COURT OF APPEAL FOR ONTARIO

CITATION: 2602203 Ontario Inc. v. Bijan Design Inc., 2023 ONCA 81
DATE: 20230207
DOCKET: C70592

Paciocco, Sossin and Favreau JJ.A.

BETWEEN

2602203 Ontario Inc.

Plaintiff (Appellant)

and

Bijan Design Inc. and Zahra Fazelipour

Defendants (Respondents)

Ian N. Roher and Dylan Baker, for the appellant

Jerome Stanleigh, for the respondents

Heard: January 23, 2023

On appeal from the order of Justice Catriona Verner of the Superior Court of Justice, dated April 13, 2022.

REASONS FOR DECISION

[1] The appellant and the respondents are in a commercial tenancy. The appellant, who is the landlord, brought a motion to terminate the tenancy and for a writ of possession on the basis that the respondents failed to comply with a previous court order which required the payment of outstanding rent pending the trial of the action. On April 1, 2022, the motion judge granted an order giving the respondents one last chance to pay the outstanding rent, which the respondents

did, albeit one day beyond the deadline set by the motion judge. At a subsequent hearing, the motion judge decided not to terminate the lease, despite the late payment.

[2] The appellant appeals the decision on the basis that the motion judge erred in effectively granting the respondents relief from forfeiture when such relief had not been sought and was not before her.

[3] At the beginning of the hearing, the panel requested that counsel address the issue of whether this court has jurisdiction over the appeal. At the conclusion of arguments on the issue of jurisdiction, the panel advised counsel that we would not hear the appeal on the merits because the court does not have jurisdiction and that reasons for that conclusion would follow. These are the reasons.

Proceedings in the Superior Court

[4] The appellant originally brought an application to terminate the tenancy and for a writ of possession on the basis that, amongst other matters, the respondents failed to pay some outstanding rent amounts in the first half of 2021. In an endorsement dated October 4, 2021, McKelvey J. ordered that the issues on the application are to proceed by way of a trial. In addition, McKelvey J. imposed a number of terms, including the following:

a. He noted that the respondents had provided cheques to the appellant for rent outstanding up to the end of September 2021. He

ordered that the appellant was entitled to cash the cheques without prejudice to its right to maintain the position that the lease was terminated and that the respondent was an overholding tenant;

b. He made an order that "[i]f the necessary payments under the lease are not made by the Tenant, the Landlord may bring a motion before the Court for a termination of the tenancy on that basis alone"; and

c. He set a schedule for the exchange of pleadings and examinations for discovery leading to the trial.

[5] The appellant later brought a motion to strike the respondents' statement of defence on the basis that the respondents had failed to comply with various terms in McKelvey J.'s order. The appellant also sought a writ of possession and a declaration that the lease was terminated on the basis that the respondents had failed to make some rent payments since McKelvey J.'s order.

[6] The motion was heard by Verner J. In her decision dated April 1, 2022, she did not grant an order striking the defence, finding that the respondents' breaches of McKelvey J.'s deadlines were minor and that the respondents provided an explanation for most of the breaches. In addition, while she found that the respondents still owed $4,215 in outstanding rent, she decided to give the respondents a chance to pay this outstanding amount. On that basis, the motion

judge directed that the respondents were to pay the outstanding rent by April 11, 2022, and she made the following order:

> The parties will return to appear before me at 9:15 am on Wednesday, April 13, 2022. The Defendants will provide proof of payment on that date, failing which, I will order:
>
> > (i) The commercial lease between the Landlord and the Defendants, Bijan Design Inc. and Zahra Fazelipour for premises municipally known as 10149 Yonge Street, First Floor, Richmond Hill, Ontario, L4C 1T5 is declared to be terminated; and
> >
> > (ii) A writ of possession in favour of the Landlord, pursuant to Part III of the *Commercial Tenancies Act*, is granted.

[7] The respondents paid the rental arrears on April 12, 2022, rather than April 11, due to counsel's mistake. At the April 13, 2022 hearing, the motion judge decided not to terminate the lease on the basis of counsel's mistake, and rejected the appellant's argument that it was an error to find the respondents in arrears but not terminate the lease in the April 1 decision. The motion judge also ordered the respondents to pay $5,000 in costs to the appellant, which was substantially less than the costs sought by the appellant.

Appeal to this court

[8] The appellant launched an appeal to this court from the motion judge's decision refusing to terminate the lease and to grant a writ of possession, and from the costs order.

[9] The primary issue raised on appeal is that the motion judge granted relief from forfeiture in circumstances where the respondents did not request such relief and without considering whether this was an appropriate case for relief from forfeiture. The specific relief the appellant seeks in the notice of appeal is a declaration that the lease is terminated and a writ of possession for the premises.

