

2003 CarswellOnt 1589
Ontario Rental Housing Tribunal

Pataky v. Lagace

2003 CarswellOnt 1589, 42 C.B.R. (4th) 281

Order under Section 32, Tenant Protection Act, 1997

In the Matter of 13291 Riverside Drive, Morrisburg ON KoC 1Xo

Theodore Pataky (Tenant) and Eileen Lagace, Carrie Ann McPherson (Landlords)

Von Cramon, Member

Heard: February 20, 2003

Judgment: April 7, 2003

Docket: EAT-04386

Proceedings: additional reasons to *Allen v. Lambden* (January 21, 2004), Doc. 00-CV-199989 CM (Ont. S.C.J.)

Subject: Corporate and Commercial; Property; Civil Practice and Procedure; Insolvency

Headnote

Mortgages --- Possession and ejectment — When mortgagee deemed in possession

Rental property was subject to municipal work order and tenants alleged that it was in very bad repair — Tenants brought claim for relief under ss. 34 and 35 of Tenant Protection Act, including claim for rent abatement, compensation and order requiring repair — Landlord made assignment in bankruptcy — Trustee in bankruptcy released its interest in property and advised mortgagee as secured creditor that it would not be taking any protective or conservatory measures, including maintenance of insurance coverage on property — Mortgagee of property refused to take possession of property and took position that it was not mortgagee in possession and was not landlord under Tenant Protection Act — Tenants' claim stayed under s. 69.3(1) of Bankruptcy and Insolvency Act — Mortgagee was not landlord within meaning of Tenant Protection Act or Mortgages Act — Mortgagee did not exercise any of rights of possession or any of rights of landlord — Fact that trustee released its interest in property in favour of mortgagee did not transfer title to mortgagee or put mortgagee in possession or require mortgagee to take on responsibilities of landlord under Tenant Protection Act.

Bankruptcy --- Effect of bankruptcy on other proceedings — Miscellaneous issues

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RULING on whether mortgagee was landlord within meaning of Tenant Protection Act.

Von Cramon, Member:

A. Interim Order EAT-04386 dated February 25, 2003 invited written submissions from the Tenants, TD Canada Trust and Doyle Salewski Inc. on the question of whether TD Canada Trust is a landlord within the meaning of the *Tenant Protection Act*. The Tenants and TD Canada Trust have filed submissions in accordance with the interim order.

B. Interim Order EAT-04386 dated February 25, 2003 also contains a summary of this application and the proceedings leading up to the scheduled hearing on February 20, 2003. It is helpful to provide a general summary now. The Tenants rented the unit from Theodore Pataky, who has since made an assignment in bankruptcy. The unit is subject to a municipal work order, and the Tenants allege that it is in a very poor state of repair. TD Canada Trust holds a mortgage on the subject property. Doyle Salewski Inc. is the trustee in bankruptcy of Theodore Pataky. TD Canada Trust says that it is not a mortgagee in possession and is not a landlord within the meaning of the law. Doyle Salewski Inc.'s position is essentially summarized in its letter to TD Bank Financial Group of January 23, 2003, which reads as follows:

This is to advise you that after examining the documentation received with your proof of claim; it would appear that The TD Bank Financial Group may hold a valid mortgage on the property [at 13291 Riverside Heights, R.R. #1, Morrisburg, Ontario].

You are hereby informed that, as Trustee, we are not taking any protective or conservatory measures including the maintenance of insurance coverage. You are advised to take any and all measures necessary to protect any interest you may have in the property described above. *It is our understanding that the clients have vacated the property.*

We hereby request that you account to us for all funds realized by you and that you remit to us any excess from the sale of the property, should a sale take place. Should you suffer a deficiency on your claim, you may file a proof of claim to rank as an unsecured creditor for the amount of the deficiency.

C. By virtue of subsection 71(2) of the *Bankruptcy and Insolvency Act*, "... a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment..." Subsection 71(2) takes effect when the bankrupt files an assignment in bankruptcy. Subject to the rights of secured creditors, subsection 69.3(1) prohibits the commencement or continuation of any proceedings against a bankrupt "... for recovery of a claim provable in bankruptcy".

