

2002 CarswellOnt 5553
Ontario Superior Court of Justice (Divisional Court)

George V. Apartments Ltd v. Cobb

2002 CarswellOnt 5553, [2002] O.J. No. 5918

George V. Apartments Ltd., Appellant and Kathleen Cobb, Respondent

Carnwath J., E. MacDonald J., Wallace J.

Heard: September 10, 2002

Judgment: December 6, 2002

Docket: Newmarket 61791/02

Counsel: *Donald Radcliffe Whitehead (Agent)*, for Appellant

Paul Dusome, for Respondent

Subject: Property

Headnote

Landlord and tenant --- Residential tenancies — Termination of tenancy — General

Landlord and tenant --- Residential tenancies — Termination of tenancy — Practice and procedure — Notice — Sufficiency

Carnwath J.:

1 George V. Apartments Ltd., the appellant/landlord, appeals an order of the Ontario Rental Housing Tribunal dated November 27, 2001. Mr. Peter Spadzinski, the Tribunal member, dismissed the landlord's application for an order requiring the tenant, Kathleen Cobb, to pay \$1,193.98 for rent alleged to be owing.

2 The appeal raises three issues under the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 (the *Act*):

1. The effect of non-compliance with the notice requirements of the *Act*.
2. Whether vacating or abandonment by the tenant can terminate the lease.
3. The landlord's remedies when the tenant vacates or abandons without proper notice.

Representation of the Appellant

3 Donald Whitehead, an officer and principal of the landlord, is not a lawyer. He sought leave to represent the corporation on the appeal. Counsel for the tenant had no objection and we so ordered.

Background

4 The tenancy was month-to-month. On September 10, 2001, the landlord served the tenant with a Form N5 - Notice to Terminate a Tenancy Early, alleging Ms. Cobb was interfering with the reasonable enjoyment of other tenants. The notice required the tenant to vacate by October 1, 2001. Ms. Cobb did not vacate by October 1, 2001, and paid the October rent. The landlord accepted the rent and abandoned the application to terminate.

5 On October 26, 2001, the tenant verbally informed the landlord she intended to vacate on November 15, 2001. She was asked to provide a Form N9 - Tenant's Notice to Terminate the Tenancy - as required by the *Act*, but she did not do so. She did not pay the November rent, taking the position that the landlord held the last month's rent which would cover November.

6 On November 2, 2001, the landlord applied to the OHRT for an order for payment of the November rent. It is important to note the landlord's Form L1 did not seek to terminate the tenancy, but only to recover the November rent. The tenant was in possession on November 2, 2001.

7 On November 15, 2001, the tenant vacated. The landlord submitted to the Tribunal that the 60-day notice period to terminate a tenancy required by s. 47(2) of the *Act* began to run from November 30, 2001. He claimed rent to January 31, 2002, less the last month's rent to be applied to January. The claim for November and December totalled \$1,193.98. The Tribunal heard the application on November 23, 2001, and denied the landlord's claim.

The Tribunal's Decision

8 The complete reasons of the Tribunal are as follows:

It is determined that:

1. The Tenant was in possession of the rental unit on the date the application was filed.
2. The Landlord served the Tenant with an N5 notice for termination of the tenancy, commencing October 1, 2001. The Tenant did not vacate until November 15, 2001. It [*sic*] the Tenant's submission that she paid the Landlord October's rent and that the Landlord had last month's rent on deposit to cover the rent for November 2001. It is the Landlord's submission that since the Tenant did not move out on the original termination date, she was obligated to give proper notification to the Landlord by way of an N9 form and that the Tenant was obligated to pay the full rent for November 2001. I find that while the Tenant did not vacate on the original termination date, the Tenant did notify the Landlord on or about October 26, 2001 that she was vacating the unit and that the last month's rent on deposit paid the rent until the end of November 2001. I find that the Landlord did receive compensation for the unit and the [*sic*] he had a reasonable amount of time to rent the unit after the Tenant vacated. In her written submission the Tenant had asked the tribunal that the Landlord reimburse her for half of the rent for November 2001, since she had vacated by November 15, 2001. This is beyond the Tribunal's jurisdiction in this application.

It is ordered that:

1. The Landlord's application is denied.

The Standard of Review

9 Both parties agree that the standard of review is correctness and we so find.

1. The Effect of Non-Compliance With the Notice Requirement of the Act

10 If both landlord and tenant intended to terminate the tenancy, they each failed to comply with the notice provisions of the *Act*. The landlord's notice to terminate early, dated September 10, 2001, became void, pursuant to s. 44(1) of the *Act*:

44.(1) A notice of termination becomes void 30 days after the termination date specified in the notice unless,

- (a) the tenant vacates the rental unit before that time; or
- (b) the landlord applies for an order terminating the tenancy and evicting the tenant before that time.

