

CITATION: Letestu v. Ritlyn Investments, 2016 ONSC 6540
COURT FILE NO.: C-403-13
DATE: 2016-10-19

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: The Estate of Armand Letestu Deceased by its Litigation Administrator,
Christopher Letestu - Plaintiff

AND:

Ritlyn Investments Limited - Defendant

BEFORE: James W. Sloan

COUNSEL: Joel P. McCoy - Counsel, for the Plaintiff

Kieran C. Dickson & Kenneth J. Raddatz - Counsel, for the Defendant

HEARD: September 30, 2016

ENDORSEMENT

- [1] Mr. Letestu (the plaintiff) unfortunately passed away from cancer on or about May 14, 2011.
- [2] At all material times the plaintiff rented an apartment in a building owned and managed by the defendant, Ritlyn Investments Ltd.
- [3] On January 11, 2010 he allegedly tripped over some “worn, torn and unsecured carpet” in his living room and fell, sustaining physical injuries.
- [4] The plaintiff alleges he made prior complaints about the condition of the carpet to the defendant, which took no steps to repair the carpet.
- [5] On December 15, 2011, the plaintiff commenced this action in the Superior Court of Ontario.

- [6] In paragraph 5 of the Statement of Claim, the plaintiff sets out numerous allegations of negligence concerning the carpet in question, and alleges that the defendant knew of the dangerous condition of the carpet and failed to correct the problem or give any effective warning of the danger.
- [7] The defendant has brought this motion to strike the plaintiff's claim on the basis that the Superior Court has no jurisdiction to hear it.

Defendant's Position

- [8] The Landlord and Tenant Board (Board) has exclusive jurisdiction to determine all matters where jurisdiction the *Residential Tenancies Act, 2006* (Act) confers jurisdiction to it.
- [9] The nature of the dispute, not the cause of action pleaded, dictates whether the claim falls within the jurisdiction of the Board.
- [10] This dispute involves allegations arising from disrepair, which is within the exclusive jurisdiction of the Board, regardless of how the allegations are pleaded.
- [11] Claims like the instant one must be brought within one year. And after the one-year period expires, the Board no longer has jurisdiction.
- [12] The powers of the Board are extended to the Superior Court for claims exceeding \$25,000, but only where the claimant would otherwise have been entitled to apply to the Board, if the damages claimed were equal to or less than \$25,000.
- [13] The statement of claim in this action was issued more than one year after the alleged incident.
- [14] Section 168(2) of the Act indicates that "[t]he Board 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."

- [15] Notwithstanding the arguments of the plaintiff about its rights under the *Limitations Act, 2002*, S.O. 2002, c. 24, and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, the defendant submits those acts do not apply.
- [16] They submit that pursuant to s. 2 of the *Limitations Act*, the *Limitations Act* does not apply to administrative tribunals such as the Board.
- [17] They further submit that they have not pleaded the *Limitations Act* because it does not apply.
- [18] They submit, they do not have to plead that the Superior Court does not have jurisdiction because if it does not have jurisdiction, it simply cannot adjudicate the dispute.
- [19] The defendant relies on the case of *Mackie v. Toronto (City)*, 2010 ONSC 3801. This was a proposed class action against the Toronto Community Housing Corporation.
- [20] The plaintiffs in the *Mackie* action alleged numerous instances of disrepair in rental units, and that the disrepair and unsafe living conditions had caused them physical injuries and significant mental anguish.
- [21] In addition, the plaintiffs claimed breaches of municipal codes, building codes, fire protection and prevention legislation, the UN *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N.G.A.O.R., 3rd Sess., Supp. No. 13, U.N. Doc. A/810 (9148) 71, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, and the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.
- [22] At paragraphs 43 and 44 of *Mackie*, the court states:

It is, therefore, my opinion that the Board has exclusive jurisdiction to resolve the Plaintiffs' repair claims. Further, it is my opinion that characterizing the claims as a negligence claim or as an Ontario Humans Rights Code or Charter claim does not infuse the Superior Court with jurisdiction. From a jurisdictional

perspective, it is the substance and not the form of the claim that matters, and the substance of the plaintiff's claim is a repair claim between a landlord and tenant that is within the monetary jurisdiction of the Board.

