CITATION: Kipiniak v. K. Dubiel; Kipiniak v. E. Dubiel, 2011 ONSC 825
COURT FILE NOS.: 352/10 and 353/10
DATE: 20110207

ONTARIO

SUPERIOR COURT OF JUSTICE – DIVISIONAL COURT

BETWEEN:	)	
	)	
Court File No. 352/10	)	*Andrew Kipiniak*, in person
ANDREW KIPINIAK	)	
	)	
Appellant	)	
	)	
– and –	)	
	)	*Joseph Kary*, for the Respondents
KINGA DUBIEL	)	
	)	
Respondent	)	
	)	
AND BETWEEN:	)	
	)	
Court File No. 353/10	)	
ANDREW KIPINIAK	)	
Appellant	)	
	)	
– and –	)	
	)	
EWA DUBIEL	)	
Respondent	)	
	)	**HEARD:** November 16, 2010 (in Toronto)
	)	and in writing

MOLLOY J.:

REASONS FOR DECISION

[1] Andrew Kipiniak appeals from two orders made by Small Claims Court Judge Pamela Thompson, both dated June 15, 2010. One order was made in an action in which Mr. Kipiniak is the plaintiff and Ewa Dubiel is the defendant (SC-10-99564-00); the other order (which is similar in its terms) was made in an action in which Mr. Kipiniak is the plaintiff and Kinga Dubiel is the

defendant (SC-10-100598-00). The orders dismissed Mr. Kipiniak's actions and prohibited him from commencing any further proceedings related to their subject matter in any Small Claims Court in Ontario.

[2] The orders were made by the Small Claims Court judge on her own initiative, in the absence of any motion before the court, without a proper evidentiary foundation, without notice to Mr. Kipiniak, and without providing him with any meaningful opportunity to be heard. For the reasons that follow, I am of the view that the orders were made without jurisdiction and in breach of principles of procedural fairness and natural justice. Accordingly, both orders are set aside.

Factual Background

[3] Mr. Kipiniak owns a condominium on Richview Road in Toronto, where he resides. In 2001, due to health issues following a stroke and brain tumour, he needed assistance at home and the respondent Ewa Dubiel moved into his Richview residence to look after him.

[4] Mr. Kipiniak is also the owner of another condominium unit on Allenhurst Drive ("Unit 502") in Toronto. On December 31, 2002, Mr. Kipiniak entered into a written agreement to rent Unit 502 to Kinga Dubiel (the daughter of Ewa Dubiel) for $1000 per month. On April 25, 2005, Kinga Dubiel gave written notice that she was moving out of Unit 502, effective June 1, 2005. She stopped paying rent after that date, but did not move out.

[5] On June 30, 2005, Mr. Kipiniak advised Ewa Dubiel in writing that he wished her to move out of his Richview residence because their "relationship" had "degenerated." He offered to permit her to live in Unit 502 for 12 months rent-free, following which she would have an option to purchase it if she wished to do so. He also agreed to pay her $1000 per month for 12 months.

[6] Ewa Dubiel did move into Unit 502 at some point in 2005, apparently towards the end of November. She did not pay rent. She stayed considerably longer than one year. Her daughter Kinga continued to live there, also without paying rent. Mr. Kipiniak made $1000 monthly payments to Ewa Dubiel for ten months. He alleges that he stopped making the payments when she made it clear that she would not be moving out of Unit 502.

[7] The situation was not without legal complexity. Were Mr. Kipiniak and Ewa Dubiel in a landlord and tenant relationship because he was allowing her to live at Unit 502 rent-free? Was Kinga Dubiel still a tenant of the property after November 2005 because of the prior landlord and tenant relationship between her and Mr. Kipiniak, or was she now merely living there as a guest of her mother? On top of that, there was the complication of Ewa Dubiel alleging a common law spousal relationship between her and Mr. Kipiniak, which he denied. Apparently, she commenced proceedings in the Family Court, but according to Mr. Kipiniak, those proceedings were resolved by an agreement that Ms Dubiel would purchase Unit 502, conditional upon her

obtaining financing, which she was unable to do. He says that since then Ms Dubiel has dropped her family law claim.

