

2007 CarswellOnt 8944
Landlord and Tenant Board of Ontario

SOT-00022, Re

2007 CarswellOnt 8944

In the matter of [Address removed]

[Tenant's name removed], Tenant and [Landlord's name removed], Landlords

J. Van Delft Member

Heard: March 6, 2007

Judgment: March 26, 2007

Docket: **SOT- 00022**

Counsel: None given

Subject: Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Real property --- Landlord and tenant — Residential tenancies — Definitions

Table of Authorities

Cases considered by J. Van Delft Member:

Cunningham v. Whitby Christian Non-Profit Housing Corp. (1997), 33 O.R. (3d) 171, 1997 CarswellOnt 1404, 9 R.P.R. (3d) 210, 34 O.T.C. 249 (Ont. Gen. Div.) — considered

Jemiola v. Firchuk (2005), 2005 CarswellOnt 7363, 206 O.A.C. 251 (Ont. Div. Ct.) — considered

Kay v. Parkway Forest Development (1982), 35 O.R. (2d) 329, 133 D.L.R. (3d) 389, 1982 CarswellOnt 1387 (Ont. Div. Ct.) — considered

Radakovic v. Stoney Creek Non Profit Housing Cor (2000), 2000 CarswellOnt 4343 (Ont. Rental Housing Trib.) — considered

Statutes considered:

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

Residential Tenancies Act, 2006, S.O. 2006, c. 17

Generally — referred to

s. 10 — referred to

s. 22 — considered

s. 61 — considered

s. 62 — considered

Tenant Protection Act, 1997, S.O. 1997, c. 24

Generally — referred to

s. 26 — considered

Regulations considered:

Residential Tenancies Act, 2006, S.O. 2006, c. 17

General, O. Reg. 516/06

s. 3 — considered

s. 3 "tenant" (1) — considered

s. 3 "tenant" (2) — considered

J. Van Delft Member:

1 [Tenant's name removed] (the 'Tenant') applied for an order determining that [Landlord's name removed] (the 'Landlord') substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of the Tenant's household.

2 This application was heard in Hamilton on March 6, 2007. The Tenant and the Landlord's representative [*Landlord Representative's name removed*] attended the hearing.

Determinations:

Request for Amendment:

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1. The Tenant requests [*name removed*] be removed from the style of cause. The Tenant completed the application form listing [*name removed*] as a sub tenant. [*Name removed*] is the Tenant's fiancé. She is not a sub-tenant. The Tenant made a mistake in completing the form.
2. The Landlord's representative states he is unsure if allowing the amendment prejudices his client or not. He makes no submissions.
3. The amendment to remove [*name removed*] from the style of cause does not prejudice the Landlord. The pleadings remain the same. There is no dispute that [*name removed*] is the Tenant's fiancée. Her intention is to reside in the unit with the Tenant, as an occupant, not as a sub-tenant. I am satisfied that the Tenant mistakenly listed [*name removed*] as a sub-tenant when completing the form.

Substantial Interference with the Tenant's Reasonable Enjoyment

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4. The Tenant of 4 years filed a Tenant's Rights application for substantial interference with his reasonable enjoyment against the Landlord. The remedy he seeks is an order from the Board enforcing the Landlord to stop the activity leading to the filing of the application.
5. The Tenant complains of the following: Recently the Tenant became engaged. The Tenant intends to reside with his new wife in the apartment. He does not seek to add her name to the lease as a Tenant.
6. The Tenant was advised by the Landlord's representative that a clause in their lease requires the fiancée to complete an "application for permission to reside". The fiancée completed and submitted the application. The application was denied because of a poor credit history. Despite his own rental history, the Tenant received notification from the Landlord refusing permission to allow his fiancée to move in. The Landlord's letter is dated January 18, 2007. It states "Please be advised that [*name removed*]'s application for residency has been rejected, and therefore she may not reside in Suite 309." The Tenant was verbally advised that if his fiancée moves in, he will face termination of his tenancy.

7. At hearing, the Landlord's representative admits that if the Tenant's fiancée moves in, the Landlord will commence standard termination proceedings by way of a polite letter stating the Landlord's legal position, a notice of termination and application to the Board.

8. The Tenant seeks an order from the Board determining whether the Landlord has unlawfully refused to allow his fiancée to move into rental unit and unlawfully threatened him with eviction if she does so. If unlawful, the Tenant submits the actions of the Landlord amount to substantial interference with his reasonable enjoyment. He seeks an order that the Landlord stop the activity which prevents him from moving his new wife into the unit.

Landlord's Response

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9. The Landlord's representative submits the Landlord has legal authority in contract, in statute, regulation and common law to refuse the Tenant's fiancée the right to occupy the rental unit. He insists he has been polite to the Tenant in explaining the Landlord's legal position and his actions do not rise to substantial interference of the Tenant's reasonable enjoyment.

