CITATION: Fava v. Harrison, 2014 ONSC 3352
DIVISIONAL COURT FILE NO.: DC-13-0494 (Hamilton)
DATE: 2014-06-05

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MATLOW, SWINTON, GRAY J J.

B E T W E E N:	
Rosa C. Fava and Steve Fava Landlords (Respondents on Appeal)	Douglas H. Levitt for the Respondents
AND:	
Adrian Harrison and Amanda Harrison Tenants (Appellants on Appeal)	Barry S. Greenberg for the Appellants
	HEARD: at Hamilton June 2, 2014

ENDORSEMENT

[1] This is an appeal by the tenants from a decision of the Landlord and Tenant Board dated August 8, 2013, by which Board Member Jonelle Van Delft, on review, reversed an earlier order of Board Member Elizabeth Beckett. Board Member Beckett had dismissed an application by the landlords to terminate a tenancy pursuant to s.48 of *the Residential Tenancies Act 2006*, S. O. 2006, c.17. The landlords took the position that one of them, in good faith, required possession of the rental unit for the purpose of residential occupation by herself. Board Member Beckett, after holding a hearing, found that the landlord's wish to occupy the premises for her personal use was not held in good faith. She also held that the landlords were in serious breach of their responsibility under the Act, and therefore,,

pursuant to s.83(3)(a) of the Act, the landlord's application for termination of the tenancy had to be refused.

[2] Without going into detail, it appears that the relationship between the landlords and the tenants has been poor. There were a number of prior applications. It is not necessary to go into detail about them. It is sufficient to note that at some point the landlords had refused to accept rent from the tenants unless the tenants signed a release of any claim for damages on the basis that there was some construction nearby that might adversely affect the safety of the tenants. The tenants refused to sign such a release and the landlords then refused to accept rent. Ultimately, the tenants secured an order from the Board that the tenants could pay the disputed rent to the Board pending the outcome of the dispute.

[3] There were two separate proceedings heard by Board Member Beckett in April, 2013. The tenants applied for an order for an abatement of rent, on the ground that the landlords had seriously undermined their reasonable enjoyment of the tenancy by refusing to accept rent and forcing the tenants to pay the rent into the Board. That order was granted by Board Member Beckett, who ordered an abatement of rent in the amount of 20%. That order was not reviewed or appealed.

[4] The other application before Board Member Beckett was the application by the landlord to terminate the tenancy. As noted, Board Member Beckett refused the landlord's application.

[5] Board Member Beckett's conclusions on the landlord's application are encapsulated in the following four paragraphs of her decision:

> 19. The female Landlord testified that she wishes to live in the house now occupied by the Tenants despite the male Landlord's sincere belief that the unit is unsafe (see paragraphs 6 + 7 above).
>
> 20. These facts seriously undermined the credibility of the Landlords in pursuing this termination because one of the Landlord wishes to occupy the property.
>
> 21. I fine [sp.] that this N12 notice was not given in good faith.
>
> 22. Even if the notice was given in good faith the Board would be obligated by subsection 3(a) of section 83 of the *Residential Tenancies Act, 2006* (Act) to refuse this termination because the board determined by SOT-34089-13 issued on April 26, 2013 that at the time the notice was given and up to the date of the order the Landlords were in substantial and serious breach of their responsibility as Landlords to not interfere with the reasonable enjoyment of the tenancy by the Tenants.

[6] The landlords requested a review of Board Member Beckett's decision. Pursuant to s.184(1) of the *Residential Tenancies Act*, the *Statutory Powers Procedure Act*, R.S.O.

1990, c. S. 22, applies to proceedings before the Board. Section 21.2(1) of the *Statutory Powers Procedure Act* provides as follows:

> 21.2(1) A tribunal may, if it considers it advisable and if its rules made under s. 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

[7] Section 209(1) of the *Residential Tenancies Act* provides that an order of the Board is final and binding, subject only to s. 21.2 of the *Statutory Powers Procedure Act*.

[8] The Board has made rules that govern its proceedings, including requests to review an order. The following provisions of the rules have relevance:

> 29.10 After a preliminary review of a request to review an order or decision, unless the Member determines that the order or decision may contain a serious error or that a serious error may have occurred in the proceedings, the Member shall deny the review request without a hearing.
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> 29.11(a) If, after a preliminary review of a request to review an order or decision, the Member determines that the order or decision may contain a serious error or that a serious error may have occurred in the proceedings, the member shall send the matter to a hearing for consideration as to whether or not the request discloses a serious error in the order, decision or proceedings.
>
> 29.17 If, after holding a hearing to determine if a review request discloses a serious error in the order or proceedings, the Member determines that there is a serious error, the Member will determine the issues to be reviewed.

[9] When the matter came before Board Member Van Delft, she determined, as a preliminary matter, that the Board may have seriously erred. She then heard submissions and determined that Board Member Beckett had made a serious error of law and she then ordered a new hearing before herself. She stated in her written reasons:

> 1) I am satisfied on a balance of probabilities that the Board seriously erred in law by considering the reasonableness of the motives of the Landlords to apply for possession of the rental unit. The legal test for a Landlord's own use application is set out in s.48 of the *Residential Tenancies Act, 2006* (the Act). Section 48 of the Act permits a Landlord to give a notice of termination to a tenant if the landlord, in good faith, requires the unit for occupation by the landlord. I am satisfied the Board failed to put its mind to the genuineness of the female Landlord's intention to reside in the unit and instead overly reflected on the reasonableness of the request.
>
> 2) I am satisfied on a balance of probabilities that the female Landlord in good faith intends to reside in the rental unit for residential purposes.

