damage to the common areas
- interference with landlord's ability to show basement apartment
- interference with delivery of new fridge for basement apartment
- interference with access to repairpersons (see page 1 of 7 - first set of 7 pages)

16 The submission also states that prior to the mediation on November 25, 2004, the landlord had "reserved her right to claim further damages discovered subsequent to the Notice [i.e., issuance of the initial Application]." (see page 2 of 7, para. 6 - first set of 7 pages).

17 The submission goes on to complain at length about various actions by the tenants after the mediated settlement on November 25, 2004. She asked that "the mediation agreement be reopened. Her submission states in part (at page 7 of 7, first set of 7 pages):

> The Landlord requests that the Tenant be ordered to vacate the premises immediately and to compensate the Landlord for all damages claimed by the Landlord, including the damages to the master bedroom and middle bedroom. [emphasis in original]
>
> The within Application is being brought without prejudice to the Landlord's right to pursue any further damages arising during the Tenancy of which the Landlord is not yet award [sic - aware].

18 During closing submissions by the defence, Mr. Jackson said that the Request to Re-Open an Application was the subject of a contested hearing before the ORHT and that the request was dismissed. He appeared for the tenants at that hearing. He characterized this action as an attempt by the landlord to re-litigate her failure before the ORHT at that hearing. When I pointed out that there was no evidence of such a hearing and disposition, he said the omission of such evidence was a result of his own inadvertence. I was not told the date of such a hearing and no reasons for decision nor other documentation in connection with such a hearing was filed in evidence.

19 The traditional rule is that evidence may not be given from the counsel table. An advocate is not a witness and is not under oath. On the other hand, s. 27(1) & (2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, permits the Small Claims Court to admit and act upon unsworn statements. I am aware of one appeal decision upholding a judgment after a trial at which none of the witnesses were sworn or affirmed: see *O'Brien v. Rideau Carleton Raceway Holdings Ltd.* (1998), 109 O.A.C. 173 (Ont. Div. Ct.). That decision, while certainly not indicative of normal practice in this court, illustrates the flexibility of this court's broad discretion over evidence under *Courts of Justice Act* s. 27.

20 In her evidence, the plaintiff said nothing that would appear to directly contradict the suggestion that there was a hearing of her Request to Re-Open an Application and that it was dismissed on the merits. I understand that she was self-represented at the time, having retained counsel for this present proceeding in about early 2010.

21 In the particular circumstances of this case, and having considered all of the evidence quite apart from Mr. Jackson's representations during closing submissions, I accept as a matter of fact that there was a hearing before the ORHT of the landlord's Request to Re-Open Application and that the request was dismissed. I find it probable that the hearing took place in late May or June 2005. However I will add that in the view I take of this matter, whether there was a hearing and dismissal of that request, as opposed to simply an abandonment of it, makes no difference to the result.

22 It is common ground that the tenants in fact vacated the premises on June 30, 2005. The Defendant's Claim was issued on January 6, 2006. In their Defence, the tenants plead among other things that the claim is barred by virtue of the prior proceedings before the ORHT.

Issue 1: Is This Claim Barred by the Prior Proceedings before the OHRT?

23 The main and threshold issue in this Defendant's Claim is whether any part of this claim barred by the prior proceedings before the ORHT? I find the answer to be yes.

24 The tenants have squarely raised the effect of those prior proceedings on this present case in light of what are broadly described as the finality doctrines, which include *res judicata*, abuse of process, collateral attack, and settlement. This court must also consider the relationship between its jurisdiction and the absolute jurisdiction of the ORHT under what was at the relevant time s. 157(2) of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 ("the TPA"). That section provides as follows:

> (2) The Tribunal has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

25 In addition to its power to make an order terminating a tenancy, TPA s. 193 also provided the ORHT with a power to award damages, as follows:

> **Monetary Jurisdiction of Tribunal**
>
> 193(1) The Tribunal may, where it otherwise has the jurisdiction, order the payment to any given person of an amount of money up to $10,000 or the monetary jurisdiction of the Small Claims Court in the area where the residential complex is located, whichever is greater.
>
> **Same**

(2) A person entitled to apply under this Act but whose claim exceeds the Tribunal'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 Tribunal could have exercised if the proceeding had been before the Tribunal and within its monetary jurisdiction.

