

Date: 20140326
Docket: CI 13-01-83042
(Winnipeg Centre)
Indexed as: Kirby et al. v. Winnipeg
Condominium Corporation No. 71 et al.
Cited as: 2014 MBQB 60

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

SANDRA LOUISE KIRBY and MARIA
HELENE BOERSCH

Plaintiffs

- and -

WINNIPEG CONDOMINIUM CORPORATION
NO. 71 and MICHAEL MASTERS

Defendants

) **APPEARANCES:**

)
) Michael G. Finlayson
) for the Plaintiffs

)
) Cella C. S. Fergusson
) for the Defendant
) Michael Masters

)
) Matthew T. Duffy
) on a watching brief
) for the Defendant
) Winnipeg Condominium
) Corporation No. 71

)
) Judgment delivered:
) March 26, 2014

TOEWS J.

[1] The defendant Michael Masters (Masters) moves for an order staying or dismissing the plaintiffs' claim against Masters on the basis that the Court of Queen's Bench has no jurisdiction over the subject-matter of the action against him.

[2] The plaintiffs commenced the action against the defendant Winnipeg Condominium Corporation No. 71 (WCC 71), seeking a declaration that WCC 71 is not entitled to a lien against the plaintiffs' condominium unit, Unit 305, located at

811 Grosvenor Avenue in Winnipeg (the condo complex). WCC 71 is a condominium corporation charged with responsibility under *The Condominium Act*, C.C.S.M., c. C170, as owner of the land and common elements at the condo complex.

[3] In the alternative, the plaintiffs seek in their action an award of damages against Masters in connection with an incident which occurred in November 2010. It is not in dispute that, at all material times, Unit 305 was leased to Masters by the plaintiffs.

[4] In their statement of claim, the plaintiffs state that in November 2010, WCC 71 sustained loss and damage by reason of a pipe freezing in an exterior wall of Unit 305. WCC 71 says that the incident occurred because Masters negligently left a window open and states in its statement of defence that it sustained loss and damage to the condo complex as a result of the negligence of Masters and/or the plaintiffs and is therefore entitled to its lien rights pursuant to *The Condominium Act*.

[5] Masters says in his pleadings that the incident and resulting damage were attributable to poor insulation in the walls, combined with very cold temperatures.

[6] At the hearing of this motion, WCC 71 was represented by counsel, but attended only on a watching brief, taking no position on the motion itself. When asked at the conclusion of the submissions made by counsel for the plaintiffs and counsel for Masters, counsel for WCC 71 indicated he had no comments to make.

[7] In his motion for a stay or dismissal of the plaintiffs' claim against him, Masters advances the argument that since he and the plaintiffs were parties to a residential tenancy agreement as tenant and landlords respectively, the Director of Residential Tenancies (the director) has exclusive authority to investigate and determine a question

between landlords and tenants pursuant to s. 152(1) of *The Residential Tenancies Act*, C.C.S.M., c. R119.

[8] Section 152(1) of *The Residential Tenancies Act* provides:

Director's authority: matters other than rent regulation and tenant services charges

152(1) Except as provided in this Act or *The Life Leases Act*, the director has the exclusive authority, at first instance, to investigate, endeavour to mediate a settlement and determine

- (a) a question arising under Parts 1 to 8 or *The Life Leases Act*;
- (b) a matter arising from an alleged breach of a tenancy agreement or contravention of a provision of Parts 1 to 8 or *The Life Leases Act*;
- (c) a question or matter arising under this Act respecting a guarantee agreement; or
- (d) the length of time a tenant is entitled to continue to occupy a rental unit that is a unit under *The Condominium Act* after the declaration is registered under that Act.

[9] On the basis of the director's exclusive statutory authority, as expressed in s. 152(1) of *The Residential Tenancies Act*, Masters argues that the Court of Queen's Bench has no jurisdiction over the subject-matter of the action against him.

[10] In response to the submission of Masters, the plaintiffs point out that they have no personal knowledge of how the loss occurred and that there is a dispute about the cause of the loss. Furthermore, they argue that this is not to be properly regarded as a dispute between a landlord and a tenant, but is, in large part, a dispute between a tenant and a third party, namely WCC 71.

[11] In fact, the plaintiffs pointed out at the hearing of the motion that if the matter was to proceed under *The Residential Tenancies Act* for consideration by the director and possibly a hearing, the plaintiffs would be unable to advance a claim against Masters since they are not aware of the cause of the loss, nor do they have a

claim to advance against Masters given that the damage was to the condo complex and not to Unit 305.

