

COURT OF APPEAL FOR ONTARIO

CITATION: One Clarendon Inc. v. Finlay, 2024 ONCA 323

DATE: 20240426

DOCKET: M55025 (COA-24-CV-0377)

Lauwers J.A. (Motions Judge)

BETWEEN

One Clarendon Inc.

Plaintiff/Defendant by Counterclaim
(Respondent/Moving Party)

and

Kathleen Finlay and John Finlay also known as
Richard Finlay and J.R. Finlay

Defendants/Plaintiffs by Counterclaim
(Appellants/Responding Parties)

Sanj Sood, for the respondent/moving party

No one appearing for the appellants/responding parties

Heard: April 26, 2024

ENDORSEMENT

[1] The moving party, One Clarendon Inc., owns and is the landlord of a residential apartment building in Toronto. The tenants, Kathleen and John Finlay, moved into an apartment in June 2021. They have not paid rent since September 2021.

[2] The Finlays did not appear on the argument of this motion on the basis that Mr. Finlay is ill and is in the hospital and that Ms. Finlay must accompany him. Ms. Finlay sent emails to the court requesting an adjournment. The adjournment request is denied. The lengthy record of proceedings between the landlord and the tenants demonstrates frequent resort by the Finlays to medical reasons for failing to attend proceedings, or to attend to their responsibilities as litigants.

[3] After the Finlays stopped paying rent, the unfortunate “cat and mouse” game so typical of bad faith tenants began. The Finlays are among the most accomplished of those who know how to “game the system”: *Bon v. Hutchens*, 2021 ONSC 2076 (Div. Ct.), *per* Favreau J. (as she then was), at para. 19. Indeed, the Finlays made one previous foray into this court in this litigation, and in the decision awarding costs of an abandoned appeal, reported at 2024 ONCA 153, the court noted that “the tenants’ conduct appears to be abusive of the system.” Their pleadings were thereafter struck by an order of Black J., dated March 12, 2024.

[4] The immediate order under appeal is that of Black J. dated March 27, 2024, which granted judgment in the principal amount of \$153,539.00 against the tenants and granted the landlord leave to issue a writ of possession. His endorsement captures the flavour of this case:

For the reasons set out in my previous endorsements in this matter, there is no doubt that the plaintiff is entitled

to the relief it seeks. The defendant tenants have paid no rent to the landlord since the fall of 2021, and their conduct throughout seems to have been calculated to live in the landlord plaintiff's premises for as long as possible without paying rent, and to make use of the court's processes to facilitate that effort.

The defendants have filed materials (in the form of a letter from the defendant Kathleen Finlay). The letter does not contest the substance of the plaintiff's request. Rather, in keeping with recent communications, Ms. Finlay says that her brother, the co-defendant John Finlay, is suffering from a cardiac condition, and that the stress of learning of the outcome of these proceedings, as well as the stress associated with vacating the premises, will risk Mr. Finlay deteriorating further, or even succumbing to his illness.

I am skeptical about this claim. It has been made repeatedly during the course of these proceedings and, despite the court noting at various points that the claim has never been accompanied by credible medical evidence, the claim is being advanced yet again without such supporting evidence. Moreover, despite Ms. Finlay's contention (in her very articulate letter) that she is necessarily spending all of her time caring for her brother, and that, as noted, involvement in ongoing legal proceedings is stressful and not generally possible given the time constraints and demands of Mr. Finlay's condition, the defendants were able to, and did in fact, file materials on March 25, 2024, in the context of a motion before the Ontario Human Rights Tribunal (where the defendants have brought a proceeding relative to many of the same matters at issue in this lawsuit).

In the circumstances, while I reject the defendants' request to "pause" the proceeding herein, I am prepared to give the defendants 10 days to vacate the premises.

[5] The Finlays failed to vacate within 10 days, and the landlord obtained a writ of possession that will be enforced on April 29, 2024.

[6] The Finlays have appealed Black J.'s order, perhaps in the hope that the automatic stay under r. 63.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, would delay the enforcement of the order until after the appeal.

[7] The landlord moves for a discretionary order under r. 63.01(5) to lift the stay so that the eviction can proceed as scheduled. The landlord also moves for an order that the Finlays post security for the costs of the appeal under r. 61.06(1). Counsel candidly stated that he expects the Finlays will not post such security so that the landlord will be able to move to dismiss their appeal under r. 61.06(2) when security is not posted.

[8] I grant the order lifting the stay under r. 63.01(5) on the basis that, pursuant to r. 61.06(1), "there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal". I agree with the logic of Penny J. in *Schwartz v. Fuss*, 2021 ONSC 1159, who said, at para. 14:

It is well settled that unjustified non-payment of rent while under the purported protection of the statutory stay of enforcement of [Landlord and Tenant Board] orders pending appeal, can be regarded as an abusive process and is otherwise sufficient grounds to warrant the lifting of the stay. There is no authority, statute or regulation that permits a residential tenant to withhold ongoing rent pending an appeal.

[9] The frivolous, vexatious, and abusive nature of the Finlays' strategy throughout, and of this appeal in particular, is evident not only in the endorsement

of Black J. under appeal, and in the costs award made by this court, but also in the litany of proceedings – 33 litigation events – that the landlord sets out in its schedule to the factum, which I will not reproduce.

[10] I also grant the order for security for costs. I fix that amount in the total of \$261,374.10, comprised of the following sums.

(i) \$153,539 for rent and rent arrears that accrued to March 18, 2024, which was awarded to the Landlord pursuant to an interim order issued by Black J. dated January 3, 2023;

(ii) \$7,500 for the costs of a previous motion, awarded to the Landlord pursuant to the interim order;

(iii) \$1,000 for the costs of a case conference, awarded to the Landlord pursuant to the interim order;

(iv) \$9,045.99 for the costs awarded to the Landlord by the Court of Appeal for Ontario pursuant to an order dated February 26, 2024;

(vi) \$70,289.11 for the costs awarded to the Landlord pursuant to Black J.'s order under appeal of March 27, 2024; and

(vii) \$20,000 for the costs of the appeal itself.

[11] I order the Finlays to post security for costs under r. 61.06 in the amount of \$ 261,374.10 by Friday, May 3, 2024.

[12] The costs for this motion are fixed in the amount of \$7,500, all inclusive.

“P. Lauwers J.A.”