

2003 CarswellOnt 5711
Ontario Rental Housing Tribunal

Toronto Community Housing Corp. v. Thompson

2003 CarswellOnt 5711, [2003] O.R.H.T.D. No. 145

Order under Section 69, Tenant Protection Act, 1997

In the Matter of 313, 600 Dundas St E, Toronto ON M5A 2B9 Toronto Community Housing Corp. (Landlord) and Anthony Thompson, Monica Thompson (Tenants)

Fine Member

Heard: December 11, 2003

Judgment: December 22, 2003

Docket: TSL-56721

Counsel: Dale Maingot (Agent) for Landlord
Gerri Laford for Tenants

Subject: Property

Headnote

Landlord and tenant --- Residential tenancies — Rent — Miscellaneous issues

Fine Member:

1 Toronto Community Housing Corp. (the 'Landlord') applied for an order to terminate the tenancy and evict Anthony Thompson and Monica Thompson (the 'Tenants') because the Tenants did not pay the rent that the Tenants owe.

2 This application was heard in Toronto on December 11, 2003. The Landlord's agent and the Tenant Monica Thompson attended the hearing. Representing the Landlord was Dale Maingot, who acted on their behalf. Representing the Tenants was Gerri Laford, who acted on their behalf.

Issues and Background:

3 Most of the facts are not in dispute. This issue has been before the Tribunal many times before. The major issue is whether or not the Tribunal can look behind the Landlord's actions, practices, policies and their calculation of rent with respect to "rent geared to income" situations in the social housing context, where the tenancy is partially exempt from the *Tenant Protection Act, 1997 (the Act)* pursuant to Section 5 of the *Act*. The position generally taken by the Tribunal has been that the exemption from provisions related to rent removes our jurisdiction over such things.

4 Additionally, there is the issue of whether the Tribunal's over-riding discretionary relief from eviction should be considered in these situations.

Evidence and findings:

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1. The Tenants have not paid the total rent they were required to pay for the period from July 1, 2003 to December 31, 2003. Because of the arrears, the Landlord served a Notice of Termination effective September 5, 2003.

2.

The Tenants paid \$1,042.00 after the application was filed or after the termination date in the notice of termination. Payment consisted of a payment of \$303 in October of 2003 after the termination date but before the application was filed, plus a payment of \$63 on November 18th, \$240 on November 27th and *an adjustment in favour of the Tenants of \$436 on December 9th, 2003*. It is my understanding that this credit was offered on the morning of the hearing.

3. According to the Landlord, the adjustment was given for the purpose of crediting the tenants with 4 months rent, as the son had left the unit in August and therefore the Tenants were not required to pay his portion of the rent for the months of August, September, October and November 2003. The son has not returned.

4. December's rent has come due since the application was filed. The Landlord is claiming that for the tenancy to continue, the Tenant must pay \$1,062 representing the arrears to the end of November, minus the payments of \$63, \$240 and \$436 (together totalling \$739) plus December's rent of \$414, for a total of \$737. **The application fee of \$150 that I would normally order in these circumstances would bring the total to \$887 to the end of December 2003.**

5. The Tenant Ms. Thompson asks the Tribunal to forgive her obligation to pay rent arrears that were incurred by her son earlier in the tenancy which were not the subject of this application, but which were cleared by applying rental payments that she made in ensuing months. She claims that he is no longer there, and should make his own arrangements with the Landlord, and indeed claims that her son did speak with a representative of the Landlord. She was not clear about the details of these discussions, or whether an agreement was arrived at.

6. At common law, Tenants are jointly and severally liable for debt incurred through tenancy agreements. The *Social Housing Reform Act 2000 (SHRA)* further affirms this in section 86(2) with respect to rent geared to income units. Ms. Thompson cannot distance herself from debts incurred under the tenancy, particularly where they were joint tenants. I cannot accept that her obligation for her son's debt should be forgiven. This excerpt is from the *SHRA*:

Reimbursement of service manager

86. (1) If a household pays geared-to-income rent at a lower rate than the rate to which the household is entitled under this Part, the service manager may request that the household reimburse the service manager for the excess amount of rent-geared-to-income assistance paid on behalf of the household. 2000, c. 27, s. 86 (1).

Joint and several liability

(2) If the service manager requests a household to reimburse the service manager, the members of the household who are parties to the lease or the occupancy agreement for the unit are jointly and severally liable to pay the amount owing to the service manager. 2000, c. 27, s. 86 (2).