The tenant did not vacate by October 1 as the notice required. The landlord did not apply for an order terminating the tenancy and evicting the tenant before October 1, 2001. The notice was void and the tenancy continued.

11 The tenant's verbal notice given October 26, 2001 that she would vacate on November 15, 2001, was deficient in three particulars:

(i) The notice was not given sixty days before the date the termination was specified to be effective, contrary to s. 47(2) of the *Act*:

47. (2) A notice under section 46, 60 or 96 to terminate a monthly tenancy shall be given at least 60 days before the date the termination is specified to be effective and that date shall be on the last day of a rental period.

(ii) The date specified to be effective was not the last date of a rental period, contrary to s. 47(2) above. The tenancy was month-to-month and the last date of a rental period was therefore the last day of each month.

(iii) The notice was not in a form approved by the Tribunal and was not signed by the tenant, contrary to s. 43(1) of the *Act*:

43. (1) Where this Act permits a landlord or tenant to terminate a tenancy by notice, the notice shall be in a form approved by the Tribunal and shall,

- (a) identify the rental unit for which the notice is given;
- (b) state the date on which the tenancy is to terminate; and
- (c) be signed by the person giving the notice, or the person's agent.

12 Counsel for the tenant referred us to a number of conflicting decisions under the prior statute, the *Landlord and Tenant Act*, R.S.O. 1990, c. L. 7 (the prior *Act*) speaking to the effectiveness of short notice given by a tenant. Several of these are noted in the judgment of Swinton, J. in *373041 Ontario Ltd. v. Elkhatib* (1997), 10 R.P.R. (3d) 10 (Ont. Gen. Div.).

13 In *Elkhatib*, the tenant was month-to-month and gave notice on November 19, 1996, of his intention to terminate the tenancy on December 31. The tenant moved out on December 31 as per his written notice, and the landlord applied for December, January and February's rent. Swinton, J. determined that the prior *Act* was "remedial" with the intent of giving greater protection to tenants than they had enjoyed in the past. She found the tenant had given "clear notice" on November 19 of his intention to leave on December 31, which intention was confirmed when he did not pay the December rent. Evidently, the tenant and his wife "had made it clear" several times after November 19 of their intention to leave on December 31. Swinton, J. found it unduly technical and inconsistent with the remedial purpose of the prior *Act* to treat short notice by a tenant as a nullity.

14 *Elkhatib* and other cases referred to in that judgment decided under the prior *Act* were cited to us as authority for the following proposition: a tenant's notice to terminate which fails to comply with the provisions of the *Act* is not necessarily a nullity. We respectfully disagree. We have found the tenant's notice deficient in three ways. This matter can also be distinguished from *Elkhatib* on the narrow ground that Ms. Cobb did not give notice in writing whereas in *Elkhatib* notice was in writing and was found by Swinton, J. to be required. (para. 17) Were the tenant permitted to give notice verbally, landlords would never know whether the notice date was effective should the tenant subsequently seek to resile from the oral notice.

15 More broadly, we find the scheme of the *Act* should be applied with an even hand between landlord and tenant when it comes to notices of termination. Section 39(1) of the *Act* recites that a tenancy may be terminated only in accordance with the *Act*. A tenant may terminate a tenancy at the end of a period of the tenancy by giving notice of termination to the landlord. (s. 46 of the *Act*). Section 47, quoted above, requires the tenant to give at least 60 days notice before the date of termination is specified to be effective and that date shall be on the last day of the rental period. Section 43(1) sets out the form of the notice that is to be given by either a landlord or a tenant. We find the notice requirements should apply equally to landlord and to tenant. There is nothing in the legislation to suggest that a tenant's notice which fails to comply with the provisions of the *Act* is other than void.

16 This Court had the following to say about the notice requirements under the prior *Act*:

It is important to both landlords and tenants notices be certain, definite and in accord with the terms of the tenancy and existing legislation. The tenant must know the date he or she is required to pack and to seek alternative accommodation.

It is equally significant that a landlord be certain of the day the premises can be rented. *Bianchi v. Aguanno* (1983), 42 O.R. (2d) 76 (Div. Ct.)

We are of the view that the notice requirements of the current *Act* should be construed in the same manner.