Same

(3) If a party makes a claim in an application for payment of a sum equal to or less than the Tribunal's monetary jurisdiction, all rights of the party in excess of the Tribunal's monetary jurisdiction are extinguished once the Tribunal issues its order.

26 One of the grounds on which a landlord could apply for early termination of a lease was for damage to property under TPA s. 63, which provided as follows:

Termination for cause, damage

63(1) A landlord may give a tenant notice of termination of the tenancy if the tenant or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex.

27 It is clear that if the ORHT had jurisdiction, it had exclusive jurisdiction which therefore ousted the jurisdiction of the Small Claims Court. Where, as in this case, the dispute was in fact the subject of prior proceedings before the ORHT involving allegations of damage to property, there can be no doubt but that the landlord is precluded from simply re-litigating matters without regard for the prior proceedings. Whether that result flows from a finality doctrine or from the absolute jurisdiction of the ORHT, the result is the same in this case.

28 In *Cahoon v. Franks*, [1967] S.C.R. 455 (S.C.C.), it was held that a single cause of action could not be split into two proceedings. In that case, a claim for property damage was commenced and later, after expiry of the applicable limitation period, the plaintiff obtained leave to amend by claiming damages for personal injury arising from the same tort. On appeal it was held that there was only one cause of action and therefore the new claim advanced by amendment were not statute-barred. To permit separate proceedings for different damages arising from the same cause of action was held to be unwarranted and undesirable.

29 Several years later, the application of that principle to the Small Claims Court in Ontario was tested in *Cox v. Robert Simpson Co.* (1973), 1 O.R. (2d) 333 (Ont. C.A.). The plaintiff sued in Small Claims Court (then called Division Court) for property damage arising from a motor vehicle accident. He recovered the amount claimed. Later he commenced a second action in the County Court claiming damages for personal injury arising from the same accident. It was held that the second action was barred by the earlier proceeding. Arnup J.A., for the court, applied *Cahoon v. Franks*, *supra*, and held that since a cause of action could not be split, all of the damages flowing from it had to be addressed in a single action. The rights claimed in the second action were therefore extinguished by satisfaction of the first claim.

30 There are many other authorities on this subject over the years since *Cahoon v. Franks* , *supra*, which I need not review. I do note the very recent decision in *Williams v. Kameka* (2009), 282 N.S.R. (2d) 376 (N.S. C.A.). That case is factually similar to *Cox v. Robert Simpson Co.* , *supra*, but with two distinguishing features. The plaintiff sued in Small Claims Court for property damage arising from a motor vehicle accident. He sued only the driver and obtained a judgment as opposed to a voluntary payment as in *Cox*. He then commenced a second action in the superior court for damages for personal injuries arising from the same accident, and he sued both the driver and the owner, who was not a defendant to the earlier claim. It was held that the second claim was barred by the earlier proceeding.

31 The first instance judge in *Williams v. Kameka* had allowed the second action to proceed, on the basis that the first claim was only for property damage and was subject to the limited jurisdiction of the Small Claims Court. That decision was reversed by the Nova Scotia Court of Appeal, which held that the second action was barred by the doctrine of *res judicata*. Beveridge J.A. (Oland J.A. concurring) pointed out (at para. 14) that *res judicata* operates both as a bar or estoppel to subsequent proceedings and as a merger of the rights flowing from the cause of action. Beveridge J.A. (at para. 33-35) rejected the notion that because

of the limited monetary jurisdiction of the Small Claims Court, that court was not a "court of competent jurisdiction" when measuring the effect of *res judicata* on a subsequent proceeding arising from the same cause of action where the damages claimed in the subsequent proceeding exceed that monetary jurisdiction.

32 Beveridge J.A. also stated (at para. 48):

> 48. The reason offered by the respondent for first proceeding in Small Claims Court was to obtain recovery for the property damage without delay, with the intention of later pursuing damages for the plaintiff s personal injuries in Supreme Court, and this was the practice in Nova Scotia. No support was offered as to the purported existence of such a practice. If such a practice did exist, it is unsupportable.