[8] Mr. Kipiniak sought to regain possession of Unit 502 so that he could sell it, but the legal route for doing so was far from clear. In 2007, based on his understanding that Kinga Dubiel was a tenant but Ewa Dubiel was not, he commenced a proceeding against Kinga before the Landlord and Tenant Board and a proceeding against Ewa in the Ontario Superior Court.

[9] On March 7, 2008, after a hearing at the Landlord and Tenant Board, Mr. Kipiniak obtained an order terminating the tenancy of Kinga Dubiel, ordering her to pay $10,150 in rent arrears and costs, and directing her to vacate by March 30, 2008, failing which she would be evicted by the Sheriff. In coming to that conclusion, the Board found that Kinga Dubiel owed Mr. Kipiniak just over $16,000 for rent arrears up to the end of March, 2008 and ordered payment at the top of the Board's $10,000 jurisdiction, Mr. Kipiniak having waived his claim for the excess. Kinga Dubiel did not move out and did not pay any rent. She sought a review of the March 2008 decision and obtained a stay pending the review.

[10] In the Superior Court action, Mr. Kipiniak brought a motion for a writ of possession, on notice to Ewa Dubiel, who was represented by the same counsel as her daughter Kinga. On June 16, 2008, Strathy J. found in Mr. Kipiniak's favour and directed that a writ of possession would issue for Unit 502, but that the writ could not be enforced for 60 days to permit Ewa Dubiel to either purchase the property or find some other accommodation. At the end of the 60 days, Ewa Dubiel was still in possession and had not taken steps to purchase the property. Kinga Dubiel also took no steps in relation to the order.

[11] On August 19, 2008, a writ of possession was issued by the Superior Court, which was then executed by the Sheriff on September 19, 2008. The writ of possession related to Unit 502 and was directed to all persons in possession, which included both Ewa and Kinga Dubiel.

[12] No appeal and no motion to set aside the order of Strathy J. were ever taken by either Ewa or Kinga Dubiel. However, Kinga Dubiel commenced a new proceeding before the Landlord and Tenant Board seeking to be put back into possession. Inexplicably, in October 2008, a Member of the Board made an interim order directing the Sheriff to put Kinga Dubiel back into possession and the Sheriff complied with the order of the Board, thereby overriding the Superior Court order. Kinga Dubiel moved back into Unit 502. She continued to live there rent-free until the end of April 2010.

[13] Meanwhile, Kinga's application for a review of the March 2008 eviction order was still pending before the Landlord and Tenant Board. There was considerable delay in getting to a hearing caused, in part, by multiple proceedings brought by the parties and also by repeated adjournments as the parties attempted unsuccessfully to settle their disputes. Ultimately, an Order was made by Member Jean-Paul Pilon on April 9, 2010. The Member found that the tenant Kinga Dubiel had notice of the order made in the Superior Court and failed to appeal or move to set it aside, even though she was represented by counsel throughout. He held that the

Board had no jurisdiction to oust the writ of possession issued by the Superior Court. Further, he held that there was no error in the original Board order made in March 2008 and specifically ruled that Ewa Dubiel was never a "tenant" of Unit 502, although Kinga Dubiel was. In the result, the Board order made in March 2008 for arrears and for possession of the unit was affirmed. It was pursuant to this order that Mr. Kipiniak ultimately regained possession at the end of April 2010.

[14] It appears that all of the matters before the Landlord and Tenant Board have now been concluded. It may also be the case that any family law matters have either been resolved or abandoned. However, Mr. Kipiniak has a number of monetary claims against Ewa Dubiel and against Kinga Dubiel, which are the subject of actions he has commenced in the Small Claims Court. There are two claims in the Small Claims Court against Ewa Dubiel:

- SC-09-081772---commenced on March 13, 2009, seeking reimbursement for parking at Unit 502
- SC-10-099564---commenced April 13, 2010, claiming $22,000 for breach of contract

[15] There are six claims against Kinga Dubiel, as follows:

- SC-09-081771---commenced March 13, 2009, seeking reimbursement for parking at Unit 502
- SC-09-090415---commenced September 28, 2009, seeking payment for a hydro bill for Unit 502
- SC-10-097113---commenced February 26, 2009, seeking reimbursement for a locksmith expense
- SC-10-100598---commenced May 4, 2010, claiming $25,000 for rent from April 1, 2008 to April 30, 2010 (the period of occupation after the initial Landlord and Tenant Board order)
- SC-10-100597---commenced May 4, 2010, seeking to recover the cost of enforcement by the sheriff ($648.00)
- SC-10-103065---commenced July 1, 2010---seeking enforcement of the Landlord and Tenant Board Order from March 2008

The Orders Under Appeal

[16] Mr. Kipiniak appeals from the orders made by the Small Claims Court judge on June 15, 2010 in Action SC-10-100598 ($25,000 claim against Kinga Dubiel for rent) and Action SC-10-99564 ($22,000 claim against Ewa Dubiel for breach of contract). Copies of the orders were mailed to Mr. Kipiniak by the court and received by him on June 17, 2010.

[17] In the action against Kinga Dubiel for rent, the June 15 order states:

> This claim is improper. The plaintiff has obtained an order of the Landlord and Tenant Board. This matter is statute barred under the Tenancy Act. The claim is further statute barred as relating to rent prior to May 4th, 2008, under the Limitations Act. No further claim relating to this tenancy/occupancy may be issued in the Small Claims Court anywhere in Ontario, except for collection of the Landlord and Tenant Board Order TSL-07348, under Rule 12 (1)(c) and (2) [*sic*]. This matter was referred to at the hearing of June 9, 2010. Costs to the defendant of $90.00.

[18] In the contract action against Ewa Dubiel, the June 15 order states:

> This claim is improper, as discussed with the parties on June 9th, 2010. The claim is barred under the Residential Tenancies Act because it relates to rent and to a current tenancy. The claim is also improper as it relates to a family law matter and a Superior Court matter. The claim is further barred by the Limitations Act as the rent was due in 2006. The plaintiff can bring no further actions in the Small Claims Court in Ontario, under Rule 12.02(1)(a) (c) and (2).

[19] Both orders refer to Rule 12.02 of the Small Claims Court Rules, which states:

> 12.02 (1) The court may, on motion, strike out or amend all or part of any document that,
>
> (a) discloses no reasonable cause of action or defence;
>
> (b) may delay or make it difficult to have a fair trial; or
>
> (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> (2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:
>
> 1. In the case of a claim, order that the action be stayed or dismissed.
>
> 2. In the case of a defence, strike out the defence and grant judgment.
>
> 3. Impose such terms as are just.

[20] The June 15 orders were made by the judge on her own initiative. There was no motion by the defendants in either action seeking such relief. No materials were filed by any of the parties. The only thing that could have been before the court was the pleadings.

[21] Both Orders make reference to a hearing on June 9, 2010. That hearing was a "to be spoken to" attendance in respect of SC-09-090415 (the action against Kinga Dubiel relating to hydro expenses). On that occasion, Small Claims Court Judge Thompson made the following endorsement:

> This claim was commenced against a current tenant. There are three claims outstanding which shall be consolidated into SC-09-81771-00 for a total of $1625.85. Defendant need not file an amended defence. The stay is lifted and the file (as consolidated) 81771-00 will proceed to a Settlement Conference. No further claims relating to this tenancy or this defendant may be issued anywhere in Ontario in the Small Claims Court, other than execution of L & TB Order TSL-07348.

The Position of the Parties

[22] Mr. Kipiniak submits that the Small Claims Court judge erred in law by granting summary judgment dismissing the two actions in the absence of a motion by the defendants. He further submits that he was denied any opportunity to be heard, which he alleges is a breach of natural justice. Finally, he argues that in any event the Small Claims Court judge erred in law in respect of each basis upon which she purported to dismiss the two actions.

