

2010 ONSC 2550

Ontario Superior Court of Justice (Divisional Court)

Morguard Residential v. Peters

2010 CarswellOnt 3919, 2010 ONSC 2550, [2010] O.J. No. 6294, 188 A.C.W.S. (3d) 1157

**Morguard Residential, Landlord/Respondent
in Appeal and Lilli Peters, Tenant/Appellant**

Lederman J., Ray J., Wilton-Siegel J.

Heard: April 27, 2010

Judgment: May 10, 2010

Docket: Toronto 436/09

Counsel: Martin P. Zarnett, for Landlord / Respondent in Appeal

Joseph Kary, for Tenant / Appellant in Appeal

Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — By landlord for cause — Miscellaneous

Landlord received complaints about odour emanating from tenant's rental unit — Landlord discovered lots of garbage throughout rental unit — Landlord served notice to terminate tenancy early — Landlord and Tenant Board issued eviction order and awarded landlord damages in amount of \$5,205.15 — Eviction was to be delayed for period of time to allow tenant to arrange housing in residential care facility — Tenant unsuccessfully requested review of order — Tenant appealed — Appeal dismissed on terms — Eviction order and damages award were upheld, but enforcement of eviction order was postponed to allow tenant to arrange alternative accommodations — In addition, landlord was required to seek assistance for tenant from Community Care Access Centre — Photographs and other evidence amply supported board's conclusion that tenant had not kept rental unit in state of ordinary cleanliness — Board had reasonable grounds to conclude odour emanating from unit had substantially interfered with other tenants' reasonable enjoyment — Failure to specify odour in notice to terminate tenancy early was not material — Odour was natural result of garbage described in notice — Board's determination that unclean state of unit substantially interfered with landlord's lawful interest was reasonable — Board was reasonable in determining tenant's mental illness was of such degree that landlord was not able to accommodate her — Board's damages award was supported by evidence and reasonable — Tenant's disability did not entitle her to be judged under more lenient standard.

APPEAL by tenant from eviction order and damages award issued by Landlord and Tenant Board.

Decision of the Board:

1 The tenant, Lilli Peters ("Peters"), appeals an order of Ruth Carey (the "Member"), member of the Landlord and Tenant Board (the "Board"), dated July 2, 2009, evicting Peters from her apartment and awarding damages in the amount of \$5,205.15 in favour of the landlord, Morguard Residential (the "Landlord"). The order dated July 2, 2009 (the "Order") was accompanied by reasons of the Member dated the same date (the "Reasons"). Peters also appeals a decision of Egya Sangmuah dated September 21, 2009 denying Peters' request to review the Order of the Member and confirming that Order.

2 The appeal proceeds under section 210(1) of the *Residential Tenancies Act, 2006* S.O. 2006, c.17 (the "*Act*"), which provides that an appeal is limited to questions of law. The standard of review accorded decisions of the Board is one of reasonableness where deference to the Board as a specialized tribunal interpreting its own statute is warranted and where, as in this case, the legal and factual issues are intertwined and cannot be separated. In particular, the standard of reasonableness also applies to

any review of the exercise of the Board's discretion under section 83 of the *Act*: see *Caputo v. Newberg*, [2009] O.J. No. 2659 (Ont. Div. Ct.) at para. 6.

3 The Landlord served a Notice to Terminate a Tenancy Early on or about August 11, 2008 (the "Notice"). The Notice alleged substantial interference with the reasonable enjoyment of the residential complex by the Landlord or another tenant, or with another lawful right, privilege or interest of the Landlord or another tenant. It stated that, on August 20, 2008, the Landlord discovered that Peters' rental unit was in a state of uncleanliness and that it was actually impossible for the Landlord to do any work in the unit. It alleged the state of uncleanliness contravened section 33 of the *Act*. It listed a number of specific items that covered the appliances, counters and floors of the unit. Peters does not deny the allegation, apart from the reference to blood-soaked bandages, but says that it was unreasonable to require her to clean up a number of the items such as papers, plastic bags, toilet paper rolls and certain other belongings which were necessary in her mind to absorb harmful substances seeping into her apartment.

4 Peters put forward three principal grounds of appeal:

(i) that the finding that she has substantially interfered with the reasonable enjoyment of other tenants or with a lawful interest of the Landlord is unreasonable;

(ii) that the Board unreasonably refused to exercise its discretion under section 83 of the *Act*; and

(iii) that the finding that she willfully or negligently caused damage to the unit was unreasonable as was the determination that the cost of clean-up of her unit constituted damages for purposes of the *Act*.

