Daly v. 1916800 Ontario Ltd., 2019 ONSC 6319

Docket Number: DC-18-15

Judge: Heeney, Sweeny and Favreau JJ.

Court: Superior Court of Justice of Ontario (Canada)

Case Date: October 31, 2019

Jurisdiction: Ontario

Citations: 2019 ONSC 6319

Id. vLex Justis VLEX-827751093

Link: https://justis.vlex.com/vid/daly-v-1916800-ontario-827751093

Text

CITATION: Daly v. 1916800 Ontario Ltd. 2019 ONSC 6319
COURT FILE NO.: DC-18-15
DATE: 20191031

ONTARIO
SUPERIOR COURT OF JUSTICE

Heeney, Sweeny and Favreau JJ.

B E T W E E N :	)	
	)	
	)	
JULIE DALY	))	Julie Daly
	))	
	))	representing herself
	)))	

Applicant

– and –

1916800 ONTARIO LTD.

Respondent

)
)
)

Neil Altman

for the Respondent

Eli Fellman

for the Landlord and Tenant Board

HEARD: October 29, 2019

FAVREAU J.:

Introduction

[1] The appellant, Julie Daly, applied to the Landlord and Tenant Board to reopen a mediated settlement of her dispute with her former landlord, the respondent 1916800 Ontario Ltd. ("191 Ltd."). In a decision dated December 20, 2017, the Board dismissed Ms. Daly's application, and, in a decision dated January 31, 2018, the Board dismissed Ms. Daly's request for a review.

[2] Ms. Daly appeals both decisions, although her grounds of appeal focus primarily on the first decision. Ms. Daly argues that the Board Member who made the first decision was biased. She also argues that she was denied procedural fairness because the Board refused her request to adjourn the hearing *sine die* and refused to allow her to lead relevant evidence.

[3] At the conclusion of the hearing, we advised the parties that the appeal is dismissed for reasons to follow. These are the reasons.

Background

Settlement

[4] Ms. Daly was a tenant in a building owned by 191 Ltd. Ms. Daly raised a number of concerns about the tenancy, including a claim that she was harassed by other tenants.

[5] In 2015, Ms. Daly filed four applications to the Board against the respondent.

[6] In March 2016, the applications were resolved through a mediated agreement. The agreement

included terms that the respondent was to pay Ms. Daly $1,273.45 and repair a damaged screen on a bedroom window. The settlement was to be a full and final resolution of all matters related to the tenancy up to that date.

[7] Ms. Daly moved out of the building sometime after the settlement was made.

Application to re-open settlement

[8] Just under one year after the mediated settlement and after she had moved out of the building, Ms. Daly applied to the Board to re-open the applications settled by mediation. Ms. Daly raised two grounds in support of her application.

[9] First, she relied on what at the time was Rule 13.13 of the Landlord Tenant Board Rules, now Rule 13.11(a), which provides that an application to the Board can be reopened where a party to a mediation agreement fails to meet a term of the agreement. Ms. Daly argued that 191 Ltd. breached a term of the agreement by failing to repair the window screen.

[10] Second, Ms. Daly relied on what at the time was Rule 13.14, now Rule 13.11(c), which provides that a party can apply to reopen an application on the basis that "during the mediation, the other party coerced them or deliberately made false or misleading representations which had a material effect on the agreement". Ms. Daly claimed that she was coerced into signing the agreement because she could not have a fair hearing before the Member of the Board scheduled to hear the matter. She also claimed that the ongoing harassment in the building had the effect of coercing her into signing the agreement and that her disabilities contributed to the coercion she felt at the time she signed the agreement.

[11] After at least one adjournment, the hearing took place on December 7, 2018, before Board Member Karen Wallace. Before addressing the merits of her application, Ms. Daly raised two preliminary issues. First, she argued that Member Wallace was biased and, second, she requested an adjournment *sine die* until a civil proceeding raising *Charter* claims against 191 Ltd. and other parties was completed.

[12] The Board released its decision on December 20, 2018. Ruling on the preliminary issues raised by Ms. Daly, the Board found that there was no reasonable apprehension of bias and that an adjournment *sine die* was not warranted. The Board also dismissed the application, finding that there was no basis for setting aside the mediated settlement.

