

 **HMV Properties Inc. v. Lycett**

Ontario Judgments

Ontario Superior Court of Justice

Small Claims Court - Oshawa, Ontario

S. Bale Deputy J.

Heard: May 26, 2010

Judgment: July 5, 2010.

No. 60929/09

[2010] O.J. No. 2842

Between HMV Properties Inc., and Elgin Lycett and Dayne Lycett

(22 paras.)

Counsel

Valentine Lovekin, for the plaintiff.

Dayne Lycett, in person.

No one appearing, for Elgin Lycett.

S. BALE DEPUTY J.

Overview

1 HMV Properties Inc. rented an apartment to Elgin Lycett for a one-year term. The tenancy agreement was co-signed by Elgin's father, Dayne Lycett. At the conclusion of the one-year term, Elgin remained in possession of the apartment but was ultimately evicted for non-payment of rent.

2 In this action, HMV claims the sum of \$4,315.80 for arrears of rent, costs incurred in proceedings before the Landlord and Tenant Board and prejudgment interest. The following are the issues to be determined:

- * whether the claim against Elgin Lycett is the proper subject of an action in this court;
- * whether Dayne Lycett is liable to HMV as a "tenant" within the definition in subsection 2(1) of the *Residential Tenancies Act, 2006*; and
- * whether Dayne Lycett is liable to HMV as a guarantor of Elgin Lycett's obligations under the tenancy agreement.

3 For the reasons that follow, I have come to the conclusion that the claim against Elgin Lycett is not properly the subject of an action in this court and that Dayne Lycett is liable neither as a tenant nor as a guarantor. Accordingly, the action will be dismissed.

Background facts

4 In April of 2007, HMV Properties Inc. entered into a tenancy agreement with Elgin Lycett. The agreement was negotiated and signed upon behalf of HMV by Masood Vatandoust. The term of the agreement was from April 17, 2007 to April 30, 2008. Because Elgin had declared bankruptcy and had a poor credit record, it was agreed that Elgin's father, Dayne Lycett, would guarantee his son's obligations under the tenancy agreement. Elgin was to work for his father who would pay the rent from the amount earned and then pay to Elgin whatever amount had been earned over and above the rent paid. Apparently, Elgin had gone through some difficult times and his father had agreed, as a sort of last chance, to assist him in this way. As Dayne put it, he was willing to guarantee payment of the rent for a period of one year to allow his son to do whatever he needed to do to re-evaluate and get on with his life but was not prepared to continue doing so forever.

5 During the term of the tenancy agreement, Dayne Lycett paid the rent and then continued to do so for a further six months following the end of the term. The payments were made by postdated cheques given by Elgin to HMV a number at a time.

6 In September of 2008, Elgin Lycett called Masood Vatandoust and told him that he would be opening up his own bank account and that his father's cheques should no longer be used to pay the rent. Mr. Vatandoust agreed to this new arrangement but became concerned when the October rent was not paid. Elgin told him that the reason for nonpayment was that there were problems with opening the new bank account and obtaining cheques. When the delay continued, HMV issued a notice of termination of tenancy. Upon receiving the notice of termination, Elgin called Mr. Vatandoust and expressed anger at the fact that the notice had been served notwithstanding that he had explained the delay. Mr. Vatandoust then called Dayne Lycett who said to go ahead and cash his October rent cheque but that he would not be responsible for his son's rent after October of 2008. HMV did have a postdated cheque from Dayne for the November 2008 rent but that cheque was never cashed even though Elgin failed to pay the rent for November and December of 2008 and January of 2009.

7 Elgin Lycett was evicted from the premises on April 2, 2009. Following the eviction, Masood Vatandoust called Dayne Lycett and asked him to get the keys for the apartment from his son. Prior to receiving that telephone call, Dayne had heard nothing about the tenancy since speaking with Mr. Vatandoust in October of the previous year.

8 The claim made by HMV consists of the following amounts:

- * rental arrears for the period November 1, 2009 to April 2, 2009;
- * an application fee of \$150 paid in relation to an application before the Landlord and Tenant Board;
- * a fee of \$351 paid to the Sheriff of Durham Region for the enforcement of the eviction order; and
- * prejudgment interest on the arrears of rent and fees.

Analysis

Whether claim against Elgin Lycett properly the subject of an action in this court

9 The arrears of rent claimed in this action are already the subject of orders made by the Landlord and Tenant Board on January 15, 2009 and February 13, 2009 in proceedings brought by HMV against Elgin Lycett. Pursuant to section 19 of the *Statutory Powers Procedure Act*, such orders may be filed in and are enforceable as orders of this court. Accordingly, it is neither necessary nor proper for those amounts to be the subject of an action in this court.