33 In the case at bar, there was no adjudication of the plaintiff s first application to the ORHT, Rather, there was a settlement. *Res judicata* does not apply to a settlement because a settlement is not a determination by a tribunal. But settlement, like *res judicata*, is a doctrine of finality: see *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (Ont. C.A.), leave to appeal denied (1999), [1998] S.C.C.A. No. 518 (S.C.C.).

34 In this case, the plaintiff pursued an application before the ORHT alleging a breach of contract by the defendants arising from damage to the property which they were alleged to have caused. At common law, the fact of some damage giving rise to a claim for breach of the Rental Agreement was all that was required for her cause of action to accrue.

35 As is well-established, a plaintiff has an obligation to sue for all applicable damages in a single proceeding. She cannot split the cause of action into several proceedings. In my view, to the extent that the plaintiff intended to reserve a right to effectively split her proceedings by proceeding first before the ORHT, with an option to sue again later in the Small Claims Court, that reservation of rights was ineffectual as a matter of law. Even consent cannot confer jurisdiction on a court which it does not otherwise possess. If the absolute jurisdiction of the ORHT was applicable, her unilateral intention to pursue further proceedings in this court could not in law prevent the ousting of this court's jurisdiction by virtue of s. 157(2) of the TPA.

36 The landlord commenced an application before the ORHT alleging that the tenants were liable for damage to the rented premises. In doing so, she was obliged to bring forward all items of damages claimed under that heading. That included not only items of which she had actual knowledge, but also all items of which she ought reasonably to have had knowledge through the exercise of reasonable diligence.

37 That application was settled pursuant to the Mediation Agreement dated November 25, 2004. A settlement implies a release: see *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Ont. Gen. Div.), at para. 24, affirmed [1995] O.J. No. 3773 (Ont. C.A.); *Bogue v. Bogue* (1999), 46 O.R. (3d) 1 (Ont. C.A.), at para. 13; *Umholtz v. Umholtz* (2004), 238 D.L.R. (4th) 736 (Ont. S.C.J.), at para. 7.

38 Accordingly, I find that the settlement reached on November 25, 2004 was a settlement of all matters raised in the application and of all matters which ought reasonably to have been raised at that time.

39 The landlord brought a second proceeding before the ORHT in about April or May 2005, being an application to terminate the tenancy early for non-payment of rent. In that application, she could and should have brought forward any and all claims for damage to the rented premises which were neither known nor ought reasonably to have been known to her until after the settlement on November 25, 2004. Such claims would have been within the absolute jurisdiction of the ORHT and therefore cannot now be claimed in this court.

40 On May 3, 2005, the landlord brought a third proceeding before the ORHT, being the Request to Re-Open an Application. That request, if granted, would have effectively set aside the settlement dated November 25, 2004. From her lengthy materials in support of that request, it is apparent not only that more damage items were actually known to her in May 2005 than were specifically listed in her application issued on October 22, 2004, but that she possessed knowledge of that longer list of items when the original application was issued.

41 During her evidence, the landlord indicated that she signed the Mediation Agreement because it was important to her that the tenants vacate the premises. I refer to her cross-examination on July 20, 2010. I find it probable, indeed inescapable, that the landlord was aware of additional potential damages claims than those specifically listed in her notice of application when she issued in on October 22, 2004. In settling that application, what was more important to her than various potential damages claims was simply being rid of the tenants.

42 It is interesting to note that although the application was initiated by the landlord's complaint of damage to property, the settlement which she agreed to on November 25, 2004 actually required her to replace two carpets at her own expense and also to perform various other maintenance and repair items (see paragraphs 1 & 2 of Mediation Agreement). No part of the terms of settlement involved any acknowledgment of damage caused by the tenants. By the plain terms of that settlement, the landlord abandoned her damages complaints and agreed to be responsible for various maintenance and repair items raised by the tenants in response to her application.