The Plaintiffs' characterization of the repair problems as negligence or as discrimination in breach of the *Code* and the *Charter* does not assist them. If the essential character of the dispute, in its factual context, arises from the statutory scheme, it does not matter that the claim is asserted for a cause of action which is ordinarily within the jurisdiction of the courts and upon which the legislation may be silent. The characterization of the dispute is resolved by whether the subject matter of the dispute expressly or inferentially is covered by the statute ... In the case at bar, the dispute about repairs and complaints about compliance with housing standards is a repair claim for under \$10,000 and comes within the Board's exclusive jurisdiction. [emphasis added]

- [23] The defendants therefore argue that the claim in the *Mackie* case for disrepair by a landlord resulting in personal injuries is identical to this case.
- [24] The defendants also rely on the Divisional Court decision of *Efrach v. Cherishome Living*, 2015 ONSC 472 (Div. Ct.).
- [25] The *Efrach* case was commenced in Small Claims Court and claimed \$25,000 in damages. The claim was based in negligence, and the plaintiff alleged that the property managers/owners failed to keep an adjacent vacant unit locked, allowing burglars to access to the plaintiff's unit.
- [26] On appeal to the Divisional Court, the appellant argued that the Small Claims Court Judge "failed to characterize this as a tort or negligence claim that seeks damages" and that "such claims clearly fall outside the exclusive jurisdiction of the landlord and tenant Board": at paragraph 12.
- [27] In disposing of the appeal, the Divisional Court stated, at paragraphs 13, 14 and 21:

This argument is contrary to the test in *Mackie*. It is not the label or title that one attaches to a claim that decides the jurisdiction issue. As Perrell J. directs, the Court must consider the essential character of the dispute. To say that the plaintiff advances a tort claim or a claim in negligence, merely

identifies a particular cause of action. It does not provide any insight into the essential character of the dispute.

The Deputy Judge correctly identified the test and then applied it to the case. The essential character of the claim is captured by the exclusive jurisdiction of the Board.

Since the one year limitation period for making a claim to the Landlord and Tenant Board had already expired when the appellant issued her claim in the Small Claims Court, she had no right to seek relief from the Landlord and Tenant Board. It follows pursuant to s. 207(2) that since the claim was statute barred before the Board, it is likewise barred from being transferred to the Superior Court, since the court can only exercise powers “that the Board could have exercised if the proceeding had been before the board”.

- [28] The defendant points out that this case dealt with conversion of property, not personal injury and the *Occupiers’ Liability Act* was not pleaded.

Plaintiff’s Position

- [29] The Act only provides the Board with jurisdiction to hear matters up to the limit of the Small Claims Court; otherwise the Superior Court has the power to make any order that the Board could make.
- [30] Any action in the Superior Court of Justice is governed by the *Limitations Act* which provides for a two-year limitation period, unless the *Limitations Act* provides otherwise.
- [31] No other act can vary the limitation period under the *Limitations Act* without expressly stating so and the *Limitations Act* permitting it to do so.
- [32] The plaintiff has framed his action under the *Occupiers’ Liability Act* and relies on the *Residential Tenancies Act*.
- [33] The one year limitation period set out in the Act does not apply to this case.

Residential Tenancies Act

- [34] Subsection 20(1) of the Act obligates the landlord to maintain a residential complex in a good state of repair.
- [35] A tenant may apply to the Board under s. 29(1) to seek redress with respect to breaches of s. 20(1). Under s. 30(1) the Board may make various orders including “any other order that it considers appropriate”.
- [36] Pursuant to s. 29(2), no application may be made to the Board after one year seeking redress for the enumerated matters set out in s. 29(1).
- [37] The Board, under s. 207(1), is limited to hearing matters within the monetary jurisdiction of the Small Claims Court which is currently \$25,000, s. 207(2) reads:

A person entitled to apply under this Act but whose claim exceeds the Board’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 power that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction.