Review decision

[13] On January 20, 2018, Ms. Daly requested a review of the Board's decision. On January 31, 2019, Member Sylvie Charron released the review decision, finding that the December 20, 2018 decision contained no serious errors, and that Member Wallace had properly considered the evidence before her and provided detailed reasons supporting her decision.

Other proceedings

[14] As mentioned above, besides the proceedings before the Board, Ms. Daly has brought a civil action against 191 Ltd. and other defendants in the Superior Court. She has also brought an application to the Human Rights Tribunal against 191 Ltd.

[15] At the hearing, the parties advised the Panel that 191 Ltd. is no longer a defendant in the Superior Court action. However, the Human Rights Tribunal proceeding is ongoing.

Adjournment request

[16] At the beginning of the hearing in this Court, Ms. Daly requested an adjournment, which the Panel denied, advising that the reasons for denying the adjournment would be included in this decision.

[17] Ms. Daly said that she needed the adjournment due to ongoing health issues and because she did not have an opportunity to prepare a motion for fresh evidence. In our view, neither of these grounds justified an adjournment.

[18] Ms. Daly did not advise the respondent's counsel prior to the hearing that she intended to request an adjournment. In fact, from a document she provided to the Court at the hearing, it is evident that she advised counsel for the respondent a few days before the hearing that she intended to proceed with the appeal on the date of the hearing. By her own admission, Ms. Daly decided to make the request for an adjournment on the morning of the hearing after she saw the Panel considering an adjournment request on another matter on the list.

[19] At the hearing, Ms. Daly provided the Court with medical documents to support her request for an adjournment. However, the documents do not support her assertion that she was not able to argue the appeal due to medical reasons. Rather, they address some ongoing health issues, and advise that these issues may limit her ability to work and may require accommodations. While the medical documents did not support the requested adjournment, the Panel did allow accommodations requested by Mr. Daly during the hearing.

[20] Ms. Daly's proposed fresh evidence motion relates to documents she hoped to obtain from a proceeding involving other parties before the Board. She claims these documents would support her bias argument. The appeal materials filed by Ms. Daly in January 2019 make reference to a potential motion for fresh evidence. However, she did not take steps to bring the motion for fresh evidence since that time. She also did not let the respondent's counsel know in advance of the hearing that she required an adjournment in order to prepare materials for a fresh evidence motion.

[21] From the materials before the Court, it is not clear that Ms. Daly can obtain access to the documents at issue or that they are relevant to her allegation of bias.

[22] While the Panel is aware that self-represented parties are to be given some leeway in the presentation of their case, Ms. Daly is a trained paralegal and is therefore familiar with the legal process.

[23] The appeal arises from a mediated settlement dating back to 2016. Ms. Daly no longer lives in the building. At the hearing, as addressed below, Ms. Daly could not identify the relief she is seeking on the appeal. This matter requires finality.

[24] Under all these circumstances, the Panel concluded that an adjournment was not warranted in this case.

Jurisdiction and standard of review

[25] Pursuant to s. 210(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, an appeal to this Court from a decision of the Landlord and Tenant Board can only proceed on a question of law.

[26] As held in *First Ontario Realty Corporation v. Deng*, 2011 ONCA 54, at paras. 16-22, the standard of review applicable to a Board's decision interpreting its home statute or exercising discretion is reasonableness.

[27] Pursuant to *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47, the decision of an administrative decision maker is reasonable if it is justified, transparent and intelligible, and if it "falls within

a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[28] With respect to allegations of bias and breach of procedural fairness, no standard of review applies. Rather, the Court is to determine whether the requisite procedural fairness and impartiality were afforded to the applicant in the circumstances of the case: *Konesavarathan v. Guelph Mercury*, 2018 ONSC 2405 (Div. Ct.), at para. 35.

Analysis

[29] Ms. Daly raises the following issues in support of the appeal:

a. The Board Member demonstrated a reasonable apprehension of bias;

b. The Board's refusal to grant an adjournment was procedurally unfair; and

c. The hearing was procedurally unfair because Ms. Daly was not permitted to lead evidence in support of her application to set aside the settlement.

[30] The respondent raises two additional issues:

a. The appeal from the Board's December 20, 2017 was filed beyond the 30-day deadline; and

b. The appeal is an abuse of process.

Timeliness of the appeal

[31] The respondent argues that Ms. Daly is out of time to challenge the December 20, 2017 decision of the Board. The respondent does not argue that the appeal from the Board's review decision is out of time.