D. In this application, the Tenants claim relief under sections 34 and 35 of the *Tenant Protection Act*. This includes a claim for financial relief in the form of a rent abatement and compensation, which is evidently provable in bankruptcy. The application also claims other relief including an order requiring or authorizing repair and maintenance of the unit. Although perhaps not provable in bankruptcy, it is unclear how the Tribunal should address the non-monetary part of this claim in the face of subsection 71(2) of the *Bankruptcy and Insolvency Act*. It seems clear that Theodore Pataky no longer has authority to deal with the rental unit, and that the Tenants are prohibited from commencing or continuing proceedings against him, including this application. In this context, one wonders what meaning to take from the trustee's letter of March 17, 2003, which informs the Tenants that:

We hereby consent to allow you to continue your on-going action as against the Estate of Mr. Pataky, in bankruptcy and other parties. We understand that this action will not include any direct involvement of the Trustee.

Without a more detailed explanation, I can only conclude that the trustee wished to state its position in relation to the issues raised by Interim Order EAT-04386 dated February 25, 2003. As it stands, Doyle Salewski Inc.'s input into these proceedings has been limited to its letters of January 23, February 10 (referred to below) and March 17. Collectively, these letters do more to complicate the issues than to resolve them.

E. E. In cases where there are no secured creditors, and the trustee has not released its interest, one might expect the trustee in bankruptcy to continue operating the bankrupt's residential rental business until a suitable purchaser is found. In the interim, tenants would presumably be required to pay rents to the trustee, and the trustee would be a landlord under the definition in section 1 of the *Tenant Protection Act*. In those circumstances, the trustee would be subject to the provisions of the tenancy agreement and the *Tenant Protection Act*. However, it appears that Doyle Salewski Inc. is not interested in operating Mr. Pataky's

residential rental business and has released its interest in the rental unit as evidenced by its letter to the Tenants' lawyer of February 10, 2003, which reads, in part, as follows:

Attached please find a copy of our release of interest back to TD Bank Financial Group dated January 23, 2003 [the same January 23 letter referred to above in paragraph A] on the above mentioned property.

Please take note that the Trustee has advised that "we are not taking any protective or conservatory measures including the maintenance of insurance coverage" on the said property. The tenant was advised the same in a conversation with me on February 5, 2003.

F. This case is complicated by the fact that the rental unit is subject to a mortgage in favour of TD Canada Trust. A mortgagee may, as a secured creditor under subsection 69.3(2) of the *Bankruptcy and Insolvency Act*, realize or otherwise deal " . . . with his security in the same manner as he would have been entitled to realize or deal with it if [section 69.3] had not been passed" However, it appears that TD Canada Trust is also not interested in exercising these rights by taking possession of the subject property.

G. The reluctance of both the trustee and the mortgagee to assume responsibility for the rental unit may stem from a municipal work order that is apparently outstanding and may require extensive repairs to the unit. However, this only begs the question: who is the landlord within the meaning of the law? The issue raised in Interim Order EAT-04386 dated February 25, 2003 and the Tribunal must now determine is whether TD Canada Trust is a landlord. If it is not, the Tenants' claim against Theodore Pataky or his bankrupt estate is subject to a stay under subsection 69.3(1) of the *Bankruptcy and Insolvency Act*. If TD Canada Trust is a landlord, the application must be heard on its merits to determine whether it has complied with its obligations under the *Tenant Protection Act*.

H. The Tenants submit that TD Canada Trust is the landlord in accordance with the *Mortgages Act* because it has become a mortgagee in possession either by its conduct or because the trustee in bankruptcy has "released its interest back to the secured creditor." Alternatively, the Tenants submit that TD Canada Trust comes within the definition of landlord contained in section 1 of the *Tenant Protection Act*.

Mortgagee in Possession

I. The *Mortgages Act* deems a mortgagee to be a landlord when the mortgagee takes possession of the subject property. Bankruptcy does not itself transfer possession from the debtor/mortgagor to the creditor/mortgagee, but it entitles the mortgagee to enforce its security in accordance with the terms of the mortgage and subsection 69.3 of the *Bankruptcy and Insolvency Act*. It is clear that TD Canada Trust has not taken any of the formal and overt steps, such as the attornment of rent, that are the strongest indicia of possession. The courts have dealt extensively with the question of when a mortgagee takes possession of mortgaged property. A long line of decisions follow the test set out in *Noyes v. Pollock* (1886), 32 Ch. D. 53 (Eng. C.A.), which holds at page 61 that a mortgagee takes possession when " . . . it can properly be said that [the mortgagee] has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate."

J. The Tenants submit in paragraph 20 of their submission that " . . . the taking of protective or conservancy measures such as maintaining insurance coverage is akin to assuming management and control of the mortgaged property." This argument fails for at least two reasons. There is no evidence that TD Canada Trust has taken any protective or conservatory measures. Additionally, the Tenants offer no legal precedent for this position, which does not reconcile easily with the principle in *Noyes v. Pollock*. For example, the fact a mortgagee has insured mortgaged lands is, on its own, very weak evidence of possession. It suggests a desire to protect against certain risks associated with a person's interest in property, but a person may take insurance without exercising any control or management of an asset, or having any intent to do so.