7.

While there is one tenancy and one rental amount of \$414 per month, for the sake of relationships under the *Social Housing Reform Act 2000* and this tenancy, Tenants within a joint tenancy are made aware of their own individual obligations for rent. If multiple persons live in one unit where rent is geared to income, the aggregate of the rents is calculated by taking the rents that each individual is responsible for, and adding them together. The rent each individual is responsible for is determined based on a number of factors. Most Tribunal Members, including myself, have generally taken the position that they are not to look behind the policies regarding calculation

of lawful rent, or the calculations themselves, and that the Landlord/Corporation is empowered to make those determinations subject to their statutory authority. In this tenancy, three people pay rent to the Landlord. Monica Thompson pays \$240 per month, her son was paying \$109 per month, and her daughter is paying \$65 per month, for a total of \$414 monthly.

8. While the Tenants acknowledge that they owe some money in order for the tenancy to continue, they asked the Tribunal to declare that the lawful rent beginning December 2003 is no longer \$414 per month, but only \$305 per month. The Tenant's logic, which is hard to dispute, is that the Landlord has acknowledged that the arrears should be reduced by virtue of the \$436 credit (\$109 x 4 months) resulting from the son's departure from the unit in August. To credit the tenancy with \$436 based on the son being lawfully out of possession from August to November, and then claiming that in December, his obligation returns without a return to occupancy, is bewildering.

9. Although not positioned this way by the Tenants, it doesn't appear to me that their argument is based on the principles of *equitable estoppel*, which would prevent the Landlord from assuming a different position than that which they took in the past, a position that would be detrimental to the Tenant considering that she relied on their earlier position. Clearly that can't be the case, as the offer to credit back the four months rent was not made until recently. It was not relied upon. It was a gratuitous offer, made without prejudice.

10. However illogical or counter-intuitive, it is the Landlord's position that the rent continues to be \$414 per month. The Landlord claims that the rules that govern the operation of the local housing corporation through the local service provider in housing with rents geared to income, allow them, in fact require them to charge the full rent for December and months thereafter subject to an internal review. The Landlord claims to be operating by the rules that allow them to determine when rents go up or down, what notice requirements for changes exist etc.

Analysis:

11. The Landlord in this case is the Toronto Community Housing Corporation. The rent these Tenants pay is geared to the Tenants' incomes. Therefore, pursuant to the provisions of Section 5 of the *Tenant Protection Act (the Act)*, this complex is exempt from certain sections of the *Act*. The Landlord claims that the Tribunal has no jurisdiction to look behind the rent to determine the lawful rent, nor to look behind the policies and application of the policies when making an order for eviction based on arrears of rent. Section 5 of the *Tenant Protection Act, 1997* reads partially as follows:

Exemptions related to social, etc., housing

5. (1) Sections 17 and 18, paragraph 1 of subsection 32 (1), sections 33, 54, 55, 57, 58 and 59, subsection 81 (2) and sections 82, 89, 90, 92, 95, 100 to 102, 108, 114, 116, 121, 123 to 125, 129 to 131, 135 to 139, 142 and 143 do not apply with respect to a rental unit described below:

1. A rental unit located in a residential complex owned, operated or administered by or on behalf of the Ontario Housing Corporation, the Government of Canada or an agency of either of them.

1.1 A rental unit in a residential complex described in paragraph 1 whose ownership, operation or management is transferred under the Social Housing Reform Act, 2000 to a service manager or local housing corporation as defined in that Act.

12. However, Section 5 of the *Act* does not provide a complete exemption from all rules relating to rent. The Landlord in this application is relying on provisions of Sections 61 and 86 of the *Act* that allow the Landlord to serve notices and make application to the Tribunal when the Tenant has failed to pay the rent which is "lawfully owing". It is clear that the Member is still required to satisfy himself that the rent is due and owing. The Landlord has satisfied me in this regard, and it is not an issue.

13. The *Social Housing Reform Act 2000 (SHRA)* came into effect on December 1st, 2000. The legislation transferred funding and program responsibilities for social housing to municipalities. It also transferred the ownership and management of public housing stock formerly belonging to the Ontario Housing Corporation. It exists partly to have consistent rules and the application of those rules across all municipalities. All housing providers are required to act in accordance with and be in compliance with the *SHRA*. The *SHRA* also provides a new funding model for calculating the subsidies provided to formerly provincially-administered non-profit housing providers.