10. The Landlord relies on the following clause in the lease:

6. "Only occupants or pets set out above are permitted to reside in the Apartment. Reside" means sleeping in the Apartment for more than three weeks in aggregate in any three month period. Any person residing in the apartment without the prior written approval of the Landlord shall be a trespasser in the building despite being invited by the Tenant and may be evicted. Landlord may declare any person, other than Tenant, who in Landlord's discretion, interferes with the operation of the building, to be a trespasser and may evict any such trespasser despite an invitation by Tenant. Should Tenant grant permission to any person to reside in the apartment without Landlord's approval, such permission shall be treated as improper assignment of the lease entitling Landlord to terminate the Tenant's tenancy. Should tenant invite into the building any person previously declared to be a trespasser, such invitation shall be treated as interference by the tenant with the landlord's lawful right to operate the building and shall entitle the landlord to terminate the tenant's tenancy. Tenants shall not provide a key to the building to anyone other than the Occupants. Each Tenant is responsible for the conduct of the other occupants and their guests."

11. The parties entered into the lease in 2003. The Landlord's representative admits initially this clause was inserted into the standard lease to fend off occupants who might pose a security or safety risk to the building. Since the proclamation of the *Residential Tenancies Act* (RTA)

and its accompanying regulations January 31st, 2007 the Landlord asserts the authority under this same paragraph of the lease to do credit checks on certain occupants.

12. Regulation 516-06 s. 3 provides the following definition of "tenant":

3. (1) If a tenant of a rental unit dies and the rental unit is the principal residence of the spouse of that tenant, the spouse is included in the definition of "tenant" in subsection 2 (1) of the Act unless the spouse vacates the unit within the 30-day period described in subsection 91 (1) of the Act.

(2) If a tenant vacates a rental unit without giving a notice of termination under the Act and without entering into an agreement to terminate the tenancy, and the rental unit is the principal residence of the spouse of that tenant, the spouse is included in the definition of "tenant" in subsection 2 (1) of the Act.

13. Prior to January 31, 2007, under the Tenant Protection Act, occupants who resided with Tenant spouses were denied security of tenure. If the Tenant died or left the rental unit, the remaining occupant faced the possibility of eviction. These spousal occupants were left to argue that an implied tenancy relationship commenced either by way of rent payments or by acknowledgement of the Landlord.¹ Although, the Courts recognized that implied contracts can exist "neither the Tribunal nor the court could read into the Act substantive rights that the Legislature had not provided."² By way of Regulation 516-06 s. 3 the Legislature codified protections to spousal occupants.

14. The Landlord's representative submits the Tenant's fiancée', by virtue of her spousal relationship to the Tenant, meets the definition of "*prospective Tenant*" because of her statutory right to remain as a Tenant in the unit if her spouse dies or leaves her.

15. The Landlord's representative submits that s. 10 of the RTA authorizes Landlords to use income information, credit checks and references in selecting "*prospective Tenants*". He argues there is no breach of the Human Rights Code, because it too allows Landlords to conduct credit and income searches on prospective Tenants.

16. The Landlord's representative argues that if the fiancée moves into the unit the Tenant will be in breach of his agreement. The Landlord submits that the fiancée's occupancy will interfere with the operation of the building because she has not received prior approval from the Landlord and passed the requisite credit check. The Landlord claims this breach rises to the level of substantially interfering with his lawful rights. The RTA authorizes the Landlord to serve notice of termination and apply to the Board for such a breach.

17. The Landlord relies on several Court decisions to support his position that he is entitled to contractually bar the fiancée from occupancy. In *Cunningham v. Whitby Christian Non-*

*Profit Housing Corp.*³ the Ontario Court of Justice held that "on general principles, I can see no reason, and know of no authority for the proposition, that a tenancy agreement may not contain provisions restricting the persons who may occupy rented residential premises to specified persons so long as the reason for the restriction is lawful." Since the Landlord believes the fiancée to be a prospective Tenant, he submits he has lawful rights under s. 10 of the RTA to screen her occupancy.

18. In *Kay v. Parkway Forest Development*⁴ the Court upheld the principle that Tenants are bound by their lease. However, a breach of the lease does not necessarily permit termination of the tenancy. Here, the Landlord argues that the Tenant agreed to the provision in the lease to receive the Landlord's prior approval of occupants.

19. In *Stanbar Properties Limited v. Joseph Rooke*⁵, the Court held that where the Act is silent, parties may agree to additional rights and obligations in the Tenancy agreement. The Court held that in the case of a Tenant breach of a Landlord's right, a right acquired as a result of the agreement, the Act authorizes the Landlord to give notice of termination and to apply to the Tribunal. The Landlord submits the Tenant agreed to paragraph 6 of the lease. He argues that inviting his spouse to move in without Landlord approval will constitute a breach of the agreement. This breach arguably rises to an interference with the Landlord's lawful right.

20. The Tenant relies on a decision of the Tribunal *Radakovic v. Stoney Creek Non Profit Housing Cor*⁶ In *Radakovic*, the Member determined that s. 26 of the Tenant Protection Act does not contemplate circumstances where some serious interference by the Landlord in a Tenant's reasonable enjoyment might be justified because the Landlord was acting reasonably or in good faith. It is the Tenant's position that despite the Landlord's polite efforts to explain his actions as lawful and made in good faith, the Tenant's reasonable enjoyment has been interfered with contrary to s. 22 of the RTA.

