

CITATION: Chowdhury v. Satveer and

Enterprise Inc., 2016 ONSC 4319

DIVISIONAL COURT FILE NO.: 393/14

DATE: 20160628

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

C. HORKINS J. (ORALLY)

Suraiya Kibria Chowdhmy)
)
 Plaintiff)
 (Appellant))

Jayanta K. Singha, for the Plaintiff
(Appellant)

— and —

Satveer and Harveer Enterprise Inc.)
)
 Defendant)
 (Respondent))

Tanya Walker, for the Defendant
(Respondent)

- AND BETWEEN_)
 Satveer and Harveer Enterprise Inc.)
)
 Plaintiff by Defendant's claim)
 (Respondent))

— and_)
)
 Surauya Kibria Chowdhury, Kibria)
 Mohammad and Khan Chowdhury)

Defendants by Defendant's claim)
 (Appellants))

HEARD at Toronto: June 28, 2016

[1] This is an appeal from the judgment of Deputy Judge Hunt dated July 28, 2014. [2]

The dispute in Small Claims Court arose out of a commercial lease between the appellant (the tenant) and Satveer and Harveer Enterprise Inc. (the landlord).

[3] Pursuant to the lease, the tenant leased premises from the landlord located at 1396 Gerrard Street East in Toronto, from August 15, 2006 to August 14, 2011. The tenant's husband, Mr. Mohammad and the tenant's cousin Mr. Chowdhury, co-signed the lease and executed a personal guarantee.

[4] The tenant operated a business in the leased premises called 'The Little Bangladesh'.

[5] Pursuant to the lease, the tenant provided the landlord with a \$10,000.00 security deposit. The evidence was that the tenant struggled to pay the rent on time. The tenant vacated the premises in July 2011.

[6] The tenant sued the landlord for return of her \$10,000.00 deposit. The landlord held back \$3,572.07 (monies that were owed to the landlord) and the landlord offered the tenant the balance of the deposit which was \$6,427.93.

[7] The tenant refused because she wanted 100% of the deposit less \$266.00 which was the difference between the GST on the last month's rent and HST.

[8] After the claim was issued in Small Claims Court, the landlord defended and asserted its own claim against the tenant for damages to the leased premises that the landlord alleged had occurred while the tenant was in possession of the leased premises.

[9] After a two day trial, the Deputy Judge found in favour of the landlord. He assessed the landlord's damages at \$16,296.06. He agreed that the landlord held a net security deposit of \$6,427.93. The Deputy Judge applied this credit against the landlord's damage award. This resulted in a net damage award of \$9,868.13.

[10] The tenant filed an amended notice of appeal listing numerous grounds of appeal. The tenant's counsel advised this Court that the appellant is only advancing four grounds of appeal and the rest are withdrawn.

STANDARD OF REVIEW

[11] The standard of review is governed by *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. On questions of law, the standard is correctness. On questions of fact, the standard is palpable and overriding error. On questions of mixed fact and law, there is a spectrum. Where there is an inextricable legal principle, the standard of review is correctness. However, with respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error.

[12] I will now address the four grounds of appeal that the tenant advances today.

[13] The tenant states that the Deputy Judge erred in law because he allowed the landlord to present documents at trial marked as Exhibit 7 and 8 and did not provide her with copies. The transcript reveals that these documents were presented by the landlord and that they dealt with improvements that the landlord made to the outside facade of the leased premises. The damages that the landlord claimed were inside the building and the facade was not relevant.

[14] There is no evidence that tenant was not given copies of Ex'hibit 7 and 8. To the contrary, when the landlord's counsel presented the documents to the Court on June 2, 2014, she stated to the Court "we have copies". This confirms that copies were available. There is no evidence that tenant was not given a copy. In any event, the documents were not relevant to the damages that the landlord alleged and the Court awarded. In summary, I reject this ground of appeal. There is no basis whatsoever for finding that the Deputy Judge erred in law.

[15] The tenant argues that the Deputy Judge made a palpable and overriding error because he allowed the landlord to file photographs of the damage to the leased premises and relied on these photographs to find in favour of the landlord and award damages against the tenant.

[16] The photographs were taken several months after the tenant vacated the property and before the repairs were done. The Deputy Judge accepted the photographs into evidence. The tenant agrees that he was entitled to do so. The Deputy Judge relied on the photographs together with the evidence of Sulinder Kaur Gill, representative of the landlord. On the basis of this evidence, he preferred the evidence of the landlord over the tenant and stated as para. 40:

"40. In the intervening two months, S&H was unable to rent the premises because of the condition they were left in. This is the evidence of Ms. Gill, and once again, I accept it as true and prefer it to the evidence of Ms. Chowduny. Ms. Gill's evidence has the support, as well, of a series of photographs showing the condition of the vacated premises at 1396 Gerrard. Significant work was clearly required."