14. Despite its name, the *SHRA* has not been a hit with stakeholders in the field of tenant advocacy. ACTO, the Advocacy Centre for Tenants Ontario, has denounced the *SHRA*, and would like to see major changes to it. Their major concerns are that Tenants can too easily lose their rent subsidies, that the procedures are inconsistent and arbitrary, that the time lines are too strictly enforced, that the *SHRA* does not recognize substantial compliance, and that there is no provision to allow overriding discretion for relief from eviction.

15.

ACTO has filed requests for Judicial Review of cases where the Tribunal has refused to seize jurisdiction with respect to the cancellation of a Tenant's subsidy (831 Queenston Road, Hamilton), and where the Tribunal evicted a Tenant without considering whether the Tenant should continue to get a rent subsidy (51 Burrell Street, Hamilton). They are also raising on appeal the issue of Section 84(1) discretion in denying eviction notwithstanding the findings of fault. To the best of my knowledge, there has been no judicial pronouncement on these issues. These facts and those from the preceding paragraph can be found on the ACTO web site, www.acto.ca.

16. The *Social Housing Reform Act 2000* further affirms the Corporation's right to vary rents without the proper notice normally required of Landlords under the *Tenant Protection Act*. It states in section 86(7) that:

Notice of increase

(6) The service manager shall not increase the amount of the geared-to-income rent under this section until the service manager gives written notice of the increase to the household, in accordance with such requirements as may be prescribed. 2000, c. 27, s. 86 (6).

Same

(7) Sections 127 and 128 of the Tenant Protection Act, 1997 do not apply with respect to a rent increase authorized by this section. 2000, c. 27, s. 86 (7).

17. To resolve the dispute surrounding the son's portion of the rent, there are two issues to be determined. One is whether or not the Member should interfere with the policies and the discretion afforded representatives of the Corporation, and then whether or not the rent of \$414 monthly is the lawful rent. However, before I decide the second, I must be satisfied about the first. Specifically, if the Tribunal should not interfere with the Corporation's lawful rights and practices and their application, that effects my decision as to whether I need to determine what the lawful rent should be from December onwards.

18. One possible position a Member might take, is that it is proper to consider the lawful rent and how it is arrived at, but not proper to disturb the operating practices of the Corporation or not look behind their policies and by doing so impose their discretion above the local housing corporation's. If that position is adopted, then the local housing corporation and local service manager have every right to determine what discretion and leniency to apply. Deciding the issue of "lawful rent" on that basis, means little more than examining the Landlord's numbers and calculations, and allowing the Corporation to set its own policies, guidelines and review procedures.

19.

For reasons set out later in this order, I do not accept this approach. While it is up to the Member to determine that the rent is lawfully owing in any application for arrears, I do not believe that it is up to the Tribunal to make policy for the Toronto Community Housing Corporation, nor to second-guess their procedures or calculations. If it were the Tribunal's mandate, either the *Tenant Protection Act* or the *Social Housing Reform Act* would have said so, or in the alternative, there would be no need for the *Social Housing Reform Act* to provide broad discretionary power to local service providers. There would also be no need for the internal review process that the *Social Housing Reform Act* provides for. The legislature clearly intended these matters to be decided, controlled and reviewed by the *Social Housing Reform Act* and its subordinate Rules and Regulations.

20. If it is the practice of the Corporation to require certain things of the Tenant, I do not find authority in the *Tenant Protection Act* to reverse their practices unless they are in conflict with the sections of the *Act* that still apply to rent-geared-to-income accommodation. The Tribunal is not an appellate body for administrative decisions made under the *Social Housing Reform Act*.

21. I do not consider the Tenant's position that the son's share of the rent not be included once a credit was offered in previous months, any different than a request by the Tenant to have the Tribunal consider whether the rent subsidies provided by the Corporation are fair and reasonable. It is beyond the mandate and jurisdiction of the Tribunal to determine these issues. If it is the lawful right of the Corporation and local service provider to determine the application of the rules, then I shall leave it to them. For this Member, determining that the rent charged is indeed lawful rent, is only to find that the rent was set by persons or agencies authorized to do so under the *SHRA* and subject to their review process.