2. *Whether Vacating or Abandonment by the Tenant Can Terminate the Lease*

17 As noted above, s. 39(1) of the *Act* provides that a tenancy may be terminated only in accordance with the *Act*. This would appear to remove consideration of the common law concept of surrender of lease. The concept of surrender is continued in statutory form by s. 39(2) of the *Act* which provides that a notice of termination need not be given if the landlord and tenant have agreed to terminate a tenancy.

18 Section 41 of the *Act* provides as follows:

41. A landlord shall not recover possession of a rental unit subject to a tenancy unless,

- (a) the tenant has vacated or abandoned the unit; or
- (b) an order of the Tribunal evicting the tenant has authorized the possession.

We see no utility in trying to differentiate between "vacated" and "abandoned". Both actions authorize a landlord to retake possession. "Vacant" is variously defined as "not occupied", "untenanted", "deserted". The Ontario Court of Appeal has defined "vacant": "the term vacant implies entire abandonment, non-occupancy for any purpose". *Golob v. Dumfries Mutual Fire Insurance Co.* (1979), 25 O.R. (2d) 65 (Ont. C.A.).

"Abandoned" carries with it the same sense. As set out in the ORHC *Interpretation Guidelines: Abandonment of a Rental Unit* (Toronto: 29 June 1998) at p. 1: "[a]bandonment means that the tenant no longer intends to live in the unit".

19 What must be remembered is that abandonment neither serves as notice by the tenant to terminate nor as termination. The lease continues in effect until some action is taken by the landlord under the *Act* to achieve termination. Earlier in these reasons, we concluded that the notice provisions of the *Act* must be complied with by both landlord and tenant and that a lease can be terminated only in accordance with the *Act*. All that abandonment does is provide the landlord with the right to recover possession of the unit, or if the landlord chooses to seek termination of the tenancy, an eviction order from the Tribunal under the applicable provisions of the *Act*.

20 Abandonment by the tenant is not established until some action is taken by the landlord. When faced with an empty unit, a landlord re-takes possession pursuant to s. 41(a) at some risk. The tenant may be working or vacationing elsewhere, sometimes for a considerable period. The landlord must be satisfied the tenant has left the unit and obviously has no intention of returning. Non-payment of rent is certainly a factor to be considered. The safest course for the landlord is to bring an application under s. 78:

78. If a landlord believes that a tenant has abandoned a rental unit, the landlord may apply to the Tribunal for an order terminating the tenancy.

21 However, the landlord may wish to continue the tenancy and look to the tenant for rent as it falls due until such time as the unit can be re-rented. Under the prior *Act*, a landlord was required to mitigate damages. Under the current *Act*, should the landlord elect to continue the lease, and not seek termination pursuant to s. 78, then s. 13 must be considered:

13. When a landlord or a tenant becomes liable to pay any amount as a result of a breach of a tenancy agreement, the person entitled to claim the amount has a duty to take reasonable steps to minimize the person's losses.

Where a tenant abandons and the landlord takes no steps to terminate the lease, we conclude that s. 13 imposes a duty on the landlord to take reasonable steps to minimize the tenant's loss by trying to re-rent the unit.

22 Where a tenant abandons and the landlord retakes possession pursuant to s. 41 or obtains an order of termination pursuant to s. 78, any damages in lieu of notice must be sued for in the ordinary course, usually Small Claims Court. In that instance, ordinary contract law requires the landlord to mitigate the damages flowing from the alleged breach of contract.

Decision

23 The Tribunal member was incorrect in considering the landlord's N5 notice in arriving at his decision. The original N5 notice was void pursuant to s. 44(1) of the *Act*. It could play no part in any conclusion that the landlord "had a reasonable amount of time to rent the unit after the tenant vacated".

The Tribunal member was incorrect in applying the last month's rent held by the landlord to the rent owing for November. The landlord's L1 form applied for payment of the November rent and specifically did not seek to terminate the tenancy. The member should have ordered Ms. Cobb to pay the November rent, leaving the deposit for the last month's rent to be dealt with whenever the lease was found to be terminated in accordance with the provisions of the *Act*.

24 Section 196(4) provides the Divisional Court may affirm, rescind, or replace the decision appealed from, or remit the matter to the Tribunal. Pursuant to s. 196(5), the Divisional Court may also make any other order it considers proper, including costs. We find no merit in remitting the matter to the Tribunal because of the cost to the parties. Although the appeal has been partially successful, the landlord did seek from this Court payment for December and January, a payment which we have no jurisdiction to order, since the order appealed from was founded on an application for the November rent, nothing more. A costs order is not appropriate.

25 We order:

1. The decision of the Tribunal is rescinded.
2. The tenant Ms. Cobb is ordered to pay the landlord \$596.99 for rent owing for November, 2001.
3. No order as to costs.