[17] I see no palpable and overriding error of fact in these circumstances. The Deputy Judge carefully considered all of the damage evidence in paras. 40 — 47 of the Reasons. The Deputy Judge preferred the evidence of the landlord over that of the tenant. I reject this ground of appeal.

[18] The tenant alleges that the Deputy Judge made a palpable and overriding error of fact when he described her voice at trial at para. 13 of the Reasons as a "plaintive voice and beseeching tone". She says that it was a palpable and overriding error for the Judge to assess her credibility based on the tone of her voice. I reject this ground of appeal. The Reasons reveal that there was much more to the Judge's credibility assessment as the full paragraph 13 reveals:

"13. It must be said that with plaintive voice and beseeching tone Ms. Chowdhury repeatedly and insistently sought the sympathy of the Court. That was essentially the basis of her claim. So, too, was it the basis of her defence to the defendant's claim; that and continued denial that she had ever done anything wrong or had ever breached any of the terms of the lease. These two stances, a quest for sympathy and a denial of breach of the lease also served as her argument at the conclusion of trial."

[19] Later at paras. 28-30 of the Reasons, the Deputy Judge had this to say about the evidence of the tenant:

"28. The breaches by the plaintiff and her co-tenants of the terms of the lease are many and manifest. The failure to comply with the tenant's covenants have been set out at some

length in these reasons. Ms. Gill, in fact seems prescient in having required a security deposit in addition to first and last month's rent.

29. I find that virtually none of the allegations in the plaintiffs claim are supported by the evidence.

30. I find as a fact that the plaintiff has largely failed in her claim; not in the sum which remains notionally owing to her; but in terms of her honesty and integrity."

[20] In summary, there is no basis for this ground of appeal and I reject it.

[21] The last ground of appeal relates to the fact the tenant did not have a lawyer at the trial. The tenant argues that the Deputy Judge erred in law because he did not advise her to get a lawyer. I reject this ground of appeal. A litigant is entitled to be self-represented in the Small Claims Court, as in this Court. Many litigants advance claims and defences in Small Claims Court without counsel. There is no law that requires the trial judge to tell a litigant in Small Claims Court, or any court, to obtain a lawyer. In this regard, I note that the tenant's husband is a licensed paralegal and he was a party to the action.

[22] This Small Claims Court trial, like so many, preceded with a self-represented litigant. It was open to the tenant to retain a lawyer and she did not do so. That was her choice. There are numerous examples in the transcript where the Deputy Judge explained the trial process to the tenant and he made an effort to clarify the evidence when necessary. This transcript reveals that the tenant cross-examined witnesses and she was able to communicate in English throughout the trial. In summary, this ground of appeal has no merit and is rejected.

[23] The appeal is dismissed.


[24] The landlord seeks costs on a substantial indemnity basis in the amount of \$8,597.38 all inclusive. I have reviewed counsel's Bill of Costs and find it to be reasonable in terms of hourly rates and time incurred. The tenant agrees that the landlord is entitled to costs but asks that the Court award only partial indemnity costs of \$5,935.48. Counsel for the tenant does not dispute the hourly rates and/or the time spent by the landlord's counsel. The landlord made an offer to settle on September 29, 2015, before the work on this appeal commenced. The landlord offered to accept a reduced damage award of \$10,000.00 all inclusive. This was an offer made under Rule 49 and Rule 49.10(1)(c) is triggered.

[25] I note that in this case, the tenant served a very extensive amended notice of appeal which in my view is poorly organized and difficult to follow. It is apparent from the landlord's factum that organizing the response to this appeal, took considerable time and effort. The tenant did not narrow and limit the grounds of appeal until today. This approach caused the landlord unnecessary expense. While I appreciate that this is a Small Claims Court appeal, I conclude that this is a case where substantial indemnity costs are justified. The confusing nature in which the tenant advanced her appeal as reflected by the amended notice of appeal, the last minute withdrawal of most of the grounds of appeal and the failure to accept a very generous compromise that was set out in the landlord's offer to settle, support substantial indemnity costs.

[26] In summary, I allow the substantial indemnity costs as requested and fixed the landlord's costs at \$8,597.38 and order the tenant to pay these costs to the landlord.

COSTS

[27]I have endorsed the Appeal Book and Compendium as follows: "The appellant's appeal is dismissed for reasons given orally today. Costs fixed at \$8,597.38 payable by the appellant to the respondent in 30 days."



C. HORKINS J.

Date of Reasons for Judgment: June 28, 2016

Date of Release:

JUL 2016

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(Appellant)

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Satveer and Harveer Enterprise Inc.

Plaintiff by Defendant's claim
(Respondent) — and...

Surauya Kibria Chowdhury, Kibria Mohammad and
Khan Chowdhury

Defendants by Defendant's claim
(Appellants)

ORAL REASONS FOR JUDGMENT

C. HORKINS J.

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