We will address each issue in turn.

Grounds for Eviction

5 The Member found that Peters had not kept the unit in a state of ordinary cleanliness. There were photographs and other evidence that amply supported this conclusion. From this finding, the Member proceeded to two further findings, each of which could support an eviction of Peters.

6 First, the Member found that the odour emanating from the unit had substantially interfered with other tenants' reasonable enjoyment because at least one had to be relocated due to the smell. Peters argues that there was no evidence of such odour emanating from her apartment as of the date of the hearing, apart from oral complaints for which the details were lacking. There was, however, uncontradicted oral evidence of complaints of other tenants as well as evidence of the relocation of one tenant due to odour emanating from the unit. Peters had the assistance of a friend of the Board at the hearing. The Landlord's representative was not cross-examined or otherwise challenged on this evidence. The Member therefore had reasonable grounds for this conclusion.

7 As a related matter, Peters argues that the Notice was defective in that it did not identify odour in the apartment or odour emanating from the apartment in the description of the specific interference alleged in Schedule "A" to the Notice.

8 To comply with the requirements of sections 43 and 64 of the *Act*, the Notice must set out the specific allegations in sufficient detail in order to permit Peters to know the case alleged against her, to be able to address the alleged conduct, activity or omission in order to void the Notice, and to decide whether to dispute the allegations.

9 We are satisfied that the Notice satisfied this requirement notwithstanding the absence of a specific reference to odour arising from the garbage. The evidence before the Board regarding odour in the unit was persuasive. It establishes that the odour was a natural result, or emanation, of the garbage described in the Notice. Peters could not reasonably have considered that the Landlord's complaint was restricted to the physical presence of garbage and did not also extend to any natural consequences of the presence of the garbage in the unit.

10 Second, the Member found that Peters' failure to maintain the unit in a state of ordinary cleanliness substantially interfered with a lawful interest of the Landlord. In reaching this conclusion, the Member referred to the Landlord's legal interest in the state of the apartment arising from its obligation under section 20 of the *Act* to maintain the unit in a state fit for habitation. The Landlord has a lawful interest in protecting itself against future claims by Peters, or a guardian appointed for her, or other tenants based on a failure to comply with section 20 of the *Act*. Accordingly, the Member's determination of substantial interference with a lawful interest of the Landlord was reasonable.

11 Based on the foregoing, there are reasonable grounds for concluding in paragraph 19 of the Reasons that the Landlord had delivered a valid notice of termination thereunder.

Relief from Eviction

12 The Member then considered whether she should exercise her discretion under section 83 of the Act to refuse to grant the Landlord's application. In this connection, the Member found, on ample grounds, that Peters was disabled within the meaning of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*") despite the absence of medical evidence to this effect. This conclusion was supported by the friend of the Board who assisted Peters at the hearing.

13 The Member then referred to the provisions of sections 17(1) and 17(2) of the *Code*. Section 17(2) provides, in effect, that no tribunal or court shall find a person incapable of performing or fulfilling duties for the purposes of the *Act*, including section 17(1), unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs.

14 The Member found that Peters had no intention, and because of her delusions is actually incapable of, maintaining the unit in a condition of ordinary cleanliness as required by section 33 of the *Act*. She also held that there was nothing the Landlord could do to accommodate Peters so that she could stay in her unit.

15 There is ample evidence to support this conclusion. After inspecting the unit on August 20, 2008, the Landlord contacted the Community Care Access Centre on August 20, 2008 to attempt to obtain some assistance for Peters. Peters subsequently refused medical assistance and would not allow access to her unit. The Landlord also contacted the emergency contact for Peters but that individual took no further action. The hearing before the Board did not occur until June 18, 2008. In the interim, the Member issued an order dated April 15, 2009 which contemplated that, if Peters did not clean her unit by a specified date, the party assisting her as a friend of the Board would contact an appropriate social agency to arrange for cleaning of the unit. Peters did not clean the unit and declined the services of the social agency contacted by the friend of the Board.

16 Peters argues that the Landlord failed to accommodate by excluding from its Notice to Terminate a Tenancy Early various items that she says did not present a health hazard but which she was unwilling to remove for reasons associated with the physical risks to which she perceives she is subject. This proposal for accommodation was not, however, before the Member. If Peters had wished to take this position, she had an obligation to "do her part" in respect of accommodation by bringing this consideration to the attention of the Landlord. More significantly, given the extent of the problem of uncleanness evidenced by the photographs and described by the witnesses, the lack of precision in her distinction between "clutter" and "uncleanliness", and Peters' refusal to allow access to her apartment, the Member's decision that there was nothing the Landlord could do to accommodate Peters was reasonable.