[32] Section 210(1) of the *Residential Tenancies Act* provides that an appeal to the Divisional Court is to be brought within 30 days.

[33] Ms. Daly commenced her appeal on February 22, 2018, which is less than 30 days after the issuance of the review decision on January 30, 2018.

[34] Counsel for the respondent provided no authority in support of his position that, where a review is sought, a party must nevertheless commence an appeal within 30 days of the original decision in order to challenge that decision in the Divisional Court.

[35] Imposing such a requirement defeats the purpose of allowing parties to seek an internal review of the decision prior to bringing an appeal to the Divisional Court.

[36] Therefore, we are not prepared to dismiss the appeal from the December 20, 2017 decision on the basis that the appeal was brought too late.

Bias

[37] Ms. Daly raised the issue of bias at the hearing on December 7, 2017, at which time she made numerous arguments in support of her position.

[38] In her decision of December 20, 2017, Member Wallace found that there was no reasonable apprehension of bias. In reaching this conclusion, relying on *R. v. S. (R.D.)*, 1997 3 S.C.R 484, she correctly stated that there "is [a] presumption of judicial impartiality and the threshold to establish bias is high". She also correctly articulated the test for bias as whether "an informed, reasonable and right minded person,

viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that the trial judge would not decide fairly": *Bailey v. Barbour*, 2012 ONCA 325, at para. 16,

[39] In reaching the conclusion that there was no reasonable apprehension of bias in this case, the Member made several findings of fact, including:

a. The Member had no prior involvement in the case other than on routine administrative matters. She never adjudicated the merits of the case.

b. While the Member had received a complaint previously made by Ms. Daly against another Board Member, she played no role in investigating the complaint.

c. Materials that Ms. Daly requested be made available at the hearing were not made available because they related to different parties and not because of any bias or animus toward Ms. Daly.

[40] The Member stated that it is not unusual for Board Members to adjudicate more than one matter involving the same party. If this was sufficient to found a claim of bias, this would allow parties before the Board to "judge shop" for the adjudicator of their choice.

[41] The review decision found no error in the conclusion that there was no reasonable apprehension of bias.

[42] We see no error in the Board's decision on the issue of reasonable apprehension of bias. The decision is well supported by the circumstances of the application and Member Wallace's factual findings.

[43] The fact that Member Wallace may have been aware of prior complaints against Ms. Daly in another proceeding or that Member Wallace may have been privy to comments by another Member of the Board about how Ms. Daly conducted a prior hearing, even if they were accurate, are not sufficient to make a finding of a reasonable apprehension of bias. There is no evidence that Member Wallace held or expressed negative views of Ms. Daly, or that her prior involvement in any matters involving Ms. Daly would lead a reasonable person to conclude that she could not decide the case fairly and with an open mind.

[44] Accordingly, we find no basis for allowing the appeal on the basis of a reasonable apprehension of bias.

Request for an adjournment

[45] At the hearing, Ms. Daly requested that her application be adjourned *sine die* to allow the proceedings before the Superior Court to be completed and to accommodate her disabilities under the *Human Rights Code*. The Member refused the request for an adjournment.

[46] The Member held that the *Residential Tenancies Act* requires the Board to resolve matters expeditiously and that this matter had been before the Board since 2015.

[47] The Member rejected Ms. Daly's argument that the Superior Court proceedings should be completed before her application to the Board was decided. Relying on this Court's decision in *Kim v. Salomon*, 2017 ONSC 7224, the Member held that a concurrent matter in the Superior Court does not prevent the Board from addressing a case that falls within its exclusive jurisdiction. Finally, the Member held that, given that the application had no merit, adjourning the matter indefinitely would serve no purpose.

[48] The Board also rejected the argument that the matter should be adjourned to accommodate Ms. Daly under the *Human Rights Code*. The Member found that Ms. Daly's medical evidence did not support the request. She found that "the letter states that the Tenant needs to have this matter resolved so she can move forward with her life and the unresolved situation at the Board has limited her ability to move forward".

[49] The Member who conducted the review found that there was no error in denying the adjournment *sine die*, stating that "it is in everyone's best interests to put the matter to rest", and that it was still open to Ms. Daly to pursue *Charter* remedies in the Superior Court.

