1989 CarswellOnt 2731
Ontario District Court

Curtis Property Management v. Rezai

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Curtis Property Management, landlord/ applicant and Davood Rezai, tenant/respondent

Conant D.C.J.

Judgment: March 28, 1989
Docket: York M17705/89

Counsel: *D.S. Strashin*, for the landlord/applicant
W. Kuszelewski, for the tenant/respondent

Subject: Property
Headnote
Landlord and tenant

***Conant D.C.J.*:**

1 This is in form, at least, an application for termination of tenancy, writ of possession and payment for arrears for rentals, claimed unpaid, for the apartment 604 at 96 Jameson Avenue, Toronto.

2 The dispute really is as to the amount of rent that can be charged and collected by the landlord. Once that contentious item is adjudicated I have no doubt any appropriate shortfall will be paid forthwith by the tenant. The unvarnished question is "what is the rent?"

3 The tenant rented the apartment for a number of years from a previous owner, Toronto Apartment Buildings Ltd. In March of 1984 the tenant completed a form called "Guest Application Form - Furnished Suite". It stated "rates subject to change without notice", "7 days written notice required prior to vacating", "check out time is 11:30 a.m.". The tenant paid the first and last weeks rent at $90.00 per week.

4 The rent was increased in 1986 by $5.40 per week by notice given on November 30th, 1985 effective the week of March 22nd, 1986. This notice states "including all services and facilities to which you are entitled". An earlier notice for the same increase was given September 27th, 1985 effective January 22nd, 1986.

5 Witnesses testified the rental included hydro, and furniture but there was no evidence whether the weekly charge included parking.

6 Then in March 1988, the then landlord obtained an application from the tenant entitled "Tenancy Application" in which were included "underground parking #28", "monthly rental $433.85", "inside parking $24.55", "allowed to keep all furnishings".

7 There was a box stating "undersigned agrees to pay the following services .... electricity yes". The tenant gave evidence this was not filled in when he signed the form but that he was told by the landlord's representative that electricity was included in the rent as it had been. Particularly as there was no evidence by the landlord to the contrary, I accept the evidence of the tenant and find that electricity was included in the rental amount. He has a separate meter and to maintain electricity he has had to pay the accounts for the last year. These amounts, I find, are the responsibility of the landlord and shall be deducted from the rents paid by this tenant. The landlord, of course, can join up the circuit of the apartment to his own circuit.

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8 There is however the main and wider issue as to whether a purported conversion of the building in question in March of 1988 created a new relationship between the parties. It is the landlord's contention that, up to March of 1988, the tenant, Rezai, was a licencee, that is, a guest in a hotel suite; and that, subsequent to the purported conversion of the building in March of 1988, he was thenceforth a tenant for the purposes of the *Landlord and Tenant Act*. The tenant argued, on the other hand, that he enjoyed all along a tenancy, that is, from his first date of occupation in March of 1984; and that he therefore is and has been within the protection of Part IV of the *Landlord and Tenant Act* notwithstanding the purported conversion.

9 In my view, whether Part IV of the Act applied to the occupation prior to March of 1988 is determined by section 82(1) of the Act which reads:

> "This Part applies to tenancies of residential premises and tenancy agreements notwithstanding any other Act or Parts I, II or III of this Act and notwithstanding any agreement or waiver to the contrary except as specifically provided in this Part.

There is no separate definition of "residential premises" in Part IV of the Act. The definition of residential premises in section 1(c)(i) is:

> any premises used or intended for use for residential purposes, including accommodation in a boarding house, rooming house or lodging house.

Part IV does separately define "tenancy agreement" in section 81(e) as follows:

> "'tenancy agreement' means an agreement between a tenant and landlord for possession of residential premises, whether written, oral or implied, and includes a licence to occupy residential premises."
>
> (emphasis added)

10 (The emphasized portion of section 81(e) quoted above was added to the Act by amendment in 1987. As the purported conversion took place in 1988, the agreement between Rezai and Toronto Apartment Buildings Co., the original landlord, is covered by the amendment).

11 Because section 82(1) makes Part IV of the Act applicable to all tenancies of residential premises and all tenancy agreements, and section 81(e) defines tenancy agreement to include a licence, it is misleading to characterize the issue as whether a tenancy or licence existed prior to the conversion. Clearly, Part IV covers both. Under the regime created by Part IV, the determining question as to whether the Act applied prior to conversion is, "prior to conversion, was this a residential premises"?

12 The definition of residential premises in s. 1(c) has been quoted above. The landlord does not appear to rely on the exception to this definition found in section 1(c)(vii) and I am proceeding on the assumption that, as a matter of fact, having no evidence to the contrary, the suite in question does not fit within the exemption. The section excepts:

> accommodation provided to the travelling public in a hotel, motel or motor hotel, resort, lodge, tourist camp, cottage, or cabin establishment, inn, campground, trailer park, tourist home, bed and breakfast establishment or farm vacation home.

13 In *Re Matlavik Holdings Ltd. et al and Grimson et al.* (1979), 24 O.R. (2d) 92 at p. 96, Anderson J. for the Divisional Court considers the meaning of "residential premises". While his Lordship does not suggest a specific test, he finds that "residential purposes" need not include permanent residence. By implication, it might be suggested that the test for residential premises is a fairly wide one.