Plaintiff’s Alternate Submissions

- [38] Alternatively, if the plaintiff is outside the time limits for claiming breach of the statutory duties of the defendant as set out in the *Residential Tenancies Act*, it argues the defendant is not excused from its other statutory duties.
- [39] The plaintiff’s alternate submissions reference the *Limitations Act* and *Occupiers’ Liability Act*:
- a) The definition of tenant in the Act does not include an estate but only includes heirs and assigns;
 - b) Nowhere in the Act does it limit the landlord responsibilities under any other act;

- c) The limitation period in the Act should be void in this court, as it does not allow for any discovery principle;
- d) Even if the one-year limitation period applies, the condition of non-repair continued to exist until the plaintiff's death on May 14, 2011 and accordingly was an ongoing default and the action was commenced within the one-year time;
- e) By their involvement in this action, the defendants have attorned to the jurisdiction of the Superior Court; and
- f) The defendants have not brought this motion promptly.

[40] As a creature of statute, the Board can only decide what the *Residential Tenancies Act* empowers it to decide. As such, the Board has no power to decide issues under the *Occupiers' Liability Act*.

[41] In addition, the *Residential Tenancies Act* does not limit the responsibility of the landlord under any other legislation.

[42] To enforce its rights under the *Occupiers' Liability Act*, the plaintiff must enforce its rights in the Superior Court. The plaintiff further points to s. 8 of the *Occupiers' Liability Act* which sets out the obligations of a landlord occupier.

[43] The plaintiff relies on the Court of Appeal decision *Taylor v. Allard*, 2010 ONCA 596. In that case, however, the plaintiff was not a tenant, but rather the guest of a tenant. Because the plaintiff was not a tenant, and therefore there was no landlord-tenant relationship, it is difficult to see how this case assists the plaintiff.

[44] The plaintiff also relies on the Court of Appeal decision *Miaskowski (Litigation Guardian of) v. Persaud*, 2015 ONCA 758. In the *Miaskowski* case the plaintiff was also not a tenant. The defendants were the owners of the property and also tenants. There was discussion about the interplay between the *Occupiers' Liability Act* and the *Residential Tenancies Act* as they concerned the obligations of the landlord and the tenant. Again, because the plaintiff was not a tenant, it is difficult to see how this case assists the plaintiff.

[45] The plaintiff also relies on the case of *Gill v. Residential Property Management Inc.* (2000), 50 O.R. (3d) 752, 100 A.C.W.S. (3d) 151 (Ont. S.C.J.), and *Politzer v. 170498 Canada Inc.* (2005), 114 A.C.W.S. (3d) 217, 39 R.P.R. (4th) 90 (Ont. S.C.J.).

[46] In *Gill*, at paragraph 14, the court states that the application, while within the monetary jurisdiction of the Board, was claiming exemplary and punitive damages, which the Board lacks jurisdiction to award.

[47] The *Politzer* case deals with class actions.

[48] It is difficult to see how either of these cases assists the plaintiff.

Limitations Act

[49] Sections 19 and 20 of the *Limitations Act* read as follows:

19(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act;
or

(b) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

(2) Subsection (1) applies despite any other Act.

(3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act.

(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.

(5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

Statutory variation of time limits

20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

- [50] The *Limitations Act* prescribes a general two-year limitation period for actions, including personal injury actions.
- [51] Section 19 of the *Limitations Act* contemplates the application of other acts with different limitation periods.
- [52] In essence, s. 19 states that a limitation period set out in another act that applies to a claim to which the *Limitations Act* applies is of no effect, unless the provision establishing it is listed in the schedule to the *Limitations Act*.
- [53] The *Residential Tenancies Act* is not an act listed in the schedule under the *Limitations Act*.