43 In my view, it is inescapable that the landlord's claim is barred in several respects by finality doctrines and by the absolute jurisdiction of the ORHT. To summarize, my findings are as follows:

- because a cause of action cannot be split, the landlord was obliged to pursue all claims for damage to the rented premises of which she had knowledge and of which she ought reasonably to have had knowledge when she issued her application to the ORHT on October 22, 2004. All such items fell within the absolute jurisdiction of the ORHT and cannot now be claimed in this court;

- the settlement reached on November 25, 2004 implied, in law, a release by the landlord of the cause of action giving rise to that application. All damages items of which she knew or ought reasonably to have known at that time cannot now be claimed because they were settled and the settlement remains valid and binding;

- if any additional damages were neither known to the landlord nor ought they reasonably to have been known to her until after November 25, 2004 and up to the end of June 2005, any such additional damages items either were before the ORHT or ought reasonably to have been pursued before the ORHT in the landlord's two subsequent proceedings before that tribunal. Any such items fell within the absolute jurisdiction of the ORHT and cannot now be claimed in this court. Any such items which were or ought reasonably to have been claimed in the Request to Re-Open and Application are also barred by the doctrine of *res judicata* and there is no satisfactory basis to relieve against the application of that doctrine;

- as to any damages items which were neither known nor ought they reasonably to have been known by the landlord until after the end of June 2005, she is entitled to pursue them before this court. However I find that no damages are proved which fall into this category.

Review of Damages Claims

44 I will review the various damages items claimed by the landlord during this trial, reviewing which items are caught by the above findings and also dealing with the merits of each item.

45 Credibility figures prominently in the damages issues in this case. To a considerable extent, I find that Ms. Athanassiades, whose evidence was not characterized by an economy of words, tended to overstate the facts and cast them in dramatic terms which did not fit with other evidence. During much of her examination-in-chief, she appeared to treat any question her counsel asked of her as a free-standing licence to give whatever lengthy speech she felt would be most helpful to her case. She appeared fixated on her own vision of the properly as a model of perfection before these tenants arrived, and an utter shambles after their departure. The details provided in her evidence appear tailed towards consistency with that vision.

46 The plaintiff's daughter, Ms. Dena Konduros, testified. She is a lawyer employed by a financial institution. Her evidence was notably consistent with her mother's evidence. As a family member, she was not an independent witness. She appeared personally offended by the matters alleged against the tenants, and I assess her evidence accordingly. The plaintiff's son, Mr.

Andrew Athanassiades, a high school teacher, also testified. His desire to help his mother's case is amply demonstrated by his suggestion that two weeks after the tenants vacated, there was a stench in the bedroom and bathroom that he said was 1,000 times worse than the smell of cadavers. I reject that evidence. He also volunteered that the CAS should have taken the tenants' children away.

47 The nightmare overview which might be derived from the plaintiff's evidence was at odds with the defence evidence. The defendants testified, and I accept, that the unit appeared "lived-in" when they took possession. The video evidence presented by Ms. Lee was particularly helpful to place in objective context the plaintiff's dramatic evidence about the state of the unit at the end of the tenancy.

48 The list of items claimed is set out in Schedule B to the Defendant's Claim as amended on March 14, 2007. I will review the various items in the order in which the appear there.

49 There is a claim for 8 paint purchases in the total amount of $652.11. The receipts (Exhibit 1, Tab B1) are dated in June, July & August 2005. The plaintiff said that re-painting was needed due to oil damage. The tenancy was from December 1, 2002 to June 30, 2005. Assuming purely for the sake of argument that oil damage occurred for which the tenants would have been responsible, it would in all likelihood have occurred over time. There is no evidence of any specific such damage having occurred after the various proceedings before the ORHT took place. I find this claim is barred by the prior proceedings, and it is not proved in any event.

50 There is a claim for $187.25 for cleaning of washroom floor and kitchen cabinets, and for steam cleaning three carpets, dated August 12, 25 (Exhibit 1, Tab B2). The landlord described thick grease all over the cabinets. I find that evidence to be unreliable and exaggerated. There were no photographs provided. I find that claim is barred by the prior proceedings and I am not satisfied that any need for cleaning beyond normal wear and tear was caused by the tenants.

51 There is a claim for $60.94 for the purchase of a used stove hood on August 3, 2005 (Exhibit 1, Tab C1). The landlord said the one previously in place was saturated with grease to the point that it was a fire hazard. I find that evidence to be unreliable. I accept Ms. Lee's evidence that she diligently cleaned the kitchen before giving up vacant possession. I accept Mr. Irwin's evidence that the appliances including the stovetop looked old when the tenancy started. I find this items fails for want of proof that the replacement was necessary and because it is barred by the prior proceedings.