[23] Both defendants have been represented by the same counsel throughout, including before this Court. In the written material filed in response to these appeals, the defendants took the position that: (1) the Divisional Court has no jurisdiction to hear the appeal because the orders in question are not for the payment of money in excess of $500.00 or for the recovery of personal property exceeding $500.00; (2) the Small Claims Court judge properly dismissed both actions as being "inflammatory, a waste of time, a nuisance and an abuse of the court's process;" (3) no notice was required because the orders were made as a result of a settlement conference; (4) the orders were appropriate because the action against Ewa Dubiel should be dealt with as a family law claim in the appropriate court and the action against Kinga Dubiel for rent is within the sole jurisdiction of the Landlord and Tenant Board; and (5) the orders prohibiting further proceedings by Mr. Kipiniak were appropriate because he had abused the court process by bringing "multifarious" proceedings.

[24] In oral argument before me, counsel for the defendants modified that position. He pointed out that the June 15 orders did not specifically state that the actions were dismissed and contended that the orders did not dismiss the two actions, but rather contemplated that they would proceed to be heard together with the other actions. He argued that this was implied because of the order made at what he termed the "settlement conference" on June 9, 2010. At the time of the argument before me, the June 9, 2010 order was not in any of the materials and neither party had a copy of it.

[25] Following argument, I reserved my decision and directed that a copy of the June 9, 2010 order be sent to me so that I could consider it before rendering my decision.

[26] As requested, Mr. Kary, for the respondents, sent me a copy of the endorsement made by the Small Claims Court judge on June 9, 2010. At that time, he also asked for an opportunity to make further written submissions in respect of four issues. I agreed to receive those submissions, with a right of reply to Mr. Kipiniak.

[27] In his written submissions, Mr. Kary argued:

(1) The order prohibiting further claims to be filed was made on June 9, 2010 and was merely repeated in the June 15 orders. The notice of appeal was not filed until July 13 and the appeal is therefore out of time in respect of the June 9 order. Further, since there has been no appeal of the June 9 order, the appeal of this aspect of the June 15 orders is moot.

(2) The June 15 orders were based on submissions made at a "trial attendance" on June 9 and the appellant's arguments about lack of procedural fairness cannot be properly evaluated without a transcript of the June 9th attendance, which Mr. Kipiniak failed to obtain.

(3) Mr. Kipiniak should not be entitled to costs for his disbursements in filing and perfecting his appeal because the Small Claims Court judge made the orders on her own initiative, rather than at the request of the respondents, and regardless of whether the respondents had opposed the appeal, the same disbursements would have been incurred by the appellant.

[28] In response, Mr. Kipiniak submits that he did not appeal the June 9 order, but only the June 15 orders, and his appeal is therefore not out of time. He argues that the lack of a transcript for the June 9 hearing is irrelevant. His main point with respect to the aspect of the orders that prohibits further proceedings is that this relates only to Small Claims Court proceedings and does not preclude this appeal. Finally, with respect to costs, he recognizes that the defendants did not bring any motion to precipitate the orders made, but points out that he has been successful on his appeals and should be able to recover his costs from someone. He queries whether those costs should be recoverable from the judge personally, or from the government that employs her.

The Divisional Court Has Jurisdiction

[29] The Divisional Court clearly has jurisdiction to hear these appeals. Section 31 of the *Courts of Justice Act* provides that an appeal lies to the Divisional Court from a "final order of the Small Claims Court in an action for the payment of money in excess of $500, excluding costs." Both of the subject actions were for the payment of money in excess of $20,000. A dismissal of an action for a claim of over $500 is appealable on the same basis as an order

granting judgment for the plaintiff. Therefore, the only real jurisdictional issue is whether the June 15 orders were "final orders" within the meaning of the section.

[30] There is no issue that an order that purports to dismiss an action is a final order. However, one of the arguments made by Mr. Kary (for the respondents) is that the June 15 orders do not actually dismiss the actions in which they were made. I recognize that the wording of the orders is somewhat vague and that there is no explicit statement that the actions are dismissed. However, I see no sensible way to interpret them other than as purporting to terminate the proceedings.

[31] It cannot be the case that the orders merely direct that no further claims can be brought with respect to the tenancy/occupation of Unit 502. An Order to that effect was already made on June 9 and the repetition of that in the June 15 orders is merely redundant.