22. However, while it may not be the Tribunal's place to interfere with a public authority acting properly, the Landlord's agent was not even able to tell me from whence this authority comes. While we are not an appellate court dealing with matters arising out of social housing disputes, this is a matter of a residential tenancy and it is incumbent on a Member to ensure that if the Tenant is entitled to any protection conferred by the *Act*, that the Tenant receives such protection. Clearly the Landlord's position, while possibly proper, seems absurd. I wish to satisfy myself that the Landlord is not acting in an arbitrary fashion, and is calculating the lawful rent and making other procedural decisions according to some authority. As a public authority deciding rights and entitlements under a statute, a local housing corporation and a service manager have a duty of fairness and must exercise its discretion reasonably.

23. What concerns me often, and in this case specifically, is that most often the local housing corporation's claim that they have such a right amounts to little more than them coming before the Tribunal on an arrears matter and saying to the Member, "trust me." Never in my time as a Member at this Tribunal has a representative of the Toronto Community Housing Corporation come before me setting out their authority to claim their exemption from certain sections of the *Act*. It is as if the Corporation expects that their name alone should be enough to have a Member of the Tribunal take notice of the fact that they are operating as a legitimate public authority empowered under the *SHRA*.

24. When the claim for rent (from December onwards) seems so logically unreasonable as the one being presented me now, it is apparent to me that to exercise my authority properly, to determine all matters of fact and law with respect to application before me, I need to have more than the Landlord's word and just "trust them."

25. Additionally, if I must consider relief from eviction pursuant to Section 84(1) of the *Act* which certainly I must in all matters where termination of the tenancy may be the outcome, and if a public authority has the duty to act reasonably and equitably, then it is incumbent upon me to delve into the specifics of their policy and to

see if it is evenly applied, without favour or prejudice, so that I can consider all the circumstances of equitable relief as section 84(1) of the *Act* instructs me to do. Section 84(1) of the *Act* reads as follows:

Power of Tribunal, eviction

84. (1) Upon an application for an order evicting a tenant or subtenant, the Tribunal may, despite any other provision of this Act or the tenancy agreement,

(a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or

(b) order that the enforcement of the order of eviction be postponed for a period of time.

26. If the legislature had intended that this tenancy not be subject to section 84(1) of the *Act*, it would have specifically exempted it as is done with so many other sections of the *Act* pursuant to section 5(1) of the *Tenant Protection Act, 1997*. It is trite law that these Tenants are still to be afforded the protection of this over-riding discretionary provision.

27. Accordingly, I instructed the Landlord to provide the Tribunal and the Tenants with a post-hearing submission by December 16th, setting out from whence the authority comes, and what rules they are operating under with respect to the son's portion of the rent, for the purpose of demonstrating that this is not an arbitrary measure being imposed on these Tenants. The Tenants were given the option of responding to the Landlord and the Tribunal by December 19th, after which time I would issue my final order.

28. The Landlord's submission came on time, but was not at all helpful, particularly with respect to the specific rules. However, I have examined the law and given the matter the analysis that the Landlord was unwilling to do.

29.

The *Social Housing Reform Act*, specifically Part V of the *Act*, is awash in provisions allowing the local housing corporation and the service manager to make rules and set conditions regarding eligibility for supportive housing and accommodation where rent is geared to income. The service manager can determine not only eligibility, but calculate and verify incomes, manage and prioritize waiting lists, set occupancy standards, determine the level of housing required by the applicant and conduct re-determinations of eligibility or rent levels. Provincial rules are established by Regulation, yet local service managers can establish local eligibility rules.

30. Sections 80 through 84 of the *Social Housing Reform Act* set out the internal review procedure. Section 82(1) sets out the Tenants' right to seek redress for just this type of dispute:

Internal review

82. (1) A member of a household may request an internal review of any of the following decisions of a service manager, supportive housing provider or lead agency:

- 1. A decision that the household is ineligible for rent-geared-to-income assistance.*
- 2. A decision that the household is ineligible for special needs housing.*
- 3. A decision respecting the type of accommodation in which the household may be accommodated.*
- 4. A decision respecting the category into which the household has been placed on a waiting list.*
- 5. A decision respecting the amount of geared-to-income rent payable by the household.*

6. *A decision respecting a deferral of geared-to-income rent payable by the household. 2000, c. 27, s. 82 (1).*

31. Sections 80 through 84 of the *Social Housing Reform Act* and Part VIII of Regulation 298/01 speak to the particulars of review. A decision of the person conducting an internal review is final when it is made, the review is not subject to outside scrutiny by the Courts, the review is not subject to the rules of the *Statutory Powers Procedure Act*, and a review is not permitted if the time period for requesting the internal review expires. The Regulation relating to review sets out that the person involved in the original decision shall not be part of the review process. These are rigid rules, with less of a guarantee of procedural fairness than other forums such as the Courts or this Tribunal provide. Yet, the Landlord, local housing corporations and local service managers have the proper lawful authority to conduct themselves with respect to review of administrative decisions.