52 There are four items totalling $725.66 for some work on the cabinets and drawers in August 2005 (Exhibit 1, Tab C2-C6). The landlord said that the drawers were damaged and needed repair, and had maggots in them. They were original cabinets from 1970 and were last painted about 10 years earlier. There is no evidence of any specific damage having been inflicted after the proceedings before the ORHT. I find that this item fails for want of proof and because it is barred by the prior proceedings.

53 There is a claim for $90.28 for lock service in late August 2005 (Exhibit 1, Tab C7). I am not satisfied on a balance of probabilities that liability for this item has been established. It was suggested by the plaintiff that Mr. Irwin's key was not returned, but I am satisfied that is wrong and it was returned by leaving it on the counter as testified to by Mr. Irwin and Ms. Lee.

54 There are three related claims for work to repair damage to the kitchen door (Exhibit 1, Tabs C8-12). The total of those three items is $797.61. The evidence entirely satisfies me that the damage was caused by delivery people who delivered a new fridge in or about April 2005 at the plaintiff's request. They forced the fridge through the doorway and it got stuck. The damage resulted from the fridge being forced through even after it got stuck. Photographs are consistent with that mechanism of damage (Exhibits 5 & 8). Ms. Gray's evidence was helpful in understanding what occurred. I find the plaintiff's argument that because the tenants had suggested that delivery be through the kitchen door rather than the main door, that somehow the tenants would therefore be liable for the negligence of the delivery people, to be without merit. I find the tenants are not responsible for this damage and in any event it is barred by the prior proceedings.

55 There is a claim for $373.43 for repair of the bathtub in early July 2005. The plaintiff had to be asked a leading question on examination-in-chief before she addressed this item. She said it had been mentioned in the proceedings before the ORHT. She said a tool must have been dropped by the tenants, causing a chip which required refinishing. Ms. Konduros said it was a

big chip and was not there before the tenancy. Ms. Lee said there were some small chips in the tub when they took possession. I prefer Ms. Lee's evidence on this point. I find this item is not proved and is barred by the prior proceedings.

56 There were claims for two repairs to the coin chute of the laundry machine (Exhibit 1, Tabs E5 & E8), which were done in December 2002 and May 2003 in the amounts of $195.20 and $206.82, respectively. Ms. Lee testified that the chutes tended to stick, which she attributed to the landlord's failure to remove accumulated coins. In any event, I am not satisfied that any damage beyond normal wear and tear for the coin chute - which was used by other tenants also - is proved. This item is also barred by the prior proceedings.

57 There is a claim for a burst pipe in the amount of $115.07 in January 2003 (Exhibit 1, Tab E7). That invoice refers to the cause as freezing. I find no evidence capable of supporting a finding of liability for a burst pipe and in any event this claim is barred by the prior proceedings. Both findings apply equally to the second invoice from the same company in May 2003 for $549.56 (Exhibit 1, Tab E10).

58 There are two items for installation of kitchen tile flooring in the total amount of $762.58, in July 2005 (Exhibit 1, Tabs F1 & F2). The landlord said the floor was damaged by oil being tracked in by the tenants. I reject the contention that oil was tracked in as she asserted. Mr. Irwin said he left his work boots at work and did not work on motor vehicles on the property, and I believe him. I also accept, based on the video evidence presented by Ms. Lee, that the landlord was planning to replace the kitchen floor in any event, before the tenants left, and to upgrade from linoleum to tile. Finally, I accept that the linoleum floor had been damaged by the leaky fridge which the landlord replaced in about April 2005. This item is not proved and it is barred by the prior proceedings.

59 There are three large amounts claimed based on an allegation that new carpeting was required for the entrance, staircase, living/dining room and hall by reason of conduct for which these tenants are responsible. The items are $2,265.98, $3,002.73 and $5,482.12, respectively. The latter two are estimates only and do not represent work that has actually be done.

60 No opinion evidence addressing the need to replace those items was presented, nor were any comparative estimates, nor any photographs. On cross-examination, when asked about the matter of photographs, Ms. Athanassiades testified that she had taken some, but then her film was stolen. She then explained that she bought new film but could not take further photographs because her camera had stopped working. She apparently could not obtain another camera. I find that evidence particularly difficult to believe. I note Ms. Konduros' evidence that she did not become aware of the allegation of that theft of film until a long time afterwards.