[10] After the appellant launched its appeal, in July 2022, the executive legal officer of this court wrote to counsel for the parties raising an issue about whether the court has jurisdiction over the appeal. Specifically, the letter stated that the appeal appeared to have been brought pursuant to s. 78(1) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, in which case the appeal should have been brought in the Divisional Court rather than this court. Counsel for the appellant responded to the letter, taking the position that the appeal should proceed in this court.

Analysis

[11] While the court originally raised the issue of s. 78 of the *Commercial Tenancies Act*, we have concluded that the court does not have jurisdiction over the appeal because the order appealed from is interlocutory.

[12] Part III of the *Commercial Tenancies Act* sets out the procedure a landlord is to follow to obtain a writ of possession against a tenant who is no longer entitled to occupy a rental property. Pursuant to s. 74(1) of the Act, landlords seeking this

relief are to bring an application for a writ of possession to the Superior Court. In accordance with s. 76(2) of the Act, a judge hearing the application has the power to grant a writ of possession "if it appears to the judge that the tenant wrongfully holds against the right of the landlord". As set out in s. 78(1) of the Act, an appeal lies to the Divisional Court "from the order of the judge granting or refusing a writ of possession."

[13] On its face, it appears that s. 78(1) of the *Commercial Tenancies Act* requires an appeal from the motion judge's order in this case to be brought to the Divisional Court because she refused to grant a writ of possession.

[14] However, as the appellant points out, the order made by the motion judge did not follow from an application brought pursuant to s. 74(1) of the Act. The motion judge's order is not an order refusing a writ of possession arising from an application brought under Part III of the *Commercial Tenancies Act*. Rather, it was based on the order of McKelvey J., who made an order that the appellant was permitted to bring a motion to terminate the tenancy if the respondents did not pay rent owing pending the trial. On this basis, we agree with the appellant that s. 78(1) of the *Commercial Tenancies Act* does not appear to apply to this appeal.

[15] However, this does not assist the appellant. We agree with the submission made by counsel for the respondents at the hearing before us that the motion judge's order is not a final order, but rather an interlocutory order. Pursuant to

s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Divisional Court, not this court, has jurisdiction over an appeal from an interlocutory order made by a judge of the Superior Court. Such an appeal requires leave of the Divisional Court.

[16] As held in *Hendrickson v. Kallio*, [1932] O.R. 675, at p. 680, the test for determining whether an order is final or interlocutory is whether the order "finally disposes of the rights of the parties". As held by this court in *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.,* 2020 ONCA 375, at para 16:

> An interlocutory order is one which does not determine the real matter in dispute between the parties – the very subject matter of the litigation – or any substantive right to relief of a plaintiff or substantive right of a defendant. Even though the order determines the question raised by the motion, it is interlocutory if these substantive matters remain undecided.

[17] In this case, McKelvey J. made an order directing that the issues between the parties are to go to trial. As set out in the parties' pleadings, the issues to be determined at trial include whether the appellant was entitled to terminate the tenancy and whether it is entitled to a writ of possession on the basis of the respondents' failure to pay some rent amounts in the first half of 2021. McKelvey J. also made an order that, if the respondents did not pay the outstanding rent pending the trial, the appellant could bring a motion to terminate the lease and obtain a writ of possession. The motion judge heard a motion arising from this

order. She decided to give the appellants one more chance to pay the outstanding rent she found was still owing, failing which the lease would be terminated and the appellant would be entitled to a writ of possession. She then made a subsequent endorsement finding that the respondents' payment of the rental arrears one day late due to counsel's mistake did not justify terminating the lease.

[18] In this context, the motion judge's order was not a final order. It did not determine the rights of the parties in the underlying action. The issue of whether the appellant was entitled to terminate the lease and to a writ of possession based on the failure to pay rent in the first half of 2021 remains to be decided. That is the core of the dispute between the parties as set out in their pleadings and the appellant has not lost its right or ability to pursue that issue. The order made by McKelvey J. requiring the ongoing payment of rent and the motion judge's order arising from that direction were meant to preserve the respondents' right to remain in possession of the property while protecting the appellant against further unpaid rent pending trial. The motion judge's order, which was based on McKelvey J.'s order, did not determine any substantive rights or defences between the parties.

Disposition

[19] Accordingly, we find that this court does not have jurisdiction over the appeal because the order under appeal is interlocutory.

[20] We are satisfied that this is an appropriate case for transfer of the appeal to the Divisional Court pursuant to s. 110(1) of the *Courts of Justice Act*, so that the appellant can seek leave to appeal from the motion judge's order.

[21] Given that the court raised the issue of jurisdiction and the respondents did not take a position on the issue until the hearing, we make no order as to costs.

"David M. Paciocco J.A."
"L. Sossin J.A."
"L. Favreau J.A."