

2012 ONSC 1160

Ontario Superior Court of Justice (Divisional Court)

Beauge v. Metcap Living Management Inc.

2012 CarswellOnt 2705, 2012 ONSC 1160, [2012] O.J. No. 1052, 213 A.C.W.S. (3d) 749

**Steeve Beauge, Tenant/Respondent and Metcap
Living Management Inc., Landlord/Appellant**

Harvison Young J., Pepall J., Swinton J.

Heard: February 16, 2012

Judgment: February 16, 2012

Docket: Toronto 497/10

Counsel: No one, for Tenant / Respondent

Rob Winterstein, for Landlord / Appellant

Subject: Property

Headnote

Real property --- Landlord and tenant — Premises — Possession — Eviction

Board ordered landlord to pay \$11,000 to tenant representing reasonable costs to replace tenant's property disposed of by landlord — Landlord appealed arguing board erred in finding landlord failed to make tenant's property available to be retrieved within 72 hours after eviction as required — Appeal was allowed in part — There was ample evidence to support board's conclusion that landlord failed to make tenant's possessions available to be retrieved within 72 hours after eviction — Board erred in awarded damages for stress — There was no claim for such damages — It was unfair to landlord to make award for damages for stress without adequate notice and without proper submissions — Denial of procedural fairness constituted error of law.

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Practice and procedure — Appeal or review

Board ordered landlord to pay \$11,000 to tenant representing reasonable costs to replace tenant's property disposed of by landlord — Landlord appealed arguing board erred in finding landlord failed to make tenant's property available to be retrieved within 72 hours after eviction as required — Appeal was allowed in part — There was ample evidence to support board's conclusion that landlord failed to make tenant's possessions available to be retrieved within 72 hours after eviction — Board erred in awarded damages for stress — There was no claim for such damages — It was unfair to landlord to make award for damages for stress without adequate notice and without proper submissions — Denial of procedural fairness constituted error of law.

Swinton J., (ORALLY):

1 The landlord, Metcap Living Management Inc., appeals from the decision of the Landlord and Tenant Board ("the Board") dated September 17, 2010, in which the Board ordered it to pay the respondent Steeve Beauge \$11,000.00, representing the reasonable costs to replace the respondent's property disposed of as a result of a breach by the landlord of s.41(3) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17. As well, the Board ordered \$3,000.00 for stress damages.

2 An appeal lies to this Court only on a question of law (see s. 210(1) of the *Act*).

3 The landlord argues that the Board erred in finding that the landlord failed to make the tenant's possessions available to be retrieved within seventy-two hours after eviction, as required by s. 41(3) of the *Act*.

4 Section 41 reads in part:

41(1) A landlord may sell, retain for the landlord's own use or otherwise dispose of property in a rental unit or the residential complex if the rental unit has been vacated in accordance with,

- (a) a notice of termination of the landlord or the tenant;
- (b) an agreement between the landlord and the tenant to terminate the tenancy; (c) subsection 93(2); or
- (d) an order of the Board terminating the tenancy or evicting the tenant.

(2) Despite subsection (1), where an order is made to evict a tenant, the landlord shall not sell, retain or otherwise dispose of the tenant's property before 72 hours have elapsed after the enforcement of the eviction order.

(3) A landlord shall make an evicted tenant's property available to be retrieved at a location close to the rental unit during the prescribed hours within the 72 hours after the enforcement of an eviction order.

5 There was ample evidence to support the Board's conclusion that the landlord failed to make the respondent's possessions available to be retrieved within 72 hours after eviction, contrary to s. 41(3). It was clear that the respondent sought his possessions, as he requested access to the apartment unit on August 20, 2010, the day of the eviction and twice on August 23, 2010.

6 The landlord has a positive obligation to make the tenant's possessions available within the time parameters of the Act (see *Mputu v. Wright*, 2004 CarswellOnt 8851 (Ont. S.C.J.) at paras. 38 and 39). In this case the landlord clearly did not discharge its obligation. Therefore, I would not give effect to this ground of appeal.

7 The Board's decision did not turn on the interpretation of s.42 of the *Act*, and therefore I need not address the interpretation given to it.

8 Pursuant to s. 41(6), where the Board finds that the landlord has breached its obligation under s. 41(3), the Board may order the landlord to pay a specified sum to the former tenant for:

The reasonable costs that the former tenant has incurred or will incur in repairing or, where repairing is not reasonable, replacing property of the former tenant that was damaged, destroyed or disposed of as a result of the landlord's breach.

9 The Board heard evidence about the possessions of the respondent that were in the apartment unit, including two couches, a large television, a bed, two night tables, a stereo, a lap top, linen, clothes and many other items. The Board made an estimate of the reasonable replacement costs. It made no error of law in doing so. The estimate was a reasonable one in the circumstances, as broken down by the Board.

10 However, the Board erred in awarding damages for stress. There was no claim for such damages in the respondent's Form T2, which sought \$20,000.00 in compensation for the respondent's possessions and also claimed for moving expenses. Nor was there any claim for such damages in the respondent's submissions to the Board at the hearing.

11 In the circumstances and without any amendment to the relief claimed, it was unfair to the landlord to make such an award without adequate notice and without proper submissions. This denial of procedural fairness constitutes an error of law. Therefore, that part of the Board's order awarding \$3,000.00 for stress damages is set aside. Otherwise, the appeal is dismissed, and the stay of the Board's order is lifted.

Costs

12 I have endorsed the Appeal Book, "This appeal is allowed in part. That part of the Board's order awarding \$3,000.00 for stress damages is set aside. Otherwise, the appeal is dismissed. The stay of the Board's order is lifted. No costs are sought."

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