61 The landlord admitted on cross-examination that the matter of damage to floors was the subject of discussion in the proceedings before the ORHT. In the Mediation Settlement, she agreed to replace the carpets for the master and middle bedrooms. Both Ms. Lee and Mr. Irwin testified that there was an unpleasant smell from the master bedroom carpet associated with dampness which was present on move-in. I accept that evidence.

62 The plaintiff presented evidence of a dramatic number of nails which she believed the tenants to have hammered into the floor, causing damage. No photographs nor any such nails were presented as evidence. I find that evidence, on balance, must be rejected.

63 I find that all three of these claims must be dismissed. First on the basis that the evidence does not satisfy me that liability and damages are proved on a balance of probabilities. Second on the basis that these claims are precluded by the prior proceedings.

64 There is a claim for $2,407.50 representing half the cost to re-pave the driveway in September 2005 (Exhibit 1, Tab G2). I dismiss that claim. I find it is based on nothing more than speculation on the landlord's part, to the effect that Mr. Irwin was carrying on business in the driveway as an automobile mechanic. His evidence was that he did not work on vehicles in the driveway, and I believe him. She said she noticed oil on the driveway in February to March 2003. She seems to have assumed that all the cars parked there were these tenants' responsibility, when of course there were other tenants in this property. Mr. Andrew Athanassiades also observed oil leaking from cars there in 2003 to 2005.

65 Ms. Lee testified that she observed the new driveway installed by the landlord after they moved out, to be four feet wider and four feet longer than the old driveway. I accept that evidence, which is corroborated by photographs (Exhibit 9). The landlord conceded on cross-examination that the driveway was the original, installed in 1970, so that it was some 33 years old at the time she says she first noticed the oil problem. There was no evidence of the normal lifespan of a driveway.

66 Considering all of the evidence on this issue, I am entirely satisfied that the plaintiff has failed to establish liability for this item. In addition, this item is barred by the prior proceedings.

67 There was a claim for $95.00 for removal of some debris and a shed in June 2004. The landlord's decision to remove that shed cannot be attributed to the defendants. In any event this item is barred by the prior proceedings.

68 There is a claim for $240.32 for advertising to re-rent the unit. That is a normal cost of doing business. I see no basis to hold the tenants liable for this item.

69 There is a claim for $84.19 for replacement of two fans in August 2005. I am not satisfied that any basis to hold the tenants liable for this item is established by the evidence.

70 To be clear, my finding is that as to all of the damages items except possibly for the last two items, I find that those claims are barred by settlement by virtue of the Mediation Agreement, and also by *res judicata* by virtue of the dismissal of the Request to Re-Open Application, and also, that they fell within the exclusive jurisdiction of the ORHT so that this court has no jurisdiction to further adjudicate such matters.

71 For the foregoing reasons, the Defendant's Claim is dismissed.

Costs

72 The costs before me involve costs of this three-day trial and also costs of the mistrial which was declared on March 3, 2010 and costs of that motion. Costs of the Plaintiff's Claim in the amount of $967.70 were awarded to the landlord on February 4, 2009, payable after judgment in the Defendant's Claim, with costs of that day reserved to the trial judge. That day involved a motion by the landlord for costs of the Plaintiff's Claim, which was withdrawn with leave of the court two years earlier but for some reason the landlord had not asked for costs at that time

73 As costs of the trial, I award a representation fee of $500 per day, and a preparation of pleadings fee of $50, plus disbursements fixed at $100 for a total of $1,650.00, payable by Ms. Athanassiades to Ms. Lee and Mr. Irwin.

74 As for the costs that were reserved to the trial judge by order dated March 3, 2010, I make no order as to costs of that motion, but the costs of the mistrial should be treated as costs in the cause and therefore are awarded to the tenants. I award costs of the mistrial payable by Ms. Athanassiades in the amount of $967.70, and direct that they be set off against the costs order in that same amount dated February 4, 2009. I award costs of that day to the tenants, fixed at $100.00, since the landlord ought to have addressed that costs issue two years earlier.

75 Therefore the total net costs award is $1,750.00 payable by Ms. Athanassiades to Ms. Lee and Mr. Irwin.