14 In *Re Queen Elizabeth Hospital and Campbell* (1985), 53 O.R. (2d) 14, Mr. Justice Gray cites with approval the *Matlavik* decision. His Lordship reiterates that the definition of "residential purposes" (the phrase under consideration in that case) relates to the nature of the premises and not the relationship between the landlord and tenant. He then follows the two step inquiry taken in *Matlavik*, that is, "was there a tenancy and, if so, were the premises used or intended to be used for residential purposes".

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15 It should be noted that the *Landlord and Tenant Act* was amended in mid-1987 to include licencees within s. 81(e). Their Lordships' requirement of a tenancy is therefore no longer applicable.

16 *Re Canadian Pacific Hotels Ltd. and Hodges et al.* (1978), 23 O.R. (2d) 573 (Co. Ct.), cited by the landlord, is therefore not helpful to the inquiry. The landlord put forth this case as supporting the proposition that the intention of the parties is essential to the determination of whether an occupant was a tenant or licencee. As noted above, this is no longer a relevant issue.

17 Seldom does one find a case factually on point. However, I suggest that some factors which might assist in the determination are:

1. Whether the occupation was intended to be somewhat permanent. For example, did he bring personal items typically found in a home and not a hotel such as stereo equipment, rugs, pictures, lamps?

2. Whether cooking was permitted in the suite;

3. Whether typical hotel services were available, such as room service;

4. Whether the occupant had some measure of control over the suite or whether the landlord could enter at will;

5. Whether the landlord or occupant was responsible for cleaning the suite.

18 There is little evidence to help us either way.

19 It is also helpful to consider whether any feature aside from the rent structure has changed in these circumstances from pre-conversion to post conversion which would suggest a different character in the premises. There is no evidence of any change except the rent became payable monthly.

20 If the premises are residential, then the landlord's calling the building a "hotel" was an invalid attempt to evade the provisions of the *Landlord and Tenant Act*.

21 If, on the other hand, the premises are not residential, the *Rental Housing Protection Act* S.O. 1986 must be considered in determining whether the conversion was legal. By virtue of s. 4(1)(b) of that Act, the conversion would be legal as the Act only prohibits conversions of "rental residential property".

22 Assuming that the premises were, all along, residential, the tenant Rezai would be entitled to the protection of Part IV of the *Landlord and Tenant Act*. More particularly, as the tenant suggests, he is entitled to the benefit of rent increase caps and adequate notice of rent increases. Upon the evidence, I am satisfied of the following:

1. The tenant's occupation was of a "residential premises" within the meaning of Part IV of the *Landlord and Tenant Act*.

2. The tenant's rent was increased in January or March of 1986 by $5.40 per week or 6 per cent of the weekly rent. (The evidence suggests either date for the same increase). Ninety days' notice was given. This increase exceeds the statutory maximum increase of 4% set out in the *Residential Rent Regulation Act*, S.O. 1986, c. 63, s. 71(1)(a) but the landlord is allowed this under the Act, the 6% being for a two year and cumulative period. Thus valid rent beginning March 1986 was $95.40 per week.

3. There is no evidence of another increase until the purported conversion of the building in March of 1988. The rent in the so-called "tenancy application" was stated to be $434.85 per month plus $24.55 per month for parking. There is some dispute as to whether the tenant was to begin paying for his own hydro, to which I have referred above, but I understand that there is no longer a dispute regarding parking.

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Assuming parking was previously separately charged or was not supplied and is not now in dispute, and finding further that the landlord is responsible for Mr. Rezai's hydro bills, Mr. Rezai's proper rent continued as it was prior to March of 1988 as there was no notice of a rent increase as required by the Act. Mr. Rezai's per diem rent prior to March 1988 was:

$\frac{\$95.40}{7}$ per week = $13.63 per day.

His monthly rent was therefore:

$13.63 × 30 days	=	$408.90 per month or
$13.63 × 31 days	=	$422.53 per month.

which I find on the median to be $415.70.

4. In addition the tenant should pay for his parking which was set in March of 1988 at $24.55 for a total of $440.25. From this he may deduct his hydro bills until the landlord pays them directly.

23 The present landlord who took over the building on or about January 1st, 1989, as of February 1st, 1989 being a designated anniversary date, increased upon 90 days notice the total rental noted above by the governmentally approved 4.6%. Therefore until varied by direct application to the Rent Review Hearings Board or by the standard guidelines, from February 1st, 1989 the rental shall be $460.50 per month, of course less hydro.

24 Thus, to capitalize, I find the charges for apartment 604 as follows:

(a) March 1984 to March 1986 — $90.00 per week.

(b) March 1986 to March 1988 — $95.40 per week.

(c) March 1988 to January 1989 — $440.25 per month including parking but less hydro bills.

(d) February 1989 until varied — $460.50 per month including parking but less hydro bills.

25 I am sure counsel can calculate the payment of additional monies owed by the tenant, or otherwise. If not, I shall be pleased to endorse, with their help, a judgment of a finite amount.

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