Analysis

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21. The RTA does not define "occupant". However, the Act does recognize that persons, other than Tenants, reside in the rental unit. S. 22 sets out it is unlawful for Landlords to substantially interfere with the reasonable enjoyment of the rental unit for all usual purposes by a Tenant or *members of his or her household*. S. 61 and 62 of the RTA set out that a Landlord may give a notice if the Tenant or *another occupant of the unit* commits an illegal act or wilfully/negligently causes undue damage.

22. The Landlord argues the RTA's silence on who constitutes an occupant gives him the right contractually to assess and approve occupants.

23. Having reviewed the lease provision set out above I am not satisfied it clearly requires the Tenant to do anything or prohibits the Tenant from doing anything (except give out a key). The lease speaks to consequences, rather than lawful rights acquired by mutual consent. The statement about the Landlord needing to approve persons residing in the building is silent with respect to the criteria considered in the approval process.

24. The Landlord maintains that he has the lawful right under the RTA by virtue of the regulation and s. 10 of the Act, the common-law and the lease to terminate the Tenancy if the Tenant's fiancée moves into the building. Despite an articulate legal argument, it has not been determined that the Landlord would be successful in bringing an application for termination on the above noted grounds.

25. On the contrary, I am astonished that the Landlord would make such an argument. Despite the RTA's silence on occupancy, I am not convinced that the legislature intended for spousal occupants to be rejected in advance of moving into the rental unit or in turn that their Tenant spouses be evicted should they move in as occupants. S. 3 of the Regulation was drafted to protect vulnerable occupants, who had recently lost their spouse by way of marital breakdown or death, from losing their housing.

26. The legislature did not draft the regulation so that Landlord could screen occupants who may have the potential to become a Tenant. The occupant spouse may be a potential Tenant but she is not a prospective Tenant. What happens if the Tenant and his spouse never separate, or if they do separate, and the spouse wants to leave anyway? What happens if the Tenant's spouse financial ability changes during the course of the tenancy? What would happen if a Tenant and his roommate fell in love? Does the roommate become a prospective Tenant now that the parties are engaging in spousal type behaviour? Is this Landlord only going to allow roommates that have no potential to become spouses into his building without this screening.

27. Given the definition of spouse in Ontario, almost any two people have the potential to be spouses and it would be unconscionable to allow a definition of prospective Tenant to be so broad as to allow the Landlord the power to prevent co-occupation in his building of only credit worthy occupants.

28. The RTA allows Landlords to screen "prospective Tenants" and Tenants in s. 10. There is no provision which allows the screening of future potential Tenants. The Landlord's definition of prospective Tenant is far too broad. A prospective Tenant is someone who is applying to be a Tenant, not someone who may in the future have the right to become a Tenant if certain things happen. In this case, the fiancée is not a prospective tenant. If the fiancée becomes a Tenant in the future by virtue of the regulation, and if she does not pay the rent, then the Landlord can seek a remedy. He can terminate her tenancy for non-payment of rent.

29. The Tenant claims the Landlord's letter denying his fiancée approval for occupancy rises to substantial interference with his reasonable enjoyment. Reasonable enjoyment is the contractual right to have full use of the rental unit for all lawful purposes. The Landlord can not use the existence of a potential future right of an occupant to limit the Tenant's use. The Landlord's definition of prospective tenant is too broad and therefore unlawful. His actions have had the effect of substantially interfering with the Tenant's reasonable enjoyment.

30. The Landlord shall refrain from refusing to allow the Tenant's fiancée from moving into the rental unit and threatening eviction on those same grounds.

7 *It is ordered that:*

1. The Landlord must refrain from refusing to allow the Tenant's fiancée from moving into the rental unit and threatening eviction on those same grounds.

Footnotes

- 1 *Jemiola v. Firchuk*, [2005] O.J. No. 6085, 2005 CarswellOnt 7363, 206 O.A.C. 251 (Ont. Div. Ct.).
- 2 *Jemiola v. Firchuk*, [2005] O.J. No. 6085, 2005 CarswellOnt 7363, 206 O.A.C. 251 (Ont. Div. Ct.).
- 3 *Cunningham v. Whitby Christian Non-Profit Housing Corp.* (1997), 9 R.P.R. (3d) 210, 33 O.R. (3d) 171, 34 O.T.C. 249 (Ont. Gen. Div.).
- 4 *Kay v. Parkway Forest Development* (1982), 35 O.R. (2d) 329, 133 D.L.R. (3d) 389 (Ont. Div. Ct.)
- 5 *Stanbar Properties Limited v. Rooke* [2005] (Ont. Div. Ct)
- 6 *Radakovic v. Stoney Creek Non Profit Housing Cor*, 2000 CarswellOnt 4343 (Ont. Rental Housing Trib.) (2000) WL 1442813