K. I agree with the submission made by TD Canada Trust in paragraph 14 of its submission, which provides in part as follows:

14. None of the indicia of possession apply in this matter. TD Canada Trust has done nothing to exercise any of the rights of possession. The mortgagee has many rights under the mortgage, including the right to quiet possession, the right to attorn rents, and the right to manage the property, following default. But until the mortgagee exercises its rights, it does not incur the corresponding obligations

Effect of Release by Trustee in Bankruptcy

L. The Tenants also submit that a trustee in bankruptcy may, in effect, place a mortgagee in possession by releasing its interest in favour of the mortgagee, and by doing so require the mortgagee to take on the responsibilities of a landlord under the *Tenant Protection Act*. I was not referred to specific provisions of the *Bankruptcy and Insolvency Act* or to any caselaw that would allow me to draw this conclusion. In the absence of such authority, I would conclude that the most a trustee in bankruptcy can do by releasing its interest is to say to a mortgagee, "you have authority to take any steps to enforce your security permitted by law." However, this does not constitute a transfer in title to the mortgagee, nor does this put the mortgagee in possession. It certainly suggests that if the mortgagee wants to go into possession, the trustee will not object.

M. In this respect, I agree with the submission of TD Canada Trust at paragraph 15:

Under the *Bankruptcy and Insolvency Act*, upon bankruptcy the bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, and *subject to the rights of secured creditors*, the property passes to and vests with the trustee in bankruptcy. This means that the secured creditors cannot be deprived of their rights by virtue of the bankruptcy, but, the secured creditors are not obliged to exercise those rights. Secondly, the trustee in bankruptcy "steps into the shoes" of the bankrupt. The trustee may choose to exercise those rights which belong to the bankrupt and may, as in this case, release their interest. The phraseology in the trustee's correspondence dated February 10, 2003 that they are providing a "release of interest *back to TD Bank Financial Group*" is a misnomer. The trustee can release its interest, and the secured creditor always maintains its rights, but the trustee has no higher rights than the mortgagor/bankrupt. Just as the mortgagor cannot make the mortgagee a landlord, neither can the trustee.

Landlord as defined by the *Tenant Protection Act*

N. Section 1 of the *Tenant Protection Act* defines "landlord" as follows:

"landlord" includes,

- (a) the owner of a rental unit or any other person who permits occupancy of a rental unit, other than a tenant who occupies a rental unit in a residential complex and who permits another person to also occupy the unit or any part of the unit,
- (b) the heirs, assigns, personal representatives and successors in title of a person referred to in clause (a), and
- (c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent

O. If TD Canada Trust falls within the *Tenant Protection Act's* explicit definition of landlord, it is on the basis of clause (c) which provides that a landlord includes:

- (c) a person, other than a tenant occupying a rental unit in a residential complex, who is entitled to possession of the residential complex and who attempts to enforce any of the rights of a landlord under a tenancy agreement or this Act, including the right to collect rent

This definition appears to cast a wider net than the *Mortgages Act* and *Noyes v. Pollock* because it applies to a person "who attempts to enforce *any* of the rights of a landlord" In spite of this, I find that TD Canada Trust has not yet attempted to enforce any of the rights of a landlord in relation to this tenancy.

P. In conclusion, I find that TD Canada Trust is not a landlord within the meaning of the *Tenant Protection Act* or the *Mortgages Act*. As set out above in paragraph G, the rental unit is part of the bankrupt estate of Theodore Pataky. Under section 32 of the *Bankruptcy and Insolvency Act*, the trustee in bankruptcy is not required to operate any business of the bankrupt. Evidently, the trustee has no intention of operating Mr. Pataky's residential rental business as evidenced by its letters. I presume this is what the trustee means when it says it has "released its interest". In these circumstances, the application is subject to a stay of proceedings under subsection 69.3(1) of the *Bankruptcy and Insolvency Act*. The Tenants must obtain an order by a court of competent jurisdiction lifting the stay of proceedings before the Tribunal can hear this application.

It is ordered that:

1. Application EAT-04386 is stayed by subsection 69.3(1) of the *Bankruptcy and Insolvency Act*.
2. Eileen Lagace and Carrie Ann McPherson may continue this proceeding by filing an order lifting the stay by a court of competent jurisdiction. If they do not do so within 12 months of this order, this order shall become final and the application shall be dismissed.

Order accordingly.