Occupiers' Liability Act

- [54] The plaintiff has also pleaded a breach of the *Occupiers' Liability Act*, which requires the occupier of premises to see that persons entering on the premises are reasonably safe while on the premises.
- [55] Landlords are required to conform to the statutory duties imposed by the *Occupiers' Liability Act*.
- [56] The plaintiff relies on the Court of Appeal decision *Guillemette v. Doucet*, 2007 ONCA 743, to argue that the two-year time limit set out in the *Limitations Act* “trumps” the one-year limitation period set out in the *Residential Tenancies Act*.

[57] The *Guillemette* case involved the limitation periods set out in the *Limitations Act* and the *Solicitors Act*, R.S.O. 1990, c. S.15. At paragraphs 33 to 36 of that judgment, the court stated:

Consequently, while by virtue of s. 19 of the *Limitations Act*, the two year limitation period in that Act trumps the twelve month limitation period in s. 4, s. 20 of the *Limitations Act* preserves the “special circumstances” exception set out in s. 4 of the *Solicitors Act*.

Applying my analysis to this case, Guillemette had to show special circumstances before an assessment could be ordered because she was seeking to assess an account that had been paid: *Solicitors Act*, s. 11. Guillemette also had to show special circumstances because she was seeking an assessment more than two years after the delivery of the accounts: *Limitations Act*, s. 4; *Solicitors Act*, s. 4.

I appreciate that my interpretation of the interaction of the *Limitations Act* and the *Solicitors Act* means that there is no absolute bar against applications for the assessment of lawyers’ accounts. This result may seem inconsistent with the purpose underlying the *Limitations Act*. However, solicitors’ accounts have always been treated differently than other debts and even other professional accounts. A superior court has inherent jurisdiction to review lawyers’ accounts entirely apart from any statutory authority. That inherited jurisdiction was not subject to a time limit. My interpretation of the two Acts preserves that *status quo* ...

The passage of time, particularly a lengthy time after a bill has been paid, will be a significant consideration in exercising the “special circumstances” discretion in both ss. 4 and 11 of the *Solicitors Act*. Time alone will not, however, preclude the examination of the suitability of the lawyer’s accounts or other circumstances compel a review of those accounts. [emphasis added]

Findings

[58] Under s. 168(2) of the *Residential Tenancies Act*, “[t]he Board 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”, and under s.174, “[t]he Board has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act”.

- [59] The specific nature of the complaint in this action is for “want of repair”.
- [60] Based on the reasoning in the *Mackie* decision, I find that the Board has exclusive jurisdiction over the subject matter of the claim.
- [61] The Act does not address its interrelationship with other Acts because it does not need to. Sections 168 and 174 give the Board exclusive jurisdiction over matters set out in the Act.
- [62] Section 2 of the *Limitations Act* makes it clear that the *Limitations Act* applies to “claims pursued in court proceedings”.
- [63] Nowhere in the *Limitations Act* does it state that the *Limitations Act* applies to claims brought before administrative tribunals.
- [64] Based on the rationale in the *Efrach* case, where the Board has exclusive jurisdiction over the subject matter, the action must be commenced within the one-year limitation period before this court can assume jurisdiction for claims exceeding \$25,000.
- [65] Since the Board has exclusive jurisdiction over the subject matter of this case, I find that the *Occupiers’ Liability Act* does not apply.
- [66] The estate of the deceased is in no different position when it comes to pursuing this claim than the deceased would have been if he were alive.
- [67] The issue of the defendants not having brought this motion promptly may be a consideration for the costs portion of this motion, but does not assist the plaintiff in a case where the court does not have jurisdiction and a Judge specifically ordered that the motion be brought prior to a trial.
- [68] A party cannot attorn to the jurisdiction of a court if that court does not have jurisdiction in the first place.
- [69] The plaintiff’s action is therefore dismissed with costs.

[70] If the parties are unable to agree on costs, Mr. Dickson shall forward his **brief** submissions on costs to me by October 26, 2016. Mr. McCoy shall forward his **brief** response to me by November 2, 2016. Mr. Dickson shall then forward her/his reply, if any, to me by November 7, 2016. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca

Date: October 19, 2016

Justice James W. Sloan