[50] Before us, Ms. Daly argued that the Board did not accommodate her Code related needs, and that, at the very least, she should have been granted a short adjournment.

[51] However, there was no request for a short adjournment at the hearing. In addition, as reviewed by Member Wallace, there was no evidence in support of an adjournment for the sake of Code accommodation. Finally, there is no evidence of prejudice suffered by Ms. Daly due to the decision not to grant a short adjournment or a long adjournment.

[52] Accordingly, there is no basis for finding that there was a lack of procedural fairness due to Board's refusal to adjourn the application.

Evidence of coercion

[53] Ms. Daly argues that the hearing before Member Wallace was procedurally unfair because she was not allowed to present evidence of coercion in support of her application to set aside the mediated settlement.

[54] While Ms. Daly has framed this as a matter of procedural fairness, this issue really goes to the merits of the decisions under appeal.

[55] Member Wallace did not allow Ms. Daly to present any evidence of the harassment she claims she was subjected to by other tenants. At the hearing, Member Wallace explained that this evidence was not relevant to what happened at the mediation.

[56] The review decision found that Member Wallace did not make any errors on this issue.

[57] On the appeal, Ms. Daly claims that Member Wallace took an overly narrow approach to the meaning of "coercion". She should have looked at the whole context of the tenancy, considered Ms. Daly's fear of an unfair hearing before the member who would have conducted the hearing if the matter had not been mediated, and considered her Code related accommodation requirements.

[58] In our view, Member Wallace's interpretation of Rule 13.14 and its application to the circumstances of this case are reasonable. The Member found that relevant coercion is limited to what occurs at the mediation. The wording of Rule 13.14 supports this approach. She also found that Ms. Daly's subjective feelings about why she agreed to the mediation are not relevant. Again, this was reasonable. Allowing the parties' subjective feelings to determine whether there was coercion, without any external corroborative evidence, would create uncertainty for the parties and the Board.

[59] The Board was entitled to control its own process. Having reasonably determined that the evidence was irrelevant, there was no requirement for the Board to allow Ms. Daly to present it.

[60] Accordingly, we see no merit to Ms. Daly's argument that she was not allowed to lead relevant

evidence at the hearing.

Abuse of process

[61] The respondent argues that the appeal is an abuse of process because Ms. Daly raised similar issues before the Superior Court and continues to raise similar issues before the Human Rights Tribunal. The respondent also argues that there is no utility to the appeal because Ms. Daly is no longer a tenant.

[62] Originally, Ms. Daly claimed that she was pursuing the application to set aside the mediation agreement out of concern that the settlement may have a negative impact on her other proceedings. Before this Court, Ms. Daly candidly told the Panel that she is no longer concerned that there will be a negative impact on her other proceedings and that she is not sure what remedies she is seeking.

[63] Under the circumstances, while we are dismissing the appeal on the basis that Ms. Daly has not established the grounds of appeal, we also agree with the respondent that the appeal is likely an abuse of process.

Costs

[64] The respondent seeks costs on a substantial indemnity basis in the amount of $14,193,53 plus disbursements of $1,046.92.

[65] If she had been successful, Ms. Daly's bill of costs shows that she would have sought approximately $3,500.

[66] We do not agree that this is an appropriate case for costs on a substantial indemnity basis. In our view, costs in the amount of $5,000 plus disbursements are reasonable in the circumstances of this case. This amount takes into account that the issues on the appeal are not particularly complex and falls within the parties' expectations.

[67] Accordingly, Ms. Daly is to pay the respondent's costs in the total amount of $6,046.92. We exercise our discretion to extend the time for payment from 30 days to 6 months.

Conclusion

[68] For the reasons above, the application is dismissed with costs payable by Ms. Daly to the respondent in the amount of $6,046.92. The costs are to be paid within six months of this decision.

FAVREAU J.

I agree HEENEY J.

I agree SWEENY J.

RELEASED: October 31, 2019

CITATION: Daly v., 1916800 Ontario Ltd. 2019 ONSC 6319
COURT FILE NO.: DC-18-15
DATE: 20191031

ONTARIO

SUPERIOR COURT OF JUSTICE

Heeney, Sweeny and Favreau JJ.

B E T W E E N :

JULIE DALY

Applicant

– and –

1916800 ONTARIO LTD.

Respondent

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: October 31, 2019