[32] I also reject the submission that the June 15 orders are merely administrative or procedural directions to have all of the related claims dealt with together. On the contrary, that was the order that was made on June 9 in SC-09-090415 (hydro bill action). The endorsement on that date refers to "three claims outstanding which shall be consolidated into SC-09-81771-00" [parking expense action] "for a total of $1625.85." It is not clear if that means three claims in addition to the hydro bill action, or three claims including the hydro bill action. In addition to the hydro and parking actions, there was a claim for reimbursement of a locksmith expense and a claim for reimbursement of the costs of the Sheriff's enforcement. Unfortunately, the action numbers of the claims to be consolidated are not set out in the Order. However, what is clear, is that the claim for rent arrears against Kinga Dubiel, which on its own was for $25,000, could not have been included in the consolidated claims which are said to total $1625.85. Further, there is no reference whatsoever in the June 9 order to either of the claims against Ewa Dubiel being consolidated with the claims against Kinga Dubiel. There is also no reference in the June 15 orders to any other proceedings being consolidated with that those actions, nor to any future steps in those actions whatsoever. This is to be contrasted with the other actions, which were directed to proceed to a settlement conference.

[33] The June 15 orders refer to the claims being "improper" and state that they are "statute-barred," for various reasons. Further, each order recites and purports to rely upon Rule 12.02 which relates to striking an action for having no cause of action or as being an abuse of process. There can be no logical reason for relying on this Rule except as authority for dismissing the actions.

[34] I therefore conclude that the June 15, 2010 orders are final orders by which the Small Claims Court judge purported to dismiss the subject actions. As such they are subject to appeal to this Court.

The June 15 Orders Were Made Without Jurisdiction and in Breach of Natural Justice

[35] The jurisdiction of a Small Claims Court judge to dismiss an action for failing to disclose a cause of action, or because the claim is "inflammatory, a waste of time, a nuisance or an abuse of the court's process" is found in Rule 12.02, as was noted by the Small Claims Court judge. That Rule clearly states that this jurisdiction arises in the context of a motion. In this case there was no motion. Because there was no motion, it follows that there was no notice to Mr. Kipiniak, no time for him to consider his position and no opportunity for him to file material or make submissions in support of his position. Indeed, the judge acted entirely on her own initiative, apparently as an administrative action. In doing so, she acted entirely without jurisdiction.

[36] The right to be heard before one's rights are determined is one of the most basic tenets of our legal system. A person whose action is subject to being dismissed is entitled to know the basis upon which this is being proposed and is entitled to file material and make submissions before his rights are determined. None of these rights were afforded to Mr. Kipiniak. This was a breach of procedural fairness and against fundamental principles of natural justice. A decision made in breach of principles of natural justice cannot stand.

[37] The respondents argued that the June 15 event was a settlement conference and that the judge was therefore entitled to dismiss the actions without a formal motion before her. That proposition is incorrect in fact and in law.

[38] As a question of law, no authority was cited for the proposition that an action can be dismissed at a settlement conference without notice and without an opportunity to be heard. A judge presiding over a settlement conference has no special powers to dispose of actions over the objection of the parties. If anything, the jurisdiction to make such an order at a settlement conference is more circumscribed than on a motion.

[39] As to the factual foundation for that submission, there was no settlement conference in these two actions on June 15, or ever. These two actions were also not the subject of a settlement conference on June 9. The attendance in Small Claims Court on June 9 was neither a trial nor a settlement conference; it was merely a "to be spoken to" attendance at which one would expect administrative matters such as trial scheduling to be dealt with. In any event, neither of these two actions was properly before the court on June 9. Indeed, pleadings were not complete at that point; the statements of defence were not filed until June 10, 2010.

[40] It would appear that the Small Claims Court judge made the June 15 orders as an administrative matter. When Mr. Kipiniak inquired about getting a transcript of the proceeding leading to the orders, Small Claims Court staff wrote to him as follows:

> Take note the above noted action was reviewed on June 15, 2010 by Honourable Justice Thomson. The review process is not a hearing and is not conducted in open court therefore, it is not on record and transcripts cannot be produced.