[10] There is nothing in Board Member Van Delft's decision that suggests that she expressly reviewed Board Member Beckett's second ground for dismissing the landlords' application, namely, that the landlords were seriously in breach of their responsibilities under the Act. However, counsel for Respondents submits that she had dealt with that issue orally at the hearing.

[11] Counsel for the tenants argues that Board Member Van Delft erred in law in two respects:

> (a) she erred in determining that Board Member Beckett considered only the reasonableness of the motives of the landlord in applying for possession; rather, it is clear that Board Member Beckett made a determination, on the evidence before her, that the landlords did not require possession in good faith;
>
> (b) she erred in law in failing to address the alternative conclusion of Board Member Beckett that the landlords were in serious breach of the landlord's responsibilities under the Act, and thus, pursuant to s.83(3)(a) of the *Residential Tenancies Act*, that the Board was obligated to refuse the landlords' request to terminate the tenancy.

[12] Counsel for the landlords argues that Board Member Van Delft committed neither error. He submits that the motives of the landlord in seeking possession are not relevant and that the only issue is whether the landlord genuinely requires possession for his or her own use. Counsel relies particularly on *Salter v. Beljinac* (2001), 201 D.L.R. (4th)744(Ont. Div. Ct.) and *Feeney v. Noble* (1994), 19 O.R. (3d) 762 (Div. Ct.).

[13] Counsel submits that the time at which a determination must be made as to whether the landlord was in serious breach of his or her responsibilities under the Act is at the time the order of the tribunal is made. He submits that by the time the order on review was made by Board Member Van Delft, any default on the part of the landlords had been corrected. Thus, he submits, it was not necessary for Board Member Delft to determine whether the landlords were in breach at the time of the original order because it was no longer relevant. Once Board Member Delft had decided that there was a potential serious error on the first ground, it was open to the Board Member to conduct a *de novo* hearing, at which both issues would be determined.

[14] It is common ground that an appeal to this Court from an order of the Board can be brought only on a question of law. Section 210(1) of the *Residential Tenancies Act* provides as follows:

> 210(1) Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

[15] It has been determined by the Court of Appeal, and by this Court, that while an appeal on a question of law suggests that the appropriate standard of review is correctness, it actually is on a standard of reasonableness where the interpretation of the Act is in issue:

see *First Ontario Realty Corp v. Deng* (2011), 330 D.L.R. (4th) 461 (Ont. C.A.) and *Marineland of Canada Inc. v. Olsen*, 2011 ONSC 6522 (Div. Ct.).

[16] The question, then, before this Court is whether it was unreasonable for Board Member Van Delft to decide, as required by Board Rule 29.17, that the original order contained one or more serious errors in law justifying review. In our view, it was unreasonable for Board Member Van Delft to so conclude.

[17] We accept, as reflected in *Salter, supra*, that the motives of the landlord in seeking possession of the property are largely irrelevant and that the only issue is whether the landlord has a genuine intent to reside in the property. However, that does not mean that the Board cannot consider the conduct and the motives of the landlord in order to draw inferences as to whether the landlord desires, in good faith, to occupy the property.

[18] In this case, Board Member Beckett made a finding of fact that the notice that one of the landlords wished to occupy the property was not given in good faith. She decided that the credibility of the landlords was undermined because one of the landlords took the position that she wished to live in the house notwithstanding the other landlord's belief that the unit was unsafe. In our view, the Board was entitled to take this into account in assessing the landlord's credibility and in assessing the landlord's good faith. In our view, Board Member Van Delft's conclusion restricts the meaning of the term "good faith" to an unreasonable degree. By excluding any consideration of the landlord's motives in deciding whether the landlord has acted in good faith, she has unduly restricted the consideration the Board must give to that term. We see nothing in *Salter* or *Feeney, supra*, to the contrary.

[19] It was also unreasonable of Board Member Van Delft to fail to consider the question of whether the landlord's review application should have been refused by Board Member Beckett because the landlords were in serious breach of their responsibilities under the Act.

[20] Even if we accept the submission of counsel for the Respondents that it was open to Board Member Van Delft to find that the landlords were not in breach of their responsibilities at the time of the review hearing (a conclusion that is not mentioned in Board Member Van Delft's decision), in order for Board Member Van Delft to order a review in the first place she had to find a serious error in Board Member Beckett's decision. Board Member Beckett made a clear finding that, on the date of her decision, the landlords were in breach of their responsibilities under the Act. Thus, it was unreasonable of Board Member Van Delft to fail to address the issue of whether the landlords were in breach of their responsibilities on the date of Board Member Beckett's decision.

[21] For these reasons, we hold that Board Member Van Delft erred in law by making an unreasonable decision and in undertaking the review, contrary to the requirements of the Board's rules.

[22] Accordingly, the appeal is allowed and the order of Board Member Beckett is restored.

[23] As agreed between counsel, the Appellants will have costs fixed in the amount of $10,000, all-inclusive.

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Matlow J.

_____
Swinton J.

_____
Gray J.

Released: June 5th, 2014

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