Annexure "A"

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The Defendants move to dismiss the action for want of jurisdiction.

The claim was issued in June 2016 , some eleven months after the rental property at 49 Springfield Way was vacated by the defendant tenants .

The one year lease commenced September 1, 2014. It was not a happy experience for either landlord or tenant. The former brought an action in this court for $17,166.55, all but $2,700 of it relating to damage and deficiencies allegedly caused by tenants. The $2,700 is for arrears rent inclusive of $50 NSF charge for bounced cheque.

The defence sets out a litany of complaints about the landlord's shortcomings in maintaining the property. There are numerous issues involving allegations and counter allegations which will occupy some time at trial.

In May 2015 the defendants gave the requisite 60 day notice to the plaintiff, and vacated the premises in July 2015.

The landlord of course had a statutory right of inspection prior to it's vacating by tenants. In an affidavit from the defendant Pamela Klerer sworn August 1, 2017, she states in support of this motion:

> **"In the two months prior to the termination of the tenancy, the plaintiff attended at the premises and I showed him the various issues with the premises that required maintenance. All items of damage alleged by the plaintiff were present at the time the plaintiff attended at the premises."**

The plaintiff responded in his affidavit of August 29, 2017 that, to the contrary, he responded to and

addressed all deficiency complaints by the defendants.

He contends that he only became aware of the full extent of the damage after the defendants had left and only issued claim once the full extent of the damage was known to him.

He did not conduct a full assessment of the damages whilst the tenants were on site as several different contractors were required and there was a "multitude of damages."

He concedes that he received 60 days notice but was left in the dark as to why the defendants were leaving.

sec. 89 (1) of the Residential Tenancies Act permits a landlord to approach the Residential Tenancy Board for relief from damage where the tenant is still on site. The reference to repairs "incurred" or <u>will</u> incur (ie future tense) seems to me to make it clear that the issue is not the landlord must approach the Board whilst the tenant is <u>still</u> <u>onsite</u> and not the issues are determinable by the <u>Board</u> - otherwise the future tense utilisation makes no sense.

There is a wealth of authority provided by the defendant to the effect that the Residential

Tenancy Board is the forum to go to in a landlord/ tenant dispute. They have the expertise and the protocol to deal with these matters.

I have reviewed the plaintiff's arguments as well ,

I recognize that the defendants arguments can lead to anomalies. It means that the tenant controls the agenda. The tenant can slip out in the dark of night leaving the landlord high and dry and without recourse. He can not approach the Board if the tenant is no longer on site nor can he seek relief in the Small Claims Court because the latter simply lacks jurisdiction.

In an effort to address this anomaly the jurisprudence has moved towards a compromise

which allows the landlord the jurisdiction at the Small Claims Court if he/she could not have ascertained the damage by the exercise of due diligence.

The points in the existing case law are that if the damage occured post-tenancy or even during the tenancy but could not have been ascertained by the exercise of reasonable diligence, then the Small Claims Court remains open to the landlord.

Indeed, in Brydges v Johnson [2016] OJ #609 Kelertas KJ refused to dismiss the plaintiff's claim and ordered it to proceed to trial on the basis that the issue of due diligence prior to vacating was not determinable without a full articulating of the issues at trial.

Now, Brydges was a case where the Deputy Judge on his own notion canvassed the issue of jurisdiction and decided it after the parties called no evidence and relied solely on the pleadings and their oral submissions.

In this case I heard a motion in the full tense of the concept, with sworn evidence on both sides. There is some assumption that both sides will put their proverbial "best foot forward" Both sides utilised this in a professional manner, vehemently argued & reached It is not contested that there was 60 days notice to

the plaintiff had ample time to inspect the property and look for damages. There is no assertion that the plaintiff did so and found nothing. He states that is was "unreasonable and unnecessary" to conduct a full assessment.

But this all begs the question: what stopped him from an inspection in the 60 days after the notice that the tenants were still occupying the property? Clearly, there is nothing advanced which would meet due diligence standards expected of a landlord of property. and the damage was capable of existing during that 60 day period.

The argument that he would or could only issue claim once he knew the full extent of the damages

is understandable on same level but it still does not address the technical issue of jurisdiction and The sec. 89 mechanism which speaks to futuristic repairs determinable at the Board.

As an aside, were his matters to proceed to trial it would not on the simple issue of due diligence.

The defence takes issue with practically everything and jurisdictional due diligence would simply add to the complications of manifold allegations both ways as to who bears the responsibility for the damage.

In all the circumstances of this particular case it seems to me that the weight of the law and all the practical considerations mitigate against this proceeding to trial.

In the result the claim is dismissed against all defendants.