Damages

17 On May 5, 2009, the Landlord served a further Notice to Terminate a Tenancy Early alleging that Peters willfully or negligently caused undue damage to the rental unit. It then commenced a second application seeking termination of the tenancy and an order for damages pursuant to section 89(1) of the *Act*. That provision reads as follows:

A landlord may apply to the Board for an order *requiring a tenant to pay reasonable costs that the landlord has incurred or will incur for the repair of or, where repairing is not reasonable, the replacement of damaged property, if the tenant,*

another occupant of the rental unit or a person whom the tenant permits in the residential complex *wilfully or negligently causes undue damage to the rental unit* or the residential complex and the tenant is in possession of the rental unit.

[emphasis added]

18 The Member found three separate categories of undue damage caused by Peters, rejecting others claimed by the Landlord.

19 The Member found that Peters had willfully or negligently caused undue damage to the rental unit by damaging the vinyl kitchen flooring. She awarded costs of \$369.90. The Member also found that the parquet floors required repair although she rejected the Landlord's claim for the replacement cost of the floors, leaving the amount of the Landlord's damages unquantified under section 89 of the *Act*. In addition, the Member found that the refrigerator exterior had been badly marked, discoloured or stained and the finish had been compromised in places. The Member found this also constituted undue damage caused by Peters' willful or negligent activity. She awarded damages in the amount of \$425.25, being the replacement cost of the refrigerator under a bulk purchasing agreement of the Landlord.

20 Peters challenges the two damage awards on the grounds that the Landlord has not established that she willfully or negligently caused the damage. In this connection, Peters also suggests that the standard of willful or negligent conduct should be relaxed in the case of a disabled person.

21 We see no error of law in the member's award of these damages. With respect to the refrigerator, the evidence amply supports the Member's finding that Peters' practice of attaching wet toilet paper to the refrigerator door damaged the finish. Such behavior satisfies the requirement of willful or negligence behavior, in this case of a willful nature. Similarly, the evidence supports the inference drawn from the evidence that Peters' activities of daily living caused damage to the vinyl kitchen flooring.

22 Moreover, the *Code* does not obviate a disabled person's responsibility to pay for damage to a Landlord's premises extending beyond reasonable wear and tear: see *Eskritt v. MacKay*, [2008] O.J. No. 3434 (Ont. C.A.) at para. 3. Put another way, the *Code* does not relax the standard of willful or negligent behavior applicable under the common law for the purposes of section 64 of the *Act*.

23 The Member also found that part of the reasonable cost that the Landlord will incur to repair the damage to the unit caused by Peters' willful or negligent conduct is the cost of cleaning out the unit. This conclusion was based on a finding that it will be necessary for the Landlord to remove all of the garbage from the unit and to disinfect it before any of the damage can be addressed. The Member found that the reasonable cost of such cleaning amounted to \$4,410.

24 Peters argues that future cleaning costs are not compensable under section 89 of the *Act* because the concept of damage is limited to physical damage which cannot include cleaning up "clutter" or "disorder".

25 This issue involves a mixed question of fact and law. Given the nature of the repairs to be addressed, the extent of the garbage deposited in the unit, and the evidence of the odour in the unit, the Member could reasonably conclude that the unit needed to be cleaned out and disinfected before the repairs could proceed. On this basis, the Member could also reasonably conclude that such cleaning and disinfecting costs were costs that the Landlord will incur for the repair of and replacement of the damaged property.

26 Accordingly, we do not find that the Member made any error of law in finding that, for the purposes of section 89 of the *Act*, the reasonable costs that the Landlord will incur for the repair of, or replacement of, the damaged property is \$5,025.15.

Conclusion

27 Based on the foregoing, the appeal is dismissed. Counsel have agreed that costs of the appeal shall be fixed at \$1,750, on an all-inclusive basis, to be payable to the successful party. Accordingly, the Landlord is entitled to costs in such amount.

28 In the Reasons, the Member noted that Peters was in urgent need of housing in a residential care facility and that such care is not easy to obtain or arrange. For this reason, the Member ordered that the eviction be delayed for a period of time. We

concur in this approach and, accordingly, order that the stay of the Board's order be vacated but that enforcement of the eviction order be deferred until August 1, 2010. Further, it is ordered that the Landlord shall notify the Community Care Access Centre forthwith of the pending eviction to seek its assistance in identifying suitable alternative accommodation for Peters.

Appeal dismissed.