[12] I note that although WCC 71's statement of defence states at para. 4 that there was loss and damage to the condo complex and to Unit 305, counsel for the plaintiffs stated at the hearing of the motion that the damage only occurred in relation to the condo complex and not to the plaintiffs' unit. Counsel for Masters did not challenge the plaintiffs' position, and accordingly, I am proceeding on the basis of that position.

[13] The case law is clear that *The Residential Tenancies Act* is both procedurally and substantively comprehensive. In *Brown v. Bermax Capital Ltd. et al.* (1998), 128 Man.R. (2d) 122 (Q.B.), aff'd (1999), 134 Man.R. (2d) 70 (C.A.), the defendants brought an application for an order dismissing the plaintiff's action on the ground that the court had no jurisdiction over the subject-matter of the action. Glowacki J. concluded that the director under *The Residential Tenancies Act* had exclusive jurisdiction over the subject-matter of the claim and therefore dismissed the claim before the court. In so doing, he commented on the legislative intention behind *The Residential Tenancies Act* (at para. 13):

It will be noted from the preamble that the intent of the legislature is to have virtually all disputes of a landlord and tenant nature resolved by a procedure set out in the *Residential Tenancies Act* by the director of residential properties. The director is given the authority to investigate and determine a matter arising under a tenancy agreement. The director may adopt the most expeditious method of investigating and determining a matter. He may mediate the dispute and he may make a decision if mediation fails. There is an appeal procedure to the Residential Tenancies Commission and a further appeal to the Court of Appeal. The comprehensiveness of the *Act* is obvious when one peruses its substantive and enforcement proceedings.

[14] The involvement of a third party in a landlord and tenant dispute does not prevent the director from exercising jurisdiction under the provisions of ***The Residential Tenancies Act***. For example, in ***Brown***, the plaintiff had initiated a claim in the Court of Queen's Bench for invasion of privacy against a landlord who had allowed workers to enter the plaintiff's suite without consent. It was held that the director had jurisdiction over the claim and not the court.

[15] In ***J & R Property Management et al. v. Kenwell***, 2011 MBCA 5, 262 Man.R. (2d) 164, the Manitoba Court of Appeal was called on to answer the following question (at para. 9):

If there is a landlord and tenant relationship in existence, does the [Residential Tenancies] Commission have jurisdiction to consider and award compensation in respect of the claim of a third person who is not a tenant, but is the owner of abandoned property under Part 7 of the ***Act***?

The court held that ***The Residential Tenancies Act*** clearly provides the Residential Tenancies Commission with jurisdiction in respect of abandoned property left by either a tenant or a third party owner.

[16] In the case at bar, there clearly is a landlord and tenant relationship between the plaintiffs and Masters. Nonetheless, is the relationship between WCC 71 and the other two parties sufficiently close so as to bring that aspect of this dispute, along with all parties, including WCC 71, within the jurisdiction of the director under the ***Act***?

[17] Neither the plaintiffs nor Masters addressed the issue of whether the lien provisions of ***The Condominium Act***, and specifically s. 14 of that ***Act***, could be considered and addressed by the director in the context of investigating and determining this matter under ***The Residential Tenancies Act***.

[18] As in **Brown**, there is a real issue as to whether the jurisdiction of the director under **The Residential Tenancies Act** can apply in any respect to a dispute involving another statute which provides the Court of Queen's Bench with the jurisdiction to resolve the matter.

[19] At the hearing of this motion, when asked what the position of Masters would be if WCC 71 had brought an action against the plaintiffs and Masters for the damages and loss it had suffered, counsel for Masters stated:

Justice Toews: What would you say as to the jurisdiction then of the Residential Tenancies Commissioner?

Ms Fergusson: Well, I would have to consider whether the condo corp. would fall under the definition of landlord vis-à-vis **The Residential Tenancies Act**. I would have to consider that. And if, in fact, they were landlord, then that matter should proceed by way of Residential Tenancies Branch.

[20] In view of the very broad legislative jurisdiction granted to the director under **The Residential Tenancies Act** and the very clear direction by the Court of Appeal in **J & R Property Management** in respect of the courts deferring to the jurisdiction granted by that statute where there is a landlord and tenant relationship, and even where a third party is involved, I am of the view that the director should be asked to consider whether that official has jurisdiction over this dispute under the authority of **The Residential Tenancies Act**.

[21] Although WCC 71 chose not to pursue a claim in this court and decided instead to file a lien pursuant to **The Condominium Act**, in my view, that approach does not bar one or more of the parties from referring the matter to the director under **The Residential Tenancies Act**. If the director determines that there is jurisdiction over