[41] Mr. Kary submits that Mr. Kipiniak should have obtained the transcript of the hearing on June 9 and in the absence of that transcript, his appeal should be dismissed. I do not agree. There was no particular reason to order the transcript of June 9, and Mr. Kary himself never objected to the absence of that transcript in his written factum or in his oral argument on the appeal, having raised it for the first time in his supplementary written submissions. In any event, there can be nothing in the June 9 transcript that could salvage the June 15 orders. Even if the Small Claims Court judge raised concerns about these two actions at the time of the attendance on June 9 (which is denied by Mr. Kipiniak), that certainly does not constitute the kind of notice required to meet the requirements of natural justice.

The June 15 Orders Cannot be Justified as Necessary to Control Abuse of Process

[42] Mr. Kary submits that the June 15 orders were necessary for the court to be able to control its own process. He points to the fact that there are eight Small Claims Court proceedings and that the claims substantially overlap. He argues that multiple related claims can be used as a way of evading the statutory limits on the Small Claim's Court's monetary jurisdiction. He alleges that the claims all arise out of Mr. Kipiniak's relationship with his former common law partner, Ewa Dubiel, and that the "trial judge" was correct in determining that the claims were also barred under the *Limitations Act.*

[43] First, it is by no means clear that all of the claims arise out of Mr. Kipiniak's relationship with Ewa Dubiel. On the contrary, most of the claims would appear at first blush to arise out of his landlord/tenant relationship with Kinga Dubiel. Indeed, even Ewa Dubiel alleges that to be the case in paragraph 1 of her statement of defence.

[44] Second, there is no actual evidence that Mr. Kipiniak and Ewa Dubiel were ever in a common law spousal relationship; there is only an allegation. She apparently asserts it and may even have pleaded it somewhere. However, Mr. Kipiniak denies it. Pleadings are not evidence. Neither party has filed any affidavit material and there has been no determination on evidence as to the accuracy of the allegation as a question fact or a question of law. Further, this issue is not raised as a defence by Ewa Dubiel in her statement of defence.

[45] Third, the legal and factual bases upon which the alleged abuse of process is said to arise are, at the very least, subject to debate. I do not wish to make conclusive findings on these issues as there is still not a full evidentiary record, nor has there been full argument on the legal issues raised. However, I note the following:

- In the action against Kinga Dubiel, the June 15 order is based on the fact that the plaintiff had already obtained an order of the Landlord and Tenant Board. However, the Board order only covered the period up to the end of March 2008. The claim in Small Claims Court commences on April 1, 2008. It is at least arguable that Mr. Kipiniak's waiver of the amount of his claim in excess of $10,000 only related to the claim as it existed at the time the Board made its order and not to the period of time subsequent to that.

- In the action against Kinga Dubiel, the order states that the claim is statute-barred under the *Tenancy Act*. It is not clear what is meant by that unless it is suggesting that the Board has exclusive jurisdiction to deal with the matter. However, it is at least arguable that there is jurisdiction to deal with this claim outside the Board because: the claim covers a period of time subsequent to the termination of the tenancy between the parties by order of the Board on March 30, 2008; the amount claimed in the Small Claims Court exceeds the monetary jurisdiction of the Board; and the claim is brought in respect of a person no longer in possession of the premises.

- In the action against Kinga Dubiel, the order also states that the claim is barred as relating to rent prior to May 4, 2008 under the *Limitations Act.* However, the period covered by the claim commences on April 1, 2008. Also, it is at least arguable that for purposes of the limitation period, the occupation by Kinga Dubiel without paying rent was an ongoing breach and the limitation period did not start to run until she was out of possession.

- In the action against Ewa Dubiel, the June 15 order states that the claim is barred under the *Residential Tenancies Act* because it relates to rent and to a current tenancy. However, the Superior Court issued a writ of possession against Ewa Dubiel after argument on a motion where she was represented by counsel, which would seem to indicate she was not a "tenant" within the meaning of that legislation. Also, the Board in its 2010 decision made a finding that she was not a tenant.