10 HMV made two applications to the Landlord and Tenant Board in relation to the rent owed by Elgin Lycett. The application fee paid for the first application was awarded by the Board to HMV and accordingly, for the same reasons as the arrears of rent, that application fee is not the proper subject of an action in this court. The application

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fee paid for the second application was not awarded by the Board to HMV. However, the costs of that application, including the application fee, were within the sole jurisdiction of the Board.

11 The eviction order was made by the Landlord and Tenant Board and was enforced pursuant to section 85 of the *Residential Tenancies Act*. Accordingly, the fee paid to the sheriff to enforce the order was an item of costs within the sole jurisdiction of the Board and, for the same reason as the second application fee, is not recoverable by action in this court.¹

12 The amounts ordered by the Landlord and Tenant Board to be paid by Elgin Lycett to HMV bear postjudgment interest pursuant to subsection 207(7) of the *Residential Tenancies Act*. Accordingly, for the same reasons as the arrears of rent and first application fee, such interest is not the proper subject of a claim in this court.

Whether Dayne Lycett liable to HMV as a "tenant"

13 HMV's position is that because Dayne Lycett paid rent to HMV, he was a tenant within the definition in subsection 2(1) of the *Residential Tenancies Act*, 2006 which provides that "tenant" includes a person who pays rent in return for the right to occupy a rental unit. Counsel for HMV argued that Dayne had the right to occupy the rental unit (notwithstanding that it was never intended that he would) and was therefore a tenant and liable to pay the rent in arrears.

14 Dayne Lycett's position is that he was a guarantor and not a tenant.

15 I don't agree that Dayne Lycett had the right to occupy the apartment or that he paid rent in return for such a right. It was clear to HMV from the outset that Elgin Lycett was the tenant and that Dayne was paying the rent for the reasons previously indicated. I also note that the tenancy agreement specifically provided that Elgin was the only person entitled to occupy the premises.

16 Counsel for HMV also argued that because the *Residential Tenancies Act*, 2006 does not contain a definition for the word "guarantor", Dayne's status could only be that of tenant. However, subsection 2(1) of [O. Reg. 290/98](#) under the Human Rights Code entitled "Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation" provides that a landlord "may require a prospective tenant to obtain a guarantee for the rent."

17 In the result, I find that Dayne Lycett was not a tenant of the rental unit and was therefore not liable to pay rent as such.

Whether Dayne Lycett liable to HMV as a guarantor

18 HMV's position is that having guaranteed the rent payable under the tenancy agreement, Dayne Lycett remained liable to pay rent during the deemed month-to-month renewal provided for by section 38 of the *Residential Tenancies Act*, 2006.

19 Dayne Lycett's position is that the tenancy agreement that he co-signed was for a one-year term and that he had no obligation to HMV following the expiry of that term.

20 In *Kar v. Chung*², a case not cited in argument, the Court of Appeal, reversing a decision of the Divisional Court, held that the deemed renewal provided for in subsection 104(1) of the *Landlord and Tenant Act* did not apply to guarantors, that landlords and tenants are deemed to have renewed their tenancy agreements but that guarantors are not deemed to have done anything. While the language in section 38 of the *Residential Tenancies Act*, 2006 is not identical to that in subsection 104(1) of the predecessor Act, it does not differ in any material respect and accordingly, the result must be the same.

Disposition

21 For the reasons given, the action is dismissed.

22 As the successful party, the defendant Dayne Lycett is entitled to costs. I allow him \$40 for disbursements (court fee paid to file his defence), \$35 for the preparation of his defence and \$300 as compensation for inconvenience and expense, for a total of \$375, such costs to be paid to him by HMV Properties Inc. within thirty days of the date these reasons are released.

S. BALE DEPUTY J.

- 1** While it is true that it was not known at the time the Board made its order whether enforcement would be required, the Board makes orders for the payment of compensation for use and occupation of a rental units for prospective periods; and accordingly, subject to the policies and procedures of the Board, there is no reason why an order for recovery of a fee payable to a sheriff could not be made on an "if incurred" basis. Payment of such costs, together with any other order for the payment of money made by the Board, could then be enforced upon the filing of the order in this court.
- 2** [\[2001\] O.J. No. 3817](#), [150 O.A.C. 245](#), [45 R.P.R. \(3d\) 197](#) (C.A.), rev'g [\[2000\] O.J. No. 3701](#), [139 O.A.C. 184](#) (Div. Ct.), rev'g [\[1999\] O.J. No. 3157](#), [102 O.T.C. 14](#) (S.C.J.)

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