Superior Court of Justice
Cour supérieure de justice

Endorsement Record/Order of the Court
Fiche d'inscription/Ordonnance judiciaire

SUPERIOR COURT OF JUSTICE * SMALL CLAIMS COURT * RICHMOND HILL * COUR DES PETITES CRÉANCES DE COUR SUPÉRIEURE DE JUSTICE

Richmond Hill
Small Claims Court / *Cour des petites créances de*

SC-16-00110000-0000
Court File No./ *N° de la demande*

Le Parc Office Tower 8500 Leslie Street St
Address / *Adresse*

Markham, ON L3T 7M8

(905)731-2664
Phone number / *N° de téléphone*

BETWEEN / ENTRE:

URI KISELMAN

Plaintiff
Demandeur

and / et

JOEL KLERER, AKA (OWNER OF I.O.F. BUSINESS FURNITURE MANUFACTURING INC); PAMELA KLERER; I.O.F. INTELLIGENT OFFICE FURNITURE

Defendant
Défendeur

Representative of the plaintiff(s): L. Zmaramaraba present
Représentant du demandeur :

Representative of the defendant(s): D. Kupilc counsel
Représentant du défendeur :

Event type: Motion on notice
Type d'affaire:

On 05-SEP-2017, a hearing was held in the above matter and the following order was made:
Le une audience a eu lieu concernant l'affaire susmentionnée, et l'ordonnance suivante a été re

For full reasons, see annexure "A".

In the result the claim is dismissed against all the defendants.

No order to costs.

Signature of judge / Signature du juge

S. Bath 07

Superior Court of Justice
Cour supérieure de justice

Endorsement Record/Order of the Court
Fiche d'inscription/Ordonnance judiciaire

SC-16-00110000-0000
Court File No./ *N° de la demande*

DARIA KRYSIK
STEINBERG TITLE HOPE & ISREAL LLP
5255 YONGE STREET SUITE 1100
TORONTO ON CA M2N 6P4

Fax: (416)225-7112

I.O.F. INTELLIGENT OFFICE FURNITURE
C/O JOEL KLERER
159 GRANDVIEW AVE
THORNHILL ON CA L3T 1H9

JOEL KLERER
159 GRANDVIEW AVE
THORNHILL ON CA L3T 1H9

LUIGI INNAMORATO
CARR LAW PROFESSIONAL CORP.
3550 RUTHERFORD ROAD UNIT 84
VAUGHAN ON CA L4H 3T8

Fax: ()-

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The defendants move to dismiss the action for want of jurisdiction.

The claim was issued in June 2016, some eleven months after the rental property at 49 Springfield Way was vacated by the defendant tenants.

The one year lease commenced September 1, 2014. It was not a happy experience for either landlord or tenant. The former brought an action in his court for $17,166.55, all but $2,500 of it relating to damage and deficiencies allegedly caused by tenants. The $2,500 is for arrear rent plus inclusive of $50 NSF charge for bounced cheque.

The defence sets out a litany of complaints about the landlord's shortcomings in maintaining the property. There are numerous issues involving allegations and counter allegations which will occupy some time at trial.

In May 2015 the defendants gave the requisite 60 day notice to the plaintiff, and vacated the premises in July 2015.

The landlord of course had a statutory right of inspection prior to its vacating by tenants. In an affidavit from the defendant Pamela Klaver sworn August 1, 2017, she states in support of his motion

> "In the two weeks prior to the termination of the tenancy, the plaintiff attended at the premises and I showed him the various issues with the premises that required maintenance. All items of damage alleged by the plaintiff were present at the time the plaintiff attended at the premises."

The plaintiff responded in his affidavit of August 29, 2017 that, to the contrary, he responded to and

addressed all deficiency complaints by the defendants. He contends that he only became aware of the full extent of the damage after the defendants had left and only issued claim once the full extent of damage was known to him.

He did not conduct a full assessment of the damages whilst the tenants were on site as "several different contractors were required" and there was a "multitude of damages."

He concedes that he received 60 days notice but was left in the dark as to why the tenants were leaving.

sec. 89(1) of the Residential Tenancies Act permits a landlord to approach the Residential Tenancy Board for relief from damage where the tenant is still on site. The reference to repairs "incurred" or will incur (ie future tense) seems to me to make it clear that the ethos is that the landlord must approach the Board whilst the tenant is still on site and that the issues are determinable by the Board — otherwise the future tense utilisation makes no sense.

There is a matter of authority provided by the defendant to the effect that the Residential Tenancy Board is the forum to go to in a landlord / tenant dispute. They have the expertise and the protocol to deal with these matters.

I have reviewed the plaintiff's authorities as well,

I recognise that the defendants argument can lead to anomalies. It means that the tenant controls the agenda. The tenant can slip out in the dark to night leaving the landlord high and dry and without recourse. He cannot approach the Board as the tenant is no longer on site nor can he seek relief in the Small Claims Court because the latter simply lacks jurisdiction.

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As an aside, were this matter to proceed to trial it would not be on the simple issue of due diligence. The defence takes issue with practically everything and jurisdictional due diligence would simply add to the complications of manifold allegations both ways as to who bears responsibility for the damage.

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