32. Considering all the above, I determine that it is not the place of the Tribunal to meddle in matters of the setting of rents and granting of subsidies and the practices and policies and procedures or the application of those practices, policies and procedures. The *SHRA* provides authority, oversight and review of those processes, and the *Act* exempts the Landlord from Tribunal scrutiny with respect to those functions.

33. The Tenants' lawful rent continues to be \$414 per month subject to review and determination pursuant to the *SHRA*. The amount that the Tenant must pay for the tenancy to continue, bringing the rent current to the end of December 2003, including the Landlord's application fee as costs is \$887 as set out more thoroughly in the findings above.

34. All legislation is remedial . . . so says the *Interpretation Act*. The *Tenant Protection Act* is remedial legislation. Eviction should be ordered as a last resort, after carefully considering Section 84 of the *Act*. Imposition of section 84 relief must balance the competing interests of the Tenant who is to be evicted, and the Landlord who may suffer a monetary loss. The Member must look at all the circumstances when considering relief from eviction. Short of losing one's life or liberty, the loss of one's home is as serious a matter as can be imagined.

35. The imposition of a repayment plan for the arrears, with the monthly rent payments continuing as well, with an instant remedy for the Landlord if the Tenant breaches a condition of the order, allows minimal cost and inconvenience to the Landlord when contrasted with the potential peril to the Tenant.

36. After considering all the circumstances of the case, I am exercising my authority under Section 84(1) of the *Tenant Protection Act, 1997*, and denying eviction subject to the following order.

37. The *Act* allows the Member to include in an order conditions, including payment by instalments. Section 190 of the *Act* includes the following:

Conditions in order

190. (1) *The Tribunal may include in an order whatever conditions it considers fair in the circumstances.*

It is ordered that:

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1. The Tenant shall make the following payments to the Landlord.

- January's rent in the amount of \$414 paid by January 5th, 2004

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- 8 Payment of arrears in the amount of \$150 made by January 15th, 2004 (\$737 remaining of the original arrears of \$887)
- 9 • February's rent in the amount of \$414 paid by February 1st, 2004
- 10 • Payment of arrears in the amount of \$150 made by February 15th, 2004 (\$587 remaining of the original arrears of \$887)
- 11 • March's rent in the amount of \$414 paid by March 1st, 2004
- 12 • Payment of arrears in the amount of \$150 made by March 15th, 2004 (\$437 remaining of the original arrears of \$887)
- 13 • April's rent in the amount of \$414 paid by April 1st, 2004
- 14 • Payment of arrears in the amount of \$150 made by April 15th, 2004 (\$287 remaining of the original arrears of \$887)
- 15 • May's rent in the amount of \$414 paid by May 1st, 2004
- 16 • Payment of arrears in the amount of \$150 made by May 15th, 2004 (\$137 remaining of the original arrears of \$887)
- 17 • June's rent in the amount of \$414 paid by June 1st, 2004
- 18 • Payment of arrears in the amount of \$137 made by May 15th, 2004 (\$0 remaining of the original arrears of \$887)

2. If the Tenants make the payments as set out herein, all the arrears and costs will have been paid, and the monthly rent payments will be current and up to date including the rent for the month of June 2004.

3. If the Tenant pays all the arrears, costs and rental payments as described herein, there will be no further cause of action based on these arrears.

4.

Failure by the Tenant to comply with any provision in this order will allow the Landlord, under Section 77 of the *Tenant Protection Act*, to apply to the Tribunal, within 30 days of the breach, without notice to the Tenant, for an order terminating the tenancy and evicting the Tenant, and requiring that the Tenant pay any new arrears of rent since the date of the order, compensation, NSF fees, NSF administration charges, application costs and related charges that become owing.