- In the action against Ewa Dubiel, the June 15 order also states that the claim is improper as it relates to a family law matter and a Superior Court matter. There is no factual foundation for the conclusion that this is a family law matter and no reference to any proceeding elsewhere dealing with the same monetary claim.

- In the action against Ewa Dubiel, the June 15 order also states that the claim is barred by the *Limitations Act* as it relates to rent that was due in 2006. Again, this is an allegation of an ongoing breach and it is arguable that the limitation period does not start to run until the breach ceased upon Mr. Kipniak regaining possession.

[46] The uncertainty of these issues underscores the need for a proper evidentiary record, and full and informed submissions on the legal issues raised. I do not purport to resolve these issues, but merely to demonstrate that they are not plain and obvious.

[47] Finally, I recognize the need for the court to control its own process. Multiplicity of proceedings is to be discouraged as it is inefficient, expensive, and can lead to inconsistent results. There is much to be said for consolidating matters and narrowing the issues where

possible. However, this must be done in a manner that respects the right of the parties to be heard, which carries with it a right to fair notice of the case to be met.

[48] I accept that some latitude must be given in the Small Claims Court, which is meant to be informal and expeditious and where the parties are often not represented by counsel. The formal processes of the Superior Court are not always appropriate. For example, it would certainly be open to a Small Claims Court judge to suggest a consolidation order to the parties. Likewise, I would not consider it improper to invite one of the parties to bring a motion to strike a pleading, on proper notice and based on proper materials. It might even be appropriate for a judge to direct that an issue such as a limitation period or possible abuse of process be addressed before an action is permitted to proceed, again provided that the parties are given a fair opportunity to consider the issues, prepare material and make submissions.

[49] However, expediency cannot trump natural justice. There were mechanisms available for addressing concerns related to these actions and to protecting the integrity of the court process. Overriding the rights of the parties is neither necessary nor permissible as a means of achieving that end. The steps taken by the judge here were unnecessary, improper and without jurisdiction.

There Has Been No Appeal from the June 9, 2010 Order

[50] Mr. Kipiniak did not appeal the June 9 order. The time for appealing the June 9 order has now expired and no application has been brought to extend the time to appeal. I therefore assume that Mr. Kipiniak is content for the remaining matters to continue as consolidated under the June 9 order. His submissions about the portion of the June 15 orders prohibiting him from bringing other proceedings relating to Unit 502 seemed to be directed to ensuring that this order did not prohibit him from appealing an order made by a Small Claims Court judge, which it clearly does not do.

[51] Although the June 15 orders will be struck in their entirety, the June 9 order prohibiting further proceedings in the Small Claims Court in relation to this property remains in force. It is likely, however, that this is of no concern to Mr. Kipiniak since the Dubiels are now out of possession and he has already commenced all of the claims he intends to bring against them.

Costs

[52] Mr. Kipiniak has been wholly successful on this appeal and would normally be entitled to his costs. He is self-represented and retired from work and therefore seeks only his disbursements. He has documented his out-of-pocket expenses in relation to these appeals at $1600.63.

[53] Mr. Kary takes no issue with the quantum of costs claimed. However, the respondents object to Mr. Kipiniak being granted any costs on two bases. First, Mr. Kary suggests (in his written submissions) that “the hearing and granting of this appeal would be an unusual indulgence of the Court, with respect to accepting late and incomplete filings, considering oral

statements as to what took place at a hearing in the absence of transcripts, and rendering a decision with respect to a matter that had already resolved by a previous unappealed order."

[54] I believe I have addressed all of these points already. Mr. Kipiniak was entitled to appeal the June 15 orders and there was no transcript because there was no hearing. My proceeding to hear his appeal does not constitute an indulgence. Indeed, the appeal hearing was completed before Mr. Kary even raised this issue. As I have already stated, the transcript of the June 9 hearing is not necessary as nothing done or said on that date would constitute a motion (so as to provide jurisdiction under rule 12.02), nor would it satisfy requirements of procedural fairness or natural justice. Mr. Kipiniak's materials were not late and were not incomplete (apart from his failure to include the endorsement made on June 9, 2010). I have not relied upon oral statements as to what occurred on June 9.

[55] The second objection raised by Mr. Kary is that the respondents should not be liable in costs because the respondents "never filed any motion or pleading requesting the relief that was granted and the court made the orders complained of on its own initiative."

[56] It is correct that the respondent filed no motion requesting the relief sought and also correct that the Small Claims Court judge acted on her own initiative in making the June 15 orders. However, it is not entirely correct to state that the respondents did not file any pleading requesting the relief granted. In her statement of defence filed on June 10, 2010, Kinga Dubiel raises no factual defence to the claim that she has lived rent free at Unit 502 for the period of 26 months from April 1, 2008 to May, 2010. Rather, her brief statement of defence claims that: Mr. Kipiniak is a "frivolous and vexatious plaintiff;" that the claim should be dismissed as an abuse of process; that the claim falls within the exclusive jurisdiction of the Landlord and Tenant Board; that the issue was already considered by the Board and granted on April 9, 2010 and was therefore *res judicata*; and that the action is barred by the *Limitations Act.* The statement of defence filed on June 10, 2010 by Ewa Dubiel in the action against her is similar in content. These allegations, some of which are misleading, are strikingly similar to the grounds upon which the Small Claims Court judge dismissed the actions on June 15.

[57] Mr. Kipiniak accepts that the June 15 orders were not precipitated by any motion by the respondents. However, he argues that he has been successful and is entitled to his costs. He also submits that Mr. Kary unduly and unnecessarily prolonged this appeal, which should be a factor in awarding costs against the respondents. In response to Mr. Kary's submission that the trial judge was acting on her own, Mr. Kipiniak asks whether judicial immunity prevents an order for costs against the judge personally and asks if the government could be ordered to pay the costs.

[58] Costs cannot be awarded against the judge, as Mr. Kipiniak anticipated in his reference to judicial immunity. There is also no basis upon which I could order the government of Ontario to pay the costs.

[59] It is sometimes the case that errors made by judges requiring correction on appeal were not triggered by anything the unsuccessful party on the appeal said or did in order to obtain the

initial order. The fact that this may have occurred in this case is not a bar to the successful appellant being awarded costs, but it is a relevant factor to take into account.

[60] I agree with Mr. Kipiniak's submission that the conduct of counsel for the respondents in the appeal was less than helpful and unnecessarily prolonged the appeal. This is particularly troubling in light of the fact that Mr. Kipiniak's claims against the respondents have been languishing during this appeal process. I realize that this delay did not increase Mr. Kipiniak's disbursement expenses to any appreciable degree. However, it is a factor in determining liability for costs, even if it does not have an impact on quantum.

[61] In all of the circumstances, I do not see this as an appropriate case in which to deprive the successful appellant of the modest costs he seeks.

Ongoing Matters

[62] There may well be some merit to consolidating all existing claims in the Small Claims Court involving these parties, or at least directing that they be tried together so as to avoid inconsistent results. There may also be some merit to some case management to work out the best manner of dealing with these various claims and legal issues. Mr. Kipiniak is understandably concerned about the impartiality of the Small Claims Court judge who made the June 15 orders. It would be best if she had no further role in these proceedings. Any further proceedings in any of the actions involving Mr. Kipiniak should be argued before a different judge.

Order

[63] In the result, the appeals are allowed and the two orders dated June 15, 2010 are set aside. Costs are awarded to the appellant fixed at $1600 inclusive of tax, payable forthwith.

MOLLOY J.

Released: February 7, 2011

CITATION: Kipiniak v. K. Dubiel; Kipiniak v. E. Dubiel, 2011 ONSC 825
COURT FILE NOS.: 352/10 and 353/10
DATE: 20110207

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MOLLOY J.

BETWEEN:

Court File No. 352/10
ANDREW KIPINIAK

Appellant

– and –

KINGA DUBIEL

Respondent

AND BETWEEN:

Court File No. 353/10
ANDREW KIPINIAK

Appellant

– and –

EWA DUBIEL

Respondent

REASONS FOR DECISION

MOLLOY J.

Released: February 7, 2011